



CAPACITY & COERCION

How do you control and overcome difficulties if you suspect one party is being coerced, manipulated or lacks mental capacity?

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Introduction

1. For over 20 years there has been a clear statutory framework for making decisions in relation to people who lack mental capacity to make their own decisions in relation to aspects of their personal welfare (including medical treatment decisions) and their finances under the Mental Capacity Act 2005. Where a person lacks mental capacity to make a relevant decision or choice, then the court (the Court of Protection) can make that decision on their behalf in their best interests.
2. Different questions arise however when a party or potential party to litigation is or may be considered to lack mental capacity to participate or provide instructions in proceedings or is considered to be vulnerable to the undue pressure or influence of others to make a decision of a particular kind which results in an outcome which may not be desired by them or is contrary to their best interests.
3. This gives rise to questions as to the responsibilities of those who act for them and of the approach to be taken by the court in relation to their future protection and resolving decisions which may already have been taken against without a valid form of consent and against their best interests.
4. These notes shall therefore attempt to address these 3 issues: -
 - a. how best to represent a person in litigation when it is suspected that they may lack mental capacity to litigate the proceedings or are vulnerable to undue pressure or the influence of others;
 - b. what measures may be put in place to safeguard future decision making;
 - c. what steps can be taken to unpick decisions already taken without capacity or when subject to undue pressure or influence.

Litigation Capacity

5. **The vulnerable client.** In family law vulnerable clients present in a variety of ways. They may be young people or children who are subject to oppressive family or cultural pressure to act in a certain way, including pressure to marry a particular person or pressure to prevent certain friendships or relationships. They may be persons vulnerable to predatory individuals pressurising them into an abusive relationship or criminal behaviour. They may be elderly clients or persons with obvious physical or mental difficulties who struggle to understand financial issues and are vulnerable to financial and other forms of exploitation. They also obviously include persons in toxic and abusive relationships who have been subject to violence, coercion and control from a partner or others.
6. We as their representatives are under a regulatory and ethical obligation to be alive to these possibilities and to be aware of and, if necessary, implement a range of steps and measures to mitigate any vulnerability.
7. For example, in relation to solicitors, Law Society Practice Note of 29 November 2022: Meeting the Needs of Vulnerable Clients; the Law Society Practice Note of 27 June 2023 and associated guidance in Financial Abuse and Law Society Practice Note of 27 June 2023: Working with Clients Who May Lack Mental Capacity highlights a host of practice guidance.
8. In this presentation I shall give place particular focus on:
 - clients who have capacity to make decisions and give instructions, but need extra support to do this because of mental and/or physical disabilities;
 - clients who lack mental capacity to make decisions and provide instructions,
 - clients who are vulnerable to undue influence, undue pressure or duress and who may or may not have mental capacity to make decisions and provide instructions.
9. **Features of vulnerability.** Features to look out for include:
 - advanced age
 - young age
 - physical disabilities
 - ill-health
 - cognitive impairment, such as dementia
 - mental health problems
 - learning disabilities
 - sensory impairment
 - acquired brain injury, caused for example by a stroke or head injury
 - behavioural disorder, such as attention deficit hyperactivity disorder
 - neurodiversity, such as autism spectrum disorder
 - psychological or emotional factors
 - communication difficulties, including no or limited speech,
 - English as a foreign language, limited ability to read or write, trouble with reading and writing accuracy and comprehension, and illiteracy

- experience of domestic violence or sexual abuse heavy reliance on others (family or friends) for care, support or accommodation
 - long-term alcohol or drug abuse exposure to financial abuse
 - poor financial literacy
 - lack of a social network living alone living in poverty
 - adverse life events, such as bereavement dependence on a care provider
10. We might consider that a person's capacity might fluctuate in different environments. It may also be useful to observe how any relative or friend who has accompanied the client behaves towards them, and vice versa. This may identify whether there is the risk of undue influence or pressure.
 11. Once aware that there are risk factors, the emphasis should then be on assisting the client to express their real wishes and objectives, to overcome any difficulties, to understand relevant advice and give valid instructions to carry through acts and transactions.
 12. The measures for assisting them can include developing an understanding of their functioning, the need for support, and developing as best as possible an understanding of their family dynamics. For example, to investigate whether positive support for them can be provided by friends, family members or social care professionals engaged with them.
 13. Remember that capacity is decision-specific, so a client could have capacity to make a simple decision but not a complex one, or one that has significant consequences or carries significant risk.
 14. If a solicitor has reasonable doubt about a client's capacity to give proper instructions, it is their professional duty under 3.4 the SRA's Code of Conduct for Solicitors, RELs and RFLs to satisfy themselves whether the client has the capacity to give instructions (see also *RP v Nottingham City Council and Official Solicitor* [2008] EWCA Civ 462).
 15. However, as we shall examine below, the law also recognises that in relation to vulnerable individuals who retain capacity, protective measures can be put in place to ensure that their capacity to consent is not overborne by duress or undue pressure or influence from malign third parties.
 16. **Capacity to litigate.** There is a legal presumption of capacity enshrined in section 1 of the Mental Capacity Act 2005. A person with the requisite capacity is free to make their own decisions, however unwise.
 17. The test of capacity is 'issue specific' meaning that the degree of understanding required will vary with the complexity of the decision to be taken. To take an extreme example, the decision whether or not to buy a morning coffee will usually be held to be of a lower magnitude of complexity than, for example, the decision to invest in cryptocurrency - an assessment of capacity should reflect that. It is an understanding of the specific issues arising in the immediate litigation which is relevant, not a general understanding of the law or process.

18. Formally, the test of capacity to conduct proceedings will vary according to the type of court. However, as the Supreme Court has made clear in *Dunhill v Burgin* [2014] UKSC 18, there is unlikely to be any real difference whether the test is the statutory test applied under the MCA 2005 (as is applied in civil proceedings) or the common law.

19. The statutory test of capacity is set out in ss 2 and 3 of the Mental Capacity Act 2005 which in summary provide:-

- A diagnostic test (section 2) - a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- A functional test (section 3) - for the purposes of section 2, a person is unable to make a decision for himself if he is unable—(a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).

20. The common law test relating to litigation capacity was considered in the judgment of Chadwick LJ in the seminal case of *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 and is routinely applied in the Court of Protection and other jurisdictions, and is whether:

'a party to legal proceedings is capable of understanding, with the assistance of such proper explanation (in broad terms and simple language) from legal advisers and other experts as the case may require, the matters on which their consent or decision was likely to be necessary in the course of those proceedings.'

This test applies to the proceedings as a whole and not at each step in the conduct of the proceedings as was confirmed in *Dunhill v Burgin* [2014] UKSC 18).

21. **The practical assessment of capacity.** There is a duty to facilitate and maximise a person's capacity. This could include a range of supportive measures which could include breaking down the relevant information into smaller sections, the simplification of language, the assistance of supportive family members or carers, the sequencing of meetings and the use of a professional intermediary. Key matters to understand are likely to include: -

- how the proceedings would be funded
- the chances of not succeeding and the risk of having to pay costs
- making the sort of decisions that arise in litigation.
- giving proper instructions relating to the promotion or resistance to an application and approving a compromise so: insight into the compromise, an understanding of the advice, an ability to be able to weigh that advice before making a decision.

- 22. Expert assessment of capacity.** There is a clear obligation to raise any concerns about a client's capacity with them and explain the process of obtaining a formal view on the matter and the implications of a conclusion/finding of incapacity before inviting their consent to examination.
- 23.** If proceedings are ongoing, it follows that because the ultimate decision as to whether or not the party has mental capacity to litigate the proceedings and the formal appointment of a litigation friend to act on their behalf is a matter for the court under Part 21 CPR, permission should be sought from the court under Part 25 FPR to instruct the relevant expert, usually a psychologist, but it can be some other registered medical practitioner or sometimes even a social worker. Usually, a fee is payable.
- 24.** The report is prima facie disclosable within the proceedings (subject to countervailing arguments as to confidentiality) as being necessary to the determination of the court as to whether or not the person is a 'protected party' i.e. lacks mental capacity to conduct the litigation¹.
- 25.** Sometimes the client will object to a report being obtained. If proceedings are ongoing there is an overriding duty to apply to the court for an assessment notwithstanding the client's objections. However, ultimately, no one can be forced to undergo an assessment of capacity in the face of an outright refusal although it is theoretically possible that in rare circumstances an assessment of their mental health could be imposed upon them under section 2 of the Mental Health Act 1983, but only provided the stringent statutory and non-statutory thresholds for intervention are met.
- 26.** In cases where the person has refused an examination, the judge may have to decide on capacity without the benefit of any external expertise, although the courts have emphasised that judges should be slow to do so because of the serious consequences for the person (*Baker Tilly v Makar* [2013] EWHC 759 (QB)). Some evidence will be required to displace the statutory presumption of capacity.
- 27.** One example of where this was possible was in *Re RGS* [2012] EWHC 4162 (COP), where the court found itself able to reach conclusions as to the capacity of P's son to conduct the litigation on the basis of evidence before the court from professional witness and the son's own account, even though the son declined to undertake a formal medical assessment.
- 28.** If the client's objections to an assessment lead to a conflict with his lawyer who is of the view that there are reasonable grounds for believing that they may lack capacity, the lawyer may well be entitled to decline to continue to act on their behalf.

Measures designed to protect the vulnerable client from duress/ undue influence.

- 29.** There are a range of measures which can be taken ranging from practical measures to ensure that decisions including litigation decisions are made independently through to

¹ CPR 21.1 (2)(c)

formal proceedings in the High Court for injunctions against third parties designed to facilitate a capacitous decision.

- 30. Practical steps.** Obvious steps include some of the following: arranging for the client to have independent support including from a registered intermediary to ensuring that meetings are carefully arranged away from the malign influence of problematic third parties and in negotiations when the client is under apparent pressure yield to an unreasonable offer, to giving firm advice as to the reasonable parameters of settlement.
- 31. Court intervention.** In extreme cases, where the person is assessed as having capacity but it is asserted that they are subject to duress or undue influence from another person, it has been held that the High Court, in the exercise of its inherent jurisdiction, has the power to make protective orders by way of injunction to enable the person to take the decision free from the influence of others. Such orders can include injunctions preventing a third party from having contact with the vulnerable person and can even extend taking steps to arrange a marriage with that person without setting up a process whereby the person can give free consent to the same.
- 32.** The jurisdictional foundation for this approach derives from the Court of Appeal decision in *DL v A Local Authority and Others* [2012] EWCA Civ 253, [2012] COPLR 504. This decision upheld the rationale propounded by Munby J (as he then was) in *Re: SA (Vulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam); [2006] 1 FLR 867 where he confirmed the existence of the inherent jurisdiction to protect persons with capacity who were nevertheless vulnerable to exploitation and pressured decision making. I cite the following key passages:

“77.....It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.

78. I should elaborate this a little:

i) Constraint: It does not matter for this purpose whether the constraint amounts to actual incarceration. The jurisdiction is exercisable whenever a vulnerable adult is confined, controlled or under restraint, even if the restraint is only of the kind referred to by Eastham J in Re C (Mental Patient: Contact) [1993] 1 FLR 940. It is enough that there is some significant curtailment of the freedom to do those things which in this country free men and women are entitled to do.

ii) Coercion or undue influence: What I have in mind here are the kind of vitiating circumstances referred to by the Court of Appeal in In Re T (Adult: Refusal of Treatment) [1993] Fam 95, where a vulnerable adult's capacity or will to decide has been sapped and overborne by the improper influence of another. In this connection I would only add, with reference to the observations of Sir James

Hannen P in Wingrove v Wingrove (1885) 11 PD 81, of the Court of Appeal in In re T (Adult: Refusal of Treatment) [1993] Fam 95, and of Hedley J in In re Z (Local Authority: Duty) [2004] EWHC 2817 (Fam), [2005] 1 WLR 959, that where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss LJ put it, be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.

iii) Other disabling circumstances: What I have in mind here are the many other circumstances that may so reduce a vulnerable adult's understanding and reasoning powers as to prevent him forming or expressing a real and genuine consent, for example, the effects of deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs. No doubt there are others.

79. I am not suggesting that these are separate categories of case. They are not. Nor am I suggesting that the jurisdiction can only be invoked if the facts can be forced into one or other of these headings. Quite the contrary. Often, indeed, the facts of a particular case will exhibit a number of these features. There is, however, in my judgment, a common thread to all this. The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors.

- 33.** The type of intervention which would be justified had been set out by Macur J (as she then was) in *LBL v RYJ and VJ* [2010] EWHC 2665 (COP) where at paragraph 62 the judge held:

'I do not doubt the availability of the inherent jurisdiction to supplement the protection afforded by the Mental Capacity Act 2005 for those who, whilst 'capacitous' for the purposes of the Act, are 'incapacitated' by external forces whatever they may be- outside their control from reaching a decision. (See SA (A Vulnerable Adult) [2005] EWHC 2942 @ para 79; A Local Authority and Mrs A 2010 EWHC 1549 @ para 79). However, I reject what appears to have been the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance. I adopt the arguments made on behalf of RYJ and VJ that the relevant case law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions.'

This was also endorsed by the Court of Appeal in *DL*.

34. So, the lawful measures are orders designed to ensure that the person can take make decisions free from influence. Thus, orders prohibiting a malign third party from contacting the person or from taking specific steps such as arranging a marriage or any engaging in any other dealings which may influence the decision to be taken are 'on-side' and may be deployed.
35. It is less clear (and indeed doubtful) as to whether the court's powers extend to injuncting the vulnerable person from taking specific steps in their best interests (such as withdrawing money for the benefit of others, selling property, making a will or marrying). In *Re RK (Capacity; Contact; Inherent Jurisdiction)*, Cobb J (as he then was) refused to exercise the inherent jurisdiction so as to impose a 'supportive framework' designed to encourage the subject of the proceedings to restore contact with her family. Whilst he 'actively encouraged' those with responsibility for her care to consider them, he held that it was:

'not "necessary" for me to make orders in relation to them in order to liberate R to make decisions freely, nor is it "proportionate" ([66] and [76] of DL) that I should. I am conscious of the need to guard against adopting an overly paternalistic attitude to a vulnerable adult who is the subject of the proceedings, and to make orders in (what McFarlane LJ referred to as) the "hinterland" of the MCA 2005 which undermine the very concepts of the MCA 2005 itself' at [136].

Existing decisions and agreements made without capacity or under duress/undue influence.

36. In the commercial sphere, there are long established common law principles addressed to the available remedies relating to apparently binding commercial contracts entered into when one of the parties is proved not to have had mental capacity to contract. The outcomes largely depend on the actual or constructive knowledge the other contracting party may have had of the incapacity.
37. More common in the sphere of family law are agreements entered into or orders made when it is said subsequently that one of the parties lacked litigation capacity or was improperly forced or influenced to do so. This gives rise to questions as to the enforceability of such arrangements when, as a matter of law, orders relating to the welfare of children and as to financial remedies require the sanction or approval of the court before they can be made.
38. *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 however was not a family case but one in which a claimant in personal injury proceedings had settled a claim for damages on terms which were very favourable to the defendant, at a fraction of the true value of the claim. The issue was whether the order could be regarded as binding on the defendant when it was subsequently established that the claimant did not have mental capacity to consent to the order compromising her claim. Baroness Hale gave the majority judgment

of the UKSC and observed that it is now generally accepted that a person may avoid a contract which they have concluded without the requisite mental capacity where the other party to the contract either knew or ought to have known of this incapacity (the latter being referred to for convenience in the present discussion as constructive knowledge).

39. This observation was made in the context of holding that a settlement of a claim by a mentally incapable person is valid only with the approval of the court, this result being held to follow from the terms of the CPR.3.70 Given this interpretation of the CPR, the Supreme Court held that the normal rule applicable to contracts made by a mentally incapable person which it had described does not apply to the settlements of claims and, therefore, did not apply to the case before it. The state of knowledge of the defendant required at the time of the settlement does not require proof of actual knowledge but can include circumstances where a party's mental incapacity is apparent or was in fact suspected by the other party and are viewed by the court as relevant to the assessment of whether, on a balance of probabilities, the other party in fact knew of the mental incapacity.
40. So in the context of family litigation, if it be the case that a financial remedies order or indeed an order relating to the welfare of children has been made in circumstances where it is subsequently established on the evidence that one party did not have the requisite mental capacity and the other party ought reasonably to have known of that, it is plain that the court will have the power to set aside that order and list the matter for a rehearing with the vulnerable party represented by a litigation friend.
41. **Duress.** What if a party who had the requisite capacity to make the agreement or agree the order subsequently asserts that they were forced into it against their will by the duress of the other party or their agent?
42. What is duress? Duress of the person may consist in violence to the person, or threats of violence, or imprisonment whether actual or threatened. The threat of violence need not be directed at the claimant. A threat of violence against the claimant's spouse or near relation suffices².
43. The relevant question is: "*... whether the threat of physical violence imposed illegitimate pressure upon the person at whom the threat was directed to comply with the demands of the person making the threat.*"³
44. At common law, the presence of duress was traditionally justified on the ground that the duress prevented the party constrained from forming a full and independent resolution to contract. Duress is now accepted as based on one party's application of illegitimate pressure in inducing the other's consent. Cases treated as falling within the doctrine of undue influence included cases of coercion that may now be seen as ones of duress.
45. A contract which has been entered as the result of duress may be avoided by the party who was threatened⁴. As was said in the UKHL: "*Duress again deflects without destroying,*

² Singh v Redford [2018] EWHC 2390 (Ch)

³ Ukraine v Law Debenture Trust Corp Plc [2023] UKSC 11 at [179].

⁴ See Goff and Jones, Law of Unjust Enrichment, 10th edn (2022)

the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms; but there is coactus volti on his side. The contrast is with non est factum. The contract procured by duress is therefore not void: it is voidable—at the discretion of the party subject to duress.”⁵

- 46. Undue pressure or influence.** The recent Family Court case of *PN v SA* [2025] EWFC 141 represents a pivotal moment in the legal treatment of undue pressure/influence and coercive control within the context of marital agreements. Previously the threshold for establishing the right to avoid a marital agreement arrived at under alleged undue influence was considered to be high.
- 47. The facts:** W (48), H (46). Three children aged between 9 and 17. Both H and W were born and raised in Country A. They met in Country A in 2002 and married there in 2005. Separated in August 2022. Marriage of c.17 years. W’s Form A was issued on 7 September 2023. Final hearing listed March 2025. The parties were extremely wealthy and on separation their accrued wealth was said to be in excess of £1.5 billion. At final hearing, that sum was between £460–540 million.
- 48.** Within the proceedings, W issued a notice to show cause why a post-nuptial agreement entered into by the parties in March 2021 (‘2021 PNA’) should not be given effect. H cross-applied seeking an order giving effect to a Separation Agreement entered into by the parties in April 2023 (‘2023 Settlement Agreement’). That latter agreement was in Portuguese. It was the validity of this second agreement which came under scrutiny.
- 49.** The 2021 PNA provided for a largely equal division of assets between the parties. The 2023 Settlement Agreement provided for most of the assets to be put into pre-existing trusts and therefore out of W’s reach- so a huge (and prim facie suspicious) difference in outcome!!
- 50.** Each agreement differed not just in its terms, but also in the circumstances in which each was signed. The post-nuptial agreement of 2021 was found to have been ‘negotiated and drafted appropriately and expertly’ and both parties had independent legal advice. Notwithstanding confusion as to when the 2023 separation agreement was concluded, the separation agreement was also found to be flawed because following *Radmacher*, Cobb J held that the husband had exploited ‘*his dominant position in the relationship to secure an unfair advantage over the wife*’.
- 51.** W’s position was that she had been placed under undue pressure by H when discussing and signing both versions of the 2023 Settlement Agreement. The judge specifically considered: (1) the context, particularly the power imbalance in the parties’ relationship; (2) scare tactics used by H; (3) lack of prior legal scrutiny, and (d) ostracism of the wife’s lawyer. *Radmacher v Granatino* [2010] UKSC 42, *X v X (Y and Z Intervening)* [2002] 1 FLR 508, *Edgar v Edgar* [1980] 1 WLR 1410, and *NA v MA* [2006] EWHC 2900 (Fam) (on undue pressure) considered.

⁵ *Lynch v DPP of Northern Ireland*. [1975] A.C. 653, 695.

52. Cobb J held that the 2023 Settlement Agreement was not a concluded agreement. The judge went on to say that on this basis alone he would not have upheld the 2023 Settlement Agreement in either the April 2023 or June 2023 forms: -

- a. It was not an implementation of the 2021 PNA
- b. W was subject to undue pressure. The judge found that the husband had exploited W's vulnerability, intimidated her, and 'took wholly unfair advantage of her'. H had deployed a number of scare tactics, including encouraging W to believe that she would end up working the tills at Tesco if she sought the implementation of the 2021 PNA.
- c. H consciously took steps to keep the lawyers on both sides away from the negotiations until there was a signed deal, such that W had a limited understanding of the implications of the proposed agreement. H specifically and deliberately sought to isolate W from her own lawyer.
- d. The 2023 Settlement Agreement was not regarded by the parties as a *Xydias* agreement.
- e. H's open proposals did not square with his notice to show cause application which demonstrated 'an incurable lack of coherence in his arguments'.
- f. As a result of these findings, it would not be fair on W to uphold the 2023 Settlement Agreement.

53. The crucial passages are perhaps the ones at §151 and § 152:-

"However, I find that in the period from the divorce application up to June 2023, the wife was, in truth, doing no more than trying to make the best of a situation which I am satisfied she found to be traumatic and in which she found herself placed under sustained and intense pressure from the husband and his scare tactics. In the whole of the period in which the negotiations were taking place she was, I find, both isolated and anxious. She may well have scrutinised the document for its terms, seeking to improve on them to protect herself, but that does not detract from the fact that she saw her situation as 'torture'; I find that she felt threatened by the husband, and I accept her evidence when she said that she felt 'cornered', 'insecure', 'trapped' and 'controlled' by him in this period.

152. I am satisfied, from all that I have read and heard, that the wife was ultimately placed in a position of obvious disadvantage, without the ability to exercise any real self-determination or free will in relation to the negotiations in 2022-2023 on the division of marital assets. I find that the husband threatened to scale back the renovations to, and/or sell, Property 1 and that he would remove the children from her care. These threats were designed to upset the wife dreadfully. I am further satisfied that the husband sought to frighten the wife by telling her that he would 'explode' the trusts, and that consequently the family would become bankrupt. She believed him on all counts just mentioned. All of these threats were real; the husband knew that they would trigger enormous anxiety and fear in the wife; and he was right, they did. I reject the husband's case that both parties entered into the 2023 Settlement Agreement voluntarily and with a full appreciation of its implications. I am satisfied that over the course of the nine months from separation to the signing of the 2023 Settlement Agreement, the wife was put under increasing undue pressure to

such an extent that her will to agree a division of the family assets was worn away, and she ended up, in the manner described by Baron J in NA v MA, ‘overborne’.”

54. The court’s acknowledgment that “persistent and attritional conduct” can erode an individual’s autonomy seems to bring family law into closer alignment with the broader societal and criminal law recognition of coercive control, as codified in the Serious Crime Act 2015.
55. The case also reinforces the principle that procedural fairness is not merely a formality in the creation of marital agreements. While the court reaffirmed the need for full financial disclosure and independent legal advice, it went further and emphasised that emotional manipulation, isolation from legal support, or sustained psychological pressure can render an agreement fundamentally flawed and vulnerable to challenge.
56. **Measures designed to avoid such a scenario.** Within the growing practice of Pre and post nuptial agreements and NCDR, safe practice would now seem to include (1) encouraging early engagement with the process (well before the wedding) (2) and ensuring that both parties receive independent legal advice; (3) full and frank financial disclosure is essential, (4) sensitivity to the emotional and relational dynamics at play; (5) practitioners would be well advised to be alert to signs of imbalance or vulnerability, and carefully document the negotiation process, including the rationale behind key terms; (6) allowing time for reflection between finalising and signing the agreement and considering the use of mediators or neutral facilitators where appropriate, can further safeguard against coercion.

Conclusion

57. And although the core legal principle is derived from the law of equity, it is plain that the judges will develop the law to record to modern values and standards. We are all aware of the development of a modern understanding of the abusive effective more subtle behaviours within a relationship. Modern mental capacity law has developed to recognise the risk of exploitation of a dominant position by a family member for pecuniary advantage of the same philosophy is emerging within the family court. As it does, so we’re practitioners will become much more aware of the risks facing some of our more vulnerable clients and the remedies available to them if they have been a victim of abuse and exploitation.

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