

Undue Influence and Wills

Undue influence is an ever-present threat in the estate planning industry and one that will writers must be mindful of especially when dealing with clients who may be described as vulnerable. We must do all we can to ensure that a testator giving instructions for the preparation of their will is acting as a free agent. To that end, this month's paper will discuss the law of undue influence as it relates to wills, what to look out for as a will writer and what potential reforms are on the table.

BACKGROUND

Undue influence is one of a few grounds for contesting the validity of a will. The effect of a successful claim would be to declare the will procured by undue influence and relying instead on an earlier valid will or intestacy. The grounds for contesting a will's validity are:

1. Undue influence
2. Lack of testamentary capacity
3. Lack of knowledge and approval
4. Improper execution – section 9 Wills Act 1837 formalities not met
5. Fraud or forgery.

While undue influence is currently the most common reason for contesting the validity of a will it is also the least successful. Undue influence has a high burden of proof attached to it making it difficult to prove for reasons we'll discuss later.

DISTINCTION BETWEEN LIFETIME AND TESTAMENTARY UNDUE INFLUENCE

In this paper we will only be considering undue influence as it relates to will, but it is still important to recognise that there is a difference between the test that applies to undue influence concerning lifetime gifts and wills. Indeed, there have been cases where leave to appeal a decision where a claim of undue influence has been refused because the applicant has cited the authorities that relate to lifetime gifts instead of testamentary gifts (see *Henein v Laffa* [2015] EWCA Civ 700).

There are two types of undue influence, actual and presumed.

Presumed undue influence only applies to lifetime gifts and then only if the gift appears irrational, requires explanation, or if there exists a relationship of presumed influence. Examples of these types of relationships of presumed influence are parent over child, solicitor over client, religious advisor over follower or trustee over beneficiary. Interestingly there is no relationship of presumed influence between a husband and wife.

Actual undue influence relies on actual proof of the coercion or pressure placed upon the donor. For wills, it is only actual undue influence that must be proven. Whilst these kinds of claims often centre around a relationship of trust and confidence that may make a testator easier to influence, there are no relationships of presumed undue influence. The presumption of undue influence does not apply to wills.

Another important difference between actual and presumed undue influence is the burden of proof. For actual undue influence, the burden of proof is on the person alleging that the will was procured by undue influence and this is a very high burden. For presumed undue influence, the burden of proof shifts to the defendant and it falls to them to establish that there was no relationship of presumed influence, or if there was, that no undue influence was applied and the donor acted on their own volition.

WHAT IS UNDUE INFLUENCE?

Undue influence is the application of pressure by a third party that has the effect of overpowering the testator's own free will, such that the will they execute can't be said to be their true wishes. This may come in the form of a person making physical or emotional threats to the testator to force them into making a will in their favour. It can also come in the form of poisoning the testator's mind against another person who might expect to inherit from them, with the goal of pushing them out of the testator's good favour. This type of influence is known as 'fraudulent calumny' and must be looked at separately.

For there to be undue influence there must be an element of coercion. Simple persuasion is allowable. This principle was originally defined in the case of *Hall v Hall* [1868] LR1 P&D 481 by Sir J P Wilde who stated "persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgement...will constitute undue influence." So, a testator may be led but they cannot be driven to write their will in a particular way.

It can be difficult to distinguish persuasion from coercion. Coercion is more likely to take the form of threats to the testator, though not necessarily physical threats. This could be verbal bullying, or even simply talking to a vulnerable person in such a way that they will do anything to appease the harasser for the sake of a quiet life. Persuasion is often seen in attempts to appeal to the testator's affection or to 'guilt trip' them in some way to convince them to write their will a certain way. The key point here is that coercion is not just convincing the testator of something or legitimately changing their mind but making them feel forced onto a certain path so that they write their will in a way that doesn't actually represent their true wishes. Their mind was never truly changed, so the will was procured by undue influence.

This distinction was discussed in *Daniel v Drew* [2005] EWCA Civ 507. This case dealt with a trustee alleging that they had been unduly influenced into resigning as a trustee of a family trust and although it is not a testamentary undue influence case, it is useful nevertheless. Here the court said that the key question in undue influence cases is "whether the persuasion invaded the donor's free will to accept or reject the persuasion or withstand the influence...There is no undue influence unless the donor if she were free and informed could say 'This is not my wish but I must do it'."

Even without threats, persuasion can slowly evolve into coercion through employing a 'drip drip' approach. A clear example of this was seen in the case of *Re Ho Chau Ying Chin* [2019] EWHC 523 (Ch). This case concerned a challenge to a will by three of the testatrix's five daughters who had been disinherited in favour of their only brother.

Mrs Chin had written a will in 2009 that split her estate equally between all six of her children. She had also written a letter of wishes that made it clear that she had always been very fair to all of her children and she wanted to grant her five daughters a share of her estate. Shortly afterwards she suffered a stroke and became dependent on her husband and son. Mr Chin was a traditionalist and believed that only male heirs should inherit; he wished for their substantial joint estate (£3m) to pass solely to their son. In 2011, Mrs Chin executed a new will leaving her whole estate to her son.

After Mrs Chin's death in 2015, three of her daughters challenged the will on the grounds of undue influence, believing their father and brother had unduly pressured her into disinheriting them.

The Court held that Mrs Chin had been placed in a vulnerable position after her stroke and her husband and son had taken advantage of this. Mr Chin had put pressure on her to change her will and had worn her down over the years until she reached a point where she gave in to the pressure for the sake of a quiet life. So over time, this persuasion had amounted to pressure that had overborne her free will.

THE KEY PRINCIPLES

The key principles of undue influence claims were nicely summarised by Lewison J in the case of *Re Edwards (deceased)* [2007] EWHC 1119 (Ch):

1. There is no presumption of undue influence, unlike with lifetime gifts where there are certain relationships where influence is presumed
2. Whether there has been undue influence is a question of fact
3. It is up to the person claiming undue influence to prove that this is the case. The claimant must prove that the facts are inconsistent with any other hypothesis
4. For there to be undue influence, the coercion or fraud that has brought about the will must have actually overborne the wishes of the testator
5. It is not undue influence if the testator's judgment is changed – It must be more than mere persuasion.
6. The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary to overbear their will.
7. A claim that the testator's mind has been poisoned against a person who would be a natural beneficiary falls under a separate heading of 'fraudulent calumny'.
8. Finally, when determining whether someone has made their will under undue influence, it is not a question of whether the will is 'fair' but whether the testator has acted as a free agent.

Undue influence is difficult to prove. There must be no other reasonable explanation for the terms of the will and it is for the person alleging undue influence to prove this. Undue influence itself often and for obvious reasons goes on behind closed doors. The point is that it isn't obvious so it's very difficult to find actual evidence of it. By the time a claim of undue influence arises, the testator is dead and no longer able to give evidence. This means that it often has to be inferred from the circumstances that the testator was in but remember that there are no presumed relationships of influence for wills to help a claim here.

All of this combined makes it a high burden to overcome.

The case of *Rea v Rea & Ors* [2019] EWHC 2434 (Ch) is a great example of how undue influence claims are decided in practice and just how high the burden of proof is. In this case the testatrix, Mrs Rea, died leaving a will dated 2015 that left the main asset of her estate to her daughter Rita. Her previous 1986 will had left her estate equally between her daughter and four sons. Three of the sons challenged the will on the grounds of (1) lack of testamentary capacity (2) lack of knowledge and approval (3) undue influence and (4) fraudulent calumny. We will only consider the undue influence claim.

The meat of the son's claim was that after Mrs Rea's care needs had increased to the point where she was dependent on Rita, she had taken advantage of her mother's vulnerability in order to coerce her into writing a new will in her favour, to the detriment of the sons.

Of course, they had no physical evidence of this, as is usually the case, and their suspicions were based only upon their feelings about their sister's character. The evidence they submitted attempted to paint a picture of Rita as an angry and vindictive woman. The courts could not accept this as evidence that coercion had taken place, to do so would be akin to accepting that people with certain personality traits were bound to commit fraud or unduly influence a testator. There was no evidence of *actual* undue influence.

What there was, was a lot of evidence that Mrs Rea knew exactly what she was doing, was very strong willed and had in her mind very good reasons for writing her 2015 will in Rita's favour. This evidence was a combination of attendance notes from the solicitor who drafted the will, assessments from the GP and accounts of how Mrs Rea's care was provided. A key factor here was the fact that Rita had been Mrs Rea's main carer for years, and while a rota was initially drawn up to share the burden with the sons, this had broken down almost immediately.

Ultimately the sons were unsuccessful in their claim of undue influence, and all other grounds.

[Fraudulent Calumny](#)

Fraudulent calumny is similar to undue influence. The difference between this and undue influence is that undue influence relies more on threats to the testator or appeals to affection and pressures the testator to make a will that doesn't represent their true wishes. Fraudulent calumny leads to the testator making a will of their own free will but after having their affection towards a natural beneficiary poisoned.

An example of this may be a child of the testator wheedling their way into the testator's good graces and once they are beginning to fill the testator's mind with false representations of their siblings characters in the hopes that this will lead to the testator benefitting this person less and writing a will that is more favourable to the person making the false statements. This is another area where a drip drip approach can be very effective, a slow poisoning of the testator's mind.

It is another difficult claim to establish. The onus is on the person alleging the fraudulent calumny to prove it. It must also be proven that the person alleged to be poisoning the testator's mind was making statements that they knew to be false, or that they had no regard as to whether the statements were true or false. If the person making the statements genuinely believed the statements to be true, then there is no fraudulent calumny even if the statements made were in fact baseless.

WHAT TO LOOK OUT FOR

The professional will writer needs to be wary of undue influence. While naturally undue influence is insidious and happens behind the scenes, there are steps that the drafter can take to protect the testator and to protect themselves.

A will writer might suspect undue influence if the testator has changed their Will in a way that seems surprising. This is why it is important that the testator is asked if they have any previous wills, and if so if they could bring a copy for the will writer to see. If changes to the will are out of character or a large departure from a previous will, the professional should dig deeper into this. Why are they making this change? Why is this person suddenly receiving a larger share of the estate or being excluded? The testator should be able to provide reasons for the changes, and these answers should be recorded. Incidentally, this is a question that is usually posed on a *Larke v Nugus* request.

If instructions are provided by a third party this should automatically raise a warning flag. A third party acting on behalf of the testator doesn't automatically indicate undue influence, but of course the will writer should make extra checks to confirm that these are the testator's instructions and they are acting as a free agent. Confirm who the person is and why they are providing the instructions. Make sure you can spend time with the testator alone to discuss the instructions and confirm they are their own wishes. Better still only speak to the testator and take instructions from them only.

In a similar vein, a third party arranging the initial appointment and seeming to want to rush the process through may be a warning sign. Especially if this is coupled with their insisting on being present at meetings with the testator or giving the instructions themselves, or them suddenly instructing you despite previous wills being written elsewhere.

There might be further cause for concern if the testator is dependent on the third party or new beneficiary, or the testator is frail or ill and potentially more susceptible to influence.

In all cases the will writer should seek to see the testator alone for at least part of each appointment even if taking instructions for mirror wills for a couple. They should explain to the client why this is preferable. If they insist on another person being present, then confirm who everyone present is and what their relationship to the testator is. This should be recorded in the attendance notes.

Additionally, to the above a will writer should also record who booked the appointment, whether they have acted for the client before and if not, why the testator is instructing the will writer and not their previous company.

Claims of undue influence often go hand in hand with claims of lack of testamentary capacity. The 'golden rule' (*Kenward v Adams* [1975] The Times 29 Nov) should be observed if the drafter has any doubts about the testator's capacity or susceptibility to undue influence. A medical professional should be consulted to confirm the testator's capacity, especially if the terms of the new will could be contentious. The medical professional's written recommendations should be recorded with the will file.

Observance of the golden rule coupled with the solicitors detailed attendance notes greatly helped confirm the wills validity in the *Rea v Rea* case discussed above. The solicitor acting for Mrs Rea had identified that her new will was a significant departure from her earlier will and had duly recorded the testatrix's reasons for this in her attendance notes. Also identifying that there was likely to be a

challenge to the will from the sons, she had recommended Mrs Rea undergo a capacity assessment with her GP. When the will was later challenged the evidence that the solicitor and the GP were able to provide went a long way in fighting off any claims that Mrs Rea was weak willed and has succumbed to undue influence from her daughter. The judge even went as far as to say, "If this level of care and competence was applied in every case there would doubtless be fewer disputes about wills coming before the courts."

POTENTIAL FOR REFORM

Just over three years ago, the Law Commission release a consultation paper into modernising succession law. This project is currently on hold. In their consultation paper, the Law Commission identified a number of areas that they feel are in need of review and one of those areas was the law relating to undue influence for wills. They believe the current framework is too narrow and suggest bringing the law more in line with undue influence and lifetime gifts.

Two approaches are proposed for a doctrine of testamentary undue influence; a structured approach or a discretionary approach.

The structured approach would be based on the lifetime gifts rules and would be a two-limb test. Under this, a presumption of undue influence would be raised if:

- there exists a relationship of influence; and
- the gift calls for explanation

Relationship of influence would be presumed in respect of gifts to:

- a trustee
- a medical adviser
- a person who prepared the will for remuneration
- a professional carer

For all other types of relationship there is no presumption and the fact a relationship of influence exists would need to be proven.

When considering if the gift calls for explanation, the court would consider two factors:

- the conduct of the beneficiary in relation to the making of the will; and
- the circumstances in which the will was made

There is also a suggestion that where a beneficiary was instrumental in the preparation of the Will there should be a presumption of undue influence.

Under the alternative discretionary approach, the court could instead presume undue influence if it were satisfied that it is just to do so in all the circumstances of the case. This approach would still consider relationships of influence and calls for explanation, but they would only need to consider them alongside the general facts of the case instead of having to be individually satisfied of the two criteria as under the structural approach.

Under either approach, if the presumption is raised it would be up to the person defending the gift to rebut the presumption.

CONCLUSION

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 being the way it is.

If you are suspicious that the testator is being subjected to undue influence and the instructions given are not their true wishes and you are unable to dissuade yourself of these suspicions, then you must refuse to act.

Important Reminder:

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