



PUMP COURT
CHAMBERS

Rogue Attorneys and Civil Litigation

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The ambit of this talk:

- Alternatives to Litigation.
- Preliminaries to Litigation.
- Litigation Friends.
- Capacitous Litigants and Inherent Jurisdiction.
- Undue Influence – inter vivos transactions v wills.
- Other claims.

Alternatives/Adjuncts to Civil Litigation.

- If P has capacity - the termination of the power by notice to the attorney and, if the power is registered, the OPG.
- Referral to the OPG and invitation to them to investigate, duty to render accounts etc.
- Referral to the Police and/or Social Services – cost v control.
- ADR.

Precursors to Litigation

- Injunctions and suspension of Powers.
- The Practice Direction on Pre-Action Behaviour and Protocols.
- ADR.
- Appointment of a Litigation Friend pursuant to CPR Part Part 21.5 without which any step taken will be a nullity unless subsequently endorsed by the court (CPR 21.3).
- Permission of the Court of Protection to pursue litigation?

Litigation Friends CPR 21.5

(1) If the court has not appointed a litigation friend, a person who wishes to act as a litigation friend must follow the procedure set out in this rule.

(2) A deputy appointed by the Court of Protection under the 2005 Act with power to conduct proceedings on the protected party's behalf must file an official copy of the order of the Court of Protection which confers their power to act either –

- (a) where the protected party is to be a claimant, when the claim is made; or
- (b) where the protected party is to be a defendant, at the time when the deputy first takes a step in the proceedings on the defendant's behalf.

Litigation Friends CPR 21.5

(3) Any other person must file a certificate of suitability stating that they satisfy the conditions specified in rule 21.4(3) either –

- (a) where the person is to act as a litigation friend for a claimant, at the time when the claim is made; or
- (b) where the person is to act as a litigation friend for a defendant, at the time when they first take a step in the proceedings on the defendant's behalf.

Litigation Friends CPR 21.5

(4) The certificate of suitability must be verified by a statement of truth and must state in accordance with the prescribed form that the person—

- (a) agrees to act;
- (b) knows or believes the person concerned is a child or lacks capacity to conduct the proceedings (stating in the latter case the grounds for that knowledge or belief); and
- (c) meets the requirements of rule 21.4(3)

Litigation Friends CPR 21.5

(5) The litigation friend must –

- (a) serve the certificate of suitability on every person on whom, in accordance with rule 6.13 (service on a parent, guardian etc.), the claim form should be served; and
- (b) file a certificate of service when filing the certificate of suitability.

(6) Where the grounds for believing that a protected party lacks capacity to conduct the litigation are based on expert opinion, a copy of such opinion must be served, either with the certificate of suitability or separately.

CPR 21.11(9)

(9) Where money is recovered for the benefit of a protected beneficiary—

- (a) if the amount is £100,000 or more, subject to (b) below, the court shall direct the litigation friend to apply to the Court of Protection for the appointment of a deputy, after which the fund shall be dealt with as directed by the Court of Protection;
- (b) [save where an LPA/EPA or Deputy already exists];

Capacitous Litigants and Inherent Jurisdiction

Re DL (Vulnerable Adults with Capacity: Court's Jurisdiction) (No.2)
[2012] EWCA Civ 253

The aggressive influence of their son was apt to deprive his parents of their capacity (which was prima facie established) in critical respects (he was seeking to persuade his father to transfer their house to him and his mother to move into care).

The Court was able to intervene with injunctive relief to protect their autonomy and afford protection to them in a 'jurisdictional hinterland' (the "SA jurisdiction") by invoking the inherent jurisdiction.

Capacitous Litigants and Inherent Jurisdiction

The precise ambit of this jurisdiction is somewhat unclear as the courts have been careful to extend it incrementally and on a case by case basis.

*Sometimes referred to as “the SA jurisdiction” after the decision of Mummy J in **Re SA (Vulnerable adult with capacity: marriage)** [2005] EWHC 2943 (Fam) [2006] 1 FLR 867.*

Undue Influence – Inter Vivos Transactions

- **Royal Bank of Scotland v Etridge (No.2) [2002] 2 A.C. 773 HL**

Two routes to establishing undue influence:

The first “comprises overt acts of improper pressure or coercion such as unlawful threats”. Such a case can be described as involving “actual” undue influence, as B may well be able to point to such coercion to show that he or she acted under an undue weight of influence.

Undue Influence – Inter Vivos Transactions

- *The second form “arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage”. In such cases, the existence of such a relationship of influence, if coupled with a transaction calling for explanation, may give B the benefit of an evidential presumption of undue influence, and thus assist B in discharging the onus of proving undue influence.*

Undue Influence – Inter Vivos Transactions

The requisite relationship has been found in respect of:

- Parents,
- Guardians,
- Fiances,
- Trustees,
- Religious, medical and spiritual advisors,
- Solicitors. (Snell's Equity 34th Ed. 8-025)

Undue Influence – Inter Vivos Transactions

Critically for us today:

In **Re EG [2015] EWCOP 6** such a relationship existed between B (a dementia patient) and A his LPA for both property and affairs and health and welfare.

Undue Influence – Inter Vivos Transactions

In **Re EG** per Chief Master Lush at para. 36:

Even if EG did have capacity to make gifts totalling £75,000 on 9 April 2014, undue influence would be presumed because:

- (a) the gift is so substantial that it cannot be accounted for by ordinary motives;*
- (b) there is a relationship of trust between the donor and the attorneys such as to place them in a position to exercise undue influence over her in making the gift; and*
- (c) the attorneys failed to ensure that independent advice was made available to the donor.*

Undue Influence – Inter Vivos Transactions

Also referenced Mental Capacity Act Code of Practice, at paragraph 7.60:

“A fiduciary duty means attorneys must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. They also must not allow any other influences to affect the way in which they act as an attorney. Decisions should always benefit the donor, and not the attorney. Attorneys must not profit or get any personal benefit from their position, apart from receiving gifts where the Act allows it, whether or not it is at the donor’s expense.”

Undue Influence – Inter Vivos Transactions

A Fiduciary Duty opens up claims against third parties in knowing receipt:

Twinsectra Ltd v Yardley & Ors [2002] UKHL 12

Royal Brunei Airlines v Tan [1995] 2 AC 378.

The key passage of the latter judgment appears in the former at para. 33:

“...at p392 F-G, Lord Nicholls stated the general principle that dishonesty is a necessary ingredient of accessory liability and that knowledge is not the appropriate test:

Undue Influence – Inter Vivos Transactions

The accessory liability principle

Drawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly (emphasis added).

Undue Influence – Wills.

NB the inter vivos rules still apply post death to inter vivos transactions. Limitation does not run until the party subject to the undue influence is released from that undue influence. However, where the transaction concerned is a will different rules apply (for sound policy reasons).

Undue Influence - Wills

In **Rea v Rea & Ors. [2024] EWCA Civ 169** Newey J approved this statement of the applicable law from Theobald on Wills, 19th ed. para 4-006:

"It has often been said that it must be shown that the circumstances attending the execution must be inconsistent with any hypothesis other than its having been procured by undue influence, but this is overstating the position; the standard of proof is the balance of probabilities. Certainly, it is not enough to show merely that the facts are consistent with undue influence, or that there was an opportunity to exercise undue influence; but the true test is whether undue influence is the most likely hypothesis, having regard to the inherent unlikelihood of someone practising undue influence on a testator" (emphasis added).

Other Claims – Pleading Points.

PD16 8.2:

The claimant must specifically set out the following matters in the particulars of claim where they wish to rely on them in support of the claim –

- (1) any allegation of fraud;
- (2) the fact of any illegality;
- (3) details of any misrepresentation;
- (4) details of all breaches of trust;
- (5) notice or knowledge of a fact;
- (6) details of unsoundness of mind or undue influence;
- (7) details of wilful default; and
- (8) any facts relating to a claim for mitigation expenditure.

Resources

- Equal Treatment Bench Book chapter 5.
- Chancery Guide.
- MCA Code of Conduct.

