



Influencing factors

Rosanna Foskett examines the recent judgment in Hart and Samways v Burbidge, which illustrates how the courts will apply the principle of presumed undue influence, even where such influence was not intentional



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In digest

- The case involved two brothers claiming their sister had exerted undue influence over their mother, causing them to lose out on their inheritance
- The court held it was the daughter's duty to prove there was no undue influence and she failed to do so
- While there was no evidence of actual undue influence, there was a relationship of trust and confidence between mother and daughter which gave rise to presumed undue influence
- The size, effect and extent of lifetime gifts will be considered by the court when a challenge of undue influence is raised against them

This article looks at the law relating to presumed undue influence, and in particular examines how this was applied by the courts in the recent case of *Hart and Samways v Burbidge* [2013] EWHC 1628 (Ch).

THE BACKGROUND FACTS

The trial concerned the estate of Mrs Phyllis Hart, who died at the age of 86 in November 2008. Her husband, Ernest, who had run a successful marquee business in Dorset – and to whom she had been married for 60 years – had died aged 82 in January 2005. They had three children: two sons (Ken and Paul Hart) and a daughter (Susan, whose married name is Burbidge). Ken and his wife, Mary, have an adult son, Peter. Paul and his partner, Christine, have two children, Lewis and Gemma. Susan and her husband, Brian, have two small children, Leighton and Trinity. Phyllis had a twin sister called Joan. Joan died in December 2008, just four weeks after Phyllis. Phyllis had three other siblings, Arthur, Graham and Christine, who are all still alive. Their family name is Samways.

Phyllis made her last will in April 2007. By that will, among other smaller gifts, she left the following:

1. a property called 7 Beacon Park Road (which was the family home for almost her entire married life) to Ken and Paul;
2. a property called 43 Beacon Park Road (which she had owned and rented out) to Joan, Arthur, Graham, Christine, Peter and any grandchildren (known in the litigation as “the Samways parties”); and
3. her residuary estate, to be split three ways between Ken, Susan and Paul.

Mr Hart died in 2005. In February 2006, acting on tax advice given to her by her solicitor, Mr Pick, and by her accountant, Phyllis entered into a variation of Ernest's will, and also into a deed of gift and release. Their overall effect was to release Susan and Brian from debts of around £44,000, which they still owed arising out of their purchase of the business in 1998, and to give them the freehold ownership of Unit 15, estimated at the time to be worth approximately £275,000. The combined value of the release of debt and gift of Unit 15 was therefore some £319,000. Susan and Brian sold the business, but had retained Unit 15, which they were letting to provide them with a rental income. The 2007 will which Phyllis made was designed (in the words of her long-time solicitor, Mr Gary Pick) to “balance the books” between the three children to some extent, which was the reason that Susan was a residuary beneficiary and was not left either of the Beacon Park Road properties in the will.

Despite making that last will in April 2007, in the period of eight months between February 2008 and October 2008, Phyllis made three transactions which undermined its provisions. She sold Numbers 7 and 43 Beacon Park Road and transferred the proceeds of both sales, together with the whole balance in a savings account (£290,000), to Susan and Brian. This was done to enable them to purchase a property

called Little Manor Farm in which they and their children and Phyllis were to live. In total, she transferred over £700,000. The effect of the transactions was to adeem the two gifts of the Beacon Park Road properties in the will, and to reduce the value of the residuary estate into which the £290,000 would otherwise have fallen.

THE PROCEEDINGS

There were two claims heard together. Ken and Paul claimed that Susan's undue influence caused them to lose the gift of Number 7, and to take a smaller amount by way of their share in the residue than they otherwise would have done. The Samways parties made a claim in respect of the loss of the gift of Number 43. Susan and her husband Brian (who was sued, not because he was accused of undue influence himself, but because he had obtained the benefit of the three transactions, by becoming a co-owner of Little Manor Farm, purchased with Phyllis' £700,000) were the defendants to both claims.

They denied that the three transactions were tainted by undue influence, and said that Phyllis had loaned them the proceeds of sale of Numbers 7 and 43 (totalling around £410,000) in order for them to be able to purchase Little Manor Farm, and that they would pay it back on re-sale.

UNDUE INFLUENCE – THE LAW

The focus of the trial was on what is known as ‘presumed undue influence’. The principles applicable to undue influence are well established, with the difference between ‘actual undue influence’ and ‘presumed undue influence’ lying only in the manner of proof of the undue influence.

In the case of presumed undue influence, the party complaining of the undue influence has to prove on a balance of probabilities that:

- a) the person at whose expense the impugned transaction was made reposed trust and confidence in the recipient of the benefit conferred by the transaction,



or that the latter acquired ascendancy or control over the former, and

- b) the transaction is of such a size or nature as to call for an explanation as being not readily explicable by the relationship of the parties.

Once those two matters are proved, the burden of proof shifts to the person seeking to uphold the transaction to demonstrate, on a balance of probabilities, that the transaction was the result of the free exercise by the transferor of an independent will.

The judge considered that:

- i) the evidence was ‘all one way’ as to the relationship of trust and confidence between Susan and Phyllis; and
- ii) the fact that Phyllis transferred nearly all her assets to Susan and Brian within a period of eight months, relatively soon after making a will with which those transactions were inconsistent, plainly called for an explanation.

Therefore, the most in-depth analysis concerned how the party seeking to uphold

the transaction can rebut the presumption of undue influence when the burden of proof has shifted to them.

The judge referred to the following principles.

- Once the burden of proof shifts, that person must show that the transaction was a result of the free exercise by the transferor of an independent will.
- In *Hammond v Osborn* [2002] EWCA Civ 885, Sir Martin Nourse described the burden so placed upon that person by quoting the remark of Lord Evershed, Master of the Rolls, in *Zamet v Hyman* [1961] 1 WLR 1442, at 1446, requiring him to prove that the gift was made by the donor “only after full, free and informed thought about it”. Sir Martin explained the reason for this as follows: “... it could hardly be suggested that a donor would act spontaneously under circumstances which enabled him freely to exercise an independent will if he was not fully informed not only of the nature of the gift but also of its effect.”
- In *Inche Doria v Shaik Allie Bin Omar* [1929] AC 129 (Privy Council), at 135, consideration was given to the way in which someone could seek to rebut the presumption of undue influence: “It is necessary for the donee to prove that the gift was the result of a free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person.”



- In *Niersmans v Pesticcio* [2004] EWCA Civ 372, Lord Justice Mummery said this in relation to the receipt of independent advice: “The participation of a solicitor is not, however, a precaution which is guaranteed to work in every case. It is necessary for the court to be satisfied that the advice and explanation by, for example, a solicitor, was relevant and effective to free the donor from the impairment of influence on his free will and to give him the necessary independence of judgment and freedom to make choices with the full appreciation of what he was doing.”

The judge also added two further ‘glosses’ to these principles.

- “The influence is labelled ‘undue’ influence. It is trite that nobody lives in a vacuum; every normal person is influenced to a greater or lesser degree by the events and experiences of daily life, by the milieu in which that person lives and has his or her being and, not least, by those others whom that person meets and with whom he or she interacts. It is not to be suggested that such everyday influences disable a person from freely exercising his or her will. The question only arises when the influences go beyond a point where the freedom of that person to act independently is compromised such that the court concludes that the transaction was not the act of a free agent. The identification of that point must obviously depend on the particular facts of the case.”
- Further, he emphasised that “... the person who is exercising the undue influence may be acting perfectly honestly and without any intention of taking advantage of the person who is presumed to have been unduly influenced”, quoting Lord Justice Mummery in *Niersmans v Pesticcio*.

REBUTTING THE PRESUMPTION

The judge absolved Susan of any deliberate wrongdoing, but emphasised that undue influence can still exist in those circumstances, and relief can still be granted to undo the transactions procured by it.

He found that Susan could not identify any independent advice received by Phyllis before she transferred the £290,000 to Susan (in February 2008) and sold Numbers 7 and 43 Beacon Park Road (in the summer of 2008), and transferred all the proceeds to Susan and Brian for the purchase of Little Manor Farm. The last time Phyllis had communicated with Mr Pick was in around May 2008, before the two properties were sold, and at a time when Mr Pick did not know that the £290,000 had already been transferred from Phyllis to Susan.

The advice given by Mr Pick at that time, when he was given outline details of the proposed purchase of Little Manor Farm with Phyllis’ money, included putting in place certain suggested safeguards for Phyllis (such as part ownership of Little Manor Farm) and making the necessary changes to her will to be made if the transactions proceeded. All of this advice was then ignored.

Furthermore, Mr Pick found that she had no advice on:

- i) what the fiscal consequences were of the proposed transactions, or how she would discharge the capital gains tax (CGT) liability that would arise on the sale of Number 43 (which was not her principal home); or

It is necessary for the court to be satisfied that the advice and explanation by a solicitor was effective to free the donor from the impairment of influence on his free will

- ii) what income she would be left with, and how she would cope if all of a sudden she found that she needed expensive medical or home care.

From their oral evidence, it was apparent that Susan and Brian had given little or no thought to these matters. Despite Susan’s attempts to explain the exclusion of Mr Pick as being Phyllis’ deliberate choice, there was no direct evidence of this, and the judge said that he was “far from persuaded” that this was the correct inference to draw.

GRANT OF RELIEF

Numbers 7 and 43 Beacon Park Road had been sold on the market to third parties, and so those sales (although procured by undue influence) could not be set aside or rescinded, as one would expect where the claimant in an undue influence case successfully showed that they had given away something or transferred something by reason of the defendant’s undue influence.

The judge identified the question with which he had to concern himself as one of putting Phyllis’s estate into the position in which it would have been if there had been no undue influence exercised over her by Susan. Accordingly, she (and Brian) were required to pay back into the estate:

- i) the market values of the two properties which had been sold as a result of the undue influence;
- ii) the £290,000 which had been transferred to Susan as a result of the undue influence;
- iii) the CGT liability that arose and was paid by the executor to HM Revenue and Customs as a result of the sale of Number 43 Beacon Park Road; and
- iv) the executor’s costs in dealing with the dispute between the parties.

Credit was given for the £410,000 already paid to Phyllis’ estate by Susan and Brian before trial.

The case is a good illustration of the factors that will lead the court to determine that undue influence has taken place, even where there has been no deliberate wrongdoing on the part of the person considered to have exerted the influence.



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