

FINANCIAL ABUSE OF THE ELDERLY AND VULNERABLE

Introduction

1. With an increasingly aging population, financial abuse is depressingly common. Sometimes it will be picked up during the person's lifetime and, if they lack capacity, the Court of Protection may become involved. Often the financial abuse is not picked up until someone has died, when it is discovered that large gifts have been made perhaps to one sibling who holds a power of attorney disadvantaging other members of the family, or perhaps it is a paid carer who has charge of the elderly person's finances.
2. I am going to look at a common scenario. One of three siblings has a Lasting Power of Attorney made by their elderly and infirm parent. That sibling (let's say it is a son) is also the main carer for his mother as he lives closest. She owns a house in which she lives with a large garden with development potential. She has made a Will dividing everything between her three children. She transfers the development plot into the name of her son and later the house. Further there are numerous unexplained withdrawals of cash from her bank account.
3. What can the other siblings do either in her lifetime or after her death?

Capacity

4. The first question is whether mother had capacity to make the gifts of the land and her house and authorise the withdrawals of cash. Capacity is both time and issue specific so that someone may have capacity for example to marry but not to make a Will, and to be capable of making a Will but not manage his day to day affairs¹.
5. The relevant test of capacity to make a gift is to be found in the case of *Re Beaney*²:

“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 a 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.”

¹ *Re Beaney* [1978] 1 W.L.R. 770

² [1978] 1 WLR 770

6. Thus, the level of capacity required where the gift is of one's home and most valuable asset is high, similar to that required for the making of a will. Further the extent of the considerations of what it means to make an outright gift can include the impact upon the donor's testamentary wishes.
7. The *Re Beaney* case and the subsequent case of *Sutton v Sutton*³ make it clear that capacity has to extend to being capable not only of understanding the nature of the transaction but also the potential claims of other individuals e.g beneficiaries under a will. Further and crucially where the gift is of a home, an ability to comprehend that the individual has no entitlement or security as a result of the gift is important.
8. Somewhat surprisingly, there is no clear authority on whether a transaction by someone lacking capacity is void or voidable. The authorities were reviewed in the case of *Sutton v Sutton*⁴ by Mr. Christopher Nugee QC but he did not find it necessary to come to a concluded view. The preferable argument is that the invalid transfer is void, as the donor has no capacity to do what she has purported to do.
9. From a practical point of view medical evidence as to the mother's mental state will be crucial and that in itself may be difficult to obtain if the son is isolating her or keeping her away from other members of the family. The intervention of the Court of Protection (discussed more below) may

³ [2009] EWHC 2576

⁴ [2009] EWHC 2576 (Ch)

be vital in getting mother's capacity assessed and enabling access by other members of the family.

Undue Influence

10. What if mother does not lack capacity? It is clear that as people age, they may become more vulnerable and dependent on others for their care and yet still be able to make decisions for themselves. The early stages of dementia may not rob someone of their capacity but may effect personality changes which turn a strong independent person into someone vulnerable and needy. This often produces a set of circumstances where one person can take advantage of the other and this has given rise to numerous cases whether the Courts have intervened to set aside transactions on the grounds of undue influence.
11. Sometimes the claim will be brought while the affected person is still alive but it is not uncommon for a claim to be brought after someone's death, either by their personal representatives or the beneficiaries of their estate. That is because the transaction may not be discovered until it is too late.
12. There is sometimes a wholly inaccurate distinction drawn between cases of actual undue influence and presumed undue influence and there is one

doctrine of undue influence and two methods of proving it. As Lord Clyde in *Royal Bank of Scotland v Etridge (No. 2)*⁵ said⁶:-

“ I question the wisdom of the practice which has grown up, particularly since Bank of Credit and Commerce International SA v Aboody [1990] 1 QB 923 of attempting to make classifications of cases of undue influence. That concept is in any event not easy to define. It was observed in Allcard v Skinner (1887) 36 Ch D 145 that "no court has ever attempted to define undue influence" (Lindley LJ, at p 183). It is something which can be more easily recognised when found than exhaustively analysed in the abstract. Correspondingly the attempt to build up classes or categories may lead to confusion. The confusion is aggravated if the names used to identify the classes do not bear their actual meaning. Thus on the face of it a division into cases of "actual" and "presumed" undue influence appears illogical. It appears to confuse definition and proof. There is also room for uncertainty whether the presumption is of the existence of an influence or of its quality as being undue”

13. The distinction turns on how undue influence might be proved. Clearly there can be significant difficulties in establishing that mother has been subjected to overt pressure. Often in such situations any actual improper pressure being brought to bear will take place behind closed doors. The son may have made it difficult for his siblings to maintain contact with their mother and isolated her from other family members and friends.

⁵ [2002] 2 AC 773

⁶ para 92

14. There are therefore few cases which succeed in being established on proof of actual pressure being brought to bear⁷. Most cases are put on the basis that undue influence should be presumed. The starting point in looking at any presumed undue influence claim has to be the masterly analysis by the House of Lords, in particular Lord Nichols in *Etridge*. The following principles can be discerned:-

- (1) The burden of proving undue influence rests on the Claimant⁸
- (2) If the Claimant can show that there was a relationship of trust and confidence between the parties⁹;
- (3) then an evidential burden falls on the donee to produce evidence to rebut that prima facie case;
- (4) Evidence to show that the gift in question was the spontaneous act of the donor acting under an independent will, and was the result of full, free and informed thought about it will be sufficient evidence in rebuttal¹⁰.

⁷ *Drew v Daniels* [2005] WTLR 807 (CA) is a rare example where the elderly lady who had been subjected to improper pressure gave evidence which the Court accepted.

⁸ *Royal Bank of Scotland v Etridge (No. 2)* [2002] 2 AC 773, at 796c

⁹ *Royal Bank of Scotland v Etridge (No. 2)* and see the recent Court of Appeal decision in *Turki v Awadh* for a case where the Court considered that the Judge was entitled to find that the transaction between father and daughter was not one which required a transaction.

¹⁰ *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 at 133; *Allcard v Skinner* (1887) 36 Ch. D 145 at 171.

15. There are also certain categories of relationship where there is automatic protection such as a priest and congregant and solicitor and client but not spouses, adult children and parents, uncle and nephew.
16. The emphasis in a number of cases has been on the quality of the advice given to the donor. In *Hammond v Osborne*¹¹ the elderly gentleman received none but in other cases such as *Jennings v Cairns*¹² the advice was wrong, or as in *Niersmans v Pesticcio*¹³ and *Wright v Hodgkinson*¹⁴ the Court held that the legal advice given was insufficient to enable the donor to weigh the consequences of his generosity and liberate him from the presumed influence.
17. A high-water mark in this jurisdiction was the case of *Macklin v Dowsett*¹⁵ where the Court of Appeal held that the nature of the transaction itself (a commercial one but where one party was in a far stronger position than the other) can raise the presumption that it was obtained through undue influence.
18. Recent cases have perhaps shown something of a rowing back from this high-water mark. In *Coles v Reynolds*¹⁶ the Court refused to set aside both a Will it was alleged had been obtained by undue influence and a lifetime transfer. The Court found that there was not the requisite relationship

¹¹ [2002] WTLR 125

¹² [2004] WTLR 361

¹³ [2004] WTLR 699

¹⁴ [2005] WTLR 435 and see also *Goodchild v Bradbury* [2007] WTLR 463 (CA);

¹⁵ [2004] 34 EG 68

¹⁶ [2020] EWHC 2151 (Ch)

between mother and daughter. The case is interesting because the Judge found that the mother was vulnerable and relied on her daughter for financial assistance and advice but had enough independence that they were not in such a relationship of trust and confidence that undue influence would be presumed. The case is perhaps surprising in that the local authority had applied to the Court of Protection for the appointment of a deputy on the basis of possible financial abuse by the daughter against the mother.

Mistake

19. It is also worth considering whether the transaction can be set aside for mistake. In particular the gift of the mother's house if she was still living in it might be very disadvantageous from a tax point of view in terms of the gift with reservation rules for inheritance tax and the loss of the capital gains uplift on her death. The law on whether a donor (or their estate) can recover a gift mistakenly made has been comprehensively addressed in the Supreme Court case of *Pitt v Holt*¹⁷. It was held that a voluntary deed only could be set aside only in the event of there being: "a causative mistake of sufficient gravity"; the "gravity of the causative mistake to be assessed in terms of injustice – or to use equity's cumbersome but familiar term, unconscionableness".

¹⁷ [2013] 2 A.C 108

20. The court has a wide degree of discretion in determining whether or not such a mistake can be set aside or rectified:

“It must consider in the round the existence of a distinct mistake ... its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable or unjust to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case”.

The Unexplained Withdrawals

21. If these come to light during the lifetime of the mother, then the other siblings could apply to the Court of Protection to have a deputy appointed. To establish the jurisdiction of the Court of Protection it has to be established that a person lacks capacity within the meaning of the Mental Capacity Act 2005¹⁸ and it is presumed that someone has capacity unless established otherwise. Once, however, it is established the Court of Protection may appoint a deputy to manage their affairs. This may be a very useful tool if it is suspected that someone lacking capacity is being subjected to financial abuse.

22. Of course, the Court will not appoint a deputy in place of an attorney whom mother has appointed lightly. In deciding whether to appoint a deputy for property and affairs in cases where the court has found that the person who lacks capacity (“P”) does not have capacity to manage

¹⁸ Sections 1-2

these for himself the court is required to have regard to the fact that a decision of the court is to be preferred to the appointment of a deputy¹⁹. However, it is impractical for the court to take many property and affairs decisions on behalf of P and in such circumstances, *“it is almost inevitable that the court will wish to appoint a deputy to manage these on a daily basis...[as] it would be neither practical, nor in P’s best interests, for these daily management decisions to be taken by the court.”*²⁰

23. The Court in making such decisions is always guided by what is in the best interests of P. Section 4 Mental Capacity Act 2005 provides that all the relevant circumstances must be considered but lists a number of factors which may be of particular significance. In cases where an attorney is abusing the trust of P, it ought not to be difficult to persuade the Court that a deputy should be appointed.

24. There may also be grounds for attacking the Lasting Power of Attorney as well, perhaps on the grounds that P lacked the capacity to enter into it.

25. The task of a deputy appointed in such circumstances is to investigate the transactions which have occurred while the attorney was in place to ascertain whether P had capacity to make them at the time or was subject to undue influence and perhaps to seek the directions of the Court of Protection as to whether such a claim should be pursued to set aside any gifts or transactions made. Such an application bears considerable

¹⁹ s.16(4) MCA 2005

²⁰ see Heywood and Massey: Court of Protection Practice, 8-007.

similarities to Beddoe relief where a trustee seeks the directions of the Court as to whether to litigate a particular matter at the expense of the trust fund. If the Court of Protection thinks that proceedings should be brought, the deputy can be appointed to act as litigation friend to P.

26. An account might also be sought against the son who of course is a fiduciary when acting under the Lasting Power of Attorney to account for his dealings with his mother's affairs.

After Death

27. It is often not until someone dies that other beneficiaries discover that transactions have been entered into by the Deceased or their monies have been used improperly which has reduced the estate.
28. The right to have transactions set aside and to seek an account vests of course in the personal representatives of the deceased and it is not uncommon to find that the very person who has benefitted during the lifetime of the deceased will be appointed. The beneficiaries of the estate may be entitled to bring the action by way of derivative action if special circumstances can be shown²¹ and the fact that the executor was himself implicated in the wrongdoing would be such a reason. Alternatively, an

²¹ Lewin on Trusts 20th edition para 47-008

objection could be raised to the son taking the grant²² or an application could be launched to remove him²³.

Summary

29. None of the above courses of action is easy. Early intervention is often of considerable importance to prevent financial abuse and local authorities are undoubtedly more aware of it and will themselves apply for the appointment of deputies. But that only assists if the elderly person lacks capacity and many are vulnerable without being incapable of making decisions for themselves.

30. The insidious way in which many of those guilty of financial abuse isolate the vulnerable person is key to their success. If that person lacks capacity the Court of Protection can direct that others have access and can put in place safeguards both from a welfare and property and affairs basis. However, in other cases, it may be extremely difficult to prevent financial abuse and it is often only after the event that the position can be rectified.

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²² Under section 116 Senior Courts Act 1981

²³ Section 50 Administration of Justice Act 1985