



The Presumption

Many practitioners are unaware that in the voluntary transfer situation, there may be a presumption of undue influence in relation to the transaction.

What this means is that if the transaction is challenged, it fails unless the donee is in a position to rebut the presumption of undue influence. In itself, the fact that there was no undue influence is not sufficient. The presumption must be rebutted.

Where a solicitor acts on both sides of a voluntary transfer, it has been held that, as he is not independent of either party, he can not give evidence which will rebut the presumption.

In order to rebut the presumption, independent advice, usually, but not necessarily, independent legal advice, must be obtained.

Signed Acknowledgements

Some solicitors get the transferor to sign an acknowledgement that the transferor has been offered independent advice but has declined the offer. This is not sufficient, as it does nothing to rebut the presumption of undue influence.

From the point of view of professional negligence, the solicitor is at risk if he has not ensured that he is in a position to rebut the presumption of undue influence. He is unlikely to be at risk in so far as the transferor is concerned. If a transferor gets back a farm he had transferred, he is not at a loss. However, the same cannot be said in relation to the transferee. If a transferee loses because the solicitor has not taken the necessary steps to rebut the presumption of undue influence, then the transferee will have his remedy against the solicitor.

Setting up the Independent Advice

When organising the independent advice, it is good practice to do a letter to the person giving the independent advice setting out all the facts relative to the transfer. In particular the letter should set out details of the property being transferred (market value, which should be based on a professional valuation, etc.), details of the transferor's other assets and full details of the family situation identifying the educational and financial circumstances of each family member. When giving independent advice, a full attendance should be done and this attendance should be returned to the solicitor doing the transfer so that it can be stored on the main transfer file. (By doing this the transferor's solicitor is setting out that he has knowledge of all the facts and it also shows that the person giving the independent advice has been made aware of these facts.)

THE PRESUMPTION OF UNDUE INFLUENCE



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(Contd.)

Wills

This presumption does not apply to wills. Where a will is challenged on the basis of undue influence, then, in every case, that undue influence must be proved.

Actual Undue Influence

Actual undue influence is outside the scope of this practice note. However, in doing a voluntary transaction a solicitor should take all steps necessary to minimise the risk of actual undue influence. For example, the transferee should not be present when the transferor is instructing the solicitor in relation to the proposed transaction.