



Précis Paper

Undue Influence

In this edition of BenchTV, Sarah Hill (Barrister) and Michelle Daniels (Barrister) discuss undue influence, with particular reference to recent cases decided by the New South Wales Supreme Court.

Discussion Includes

- What is undue influence?
- Categories of undue influence
- Circumstances where a presumption of undue influence arises
- Circumstances where actual undue influence can be proved
- The difference between undue influence and common law duress

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Undue Influence

1. In this edition of BenchTV, Sarah Hill (Barrister) and Michelle Daniels (Barrister) discuss undue influence with particular reference to the recent New South Wales Supreme decisions, including *Walton v Walton* [2015] NSWSC 218 in which Ms Hill acted as counsel for the defendants.

What is Undue Influence?

2. Undue influence is an equitable cause of action used to set aside a gift or contract where a person who transfers a benefit to another person did so in circumstances where they were subject to improper dominion or psychological ascendancy. Whilst this transfer may be valid at law, it may be set aside under equity due to the improper use of influence.
3. Ms Hill discusses the two types of undue influence: inter vivos and testamentary. Inter vivos involves improper influence in transactions that occur during a person's lifetime. This had been the case in *Walton v Walton* where the deceased had, prior to her death, forgiven a debt owing by her son and daughter-in-law. Testamentary undue influence occurs where a gift is made pursuant to a will.
4. Inter vivos undue influence can occur in two ways: actual undue influence and presumed undue influence.
5. Presumed undue influence automatically arises in special relationships that have already been identified by the courts, including parent/child, doctor/patient, guardian/ward, solicitor/client and religious leader/devotee. Proof of the relationship itself is sufficient to give rise to the rebuttable presumption of undue influence.
6. Where there is no established category of relationship, de facto presumed undue influence may arise if it can be shown that the relationship was one of ascendancy, trust and confidence. Brereton J in *Brown v The NSW Trustee & Guardian* [2011] NSWSC 1203 stated that the relationship must go beyond mere trust and confidence.
7. Once a presumption is established, the burden of proof shifts to the beneficiary of the transaction (e.g. the donee, transferee, etc.) to rebut the presumption. The beneficiary must prove the transaction was in fact the pure, voluntary and well-understood act of the transferor (*Johnson v Buttress* (1936) 56 CLR 113).
8. Where a presumption of undue influence cannot be established, the complaining party must prove actual undue influence, that is, improper influence was actually exerted on the donor

and that influence caused the donor to bestow the benefit on the donee. However, this category of undue influence may impose a significant evidentiary burden on the complaining party, particularly in circumstances where the donor is deceased or incapacitated at the time of the hearing. This category of undue influence may arise where threats are involved, where there has been an illegitimate use of power, or concealment of material facts.

Recent Decisions

9. In *Walton v Walton*, the deceased had forgiven a debt owed by her son and daughter-in-law. However, whilst the court found that she was in poor physical health, there was also evidence showing she was very mentally astute and independently minded. Additionally, she had sought independent legal advice and drafted a deed which stipulated that she would be looked after for the remainder of her life. In this case, the court held no presumption of undue influence was established.
10. Contrastingly, in *Winefield v Clarke* [2008] NSWSC 882, it was found that a daughter had exerted undue influence over her elderly mother after the mother transferred the family home to the daughter even though the daughter's actions were found to have been motivated out of concern for her mother. The daughter had lived with the mother for several years, except for a short period during which she travelled. In her absence, her siblings admitted their mother to an aged care facility and put her house on the market. Upon her return, the daughter continued to live with her mother in the house. The court found that the inhibited cognitive function, gratitude and strong dependency of the mother on the daughter, placed the daughter in a position of ascendancy. As a result, the court held that there was a presumption of undue influence and in considering the transaction itself, found that the mother was entitled to relief.
11. Ms Hill notes that the difference between the above cases indicates the importance of assessing each case on its own relevant facts and circumstances.

The Interrelationship between Undue Influence, Incapacity and Unconscionable Conduct

12. Undue influence, incapacity and unconscionable conduct are often pleaded together in claims to set aside a transaction, although there are distinct differences between the three concepts. Capacity is a common law doctrine, requiring consideration of whether the donor had the capacity to enter into the relevant transaction. In a situation of unconscionable dealing, the focus of inquiry lies upon the stronger party's exploitation of power and conduct when transacting with a person encumbered by a special disability. Contrastingly, undue influence looks to the quality of the weaker party's assent to the transaction.

BIOGRAPHY

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Sarah Hill was admitted as a Lawyer in 2003 before being called to the NSW Bar in 2004. She graduated from Sydney University with Honours. She practises in a variety of areas including administrative law, equity, commercial law, building & construction, wills & probate, trusts, estates, banking and bankruptcy.

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