DUE REWARDS OR UNDUE INFLUENCE? – PROPERTY TRANSFERS BENEFITTING INFORMAL CARERS

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A. INTRODUCTION

In a number of recent cases, informal carers have invoked the equitable doctrine of proprietary estoppel to claim an interest in the property of a care recipient following an oral promise made to them by that recipient of care.¹ The concern of this article is the “flip side” of the estoppel scenario.² It examines situations where a grateful care recipient transfers property *inter vivos* to an informal carer, or enters into a similar beneficial transaction with the carer, and considers the circumstances in which such transactions are and should be set aside because the carer unduly influenced the care recipient. Proceedings may be initiated by the care recipient’s estate only after

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² For a discussion of the relationship between the doctrines of proprietary estoppel and undue influence, see *Murphy v Rayner* [2011] EWHC (Ch) 1, [319] (Jeremy Cousins QC).

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she has died, and judges must undertake a difficult balancing of interests in these potentially “classic” cases of undue influence.\(^3\)

This article begins by examining some of the policy issues surrounding informal carers and transfers that benefit them. It then analyses the application of the elements of undue influence to cases involving care. Its primary argument is that many care situations will inevitably involve relationships of influence, but that it is important to recognise care as an explanation of beneficial transfers that the care recipient’s heirs have a clear interest in setting aside.

B. POLICY ISSUES

Since the world’s population is ageing,\(^4\) one of the most important questions in social policy is the allocation of the burdens of the increasing need for care.\(^5\) A Commission on Funding of Care and Support, formed by the Coalition Government, will report by July 2011.\(^6\) Whatever that Commission proposes, especially in the light of the savings in public expenditure for which the Government is currently aiming,\(^7\) it seems inevitable that social care systems will continue to rely on the informal

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\(^5\) See, eg, HM Government, “Building the National Care Service” (Cm 7854, London 2010), published by the outgoing Labour Government. Nevertheless, account should be taken of Herring’s assertion that more elderly people are involved in the provision of care than in receiving it: J Herring, Older People in Law and Society (OUP, Oxford, 2009), 94.


\(^7\) See, eg, House of Commons Health Select Committee, “Public Expenditure” (HC 512, London, 2010), ch 3.
An informal carer, in the absence of a contractual duty, “looks after and supports a friend, relative or neighbour who could not manage without their help…due to age, physical or mental illness or disability”. The question of how best to support these carers is equally crucial, since they often suffer significant disadvantages, *inter alia* relating to health and employment, by virtue of their assumed responsibilities. The Government has ambitious plans to support informal carers, 5.2 million of whom were recorded by the 2001 census, but private support mechanisms may well become all the more pertinent in the lean years to come.

On one view, the broad questions of support for care and for carers are of only indirect relevance to the undue influence doctrine. It could be said that in the paradigm case, the care recipient has ostensibly made a choice to enter a transaction for the benefit of the carer, perhaps out of a sense of gratitude or moral obligation, irrespective of whether the carer has a legitimate expectation of compensation or support. In the absence of adequate state support for carers, such

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8 It has been said that care provided by the family in the home is the most important source of care from a global perspective: Organisation for Economic Co-operation and Development, “Long-term Care for Older People” (OECD, Paris, 2005). For a general discussion of the interaction between public and private support in this context, see MPC Oldham, “Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France” [2001] Cambridge Law Journal 165.


10 Herring, *Older People in Law and Society*, ch 4.


individuals should not readily be deprived of the reward that a care recipient has apparently chosen to confer upon them,\textsuperscript{14} whatever the views and motivations of the care recipient’s heirs. The carer has no need to circumvent the “risk-taking” and voluntariness arguments that would arise were he to assert that the care recipient was unjustly enriched by a benefit for which she had not contracted.\textsuperscript{15}

Nevertheless, the fact that the care recipient has entered the transaction brings its own difficulties, and arguably the very aim of undue influence and related doctrines is to vitiate transactions that have not truly been entered voluntarily. In evaluating the operation of undue influence, the potential for elder abuse must be recognised.\textsuperscript{16} Moreover, the wider policy debate on care funding does affect the operation of undue influence. The courts have been particularly willing to intervene where the sheer magnitude of the property transfer under scrutiny would have disabled a care recipient who was able to remain in her own home at the time of the transaction (often due to the support of the carer) from funding formal residential care had the need arisen.\textsuperscript{17} While the Coalition Government has signalled a desire to “protect the assets” of those entering residential care,\textsuperscript{18} local authorities are currently placed under a duty to recover the cost of such care in certain circumstances.\textsuperscript{19}
Judges are therefore presented with the difficult task of balancing interests in cases where the care could have been an altruistic endeavour or “just the bait in order to secure the transaction”. The next section examines the substantive law with these policy questions in mind.

C. PRESUMED UNDUE INFLUENCE AND INFORMAL CARERS

The focus of this article is not on situations where the dealings between the parties are sufficiently formal to permit conclusions that that the care itself is provided under a contract and the beneficial transaction is direct consideration for the care. Rather, its concern is the situation where the care is provided informally and apparently gratuitously, but where a subsequent transfer can potentially be set aside on the basis of undue influence because of (inter alia) the care relationship between the parties.

1. The Nature of Undue Influence

In spite of relatively recent consideration by the House of Lords in Royal Bank of Scotland v Etridge (No 2), it has been said that undue influence “can be more easily recognised when found than exhaustively analysed in the abstract”. On Lord Nicholls’ account, it exists where one party’s intention to enter a transaction was procured by “an unacceptable means”, such that her consent to the transaction “ought not fairly to be treated as the expression of a person's free will.”

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20 Badman v Drake [2008] NSWSC 1366, [75] (Young CJ in Eq).


23 RBS v Etridge, [92] (Lord Clyde).

24 RBS v Etridge, [8].
Where such influence is present, either because it is proved or presumed, equity will not allow the transaction to stand. Undue influence can be applied to both gifts and contracts, but it has been argued that a gift is more likely to be set aside than a contract because of the need to protect the bargaining process.\textsuperscript{25} Once the claimant makes out her case, she possesses an equity to set aside the transaction.

Undue influence \textit{inter vivos} is related to several other doctrines. Testamentary undue influence is obviously relevant, although there are legal reasons why an elderly person may wish to transfer property \textit{inter vivos} rather than by will\textsuperscript{26} and at least some care recipients attempt to “compensate [their familial carers] on the spot rather than let them accumulate any advantage and pass it on to them at death”.\textsuperscript{27} Developed separately by the probate courts, testamentary undue influence is narrower in focus and has much in common with actual undue influence (discussed below) since there is no presumption of testamentary undue influence.\textsuperscript{28} Ridge has questioned the cogency of the distinction between the testamentary and \textit{inter vivos} doctrines, which is an historical accident.\textsuperscript{29} The doctrine of unconscionable dealing is also pertinent, and Devenney and Chandler argue that undue influence is in fact a sub-species of the unconscionable dealing doctrine.\textsuperscript{30} That said, it is a matter of some doubt whether the latter doctrine applies to gifts.\textsuperscript{31}

\textsuperscript{28} See, eg, \textit{Gill v Woodall} [2009] EWHC 834 (Ch) (James H Allen QC), [488]-[490]. The Court of Appeal upheld the decision on different grounds: [2010] EWCA Civ 1430.
\textsuperscript{31} \textit{Langton v Langton} [1995] 2 FLR 890, 910 (Charles QC). For criticism, see Capper, “Unconscionable Bargains and Unconscionable Gifts".
(a) Actual and Presumed Undue Influence

Undue influence is divided into actual and presumed undue influence, although in *Etridge* Lord Clyde doubted the wisdom of the distinction since it may confuse definition and proof. Actual (or Class 1) undue influence requires proof of “overt acts of improper pressure or coercion such as unlawful threats”. It bears a resemblance to duress at common law, and Birks and Chin argued that actual undue influence should be litigated as duress.

Presumed undue influence cases focus on the relationship between the parties to a transaction, rather than their proved conduct, and deal with scenario where one party has developed “a measure of influence, or ascendancy” over another, and takes “unfair advantage” of his ascendant position. In such situations, equity may be willing to assume that undue influence was exerted notwithstanding a failure to prove any of the actions necessary to establish actual undue influence.

This article primarily concerns presumed undue influence. If proved in a carer case, the effect of actual undue influence is relatively uncontroversial. That doctrine gives rise to fewer conceptual difficulties than presumed undue influence, since it involves proof of the effect of the defendant’s conduct on the mind (and particularly the free will) of the care recipient. It does not depend on the precise nature of the parties’ pre-existing relationship. Conversely, although actual

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32 *RBS v Etridge*, [92].

33 *RBS v Etridge*, [8] (Lord Nicholls).


35 *Etridge*, [8] (Lord Nicholls).
undue influence has been made out in some “carer” cases,\textsuperscript{36} difficulties of proof make it more likely that presumed undue influence will be argued.\textsuperscript{37}

\textit{(b) Claimant- or Defendant-oriented?}

One of the great controversies surrounding the nature of undue influence is whether it does (or should) focus primarily on the vulnerability of the claimant or the conduct of the defendant.\textsuperscript{38} Birks took a claimant-sided approach and argued that the claimant’s conduct was relevant to presumed undue influence only in the sense that “[i]t is unconscientious to retain what ought to be given back”.\textsuperscript{39} Enonchong, by apparent contrast, rejects the existence of “innocent” undue influence.\textsuperscript{40} But he also accepts that no proof of specific wrongdoing is necessary,\textsuperscript{41} and claimant- and defendant-sided views may be reconcilable.\textsuperscript{42} In any case, Burns argues that the House of Lords in \textit{Etridge} avoided choosing between an approach based solely on dependency and one based on victimisation,\textsuperscript{43} Virgo concludes that “nothing can usefully be gained” from treating undue influence as either claimant- or defendant-oriented,\textsuperscript{44} and Chen-Wishart strongly advocates a relational approach that “goes beyond the single factor explanation of a complex phenomenon”.\textsuperscript{45}

\textsuperscript{36} \textit{Langton v Langton}.


\textsuperscript{38} See, in particular, Birks and Chin, “On the Nature of Undue Influence”.


\textsuperscript{40} N Enonchong, \textit{Duress, Undue Influence and Unconscionable Dealing} (Sweet & Maxwell, London, 2006), [7-006].

\textsuperscript{41} \textit{Ibid}, [9-004].

\textsuperscript{42} Devenney and Chandler, “Unconscionability and the Taxonomy of Undue Influence”.


\textsuperscript{44} Virgo, \textit{Principles of the Law of Restitution}, 249.
Whatever the prevailing academic view, a lack of need to find fault could potentially have consequences for the carer. A claimant-oriented approach could make it more likely that a transaction will be set aside, since care recipients are, almost by definition, vulnerable and courts will readily intervene to protect them if vulnerability is the primary criterion. But although the courts will evaluate the carer’s conduct in any event it is not clear that this doctrinal debate has a significant effect on the outcome of cases, not least because presumed undue influence relies on presumptions by its very nature.

2. Applying the Elements to Care Cases

Presumed undue influence is made out if there is a relationship of influence combined with a transaction calling for explanation, and the defendant fails to provide sufficient evidence that the transaction in question was nevertheless the product of the complainant’s free will. The elements of the doctrine, and their application in care cases, are considered below.

(a) Care generating a Relationship of Influence

Presumed undue influence cases have traditionally been sub-divided into two classes, although the House of Lords attempted to abandon the terminology associated with this approach in Etridge. 48

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46 See, eg, Badman v Drake, [83] (Young CJ in Eq).


In the class often called Class 2A, influence is irrebuttably presumed to exist because the relationship between the parties falls into a pre-recognised category. In Class 2B, the existence of influence must be proved in order to justify the presumption of undue influence. Lord Scott in *Etridge* suggested that the strength of the presumption varies according to the nature of the relationship and the nature of the transaction.\(^{51}\)

In spite of considerable confusion on the point, undue influence is not presumed to have been exercised in either type of Class 2 case merely because of the relationship between the parties. Even in Class 2A, the irrebuttable presumption relates to influence only.\(^{53}\) Where a relevant relationship is found to exist, it must still be shown that the transaction in question “calls for explanation”.

The list of relationships considered to be within Class 2A includes “parent and child, guardian and ward, trustee and beneficiary, solicitor and client, and medical adviser and patient”,\(^{54}\) as well as spiritual leader and follower,\(^{55}\) with the former party assumed to hold influence over the latter in each instance. Spouses do not fall within the class,\(^{56}\) but (somewhat anomalously) fiancé(e)s may do so.\(^{57}\) While the 2A relationships may be relevant in cases involving a care

\(^{49}\) In *Hogg v Hogg* [2007] EWHC 2240 (Ch); [2008] WTLR 35, Lindsay J interpreted *Etridge* as laying down the principle that Class 2A applies only to gifts ([42]).

\(^{50}\) Cf *Hillston v Bar-Mordecai* [2003] NSWSC 89, [48] (Bryson J). For criticism of the irrebuttable presumption, see Edelman and Bant, *Unjust Enrichment in Australia*, 221.

\(^{51}\) *RBS v Etridge*, [153].


\(^{54}\) *Etridge*, [18] (Lord Nicholls).

\(^{55}\) *Allcard v Skinner* (1887) 36 Ch D 145.

\(^{56}\) *Etridge* [19] (Lord Nicholls)

\(^{57}\) See Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, [10-016]-[10-020].
situation of sorts, a case will not be placed in that category by virtue of informal care that happens to be provided. Since many informal carers are the adult offspring of the care recipient, it is vital to note that no presumption generally applies where a parent enters into a transaction for the benefit of such offspring. Nevertheless, in Hogg v Hogg Lindsay J considered it “at least arguable” that a presumption of influence could arise where:

“...the alleged victim is an elderly parent [who] is living alone and is no longer in good health [and] that the child alleged to have influence is the one who, in large part, is responsible for his care”.

In spite of this remark, it is unlikely that the law will be developed to include carers within Class 2A. While it seems that the list of relationships falling within that category is not definitively closed, the propriety of Class 2A in modern times has rightly been doubted since a donee falling within it may be “compelled to rebut an erroneous presumption”. Moreover, in Randall v Randall, the judge refused to treat the relationship between an elderly aunt and a nephew as falling within Class 2A since there was no authority on which he could base such a conclusion. The lack

58 See, eg, Re CMG [1970] Ch 574, involving a transaction between a mental patient and a hospital board.

59 See Burns, “Undue Influence Inter Vivos and the Elderly”, 509-510 for discussion. Indeed, by virtue of the presumption of advancement it was traditionally assumed that a parent intended to make a gift rather than to retain a beneficial interest in property transferred to a non-emancipated child (see, eg, Gray and Gray, Elements of Land Law, [7.2.33]-[7.2.37]). Cf Equality Act 2010, s 199, which will prospectively abolish the presumption of advancement if commenced.

60 [2007] EWHC 2240 (Ch), [43].

61 Enonchong, Duress, Undue Influence and Unconscionable Dealing, [10-026]-[10-027].


63 [2004] EWHC 2258 (Ch); [2005] WTLR 119.
of prospects for the inclusion of carers in Class 2A is to be welcomed, partly because of the definitional problems that would inevitably arise. More fundamentally, it is desirable to uphold some transactions for the benefit of carers for the reasons outlined earlier. This renders it preferable to consider each such case on its own facts rather than attempting to place “carers” within category 2A, even if this reduces predictability.

This article therefore focuses on cases in the traditional category 2B, where the care itself generates the required relationship of influence. Lord Nicholls has noted the inadequacy of attempts to encapsulate the nature of the relevant relationship, and the courts have often been deliberately vague in this respect. While relationships within category 2B are often said to involve “trust and confidence”, that is not synonymous with “influence”, and merely reposing “a degree of trust and confidence in and reliance upon” a carer is insufficient. On the other hand, domination of the donor in the usual sense of that word is not required, and dependency is clearly an important factor in identifying a relationship of influence. Care recipients are by definition dependent on their carers to a certain extent, and it is significant that this concept is at the heart of much feminist literature on care.

In Re Morris, for example, the defendants admitted that they were the carers of the deceased transferor. Rimer J found that the deceased was “wholly dependent” on the defendants, who “suddenly assumed unusual importance in her life”. The judge would therefore have set the

70 [2001] WTLR 1137.
71 Re Morris, [186].
transactions aside on the basis of undue influence if he had not already found that the deceased lacked the required capacity.

On the other hand, where the claimant has a reputation for being strong-willed and independent, it is likely that the transaction will be allowed to stand.\textsuperscript{72} Burns expresses concern that a reputation for independence will conceal the true context of the transaction, or the claimant’s vulnerability at the relevant time.\textsuperscript{73} But it would be undesirable to allow a donor’s estate retrospectively to cast doubt on the autonomy of an independently-minded donor who happened to require care, and judges have demonstrated an awareness of the dangers highlighted by Burns.\textsuperscript{74}

It is possible that carers could avoid the operation of the doctrine if their relationship with the care recipient did not include management of her financial affairs. This suggestion, made by Lord Nicholls in \textit{Etridge},\textsuperscript{75} contrasts with earlier authority holding that “there is no need for any identity of subject matter between…the affairs which are managed on the one hand and the transaction of which complaint is made on the other.”\textsuperscript{76} Enonchong advocates this wider approach, arguing that the focus should be on the nature of the relationship rather than the details of the proposed transaction.\textsuperscript{77} In the recent case of \textit{Thompson v Foy}, Lewison J expressed the view that Lord Nicholls’ reference to management of financial affairs merely addressed the “paradigm” relationship of influence and was not intended to constitute an “exhaustive” description.\textsuperscript{78} This may close an unfortunate loophole that would otherwise have arisen where a carer was in a relationship of influence but happened not to manage the deceased’s financial affairs.

\textsuperscript{72} See, \textit{eg}, \textit{Morley v Emaleh} [2009] EWHC 1196 (Ch).
\textsuperscript{74} \textit{Sillett v Meek}, [58] (Michael Furness QC).
\textsuperscript{75} \textit{RBS v Etridge}, [14].
\textsuperscript{76} \textit{Goldsworthy v Brickell}, 401 (Nourse LJ).
\textsuperscript{77} Enonchong, \textit{Duress, Undue Influence and Unconscionable Dealing}, [10-035].
\textsuperscript{78} [2009] EWHC 1076 (Ch), [100].
In considering the level of dependence required under English Law, Burns concludes that it need not be “excessive”. The facts of each case are of paramount importance, but it seems likely that a situation involving a significant amount of care will lead to a relationship of influence. Moreover, Chen-Wishart has argued that relationships of influence are a positive and normal part of life, much in the same way that scholars on care claim that “dependency and the accompanying need for care are universal”.

But from the carer’s point of view, an objection to an overly interventionist application of the undue influence doctrine might be that the more assistance the carer gave, the more likely it is that the relationship is one of trust and confidence and the more likely it is, in turn, that the transaction will be set aside. The results produced, however, can be mitigated by the possibility that the care provides an explanation for the transaction. The next subsection considers that issue.

(b) Transactions Calling for Explanation

Despite some surprisingly recent suggestions to the contrary, it has long been established that a relationship of influence is insufficient in itself to lead to a presumption of undue influence. Any presumption is “not perfected” until an inexplicable transaction is entered into. This is a thoroughly sensible state of affairs since otherwise parties within Class 2A would be presumptively

79 Burns, “The Elderly and Undue Influence Inter Vivos”, 268.
80 Chen-Wishart, “Undue Influence: Vindicating Relationships of Influence”.
83 Re Coomber [1911] 1 Ch 723.
84 Goldsworthy v Brickell, 401 (Nourse LJ).
unable to enter into transactions with each other;\textsuperscript{85} and many carers within Class 2B would be in the same position. The language of “calling for explanation” is misleading, however, since the presumption arises only if the explanation for the transaction “is not forthcoming”.\textsuperscript{86}

The question whether a transaction calls for explanation goes to the heart of this article’s concern. The key issue is whether a transaction can be justified on the basis of the work done by the carer and the care recipient’s gratitude for it. As the Court of Appeal accepted in Jennings v Cairns, the relationship between two people can provide both the motivation for a gift and the opportunity to take unfair advantage.\textsuperscript{87} It must be conceded that sometimes a transaction will not be entered out of sheer gratitude, and fear of abandonment by the carer may well form part of the care recipient’s motivation.\textsuperscript{88} In the absence of a general duty to compensate an informal carer, the mere fact of care should not permit the upholding of a transaction to which the care recipient did not validly consent.

A transaction calls for explanation if, in the words of Lindley LJ in Allcard v Skinner, it “cannot be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act”.\textsuperscript{89} In cases where there is more than one transaction, their explicability is sometimes assessed as a pattern.\textsuperscript{90} The explicability requirement has been expressed as involving “manifest disadvantage” to the party seeking to have the transaction set aside, but there are dangers in working backwards to find a relationship of influence from the

\textsuperscript{85} Etridge, [24] (Lord Nicholls).

\textsuperscript{86} Turkey v Awadh [2005] EWCA Civ 382; [2005] 2 FCR 7, [15] (Buxton LJ). That in itself has caused confusion between whether the presumption has arisen and whether it has been rebutted: Smith v Cooper [2010] EWCA Civ 722, [65]-[66] (Lloyd LJ).


\textsuperscript{88} See, eg, Re Craig [1971] Ch 95.

\textsuperscript{89} (1887) 36 Ch D 145. 185.

\textsuperscript{90} Re Craig, 119 (Ungoed-Thomas J). Cf Cattermole v Prisk [2006] 1 FLR 693.
disadvantageous nature of the transaction.\textsuperscript{91} In \textit{Etridge}, Lord Nicholls confirmed that the transaction need not disadvantage the claimant at all, while admitting that undue influence was unlikely to occur when the transaction is “innocuous”.\textsuperscript{92} As well as the magnitude of the transaction, any devaluation of the donor’s retained assets will be relevant.\textsuperscript{93}

The court will clearly examine a wide variety of factors in determining whether a transaction calls for explanation, and proportionality is a pivotal aspect of the decision. As Gray and Gray put it:

“…an act of generosity entirely out of proportion to any kindness or service which may have been rendered by the disponee affords an immediate ground for suspicion”.\textsuperscript{94}

This remark seems particularly apposite to relationships involving care. Defence counsel in \textit{Hammond v Osborn} conceded that the disposition representing 90\% of a care recipient’s assets called for explanation, but Wall LJ still emphasised that it was not a “modest gift which could be explained away as a token of gratitude for the help [the donor] was receiving”.\textsuperscript{95} Rather, it was “an act of generosity wholly out of proportion to the kindness shown”.\textsuperscript{96} This robust attitude is also demonstrated in \textit{Niersmans v Pesticcio}, where Mummery LJ appeared to assume that a transaction involving the transfer of the home of a dependent party caught up in a relationship of influence would require explanation.\textsuperscript{97} The proportionate nature of the transfer in relation to care performed,

\begin{itemize}
\item \textsuperscript{91} \textit{Tafton v Sperni} [1952] 2 TLR 516.
\item \textsuperscript{92} \textit{RBS v Etridge}, [12].
\item \textsuperscript{93} \textit{Goodchild v Bradbury} [2006] EWCA Civ 1868, [2007] WTLR 463.
\item \textsuperscript{94} Gray and Gray, \textit{Elements of Land Law}, [8.1.103].
\item \textsuperscript{95} \textit{Hammond v Osborn}, [52].
\item \textsuperscript{96} \textit{Hammond v Osborn}, [58].
\item \textsuperscript{97} \textit{Niersmans v Pesticcio}, [4].
\end{itemize}
however, must be seen in the light of the effect of the transaction on the claimant and the relationship between the parties.\footnote{Chen-Wishart, “Undue Influence: Vindicating Relationships of Influence”, 254-258.}

Where more modest benefits are concerned, judges are sometimes called upon to adopt a highly nuanced approach. In \textit{Cattermole v Prisk}, Judge Norris QC did so admirably.\footnote{\cite{CattermolePrisk2006} 1 FLR 693.} He upheld a first gift of £50,000 on the basis that it was “readily explicable” by the relationship between the parties, since the defendant:

“…was ever increasingly [the deceased’s] carer, and enabled her to avoid being a burden to her family or becoming a resident in a care home”.\footnote{\cite{CattermolePrisk82} 82.}

A second gift of £24,000, however, was not so readily explicable. The judge could not explain the deceased’s decision to “give another sizeable gift so soon after the first and out of reduced means”.\footnote{\cite{CattermolePrisk85} 85. See also \textit{Nattrass v Nattrass} [1999] WASC 77, [109] (Commissioner Buss QC).} The gift was therefore set aside.

Enonchong opines that a transfer in return for care may not call for explanation, provided there are adequate safeguards to enable the care recipient to finance alternative accommodation should her needs require it.\footnote{Enonchong, \textit{Duress, Undue Influence and Unconscionable Dealing}, [11-016].} Conversely, as noted earlier, the court will readily intervene where the care recipient leaves himself in a position whereby he would no longer be able to pay for residential care if and when it is required. This occurred in \textit{Langton v Langton}. In entering the “extremely improvident” transaction, Charles QC was concerned that the deceased “effectively placed his future in the hands of the defendants.”\footnote{\cite{LangtonLangton905} 905.}
Given the difficulties surrounding care funding outlined earlier, it is essential that the interests of those who may need to pay for formal care are safeguarded, and it is a terrible irony that judges are often able to assess these needs only hypothetically and after the care recipient has died. It is also unfortunate, however, that shortages in public funding can both enhance the significance of private transfers to carers and render them more vulnerable to being set aside through undue influence, and a judge could potentially over-use the benefit of hindsight. Still, the “calling for explanation” requirement provides an opportunity for the value of the carer’s work to be recognised. This is true even if judges are forced to make difficult proportionality-based judgements and effectively become involved in the “substantive” rather than simply the “procedural” aspects of the transaction.\(^\text{104}\) In any case, Chen-Wishart has argued that “substantive unfairness is of the essence of undue influence”.\(^\text{105}\) Provided the explicability requirement is applied rigorously, it can compensate for the likely finding of a relationship of influence.

(c) Rebutting the Presumption

If there is a relationship of influence and a transaction calling for explanation, a presumption of undue influence is raised. The usual method by which a defendant seeks to rebut it is by showing that the claimant had access to independent professional advice, although other methods are possible. This may be the first stage at which the carer can realistically mount a defence: in *Hammond*, for example, defence counsel conceded both that there was a relationship of influence and that the transaction called for explanation.\(^\text{106}\)

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\(^{105}\) Chen-Wishart, “Undue Influence: Vindicating Relationships of Influence”, 265.

\(^{106}\) *Hammond v Osborn*, [1].
When seeking to discharge the evidential burden placed upon him, it is not sufficient for the defendant to show that the donee understood what she was doing and intended to do it. Where undue influence is truly at issue (as opposed to lack of capacity, for example), “the influencee...will always know what he or she is doing; the question is why”.107 The protection relates to weakness, rather than an inability to comprehend,108 although issues of capacity are sometimes intermingled in decisions based on undue influence.109

The mere fact that the care recipient broadly took the initiative does not necessarily mean that the eventual transaction is justified,110 and a donor’s statement that no pressure was applied may not provide a justification either.111 Conversely, it is insufficient to show that the donee did not ask for the transaction to be entered into.112

In Inche Noriah v Shaik Allie Bin Omar, the Privy Council held that legal advice is neither necessary nor sufficient to discharge the presumption. The question is whether the transaction was in fact “the result of the free exercise of independent will” with knowledge of its consequences, regardless of the means by which that is demonstrated.113 Again, it is not necessarily enough that the owner should understand the transaction as a result of the advice, and the advisor may be expected to discuss whether the transaction is in the donor’s best interests. The advice, according to

108 RBS v Etridge, [111] (Lord Hobhouse).
111 Goodchild v Bradbury.
113 [1929] AC 127, 135 (Lord Hailsham LC).
Lord Nicholls in *Etridge*, must have an “emancipating effect”. It will therefore be a significant factor weighing against the independent advice where a solicitor is engaged by the defendant.

It is arguable that stringent obligations are effectively placed upon the carer in many situations. As Ward LJ has said, while actual undue influence concerns what has been done “to twist the mind of a donor”, with presumed undue influence “it is more a case of what has not been done”. One commentator goes as far as to suggest that it may be necessary to subject donors who are “clearly ill or of very advanced age” to a medical examination to ensure that the transaction will not be overturned after the event. While this is probably an exaggeration and seems more relevant to capacity, it could be argued that any obligation undertaken by the carer in this respect is outweighed by the fact that he will obtain the benefit of the transaction. This argument is somewhat undermined by the fact it that a carer may be aware of his effective obligations only if and when he seeks legal advice himself.

On the other hand, it must be remembered that before reaching the stage where the carer’s obligations in respect of the transaction become relevant, the transaction has already been found to call for explanation. Some deserving carers will not be able to retain benefits that the care recipient has personally attempted to confer upon them, but many will encounter no difficulties if they receive a benefit proportionate to what they have done, provided it does not cause disproportionate disadvantage to the care recipient and is explicable in the context of the relationship. Many more will be able to justify the receipt of disproportionate, less explicable benefits if the care recipient obtains appropriate advice. This appears to strike an adequate balance between the interests.

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114 *RBS v Etridge*, [20].

115 See, eg, *Niersmans v Pesticcio*, where the solicitor was on first-name terms with the donee and her daughter.


118 *Goodchild v Bradbury*. 

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One remaining problem is that the decision as to the size of the benefit originally conferred rests in the hands of the care recipient so that the carer may have had little choice but to receive a large benefit (vulnerable to being set aside on the basis of undue influence) where a smaller one would have been acceptable because of the extent of the care provided. Counter-restitution is potentially available as a defence in respect of valuable benefits provided by the defendant to the claimant under an impugned transaction. But asserting a defence of counter-restitution would effectively require the carer to show that the care recipient was unjustly enriched by the care, and it is not clear that English Law is yet sufficiently developed to support such an unjust enrichment claim by the carer because of the difficulty of establishing a ground of restitution.\textsuperscript{119} It may be possible to argue that the care recipient was unjustly enriched only to the extent that the transaction was inexplicable. However, although they are willing to consider separate transactions individually in care scenarios, the courts tend to talk in terms of setting aside each impugned transfer as a whole.

\textbf{D. CONCLUSION}

The question of support for carers is a difficult area of social policy, and private law may be useful in filling some of the gaps. Undue influence can sidestep some of the policy questions, since the main issue is whether a transaction that has already occurred should be upheld by the court. That is not to say that the decision is an easy one, and it will be highly fact-dependent. Moreover, the doctrinal uncertainties relating to undue influence itself do not help matters.

Burns concludes that the courts in the UK have shown themselves to be highly suspicious in cases where a claimant has transferred her only asset to a relative or carer.\textsuperscript{120} In an overall sense, the doctrine of undue influence is indeed likely to be a significant fetter upon the ability of a care recipient to transfer a benefit to her carer. While a care relationship will not fall into the old category 2A of itself, the relationship is likely to be one in which the presumption of undue influence can apply when combined with an inexplicable transaction.

The explicability requirement is therefore to be welcomed, since it has the potential to permit a carer to retain a modest and non-damaging reward for his efforts through the application of a proportionality analysis. Such an approach, however, will inevitably be approximate and may not be the subject of accurate predictions. Legal advice for the care recipient will often be necessary, and the carer is placed in a difficult position since he is likely to be in a position to arrange for the advice and yet he must take great care not to be connected with its delivery.

The fetter of undue influence is often a beneficial one given the inherent vulnerability of the care recipient. On the other hand, it should not be forgotten that the doctrine can override the autonomy of a legally competent care recipient, effectively through the actions of her estate. Such a donor may be outraged at the suggestion that her actions could be undone by a court at the instance of her heirs after her death. The court must therefore be mindful of the motivations of the accusing parties in bringing an undue influence claim, and assess the available evidence in an even-handed manner.\textsuperscript{121}

\textsuperscript{120} Burns, “The Elderly and Undue Influence Inter Vivos”, 272.

\textsuperscript{121} In \textit{Morley v Loughnan} [1893] 1 Ch. 736, Wright J was easily satisfied that the deceased’s executors were “actuated by no motives of personal interest whatever” in bringing their claim (751).