

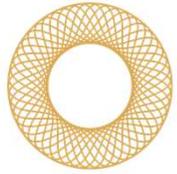
Outer Temple

How do you gain an edge for your client when contending with attorneys suspected of financial abuse and recovering misappropriated monies?

Talk for White Paper Conference

Thursday 10 November 2021

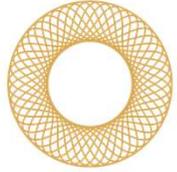
David E. Grant



Outer Temple

Introduction - increasing problem

- Increasing number of applications for LPA
 - 273,583 in 2013
 - 525,915 in 2015
 - c920,000 in 2019-20 (decrease to 691,746 in 2020-21)
- Increasing number of investigations by the OPG
 - 1871 in 2017/18
 - 2883 in 2018/19
- Increasing number of applications by OPG to censure or remove attorneys:
 - 465 in 2017/18
 - 721 in 2018/19
- Predominantly concerned with property & financial affairs LPAs

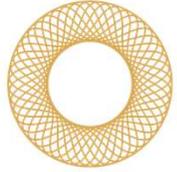


Outer Temple

Ever-present risk of abuse

- Historic concerns about EPAs
- Less control of LPAs than deputies
- No ability to call in a bond
- Majority of concerns with individuals rather than trust corporations?





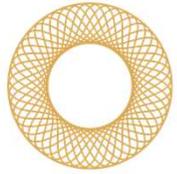
Outer Temple

Likely egregious conduct

- Spending donor's money as if it were attorney's own
- Mixing funds
- Investments made in attorney's name
- Making poor investment decisions
- Not keeping receipts
- Taking decisions unilaterally which require court approval
- Transferring assets out of the jurisdiction

Such action is prima facie contrary to donee's authority and/or not in donor's best interests

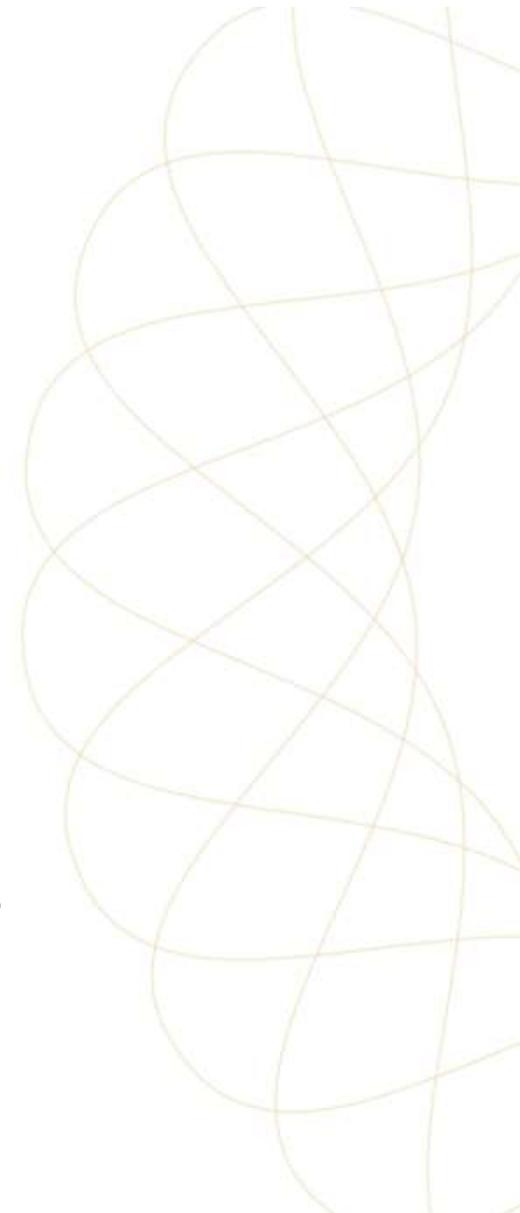


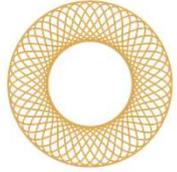


Outer Temple

Summary of options

- Seek the revocation of the attorney's appointment
- Seek revocation of entire LPA
- Appoint deputy
- Suspend the LPA pending investigation
- Interim freezing or other injunction
- Other interim action
- Seek declaration that attorney not acted in best interests
- Criminal proceedings

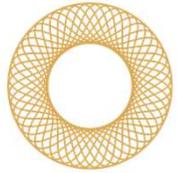




Outer Temple

Difficulty of evidencing wrongdoing

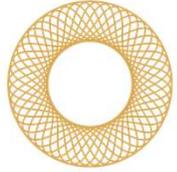
- Often wrongdoing only comes to light after some time
- Unlike other fiduciaries, there may well be fewer professionals involved and less scope for whistleblowing.
- Inherent difficulties if donor does not have capacity
- Is there increasing sophistication of attorneys? Lack of reported cases



Outer Temple

How to gather information

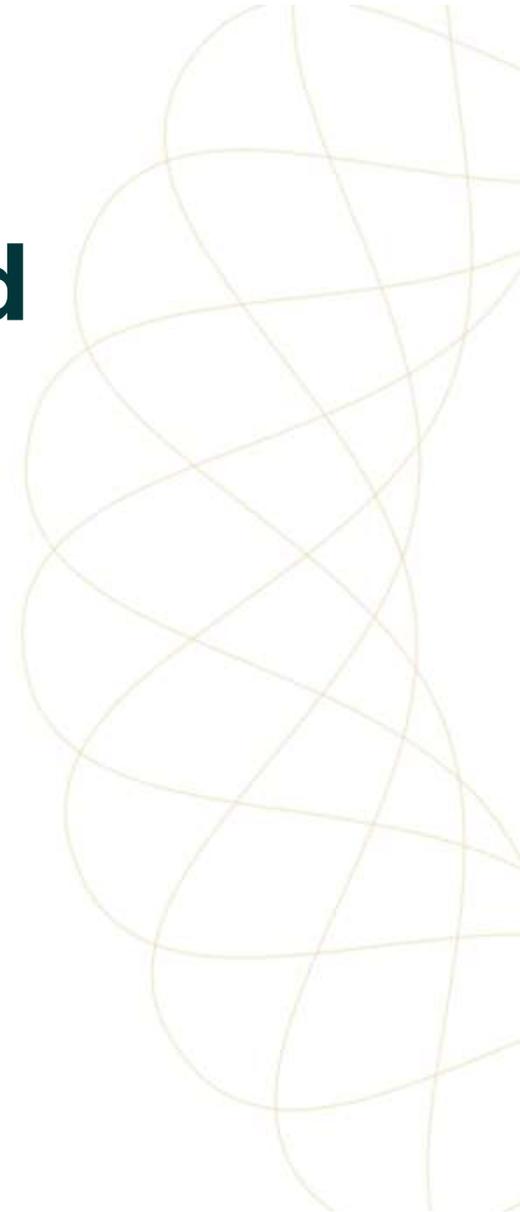
- Easier if donor has capacity
- Warning signs – unpaid nursing fees and other liabilities
- Care home manager contacts council - *Re Harcourt: The Public Guardian v A* [2012] WTLR 1779
- Complain directly to Office of Public Guardian
- *R v TJC* [2015] EWCA Crim 1276 – sole attorney's brother saw bank statements and contacted OPG
- Court of Protection General Visitor to attend
- A Safeguarding Strategy for Recognising, Preventing and Dealing with the Abuse of Older and Vulnerable People.

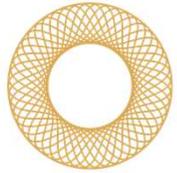


Outer Temple

Statutory and other background

- Mental Capacity Act 2005
- Mental Capacity Act 2005: Code of Practice
- Court of Protection Rules 2017
- s37 Senior Courts Act 1981
- Inherent jurisdiction

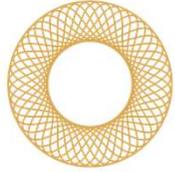




Outer Temple

MCA 2005 – COP's powers

- s45 – establishment of (new) Court of Protection
- s47 – general powers and effects of orders – COP has same powers &c as the High Court
- s15(1)(c) – powers to make declarations as to lawfulness of certain acts
- s16(2) – powers to make decisions and appoint deputies
- s16(5) – powers to make further orders/directions as necessary or expedient for giving effect to, or otherwise in connection with, order under s16(2)
- s22(3) & (4) – powers to revoke instrument or LPA
- s23 – powers re operation of LPA – directions re rendering of reports and records
- s48 - interim orders and directions



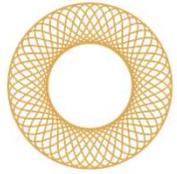
Outer Temple

Code of Practice & Court of Protection Rules 2017

- See summary of Code of Practice in *Public Guardian v CH* [2016] EWCOP 9 at [27]

Court of Protection Rules 2017

- 4.1 – general rule is that hearing to be in private (cf CPR presumption of open justice & test of necessity for sitting in private & anonymity CPR 39.2(3) & (4))
- 21.4 - Enforcement of judgment, order or undertaking to do or abstain from doing an act
- PD21A, para 1 – powers of committal for non-compliance



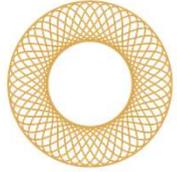
Outer Temple

Other powers

- s37 Senior Courts Act 1981

"Powers of High Court with respect to injunctions and receivers.

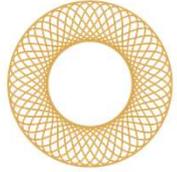
(1)The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so"



Outer Temple

Orders to suspend attorney

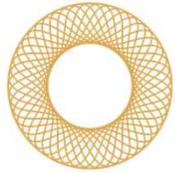
- s48 MCA 05 – interim orders and directions
- Suspend appointment of attorney
- Appoint interim deputy – investigate accounts
- *re Buckley: Public Guardian v C* [2013] EWHC 2965 (COP) – OPG's application for interim order – F & P LPA be suspended until further notice
- Orders granted:
 - bank account frozen
 - Donee to provide full account of dealings, receipts/invoices



Outer Temple

Freezing & similar injunctions in COP

- No reported authority on the point
 - See Lush "*The Mental Capacity Act and the new Court of Protection*" International Journal of Mental Health and Capacity Law, 2005
- Argument that COP has jurisdiction
 - s16(5) "*make such further orders or give such directions.....as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order.....made by it under subsection (2)*"
 - *A Local Authority v SF* [2020] EWCOP 19 at [32, 33]
the Court of Protection does indeed have the power to grant injunctive relief in support of and to ensure compliance with its best interests decisions and its orders.
 - Keehan J discharged injunction made under inherent jurisdiction of High Court and substituted it with one in same terms made by COP



Outer Temple

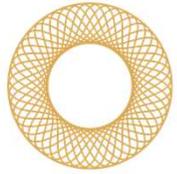
Freezing & other injunctions in COP

Jurisdictional points of doubt

- How does COP have jurisdiction if no extant proceedings
- *SF* limited to consideration of injunctions for the purposes of safeguarding best interests of an incapacitous person –
- If attorney suspended, can/should application be in COP
- What about freezing injunction against third parties

Practical points of uncertainty

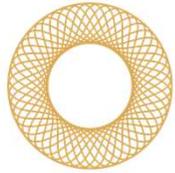
- Appropriate applicant
- Power to make orders without notice? Return date?
- Q of cross-undertakings
- What evidence of risk of dissipation required? Purpose of freezing injunctions is to restrain D from evading justice – see *Arcelormittal USA LLC v Ruia* [2020] EWHC 740 (Comm) at [217]
- Need clear evidence and real risk of injustice if relief is refused



Outer Temple

Freezing injunction in Chancery Division

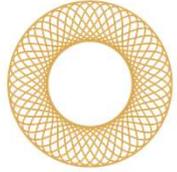
- Application in COP may not be possible/desirable. Potential for application to be brought in ChD
- Even if COP has jurisdiction, act of disclaiming brings to end COP's jurisdiction save for residual jurisdiction re costs
- Initial order in High Court, then transfer to COP
- If donor without capacity, application by litigation friend – CPR 21.1 – 21.6
- Cases where appointment of Official Solicitor not practical
- Question of joining Office of the Public Guardian
- If P dead, no such issues over appropriate court



Outer Temple

Recovery of assets

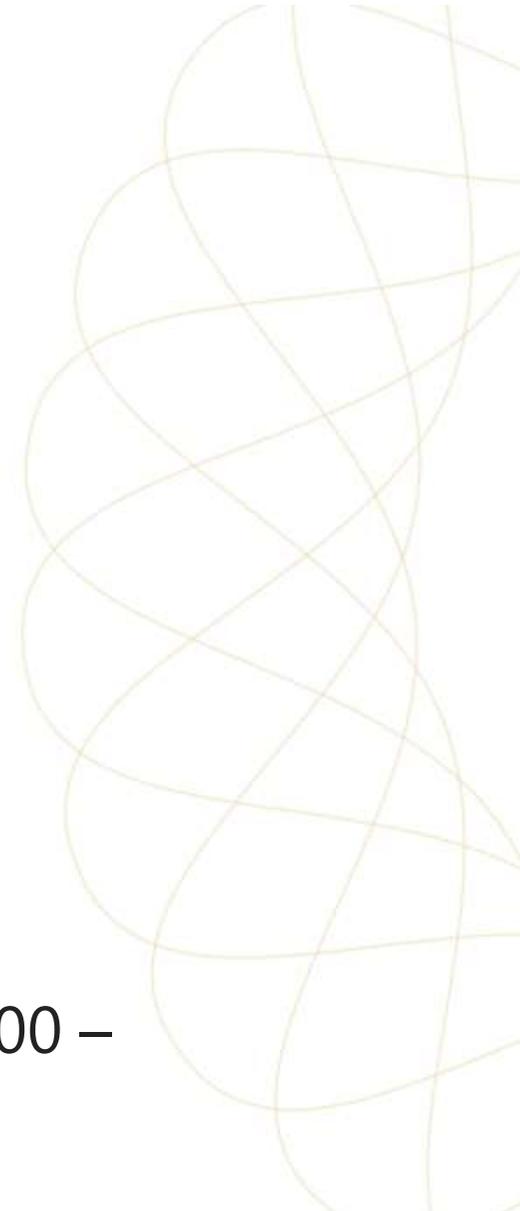
- COP no power to order repayment directly from donee
- Can order money to be deducted from donee's share of residuary estate - *Re HH* [2018] EWCOP 13. £73k approved. £27k to be repaid via deduction (no power to order repayment directly)
- repayment order *BB v PP (by the Official Solicitor as litigation friend)* [2015] EWCOP 93, application for retrospective ratification by donee
- Orders in parallel proceedings - *Clarke v Allen & Anor* [2019] EWHC 1193 and 1194 (Ch). Executor/donee was ordered to forfeit £80k of share of residue

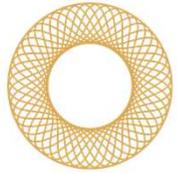


Outer Temple

Criminal Proceedings

- Offences under s1(2), 2, 3 & 4 Fraud Act 2006
 - False representation
 - Failing to disclose information
 - Abuse of position
- Example of cases - *R v TJC* [2015] EWCA Crim 1276
- Some attorneys have been sentenced
- Also attorneys have been committed for contempt
- S148 Powers of Criminal Courts (Sentencing) Act 2000 – restitution orders

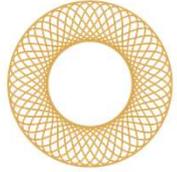




Outer Temple

Termination of LPA/attorney

- revocation by the donor s13(2)
- disclaimer by the attorney – s16(a)
- revocation by operation of law – s16(b) and (c)
- revocation by the Court of Protection of attorney or entire LPA – s16
- *Re Harcourt: The Public Guardian v A* [2012] WTLR 1779
- *re Buckley: Public Guardian v C* [2013] EWHC 2965 (COP)
- Consideration by COP of options even if OPG not seeking revocation - *BB v PP (by the Official Solicitor as litigation friend)* [2015] EWCOP 93



Outer Temple

Next steps: Jurisdiction of deputies

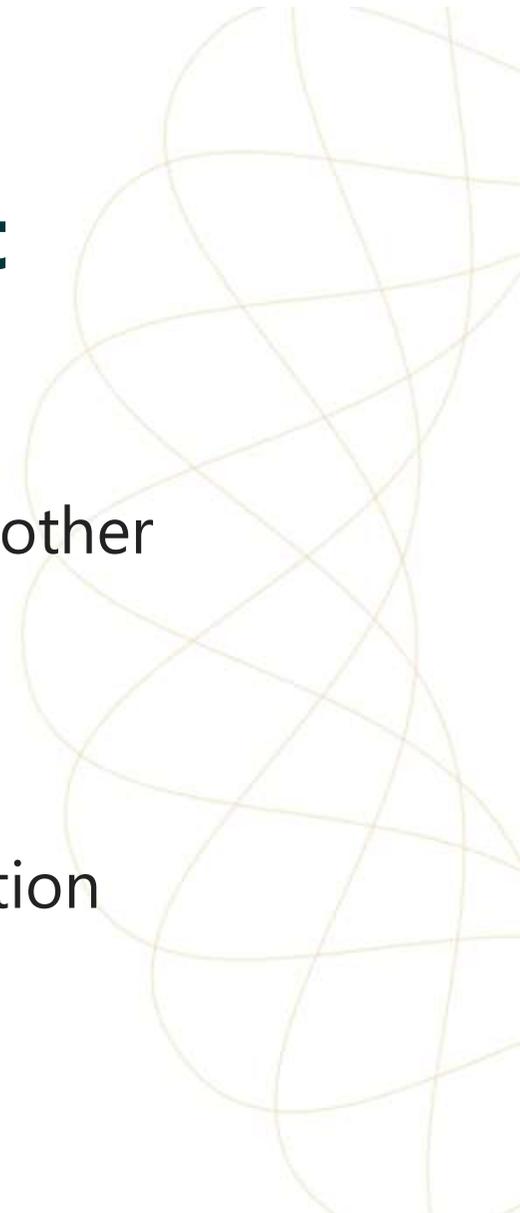
- In cases of wealthy families almost inevitable assets will be in different jurisdictions
- COP deputy can manage assets/property held abroad
- Potential issues over recognition in foreign jurisdiction of Deputyship Order or LPA

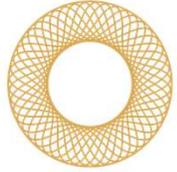


Outer Temple

Ways of avoiding/shortening court proceedings

- Question of mediation/discussion
- Outline range of possible options and financial and other consequences
- Benefit of interim order in any case
- Invite attorney to disclaim
- OPG requests attorney to seek retrospective ratification

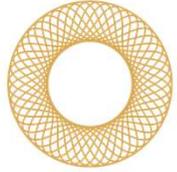




Outer Temple

Future developments

- Ministry of Justice and Office of the Public Guardian consultation July 21 "*Modernising Lasting Powers of Attorney*"
- Consultation now concluded, awaiting report (early 2022)
- Focus on examining entire process of creating and registering an LPA with view to introducing a mainly digital service whilst boosting the OPG's powers to prevent fraud and abuse
- No consideration of instant issues



Outer Temple

Concluding remarks

David E. Grant

David.Grant@outertemple.com

+44 (0) 207 353 6381

