

Love or manipulation? Inter vivos undue influence and the precarious autonomy of elders with Mild Cognitive Impairment (MCI) in romantic relationships

Lauren Xiong¹

¹ The University of Hong Kong, BSS (GL) & LLB. The author is particularly grateful to Professor Niamh Connolly and Mr. Qasim Mian for their helpful support.

Introduction

Rising elderly marriage rates bring well-being benefits but also unique vulnerabilities.² While severe cognitive decline is addressed by mental capacity law, this article focuses on elders with Mild Cognitive Impairment (MCI) – affecting over 21.2% of those aged over 65.³ MCI causes fluctuating judgment and memory issues, impairing complex decisions like finances, yet sufferers are legally presumed capable. Consequently, undue influence claims become the last defense against exploitation within romantic relationships, especially concerning inter vivos financial transactions.

This article argues that the current undue influence doctrine inadequately protects elders with MCI, failing to assess vulnerabilities arising from cognitive decline interacting with relational pressures. Rising marriage and litigation necessitate reform. This article proposes recognizing a specific "MCI-relationship vulnerability presumption" to better balance protection and autonomy for this group.

The current mental capacity law and issues beyond

Personal autonomy in decision-making lacks a precise legal definition, fueling debate over whether courts should act paternalistically as 'gate-keepers' for elders with MCI (**the “paternalistic view”**)⁴ or maximise autonomy by avoiding intervention (**the “autonomy-maximisation view”**).⁵ This section first outlines current common law and legislation, arguing that it strongly favors the autonomy-maximisation view. This attitude tends towards granting full autonomy once mental capacity is established, even with mild decline. Consequently, assuming that the vulnerable elderly with MCI have the same capacity as a healthy adult might cause potential problems. This can only be addressed through the demanding doctrine of undue influence. Next, the article reviews recent case law, critically assessing potential risks. Finally, the author proposes reform suggestions on how the law ought to operate.

The current mental capacity law under the court’s autonomy-maximisation rationale

² See, for instance, Chloe Reeves, Aisha Islam, Tom Gentry, ‘The State of Health and Care of Older People in England 2023’ (2023).

³ ‘Marriage and divorce on the rise at 65 and over’, (2017) Office for National Statistics <
[⁴ Mary Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity, and the Limits of Liberalism* \(CUP 2010\) 90.](https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/articles/marriageanddivorceontheriseat65andover/2017-07-18#:~:text=Marriages%20of%20opposite%2Dsex%20couples,for%20both%20sexes%20since%202009.>,
accessed 1 June 2025.</p></div><div data-bbox=)

⁵ This views upon personal autonomy occur in the courts. For instance, per Lord Sumption in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2014] 3 WLR 200 [208] that ‘individuals are entitled to be the masters of their own fate’.

Courts first assess an elder's mental capacity before considering undue influence claims. Applying the *Banks v Goodfellow* test⁶ (understanding the act, property, and claims) or MCA principles⁷, the threshold is low: capacity requires only the ability to understand, not actual understanding (*Re Beaney*⁸). Recent trends (e.g., *Re BKR*⁹) encourage examining the elder's actual circumstances, including potential pressure, when impairment and influence interact. However, the MCA's core purpose is maximizing autonomy by allowing individuals to make their own decisions whenever possible; it generally does not invalidate past transactions based on capacity alone.

Consequently, decisions by elders with MCI often stand as legally valid, even if potentially impaired, because they meet this low capacity threshold. *Poulton*¹⁰ exemplifies this: a terminally ill man's decision to disinherit his children for his wife was upheld despite temporary impairment, as he was deemed capable at the time.¹¹ This autonomy-first approach raises a critical question that when should courts intervene to protect capable elders with MCI in romantic relationships from exploitation via undue influence, given their heightened vulnerability? The next section examines current judicial approaches to this dilemma.

Recurring issues illustrated in the current case laws

The autonomy-maximisation orientation of mental capacity law makes the doctrine of undue influence serve as the sole recourse for an older person with MCI against exploitation or manipulation within romantic relationships. Crucially, however, vulnerability arising from impairment does not automatically invalidate decisions under undue influence. My analysis of recent cases identifies three pervasive issues inherent in the decision-making of elderly individuals with MCI in such contexts, which are personality issues, complex family structure, and dependency and manipulation. This article analyses these core vulnerabilities while also addressing challenges that might occur in the future if this area of law has not been reformed.

(1) Personality issues: The Interplay of MCI, altered personalities, and judicial perceptions

Scientists have proven that MCI can cause or exacerbate personality traits. For instance, sometimes cognitive impairment will lead to high agreeableness due to worsening numeric

⁶ *Banks v Goodfellow* at p 565.

⁷ Even though there is some potential uncertainty as to the interplay between the common law principle and the legislation regarding the mental capacity, the court usually apply them simultaneously. For instance, see *Re Estate of Joyce Smith (Deceased); Kicks and another v Leigh* [2014] EWHC 3926 at [26].

⁸ *Re Beaney deceased* [1978] 1 WLR 770.

⁹ *Re BKR* [2015] SGCA 26.

¹⁰ *In the Matter of the Poulton Family Trust* FSD 121 of 2016 (IKJ).

¹¹ *Poulton* at p 493.

reasoning.¹² This is likely to have a detrimental effect on financial decision-making.¹³ These scientific findings are reflected in the facts of many recent cases. In *Clarke v Prus*¹⁴, an elderly man had a romantic liaison with a woman who was more than 20 years younger than him. During the course of their relationship, the elder, while suffering from MCI and a severe paranoid personality with a disordered irrational suspicion towards his children, made a series of extravagant gifts to the young lady.¹⁵ This stream of cases has shown the likelihood that the romantic partner might take advantage of the high agreeableness and soft personality that the elder who has MCI might have.

These personality alterations associated with MCI in elders are not only shown in romantic liaisons cases but also manifested periodically and sometimes attributable to other relational challenges, like parent-child relationship, which are all very similar to the romantic liaison – both require love, sympathy, and understanding. When cognitive impairment occurs, however, this may increase the degree of sympathy of the elderly with MCI to an unbearable extent and thus might make them more exploitable by the wicked defendant. In *McFarlane v McFarlane*, an elderly woman has transferred land to her adult son. Contributing factors included her mental illness, the son's abusive behavior, and her highly empathetic nature, specifically, an inability to refuse due to pity stemming from his abandonment by his father.¹⁶ Richards J, after considering these combinations of factors, held that the evidence sufficiently established that the son was in a position of ascendancy and influence over the elderly mother.¹⁷

Crucially, courts often misattribute these symptoms to inherent personality or fail to recognize them as vulnerability factors stemming from impairment, thus setting the evidentiary bar too high. This is because there is a blurred line between true personality issues and personality issues created by cognitive impairment. This ambiguity carries significant legal consequences, as demonstrated in *The Estate of Brocklehurst*¹⁸, where the court prioritized the elder's reputation for strong-willed independence, despite evidence of loneliness, eccentricity, abandonment of his family solicitor, and dependence on the defendant for companionship.¹⁹ Even though in *Brocklehurst*, the elder did not suffer from any cognitive decline, the judgment risks

¹² Terracciano A, Stephan Y, Luchetti M, Albanese E, Sutin AR, 'Personality traits and risk of cognitive impairment and dementia' (2017) *J Psychiatr Res*, 89:22-27.

¹³ Nelson Mauro Maldonato, Raffaele Sperandeo, Silvia Dell'Orco, Pasquale Cozzolino, Maria Luigia Fusco, Vittoria Silvana Iorio, Daniela Albesi, Patrizia Marone, Nicole Nascivera, Pietro Cipresso, 'The Relationship Between Personality and Neurocognition Among the American Elderly: An Epidemiologic Study' (2017) *Clinical Practice and Epidemiology in Mental Health* Volume 13, p 233-245.

¹⁴ *Clarke v Prus* (Unreported, 8 March 1995), Ch D, Knox J.

¹⁵ *Clarke v Prus* at 25.

¹⁶ *McFarlane v McFarlane* at [11], [12], [77] and 'Elder Abuse, Undue Influence & Unconscionable Conduct', de Groot's wills and estate lawyers, <https://degroots.com.au/elder-abuse-undue-influence-unconscionable-conduct/>, accessed on 11 June 2025.

¹⁷ *McFarlane v McFarlane* at [76], [77].

¹⁸ *The Estate of Brocklehurst* [1978] 1 Ch 14.

¹⁹ *The Estate of Brocklehurst* [1978] 1 Ch 14 per Lawton LJ at 36 – 37, per Bridge LJ at 47-49.

misleading future courts that the court may allow the elder's reputation for an independent mind, which might be brought by the cognitive impairment, to obscure the true context in which the elder entered into the transaction or the elder's actual vulnerability, particularly if the elder is in the very early stage of dementia.²⁰

Recent cases reveal a disturbing trend where courts allow an elder's perceived "dominant personality" to negate findings of undue influence, even when dependency exists.²¹ In *Forsdike v Forsdike*²², a father's dominant nature was held to negate his son's influence despite early dementia. More troublingly, in *Gorjat v Gorjat*²³, the court prioritized the elder's "dominant and opinionated" character over documented cognitive decline and memory loss to reject a finding of spousal ascendancy. This reasoning commits a critical causal fallacy, that is, apparent dominance does not preclude vulnerability.²⁴ Crucially, MCI itself can manifest as a facade of control, masking underlying susceptibility to exploitation. Attributing dominance solely to personality risks overlooking MCI as the pathological driver, leaving elders unprotected.

(2) *Complex family structures: MCI, fractured kinship, and relational gatekeeping*

Elders in late-life romantic relationships involving remarriage or blended families face heightened susceptibility to undue influence due to interacting risk factors – cognitive decline and fractured family dynamics. These elements create fertile ground for control, particularly when the romantic partner assumes gatekeeping functions that isolate the elder from protective kinship networks. This complex family structure, marked by multiple marriages, step-relationships, and competing loyalties, will in some cases exacerbate the elder's vulnerability in several possible ways, according to the analysis of recent cases:

- Acting as the gate-keeper: Biological children of the elder might lack access to monitor the elder's well-being due to the strained relationship with the new partner.
- Creating tensions: The romantic partner might intentionally exploit unresolved tensions between the elder and their biological children and make themselves the only trustworthy caregiver.

In *Poulton*, the old man had multiple intimate relationships, marrying three women and fathering five children.²⁵ In 2015-2016, he suffered from impaired mobility, prescription of medications,

²⁰ Fiona R. Burns, 'The Elderly and Undue Influence Inter Vivos' (2003) 23 *Legal Stud* 251, 267.

²¹ *ibid* at 266.

²² *Forsdike v Forsdike* (unreported, 21 February 1997), CA (Civ), Staughton PILL, Mummery LJJ.

²³ *Gorjat and others v Gorjat* [2010] EWHC 1537 (Ch).

²⁴ *Gorjat and others v Gorjat* at [148A]-[154].

²⁵ 'In the matter of the Poulton Family Trust: Mental incapacity and undue influence' Collas Crill <<https://www.collascrill.com/articles/in-the-matter-of-the-poulton-family-trust-mental-incapacity-and-undue-influence/>>, accessed on 12 June 2025.

and loss of vision. He then removed all his children as beneficiaries of his trust, designating his last wife as the sole beneficiary instead.²⁶ His children, the claimants, stated that they struggled to contact him directly. According to the children's allegation, it is the exact case where the romantic partner acts as the 'gate-keeper' and actively exploits the elder.²⁷

The elderly claimant with MCI or their family members face a heightened burden in proving the relationship of trust and confidence, as neither spousal or unmarried cohabitant relationships,²⁸ nor bonds between elderly parents and adult children trigger the automatic presumption of influence.²⁹ Consequently, most claims, like in *Poulton*, must navigate the exacting requirements of Class 2B undue influence. Specifically, as shown in *Poulton*, the judge asked the question based on *Etridge (No 2)* as follows: '(1) There must be a relationship of influence between the parties; (2) The Impugned transaction must be one that calls for an explanation; and (3) In the absence of a satisfactory explanation the court may infer that a transaction has been procured by undue influence.'³⁰ As a result, this structure prioritises procedural formality over substantive protection, requiring cognitively impaired elders to overcome evidentiary hurdles their condition renders uniquely difficult to satisfy.

The court has once given various reasons that this relationship should not be under the automatic relationship of influence as there are strong expectations that 1) nothing unusual or strange in a wife/husband/cohabitee from motives of affection or even of prudence conferring a large proprietary or pecuniary benefit upon the partner³¹, and 2) elderly parents would make gifts of property to their children.³² However, the fundamental flaw of this assumption is that the reasoning behind it ignores how MCI distorts elderly people's judgment, reframing pathological selflessness as rational choice. Therefore, this evidentiary hurdle might normalize disproportionate asset transfers by incentivizing exploitative partners or family relatives to weaponize emotional dependency, or impose impossible evidentiary burdens on cognitively vulnerable elders seeking redress.

(3) Dependency and manipulation: From genuine love and care to coercive control under MCI

The interplay of aging, cognitive decline, and romantic dependency creates significant risks of financial exploitation for elders, particularly those with MCI. Diminished functional capacity and

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *Etridge (No 2)* at [130].

²⁹ Fiona R. Burns, 'The Elderly and Undue Influence Inter Vivos' (2003) 23 *Legal Stud* 251, 264.

³⁰ 'In the matter of the Poulton Family Trust: Mental incapacity and undue influence' Collas Crill <<https://www.collascrill.com/articles/in-the-matter-of-the-poulton-family-trust-mental-incapacity-and-undue-influence/>>, accessed on 20 July 2025.

³¹ Miranda Kaye, 'Equity's treatment of sexually transmitted debt' (1997) *Feminist Legal Studies*, Vol.V no.1, 35, 46.

³² Fiona R. Burns, 'The Elderly and Undue Influence Inter Vivos' (2003) 23 *Legal Stud* 251, 264.

heightened reliance on partners for care and emotional support establish fertile ground for manipulation. This manifests in two primary scenarios: exploitation of inherent dependency arising from genuine need, and deliberate manufacturing of dependency through emotional coercion within romantic relationships.

Cases like *Langton v Langton*³³ illustrate inherent dependency exploitation, where an ailing elder transferred property to secure continued care from relatives, despite personal reservations.³⁴ Similarly, *Meredith v Lackschewitz-Martin*³⁵ demonstrates how MCI-related dependency (in this instance, short-term memory loss) can compel disadvantageous transactions, as the elder transferred assets to the son upon whom she relied. Manufactured dependency is starkly evident in relationships like *Clarke v Prus*. There, an elder with "failing mental powers" proved susceptible to a partner's "well-developed capacity to persuade," masking coercive control as affection.³⁶ MCI critically impairs judgment, increasing vulnerability to partners who exploit fears of abandonment – a scientifically documented concern among cognitively impaired elders. The profound emotional and financial dependence inherent in such bonds, amplified by the terror of relationship loss, creates exploitable vulnerability, as demonstrated even in cases involving competent younger individuals like *Louth v Diprose*³⁷.

Establishing legal redress through actual undue influence faces formidable hurdles. It demands proof of "extreme facts" – overt pressure and manipulation akin to the sworn demands and physical threats documented in *Clarke v Prus*. Such explicit evidence is rare. Far more common are subtle tactics like emotional blackmail and exploitation of affection. These insidious methods are inherently difficult to evidence directly. MCI heightens susceptibility to these tactics, yet the stringent requirement for extreme facts renders this heightened vulnerability legally invisible in actual undue influence claims. Furthermore, elders may make gifts or payments based on acknowledged dependence, absent overt coercion, complicating claims further.

Consequently, presumed undue influence often becomes the essential recourse. However, proving its prerequisite – a specific 'relationship of trust and confidence' – presents its own significant challenges. Age alone is insufficient; the elder's degree of retained independence is determinative (*Hadjiconstantinou v Charalambous*³⁸).³⁹ While financial dependency often clearly satisfies this requirement, emotional dependency – the profound need for care and affection central to cases like *Langton* and *Meredith* – exists in a persistent legal grey area. The

³³ *Langton v Langton* [1995] 2 FLR 890.

³⁴ *Langton v Langton* at 902.

³⁵ *Meredith v Lackschewitz-Martin* [2002] WEHC 1462 (Ch).

³⁶ *Clarke And Ors v Prus* (Unreported, 8 March 1995), Ch D, at 32.

³⁷ *Louth v Diprose* (1990) 54 SASR 438.

³⁸ *Hadjiconstantinou v Charalambous* (unreported, 12 November 1993), Ch D.

³⁹ Fiona R. Burns, 'The Elderly and Undue Influence Inter Vivos' (2003) 23 *Legal Stud* 251, 267.

law lacks clear criteria to distinguish relationships of "friendly acquaintance"⁴⁰ from formal romantic partnerships involving significant trust and reliance. When an elder transfers substantial assets to a romantic companion, motivated by expectations of affection or future care, courts face a critical dilemma: does this constitute sufficient dependency for a presumption, or merely reflect a voluntary gift?

This ambiguity forces reliance on judicial subjectivity, inviting inconsistent characterisations of relational dynamics and risking substantive unfairness. Critiques of cases like *Louth v Diprose* highlight this peril, where focus on alleged "manufactured" suicide threats potentially overshadowed contextual evidence like the claimant's spending history and the defendant's documented depression. This exemplifies Chen-Wishart's identified procedural hazard: unstructured judicial discretion applied to malleable concepts like 'dependency' entrenches unreliable outcomes.⁴¹ The ambiguity further complicates determining whether a transaction inherently "calls for explanation." Elders may transact for seemingly benign reasons, while partners may intend asset control. Courts also struggle to verify purported mutual benefit (e.g., care for financial support), potentially forcing vulnerable elders to prove care was inadequate relative to payment. This fundamental difficulty in objectively assessing when an explanation is required underscores the profound challenges in protecting this vulnerable population under current legal frameworks.

Reform proposals: A new evidentiary category – MCI-relationship vulnerability presumption

As mentioned above, the issues that arise under the personality, complex family structure, and dependency & manipulation make it hard for the elderly with MCI to challenge the inter vivos transactions or gifts on the ground of undue influence. The law might not be protecting this vulnerable group of the elderly from financial abuse in this sense. Thus, the doctrine of inter vivos undue influence requires reform. The following sections propose a doctrinal shift of recognising a new evidentiary category – MCI-relationship vulnerability presumption.⁴²

The MCI-relationship vulnerability presumption would arise where an elder has documented MCI through diagnosis or medical evidence and is in a romantic relationship involving cohabitation, financial interdependence, or significant caregiving. In these circumstances, a rebuttable presumption would arise that the relationship creates a heightened potential for undue

⁴⁰ *Hadjiconstantinou v Charalambous* (unreported, 12 November 1993), Ch D, C Rimer QC, Deputy Judge, at 24.

⁴¹ Mindy Chen-Wishart, 'The O'Brien Principle and Substantive Unfairness' *CLJ* 60, 64.

⁴² The insight is drawn from the Law Commission, 'Modernising wills: Final report', (2025) <<https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/54/2025/05/Wills-Report-Volume-I-Report-Final.pdf>> accessed on 16 July 2025, in which the Law Commission propose to create a specific statutory doctrine of testamentary undue influence at 9.37.

influence regarding substantial inter vivos transactions. This presumption shifts the burden to the defendant early to show that the transaction was “objectively acceptable” instead of the one that “calls for explanation”. Additionally, it avoids forcing the claimant to first prove the traditional “relationship of trust and confidence”, which the inconsistent and subjective judicial characterizations of relational dynamics usually arise. In this sense, this is ultimately a two-step test:

- Step 1: A rebuttable presumption that the relationship creates a heightened potential for undue influence arises when an elder with MCI enters into a romantic relationship; and
- Step 2: Shifting the burden of proof to the defendant early to show that the transaction was “objectively acceptable”.

While this proposed test admittedly moves beyond a simplified approach to undue influence, this complexity is justified. Given the intrinsic link between presumed undue influence and unconscionable dealing,⁴³ the rationale is to advocate for, or at minimum, recognise the necessity of conceptually unifying the doctrine of unconscionability with presumed undue influence in this legal domain. When elderly people with MCI end up in a transaction that is potentially unfair to them with their wicked romantic partner, two doctrines share three common features as noticed by Capper: (1) the inequality in the bargaining positions of the parties (i.e. relational inequality); (2) transactional imbalance; and (3) unconscionable conduct on the part of the defendant.⁴⁴ Crucially, recognising their shared focus compels courts to examine the substantive relational imbalance between the vulnerable elder and their partner. Specifically, whether the transaction the elderly have entered into was substantively unfair, in that they received nothing or very little in return due to the unconscionable conduct of the partner and/or their own cognitive vulnerability.⁴⁵

When deciding this imbalance, this reform proposes to shift the burden of proof to the defendant to show the objective acceptability of the transaction early in the process. When considering the question of ‘was the transaction objectively acceptable’, the court may consider various factors as follows:

- (a) The elder’s known MCI and the impact on decision-making; and
- (b) The nature and duration of the romantic relationship; and
- (c) The elder’s family structure and competing moral/financial obligations to relatives; and
- (d) Whether the elder has received and understood independent advice

⁴³ For instance, see *Langton v Langton*, where Mr AWH Charles QC opined that the rationale underlying the doctrine of unconscionability was closely linked to the class 2B presumed undue influence relationship at 908.

⁴⁴ D Capper, ‘Undue Influence and Unconscionability: A Rationalisation’ (1998) 114 *LQR* 479.

⁴⁵ Mark Pawlowski, ‘Undue Influence: Towards a Unifying Concept of Unconscionability’ (2018) *The Denning Law Journal* 30, (1): 117-151, 131.

These considerations under the “objective acceptability” test force the court to engage with MCI’s specific impact and the substance of the transaction under the relational context instead of staying at the simplistic friendship or affection explanations. According, it targets some main deficits of MCI like impaired judgment and reduced risk perception that led elders to accept flawed explanations.

Conclusion

Rising late-life romance creates a paradox: enhancing well-being while exposing elders with MCI to unique coercion risks. As current law presumes their mental capacity, undue influence is the primary recourse. Yet, this doctrine faces critical flaws: courts often misattribute MCI-driven vulnerabilities to personality; complex family structures impose impossible proof burdens without automatic presumptions; and inconsistent judicial assessments of dependency create uncertainty. These deficiencies necessitate reform. The author proposes an MCI-relationship vulnerability presumption, triggering a heightened risk of undue influence in financial transactions within qualifying romantic relationships. This reform shifts the evidentiary burden early to defendants to prove the transaction's "objective acceptability," addressing procedural hazards and affirming that true autonomy for elders with MCI requires the law to recognise their inherent vulnerability, safeguarding dignity against covert coercion.