<u>Influencing the future: What next for Undue Influence in Probate?</u>

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1. Since this is a conference on the law of succession, this paper is about undue influence in the probate context, as distinct from equitable undue influence as it applies to transactions *inter vivos*. But we will have come back to consider the equitable doctrine. And although this paper will focus on undue influence, rather than the other ways in which a will might lack substantial validity – lack of testamentary capacity, want of knowledge and approval, fraud – we will have to touch on those too, in order to look at how undue influence fits into that range of possible challenges.

2. The reasons it is particularly worth discussing undue influence now are: first, because this year produced an important decision of the Court of Appeal about it, the case of *Rea v Rea*,[1] and secondly, because, early next year, 2025, the Law Commission[2] is due to publish its Report on reforming the law of wills and a draft bill; and thirdly, because it may seem to some, in the light of *Rea v Rea*, that it may be that something needs to be done to improve undue influence, whether that be through legislation on the Law Commission's recommendation, or at least by way of judicial manoeuvre.

3. As readers may remember, the Law Commission's project began way back in 2016, with a substantial consultation in 2017 but was then paused for a project on the law of weddings. It was then restarted last year, with a supplementary consultation paper on just two issues: electronic wills, and the automatic revocation of wills by marriage. But just because it reconsulted on only those two issues certainly does not mean that it has abandoned any intention to recommend reform on all the other many issues featured in the original

[1] [2024] EWCA Civ 169
[2] We were lucky enough to have few members of the Law Commission team present at the Three Books Conference.

consultation paper, including formalities and a dispensing power, capacity, statutory wills and assisted will-making, mutual wills, deathbed gifts and – crucially – undue influence.

4. The facts of *Rea v Rea* are quite typical of a contentious probate dispute. Mrs Rea – Anna – died in July 2016. She was elderly and immobile, and relied on her daughter, Rita, and a carer, who lived with her, to help her day-to-day. Her eyesight wasn't great, and she spent most of her time doing adult colouring books. She had made the contested will on 7 December 2015, and left her biggest asset by far, her house in Tooting, London, to her daughter, Rita, and the residuary estate in equal shares between her four children, Rita, and her three sons David, Nino and Remo. This was very different from the previous will from 1986, which left the whole estate to the four children in equal shares. She said this was because her sons had 'abandoned her', which was at least sort of true – one of them lived abroad, and the other two had recently said they would no longer stick to the timetable of visits they had previously agreed. These sibling quarrels about caring responsibilities are of course quite typical of the sorts of case contentious probate lawyers see.

5. But despite its fairly standard facts, it had a troubled procedural history, taking 8 years to reach a conclusion. Rita had issued her claim to propound the 2015 will quite promptly, about a year after her mother's death, and the brothers duly contested it. They then represented themselves at the trial before the Deputy Master in 2019, and lost. They applied for permission to appeal. Mr Justice Birss (as he then was) said no. But they renewed their application for permission to a different judge, who granted permission on the basis that the trial might have been rendered unfair by the Deputy Master having restricting David's cross-examination of Rita. Having got permission, they lost the appeal. But the brothers were not to be beaten; they applied for permission for a second appeal, and got it, from none other than Lord Justice Birss, as he had by then become, who evidently took a different view of the case the second time around. The Court of Appeal allowed the brothers' appeal in February 2022, and directed a retrial before a High Court Judge. Strikingly, Rita was ordered to pay both sides' costs of both appeals and the first trial itself, with the costs of the case up to trial being reserved.

6. The retrial went before His Honour Judge Hodge KC in July 2023. He found in the brothers' favour on one ground, and one ground only: undue influence. But then of course Rita appealed: and the Court of Appeal allowed her appeal, on the basis that Judge Hodge was *not entitled* to find undue influence on the basis of the evidence before him. In July this year, the Supreme Court refused permission to appeal.

7. So what happened? What went wrong? How could so experienced a chancery judge as HHJ Hodge KC have made a finding of undue influence, yet an appeal court think such a conclusion was not even open to him on the evidence?

8. Rita's evidence was that she had had little or nothing to do with the making of the 2015 will. The usual story: her mother told her she wanted to update her will, but in relation to funeral wishes only. She asked her to make the appointment with a solicitor. She asked her to come along to the meeting. Only at the meeting did Rita find out that Anna wanted to leave the house to her, because she didn't want Rita to be made homeless, and because she didn't want her sons getting it, because she felt abandoned by them. The experienced solicitor Mrs Sukul noticed no problems with her spoken English, or her hearing, or her understanding, but advised that a capacity test be taken, to be on the safe side. The GP assessed her and found her to have capacity (albeit applying the Mental Capacity Act test). She told the GP that her sons had given up on her, and that they had their own houses and jobs. The GP and the solicitor then supervised the will's execution at a further 50-minute meeting – a rare example of Lord Templeman's Golden Rule being followed to the letter.

9. Neither GP nor solicitor saw any signs of undue influence. The live-in carer also described Anna as strong-minded, and said that she had never witnessed Rita abuse her mother in any way. She confirmed that Anna was upset by her sons having 'given up' on her care.

10. But the trial judge found that Rita had lied; the solicitors' notes made it clear that she and her mother had had considerably more discussion about the will before attending the solicitors than Rita had admitted. Rita had also intervened in the meeting more than she had been prepared to admit; the trial judge had felt she could and should have corrected her mother, when she said her sons had not cared for her, given that David and Nino had each visited her only a few days earlier, although at that point they had each withdrawn from the agreed care regime. The judge found Rita to have a 'forceful' personality, and, I infer, a strong sense of entitlement. And her evidence about why she had not suggested that Anna should tell the brothers about the new will was disbelieved.

11. The Judge was quite satisfied that Anna Rea had capacity; her statement about her sons abandoning her was perhaps harsh, but could not be said to be irrational. And she knew and approved the contents of the will – that was established by the evidence of the solicitor and the GP, that she repeated that the house should go to Rita, not her sons, as the will duly provided.

12. But the judge found undue influence, in the probate sense, meaning 'coercion': in other words, that Rita so *coerced* her mother that she had "overpowered her volition without convincing her judgment". He found that, even though there was no direct evidence of any pressure being brought to bear; he proceeded by way of *inference* from circumstantial evidence. He identified eight factors:

    a. Anna was frail and vulnerable;

    b. She was dependent on Rita;

    c. Rita had lied about their previous discussions about the will and involvement;

    d. The fact that will was made so soon after David and Nino had withdrawn their assistance with their mother's care;

    e. The fact that Rita made the appointment with the solicitor and that Anna had insisted she be present at it;

    f. The dramatic change of testamentary intentions after 30 years;

    g. The fact that Rita had another flat, which she was in the process of selling, but which Anna may not have been aware of; and

    h. The failure by Anna or Rita to inform the brothers about the new will until after Anna's death.

13. To that list, one might also add the finding as to Rita's forceful personality.

14. The judge felt that these factors, in combination, "*all point inexorably to the conclusion that Rita had pressured Anna into making a new will*", and so held.

15. But when one looks at this list of factors, one recognises all but two of them as fairly common features of will-making:

    a. Wills are often made by frail and vulnerable people;

    b. They are often made in favour of those on whom the testator is dependent, such as the daughter who lives with them;

c. Testators often ask that person to book a solicitor for them, and often want to be accompanied in the meeting itself;

d. A new will after 30 years is very likely to be in different terms from the previous one;

e. The fact that the new will comes shortly after one of the events that is said to have motivated the change of intention – in this case, the sons' decision not to carry on with the previous care regime – is hardly remarkable;

f. And when a parent cuts down a child's inheritance in a new will, they rarely announce that to them, particular if that is due to a grievance.

16. So those factors can at worst set out a situation within which undue influence is perhaps possible, but do not indicate a situation in which undue influence is more probable than not. And similarly, as Lord Justice Newey observed, people with argumentative or forceful personalities might be capable of exercising undue influence, but that doesn't mean they are likely to do so.

17. This case appears to have lacked the additional factors mentioned in last year's very similar case of *Jones v Jones*,[3] where HHJ Jarman KC found the daughter actively sought to isolate her mother, and reacted angrily, in front of her mother, to her uncle's advice that she should divide her estate equally.

18. So the only unusual factors of this case were Rita's lies in evidence, and the fact she was selling her own flat at the time.

19. But these also could have had a more innocent explanation than undue influence in the making of the will, as the Court of Appeal explained. Undue influence means *coercion*, but there is nothing legally wrong with a beneficiary *wanting* to benefit more, or with a beneficiary exercising *persuasion* on a testator to get that. That has been clear since *Hall v Hall*,[4] where Sir J P Wilde pointed out that "*all influences are not unlawful. 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*". Note the word "*pressed*". And the same word "*pressed*" is

[3] [2023] EWHC 1457 (Ch)
[4] (1865-9) LR 1 P&D 481

used in other old cases.[5] *Pressing* – i.e. pressure – by persuasion is all right. But "pressure" exercised was all that HHJ Hodge had found Rita exercised on Rita.

20. No doubt the argument leading to the sons' withdrawal from Anna's care regime gave Rita a fact she could use to *persuade* her mother to change her will. The fact Rita was selling her flat (to repay a debt in respect of overpaid benefits, it seems) also meant that she may have had a particular motive for wanting to be left a house, but does not of itself show that she must have used coercion to obtain that result, rather than mere persuasion. Rita's false evidence about her involvement in the process could, in the Court of Appeal's view, just as well be attributed to an embarrassment and reluctance to reveal that she had *encouraged* or *persuaded* her mother to make a new will, as to her covering up something more sinister.

21. The Court of Appeal also felt that the trial judge had also failed to take sufficient account of the evidence of the solicitor, the GP and the carer, all of whom spent a fair amount of time with Mrs Rea, but none of whom saw any reason to suspect foul play.

22. Looking at the objective facts of this case, so far as one can see them from the judgments, it is hard to see why the trial judge was so convinced that coercion must have been used, on the balance of probabilities. It is not an "inexorable" conclusion from his eight factors, at least as a matter of logic. The trial judge, with the benefit of observing the parties and their witnesses giving live evidence must just have 'smelt' something about Rita, which could not quite be fully articulated in the written judgment.

23. This is a problem with proving undue influence: as Mr Justice Mann observed in *Schrader v Schrader*, "*it is of the nature of undue influence that it goes on when no-one is looking"*.[6] He said that *"the proof has to come, if at all, from more circumstantial evidence*". But if 'pressing persuasion' is legitimate, how can one *ever* prove, by circumstantial evidence alone, that the line between persuasion and coercion has been overstepped?

24. That difficulty is particularly acute, if, as seemed to be accepted, the accusation of undue influence is routinely to be treated as a serious one. Lord Justice Newey cited the usual cases about how the civil standard of proof works in respect of serious allegations, and held: "*it seems to me that it 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*

[5] *Parfitt v Lawless* (1869-72) LR 2 P&D 462 per Lord Penzance; *Wingrove v Wingrove* (1885) 11 PD 81 per Sir James Hannen P.

[6] [2013] EWHC 466 (Ch) at [96]

likely to resort to coercion than to rely on affection, gratitude or even persuasion." So there is a high standard of proof to meet, but in circumstances where direct evidence is in short supply.

25. Secondly, it is sometimes suggested – the writer recalls one member of the chancery bar, since appointed a judge of the Chancery Division, saying this – that an accusation of coercion is tantamount to one of fraud. And if that is so, then that creates another obstacle for a claimant: a barrister might well feel professionally inhibited from pleading a case of undue influence where only circumstantial evidence exists, on the basis that it is professional misconduct to allege fraud in the absence of *prima facie* evidence. One's own client's insistence that "*mum would never have cut me out unless she had been bullied*", or the like, might well not meet that threshold.

26. Thirdly, by alleging undue influence, a party takes on a significant costs risk. Only rarely will costs be ordered to come out of the estate in a case where an allegation of undue influence has been raised and fails, even if there were reasonable grounds for suspecting it.

27. So this can leave those wanting to challenge those wills which seem to them unfair or unlikely in a quandary. Each of the other potential grounds of invalidity has been chiselled away at, in a succession of cases, usually in deference to the perfectly sensible point of public policy, that those in the final stages of their lives ought not to be unreasonably prevented from making a valid will.

    a. As to formal validity, we know that there is a strong presumption that wills have been duly executed, if they appear so on their face. See for example *Channon v Perkins*,[7] where neither attesting witness could remember seeing the testator sign; the fact their signatures appeared on the will under an attestation clause was enough to show they must have.

    b. As for testamentary capacity, the case law has made clear that the threshold set by the 150-year-old *Banks v Goodfellow* test is not a high one. *Simon v Byford* [8] will serve as authority for four propositions: first, that capacity depends on the capacity to understand not on actual understanding; secondly, that capacity is not to be equated with a test of memory; thirdly, that the law does not require the testator to understand the collateral, indirect consequences of disposing of their assets in one way as opposed to another, but only the direct, immediate, consequences; and fourthly, that the law

[7] [2005] EWCA Civ 1808
[8] [2014] EWCA Civ 280

does not require one to remember the reasons one made one's previous will as one did.[9] The writer has expressed the opinion before that the level of capacity required to make a will should be thought of as relative not only to the complexity of the testamentary decision to be made, but also to the quality of assistance given to the testator when making that decision.[10] But if an understanding of the indirect consequences of the will is irrelevant, the assistance given to a testator would not have to be particularly in-depth.

c. Cases on knowledge and approval show that that just means one knows what is in the will, and understands in broad terms what it does. As *Gill v Woodall*[11] shows, if it can be shown that the will accords with the instructions given by the testator, or that the will has been read or better still explained by a professional, that is strong evidence or even a presumption of knowledge and approval, even if there has been beneficiary involvement along the way. Ironically, the Law Commission's 2017 proposal that knowledge and approval be confined to knowing the terms of the will and their broad effect, and intending them to be given effect, is already the law, in the writer's view; the arguments to the contrary relate to the evidence which may be required to establish that knowledge and understanding.

d. Beyond that, there is, seemingly, no doctrine of mistake in relation to wills. Being mistaken about even key facts relevant to one's decision-making process doesn't invalidate a will. So, seemingly, a testator can think that she has already given a house to one child, and so leave what she has left equally to the other, and that will not invalidate the will, unless of course this false belief was a delusion or the result of some other disorder of the mind. A testator with short-term memory problems can forget that her son has been to visit her every week for the last year, and leave her estate to her daughter as a punishment to him, but that apparently will not be a ground of challenge unless, had she been reminded of his visits, she would have been incapable of remembering them for long enough to make a decision.

e. Fraudulent calumny – often described as another species of undue influence but conceptually distinct, in the writer's view – has also now been so hedged around with requirements that it is almost impossible to prove. A would-be beneficiary might

[9] See also *Goss-Custard v Templeman* [2020] EWHC 632 (Ch).
[10] "Allow me to explain" (2015) 13(3) TQR 4
[11] [2010] EWCA Civ 1430

poison the testator's mind against her rival beneficiaries by telling falsehoods about them. But the will is only invalidated if she does it dishonestly. If she *thinks* her allegations are probably true, then there is no fraud. There is no doctrine of innocent or negligent misrepresentation applicable to wills. This is shown by the facts of *Rea* itself. As HHJ Hodge KC said: "*If a person believes that they are telling the truth about a potential beneficiary, then, even if what they tell the testator is objectively untrue, the will is not liable to be set aside on that ground alone. In the present case, I am left in no doubt that Rita genuinely believed that after 7 and 14 November 2015, her brothers, David and Nino respectively, had 'abandoned' the care of their mother, something Remo had done many years before. This is not, in my judgment, a case of fraudulent calumny.*"

28. So, on the face of it, someone can seek to persuade a testator with false representations, which the testator, due to her poor memory, is not in a position to gainsay, and on the strength of which the testator cuts a rival beneficiary out, provided the representor thinks they might be true. And this sort of situation has been a particularly pressing problem in the last few years, with the Covid-19 pandemic and consequent lockdowns, which not only hugely increased the dependency, isolation, and vulnerability of millions of elderly people, but also prompted a slew of hastily drawn wills, sometimes followed, sadly, by hastened deaths.

29. What can be done? As the Law Commission said in their 2017 Consultation Paper, there are two objectives to be balanced. On the one hand, the law must provide adequate protection to testators by ensuring that wills which do not reflect their freely made wishes can be challenged. On the other, the law must not encourage speculative claims by disappointed beneficiaries.

30. The Law Commission's proposal in 2017 was to introduce a modified version of the equitable doctrine of undue influence applicable to lifetime transactions, as set out in *RBS v Etridge*, but tailored to the testamentary context.

31. First, one would have to show a 'relationship of influence' of the beneficiary over the testator (and in some cases that relationship would be irrebuttably presumed, such as gifts to solicitors or doctors).

32. Then, in place of the *Etridge* requirement that the transaction 'calls for explanation', one would have to show *either* that there was some conduct of the beneficiary in relation to the making of the will, *or* that the will was made in certain circumstances, such that the disposition in the will calls for an explanation. In other words, the court would not just be asking whether the

disposition could be accounted for by the ordinary motives of persons in that relationship, or considering 'manifest disadvantage' – that would not be terribly useful in the testamentary context. Merely asking a parent whether they have made a will, or helping them to make the appointment with the solicitor, would not amount to such conduct, nor would the fact that the will was made during end of life care necessarily amount to suspicious circumstances.

33. If those two ingredients – a relationship of influence, plus a testamentary disposition calling for an explanation, are established – then the onus shifts to the person propounding the will to rebut the presumption of undue influence. As with *Etridge* presumed undue influence, merely taking legal advice may not be enough: the solicitor may have had to elicit a rational, and perhaps factually accurate, explanation for the change before the presumption might be rebutted.

34. The proposal in the 2017 paper was relatively loosely drawn. Exactly what amounts to a sufficient 'relationship of influence' in this context is not made clear: does it mean something closer to ascendancy, or is trust and confidence enough? Nor is it clear what sort of conduct by a beneficiary or what sort of circumstances attending the making of the will would mean that the disposition 'calls for an explanation', nor what would have to be shown to rebut the presumption. These things are discussed, but not in any conclusive manner. No doubt, when any final proposal for reform is published, it will be more fully elaborated. We must recognise that in critiquing the proposal in the form in which it was published for consultation, there is a risk of setting up a straw man.

35. Nonetheless, it seems to me that there are likely to be some real drawbacks with this so-called 'structured approach'. First, there will be a limit to how far the legislation is able to remedy the lack of clarity in the elements of the test. It will certainly require a great deal of judicial working out, over a number of cases and appeals, creating a prolonged period of uncertainty (which is great for contentious lawyers like the writer, but not so good for non-contentious lawyers, or more importantly, for the public).

36. Secondly, much would inevitably turn, it seems, on what the changes being made to the contents of the will were, and would therefore involve a subjective consideration by the court of whether they were fair, justified and reasonable. In practice, of course, the court often takes those things into account as the law stands, not only in cases of undue influence but other

grounds: look at *Sharp v Adam*,[12] for example. But as a general proposition, the courts try *not* to be overly influenced by its subjective view of the testator's choices, for a number of reasons. Freedom of testamentary disposition – including the ability of a capricious or spiteful testator to make a capricious or spiteful will – is respected. As stated in *Fuller v Strum*,[13] the question is never whether the court 'approves' of the will's contents. And as Lord Neuberger wisely observed in *Gill v Woodall*,[14] "*Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix*". "*Few declarations*", said the sceptical Lord Eldon in *Pemberton v Pemberton*, "*deserve less credit than those of men as to what they have done by their wills*".[15]

37. Thirdly, there is a strong judicial trend *against* overreliance on evidential presumptions, in probate cases and in the law generally. Ultimately, after a contested trial, the court decides the matter according to the evidence on the balance of probabilities. Cases are rarely decided on the basis of where the burden of proof lies. That can be seen in Lord Neuberger's one-stage test for knowledge and approval in *Gill v Woodall*, as well as in dicta of the Court of Appeal in *Burns v Burns* in relation to testamentary capacity.[16] We also see it in cases on lifetime undue influence, and in an influential article by Sir Kim Lewison from 2011.[17] To introduce a new statutory evidential presumption would be trying swim against the tide, and would raise the question of whether a statutory presumption is to be accorded some different status to an evidential presumption in the common law.

38. Fourthly, and related to that, to apply a rebuttable presumption, one still needs to know exactly what question the evidential presumption is intended to help the court determine – what actually is "undue influence"? Would it still mean only 'coercion', or would it now include the other forms of unfair conduct which the equitable doctrine catches in relation to lifetime transactions, such as the common 'don't worry, just sign here darling' scenario? The difference between the two doctrines of undue influence is not merely evidential, but substantive, so this is a fundamental question, though it does not seem to find an answer in the 2017 consultation paper. Would it still possible to prove undue influence *without* reliance on the statutory

[12] [2006] EWCA Civ 449
[13] [2001] EWCA Civ 1879
[14] Op. cit. at [16]
[15] (1807) 13 Ves Jr 290, 301
[16] [2016] EWCA Civ 37 at [56]
[17] "*Under the Influence*" [2011] Restitution Law Review 1

presumption? The consultation paper does not say, but any legislation would need to be clear on this.

39. In any event, of course, any legislative reform would unfortunately not have retrospective effect to help those many testators who made their last wills during Covid-19 lockdowns

40. It may be that one potential answer already lies within the common law test, when it is properly understood and applied.

41. Mr Justice Lewison famously summarised the test for undue influence in probate cases in *Re Edwards*.[18] Having made the point about persuasion being legitimate, he then went on to point out that where the line is to be drawn depends on the mental and physical strength of the testator. He said this:

> "*The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A 'drip drip' approach may be highly effective in sapping the will.*"

42. HHJ Hodge KC at trial, like almost every judge in almost every undue influence case of the last 15 years, quoted this passage in his judgment. The Court of Appeal, surprisingly, did not even mention *Edwards*, but it did at least quote from some of its source material, such as *Wingrove v Wingrove,*[19] where it was pointed out that "*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 bring 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, that the sick person may be induced, for quietness' sake, to do anything*".

43. So in that situation, it seems "*pressing persuasion*" is not allowed after all. But despite the quotation from *Wingrove*, it is not apparent from the Court of Appeal's judgment that they had taken that on board.

44. Properly understood, in these cases of the elderly, the frail, the mentally enfeebled, the dependent, the vulnerable, very little – just harping on about something constantly – could be enough to make that person do what they don't really want to do. Testators may succumb to what was intended merely as persuasion, not because they were persuaded, but because they

[18] [2007] EWHC 1119 (Ch)
[19] *supra*

were so worn down by it over days or weeks. In these cases, there is little if any distinction between "mere" persuasion and coercion.

45. If that is understood, then it follows that alleging undue influence in such a case need not be seen as such a 'serious' allegation. It would be appreciated that beneficiaries – particularly those with overbearing and self-entitled personalities – might well commit undue influence without even realising that that was what they were doing, *i.e.* without knowing that the effect of their persuasion was not to persuade but to overbear. The evidential burden required to prove such an allegation then need not be thought so high. The dire costs consequences attending the making of an allegation of undue influence need not follow. Counsel could plead it in good conscience.

46. From the judgments of the trial judge and the Court of Appeal, it is not possible to say that *Rea* was in fact such a case – Anna may have been frail, somewhat cognitively impaired and dependent on Rita, but there was evidence that she still had a strong spirit. But it may be that Rita's lies about what she had and hadn't said to her mother would be sufficient to justify the trial judge's adverse inference about whether she had crossed that line between true persuasion and the 'drip-drip' coercion.