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Contentious Probate Update

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2024 contentious probate cases

- **Rea v Rea** [2024] EWCA Civ 169 **-** undue influence and the need to prove coercion.
- **Gohil v Gohil** [2024] EWHC 213 (Ch) **-** reverse summary judgment (on extreme facts).
- **Leonard v Leonard** [2024] EWHC 321 (Ch) - capacity and dementia.
- **Biria v Biria** [2024] EWHC 121 (Ch) - will validity in light of abusive behaviour.
- **Gowing v Ward** [2024] EWHC 347 (Ch) - don't ask for petrol money on the way back from a funeral (if you are bringing a probate claim).
- **Re Golbourne** [2024] EWHC 130 (Ch) **-** unless orders by registrars and relief from sanctions.

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Rea v Rea facts

- T had 4 children.
- A 1986 will divided her estate equally.
- As her health deteriorated, T's daughter Rita moved in along with her (Rita's) friend.
- A 2015 will left her main asset (the house) to Rita, leaving only small legacies to her sons.
- The will recorded the explanation that the sons had 'abandoned' her. The (re)trial judge found that T was entitled to form this view.

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Rea - facts

- Rita had organised the will instruction and attended the meeting. The solicitor had kept very detailed notes, including that she had stopped Rita from interrupting and answering questions for T, that Anna was firm in her instructions, and that a suggestion from Rita that the residue go to the grandchildren had been rejected.
- GP confirmed that capacity and indicated that there was no undue pressure on her.
- Rita was not present at a second meeting where T made some amendments. Again, detailed notes were kept including that the contents were explained in detail to T.
- The sons were not told about the new will until after T had died.

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Rea - proceedings

- Rita brought proceedings for probate in solemn form. The sons challenged for lack of capacity, lack of knowledge and approval, undue influence, and fraudulent calumny.
- 3-day trial before DM Arkush [2019] EWHC 244 (Ch) upholding the 2015 will.
- Appeal to Adam Johnson J who dismissed the appeal [2021] EWHC 893 (Ch).
- Appeal to the Court of Appeal which overturned the judgments on procedural irregularity grounds relating to Rita's evidence [2022] EWCA Civ 195.
- 4-day re-trial before HHJ Hodge KC [2023] EWHC 1901 (Ch) - pronouncing against the 2015 will due to undue influence.
- Appeal to the Court of Appeal [2024] EWCA Civ 169 - reversing HHJ Hodge KC and granting probate of the 2015 will in solemn form.

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Rea - the CA's approach to the law

- Affirmed that probate undue influence connotes *coercion*.
- The burden of proof is the civil standard of the balance of probabilities bearing in mind the inherent probabilities:

> **[27] '[I]t will commonly be appropriate to proceed on the basis that undue influence is inherently improbable… as I have said, "undue influence" signifies coercion in this context, and potential beneficiaries are surely less likely to resort to coercion than to rely on affection, gratitude or even persuasion.'**

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Rea - the CA's approach to the law

- Undue influence can be proven without *direct* evidence of coercion (**Schrader**)**.** Judicial statements that all alternative hypotheses need to be excluded were wrong.

> **[32] 'I would accept that undue influence can be proved without demonstrating that the circumstances are necessarily inconsistent with any alternative hypothesis. On the other hand, the circumstances must be such that undue influence is more probable than any other hypothesis. If another hypothesis is just as likely, undue influence will not have been established. When making that assessment, moreover, it may well be appropriate to proceed on the basis that undue influence is inherently improbable.'**

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Rea - HHJ Hodge KC's factors

- 1) T was frail.
- 2) Rita had a forceful personality and physical presence.
- 3) T was dependant on Rita.
- 4) Rita's evidence about the circumstances of the changes had been rejected.
- 5) The will was timed shortly after the sons had stopped assisting Rita with Anna's care.
- 6) Rita made the arrangements for T to visit solicitors.

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Rea - HHJ Hodge KC's factors

- 7) The language of cl 11 (explaining the decision to exclude the sons) would not have come from T and instead came from Rita.
- 8) T had told her GP that the sons had their own properties, but Rita also had a flat.
- 9) Rita had a reason to want the property - she needed to sell her flat to repay overpaid benefits.
- 10) Rita's failure to disclose the will until T had died in order to make a challenge more difficult.

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Rea - other issue and disposal

- HHJ Hodge KC gave insufficient weight to the solicitor, the GP, or Rita's friend who lived with them. The friend's evidence was that Anna was strong-minded, reacted badly to Nino and David giving up on her care, and that Rita never abused T verbally or physically.'

- Standing back, the evidence did not entitle the judge to make a finding of undue influence.

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Rea - Comment

- Direct evidence of coercion not necessary, but without it how can coercion be proved to be more likely than persuasion?
  - Evidence going to T's 'real' testamentary intentions?
  - Evidence of coercion in other contexts?
  - Compare **Schrader v Schrader** [2013] EWHC 466 (Ch) at [97].
- The value of a good will file.

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Rea - Comment

- Whither **re Edwards** and other cases indicating that undue influence encompasses coercion *or* fraud.
- The judgment does not refer to argument on the law.
- But is this a return to orthodoxy?

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Gohil - facts

- T was estranged from his wife and son. He left a will in favour of his daughter in law (34%) and her 2 children with the son (33% each). The wife took out a caveat and entered an appearance to a warning. The daughter in law brought a probate claim.
- The wife's defence required C to prove capacity, due execution and knowledge and approval, and alleged undue influence and 'fraud and calumny'. It alleged that T had been 'isolated' from his family and that C had induced a state of confusion, anxiety, depression, 'fuelled his anger' and caused him 'to be unable to think and do things for himself' making him vulnerable to manipulation.
- Counterclaims based on proprietary estoppel and IPFDA also brought.
- The daughter in law applied for summary judgment on the probate claim.

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Gohil - DM Lampert's judgment

- **Due execution:** no reason to doubt the *Larke* statement that the will was signed in the presence of 2 solicitors who did not doubt his capacity.
- **Capacity:** Presumption of capacity from due execution. No evidence to support D's 'mere speculation' on capacity. The documents showed that T could communicate cogently with an interpreter.
- **Knowledge and Approval:** the will was short and straightforward. Concerns from C's presence at execution were overcome by T having a Hindi translation.
- **UI/fraudulent calumny:** no particulars of what C was said to have done. There was a clear alternative explanation for the will: T had a good relationship with C and none with D. In any case, T's views on D and her family had nothing to do with C.

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Leonard v Leonard - facts

- Dr Leonard had four children (Jonathan, Andrew, Sara and Megan) from his first marriage. He was survived by his second wife Margaret. She had three children (Mark, Liz and Melanie). Melanie predeceased leaving Charlotte, Michael and Melissa.
- One son Andrew suffered a brain injury and lived in the US
- He left a 2007 Will and a 2015 Will.

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Leonard v Leonard - facts

- 2007 Will:
  - Family home to Margaret
  - Shares to children
  - Option for Andrew to purchase his home
  - Marjorie (sister in law, first marriage) to have right to occupy his home, then to Sara
  - Residue to children and Margaret in 5 equal shares
  - £100, to Sara brought into hotchpot

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Leonard v Leonard - facts

- 2015 Will:
  - Family home to Margaret
  - Marjorie (sister in law, first marriage) to have right to occupy his home, then in seven shares
  - Residue Margret for life and then into 7 shares with 4/7 going to Jack's children and 3/7 to Margret's family
    - Sara accounting for advancement £200,000
    - Megan accounting for £100,000
    - Andrew to account for a gift of US property

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Leonard v Leonard - facts

- Estate £5.4m
- Difficult to estimate precise impact of 2015 Will
- It was not drafted by a solicitor but rather a chartered tax advisor at Barclays
- Rough estimation that the children got c. £459,000 each under 2015 Will as compared with £615,000 under the 2007 Will whereas Maragret's family got on average got £870,000 under the 2015 Will compared with £680,000 under the 2007 Will

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Leonard v Leonard - decision of Joanna Smith J

- Capacity
  - Failed on limbs 1 and 4 of *Banks v Goodfellow* perversion of moral sense of right regarding Andrew's inheritance of his home.
- No application of the rule in *Parker v Felgate* – no will for which the Deceased had given capacious instructions
- The Deceased did not know and approve of the contents of the 2015 Will

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Biria - facts

- T lived with 2 of his sons (Hamid and Nasrin). His eldest son (Ali)'s case was that from 2018 they took steps excluding others from accessing T and were able to exercise virtually complete control over his affairs.
- 24.04.2020 - COP declares T lacked capacity to consent to an assessment.
- 01.05.2020 - date of purported will.
- 22.05.2020 - letter from solicitor says he is satisfied that T's capacity is 'intact' and that T did not consent to being examined.
- 26.05.2020 - Dr attempts but fails to gain access to T to carry out assessment, Hamid procuring T to say he did not want to see the Dr.

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Biria - facts

- 14.08.2020 - Hamid agrees to co-operate with assessment after committal proceedings are brought.
- 24.08.2020 - assessment concludes that T lacked capacity to manage his affairs. The assessor later gives evidence that T would not have understood the extent of his estate or the moral claims of potential beneficiaries and had limited sight.
- 07.09.2020 - COP appoints a deputy.
- Hamid and Nasrin later prevented attempts at a Care Act assessment and failed to disclose large transfers being made from T's bank account to another son and the existence of the 'will'.

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Biria - facts

- Will drafted by an American attorney - Mr Scott. Mr Scott said he had begun to prepare it in 2016 and sent drafts in 2017, and that the executed version was drafted long before it was signed. However the earlier drafts were substantially different.
- Mr Scott said that T was not unduly influenced and had capacity, but no evidence that he had met T and he did not provide a proper *Larke* reponse. He indicated that instructions were relayed via Hamid and Nasrin, and that Hamid had acted as interpreter for T in giving instructions.
- The will disinherited Ali on the ground that had 'not been a good son', was not honest, and had received sums from T's American properties. Mr Scott indicated that T suspected Ali of 'skimming' rental income from their business partnership. That allegation was however, not supported by evidence or developed.

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Biria - facts

- The will was executed in the offices of a notary. Hamid and Nasrin attended with T along with 2 witnesses. Hamid booked the appointment, but he and Nasrin were not present for the actual execution. The notary had had no previous dealings with T.
- The notary said that he had read the will to T and insisted that T read it in the absence of Hamid and Nasrin.
- The notary said that when he read a clause excluding Ali, T had responded ‘no Ali, no Ali’ and had come across as knowing what he was doing and as an opinionated and angry old man.
- None of the sons other than Ali took part in the proceedings.

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Biria v Biria: DM Bowles' judgment

- The correct test was the **Banks v Goodfellow** test.
- The assessor's reports showed that the test was not satisfied and that T had not had capacity to make the will. Documents from Mr Scott and the English solicitor (who did not consider testamentary capacity or refer to the COP proceedings) did not displace this.
- Absent capacity, the will must have been brought about by undue influence and did not reflect his testamentary intentions. No evidence to the contrary had been produced.
- But the fraudulent calumny allegation failed. T had believed that Ali had threatened to kill him and had wrongfully taken money, but there was no evidence that this emanated from Hamid or Nasrin.

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Gowing v Ward - facts

- T had 3 children – one had predeceased with 5 daughters of his own who were the claimants
- A 2011 Will divided the estate between three children – benefiting the grandchildren by way of section 33 of the Wills Act 1987
- A promise to leave estate three ways
- A 2018 Will left residue to surviving children – instructions given in 2017 and were settled for more than 18 months
- Challenge on the basis of lack of capacity, undue influence, want of knowledge and approval – with a claim of fraudulent calumny dropped before trial

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Gowing – Judgement of Master Brightwell

- **2018 Will**: admitted to probate
- **Capacity:** decision should not be based on a rigid application of the presumption of capacity but on an evaluation of all the evidence.
- **Knowledge and Approval:** the rationality of the will on its face had to be considered from the testator's perspective. It was not irrational to give the estate to the surviving children.
- **Undue Influence –** applied *Edwards v Edwards* – no evidence of coercion – allegation not put to Susan

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Re Goulbourne - facts

- C was T's daughter. D was T's widower. T sought to propound a copy of a will. The original could not be found.
- After C failed to apply for probate, a Registrar ordered that unless C issued and served a probate claim in the ChD, a grant would be issued as though the will was invalid. The deadline expired on 02.03.2023.
- C issued a claim on 02.03.2023 and e-mailed D's solicitors an unsealed copy of the claim form. C's solicitors said that this was not by way of service (believing that the court would serve). The deadlines for service (both under r 7.5 CPR and the unless order) elapsed. C e-mailed a sealed claim form on 27.07.2023 and applied for relief from sanctions.

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Re Goulbourne - DM Teverson's judgment

- The breach was significant. No directions had been made but the effect on litigation was only one measure of significance. D's knowing of the claim did not make the failure to serve insignificant.
- There was no good reason. D's solicitor's belief that the court would serve the claim was wrong (PD51O para 8.2 and Ch Gd para 4.15). In any event, she left insufficient time for service since she issued on the day of the deadline.

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Re Goulbourne - DM Teverson's judgment

- There had already been considerable delay and C had had a significant opportunity to propound the will prior to the unless order. The unless order was a final chance.
- C's solicitor had waited until 11.03.2023 before telephoning the court, a further 2 months before telephoning again, and 4 months before writing.
- D's solicitors had not been obstructive and were not required to warn C about the deadline for service.

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Re Goulbourne - DM Teverson's judgment

- The application was not prompt.
- The weight to attach to the fact that the default was the solicitors' depended on the circumstances.
- No special rule applies to probate claims. Relief would undermine the unless order.
- C being denied an opportunity to keep her mother's house was not determinative. D might have secured this in any case via an IPFDA claim.

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Homework

- **Rea v Rea - [**20]-[32]
- **Leonard v Leonard** - [149]-[167], [432]-[445], and [447]-[479]

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