

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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Overview

01

Litigation Capacity

Understanding who is a 'protected party' and the statutory & common law tests

02

Practical & Court Measures

Steps to protect vulnerable clients from duress and undue influence

03

Unwinding Existing Decisions

Setting aside orders and agreements made without capacity or under duress

04

PN v SA [2025]

Landmark case on undue pressure within nuptial agreements

The Vulnerable Client

Vulnerability presents in many forms. As representatives we have a regulatory and ethical duty to identify risk factors and take steps to mitigate them.

Capacity & Cognition

- Advanced or young age
- Cognitive impairment / dementia
- Mental health problems
- Learning disabilities
- Acquired brain injury
- Neurodiversity (e.g. autism)
- Behavioural disorders (e.g. ADHD)

Physical & Communication

- Physical disabilities / ill-health
- Sensory impairment
- Limited or no speech
- English as a second language
- Illiteracy / limited reading / writing
- Psychological or emotional factors

Social & Situational

- Domestic violence / sexual abuse
- Heavy reliance on others for care
- Long-term alcohol or drug abuse
- Financial abuse / poor literacy
- Living alone / in poverty
- Adverse life events (e.g. bereavement)

Capacity can fluctuate across environments and decisions — always observe relational dynamics.

Three Areas of Focus

This presentation addresses three core questions for practitioners:

A How best to represent a person in litigation when they may lack capacity or are vulnerable to pressure?

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 under duress?

Litigation Capacity: The Legal Test

Presumption: Every adult has capacity — Mental Capacity Act 2005, s.1

Statutory Test (MCA 2005, ss. 2–3)

Two-stage test:

- Diagnostic (s.2) — impairment of, or disturbance in, the functioning of the mind or brain
- Functional (s.3) — inability to: understand relevant information; retain it; use or weigh it; or communicate a decision

Common Law Test

Masterman-Lister v Brutton & Co [2003]

- 'Capable of understanding, with proper explanation from legal advisers, the matters on which consent or decision is likely to be necessary in the course of those proceedings'
- Test applies to proceedings as a whole — confirmed in *Dunhill v Burgin* [2014] UKSC 18

Test is issue-specific: the complexity of the decision determines the degree of understanding required.

Practical Assessment of Capacity

Duty to Maximise Capacity

Supportive measures may include:

- Breaking information into smaller sections
- Simplifying language
- Use of a professional intermediary
- Assistance from supportive family/carers
- Sequencing of meetings

Key matters client must understand:

- How proceedings would be funded
- Risk of not succeeding and paying costs
- Nature of decisions arising in litigation
- Understanding advice before approving any compromise

Expert Assessment

SRA Code of Conduct (3.4)

If reasonable doubt exists, a professional duty to investigate capacity (RP v Nottingham City Council [2008]).

Court permission (Part 25 FPR) required to instruct an expert — usually a psychologist.

Report is prima facie disclosable (CPR 21.1(2)(c)).

If client refuses assessment:

Courts slow to find incapacity without expert evidence — Baker Tilly v Makar [2013].

Solicitor may be entitled to cease acting if conflict arises.

Protecting the Vulnerable Client: Practical Steps

1. Independent Support

Arrange a registered intermediary or trusted third party for meetings and decision-making.

2. Safe Environment

Meetings must be held away from any controlling influence — never allow opposing parties or associates to be present.

3. Monitor Settlement Pressure

If the client appears to yield to unreasonable offers under pressure, pause and give firm advice on the parameters of a fair settlement.

4. Document Everything

Keep detailed attendance notes of instructions, the client's demeanour, and any third-party presence.

5. Court Intervention (Injunctions)

The High Court's inherent jurisdiction can restrain a malign third party from contact — *DL v A Local Authority* [2012] EWCA Civ 253.

6. Know the Limits

Courts may not impose decisions on a capacitous adult 'in their best interests' — *LBL v RYJ* [2010]. Orders must facilitate free decision-making, not replace it.

The Inherent Jurisdiction: Re SA [2005]

Munby J confirmed the inherent jurisdiction applies where a vulnerable adult — even with capacity — is:

(i) Constraint

Significant curtailment of freedom — does not require actual incarceration. Any confinement, control or restraint suffices.

(ii) Coercion / Undue Influence

Where a vulnerable adult's will has been 'sapped and overborne' by improper influence — which may be subtle, insidious and pervasive, particularly from family members.

(iii) Other Vitiating Circumstances

Deception, misinformation, physical disability, illness, weakness, fatigue, depression, pain or drugs — anything preventing the formation of real and genuine consent.

Court of Appeal endorsed this approach in *DL v A Local Authority* [2012] EWCA Civ 253

Limits of the Inherent Jurisdiction

✓ The Court CAN

- Issue injunctions preventing a malign third party from contacting the vulnerable person
- Restrain steps such as arranging a marriage without setting up a process for free consent
- Facilitate the process of unencumbered decision-making — *LBL v RYJ* [2010] EWHC 2665
- Make orders removing the person from the presence of those exerting pressure

✗ The Court CANNOT

- Impose decisions on a capacitous adult — even in their 'best interests'
- Prevent the vulnerable person from taking specific steps (e.g. making a will, selling property, marrying) — jurisdiction is protective, not paternalistic
- Issue 'supportive frameworks' that undermine the principles of the MCA 2005 — *Re RK (Cobb J)*

Setting Aside Orders: Lack of Capacity

Dunhill v Burgin [2014] UKSC 18 — the leading authority

The Rule

A settlement by a mentally incapacitated person is valid only with court approval (CPR 21). A court order can be set aside if a party lacked capacity.

Knowledge Standard

Constructive knowledge suffices — if the other party suspected incapacity or it was apparent, the court may find the requisite knowledge established.

Family Law Application

A financial remedies or children order made where one party lacked capacity — and the other ought reasonably to have known — can be set aside and reheard, with the vulnerable party represented by a litigation friend.

Commercial Context

Long-established common law principles apply. Outcomes depend on the other party's actual or constructive knowledge of the incapacity.

Duress

Duress = violence, threats of violence, or imprisonment (actual or threatened) — including threats against a spouse or close relation

Legal Test — *Ukraine v Law Debenture Trust Corp* [2023] UKSC 11:

"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."

Effect of Duress

Duress deflects (but does not destroy) a party's will. The agreement is NOT void — it is voidable at the election of the party subject to duress.

Lynch v DPP of Northern Ireland [1975] AC 653

Basis in Law

At common law, duress prevented 'a full and independent resolution to contract'. Modern law treats duress as illegitimate pressure overriding genuine consent.

Cases formerly labelled 'undue influence' may now be analysed as duress.

PN v SA [2025] EWFC 141 — The Facts

A pivotal moment in the legal treatment of undue pressure and coercive control within marital agreements

The Parties

W (48) and H (46). Three children aged 9–17. Both born in Country A; married there in 2005; separated August 2022.

The Wealth

Net assets £1.5 billion at separation; £460–540 million at final hearing.

The 2021 PNA

Post-nuptial agreement providing for a broadly equal (50/50) division. Negotiated with both parties having independent legal advice.

The 2023 Agreement

Separation agreement (in Portuguese) placing most assets into pre-existing trusts — a massive and prima facie suspicious departure from the 2021 PNA.

The Applications

W issued notice to show cause why the 2021 PNA should not be given effect. H cross-applied seeking enforcement of the 2023 Settlement Agreement.

PN v SA — Court's Findings: 2023 Agreement Set Aside

a

Not an implementation of the 2021 PNA

Terms were materially different — not a logical continuation of the earlier agreement.

b

Undue pressure — will overborne

H exploited W's vulnerability and 'took wholly unfair advantage'. Scare tactics included threatening she would 'end up working the tills at Tesco'.

c

Deliberate isolation from lawyers

H kept lawyers on both sides away until a signed deal existed, ensuring W had limited understanding of the implications.

d

Not a Xydias agreement

The 2023 Agreement was not a concluded binding agreement within the proceedings.

e

Incoherent open proposals

H's proposals were irreconcilable with his show cause application — 'incurable lack of coherence'.

f

Result: Unfair to uphold

Given all findings, it would not be fair on W to give effect to the 2023 Settlement Agreement.

PN v SA — Key Passages (Cobb J)

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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.

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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'.

'Persistent and attritional conduct' can erode individual autonomy — bringing family law into alignment with the Serious Crime Act 2015

Significance of PN v SA

Coercive Control Recognised

The court aligned family law with the criminal law recognition of coercive control under the Serious Crime Act 2015. 'Persistent and attritional' pressure can erode autonomy.

Procedural Fairness is Substantive

Emotional manipulation, isolation from legal support, and sustained psychological pressure can render an agreement fundamentally flawed — beyond mere procedural failures.

Subjective Evaluation Matters

Following *Edgar v Edgar*, the court must look beyond the formal act of signing to the relational context — including the cumulative impact of behaviour over time.

Limits of the Decision

The circumstances were egregious. The existence of the valid 2021 PNA meant party autonomy was upheld. Unclear if the agreement alone would have been set aside.

See also: KA v MA [2018]; Helliwell v Entwistle [2025] EWCA Civ 1055; NA v MA [2006]; Radmacher v Granatino [2010] UKSC 42

Safe Practice: Pre & Post-Nuptial Agreements

To avoid an agreement being set aside, practitioners would be well advised to follow this framework:

1. Early Engagement

Begin the process well before the wedding to allow genuine reflection and negotiation.

2. Independent Legal Advice

Both parties must receive independent legal advice from separate solicitors.

3. Full Financial Disclosure

Complete and frank financial disclosure is essential — non-disclosure can alone vitiate an agreement (*Helliwell v Entwistle* [2025]).

4. Sensitivity to Dynamics

Be alert to power imbalances, signs of vulnerability, and emotional or relational pressures.

5. Document the Process

Detailed records of negotiations and rationale behind key terms may be critical in any later challenge.

6. Allow Time & Facilitation

Allow reflection time between finalising and signing. Consider mediators or neutral facilitators where appropriate.

Conclusion

- The core legal principle derives from equity, but the courts continue to develop the law in line with modern values and standards.
- Modern understanding of abusive and coercive behaviours is reshaping how the courts approach both litigation capacity and nuptial agreement challenges.
- Mental capacity law has long recognised the risk of exploitation by family members for pecuniary gain — the same philosophy is now emerging within the family court.
- As the law develops, practitioners must become far more alive to the risks facing vulnerable clients, and to the remedies available where a client has been a victim of abuse or exploitation.