FINANCIAL ABUSE: A CIVIL RECOVERY PRIMER

What is meant by 'financial abuse'?

1. The term 'financial abuse' is a catchall term, with no single legal definition, which conveniently describes a range of behaviour that amounts to a civil or criminal wrong concerning improper use of a person's financial resources and assets.

2. The Care Act 2014 has created a new statutory framework imposing duties on Local Authorities and Safeguarding Adults Boards in relation to safeguarding vulnerable adults from abuse, including financial abuse, defined at s. 42(3) in the following terms:
   "Abuse" includes financial abuse; and for that purpose "financial abuse" includes
   (a) having money or other property stolen,
   (b) being defrauded,
   (c) being put under pressure in relation to money or other property, and
   (d) having money or other property misused.

3. The accompanying Statutory Guidance, expands on that definition identifying the following forms of financial abuse:
   - theft
   - fraud
   - internet scamming
   - coercion in relation to an adult's financial affairs or arrangements, including in connection with wills, property, inheritance or financial transactions the misuse or misappropriation of property, possessions or benefits[1]

4. The very helpful Law Society Practice Note on Financial Abuse[2] 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;

[1] Care and Support Statutory Guidance, updated October 2018.
[2] Recommended reading – the Practice Note is available here:
https://www.lawsociety.org.uk/support-services/advice/practice-notes/financial-abuse/

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;

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 financial abuse: what are the 'hallmarks' of financial abuse?

5. 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.

6. 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.

7. 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 elderly client practitioner on alert to look for further evidence of financial abuse:

   "*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"* Senior Judge Lush in *Re GW* [2015] EWCOP 9.

   "*As is frequently observed in cases of this kind, failure to pay care home fees, a failure to provide an adequate personal allowance, a failure to visit, and a failure to produce financial information to the statutory authorities, go hand in hand with the actual misappropriation of funds*" Senior Judge Lush in *Re ARL* [2015] EWCOP 55.

<u>Investigating financial abuse</u>

8. A few practical pointers, when investigating financial abuse:
   a. Obtain details of financial resources and assets (bank accounts, details as to how the elderly person carries out their banking, who has had access, social security number, income particulars).
   b. Obtain any necessary authority to make enquiries with banks, building societies, pension providers, DWP, solicitors involved in any transactions etc.
   c. Speak with family members and anyone involved in caring for the client.
   d. Consider taking formal statements from the elderly person and any family members able to provide information.

e. Enquiries with GPs and Social Services can often be particularly revealing. Ask for copies of any records held. They may hold relevant information in terms of capacity assessments and records may also comment on relevant social context.
f. Investigate the ownership of the elderly person's home. Has there been a recent transfer? Do steps need to be taken to register a restriction to prevent further dealings?
g. Has there been solicitor involvement in any questionable transactions? If so, obtain a copy of any files held by the solicitor.
h. Obtain copy statements – look for suspicious activity in particular unexplained transfers (consider if these point to the existence of other accounts), large cash withdrawals, odd expenditure (e.g. gambling transactions, unlikely shopping transactions, car insurance where the elderly client no longer drives, transactions at times when the elderly client could not have been using their card such as hospital stays).
i. Copy cheques can usually be obtained from the bank.
j. Obtain a copy of any EPA / LPA and any wills made by the elderly person.
k. Start collating schedules of disputed transactions. In very complex cases, and where the scale of the abuse and client's resources justify it, it may be helpful to engage a forensic accountant.
l. Formulate a clear letter requesting that the person suspected of abuse provide an explanation of their dealings with the elderly person's assets together with documentary records evidencing any expenditure.[3]
m. Engage the assistance of any other agencies that may be able to help investigate matters e.g. OPG, social services, police.

9. 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;

[3] NB. If there is any question of seeking an ex parte injunction to freeze assets, the timing of any letter that might tip off the perpetrator will need careful consideration.

- inform external agencies. This will include notifying any professional body, where the perpetrator is a member, and the Independent Safeguarding Authority.

10. Local authorities have a duty to investigate cases of financial abuse under s. 42 of the Care Act 2014. In clear-cut cases, the police may also take an interest but many forces lack the funds to investigate financial abuse cases. Police involvement may be the last link in the chain; after action has been taken in the Court of Protection or civil courts, evidence turned over to the police may lead to criminal proceedings.

11. 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.

12. 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.

Remedying financial abuse: Routes to Recovery

Urgent action

13. Evidently, the first consideration must be to take appropriate steps to stop any further abuse. Where the elderly person lacks capacity, 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. Where the elderly person possesses capacity, they may need to be advised as to the revocation of any power of attorney.

14. Steps may need to be taken immediately to remove access to bank accounts and to cancel any appointee arrangements for the receipt of state benefits.

15. Consideration may further need to be given to taking steps to preserve assets. A restriction may be entered against the title to the property, if it has been transferred away in circumstances where there is an arguable case that the elderly person retains a beneficial interest or is entitled to set aside the transaction, to prevent further sale or mortgaging of the property.

16. In appropriate cases, an interim injunction may be sought to preserve assets pending trial. There are three cumulative conditions for the grant of a freezing injunction:
    a. The claimant must show a good arguable case: that is something less than the balance of probabilities but more than a serious question to be tried (i.e. the *American Cyanamid* test).
    b. There must be a real risk of dissipation of assets such that a judgment in the claimant's favour would be unsatisfied.
    c. It must be just and convenient to grant relief: sect. 37(1) of the Senior Courts Act 1981.

17. Proprietary injunctions, where the applicant can make out an arguable case to a proprietary interest in the assets to be the subject of the injunction, have an advantage over personal injunctions in that the threshold for obtaining a proprietary injunction is lower. It is only necessary in respect of a proprietary injunction to satisfy the *American Cyanamid* test on merits, which is a “serious issue to be tried” (i.e. that the claim would survive strike-out), which is a lower hurdle than establishing a “good arguable case”. There is further no need to prove risk of dissipation: *Polly Peck International plc v Nadir (No. 2)* [1992] 4

All ER 769 at 784g. Furthermore, whereas with a purely personal injunction a defendant is permitted to utilise his assets for reasonable living expenses and legal fees, he will not be permitted to use funds that are the subject of a proprietary injunction unless he can satisfy the court that he has no other non-proprietary assets at his disposal and can persuade the court to exercise its discretion to permit him to use the proprietary pot for these purposes.

18. Applications for injunctive relief require very careful planning. This is only likely to be appropriate in very urgent cases and where the costs justify the application e.g. substantial funds at risk of imminent dissipation or removal from the country. Careful consideration will need to be given to whether or not notice is going to be given to the defendant. A duty of full and frank disclosure applies in the case of *ex parte* applications and a failure to comply with this requirement may lead to the application being dismissed with costs on the return date. Consider seeking early advice from counsel.

19. Looking beyond the scope of this talk, note further the inherent jurisdiction of the High Court in relation to vulnerable adults who possess capacity and are therefore not subject to the jurisdiction of the Court of Protection. See e.g. *A Local Authority v DL & Ors* [2012] EWCA Civ 253 [2012] COPLR 504, in which the High Court made orders protecting a couple from the influence of their son, with whom they lived, who was aggressive and physically violent towards his parents and had been attempting to coerce them into signing ownership of their property over to him.

Statutory Wills – the first step?

20. It may also be appropriate to consider whether or not an application for a statutory will should be made before any civil proceedings are issued. 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 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 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 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" (in the view of Munby J) 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."

22. In *Re GM, MJ and JM v The Public Guardian* [2013] COPLR 290, lay property and affair deputies were removed following a breach of duty 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.[4]

23. 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, 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

[4] In the next stage of the proceedings, reported as *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.

evidence that will assist in subsequent proceedings to recover assets or funds.

Civil Proceedings

24. 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.

25. There are a variety of civil actions that may be appropriate in circumstances of financial abuse. The following are the key causes of action that are likely to be appropriate.

Breach of duty and claims to an account

26. In circumstances where a person has been appointed to assist 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* [2013] EWHC 2965 (COP)). 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."

27. Where funds or assets have been misapplied by a person who has assumed a duty of care in relation to the elderly person's assets, a claim to damages may be framed in negligence, or on the basis of a breach of trust or fiduciary duty.

28. In many cases, the picture as to the defendant's dealings with the elderly person's assets will be confused and there will be unanswered questions as to there whereabouts of assets and as to whether or not expenditure was legitimate or not. A failure to keep accounts is a breach of duty in and of itself. A claim may be made requiring an account to be taken of the defendant's dealings. This is a procedural and substantive remedy by which the court will require the party dealing with the elderly person's assets to explain their dealings and thereafter will consider whether or not the defendant is liable to pay compensation. The defendant will be required in the first instance to provide details of all the assets that have come into their hands and as to how they have been applied. The claiming party will then have the opportunity to 'surcharge' or 'falsify' the accounts, alleging that assets should have been brought in or that funds have improperly been paid

away. Thereafter, unless the parties agree, the question of whether or not funds or assets should be returned will be determined by the court.

29. 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 resulting or 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 them. 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.

Tracing claims

30. 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.

Set aside on the grounds of lack of capacity

31. 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."

32. 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.

33. Capacity challenges can be difficult to succeed on. Even moderate dementia may not be enough. In *Gorjat v Gorjat* [2010] EWHC 1537, a case concerning lifetime gifts of substantial share holdings, the statistical evidence concerning MMSE scores and testamentary capacity was examined. It was noted by Professor Howard on behalf of the defendants, and conceded by Professor Jacoby for the claimants, that statistically approximately 50% of people scoring between 10/30 and 20/30 on the MMSE were also found to have testamentary capacity. Notwithstanding the evidence that the deceased was suffering from cerebrovascular cognitive impairment and diminishing memory function at the material time, the deceased was held to have capacity. There was a substantial amount of evidence from friends and family and others concerning the deceased's mental faculties at the time of the transactions, which was preferred to retrospective expert evidence.

Undue influence

34. 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 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.

35. 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*."

36. In relation to lifetime transactions, there are two kinds of cases in which undue influence may be held to arise: 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."

37. 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.

38. 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:

    a. 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

b. 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.

39. If, on the evidence, the transaction cannot be so explained, the burden then shifts to the defendant 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).

40. In order to rebut a presumption of undue influence, it is not sufficient to show that the donor understood what she was doing and intended to do it (*Curtis v Pulbrook* [2009] EWHC 782 (Ch)). It must be shown that the transaction was the spontaneous act of the donor in circumstances that enable her to exercise an independent and informed free will in respect of the decision to enter into the transaction.

41. Generally, it will be necessary to show that the complainant received competent and independent legal advice. The participation of a solicitor is not, however, guaranteed to result in the transaction being upheld: "*It is necessary for the court to be satisfied that the advice and explanation by, for example, a solicitor, was relevant and effective to free the donor from the impairment of the influence on his free will and to give him the necessary independence of judgment and freedom to make choices with a full appreciation of what he was doing*" (*Pesticcio v Huet and Others* [2004] EWCA Civ 372). It is not for the solicitor to veto the transaction, however. The decision whether or not to proceed is the decision of the client. Only in exceptional cases where it is glaringly obvious that the complainant is being grievously wronged, should the solicitor decline to act (*Etridge*, per Lord Nicholls at 62).

42. In Etridge it is suggested that as a minimum the legal advisor should meet the donor face-to-face and in the absence of the donee, should explain the nature and practical consequences of the transaction, point out the seriousness of the risks concerned, make it clear to the donor that she has a choice whether or not to enter into the transaction and check whether she wishes to proceed.

43. *Brindley v Brindley* [2018] EWHC 157 (Ch): *"[a transaction] will not be set aside, for example, if the victim receives a sufficiently full and independent explanation of the proposed transaction before the transaction is effected from someone with full knowledge of the relevant circumstances so that, taking into account the other circumstances which exist at the time, the victim makes an independent and fully informed judgment about the proposed transaction."*

Unconscionable bargain

44. 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.

Calling in the security bond

45. 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 upon 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 hangs together with other considerations, such as leaving the new deputy to pursue civil proceedings in the alternative and the making of a statutory will.[5]

46. One point of interest to probate practitioners dealing with suspected financial abuse by a deputy (or breach of duty or negligence on the part

[5] Note, there is some uncertainty about the circumstances in which the COP should call in a security bond following *Re M* [2017] EWCOP 24 – a very unusual case which probably turns on its own facts but in which HHJ Purle QC (without having Re Meek cited to him) was critical of an attempt to call in a bond in circumstances where liability had not yet been established. Calling in the security bond, as an alternative to civil proceedings, is probably best confined to very clear cases of misappropriation.

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 *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 leaving the incapacitated person's executors to bring proceedings after his death to recover the misappropriated funds from the deputy personally.

Best interests and litigation: Difficult cases

47. Deputies and attorneys contemplating litigation 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.

48. 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 the litigation friend may have to be repaid from the assets of the protected party.

49. 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)).

50. A deputy should always seek permission from the Court of Protection before issuing proceedings.

51. 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) MCA 2005 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.

52. Those practicing in estates and trusts disputes 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 sanctions 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).

53. *Beddoe* applications are made pursuant to Part 64 of the CPR. 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 office-holder 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[6]. In summary, the following procedure (adapted from PD 64) should be adopted and office-holders should ensure the application is supported by:
    a. the advice of an appropriately qualified lawyer as to the prospects of success;
    b. an estimate in summary form of (a) the value or other significance to P of the issues in the proceedings and (b) the costs likely to be incurred by the office-holder in the proceedings, by reference to the principal stages in the proceedings;
    c. an estimate of the costs of other parties to the proceedings for which, if unsuccessful, the office-holder may be exposed to liability;
    d. any known facts concerning the means of other parties to the proceedings;
    e. any other factors relevant to the court's decision whether to give the directions sought, including analysis as to why the proceedings are in P's best interests;

[6] 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 to *Beddoe* applications.

f. whether (i) the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol has been complied with; and (ii) the office-holder has proposed or undertaken, or intends to propose, mediation by ADR, and (in each case) if not why not.
g. If appropriate, consult with the residuary beneficiaries of P's estate and any persons involved with their care and seek their views about the litigation. Of course, if P is able to express some views about matters, they should be consulted.

54. PD 64 paragraph 7.6 of the CPR, 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. 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.

55. 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, r9.3(c)(iii) CofPR 2017 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 when 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.

56. Court of Protection practitioners will 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.

57. 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 P is residing with them, or where the proposed defendant is a residuary beneficiary.

58. 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 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.

59. 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, which may be a factor that weighs in favour of making the prospective defendant a party to any application for permission to bring civil proceedings.

60. 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 of Protection, 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.

61. 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."

62. 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*."

63. 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.

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