

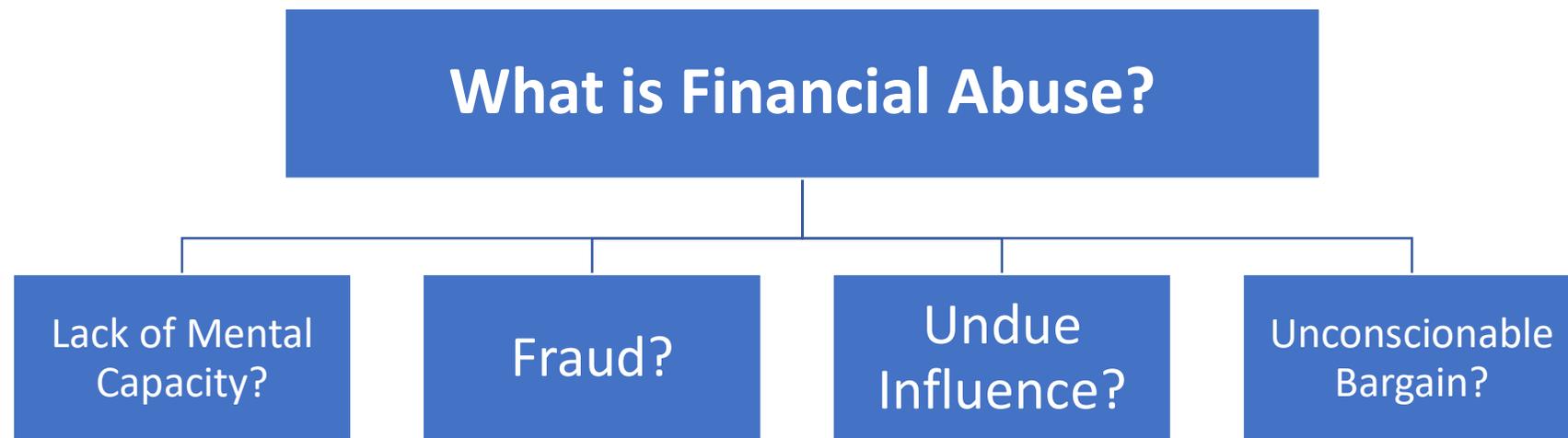


# How do you gain an edge for your client when contending with attorneys / deputies / executors / trustees suspected of financial abuse and recovering misappropriated monies?

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# Financial Abuse



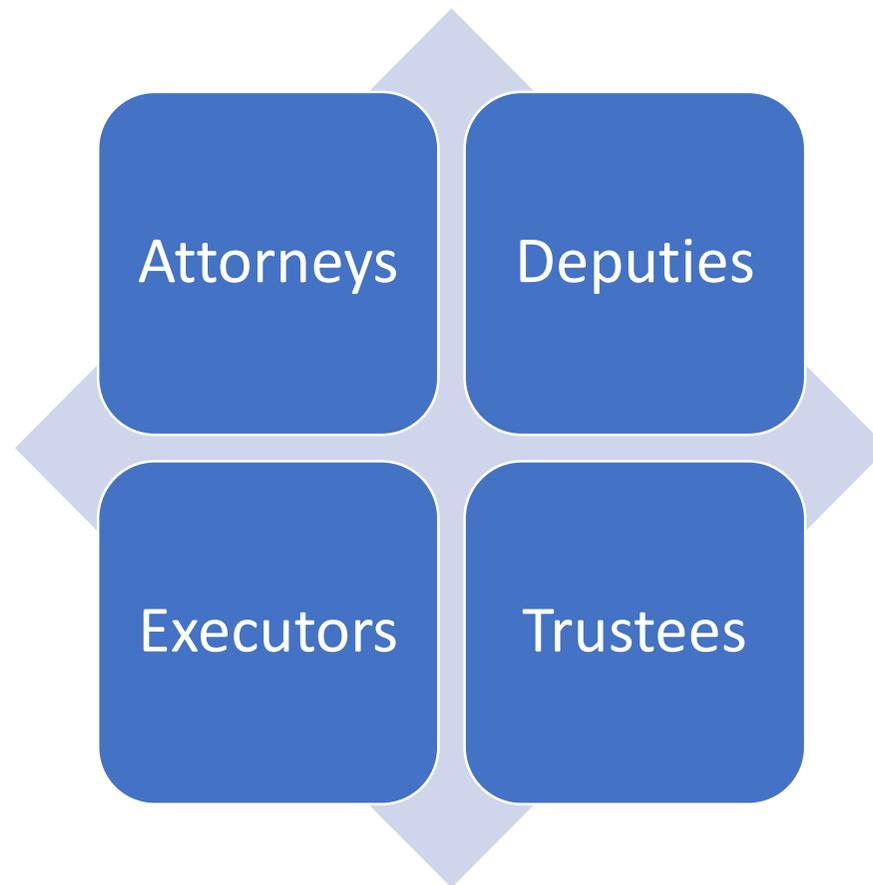
# Financial Abuse

Section 42 Care Act 2014

“Abuse” includes financial abuse; and for that purpose “financial abuse” includes –

- Having money or other property stolen
- Being defrauded
- Being put under pressure in relation to money or other property; and
- Having money or other property misused.

# Potential Defendants



## Initial Concerns – Some Guidance

Law Society –  
“Financial Abuse” –  
14<sup>th</sup> July 2020

- <https://www.lawsociety.org.uk/topics/client-care/financial-abuse>

“Solicitors are well placed to identify possible or actual financial abuse. They should consider whether a client’s circumstances might make them vulnerable to the risk of abuse and acting against their own interests whenever they are consulted or instructed by a client in any matter.”

# Initial Concerns – Early Action

- Attorneys and Deputies
  - Consider the supervisory powers of the **Office of the Public Guardian** ('OPG')
  - Powers include
    - apply to the Court of Protection for:
      - the **suspension, discharge or replacement of a deputy**
      - an order to be varied or for a deputy's security bond to be called in or varied
      - a revocation of a power of attorney
    - **inform the police**, where a crime may have been committed
    - require a deputy to **provide a final report** where the person he or she was acting for has died or the deputy has been discharged
    - **monitor** the situation through ongoing close supervision of the deputy in the case
  - OPG aims to complete investigations within 14 weeks.

## Initial Concerns – Early Action

### Deputy for Property and Financial Affairs

Regulation 34  
Lasting Power of  
Attorney,  
Enduring Powers  
of Attorney and  
Public Guardian  
Regulations 2007

- Requirement for a security bond.
- An insurance product intended to cover against financial loss arising in the course of deputyship.

# 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) 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

# Removing the Power

## Executors and Trustees

- Express power in will or trust?
- Written direction from solely entitled beneficiary – s. 19 TLATA
- Section 41 Trustee Act 1925 / Inherent Jurisdiction
  - Unfit to act
  - Acting improperly / breach of trust
  - *Letterstedt v Broers (1884) 9 App Cas 371 at 386*
    - “acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties or a want of reasonable fidelity”
- Section 50 Administration of Justice Act 1985
  - *Long v Rodman* [2019] EWHC 753
  - *Schumacher v Clarke* [2019] EWHC 1031 (Ch)

# 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.

# Recovering Misappropriated Monies

## Case Example 1: The Rogue Executor

- Testatrix died alone leaving all to daughter but appointing neighbour as executor.
- Executor proved to be untrustworthy:
  - Stolen household items and money
  - Secret commission on sold assets
  - ‘Professional’ fees
- Removed as executor
- Damages claim supported by private investigator and police evidence.

# Recovering Misappropriated Monies

## Case Example 2: 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
- Regained control over accounts
- Swift action to create new will and take full proof of evidence – just in time!

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