

Financial Abuse under a Power of Attorney: Post death investigations and claims

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Case study: (*Biria v Biria* [2024] EWHC 121)*

- Mr B had lived, in his home with H and N
- A (the eldest son) had long suspected financial abuse
- Before death, COP proceedings to assess Mr B's capacity and seek further orders. Third party appointed Deputy
- H and N refuse to cooperate and H is found to be in contempt
- Post death disclose a later Will, witnessed by a notary
- Very substantial assets (£10m+) missing.

*Credit to Nicola Bushby @Boodle Hatfield for the actual work in this case



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Issues to consider:

1. Gaining control of the estate
2. Investigations
3. Claims
4. Defences
5. Recovering assets
6. Tax



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Gaining Control of the Estate

- Ad colligenda grants
- Claims to be appointed executor/administrator (s116/s50)
- Interim appointment pending probate proceedings (s117)
- Third party administrator?
- Dodgy Wills



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Investigations



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Investigations

- Banks and Financial Institutions
- Land Registry (including the underlying documents)
- Conveyancing and Will files
- Mandatory Orders in claims to remove / probate proceedings
- Freezing injunctions / Search orders
- Use of information obtained in COP proceedings



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Claims

What liability does an attorney have for financial abuse?

- Liability for payments made without authority
- Abuse of fiduciary duties
- Fraud

Third parties:

- Recipients
- Dishonest assisters
- Banks and financial institutions



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Defences

- Dodgy Wills
- The power to make gifts (next)
- Payments made in 'best interests' / within terms of the power
- Authorisation / ratification



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Defences

Section 12 MCA 2005:

Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).

(2) The donee may make gifts—

- (a) on customary occasions to persons (including himself) who are related to or connected with the donor, or
- (b) to any charity to whom the donor made or might have been expected to make gifts,

if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.



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Defences

A further thought about ‘gifts’:

“The rule against double portions”

See e.g. *Sheron v Sheron* [2021] EWHC 2526 applying *Kloosman v Aylen* [2013] EWHC 435



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Recovering Assets



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Recovering Assets

- Bankruptcy
- Charging orders and enforcement
- Tracing claims and claims against third parties
- Claims in other jurisdictions



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And finally: Taxation

If the payments are valid gifts:

- Capital gains tax (e.g. on transfers of a property)
- IHT is payable by the recipient
- And will use up available NRBs



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