



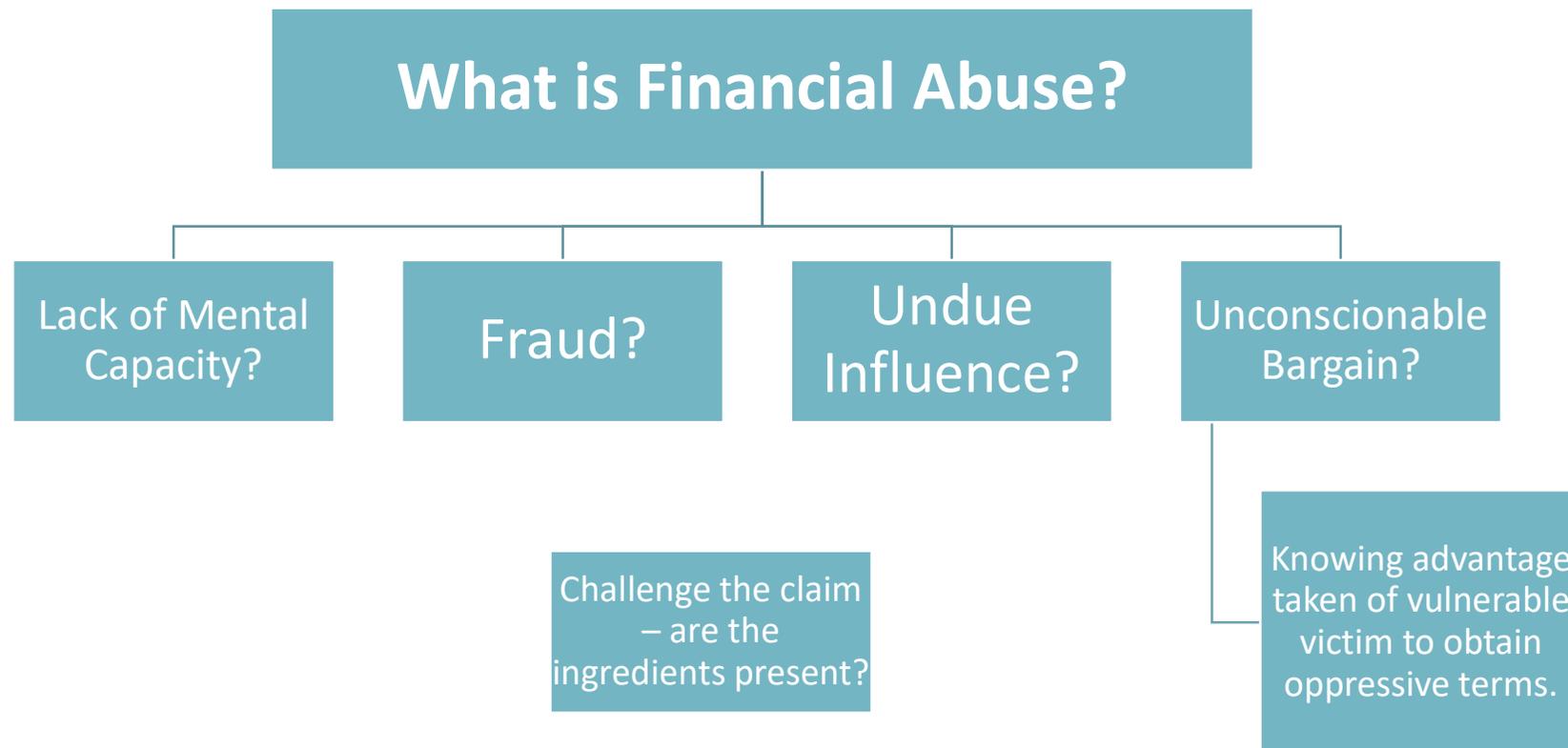
Financial abuse

Weighing up all the tactical scenarios, how do you control - and overcome - the difficulties with financial abuse of the elderly cases?

Matthew Hodson - Barrister

October 2020

Financial Abuse



Undue Influence – Probate Doctrine

Edwards v Edwards [2007] W.T.L.R. 1387, @47:

- No presumptions apply
- Burden on accuser. “What must be shown is that the facts are inconsistent with any other hypothesis.”
- Coercion or Fraud. “Coercion is pressure that overpowers the volition without convincing the testator’s judgment.”
- ***Scott v Hubbard***: Proof of coercion, not just persuasion? [2011] EWHC 2750; ***Chin v Chin*** [2019] EWHC 523

Undue Influence – Equitable Doctrine

- ‘Actual Undue Influence’
- Blackmail, threats, coercion, misrepresentation
- ***Etridge*** – all the circumstances:

“the nature of the alleged undue influence, the personality of the parties, their relationship [and] the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship”

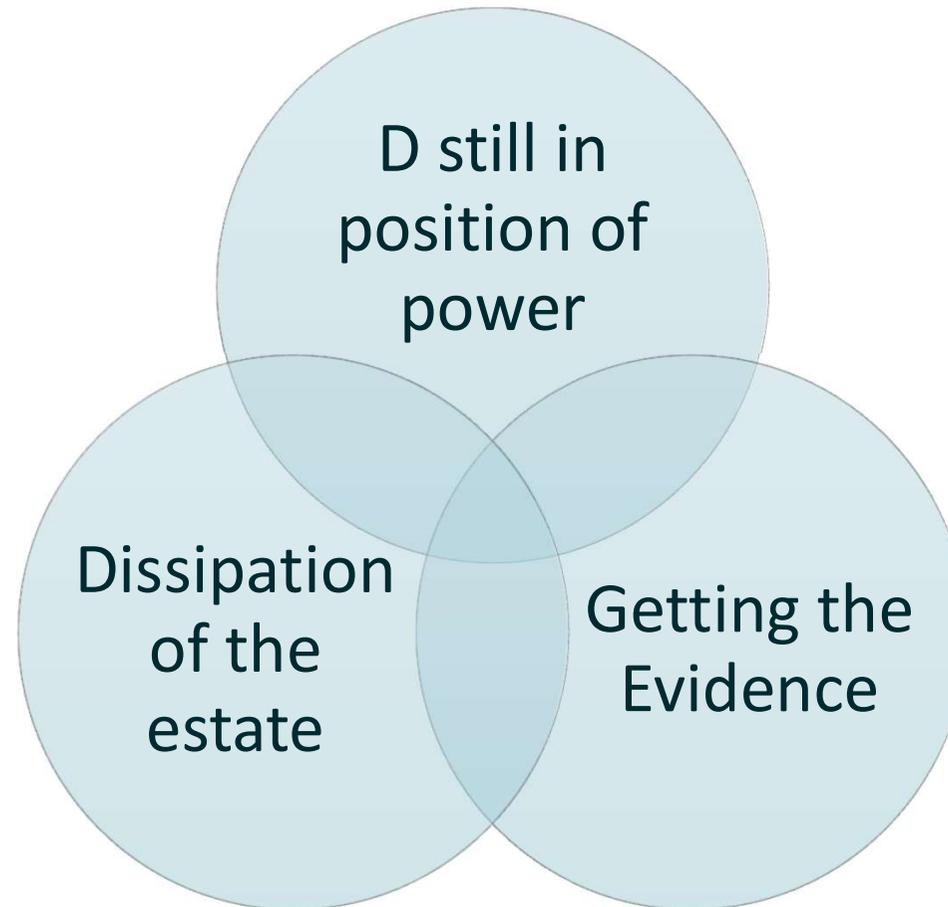
Undue Influence – Equitable Doctrine

‘Presumed Undue Influence’

Two requirements to shift the burden of proof:

- (1) Relationships of influence
 - Special Cases: parents; trustees; spiritual, medical or legal advisors
 - Any other relationship of influence on the facts: banker; spouse
- (2) Transactions calling for explanation
 - Substantial gift, transaction at undervalue, favourable loan

Potential Difficulties



Removing the Power

Attorneys

- Option 1: Revoke the LPA, if there is capacity and inclination.
- Option 2:
 - Section 22(3) Mental Capacity Act 2005 if:
 - Obtained by fraud / undue influence; or
 - Not in P's best interests
 - See *Re AMH* [2015] EWCOP 70

Removing the Power

Deputy

- Application to remove a deputy made to Court of Protection
- Section 16(7)&(8) Mental Capacity Act 2005:
 - Contravening authority; or
 - Not acting in P's best interests
- N.B. Section 50:
 - Permission of COP required for applications by persons other than P or the Deputy.
 - Will consider the applicant's relation to P, reasons for application and best interests of P

Preventing Dissipation

- Trustees and Executors

- Proprietary Injunction?
- *Clarke v Donaldson & Ors* [2003] EWHC 2898

10. What is designed and desired by the order which is being sought by Mr. Clarke is to preserve the assets of the estate so far as they now exist, and to prevent the dissipation of those assets, but, by dissipation, not necessarily meaning going down to the Post Office and putting them all over the counter on a massive bet on the national lottery, but simply dealing with them in such a way that it becomes very difficult to trace what has happened to those assets.

Preventing Dissipation

- Trustees and Executors

- Proprietary Injunction?
- *Clarke v Donaldson & Ors* [2003] EWHC 2898

19. It seems to me that it is right to say that this order which is being sought, and indeed which is in part a continuation of an earlier order which has been granted already in these proceedings, is not a freezing order. It is an order of a proprietary nature which affects purely the assets which form part of the late Mrs. Ludlow's estate, [...] It does not in any way freeze the free assets of Mr. Ronald James Davey, it only prevents him dealing with those parts of his free assets which have been derived from the estate of the late Mrs. Ludlow.

Preventing Dissipation

- Trustees and Executors

- Proprietary Injunction?
- *Clarke v Donaldson & Ors* [2003] EWHC 2898

20. That particular distinction is one of some considerable importance. It is not therefore necessary in the granting of such an order for me to be satisfied in any shape or form that there has been some attempt by Mr. Davey to dissipate those assets. This is not seeking to secure funds so that a judgment will bite, it is seeking to secure property so that the trust will be properly administered in the event, which may or may not happen, Mr. Clarke wins his probate claim.

The Evidence – Claimant’s Case

The Dishonest Attorney

- 90 year old client with son as attorney pursuant to LPA.
- Investigations showed:
 - Substantial misuse of bank accounts
 - Fraudulent trust over property
- Revoked LPA
- Swift action to create new will and take full proof of evidence – just in time.
- But watch out: capacity & UI. Golden Rule and very careful notes.

The Evidence – Defendant’s Side

The Favoured Daughter

- Daughter with three siblings receives mother’s residuary estate amounting to 90% while others get only a specific legacy. Previous will provided for equal split.
- Daughter was sole carer; mother developed Alzheimer’s in final years.
- Daughter, not as deputy or attorney, had been spending from a joint account and is accused of taking advantage.

The Evidence – Defendant’s Side

Supporting the Defendant’s Case

- Consider the bigger picture, especially in full time care cases – does a more detailed day to day account show the client in a more realistic light?
- What witnesses might you be able to find? Carers, cleaners, colleagues, family? What about professionals?
- Is there a good reason for the transaction in question?
- Are there helpful previous wills?

The Evidence – Defendant’s Side

Evaluate the Claimant’s Evidence

- For undue influence cases, is there really more than mere ‘persuasion’? ***Scott; Re Devillebichot*** [2013] EWHC 2867
- Is their evidence good enough to plead UI / fraud, bearing in mind professional duties?

The Evidence – Defendant’s Side

- High threshold for capacity cases – ***Banks v Goodfellow***:

“a testator shall understand the nature of the act and its effects [...] the extent of the property [...] comprehend and appreciate the claims to which he ought to give effect [...] no disorder of the mind shall poison his affections, pervert his sense of right [...] no insane delusion shall influence his will in disposing his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”

- The **‘Golden Rule’** – were there solicitors involved, what did they do? What other evidence on capacity is available?

Matthew Hodson

matthew.hodson@gateouselaw.co.uk

+44 (0)207 242 2523