

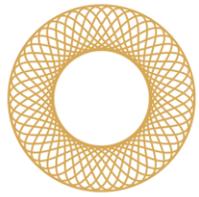
Outer Temple

White Paper Talk

Financial abuse

*What is realistic and achievable when dealing with financial abuse cases, including predatory marriages, dodgy attorneys and the Quincecare duty? **Some thoughts***

Wednesday 7th December 2022
David E. Grant KC



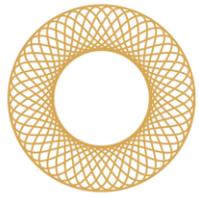
Scope of the talk – what is financial abuse

Predatory marriages, dodgy attorneys, *Quincecare* duty

Event, cause of action and response

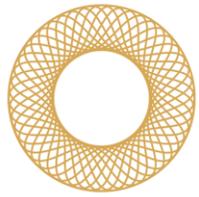
Considerations:

- Inter vivos or testamentary disposition
- Question of capacity
- Can the testamentary disposition be revoked
- Who is the claimant



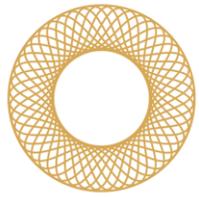
Structure of the talk

- General observations on difficulties of evidencing wrongdoing
- Attorneys
- Deputies
- Testamentary dispositions
- Case study – *re B*
- Predatory marriage
- *Quincecare* duty



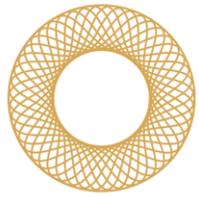
General difficulty of evidencing wrongdoing

- *"It is in of the nature of undue influence that it goes on when no-one is looking"*
- Often wrongdoer is a trusted position (carer, attorney etc)
- Often wrongdoing only comes to light after some time
- In case of attorneys, 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 caselaw



Worthy of the candle?

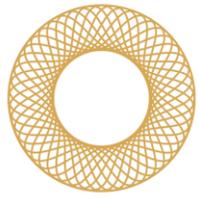
- Recovery of misappropriated moneys often beset by difficulties
 - cost of discovering the evidence
 - capacity of the donor
 - jurisdictional limitations of CoP
- Litigation of probate disputes diminishes the finite pot
- Proportionality and commerciality balanced by strong feelings. Motivation to honour intention and prevent abuse



Attorneys: Likely egregious conduct

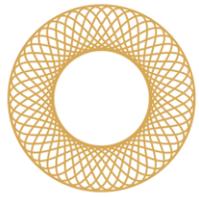
- Spending donor's money as if it were attorney's own
- Mixing funds
- Investments made in attorney's name
- Making poor investment decisions
- Not keeping receipts
- Taking decisions unilaterally which require court approval
- Transferring assets out of the jurisdiction

contrary to donor's authority/not in donor's best interests



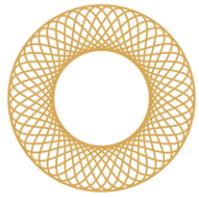
Summary of options re attorneys

- Revoke LPA if capacity/apply to CoP under s22(3) Mental Capacity Act 2005 if fraud/undue pressure or donee contravened authority/not acted in best interests
- If capacitous, make new will
- Appoint deputy
- Suspend the LPA pending investigation
- Interim freezing or other injunction (query if CoP has jurisdiction)
- Seek declaration that attorney not acted in best interests
- Criminal proceedings



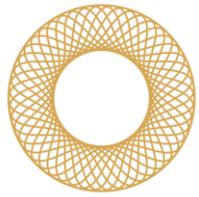
Attorneys: Recovery of assets

- 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.
- 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). 1975 Act claim. Executor/donee was ordered to forfeit £80k of share of residue – see [257]



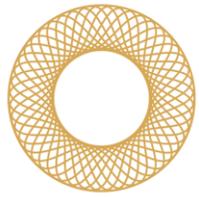
Costs in CoP

- Under r19.2 COPR 2017 the general rule is that the costs of the proceedings shall be paid by P or charged to P's estate.
- In some cases COP will readily made a different order
- However, fact that court is critical of attorney's conduct does not mean that will depart from general order – see *re HH* [117]



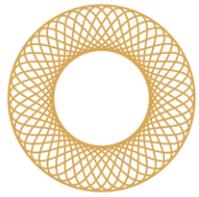
Deputies

- Applications to remove deputies – s16(7) & (8) MCA 05 if contravened authority/not acted in P's best interests
- (cases of replacing deputies less common than attorneys)
- Call on security bond
- Possibility that acts may be retrospectively ratified – see over



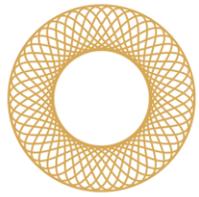
Deputies - ratification

- *Riddle v Public Guardian* [2021] EWCOP 38
- Question of retrospective ratification of acts of a deputy
- No express provision in MCA 2005 but jurisdiction to be found in combination of s15(1)(c) & s19(4) (declarations as to lawfulness of acts and appointment of deputies)
- Established practice of ratification re LPA and deputyship cases e.g. *Re PP* [2015] EWCOP 93 , *Re GM* [2013] EWHC 2966 (COP), *WP (deceased) and EP* [2015] EWCOP 84.



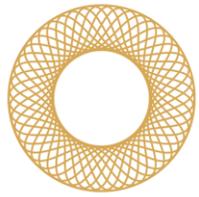
Predatory marriage – comparison

- Forced marriage is where X is forced against will to marry – young females from immigrant communities predominantly affected
- Criminal & family law definitions – s121 Anti-social Behaviour, Crime and Policing Act 2014, s63A Family Law Act 1996
- Where W lacks capacity to marry at time of marriage, it will necessarily be a forced marriage
- Often seek decree of nullity rather than divorce because of stigma in some societies



Predatory marriage - predicament

- Typically younger person takes advantage of older person (often a man), whether incapacitous or merely vulnerable
- Consequences:
 - Marriage automatically revokes pre-existing will: s18 Wills Act 1937
 - S12(1)(c) Matrimonial Causes Act 1973 – marriage by person lacking capacity is voidable, not void
 - Annulment only effective prospectively: s16 MCA
- Only parties to a marriage can challenge its validity. No recourse for challenge after death



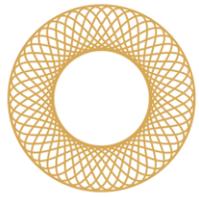
Predatory marriage - prevention & responses

Preventing predatory marriage

- Inherent jurisdiction of the family court to intervene in the case of capacitous but vulnerable individuals – see *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam)

Response to predatory if vulnerable person alive

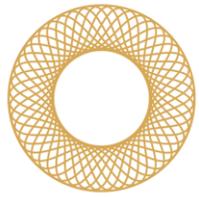
- Does M have sufficient capacity to execute codicil to republish will revoked by marriage?
- Application for declaration of incapacity – no effect on revocation of will prior to marriage
- Application for statutory will



Testamentary dispositions

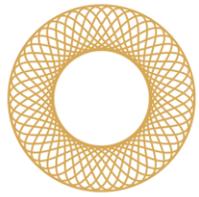
4 principal bases for resisting a will potentially the product of financial abuse

- Capacity
- Knowledge and understanding
- Undue influence
- Fraudulent calumny



Deployment of arguments

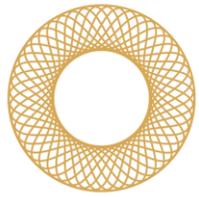
Case	Capacity	Want of knowledge and approval	Undue influence	Fraudulent calumny
<i>Edwards 2007</i>	N	N	Y	Y
<i>Nesbitt 2013</i>	Y	N	N	Y
<i>Hayward 2016</i>	Y	Y	N	Y
<i>Christodoulides 2017</i>	N	N	N	Y
<i>Rea 2019</i>	N	Y	Y	Y
<i>Re B 2019</i>	Y	N	Y	Y



Financial abuse - coercion & misleading

Financial abuse broad enough to encompass undue influence and fraudulent calumny

- Is fraudulent calumny a species of undue influence?
- See *Nesbitt v Nicholson*, *Christodoulides v Marcou*, Tristam & Coote's Probate Practice, & Selway "*Fraudulent Calumny*", 2018
- but fraud misleads while undue influence coerces

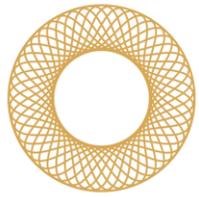


Potential limits to fraudulent calumny

Uncertainty:

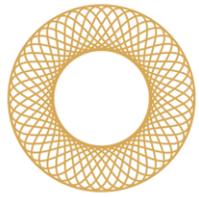
- whether the representor must have made the statements in question with the purpose of inducing the testator to alter his testamentary disposition
- whether the representor must benefit from the change in testamentary disposition
- what is the test of knowledge
- must the natural object of the testator's bounty, who has suffered as a result of the poisoning, be completely cut out of from the testator's will
- must the natural beneficiary have been previously provided for in a prior will
- what is the causation test

Only first and last questions considered by the courts



Case study (1) –*re B*

- a. Previous will 1998 (also EPA)
- b. Attempts from 2015 to make new arrangements
- c. New will 2016 - £1m pecuniary legacy to carer
- d. Grounds for challenging will – incapacity, undue influence, fraudulent calumny



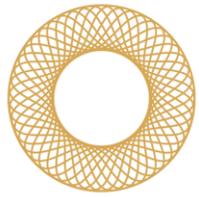
Case study (2) - classic scenario

From Mary Poppins



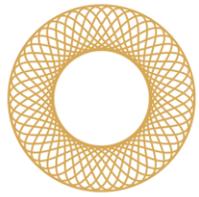
To Cruella de Vil





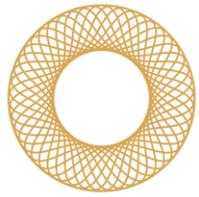
Case study (3) – chronology

- 2016 private client solicitor (Mr G) attends regularly (1 of 4 experienced solicitors to have attended 2015/2016)
- Mr G concerned as to undue influence – generosity of legacy
- Cousin (executor) concerns over legacy to Ms P "*I regret not saying to [Col B] that the legacy...was too large*"
- Prof H attends on several occasions - diagnoses dementia & assesses fluctuating capacity
- Jan & Feb Letter of Wishes, April LPA, 1st & 2nd codicils
- May 2016 Will Meeting, recorded



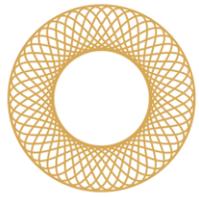
Case Study (4) – Steps post will

- Remove Col B from house, take to live with niece
- Seek to register 1998 EPA (which Col B opposed)
- Referral from National Crime Agency for Registered Intermediary assessment
- Allegations of undue influence made to Universal Aunts, social services, Disclosure & Barring Service, NHS, private doctors



Case Study (5) – Steps post will ctd/

- Reported matter to Police – allegations of fraud by abuse of position, theft. Police investigation
- Access to & analysis of emails and web history of Ms P
- Application in CoP for the authorisation of a statutory will to reduce legacy to Ms P to £50k
- Col B's death concludes CoP's involvement
- Grant ad colligenda bona
- Probate proceedings, resolved 2019



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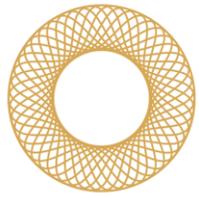
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Financial Abuse – Recovery from banks & the *Quincecare* duty

Relevant if:

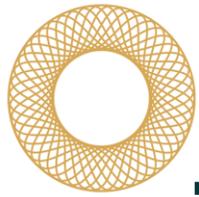
- no proprietary injunction in place
- donee has dissipated assets





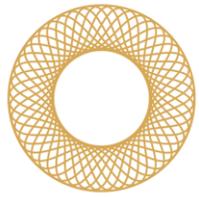
Essence of the *Quincecare* duty

- duty on a bank not to follow a customer's instructions where the relevant bank is "put on enquiry" that it may in fact facilitate a fraud on the customer
- Test of enquiry/notice:
"reasonable grounds for believing that the order was an attempt to misappropriate funds"
- duty can be excluded by contractual terms
- duty is *"carefully calibrated"* and rests on a *"somewhat slender foundation"*



Internal fraud on a customer perpetrated by an agent

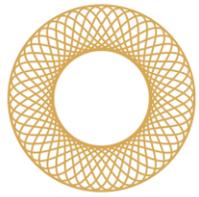
- *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All ER 363 (unsuccessful) – genuine instruction, entitled to give, but constituted fraud
- *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 [2020] A.C. 1189 (successful)
- *Federal Republic of Nigeria* [2022] EWHC 1447 (Comm), 14 June 2022 (unsuccessful)



Expansion – not limited to internal fraud 1

Aegis Resources DMCC v Union Bank Of India (DIFC) Branch [2020]
DIFC CFI 004 (11 July 2021)

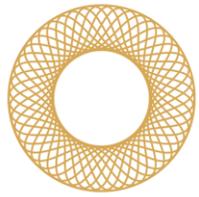
- Fraudster hacked email and sent instructions (previously email instructions generally accompanied by fax and phone call)
- 4 fraudulent payment instructions. Payment in first two. 3rd declined (insufficient funds). 4th recognised by bank as fraudulent. Payment not made, Aegis was alerted
- claim determined on mandate basis – Bank in breach of facility by giving effect to unauthorised payment requests
- Also upheld (obiter) claim that Bank in breach of duty to exercise reasonable care



Expansion – not limited to internal fraud 2

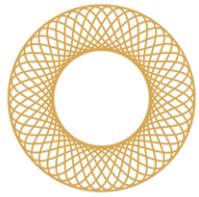
Philipp v Barclays Bank UK Plc [2022] EWCA Civ 318

- C victim of authorised push payment (“APP”) fraud - deceived by a fraudster into making payments from her account, believing for a legitimate purpose.
- The Court of Appeal overturned finding of summary judgment
- Ratio – [78] "*as a matter of law the duty of care identified in Quincecare, which is a duty on a bank to make inquiries and refrain from acting on a payment instruction in the meantime, does not depend on the fact that the bank is instructed by an agent of the customer of the bank.*"
- [76] "*... the right way of looking at this case is that the Quincecare duty is not limited to agents but applies in any case in which the bank is on inquiry that the instruction is an attempt to misappropriate funds.*"
- CA clearly thought potential claim on the facts



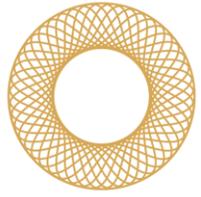
Limits – only concerned with customer/bank duty. No duty to 3rd party

- *Royal Bank of Scotland International Ltd v JP SPC 4* [2022]
UKPC 18 (12 May 2022)
- No duty of care to beneficial owners of monies held in account of bank's customer
- Investment fund established lending scheme
- Loans advanced through Isle of Man co which held 2 accounts with RBS



Potential application here

- Vulnerable customer transfers money under the influence of or being misled by someone else – analogy with APP fraud
- Attorney transfers money
- No possibility of claim by beneficiary/any other person – see *JP SPC 4*
- How would one go seek to establish that bank on notice?
 - Frequency of payments
 - Amount
 - Destination
 - Means of request

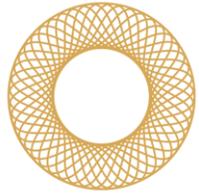


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Concluding remarks & questions





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Thank you

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