Articles

The vulnerable testator and undue influence

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The disappointed beneficiary often complains that the will is the result of the exertion of improper influence exercised over the testator. However establishing that the influence exercised was 'undue' such that court should intervene is notoriously difficult. This article examines the 19th century development of undue influence as the basis for a challenge to a will. The cases established that there was no presumption of undue influence in a probate claim. This was in direct contrast to the position in relation to lifetime giving. From a review of the modern cases it is clear that establishing undue influence in a probate action remains a difficult task.

Whilst potential testators live longer in the 21st century they do so often in frail health. They are the more vulnerable to influence when making wills. The author explores whether there should be an alteration to the burden of proof where the testator is enfeebled and the beneficiary in a position to take advantage of that vulnerability. In such circumstances the burden of demonstrating that the will was not the result of undue influence would be borne by the beneficiary. In an ideal world this would lead to the retention of a solicitor to supervise the will-making process and provide the testator with the ability to resist undue influence.

Introduction

The purpose of this article is to review that current application of the principle of undue influence in probate. The problem arises where the testator has retained sufficient capacity to satisfy the *Banks & Goodfellow* (1870) LR 5 QB 549 testamentary capacity test, but is a vulnerable individual. In the 21st century a woman of 70 can expect to live a further 19.7 years (Table 14 in *At A Glance*), but with an increased risk of mental and physical decline. The application of the equitable doctrine in respect of lifetime gifts does not apply – in part on the basis that a testator must leave their assets to someone, at the date of their death, and will have no need of the same.

However there are cogent arguments to be made in favour of greater professional scrutiny of relations between testator and beneficiary. Improper pressure erodes the testator's freedom of testamentary disposition. It disinherits the natural beneficiaries. Where a will has been made as a result of improper influence, there is an enhanced risk of pressure to advance the gifts to be made in the testator's lifetime.

The principles

There is a synopsis of the law contained in the case of *Re Edwards* [2007] EWHC 1119 (Ch) set out by Lewison J (as he then was):

(i) There is no presumption of undue influence.

(ii) Whether undue influence has procured the execution of the will is a question of fact.

(iii) The burden of proving it lies on the person who asserts it.

(iv) Influence exercised by coercion, the sense that the testator's will must be overborne, or by fraud.

(v) Coercion is pressure that overpowers the volition without convincing the testator's judgment.

(vi) The physical and mental strength of the testator are relevant factors.

(vii) There is a separate ground for

> avoiding a testamentary disposition on the ground of fraud; 'fraudulent calumny'.

Below is a short review of the origins of the seven pillars of wisdom from Lewison J.

Nineteenth century cases

The leading case of *Boyse v Rossborough* (1857) 6 HLC 2 concerned the estate of Mr Colclough, which he left to his 'dear wife', outright. The relatives complained that she had 'reduced him to a state of apprehension and dependence'.

Lord Cranworth grapples with permissible and impressible influence stating:

> 'I am prepared to say that influence, in order to be undue within the meaning of any rule of law that would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud.'

Coercion

Lord Cranworth admits of a degree of latitude in the use of the word coercion. The same can occur without threats or actual violence:

> 'The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed'

In the later case of *Wingrove v Wingrove* (1885) 11 PD 81 we have a clear exposition of the interaction between the influence becoming undue and the physical and mental frailty of the testator:

> 'The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to be about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, and the sick person may be induced for quietness' sake to do anything'

Fraud

Lord Cranworth cites by way of example:

> '... if a wife, by falsehood, raises prejudices in the mind of her husband against those would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives.'

That conduct might render invalid any will executed whilst under a false impression.

The burden of proof

The person alleging the undue influence bears the burden of proof, it was there held that 'undue influence cannot be presumed.

Standard of proof

As to the standard of proof where undue influence was sought to be established by circumstantial evidence only Lord Cranworth held:

> '... it is not sufficient to show that the circumstances attending it execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with the contrary hypothesis.'

In the *Boyse* case this was tested on the premise that it may not be surprising that this childless man should give all his assets to his wife, rather than to his distant heir presumptive. There was insufficient evidence to justify a conclusion that the testator 'would not have executed the will but from fear of the consequences which might result to him if she should discover that he had given his property to anyone but herself'.

The standard of proof required in the early cases of circumstantial evidence appeared to equate to the level of certainty required with something akin to the criminal standard of proof. This imposed a significant limitation on the application of the principle of undue influence.

Legitimate persuasion

In the case of *Hall v Hall* (1868) 1 P & D 481, a farmer had left his estate outright to his wife. His disgruntled brother complained that the terms of the will were the result of violence and threats of the wife.
Sir J P Wilde directed the jury that putative beneficiaries can exert influence in the following ways:

> 'Persuasion, appeals to the affections or ties of kindred to a sentiment of gratitude for past services, or pity for future destitution, or the like, – these are all legitimate and may be fairly pressed on a testator.'

In contrast the only type of influence that will vitiate a will occurs where:

> '... pressure of whatever character, whether acting on the fears or the hopes, if so exerted to overpower the volition without convincing the judgment is a species of restraint under which no will is valid. In a word the testator may be led but not driven and his will must be the offspring of his own volition and not the record of some one else's.'

The line is crossed where the testator would respond 'this is not my wish, but I must do it': *Wingrove v Wingrove* (1885) 11 PD 81.

Undue influence and morality

In the case of *Wingrove* Sir James Hannen was keen to distinguish between immoral influences and that influence that may amount to undue influence. He used the following graphic illustration:

> 'A young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives; yet the law does not attempt to guard against those contingencies. . . . It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.'

The relationship between testator and beneficiary

The clear distinction between the protective attitude of the courts of equity to lifetime gifts and testamentary bequests is found in the case of *Parfitt v Lawless* (1872) LR 2 P&D 462. Under the terms of her will the testator left a sizeable portion of her estate to her priest.

The disappointed beneficiary unsuccessfully sought to argue that by reason of the priest's position he should bear the burden of proof of disproving undue influence.

Lord Penzance examined the difference between inter vivos gifts and wills:

> 'In equity persons standing in certain relations to one another – such as parent and child. confessor and penitent . . . – are subject to certain presumptions when transactions between them are brought into question . . . the Courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger.'

This was in contrast to a gift under a will, in respect of which *Boyse v Rossborough* had made it clear that: 'Undue influence cannot be presumed'.

Involvement in the will-making process

The involvement of the main beneficiary in the will-making process was examined in the case of *Craig v Lamoureux* [1920] AC 349.

There the deceased's husband was the sole beneficiary of the will he had prepared during his wife's terminal illness. The Canadian Supreme Court had applied:

> '... what they took to be a principle of universal application, that a person who is instrumental in framing a will under which he obtains a bounty is placed in a different position in law from ordinary legatees. . . . For they have thrown on them the burden of proving the righteous of the transaction.'

The Privy Council appears to treat this as an allegation of undue influence rather than

want of knowledge and approval. It drew a clear distinction between lifetime giving and a will: 'a will, which merely regulates succession after death, is very different to a gift inter vivos, which strips the donor of his property during his lifetime'. This lack of the testator's potential need for the funds appeared to justify the distinction. It reversed the Canadian Court's decision; the beneficiary husband did not bear any burden of proof in relation to undue influence.

The Privy Council restated the *Boyse* dicta as to:

- The need to demonstrate that circumstances are not just; 'consistent with the hypothesis of its having been obtained by undue influence. It must be inconsistent with a contrary hypothesis'.
- It is not sufficient to prove the opportunity or inclination for coercion, but that the power was exercised.
- It was that power that brought about the terms of the will.

The courts rejected the application of the lifetime presumption to be applied to the testamentary gift.

The development of the doctrine of want of knowledge and approval

The development of the doctrine of want of knowledge and approval following the case of *Barry v Butlin* (1838) 2 Moo PC 480 is for a further article. Where the beneficiary was involved in the making of the will a challenge based upon want of knowledge and approval can be mounted, and may be easier to establish. In the recent case of *Poole v Everall* [2016] EWHC 2126, the carer of a brain-damaged testator 'assisted' him in making a will leaving the carer 95% of his estate. However the carer was unable to discharge the burden of showing that the testator knew and approved of the contents of the last will.

The modern standard of proof

The strict test in *Boyse* has been re-examined. The apparent need to find that the facts are only consistent with the hypothesis that there must have been undue influence needs to be rephrased, to take account of more recent authority on the civil standard of proof.

In the case of *Re Edwards* in 2007 Lewison J (as he then was) held that the *Boyse* test in the 21st century might be restated as:

> 'In the modern law this is, no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition'.

In *Cowderoy v Cranfield* [2011] EWHC 1616 Morgan J, at para [141] in reviewing the standard of proof:

> 'That in the present case, where I have considerable evidence as to the circumstances in which the disputed will was prepared and executed, I think that it is more appropriate for me simply to ask whether the party asserting undue influence has satisfied me to the requisite standard.'

As to the requisite standard the judge concluded that this is on the balance of probabilities. Morgan J continued by stating that as the allegation is a serious one then the evidence required must be sufficiently cogent to persuade the court that the testator's will has been overborne, rather than there being some other explanation.

The House of Lords examined the civil standard of proof in the case of *Re B (Children)* [2008] UKHL 35, [2008] 2 FLR 141. The subject matter of the litigation related to the degree of proof necessary to establish under s 31(2) of the Children Act 1989 that a child 'is likely to suffer significant harm.'

Lord Hoffmann conducted a thorough review of the standard of proof (at [2]):

> 'If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for finding that it might have happened. The law

> operates a binary system in which the only values are 0 and 1. The fact either happened for it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof.'

He goes on to consider, the correct standard of proof, which he describes as; 'the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen. It must be satisfied that the occurrence of the fact in question was more likely than not.'

The circumstantial evidence

In recent years *Schrader v Schrader* [2013] EWHC 466 (Ch) provides us with a relatively rare example of a claim succeeding based upon circumstantial evidence, from which a finding of undue influence could be made.

The testator was 90, when she changed her will from an equal division of her assets between her two sons. The last will favoured Nick, leaving him her house, which was her most valuable asset. Nick had moved to live with his mother when she had a fall.

Mann J (at para [96]):

> 'It is of the nature of undue influence that it goes on when no-one is looking. That does not stop it being proved. The proof has to come, if at all, from more circumstantial evidence.'

The judge recognised even if the will writer asks as to influence, it is not surprising that the testator may give a negative response. At para [97] 'If the usual more subtle form of undue influence is being applied, its victim would hardly be likely to answer "Yes" to the question.'

The relevant circumstances there included:

- T's vulnerability and consequent dependency on Nick to provide care for her at home.
- Nick – a powerful personality with a powerful physical presence. Though no finding of direct abuse, there was evidence of him being quick to anger if crossed.
- Nick's antipathy towards his brother and his view he had been 'hard done by'.
- T had a mainly cordial relationship with her other son.
- The use of a will writer, where T had a 'family solicitor'. The will writer was organised by Nick, and he took his mother to have the will executed.
- Nick was unusually reticent as to the content of the will for a full 6 months after's T's death.
- Conduct at trial. Nick was found to be economical with the truth as to his involvement with the draft will.

The case of *Schomberg and Taylor* [2013] EWHC 2269 (Ch) provides a further rare illustration of a successful undue influence claim, an inference being drawn from the circumstantial evidence. One important feature in establishing the hypothesis of undue influence was there had been no break in the relationship with her previous beneficiaries. There was no discernible reason for the radical departure in testamentary provision.

In *Schomberg* the elderly testator had fractured both hips in one year; she was in poor general health. This frail physical health was compounded by bereavement following the loss of her husband.

The medical condition

It can be seen that central to any finding of undue influence is the vulnerability of the testator. Medical evidence of underlying conditions can provide the factual background for the inference of undue influence.

There is a helpful paper prepared by the International Psychogeriatric Association Task Force on Wills and Undue Influence: *The Wills of Older People: risk factors for undue influence*, published in *International Psychogeriatics* (2009) Feb 21. The paper

gives examples of how particular medical conditions may render someone more susceptible to influence: 'A range of mental disorders such as delirium, dementia, chronic schizophrenia, paranoid and mood disorders may predispose a person to undue influence'.

A common effect of dementia is the impact upon short-term memory; this leaves a sufferer prone to complain 'no one comes to see me'. The medical notes may show this to be false; however the testator has been unable to retain that information and judges the absent child harshly. A further weakness, consequent upon dementia, identified in the paper is that the testator is 'unable to appraise their relationships in the context of the past and present simultaneously, and they may be particularly vulnerable to those with whom they are in frequent visual contact'. If the geographically distant adult child is replaced with an 'over-solicitous' carer there is a prospect of the testator not being able to resist the blandishments of the carer.

Further personality disintegration may result in passivity, where a testator loses their previous independence of mind. Where dementia coexists with depression as for example in *Key v Key* [2010] EWHC 408 (Ch) (see [2011] Eld LJ 15) (a case on testamentary capacity), one could see that being grief stricken could lead a testator to give in for the sake of a quiet life and end.

The paper endorses the idea of a sliding scale of resilience to influence depending on the degree of deterioration recognised in conventional dementia testing.

The good medical report

While the contemporary medical records and reports may provide the raw material for the tribunal, it will often be preferable to commission a retrospective report making sense of the records, any diagnosis, analysis of medication etc.

If the full gamut of testamentary capacity, want of knowledge and approval, and undue influence are being invoked, it is likely the specialist psychiatrist will be needed. Where there is sufficient material to justify an allegation of undue influence then the consultant psychiatrist should be asked to give details of whether the severity of the dementia would impact upon the testator's ability to resist influence. Medical material which supports a finding of impaired capacity and impaired judgment will assist in providing specialist assistance as to the weakened state of a testator.

Social circumstances of the testator

There are a number of features that may pre-dispose a testator to undue influence:

- Isolation which is increased by the 'influencer' who becomes the guardian at the gate for other contacts.
- The testator withdraws from other relationships.
- Conflict within a family, eg between siblings or first and second family.
- Care giver becomes possessive of the testator.
- The testator cedes financial control to the 'influencer'.
- The relationship may be inappropriate suggesting emotional dependency.

The frail testator's hope

While we identify the features above as warning signs for the presence of undue influence, the forging of an intense relationship may be viewed another way. The potential hypothesis may be that the testator has entered into a quasi-bargain.

While as individuals we may have a sense of unease at the linking of financial reward in this world for a good deed done, this unease was shared by the judiciary in the early cases. The 19th century case of *Van Alst v Hunter* (1821) 5 Johnson 148 (NY Ch Rep), p 159:

> 'It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient

> means which has in protracted life to command the attentions due to his infirmities.'

In *Cowderoy v Cranfield* the testator left her estate to a drinking acquaintance of her deceased son. Her chosen beneficiary 'Lionel' had shown her some friendship, when her son died of alcohol abuse. He had been present when she was first interviewed by a solicitor to make a will. Such was the concern of that solicitor that it was recorded that the testator was constantly looking to Lionel for answers. It was clear that Lionel knew of the contents of the will, and indicated there had been discussions re a lifetime gift of the same.

In dismissing an allegation of undue influence Morgan J commented (at para [147]):

> 'She freely chose [Lionel], her choice was influenced by her belief, or at any rate her hope, that if she made a will in favour of [Lionel] and told him that she had done so that would help her because he would be more likely to continue to visit her and care for her.'

So Morgan J concluded that the making of the will with the aim of securing a heightened level of attendance was not in that case a marker of undue influence. This idea of a possible bargain of care in return for my estate is also found in the proprietary estoppel case of *Jennings v Rice* [2002] EWCA Civ 159, where Walker LJ (as he then was) propounds a bargain between the testator and carer, to which effect should be given.

But what if the bargain or expectation occurs where there is a gross disparity in mental strength between the feeble testator and the person who can withhold care? If the testator felt compelled to make a particular will to avoid abandonment in nursing home, would that amount to undue influence? If I want to avoid residential care I must make this will?

Exploiting an inappropriate relationship

In *Hubbard v Scott* [2011] EWHC 2750, the only challenge to the will was based upon undue influence. The testator made a will a few weeks before his death in favour of a younger lady who originally was his cleaner. At most he had known her for 3 years, and she had partially moved in to his property. Proudman J in dismissing the challenge referred to *Wingrove* in which case the court made it clear that where a man unwisely succumbs to the fascination of a woman that does not make her influence undue. The default beneficiaries of the earlier will failed.

The warning

While I have examined a number of recent cases where a probate claim of undue influence has been successful, such cases remain rare.

The case of *Wharton v Bancroft* [2012] EWHC 91 is an example of a failed probate claim where the adult children of the testator challenged a death-bed will made in favour of a long-term cohabitee. There was a concession that their terminally ill father had capacity and challenges were raised on the two bases of want of knowledge and approval and undue influences. Norris J dismissed both challenges. He considered the evidence of 40 witnesses, the majority of whose evidence he concluded was partisan!

Condemned in costs

Norris J applies the appellate case of *Re Cutliffe's Estate* [1959] P 6 where Hodson LJ held that where pleas of undue influence and/or fraud are unsuccessfully made in probate claims 'the people who make such charges and fail will be condemned in the costs not only of that charge but the whole action'. Norris J in *Wharton* concluded that the award made against the unsuccessful daughters would be on the indemnity basis. A challenge on the basis of undue influence can raise the stakes as to the costs outcome.

Fraudulent calumny

The *Re Edwards* guidance states:

> '(vii) The shorthand used to refer to this species of fraud is fraudulent calumny. The basic idea is that if A

poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on their character, then the will is liable to be set aside

(viii) the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false.'

Necessary features

- It must be established that A did (on the balance of probabilities) poison the testator's mind against B.
- Which poison did affect the testamentary disposition.
- B must be a natural beneficiary.
- The complaints must have been made falsely (and known or recklessly believed to be false).
- It is not enough if A genuinely believed the aspersions he was making.

These stringent conditions will not often be met, and the case of *Edwards* is a rare instance of the allegation being made out.

Mrs Edwards had two surviving sons: Terry (who claimed to be unfit to give evidence at trial) and John. Terry had not left home and was a heavy drinker. Lewison J indentified a number of allegations that were levelled at John and in particular his wife Carol, which were reported by either Mrs Edwards, Terry or his friend. These included:

- that Carol had removed ornaments (when she was in hospital);
- that Carol had taken money from Mrs Edwards;
- that John and Carol had put her in a nursing home to die;
- that John and Carol had taken a bag with insurance policies; • plus two purses with £600 in them.

Lewison J concluded that Terry deliberately poisoned his mother's mind by 'making deliberately untruthful accusations against John and Carol'. Further that the accusations had the effect desired by Terry so as to cause her own discretion and judgment to be overborne, so that 'in changing her will she was simply doing as she was told'.

The judge dealt at length with the 'red markers' that might flag up the general species of undue influence discussed above:

- the frail elderly mother;
- the bombastic angry son;
- the isolation from her previous support network of John and Carol.

These additional features made it the more likely that in her weakened state Mrs Edwards would have accepted and relied upon the accusations in changing 'her' testamentary wishes. Therefore the surrounding circumstances of vulnerability supported a finding that the lies told would have unduly influenced the testator, who was no longer a feisty and independent lady.

There was a rather forlorn attempt at establishing fraudulent calumny in *Re Boyes* [2013] EWHC 4027 (Ch). One dominant sibling took over the care of her father's finances to the chagrin of the other two siblings. The family fell out and the domineering sister may well have conveyed her upset at her brothers' attitude. The father testator earnestly wished for a reconciliation and proposed mediation, which was not taken up. The father changed his will, and removed the brothers entirely. While the testator was reduced in capacity he was able to communicate appropriately with professional advisers: in relation to the family dispute, a power of attorney and the making of the will. There was insufficient evidence to establish that the terms of the will were the product of fraudulent calumny.

In the recent case of *Kunicki v Kunicki* [2016] EWHC 3199 (Ch) (see Case Report at p 73) a challenge was mounted on the basis of a fraudulent calumny having induced the making of the disputed will. It centred on an allegation that there had been a representation to the deceased that the potential beneficiary 'could not be trusted

and had behaved dishonestly' when administering his wife's estate. The judge concluded that it had not been proved that the person making the representation did so knowing the same to be false or being reckless as the veracity of the same. The claim of fraudulent calumny was not made out.

Conclusion

As our number of twilight years increase the risk of a greater incidence of undue influence also rises. Is there a method of improving the policing of testamentary dispositions brought about by influence that may amount to undue influence? One approach that has been adopted in British Columbia is by shifting the burden of proof. This has been achieved by s 52 of the Wills, Estates and Succession Act 2013, which applies where the challenge is that the will resulted from another person:

(a) being in a position where the dependence of dominance was present; and

(b) using that position to unduly influence the will maker to make the will.

If the potential for dominance is established then that person has the onus of establishing that they did not exercise undue influence. This imports the presumption of undue influence from equitable undue influence in lifetime gifts, see *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773. The common method of negating the inference of undue influence, for lifetime giving, is the existence of independent advice as to the transaction. It might be that the consequence of any reform in relation to testamentary disposition and undue influence would result in an increased number of professionally drawn wills, in order to counter the application of a presumption. It can be cogently argued that the additional transparency injected by the involvement of the professional at the drafting stage should reduce, rather than increase the number of will challenges. This would justify the introduction of legislation to alter the burden of proof.