

5 Stone Buildings

Undue Influence in Lifetime: The role of legal advice

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The remit of the webinar

- The purpose of this webinar is consider the application of the principles of presumed undue influence in lifetime transactions
- In particular we will examine the role of legal advice in rebutting the presumption of undue influence
- Identify practical steps for lawyers in dealing with lifetime transactions by the vulnerable: Law Society Guidance Notes 2019/2020.

Allcard v Skinner

- 19th Century case *Allcard v Skinner* (1887) 36 Ch D 145
- Gift by novice joining the Protestant Sisters of the Poor, of nearly all her valuable property. After she lost her vocation she sought to recover the gift. LJ Cotton: “*where relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor.*”
- There spiritual and religious fervour gave rise to a presumption.



Free Agent

- May be set aside unless *“it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will”*

Presumed undue influence in the 21st century

- *Niersmans v Pesticcio* [2004] EWCA Civ 372 LJ Mummery [4] identified a number of social trends that lead to pressure on the vulnerable to make life time gifts (often even their homes) of their property
- *“As people live longer, the inheritors will have to wait longer... the elderly and infirm in need of full time residential care are vulnerable to suggestions that they should dispose of the home to which they are unlikely to return”*.
- These are the common circumstances we see in our respective practices.

The basic principles

- Seeking to ensure that the transaction was the result of the donor's free will
- If not then the transaction will be voidable
- Undue influence is the basis for setting aside the transaction
- BUT can be proved by 2 different methods
- *Royal Bank of Scotland v Etridge (No 2)* [2002] 1 AC 773 [para 8]
- (1) Direct proof of actual undue influence: “*overt acts of improper pressure*” e.g. unlawful threats
- 2nd Presumed undue influence “*arises out of a relationship between two persons where one had acquired over another a measure of influence*”.

Evidential presumption

- (2) Presumed undue influence - for this evidential presumption to apply
- 2 elements required
- (i) Proof that C placed trust and confidence in the other party in relation to their affairs or there is exploitation of the vulnerable;
AND
- (ii) A transaction that calls for an explanation

Forensic tool

- The person alleging undue influence bears the legal burden of proving the same but Lord Nicholls *Etridge* [14]:
- *“Proof that the complainant placed trust and confidence in the other party in relation to the management of the (C’s) financial affairs, coupled with a transaction that calls for explanation will normally be sufficient”*.
THEN *“the stage is set”*
- The evidential burden will shift to the D to demonstrate that there is satisfactory explanation to demonstrate that he did not abuse the influence he had acquired in the relationship.

The nature of the relationship

- The specific type of relationship e.g transactions between spiritual adviser or solicitor & client. The fact of the relationship means an irrebutable presumption that the spiritual adviser had influence over the novice *Allcard*. A limited number of relationships acquire this protection
- All other participants require proof of trust and confidence but where *Etridge* [11] “*reliance, dependence or vulnerability*” other side of the seesaw “*ascendency, domination or control*”
- May be just in relation to the impugned transaction *Turkey v Awadh* [2005] EWCA Civ 382.

Transaction Requiring an explanation

- Second feature: - That the transaction is not readily explicable by the relationship of the parties
- See LJ Lindley in *Allcard* [page 185]
- “.if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act”,
- THEN the stage is set and it falls to the recipient of the gift to demonstrate the gift was not the result of undue influence.

Explain what this means!

- Lord Scarman in *National Westminster Bank v Morgan* [1985] AC 686 “*manifest disadvantage*”, as necessary feature BUT not adopted
- *Etridge* [26] beware simple label may work for “*substantial gift or sale at an undervalue*” only but problematic if re guarantee debts of husband benefits and negative aspects!
- Prefer the wider question does the transaction call for an explanation
- BUT evidential value if the transaction is disadvantageous will require a cogent explanation to rebut the presumption.

Emancipating Advice

- While a donee may have capacity to make the gift it is a different question as to whether this advice freed the donee from the undue influence.
Etridge [20].
- If there has been competent and independent advice given to the donor then this may rebut the presumption *Inche Noriah v Omar* [1929] AC 127
- 2 elements (i) was there independent coherent advice (ii) was it effective to free the donor from the undue influence
- The advice of a solicitor does not automatically equal rebuttal of the presumption.

Independent solicitor

- Was the advice relevant and effective to free the donor from the impairment of the influence on his free will and give him independence of judgment and freedom to make choices with a full appreciation of the transaction. *Pesticcio v Huet* [2004] EWCA Civ 37
- Not a “*formulaic or mechanistic approach*” case by case on the facts
- Can the advice be effective where the solicitor is chosen by the donee & it is not clear who is giving the instructions?
- See *Sollis v Leyshon* [2018] EWHC 2853. Transfer set aside.



Emancipation?

- *Sollis* mother gifts house to her daughter
- Daughter chooses the solicitor “friendly”
- Short sole interview with daughter in the waiting room
- NO SPACE TO THINK

Quality of the advice

- The presumption may be rebutted if it can be demonstrated that the transaction was entered into: *“after the nature and effect of the transaction had been fully explained to the donor by some independent qualified person”*. *Pesticcio*
- Requires cogent explanation of the disadvantages of gift
 - no security if still living in the property
 - no assets to realise if need funds
 - Ineffective if reservation with benefit for IHT
 - danger of deprivation of assets if in care
 - decision to be the client’s own



Paul v Paul

- [2018] EWHC 2520
- Transfer by Neville (67) of his house to his son Bradley
- Neville vulnerable eccentric
- Both men attend the conveyancing solicitor 2 x
- 1 session letter of advice read through to Neville

Paull continued

- House worth £375,000 lived in by Neville & cohabitee
- Conveyancing solicitor instructed [85] charge of £250
- Attendance Notes taken of 2 Interviews with father and son present
- Solicitor's view acting solely for Neville, & tried to see Neville alone but Neville wanted his son to remain
- Solicitor misled to effect house empty & Neville living with son
- Saw Neville alone 1 x read to him a draft letter re disadvantages.

Paull: Master Bowles

- [105] The note from solicitor was *“not an easy read .. A lawyers document”*
- It did go into detail of problems e.g local authority fees
- BUT it did not with clarity *“make plain that a transfer is irrevocable and that the transferor cannot simply go back”*
- Neville had the bit between his teeth and executed the transfer
- Master held: solicitor not advised Neville that his home at risk or that irrevocable, and not freed from influence.

Relevant advice and the circumstances

- Father & son's misrepresentation meant that solicitor deprived of opportunity to advise re risk of eviction etc.
- 1. [115-119] so Neville entered into the transfer without full understanding of the effects of transfer - that full understanding is necessary pre-condition before a court can be satisfied as to rebuttal
- 2. Even if 1 had been on correct premise circumstances of the advice not emancipating so as to negate the undue influence
- Giving cautionary advice in the presence of the influencer ineffective.

Elder abuse

- *Moursi v Doherty* [2019] EWHC 830 (Ch) Summary Judgment application by PRs of Mrs Gurney’s estate “Mrs G”
- Mrs G was in poor health aged (78) sold her home (value £275,000) to Mr Doherty “D” aged (33) for £70,000
- Subject to a life interest for Mrs G
- D claimed a loving relationship. On Mrs G part believed they may marry
- Clearly reposed trust and confidence in him!.

Involvement of a solicitor

- ? 2 legal advisors from 1 firm acting for both parties - muddle!
- Solicitors' conveyancing file no clear advice to Mrs G
- Mrs G wrote to solicitors that she had known D for 10 years & loved each other
- Plus that she needed liquid funds (despite having over £100k) albeit £s subsequently disappeared
- Did get a GP's report as to capacity & "not coerced" but Mrs G misled the GP as to the details of the "relationship" and that they were to live together.

Problems for the solicitor

- Such legal advice as there was on the false representation by Mrs G that she needed liquid funds so undervalue but with a life interest
- SO advice was not informed advice on a correct premise
- PLUS the D had an unknown history of fraud including preying on the vulnerable elderly
- By reason of the relationship of trust and confidence D owed Mrs G a duty of candour and fairness.
- So that Mrs G could make an informed decision

False information infects the advice

- In *Hewitt v First Plus* [2010] EWCA Civ 312 a wife was asked to allow a mortgage over the fmh to secure husband's debts
- Husband was having a secret affair CA held that this was a material fact that he should have disclosed
- By analogy Master Price in *Moursi* that the lack of knowledge as to D's past meant that the legal advice was both uninformed and inadequate
- Difficult for solicitors where donee is prepared to twist the fact as a result of the undue influence!.

Guidance from the Law Society

- <https://www.lawsociety.org.uk/topics/practice-notes>
- Practice Note: Making gifts of assets 4/12/19
- Meeting the needs of vulnerable clients 5/6/20
- Financial abuse 14/7/20
- Guidance: Conflicts of Interest Solicitors Regulation Authority 2/3/20
- Significant material but how to apply in practice?.

Practice Note: Gifts of Assets

- Para 2.2 Consider any possible conflict of interest where you receive instructions from a donee especially if you already act for the donor
- See Paras 6.1 & 6.2 of SRA Code of Conduct
- SRA Guidance - *“A conflict of interest means a situation where your separate duties to act in the best interests of two or more clients in the same matter or related matter conflict”*.
- IF asked to act for both parties to the gift tell them of possible conflict & advise one of them to take independent advice
- Seek their consent in writing to act for both

How to advise the donor

- Solicitor will be examining: (i) capacity and (ii) whether subject to undue influence
- More than drawing up documentation must ensure donor fully understands
 - nature, effect, benefits, risks and foreseeable consequences
- Para 3.1 request details of other assets, financial circumstances
- Para 3.3 helpful check list of risks e.g relationship breakdown, care home fees, anti-avoidance problems, CGT
- Para 3.5 other consequences e.g impact on inheritance etc.

Meeting the needs of vulnerable clients

- [Page 16] Your overriding duty is to your client and you must ensure that your instructions are from your client free of undue influence
- If you suspect that a client's instructions are the result of undue pressure or coercion you cannot act unless you have satisfied yourself the instructions are the client's wishes
- If concerns remain but client wishes to continue with transaction that is against their best interests you should see them alone
- Explain the consequences & get instructions (preferably) in writing.

Practical steps (1)

- In an impugned transaction solicitor's attendance note will be subject of close examination - make a full attendance note
- Whilst no absolute prohibition on acting for both sides problems gives rise to real conflict issues
- Be wary of the donor who will not be separated from the donee for advice purposes, should be seen alone
- Take steps to discover the financial position of the donee, and apparent reasoning behind the gift.

Practical steps (2)

- If worried about capacity then a medical report may be required and could expose vulnerability in respect of undue influence, even if capacity established
- Identify in simple terms the impact of the outright gift:
 - Absolute nature of the gift
 - Where will they live if falling out
 - No money to pay care home fees
 - Can choose not to make a lifetime gift & alternatives.

Difficult task

- Where a property is to be transferred the property solicitor is first point of contact
- Requires involvement of the private client as well with experience of the vulnerable elderly
- Know who your client is
- See them alone
- Create a short clear checklist of the risks.

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Thank you,
any Questions?

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