Identifying Norms in the Parent-Child Relationship: A Relational Theory Analysis of Presumed Undue Influence

I. INTRODUCTION

There have been consistent debates over the normative basis of presumed undue influence. Claimant-sided theories focus on the claimant's impaired consent arising from dependence within a relationship of influence. By contrast, defendant-sided theories focus on the defendant's wrongdoing or unfair advantage-taking. Neither of these two theories adequately explains the normative basis. This essay agrees with Mindy Chen-Wishart that the core of legal intervention is to vindicate relationships of influence as valuable social forms by upholding the implicit relational norms that govern conduct and outcomes within them, thereby protecting both the integrity of the relationship itself and the claimant's relational autonomy.

Different relationships have different norms. This essay seeks to identify the norms that operate within the parent–child relationship, including both cases of parents influencing just-adult children and cases of adult children influencing elderly parents. By analysing the kinds of transactions that the courts have recognised as justifiable and explicable between parent and child, it aims to infer those norms and then considers the implications of the relational theory that emerge from the analysis.

II. THE LAW OF PRESUMED UNDUE INFLUENCE

The principles of the law on presumed undue influence were clarified by the House of Lords in *Royal Bank of Scotland plc v Etridge (No 2)*[1]. Under this case, presumed undue influence arises in three steps. First, the claimant must prove the existence of a relationship of influence, typically by showing that he or she reposed trust and confidence in the other party. Second, the claimant must show that the impugned transaction "calls for an explanation", namely, it is not readily explicable by the ordinary motives of the parties' relationship. Once these two elements are established, the burden shifts to the defendant. Third, the defendant may rebut the presumption by proving that the transaction was in fact the free and informed exercise of the claimant's will. He or she can prove it by demonstrating that the claimant received independent legal advice and fully understood the nature and consequences of the transaction.

A. Relationship of Trust and Confidence and its Scope

The first step requires the claimant to prove a relationship of influence. The relationship of trust and confidence is sometimes understood as the claimant having entrusted the other party with the management of his or her financial affairs. This reading is supported both by *Etridge* itself and by subsequent authority. In *Etridge*, Lord Nicholls stated that "proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs,

[1] [2001] UKHL 44, [2002] 2 AC 773.

coupled with a transaction which calls for explanation, will normally be sufficient…"[2]. The Privy Council in *Enal v Singh* adopted similar formulation, holding that the claimant must prove "a relationship of trust and confidence… in relation to Mr Maharaj's financial and business affairs"[3] and treating the grant of a wide power of attorney over the elderly man's property and investments as clear evidence of that relationship.

This understanding is not, however, absolute. *Etridge* itself defines the principle in broader terms. In this essay the relationship of trust and confidence is not equated with financial dependence. Rather, it is understood more broadly as any situation in which one party reposes "trust and confidence, reliance, dependence or vulnerability"[4], or in which the other acquires "ascendancy, domination or control"[5].

B. Transaction Calling for an Explanation

Turning to the second step, the requirement that the transaction "calls for an explanation" is drawn directly from Lindley LJ's classic statement in *Allcard v Skinner*[6]. A transaction calls for an explanation when it cannot readily be accounted for by the ordinary motives of the parties' relationship. Its scale, nature or consequences raise a reasonable question of why the party would enter into this.

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2 *Etridge* (n 1) [14].

3 *Enal v Singh* [2022] UKPC 13, [52].

4 *Etridge* (n 1) [11].

5 *Etridge* (n 1) [11].

6 (1887) 35 Ch D 145 (CA).

The courts have moved away from the previous test of “manifest disadvantage” because, in some cases, it is far from clear whether the transaction is truly disadvantageous. The classic illustration is the wife’s guarantee of her husband’s business debts discussed in *Etridge* itself. On a narrow view the wife undertakes a serious financial risk and receives nothing personally in return. Yet the fortunes of husband and wife are ordinarily bound up together: the husband’s business is often the source of the family income, so the wife has a real interest in supporting it and may well benefit from the loan which the guarantee enables. Because the presence or absence of advantage is frequently ambiguous in such everyday family transactions, the House of Lords discarded the ambiguous label of “manifest disadvantage” in favour of the clearer and more flexible test of whether the transaction calls for an explanation.

III. The Normative Basis of Presumed Undue Influence

There has been constant debate over the normative basis of presumed undue influence. Some people stated that the debate has become a bipolar one between claimant-sided and defendant-sided theories[7]. On the claimant-sided view advanced, the doctrine’s justification rests on the claimant’s impaired consent: within a relationship of influence the claimant may suffer from an excessive dependence that renders her judgmental capacity and autonomy “markedly sub-standard”[8]. The relief

[7] Rick Bigwood, ‘Undue Influence: “Impaired Consent” or “Wicked Exploitation”?’ (1996) 16 OJLS 503.

[8] P Birks and NY Chin, ‘On the Nature of Undue Influence’ in J Beatson and D Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 57.

granted protects the claimant's autonomy without any requirement of defendant wrongdoing. By contrast, the defendant-sided theory[9] contends that the normative foundation is the defendant's "wicked exploitation" or unfair advantage-taking, which raise a presumption that the defendant has exploited the claimant's vulnerability by preferring his own interests and failing to observe the standards of transactional fairness that the relationship of influence demands, whether through active pressure or passive acceptance of an improvident benefit. Importantly, because Bigwood's defendant-sided account expressly recognises passive acceptance of an improvident benefit as a form of wrongdoing, it does not insist upon active misconduct. The position is therefore not wholly incompatible with claimant-sided approaches. Even so, the doctrine remains grounded in the defendant's reprehensible use of influence, treating the transaction as voidable because of that exploitation rather than because of any independent defect in the claimant's consent.

I consider both theories inadequate to explain the normative basis of presumed undue influence. As Mindy Chen-Wishart demonstrated, the classic decision in *Allcard v Skinner* cannot fit in either of these theories[10]. In that case a young woman, having taken vows of poverty, chastity and obedience and joined an Anglican sisterhood, transferred a substantial inheritance to the Mother Superior. The Court of Appeal held that the gift should be set aside for presumed undue influence even though it expressly acquitted the Mother Superior of any selfish motive or reprehensible conduct (but the

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[9] Rick Bigwood (n 7).

[10] Mindy Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing towards a Relational Analysis' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press 2006) 201.

gift was not in fact set aside due to the lapse of time). In fact, she believed the divestment to be in the nun's own spiritual best interests. At the same time the judges rejected any suggestion that the claimant's consent was impaired: Lindley LJ stressed that everything she did was "referable to her own willing submission" and "enthusiastic devotion," while Bowen LJ insisted that religious enthusiasts remain free agents in law and that there was "no want of mental power." The decision therefore simultaneously negates the necessity of defendant wrongdoing and the necessity of any defect in the claimant's autonomy.

Since both theories have been refuted by *Allcard v Skinner*, what is a better account? Mindy Chen-Wishart advances a relational theory of undue influence[11]. This theory discards the dominant paradigm of the "Super-Detached Man", which is the atomistic, self-sufficient individualist whose autonomy is understood solely as freedom from interference. On the view of this theory, persons are constitutively embedded in relationships of trust, commitment and dependency. Autonomy is accordingly conceived as including a positive capacity to pursue valuable relationships. However, there are multiple implicit norms that govern the relationships of influence. Although norms in a broad sense encompass both positive requirements (what one must do) and negative prohibitions (what one must not do), in the present context they primarily refer to the latter, i.e., constraints that forbid certain conduct, such as prohibiting the trusted party from prioritising self-interest to the detriment of the other's welfare. A transaction that "calls for an explanation" signals a failure to observe those norms.

[11] Mindy Chen-Wishart, 'Undue Influence: Vindicating Relationships of Influence' (2006) 59 CLP 231.

The inference of undue influence can be rebutted by showing that the protective obligation imposed by the norms has been successfully fulfilled or shifted to an independent adviser. In summary, the core of legal intervention is to vindicate relationships of influence as valuable social forms by upholding the relational norms, thereby protecting the integrity of the relationship and the claimant's relational autonomy.

Mindy Chen-Wishart's relational account offers a more coherent foundation for understanding presumed undue influence. This essay is therefore based on the relational theory. Yet the concept of a relational norm remains inherently abstract and complicated. It does not have the determinate clarity of a statutory rule. Different forms of interpersonal relationship have distinct implicit norms. Through a close examination of the case law, the following paragraphs seek to identify some of the norms operating within the parent–child relationship.

IV. Cases of Parents Influencing Just-Adult Children

Most of the authorities concerning undue influence exerted by parents over their just-adult children are historic decisions that were long before the structured analytical framework in *Etridge*. However, *Etridge* did not overrule these earlier cases. The reasons for the marked decline in the number of this kind of cases in modern times are not entirely clear cut, but there are two possible explanations. First, the law of inheritance has changed. Strict settlements have been replaced by more flexible testamentary dispositions, reducing the chance that young adults possess substantial expectant interest in land that are readily susceptible to being charged or transferred in favour of a parent. Second, cultural shifts have taken place in the understanding of parent–child relationships. In earlier periods, children were typically raised with strong expectations of filial piety, obedience and deference to parental authority. Contemporary norms, by contrast, place greater emphasis on the autonomy, independence and individual rights of children.

The first observation is that, in the eighteenth century, the norm operating within the parent-child relationship did not regard it as improper for a son to assist his father out of a sense of personal honour or familial duty. In *Blackborn v Hewer Edgley*[12], the son initially resisted signing a bond to pay his father an annuity of £120 per annum but later executed the bond precisely because he considered himself bound in honour to do so. The court's acceptance of the agreement indicates that it was regarded as entirely normal for a son to help his father out of honour at that time.

Further, the implicit norm did not prohibit a child from entering into a family arrangement that conferred benefits upon the family as a whole, even where this entailed a personal detriment to the child. This principle is illustrated by *Baker v Bradley*[13]. In that case, the plaintiff son joined in charging his remainder interest under his maternal grandfather's will with his parents' existing mortgage debts. The purpose of the arrangement was to relieve his parents of the burden of maintaining life

[12] (1719) 1 P Wms 600, 24 ER 534.

[13] (1854) 2 Sm & G 531, 65 ER 513.

insurance policies on their lives. By doing so, the family was able to preserve its existing establishment, including its residence, business interests and accustomed lifestyle. At the same time, the son, who was training as a land surveyor, was enabled to continue developing his career. Although the guarantee itself exposed the son to additional financial risk, the transaction as a whole produced an indirect benefit to him through the preservation of the family's position. The Vice-Chancellor applied the family arrangement principle: such arrangements are viewed as "family arrangements" and are approached with a reasonable degree of jealousy, rather as strict reversionary bargains. While the son was not entirely without indirect personal advantage, the disproportion between the risk he assumed and the benefit he received, together with the court's express reference to the family-arrangement principle, demonstrates that the prevailing norm did not preclude a child from accepting personal detriment in order to advance the collective interests of the family.

In summary, although the relational norms generally required the trusted party (here, the parents) to restrain self-interest and to protect the affairs of the other (here, the child), these historical cases demonstrate that, at the time, such norms permitted children to enter into transactions detrimental to their interests out of a sense of honour or for the benefit of the family.

V. Cases of Adult Children Influencing Elderly Parents

A. Transactions that Fundamentally Undermine Future Autonomy

In the relationship between elderly parents and adult children, the relational norms do not prohibit elderly parents from entering into any transaction that benefit their children at their own expense. However, the more enormous and disadvantageous the transaction, the more likely it is to be set aside. This essay argues that the norm does not ordinarily permit a parent to make a gift that fundamentally undermines their future autonomy, for example, by leaving them without resources for their own maintenance, care or medical needs in old age. Several cases illustrate this principle. In *Hackett v Crown Prosecution Service*[14], an elderly mother made a gratuitous transfer of her house to her son. The house was her only substantial asset, and after the transfer she permanently lost the rental income it had previously generated. In *Paull v Paull*[15], the father transferred to his son the house in which he and his disabled partner lived for no consideration, which represents more than half of his assets. The transfer left him with no secure home and put his occupation of the property entirely at the son's mercy. In both cases the transactions were set aside.

By contrast, transactions that do not seriously compromise the parent's future autonomy have been upheld. The case *Portman Building Society v Dusangh*[16] is well known for its discussion of unconscionable bargains, but the Court of Appeal also addressed undue influence. In that case, the father used part of his borrowing to help the son start a business. The court held that it could not be said that the transaction

[14] [2011] EWHC 1170 (Admin).

[15] [2018] EWHC 2520 (Ch).

[16] [2000] EWCA Civ 142, [2000] 2 All ER (Comm) 221.

was "so extravagantly improvident that it was difficult to explain in the absence of impropriety".[17]

Interestingly, however, a transaction that seriously damages the parent's future autonomy is not treated as fatally objectionable in the parent–child relationship in the same way that it is in other relationships of influence. As discussed earlier, in the classic religious-adviser case of *Allcard v Skinner*[18] the gift should be set aside simply because of its scale and its profound effect on the donor's future position. By contrast, in the parent–child context there are cases in which a transaction that substantially impaired the parent's future autonomy was nevertheless upheld, for example *De Wind v Wedge*[19] (the facts and reasoning of which will be examined later). Why does this difference arise? One possible explanation is that transferring the whole of one's property to a religious adviser is qualitatively different from transferring it to one's own children. The blood relationship between parent and child carries with it a continuing expectation that the child normally will not abandon the parent in need. Therefore, courts, while carefully scrutinising such transactions, appear relatively more prepared to accept that a parent may, consistently with ordinary familial norms, make even a very substantial gift to a child.

B. Family Arrangements Benefiting the Family as a Whole

[17] *Portman Building Society* (n 12), [18].

[18] *Allcard* (n 4).

[19] [2008] EWHC 514 (Ch).

Similar to the earlier parent and just-adult child cases, the contemporary norms do not prohibit a parent from entering into a family arrangement that confers benefits upon the family as a whole, even where this entails a personal detriment to the parent. This principle is illustrated by *Malik v Mali*k[20]. In that case the family and another partner jointly operated a restaurant business through a limited company. The father sought to intervene in the company so the other partner indicated that he would refuse to continue the partnership and would close the restaurant. In order to remove the father from his directorship and to ensure that the mother would not be prevented, by pressure or persuasion from the father, from voting against him, the mother transferred a small number of shares unconditionally to the sons. This enabled the sons to vote as shareholders and thereby to preserve the restaurant business, the associated jobs and the family's principal source of income. Although the transfer of the shares was itself disadvantageous to the mother, in that she parted with valuable property, the family as a whole derived a clear benefit. While the mother obtained an indirect advantage through the preservation of the business and the income it generated, the decision is best explained by the family-arrangement principle.

However, any claimed family benefit must be genuine and sustainable. In *Paull v Paull*[21] the father transferred his house to his son. The son sought to rely on several grounds to argue that the transaction does not call for explanation. These included tax avoidance, protection against care-home fees, and protection against stepchildren inheriting. The court rejected all of these reasons. The transfer was ineffective against

[20] [2024] EWHC 69 (Ch).

[21] *Paull* (n 15).

care-home fees. Inheritance-tax relief requires survival for seven years and is defeated by continued residence. Any problem concerning stepchildren could readily have been solved by will or trust. Because the claimed benefits were neither genuine nor tenable, the transaction was accordingly set aside.

C. Transactions Explicable by Ordinary Human Emotions

Contemporary norms also do not prohibit elderly parents from benefiting their children at their own cost when motivated by ordinary human emotions. It is not possible to compile an exhaustive list of the emotions that may legitimately explain such transactions, nor is it possible to state with precision which forms of conduct may be justified by which emotions. Nevertheless, decided cases show that love and affection, gratitude and guilt have all been accepted as ordinary and legitimate motivations in certain scenarios.

Love and affection can justify a transaction, as illustrated in *Portman Building Society v Dusangh*[22]. In that case the elderly father used part of a remortgage on his home to help his son purchase and start a small supermarket business. The court accepted that the father's decision could reasonably be explained as an act of natural love and affection. As the judges observed, "it could reasonably be explained on the basis of a borrower/father's wish to help his son purchase and run a small business, that he was doing this out of natural love and affection. The notion that it is common for parents

[22] *Portman Building Society* (n 12)

to make financial sacrifices for their children, whether or not within the Asian community, is commonplace".[23]

Gratitude can likewise justify a substantial gift. In *Casimir v Alexander*[24] the father was hospitalised with heart disease and the mother was paralysed. The daughter had for a long time cared for both parents. On the father's discharge from hospital the family decided that the house, which the father had paid for, should be registered in the daughter's name, even though there were other children. This large gift was upheld. The court regarded the transfer as a recognition of the care the daughter had given to her parents and treated it as a reasonable expression of parental gratitude.

Guilt is another recognized emotion. In *De Wind v Wedge*[25] the mother sold her only house and gifted the entire net proceeds directly to her son. She had both a daughter and a son. She was well aware that the daughter had for many years borrowed large sums from the family, including from the son, and had never repaid them. In the mother's eyes the son had long been short-changed. It should be noted that this transaction did call for an explanation according to the court because the house was the mother's only capital asset, and by transferring the proceeds she lost the ability to buy another property or to maintain financial independence. The presumption of undue influence therefore arose, but it was ultimately rebutted. Two questions arise. First, why was the mother willing to sell the house at all? This can be explained by

[23] *Portman Building Society* (n 12), [18].

[24] [2001] WTLR 939.

[25] *De Wind* (n 15).

love and affection and thus a desire to help her children. Second, why were the proceeds given to the son rather than the daughter? This can be explained by a sense of guilt towards the son. Alternative analyses are also possible. From the perspective of internal family fairness, the daughter had already received substantial assistance, so the gift served to restore balance. A modest family-arrangement reading is also available: if the daughter tended to dissipate resources, entrusting the principal asset to the son might better preserve family wealth for the future. These explanations are not mutually exclusive. The case is sufficient to show that guilt is one of the ordinary emotions that the norm regards as a legitimate ground for a parent to act to his or her own detriment.

VI. Implications of Relational Norms for English Judicial Practice

A. Implications of Assessing Emotional Motivations

First, even though the emotions that courts must examine are complex, the analysis that follows will show that they are fully capable of dealing with this complexity by applying a relatively low, qualitative standard of scrutiny.

The preceding analysis has shown that the relational norms governing the parent–child relationship permit transactions motivated by ordinary human emotions. These include natural love and affection, gratitude for care provided, and the desire to preserve the interests of the family as a whole (which itself may also be understood as an expression of love for the family unit). Since such motives are recognised as legitimate under the prevailing norms, courts applying the doctrine of presumed undue influence are inevitably required to examine the emotional context in which a transaction was entered into.

Human emotions are complex. Science cannot explain them with great precision or objectivity, and they raise intricate psychological questions. Courts have long been approaching this terrain with caution. As the Vice-Chancellor observed in *Baker v Bradley*[26], quoting Lord Eldon in *Tweddell v Tweddell*, parent–child transactions in the nature of family arrangements are to be viewed "with a reasonable degree of jealousy," yet without inquiring deeply into every motive and emotional factor, for "there may be considerations in such cases which the Court could not possibly reach."

The complexity of human emotions does not, however, present a genuine difficulty. Courts routinely assess emotional and relational factors in other areas of law, such as family law. The relatively low threshold embodied in the "reasonable degree of jealousy" standard is appropriate. The inquiry is qualitative rather than quantitative. The court is not required to determine with laboratory precision whether, for example, a parent in the given circumstances would have given a gift of £1,000 but not £1,001. Ordinary human conduct within any particular set of circumstances itself occupies a range. Provided the impugned transaction does not clearly depart from that range of conduct that a person might reasonably adopt, the court may properly uphold it.

[26] *Backer* (n 9), 520-521 (quoting *Tweddell v Tweddell* (1822) 1 T & R 1, 37 ER 992).

B. Implications of the Temporal and Cultural Variability of Norms

The second implication is that the English courts must take the variability of relational norms into account and approach such variations with caution.

Relational norms change over time because the nature of parent–child relationship itself evolves across different historical periods. The expectations that governed such relationships in the eighteenth century differ markedly from those that prevail today. Conceptions of filial support, intra-family assistance and the proper scope of parental authority have all shifted. Take *Blackborn v Hewer Edgley*[27] for example, it is difficult to imagine the case being decided in the same way today. At the time, a just-adult son's sense of moral duty to pay his father an annual sum was consistent with the prevailing norms, but the same behaviour might not conform to modern norms. Although cases of parents influencing just-adult children have largely disappeared in modern times, the same kind of normative change is equally capable of affecting transactions between adult children and elderly parents. Courts cannot simply repeat earlier authorities mechanically; they must consider whether the norms that once rendered a transaction unremarkable continue to do so in the present social context.

Relational norms also differ across cultures. In *Portman Building Society v Dusangh*[28] the Court of Appeal observed that "the notion that it is common for parents to make financial sacrifices for their children, whether or not within the Asian community, is commonplace." This statement actually implied that while some forms of parental

[27] *Blackborn* (n 8).

[28] *Portman Building Society* (n 12), [18].

support may be near-universal, others are culturally specific. Mindy Chen-Wishart has expressly affirmed that the norms in the relational theory are themselves cultural, so that what counts as "undue" will vary between cultures. In her study of the transplant of English undue-influence doctrine into Singapore[29], she shows how Confucian values of hierarchy, collectivism and patriarchal authority have led Singaporean courts to be markedly more reluctant than their English counterparts to characterise a husband's or father's request that a wife or child guarantee family-business debts as undue influence. Although that analysis concerns two different jurisdictions, it prompts a further question within a single jurisdiction. If family bonds are, on average, stronger within certain cultural communities in England and Wales, so that mutual financial support is regarded as more ordinary, should an English court decide a case differently because the parties belong to that community? If so, what degree of differentiation would adequately reflect genuine normative variation without introducing unequal treatment between ethnic groups? These questions admit of no simple answer. This essay does not attempt to give a perfect answer. It insists only that courts must recognise that relational norms are culturally contingent and must develop a principled method of taking that contingency into account.

VII. CONCLUSION

This essay has drawn on Mindy Chen-Wishart's relational theory to argue that the purpose of the doctrine of presumed undue influence is to uphold the implicit norms

[29] Mindy Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?' (2013) 62 ICLQ 1, 5.

that govern relationships of influence, thereby protecting both the integrity of those relationships and the parties' relational autonomy.

An examination of the case law reveals the norms operating within the parent–child relationship. The authorities concerning parents influencing just-adult children are mostly historical and have largely disappeared in modern times. Some of the decisions, such as those that upheld a child's giving money to a parent out of honour, are deeply rooted in their particular historical context. Others may have been retained: the acceptance of family arrangements that confer collective benefits to the whole family at personal detriment continues to appear in the modern cases of adult children influencing elderly parents. In these modern cases, the norms continue to permit a parent to benefit a child at personal cost where the transaction can be explained by ordinary human emotions, such as natural love and affection, gratitude or guilt, or forms part of a genuine family arrangement. At the same time, the norms do not ordinarily allow a transaction that fundamentally undermines the parent's future autonomy, although the family relationship seems to allow more room for this than other relationships of influence.

These findings carry two principal implications for judicial practice. First, the inherent complexity of human emotions does not present a genuine obstacle because a relatively low, qualitative standard of scrutiny is appropriate and workable. Second, because relational norms are temporally and culturally contingent, courts must approach earlier authorities and cross-cultural differences with caution rather than applying them mechanically.