FINANCIAL ABUSE FOR COURT OF PROTECTION AND PROBATE PRACTITIONER

A primer on detecting and remedying financial abuse in the administration of the estates of persons lacking capacity and estates in probate

What is meant by 'financial abuse'?

1. The term 'financial abuse' has no single legal definition but encapsulates a range of behaviour that amounts to a civil or criminal wrong, typically committed against a vulnerable individual. Statutory guidance published by the Department of Health entitled 'No Secrets' defines financial abuse as follows:

   'Financial or material abuse, including theft, fraud, exploitation, pressure in connection with wills, property or inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits. (DH/Home Office, 2000)'

2. The very helpful Law Society Practice Note on Financial Abuse[1] offers some examples of the sorts of activities that might amount to financial abuse:

   Theft - either physically, or through transfer of funds from the vulnerable person;
   Misappropriation or misuse of money or property - for example, improper use of money or assets when handling it for a vulnerable person under informal arrangements;
   Exerting undue influence to give away assets or gifts - this can include placing inappropriate pressure on a vulnerable person to change their will, or make gifts they otherwise would not or signing over the family home to one relative when the older person is about to go into residential care;
   Putting undue pressure on the older person to accept lower-cost/lower-quality services in order to preserve more financial resources to be passed to beneficiaries on death;
   Carrying out unnecessary work and/or overcharging - for example, tradesmen advising repairs for non-existent problems to property, or offering a service such as will writing accompanied by pressure selling, work for which is overcharged, and/or charged in advance;
   Misuse of older persons' assets by professionals - for example, by accountants or legal professionals with access to client funds;

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[1] Recommended reading – the Practice Note is available here: http://www.lawsociety.org.uk/support-services/advice/practice-notes/financial-abuse/#fa631

[2] Credit here goes to Barbara Rich who has written a very useful article on Capacity to litigate and best interests in litigation in the Elder Law Journal [2014] Eld LJ 181, positing that COP practitioners should follow the approach

Misuse of enduring/lasting powers of attorney - use other than as intended or further than as limited by the document;
Misuse of welfare benefits by appointees appointed to manage such benefits on behalf of a person lacking capacity to manage them;
Misuse of Direct Payments by paid carers or family members instead of using the money for the benefit of the recipient.
Salesmen encouraging certain people with learning disabilities who may lack capacity for their finances to enter into contracts or changing suppliers (for example for mobile phone services) when they do not understand their contractual responsibilities. This can also arise with older people, who may have limited capability to understand such contracts
Apparent theft or loss of possessions, for example in contexts such as hospitals or care homes, or where people have carers at home. **Assumptions that a person is fully protected once in these contexts should be avoided**, as they can remain vulnerable to any of the above forms of abuse.

Detecting and investigating financial abuse: what are the 'hallmarks' of financial abuse?

3. Solicitors for the Elderly in their published document "A Strategy for Recognising, Preventing and Dealing with the Abuse of Older and Vulnerable People" identify the following as indicators of financial abuse that both Court of Protection and probate practitioners should be alert to:

- Signatures on cheques, etc, that do not resemble the person's signature or signed when the person cannot write;
- Any sudden changes in bank accounts, including unexplained withdrawals of large sums of money by a person accompanying the holder of the account;
- The sudden inclusion of additional names on the person's bank accounts. These individuals may be unrelated to the older person;
- Abrupt changes to or creation of wills;
- The sudden appearance of previously uninvolved relatives claiming their rights to the person's affairs and possessions;
- The unexplained sudden transfers of assets to a family member or someone outside the family;
- Numerous unpaid bills, overdue rent, care home bills, public utilities bills etc when there is someone who is supposed to be paying his bills for them;
- Unusual concern by someone that an excessive amount of money is being expended on the care of the person;
- Lack of amenities such as TV, personal grooming items, appropriate clothing items, that the person should be able to afford;
- The unexplained disappearance of funds or valuables such as art, silverware, jewellery;
- Deliberate isolation of the person from their friends and family, resulting in the carer alone having total control.

4. I would also add that the impact of financial abuse is sometimes insidious and subtle, perhaps being perpetrated at a low level over a number of years, and practitioners should also be alert to circumstances where the expenditure from a persons accounts, their level of savings and their lifestyle do not appear commensurate with one another – for example, an elderly person with a good income who appears to be leading a comparatively frugal lifestyle yet does not have very much by way of savings.

5. The accrual of unpaid bills will often be one of the most immediate and obvious signs that something has gone seriously wrong with the management of a person's financial affairs and should put the Court of Protection or probate practitioner on alert to look for further evidence of financial abuse. *Per* Senior Judge Lush in *Re GW* [2015] EWCOP 9 (a case concerning the revocation of a power of attorney):

   "*With almost unerring monotony in cases of this kind, a failure to pay care fees and a failure to provide a personal allowance are symptomatic of more serious irregularities in the management of an older person's finances"*

6. In cases of suspected wrongdoing by attorneys and deputies, the Public Guardian has power to commence an investigation. The OPG may itself take any of the following actions:
   - apply to the Court for the suspension, discharge or replacement of a deputy
   - apply to the Court for an Order to be varied or for a deputy's security bond to be called in or varied
   - apply to the Court for a revocation of a power of attorney
   - inform the police, where a crime may have been committed
   - require a deputy to provide a final report where the person he or she was acting for has died or the deputy has been discharged.
   - monitor the situation through ongoing close supervision of the deputy in the case
   - inform external agencies. This will include notifying any professional body, where the perpetrator is a member, and the Independent Safeguarding Authority.

7. A Court appointed deputy will in certain instances have a duty to investigate prior financial abuse and to consider whether or not proceedings should be issued. Where a deputy has been appointed in circumstances where there is an accusation of financial abuse against an attorney or some other person involved with P, it is commonly the case that the order appointing the deputy will authorise them to investigate and if appropriate to take any action in respect of such transactions (including the commencement and conduct of legal proceedings to have such transactions set aside) as the deputy considers necessary or expedient and in P's best interests.

8. The question of how far a deputy should be required to go in investigating matters is a difficult one. A deputy will owe a duty of care to P and may be in breach of his duties if he fails to investigate financial abuse, in circumstances where there would be a reasonable prospect of recovering misappropriated assets or other action is required to promote P's best interests. The question of what is reasonable will vary from case to case. By analogy with the duty of an incoming trustee to investigate a prior breach of trust, I would suggest that a newly appointed deputy will be entitled to assume that there have been no prior breaches of duty by any person previously authorised to deal with P's assets unless there are suspicious circumstances indicating such a breach (*Re Strahan* (1856) 8 De GM & G 291). Where a deputy is appointed in circumstances where there is a suspicion of financial abuse, it would be sensible in the first instance to commence with a review of P's bank statements. A reasonable time frame should be adopted (I would suggest in the first instance a 12 month review), and, if suspicious transactions are identified over that period, there may be justification for extending the review to cover a longer period (say the last six years). In a large estate where it is suspected that substantial assets have been transferred to a third party in suspicious circumstances, a longer review may be justified – where the assets in question, or their proceeds, are still identifiable and have not been dissipated, there are equitable and proprietary claims that may be available without any applicable limitation period. In every case, the question will be whether or not the action that you are considering is in P's best interests – there may be cases where you consider that it is not in P's best interest to incur further costs in investigating financial abuse where it appears that the proceeds have been dissipated and the prospects of recovery are low, even if there appears to be clear cut evidence of wrong doing.

9. Similar considerations will apply in the case of administering an estate in probate. An executor or administrator owes a duty to the beneficiaries and/or creditors of the estate to call in all of the Deceased's assets, which will include recovering any debts owed to the Deceased or property in which the Deceased had an interest. If the personal representatives fail to do this, they may be liable for a devastavit in causing loss to the estate. Again, the question of how far the personal representative should be required to go in investigating and pursuing a perpetrator of financial abuse will turn to a great degree on the value of the potential claim to the estate and the prospects of recovery.

10. In both cases, if there is doubt about the action that a deputy or attorney, or a personal representative should take, an application may be made respectively to the Court of Protection (by a deputy or attorney) or to the Chancery courts (by a personal representative) for guidance.

Remedying financial abuse: what can be done about it?

11. There is a great deal of overlap between the remedies that are available to both Court of Protection and probate practitioners in terms of civil proceedings to recover the proceeds of financial abuse and criminal proceedings to punish the perpetrator. However, there are also distinct considerations in each jurisdiction.

12. The key objective for Court of Protection practitioners will be in the first instance to stop the abuse and secondly to then give consideration to whether or not any remedies need to be sought to rectify the consequences of the abuse. For probate practitioners, the chief consideration will be whether or not any proceedings should be brought to recover the proceeds of financial abuse in the interests of maximising the deceased person's estate.

Court of Protection

13. Considerations are likely to arise as to whether or not an attorney or deputy needs to be removed and a deputy appointed in their stead in most cases where financial abuse is being perpetrated against a person without the capacity to manage their affairs.

14. The statutory jurisdiction for the removal of an attorney appointed by EPA is found in paragraph 16 of Schedule 4 MCA 2005. The "misconduct" ground for revocation is in paragraph 16(4)(g). The Court must direct the Public Guardian to cancel the registration of an EPA "on being satisfied that, having regard to all the circumstances, and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney".

15. The statutory jurisdiction for the removal of an attorney appointed by LPA is found in section 22 of the MCA. The Court of Protection may direct that an instrument purporting to be an LPA is not to be registered or that it is to revoked (if P lacks capacity to do so), where the execution or creation of the LPA has been procured by fraud or undue pressure (s23(4)(a)) or where the donee has behaved or is proposing to behave in a way that would contravene his authority or is not, or would not be, in P's best interests (s23(4)(b)).

16. The jurisdiction in relation to the appointment, removal or supervision of deputies is derived from section 16 of the MCA.

17. There have been a plethora of cases concerning the removal of attorneys and deputies in recent years, by way of example only:
Re Buckley: The Public Guardian v C **[2013] COPLR 39** - P appointed her niece, C, to be her sole property and affairs attorney. The OPG opened an investigation into P's affairs following a complaint. The OPG asserted that C had used at least £87,682.53 of P's monies to fund C's reptile breading business. It was contended by C that this was an investment on behalf of P, although made in C's name. The OPG further claimed that C had used an additional £43,317.47 of P's

money for C's own benefit. The Public Guardian applied for an order that the LPA be revoked. Senior Judge Lush revoked the LPA, emphasising the fiduciary nature of an attorney's duties. This is a very useful judgment on the nature and scope of the duties of attorneys and fiduciaries in relation to the investment of P's funds.

Public Guardian v JW **[2014] EWCOP B24** – the attorney was P's son. Concerns were raised following a failure to pay P's nursing home fees and to engage with the local authority's financial assessment. It transpired that the son had used his mother's assets to fund his own lifestyle and had failed to provide his mother with a personal allowance. His actions, which were judged to have been calculated to salvage as much as possible of his potential inheritance were noted to have spectacularly backfired, having rendered her estate technically insolvent. The LPA was revoked. A panel deputy was appointed, but it was suggested that the deputy should consider whether or not it would be appropriate to step down in favour of P's daughter once P's affairs had been put in order.

Re GM, MJ and JM v The Public Guardian **[2013] COPLR 290**, lay property and affair deputies removed following breach of trust on a spectacular scale (described by HHJ Hodge QC as "tantamount to daylight robbery") in relation to excessive gifts to themselves and others from P's funds, which the Court had largely refused to ratify. A statutory will application was suggested as "the missing piece of the jigsaw", in order that the Court could consider whether or not to it would be appropriate for the deputies to be included as potential residuary beneficiaries before deciding whether or not to call in the security bond (in *Re Meek* [2014] COP 1 it was decided that it was not appropriate to include either of them as beneficiaries and that the security bond should further be called in).

18. Ordinarily, the Court of Protection will require a deputy to put in place a security bond. Essentially, this is an insurance product, the premiums for which will be paid from P's estate, that can be called in in the event that the deputy causes loss to P. This short circuits the need for the substitute deputy to pursue proceedings against the former deputy (with all the risks that entails as to the costs of litigation, the solvency of the deputy and the delay in obtaining a remedy) and will leave the bond company to pursue proceedings against the former deputy. In *Re Meek*, above, HHJ Hodge QC noted that there was no statutory guidance as to the circumstances in which a security bond should be called in. He considered that the question of whether or not the bond should be called in should be resolved on the basis of a "best interests" analysis. His judgment bears consideration in detail, since it gives some indication as to how calling in the security bond hands together with other considerations, such as leaving the new deputy to pursue civil proceedings in the alternative and the making of a statutory will:

"84. If the court does not call in the security bond, the reality is that the present deputy will need to take proceedings, at Mrs Meek's expense, to recover the monies owed as they are likely to be needed for her care

during her lifetime. Particularly given the likely costs of these proceedings, and the consequent effect upon Mrs Meek's existing assets, it would be imprudent in the extreme for the deputy to wait before taking any action as by that stage he could not be confident that he would have the necessary funds available to see the proceedings through. Moreover, Mrs Meek needs the income which would otherwise be generated by the funds which her former deputies have misappropriated.

85. I accept Mr Rees's submission that there can be no proper basis upon which the court can conclude that declining to call in the security bond would be an appropriate step to take. I have already indicated that in my view the appropriate test is the "best interests" test. Even if that is not correct, I would accept that it is plainly a relevant factor. It cannot be in Mrs Meek's best interests to require what is left of her dwindling resources to be expended on litigation when a straightforward alternative is available. I also accept that the whole purpose of requiring a deputy to provide security, the premiums for which are paid at the expense of the incapacitous party, is to put in place a cheap, quick and simple mechanism to reimburse the incapacitous party's estate in the event of a deputy's default.

86. I also bear in mind that despite a year having passed since Senior Judge Lush's judgment, no serious proposals for repayment of any of the sums owing have been put forward. ....

87. I accept that the security bond should be called in. That view is supported by the Official Solicitor on behalf of Mrs Meek.

88. At one stage during the course of the hearing I did consider whether a lesser sum than £250,000 should be called in, such lesser sum representing the benefit that Mrs Miller and Mrs Johnson might otherwise have been expected to receive had they been made beneficiaries under a statutory will. My thinking had been that it would be to penalise the former deputies twice over if the security bond were to be called in, and reparation thereby made to the estate, yet the former deputies were denied any entitlement under the statutory will.

89. Mr Rees opposed such a course. His submission was that because of the way in which they had conducted themselves, and abused their fiduciary position with regard to Gladys Meek, it could not be said to be in her best interests for any reduction to be made in the amount to be called in on the security bond. He emphasised that Gladys Meek and her daughter, Barbara, had lived modestly, and would have been horrified had they known, and appreciated, the nature and effects of the conduct of Mrs Miller and Mrs Johnson. Even if they were now to repay the money back, or if it were to come back to the estate through enforcement of the security bond, it would not be appropriate to allow the former deputies anything.

90. Mr Rees also made the point that although enforcement of the security bond would result in £250,000 coming in, that is considerably less than the amount that Mrs Miller and Mrs Johnson have removed from the estate.

91. Miss Hughes submitted that if any concession is to be made to Mrs Johnson and Mrs Miller, then it should be through the medium of a statutory will, and not through the reduction in the amount for which the security bond should be enforced. The reason for that is that Gladys Meek needs the money brought back into her estate quickly. Care costs have been depleting Mrs Meek's estate over time, and they will represent a significant factor for the future. The Official Solicitor is very concerned for the money to come back into Mrs Meek's estate so that she can have the security of knowing that her future care home fees will be met.

92. Moreover, Mrs Miller and Mrs Johnson should not be entitled to any consideration by the court in view of their failure to put in place, or even to suggest, any realistic mechanism to effect repayment of the amounts they have taken from Gladys Meek's estate. They have failed to offer any realistic mechanism to replace even the £204,000 that Senior Judge Lush found that they had taken, and their failure to do so indicates a lack of understanding, insight and remorse.

93. In my judgment, the appropriate course the Court of Protection should take in cases of default by a deputy is to call in the security bond almost as a matter of course. In the present case, I am not satisfied that there is any sufficient reason for not taking that course. The whole purpose and object of the security bond is, as has been submitted, to provide a speedy and effective source for remedying any default on the part of a deputy. Enforcement of the security bond in those circumstances should be viewed almost as a matter of course."

19. One point of interest to probate practitioners dealing with suspected financial abuse by a deputy (or breach of duty or negligence on the part of a deputy for that matter), is that any security bond required by the Court of Protection upon the appointment of a deputy will remain in force for 2 years after the death of P, unless the Court orders otherwise, and the Court of Protection retains jurisdiction to deal with matters relating to the security bond after P's death. In the recent decision of Senior Judge Lush in the case of *Re Joan Treadwell (Deceased), Public Guardia & Lutz* [2013] COPLR 587, the court called in the security bond of a deputy who had made unauthorised gifts, rather than leave the incapacitous person's executors to bring proceedings after his death to recover the misappropriated funds from the deputy personally.

20. It may also be appropriate to consider whether or not an application for a statutory will should be made. You may have circumstances where a party who would otherwise benefit under the terms of P's last will or on

intestacy has acted so poorly towards P that there is a real cause for considering that they have disentitled themselves to qualify for any provision from P's estate. Where P is very elderly or in poor health, it may be appropriate to bring a statutory will application before commencing civil proceedings to recover the misappropriated assets if there is a risk otherwise that the civil proceedings might not be resolved within P's lifetime and could be futile if the perpetrator of the abuse stands to take P's residuary estate.

21. There are a number of reported decisions in which the Court of Protection has directed the execution of a statutory will excluding a party, who formerly had been a beneficiary of the estate of P pursuant to the provisions of P's existing Will or on intestacy, on the grounds of their conduct towards P. See e.g.:
Re D (Statutory Will); VAC v JAD **[2010] EWHC 2159 (Ch)**, in which it was held that there is no presumption that the Court of Protection should not direct the execution of a statutory will in any case where the validity of an earlier will is in dispute. Such an approach would tend to elevate one factor (a previous written statement) over all others, contrary to the structured decision-making process required by the MCA 2005. On the facts, the doubts about the validity of the previous wills were sufficient to conclude that D's best interests would be served by the execution of a statutory will to prevent her estate being eroded, and her memory being tainted, by a bitter contested probate dispute.
Re M, ITW v. Z **[2009] EWHC 2525 (COP)**, in which Munby J granted an application for a statutory will in circumstances where the misconduct of P's former carer was found to justify excluding him from provision. In that case a professional deputy, ITW, was appointed for M, Z having been persuaded not to pursue his application for registration of an enduring power of attorney in the face of opposition from the local authority and the Official Solicitor. Z was the sole beneficiary of the last pre-incapacity will made by M. ITW obtained the Court's directions for litigation against Z to recover lifetime gifts and other payments, but "understandably" pursued a statutory will application first, with a view to excluding Z from benefit under the will. The Court readily made such a will, and took a view of the outcome of the prospective proceedings into account in its reasoning and included this as a "magnetic factor" for excluding Z from benefit:
" . . . there is the fact that Z has already received large sums from M and, on top of what he has already had, is seeking in addition reimbursement at the annual rate of £20,100 for the cost of her care. Now it seems to me that Z is really here on the horns of a dilemma, impaled, as it were, upon one or other prong of Lord Chancellor Morton's well-known fork. Either he has properly received, and without any impropriety on his part, the various monies transferred to him by M or he has not. If he has, then what further call can he have upon M's bounty, given (a) the sums he has already received and (b) the further sums he is claiming, when both are evaluated in the light of his caring for M for some four years and not, as matters have turned out, for the rest of her life? How can it be in her best interests on this hypothesis to

give him yet more? The simple fact, in my judgment, is that there is only one possible answer to such questions. But if, on the other hand, he has not – if he has indeed been guilty of impropriety – then how can it possibly be in M's best interests to 'reward' him by making yet further provision? Again, there is only one possible answer to the question."

***Re Meek* [2014] EWCOP 1** (the concluding part of *Re GM*, noted above) is a further example of a case in which the court was persuaded to exercise its discretion to authorise a statutory will that provided no benefits for parties who would otherwise be candidates for provision under a statutory will. The former deputies' course of conduct disqualified them from benefit, notwithstanding the obvious affection of Mrs Meek for them.

22. Where the Court is invited to deal with an application for the removal of an attorney or the appointment of a deputy or a statutory will application that arises in circumstances where a person with an interest in the outcome of proceedings is suspected of financial abuse, it may be possible to obtain orders requiring a person suspected of financially abusing P to account for their dealings with P's assets and to answer questions relating to transactions of concern. Not only can such orders be of assistance in obtaining the evidence necessary for the application in the Court of Protection, it may be a valuable means of obtaining evidence that will assist in subsequent proceedings to recover assets or funds.

Chancery proceedings

23. Proceedings may be brought to recover funds or property misappropriated by the perpetrator of financial abuse, both in the lifetime of the victim and after their death. Save for proceedings in the Court of Protection to call in the bond in the case of abuse by a deputy, proceedings to recover misappropriated funds or for damages for breach of fiduciary duty or breach of trust, will proceed in the civil courts and the Court of Protection will have no jurisdiction in relation to these matters.

24. There are a variety of civil actions that may be appropriate in circumstances of financial abuse. In very brief (and non-exhaustive) summary, the following causes of action may afford a basis for recovering losses sustained as a result of the sort of conduct considered above as amounting to financial abuse:

Breach of fiduciary duty / breach of trust: in circumstances where a person has assumed a responsibility for assisting another with their finances pursuant to a power of attorney or as a court appointed deputy, the courts have recognised that a fiduciary relationship arises (see e.g. *Re Buckley* above). However, it is also likely that such a fiduciary relationship would be found in circumstances where a relative or carer has assumed responsibility for assisting a person with their financial affairs on a more informal basis: in *White v Jones* [1995] 2 AC 207 at 271 Lord Browne-Wilkinson held that: "... the paradigm of

circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B." Where funds or assets have been misapplied by a fiduciary, a breach of fiduciary duty is likely to be found and to give rise to a claim to damages or alternatively to a proprietary claim to recover the funds or assets or their proceeds. Alternatively, where a person has come into possession of property or assets of another where the owner did not intend a gift, the law may impose a constructive trust on the recipient, who may be liable to return the assets, if they still exist, or alternatively to pay compensation for any breach committed in dealing with the assets. Note that no period of limitation applies to an action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee was a party, or to recover from the trustee trust property (or the proceeds of trust property) in the possession of the trustee (section 21(1) of the Limitation Act 1980) (a time limit of six years will apply in the case of non-fraudulent breaches of trust or fiduciary duty). Accomplices, e.g. spouses or other family members, who participate in a breach of fiduciary duty may be liable for knowingly receiving funds attributable to a breach of fiduciary duty or for dishonestly assisting in such a breach.

Set aside on the grounds of lack of capacity: 17. The test for mental capacity for an inter vivos gift has been stated in *Re Beaney* [1978] 2 All ER 595 as follows:

"the principle is that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.

In the circumstances, it seems to me that the law is this. The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and value of the gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of."

The High Court in *Kicks v Leigh* [2014] EWHC 3926 has confirmed that the *Re Beaney* test survives the enactment of the Mental Capacity Act 2005. Stephen Morris QC (sitting as a deputy High Court judge) held that the test contained in the MCA 2005 did not apply to a civil court's retrospective consideration of the capacity to make a lifetime gift. He also noted that the burden of proof (per the test in *Re Beaney*) falls initially on the party claiming incapacity. If that party adduces evidence

which raises sufficient doubt as to capacity, then the burden shifts to the defendant.

Undue influence: Undue influence is an equitable doctrine which provides that transactions (including gifts and contracts) may be set aside in circumstances where the transaction has been procured by conduct, which, whilst falling short of actual fraud, consists of the exercise of an unfair advantage, typically by a party in a position of power, influence or trust, over the other party to the transaction. The rational of the doctrine then is to protect vulnerable parties from exploitation by people in whom they repose trust and confidence. It is not a necessary ingredient of the doctrine that misconduct on the part of the stronger party should be demonstrated. The objective of the doctrine of undue influence is helpfully summarized by Mummery LJ in *Pesticcio v Huet* [2004] EWCA Civ 372 at 20:

"Although undue influence is sometimes described as an "equitable wrong" or even as a species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives… The court scruitinises the circumstances in which the transaction, under which benefits were conferred on the recipient, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient. A transaction may be set aside by the court, even though the actions and conduct of the person who benefits from it could not be criticized as wrongful."

In relation to lifetime transactions, there are two kinds of cases in which undue influence may be held to arise which have often been distinguished and described as cases of actual undue influence or presumed undue influence.

'Actual undue influence' is used to describe cases where there is direct evidence of improper pressure or coercion being exerted on a party so as to overbear their free will in relation to a transaction. The necessary ingredients for a finding that undue influence was actually exerted were summarised in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923 in which Slade LJ states (at 967):

"… we think that a person relying on a plea of actual undue influence must show that (a) the other party to the transaction… had the capacity to influence the complainant; (b) the influence was exercised; (c) its exercise was undue; (d) that its exercise brought about the transaction."

The expression 'presumed undue influence' is better regarded as a term referring to an evidential (and rebuttable) presumption that may arise in certain circumstances and relationships, rather than as a sub-category of undue influence i.e. presumed undue influence is a route, by the method of an evidential presumption, to a finding, on the balance of probabilities, that undue influence has in fact been exercised.

The presumption of undue influence arises, so as to shift the evidential burden from the party alleging undue influence to the party seeking to uphold the transaction, in circumstances where two elements are established:
The complainant reposed trust and confidence in the other party (which may be presumed in certain cases where the law recognises that a strong relationships of influence typically exists), or the other party acquired ascendancy over the complainant; and
The transaction is not readily explicable by the relationship between the parties. (Per Lord Nicholls in *Royal Bank of Scotland v Etridge No. 2* [2002] 1 AC 773 at 21) i.e. it must be one which cannot be explained by reference to friendship, the parties' relationship, charity or other ordinary motives on which people act.
If, on the evidence, the transaction cannot be so explained, the burden then shifts to the Claimant to show that in fact, and despite the terms and nature of the agreement, he did not in truth abuse the position that he held (*Turkey v Awadh* [2005] EWCA Civ 382 at 15, Per Buxton L.J.).
The greater the disadvantage, the more cogent the explanation must be before the presumption will be regarded as rebutted (*Etridge* at 24).
Generally, it will be necessary to show that the complainant received competent and independent legal advice.
Where undue influence is found, the transaction in question may be set aside.

Unconscionable bargain: this doctrine may assist where a vulnerable person has been exploited in a contractual or commercial context e.g. the unscrupulous salesman who has taken advantage of a vulnerable party. This basis of such a claim was considered in *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 to be as follows:
Impropriety: There must be some impropriety in the conduct of the stronger party and the terms of the transaction which "shocks the conscience of the court", such that it is against equity and good conscience that the stronger party should be allowed to retain the benefit of a transaction unfairly obtained.
Unfair advantage taken of a disadvantaged position: One party has to have been at a serious disadvantage to the other (whether through poverty, ignorance, lack of advice or otherwise, so that circumstances existed of which unfair advantage could be taken).
Morally culpable behaviour: The weakness of one party has to have been exploited by the other in some morally culpable manner.
Overreaching or oppressive result: The resulting transaction must be not merely hard or improvident, but overreaching or oppressive.

Monies had and received: At common law the recipient of money which had been paid to him by virtue of a mistake can be sued for money had and received. If he has subsequently parted with the money he will still be liable to a personal claim for damages unless he can raise a defence (such as innocent change of position). Such an action may provide a remedy where a person has wrongfully been

induced to pay over funds – for example where they have been induced to pay a liability that did not really exist.

Tracing claims: Tracing is not so much a remedy in and of itself but rather a legal process by which a remedy may be obtained. In many cases, proving that there has been a fraudulent misappropriate of assets may not be particularly difficult, however the greater difficulty may be that the fraudster has disappeared or is no longer in possession of the assets or has intermingled the funds with their own assets and the fraudster is now insolvent and other creditors are looking for a share in his assets. The object of a claim relying upon equitable tracing is to establish a proprietary claim against identifiable property, with the advantage that no limitation period will apply and that the claimant will have priority over the claims of unsecured creditors. Equitable tracing rules permit tracing into intermingled funds and in certain circumstances may even permit a proprietary claim to be made against an innocent volunteer (without notice of the breach of duty but who has not given consideration) in order to recover the misappropriated property.

Should proceedings be issued? Best interests and Beddoe orders[2]

25. The question of whether or not proceedings should be issued is a difficult one for both probate and Court of Protection practitioners. In both instances, you will be asking yourself the vexing question of whether or not the funds you are administering on behalf of another should be expended on pursuing proceedings.

26. Both probate and Court of Protection practitioners will need to carefully evaluate the prospects of success of the contemplated proceedings (including the prospects of enforcement), as well as the likely value of the claim, and the costs of the proceedings, including the potential exposure to adverse costs orders.

27. In either case, it is rarely going to be appropriate to issue proceedings to recover sums that are below the small claims track limit (currently £10,000), where the starting point is that there will be no order for costs between the parties and the costs of proceedings may substantially eat into or eclipse the sum that may be recovered.

28. In probate cases, the main question for those administering estates, will be whether or not it is appropriate for the proceedings to be pursued at the expense of the estate (and ultimately the residuary beneficiary). In many cases, where the outcome of the proceedings will simply be to inflate or diminish the residuary estate and there are no

[2] Credit here goes to Barbara Rich who has written a very useful article on Capacity to litigate and best interests in litigation in the Elder Law Journal [2014] Eld LJ 181, positing that COP practitioners should follow the approach taken in *Beddoe* applications in seeking permission to litigate and whose observations I have adopted in the following section.

complex trust arrangements and the beneficiaries are of full age, it will be appropriate to leave it to beneficiaries to fight it out between them and for the administrator or executor to play a neutral role. In Court of Protection matters, similar considerations might arise for example where P is elderly and has sufficient assets to comfortably meet their needs and there is no pressing need to issue proceedings to recover funds – in this case, if there are no limitation issues, there may be an argument for leaving the issue of litigation to the personal representatives and beneficiaries following P's death.

29. Court of Protection practitioners will need to consider CPR 21 and the rules that apply to the conduct of proceedings on behalf of a person lacking capacity. A protected party must have a litigation friend to conduct proceedings on his behalf or her behalf. Note that it does not necessarily follow that a person lacking capacity in one area of their life, will lack capacity in all others – in all cases, the question of whether or not the individual possesses litigation capacity will need to be considered.

30. A person may become a litigation friend without a court order under CPR 21.4 if:
    a. S/he is a deputy appointed by the Court of Protection with power to conduct proceedings on the protected party's behalf.
    b. Alternatively, where there is no deputy, a person may act as a litigation friend if they can fairly and competently conduct proceedings on the protected party's behalf – they must have no interest adverse to the protected party, and, where the protected party is a claimant, they must undertake to pay any costs which the protected party may be ordered to pay, subject to any right he may have to be repaid from the assets of the protected party.

31. Under the CPR a litigation friend has a right to recover *reasonable* expenses in the litigation from any money recovered for the protected party in the litigation. The CPR does not provide for the recovery of costs from the protected party's estate in the event that proceedings are unsuccessful. However, there is authority for the proposition that the litigation friend is *prima facie* entitled to a full indemnity for those costs against the protected party provided that the litigation friend has acted reasonably in bringing the proceedings (see e.g. *Steeden v Walden* [1910] 2 Ch 393, applied more recently in *B v B* [2010] EWHC 543 (Fam)).

32. Nonetheless, it is far preferable to remove any doubt about the recovery of costs and the issue of whether or not it was reasonable to bring proceedings, by making an application to the Court of Protection for authority to litigate. A deputy should always seek permission from the Court of Protection before issuing proceedings.

33. Unless an order appointing a deputy gives prior authority to litigate, an application will need to be made for an order pursuant to section

18(1)(k) for a decision to be made as to whether or not the deputy should have the conduct of legal proceedings in P s name or on P s behalf. Even where an order appointing the deputy has given the deputy authority to litigate, the need for a decision from the court as to whether or not specific proceedings should be issued may arise where the decision involves complex questions as to whether or not it is in the interests of P to bring proceedings. Where a professional deputy or attorney proposes to instruct their firm's litigation department, prior approval of their proposed litigation costs should also be sought.

34. Probate practitioners will probably be familiar with the Beddoe procedure. A Beddoe application (so termed after the seminal case of *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 (CA)) is an application whereby trustees or personal representatives can seek the directions of the court in relation to the question of whether or not they should bring or defend proceedings or take some other step in relation to litigation. Where the court gives its blessing to the personal representatives' proposed course of action, the personal representatives will usually receive a guarantee that they can recover their reasonable costs of the litigation out of the fund irrespective of the outcome of the proceedings (including any adverse costs orders).

35. Such applications are made pursuant to Part 64 of the CPR. PD 64 paragraph 7.2 deals with the evidence required on an applications for directions whether or not to take or defend or pursue litigation, which must include:

(1) the advice of an appropriately qualified lawyer as to the prospects of success;
(2) an estimate in summary form of (a) the value or other significance to the trust estate of the issues in the proceedings; (b) the costs likely to be incurred by the trustees in the proceedings, by reference to the principal stages in the proceedings;
and (c) the costs of other parties to the proceedings for which, if unsuccessful, the trustees may be exposed to liability;
(3) any known facts concerning the means of other parties to the proceedings; and
(4) any other factors relevant to the court's decision whether to give the directions sought.

36. PD 64 paragraph 7.5 further provides that on an application for directions about actual or possible litigation the evidence should also state whether (i) the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol has been complied with; and (ii) the trustees have proposed or undertaken, or intend to propose, mediation by ADR, and (in each case) if not why not.

37. PD 64 paragraph 7.6, stipulates that if a beneficiary of the trust is a party to the litigation about which directions are sought, with an interest opposed to that of the trustees, that beneficiary should be a defendant

to the trustees' application, but any material which would be privileged as regards that beneficiary in the litigation should be put in evidence as exhibits to the trustees' witness statement, and should not be served on the beneficiary. However if the trustees' representatives consider that no harm would be done by the disclosure of all or some part of the material, then that material should be served on that defendant. That defendant may also be excluded from part of the hearing, including that which is devoted to discussion of the material withheld.

38. Paragraph 7.7 of PD 64 deals with the requirement for consultation with beneficiaries. Where the beneficiaries are adults and are identifiable and traceable, the trustees will be expected to have canvassed with all the adult beneficiaries the proposed or possible courses of action before applying for directions.

39. Paragraph 7.8 of PD 64 provides that (1) If the court gives directions allowing the trustees to take, defend or pursue litigation it may do so up to a particular stage in the litigation, requiring the trustees, before they carry on beyond that point, to renew their application to the court. What stage that should be will depend on the likely management of the litigation under the CPR. If the application is to be renewed after disclosure of documents, and disclosed documents need to be shown to the court, it may be necessary to obtain permission to do this from the court in which the other litigation is proceeding. Usually, the renewed application can be dealt with on paper provided that it is supported by a revised opinion from a suitably qualified lawyer supporting the continuation of the action.

40. It is surprising that there is no equivalent practice direction for applications in the Court of Protection for directions as to whether or not an attorney or deputy should issue proceedings. An attorney or deputy contemplating whether or not proceedings should be issued on P's behalf to recover losses sustained in consequence of financial abuse, would be well advised to adopt (with modifications) the procedure that applies to applications made by personal representatives and trustees for directions from the Chancery courts as to whether or not to pursue proceedings.

41. It is less obvious that the prospective defendant with a potential interest in P's estate should be joined as a party to the application. However, r63(c)(iii) of the Court of Protection Rules requires that an applicant should name as a respondent any person (other than P) whom the applicant reasonably believes to have an interest, which means that he ought to be heard in relation to the application. Accordingly, there may be cases where it is appropriate to invite the Court of Protection to consider whether or not they ought to be joined, and to seek directions as to what documentation ought to be served and as to the participation of that party in the hearing of the application, to ensure that privileged material is not disclosed. Arguably, the interest of the parties who are ultimately likely to have an interest in P's estate is

sufficiently analogous with the position of the beneficiaries where trustees are contemplating proceedings, particularly where P is elderly, that it would be appropriate for a deputy or attorney to consult them as to their views and to consider whether or not they should be joined to the application.

42. Court of Protection practitioners will also need to grapple with the question of whether or not the contemplated proceedings will be in the best interests of P – the answer to this question is not always obvious. As with all decisions taken on behalf of P, the decision to litigate pursuant to Section 18(1)(k) must be exercised in P's best interest. What is in P's best interests is a value judgment by the decision-maker based on consideration of all relevant circumstances, and in particular those set out in s4(6) MCA, including:

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
(b) the beliefs and values that would be likely to influence his decision if he had capacity, and
(c) the other factors that he would be likely to consider if he were able to do so.

43. The decision to litigate to recover assets is straightforward when the proposed proceedings are against a third party who is not a beneficiary of P's estate and is not a party who might reasonably have an expectation of a gift or inheritance or, alternatively, where there is a clear case that P has financial needs that cannot be met from their remaining assets. Matters may be more complex where the party suspected of financial abuse continues to be P's primary carer or is a residuary beneficiary.

44. If Chancery proceedings are issued with a view to recovering funds misappropriated from a party who perhaps has an expectation of provision from P's estate or is someone for whom P might be expected to provide, it is possible that party may seek to bring proceedings in the Court of Protection seeking to argue that it is not in P's best interests for proceedings to be pursued against them or alternatively to bring an application in the Court of Protection for retrospective approval of the 'gift' in question. Under CofPR r52(4)(e), an application for a statutory will or gift or settlement may be made, without permission, by any "person for whom P might be expected to provide if he had capacity to do so".

45. Such satellite proceedings may greatly increase the costs of the proposed action and may have the effect of repressing the proposed action or of undermining its effect. Before issuing recovery proceedings, a deputy or attorney will need to consider the prospect of this sort of application. As suggested above, there may be cases where it will be appropriate for the deputy or attorney to make such an

application before resorting to civil recovery proceedings. In several recent cases that I have been instructed in, involving misappropriation of funds by an expectant residuary beneficiary and where P is elderly and unwell, we have taken the view that statutory will applications should be made before any Chancery proceedings were brought – to avoid a situation of circularity and ultimate futility if P died before the Chancery proceedings could be concluded and the estate then passed to the individual concerned, and also to give the individual the opportunity to explain their actions and to seek retrospective approval.

46. The case of *D v R* [2010] EWHC 2045 (COP) provides an illustration of the sorts of issues that may arise in complex cases. It is an example of a case where the defendant to the hostile claim herself made an application to the Court, effectively to review the conduct of the litigation in P's best interests. The primary issue dealt with in the reported judgment was whether Mr Sharma (his name no longer being anonymised following his death) had capacity to decide whether an action started in his name and on his behalf by his deputy, his daughter Ragny, should be discontinued or compromised. Ragny had issued proceedings to set aside gifts of c. £500,000 which Mr Sharma had made to a woman, Mrs Duke, who had befriended him, on the grounds that they were procured by the exercise of undue influence.

47. Mrs Duke issued a COP1 application asking the Court of Protection to determine the following matters:
"Whether (1) [Mr S] should be consulted in the decision to commence proceedings in the Chancery Division against the Applicant, in which the Deputy seeks to set aside gifts by [Mr S], (2) the Deputy, [R], ought to have consulted [Mr S] in the decision to commence the said proceedings in the Chancery Division, (3) a Visitor or Doctor should be appointed to meet [Mr S] and ascertain whether (a) he has capacity to decide whether the proceedings should be pursued or compromised and if so on what terms and/or (b) his views ought to be taken into account in deciding whether to pursue or compromise the same, and (c) to assist [Mr S] in making any decision whether to pursue or compromise the said proceedings, and (4) for the court to decide if necessary whether the said proceedings should be pursued or compromised or what further steps should be taken in respect of the decision to pursue the said proceedings."

48. Mr Sharma died before all of the issues on the application could be concluded. However, that application lead to the reported decision of Henderson J, which focused on the question of Mr Sharma's capacity to take decisions in the proceedings. Mr Sharma was not considered to have capacity, however his wishes and feelings were ascertained and he was opposed to the proceedings and continued to express his affection for Mrs Duke. Henderson J, in concluding that Mr Sharma did not have the capacity to conduct litigation stated that it was a conclusion that he did not reach with any pleasure, as it was clear that the decision would bring "nothing but unhappiness" in the short term at

least to Mr Sharma, who had expressed his opposition to the litigation and his continuing sense of friendship and gratitude towards Mrs Duke. Since Mr Sharma died before any further directions could be given in the proceedings, the best interests analysis that would have been required in considering paragraph 4 of Mrs Duke's application was not fully explored. Nonetheless, Henderson J concluded his judgment with the following remarks, which were not binding as to the future of the litigation, but nonetheless raise the prospect that a court could conclude, in a case of this nature, that it would not be in the best interests of P to pursue litigation, even where that litigation has reasonable prospects of success:

"I end by expressing the hope that, in deciding on the future conduct of the Chancery proceedings, R will have full regard to her father's wishes and feelings, and to the comfort and support that Mrs D provided to him at a time when he was still estranged from both his daughters. A trial of the action is likely to be a painful and damaging experience for all concerned, and I repeat my hope that the parties will, even now, be able to come to a settlement. I would add that, if the settlement were one that were relatively generous to Mrs D, that would surely accord with Mr S's wishes, and the court would probably need little persuasion to approve it on his behalf."

49. In cases where it is doubtful that proceedings should be issued, there may nonetheless be justification for seeking to take action short of litigation, such as sending a letter before action and conducting a mediation or round table discussion. That is an observation that applies equally to matters within the remit of the Court of Protection and disputes arising in the administration of estates in probate.

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