# Lessons from a successful fraudulent calumny claim: *Whittle v Whittle* [2022] EWHC 925 (Ch)

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All those familiar with the world of probate litigation will be aware of the caution with which practitioners treat allegations of fraudulent calumny and undue influence. With a legal test which is exceptionally difficult to meet, and with the necessary facts often difficult to prove, it is little surprise that these grounds for challenging disputed wills are very rarely successful.

One occasion where the claimant beat the odds, however, is the recent High Court case of *Whittle v Whittle* [2022] EWHC 925 (Ch). That on its own merits some discussion. This update will go through the law on fraudulent calumny and undue influence briefly before discussing the facts of *Whittle* and the judge's decision. It will be shown that this case had highly specific circumstances which made the claims of fraud and undue influence much more likely to succeed. In turn, even this successful case demonstrates the difficulty in making such claims and the need for practitioner wariness.

***The law on undue influence and fraudulent calumny***

Among the most frequently cited summaries of the law on undue influence and fraudulent calumny derives from the well-known decision of Lewison J (as he then was) in *Edwards v Edwards* [2007] WTLR 1387, which can be read in full at paragraph [47].

In summary:

· The person alleging **undue influence** must prove that the volition of the testator was overpowered without convincing the testator's judgment. In this way, undue influence is to be distinguished from persuasion, appeals to ties of affection, or pleas to take pity, all of which are legitimate (and involve convincing the testator's judgment). Furthermore, it is not enough to prove that the facts of the case are merely consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis.

· The person alleging **fraudulent calumny** must prove that a person ("A") poisoned the mind of the testator by casting dishonest aspersions about the character of a natural beneficiary ("B"). A must know that their statements about B are false, or not care about whether their statements are true or not. Even if A's statements are objectively false, it is a defence that A genuinely believed them to be true.

The summary in *Edwards* is not without controversy. In particular, it should be noted that the high bar for proving undue influence – that a will be consistent **only** with a hypothesis of undue influence – has been questioned in

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*Theobald on Wills* (19th edn., 4-060) and in cases such as *Cowderoy v Cranfield* [2011] EWHC 1616 (Ch) at [141].

The crucial question, however, is of coercion – whether by pressure (as in undue influence) or by active dishonesty about a potential beneficiary (as in fraudulent calumny). In both cases, the physical and mental strength of the testator will be relevant factors in the court's assessment of whether the pressure or fraud was sufficient to overbear the testator's own volition. Clearly, a weakened or vulnerable testator will be more easily overborne than one still in possession of their full faculties.

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With that summary of the law in mind, what happened in the case of *Whittle*?

***Whittle: the background***

Gerald Whittle had two children: Sonia and David. When Gerald died, his will left almost his entire estate to Sonia, which some national press reports valued in the seven-figure range. David was left only his father's cars and the contents of his garage – subject to David bearing the costs of clearing it out. There was therefore a clear imbalance of gifts.

David claimed against Sonia and her husband chiefly on the grounds that they had procured the will by fraudulent calumny and undue influence. In particular, the fraudulent calumny was said to have arisen by virtue of allegations Sonia had made to her father against David and his wife. There was evidence that she had repeatedly told her father that David had been violent towards women and had stolen money, and that she had alleged that David's wife was a prostitute. The evidence showed that Sonia had also repeated this allegation in front of a trainee legal executive who had been invited to Gerald's house to draw up the will.

Of equal importance to the background of this case is the procedural history. After Sonia and her husband had not only failed to pay costs ordered from a previous part of the litigation, but also failed to provide disclosure and exchange witness statements, the judge debarred them from defending the proceedings. Accordingly, the only evidence in the case came from written evidence put in by David.

***The decision***

After considering David's evidence, the judge found that the allegations of fraudulent calumny and undue influence were both made out.

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exchange witness statements – which led to the debarring order being made against them – had meant that there was no evidence whatsoever to support either the objective truth of Sonia's allegations, or her belief in the truth of them.

At [43]-[47] of the judgment, the judge went through the factual evidence put in by David and his wife. This included letters from Thames Valley Police confirming that David had never been charged with any of the crimes Sonia had accused him of, and a statement from David's wife denying that she was a prostitute or had ever engaged in any criminality whatsoever. The judge concluded that Sonia's allegations were not merely unproven, but were "*completely false*". Furthermore, the judge found that "*[Sonia] must have known, at all times, the allegations to be false, harmful and hurtful particularly of [David] and his wife.*" ([48]).

The final piece of the puzzle was a finding of fact that Sonia's falsehoods had induced her father to exclude David from a more substantial share of the estate. In circumstances where the father was vulnerable and reliant upon his children for assistance and support, and where Sonia made the false allegations repeatedly and stridently over many months, the judge found that the father's will had been overborne by Sonia's.

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In sum, Gerald's will had been overborne both by Sonia's coercive pressure and by her dishonest aspersions about David's conduct. This led the judge to uphold the claims of fraudulent calumny and undue influence.

***Discussion***

As alluded to above, this case is one of only a handful in the past two decades where a claim of fraudulent calumny has been upheld. Successful allegations of undue influence are slightly less rare, but are still difficult to establish. What can be taken away from this case, then?

**The first key point** is to note the court's restatement of the summary of the law on undue influence and fraudulent calumny as set out in *Edwards*. Although criticised in some authorities for setting the bar too high, it is clear that it continues to be used by judges. This means that practitioners must remain alive to the significant evidential difficulties involved in making allegations of this nature. This is particularly so in view of the costs consequences of making claims of fraud or undue influence unsuccessfully[1]. Even if the requirement that undue influence be the only possible explanation for the will is now being questioned by some judges, it is submitted that it will remain a useful benchmark

1 See *Williams, Mortimer and Sunnucks on Executors, Administration and Probate*, 21st edn., 10-64

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for practitioners in assessing whether their clients' claims are likely to be successful at trial.

**The second key point** is to observe how specific the facts of this case are. Not only was it a case where many of the lies told (about criminal conduct) were easily verifiable by the police as being untrue, but it was a case where the Defendants had been actively debarred from participating in proceedings. It also involved a very elderly and vulnerable testator, and the clear and contemporary evidence of Sonia's conduct from a legal practitioner. In other words, the Claimant had both a very strong case, and could make it forcefully without the difficulties of being cross-examined or contradicted by the Defendants.

If this is what an example of a rare successful case looks like, it is easy to see just how strong a set of facts is needed to make out undue influence or fraudulent calumny. Most cases where undue influence is raised will be significantly more nuanced (and will not involve debarred defendants), and careful scrutiny should therefore be applied before advising clients to proceed with the claim.

**The final key point** is one which is emphasised frequently in probate cases but bears repeating. The judge in *Whittle* placed what appears to have been significant weight on the evidence of the trainee legal executive who heard Sonia's outbursts about her brother. She had written a detailed attendance note describing clearly what had happened and noting her observations about Gerald's capacity, health and wishes. Such contemporaneous evidence is, as ever, of huge importance in capacity proceedings[2]. It is likely that it will be of even greater importance in seeking to prove undue influence or fraudulent calumny, however. Whether through *Larke v Nugus* requests or other means, practitioners preparing such claims should therefore pay particular attention to gathering any attendance notes or contemporary documentation surrounding the creation of the disputed will.

***Conclusion***

The *Whittle* case is an interesting one because of the rare success of claims of fraudulent calumny and undue influence. But when going behind the headlines, the severity of the Defendants' wrongdoing and rare procedural circumstances perhaps demonstrate why the Claimant was victorious. Other litigants cannot bank on having such an open goal. The bar remains high for these claims to succeed, and practitioners should continue to apply caution to advancing them.

2 And, of course, the evidence of solicitors who have prepared full notes and considered the question of capacity will be afforded particular weight: *Hawes v Burgess* [2013] EWCA Civ 94; [2013] WTLR 453, at [57]; and, recently, *Hughes v Pritchard* [2022] EWCA Civ 386 at [76].

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