

UNDUE INFLUENCE

– a developing area of practice

By Patrick Mugliston

The importance of protecting vulnerable people from exploitation is fairly obvious. Those who care for people with disability and others who are frail¹ often wield considerable influence. Wherever possible, carers should endeavour to help those with disability from wasting their assets, and protect those assets from the undue influence of opportunists. In this context, it is worth examining the protective device of a discretionary trust and the law in relation to undue influence.

TRUSTS

Trusts are commonly used to protect the assets of people with disability by placing legal ownership of the assets in the hands of a trustee. Courts often create trusts when awarding damages. They may also be created by families of vulnerable people, or by testators who want to make such people beneficiaries under their will.

Parents of disabled children will often consider establishing testamentary trusts. 'Testamentary' means that the trust has been set up through a will, so no separate trust deed is required. The trust comes into existence only upon the death of the testator.²

Not only people with physical or intellectual disability can benefit from the establishment of such trusts. They are an attractive device for those who:

1. have an alcohol or drug addiction;
2. have a gambling addiction;
3. are spendthrifts and are likely to waste any inheritance;
4. are likely to be unduly influenced by others; or
5. are bankrupts.

The terms and conditions of a testamentary trust are contained in the will itself. The following issues should be specifically addressed by practitioners when considering the terms of a testamentary trust, or indeed when giving advice to those wishing to establish an *inter vivos* trust:

1. What are the accommodation and support needs of the beneficiary? Finding suitable accommodation for the vulnerable person may be one of the most important objectives of the trust, and will significantly affect their quality of life.
2. What support services does the vulnerable person need, and how are they to be paid for?
3. How much money should be available for the recreation, holidays, and travel needs of the vulnerable person?
4. Who should be able to influence the trustee so that the capital and income is actually directed to what will ultimately give the vulnerable person the most benefit?

Establishing a trust has important legal implications, and has developed considerably since the early days of the Court of Chancery. There are many situations in which a

court may appoint or remove a trustee or establish a trust. We are all familiar, in personal injuries cases, with the court establishing a trust from the proceeds of an award of damages. Usually, but not invariably, this is a result of damages connected with personal injuries to a person who has not attained the age of majority or who, because of their disability, cannot be expected to manage the money responsibly.

The court now has responsibility, once exercised through the Lord Chancellor's *parens patriae* jurisdiction, for supervising such litigation and protecting the proceeds. The court's role in relation to trusts is both protective and continuous. At any time, any actual or potential beneficiary, who is aggrieved by an act of the trustee, may bring him or her to account.³

Trustees should not be put in a position where there is a conflict between their duty and interest. It is quite proper for trustees to receive payment for their services; however, certain conditions must be satisfied before they can be paid. The instrument creating the trust must expressly or impliedly confer the right to payment, or there must be some special agreement between the trustee and the beneficiaries, all of whom must be *sui juris* (that is, having the full legal capacity to enter into it). The courts are very watchful of such agreements and will strike them down if there is suggestion of undue influence or pressure.⁴

THE EQUITABLE DOCTRINE OF UNDUPLICATE INFLUENCE

Because our population is ageing, there has been growing interest in the capacity of our legal system to ensure the care and protection of people, including elders, who are unable to look after their own interests due to severe disability. As an example, Dr Fiona Burns has done considerable work on the doctrine of undue influence *inter vivos*. If you are advising a client on issues connected with the doctrine of undue influence, Dr Burns's paper, *Undue Influence Inter Vivos and the Elderly*,⁵ is certainly worth studying. It investigates recent cases where elders have sought to have a variety of transactions set aside and have relied on undue influence *inter vivos*. Dr Burns notes that the courts generally apply a high threshold before granting relief.

Dr Burns argues that, 'whilst this is very much a developing area of the law', a broad-based legislative reform of undue influence *inter vivos* is necessary, both to protect elders and to allow them the freedom to deal confidently with their own assets. While Dr Burns was referring specifically to the situation of elderly people, her comments have wider relevance to vulnerable people generally.

The courts also provide protection for those who give gifts, to prevent the donor from being exploited. The doctrine of undue influence enables such people to set aside gifts, contracts and guarantees that were not made in their best interests. Gifts can be set aside on grounds including fraud, misrepresentation, duress, undue influence, mistake, incapacity, or where they are declared unconscionable in equity. As the law construes a gift with the utmost strictness against the donee, such allegations are more easily proved in the case of voluntary dispositions than in dispositions for value.

Gifts can also be set aside on the basis that the donor did not have the legal capacity (the level of mental capacity required by law) to do so. However, this is usually a difficult task, since the test is whether the person has the capacity to understand the nature of the transaction when it is explained – not a high onus for a defendant.⁶ Undue influence, however, can often assist people in this situation.

The purpose of the court's jurisdiction in setting aside a transfer of property on the basis of undue influence is to prevent the unconscionable (against equity and good conscience) use of any special capacity or opportunity to affect a vulnerable person's will or freedom of judgement. A plaintiff may either show actual undue influence or a presumed relationship of undue influence. For actual undue influence, the burden of proof is on the party alleging undue influence to show that the transaction was made due to the wrongful act of the defendant.⁷ As Dixon explained in *Johnson v Buttress*:

'The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act.'⁸

The position is very different for a presumed relationship of undue influence, as it does not require proof that undue influence was actually exercised. Instead, it is enough to show that a special relationship of trust and confidence existed and that it is reasonable to assume that the transaction occurred under the influence of that special relationship.⁹ Dixon J explained this in *Johnson v Buttress*:

'But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee.'¹⁰

Therefore, once a special relationship has been established, there is a rebuttable presumption that undue influence has been exercised without the need to prove that such influence was actually exerted on the vulnerable person.¹¹ In such circumstances, the burden of proof shifts to the defendant to show that undue influence was not exercised and that the transaction was the independent and well-understood act of the vulnerable person.¹² An obvious way of rebutting the presumption is by establishing that the nature and effect of the transaction was fully explained to the donor by some qualified and independent person.¹³

The following example demonstrates the essential aspects of pleading undue influence. The plaintiff is suing to have a gift set aside, pleading undue influence as an alternative argument to lack of legal capacity: >>

'Further, and in the alternative, if the plaintiff is found to have sufficient capacity to have made the gift (which is denied) the plaintiff says the making of the gift was not done as a consequence of the exercise of his free will but that his will was overborne at the time.

Particulars

- i) The plaintiff and the defendant had a special relationship of trust and confidence;
- ii) The relationship was such that the plaintiff depended on the defendant for advice and guidance;
- iii) As a result of his illness (particulars pleaded earlier) and his dependency on the defendant the plaintiff was in a position of having insufficient awareness of the implications of his actions and thereby disadvantaged when dealing with the defendant;
- iv) As a consequence of his illness and his dependency on the defendant, the plaintiff was not able to form his own judgement as to the advisability of any action he might take; and
- v) The plaintiff acted to his gross detriment by the gift to the defendant.'

Note that the example states that the plaintiff acted to his actual disadvantage. This is an essential aspect of relational undue influence – unlike actual undue influence, which does not require proof of manifest disadvantage.

Relationships that are deemed to constitute relationships of influence include parent/child,¹⁴ doctor/patient,¹⁵ devotee/spiritual adviser,¹⁶ client/solicitor,¹⁷ and beneficiary/trustee.¹⁸ Although there is no general presumption of undue influence by children over parents, the circumstances of a particular child/parent relationship may involve a degree of reliance and trust that constitutes actual undue influence.

The doctrine of undue influence differs from the law relating to duress. Undue influence is concerned with the quality of the consent of the weaker party to a transaction. Duress – a kind of unconscionable act – examines the conduct of a stronger party who attempts to enforce, or obtain a benefit from, a person under a special disadvantage in circumstances where it is inconsistent with equity or good conscience to do so.¹⁹

UNDUE INFLUENCE IN PROBATE

Undue influence in the context of probate proceedings is distinct from the equitable doctrine of undue influence. General influence – for example, persuasion or moral pressure – will not invalidate a will in probate, unless the pressure on the testator constitutes actual 'coercion' of the mind so as to produce an act contrary to his/her wishes.

The decided cases suggest that, to make a valid will, the testator must be a free agent; but not all influences are unlawful. Appeals to family affections or gratitude for past services are legitimate. On the other hand, any kind of pressure that overpowers the testator's volition will invalidate a will – the will must be the offspring of the testator's own volition, not the record of another's.²⁰

However, it is not sufficient to establish merely that one party has the potential power to unduly overbear the will of the testator. In contrast with the equitable principle, undue

influence cannot be presumed in probate: actual and effective coercion must be proved.

CONCLUSION

Where there is a special relationship of trust and dependency, apart from in probate cases, the doctrine of undue influence creates an important rebuttable presumption. Where that presumptive relationship is established, the defendant cannot maintain their title to a gift of substantial value unless s/he first satisfies the court that the gift was the result of the free exercise of the donor's independent will.²¹ This applies even where the vulnerable person intends to give the gift, which makes it a useful mechanism for protecting the rights of people with disability and others from exploitation.

When dealing with clients who may be vulnerable, lawyers should be aware of the possibility of undue influence and, where appropriate, suggest that a discretionary trust be created to protect their assets. ■

Notes: **1** The population aged 65 years and over is projected to increase from 2.5 million in 2002, to between 6.1 and 11.7 million in 2010. As a proportion of the population, this is an increase from 13% to between 29% and 32%: Australian Bureau of Statistics, *4102.0 - Australian Social Trends* (2004). **2** Often, the testator will prepare a letter for the trustee that, although not binding on the trustee, states how the testator would like the trustee to exercise their discretion. **3** See the provisions in the respective state legislation: ACT – *Trustee Act 1925*; NSW – *Trustee Act 1925*; NT – *Trustee Act 1893*; SA – *Trustee Act 1936*; Qld – *Trusts Act 1973*; Tas – *Trustee Act 1898*; Vic – *Trustee Act 1958*; WA – *Trustees Act 1962*. **4** J D Heydon and M J Leeming, *Jacobs Law of Trusts in Australia*, 7th ed, LexisNexis Butterworths, Sydney (2006) [1739]; *Re Sherwood* (1840) 3 Beav 338; 49 ER 133. **5** (2002) 26 *Melbourne University Law Review*, pp499-536. **6** *Gibbons v Wright* (1954) 91 CLR 423 at p438. The mental capacity required by law depends on the transaction in question. **7** *Johnson v Buttress* (1936) 56 CLR 113. **8** (1936) 56 CLR 113 at p134. **9** *Johnson v Buttress* (1936) 56 CLR 113. **10** *Op cit* p134. **11** *Allcard v Skinner* (1887) 36 Ch D 145. **12** *Barclays Bank plc v O'Brien* (1994) 1 AC 180. **13** *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127; [1928] All ER Rep 189; *Vital Finance Corp Pty Ltd v Taylor* (1991) ASC 56-099 at 57-051-2; *Australia and New Zealand Banking Group Ltd v Barry* [1992] 2 Qd R 12; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. **14** *Powell v Powell* [1900] 1 Ch 243; *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSW 30. **15** *Breen v Williams* (1996) 186 CLR 71 at p92; *Dent v Bennett* (1839) 4 My & Cr 269; *Re CMG* [1970] 1 Ch 574; [1970] 2 All ER 740n. **16** *Hartigan v International Society for Krishna Consciousness Inc* [2002] NSWSC 810. See also P Ridge, 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia', 2003, 26(1) UNSWLJ 66. **17** *Westmilton (Vic) Pty Ltd (rec and mgr apptd) v Archer and Shulman* [1982] VR 305; *Re P's Bill of Costs* (1982) 45 ALR 513. **18** Halsbury's Laws of England, 4th ed, vol 18, 1977 [338]. **19** *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at p474, per Deane J; *Louth v Diprose* (1992) 175 CLR 621 at pp628-9, per Brennan J; at pp637-8 per Deane J; at p650, per Toohey J. See also *Bridgewater v Leahy* (1998) 194 CLR 457. See generally, T Cockburn, 'Boundaries of Unconscionability and Equitable Intervention: *Bridgewater v Leahy* in the High Court' (2000) 8 APLJ 143. **20** See *Hall v Hall* [1868] LR 1 P & D 481. **21** *Bridgewater v Leahy* (1998) 194 CLR 457 at [118] per Gaudron, Gummow and Kirby JJ.

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