

# Conduct:

Tips and tricks when contending with financial abuse by attorneys and deputies and recovery of misappropriated monies

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# Overview

1. Have a plan

2. Take proactive steps to reduce risk

3. Recognise the early warning signs

4. Prepare for the worst

5. Apply best practice when  
investigating potential abuse

6. Know your potential remedies

# 1. Have a plan

- ▶ Who is the (alleged) perpetrator of the abuse?
- ▶ What is their role/authority?
- ▶ Is the client/P still at risk?
- ▶ Can you put measures in place to prevent further risk?



# What is abuse ?

*Abuse:*

*“A single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust, which causes harm or distress ...”*

(Action on Elder Abuse now Hourglass)

## Typical perpetrator

- ▶ Usually family member (67%)
- ▶ Mostly adult children (50%)
  - ▶ Usually adult son/male
- ▶ Care workers (31%)
- ▶ Most abuse is at home (60-80%)
- ▶ Residential care (15-20%)

Source: Davidson, Rossell and Hart:  
Financial Abuse Review, November  
2015



## Typical explanation/mindset of perpetrator

They had capacity and wanted me to have the money

They would have wanted me to have the money if they had capacity

We pool all money in the house to use for the family

I deserve this for the sacrifice I am making

It will all be mine soon anyway so what is the problem?

## Typical measures to reduce risk (short, medium long term)

- ▶ Friendly warning (if carer, new friend, neighbour)
  - ▶ Require carer to provide time sheets
  - ▶ Require a record of any expenditure on P's behalf
- ▶ Move a trusted family member into the property
- ▶ Report to OPG
- ▶ Apply to appoint a deputy
- ▶ Apply to remove the A or D

## 2. Preventative measures



## High risk clients – common attributes

Client or donor over the age of 75

Female

Cognitive impairment

Physical, mental or emotional dysfunction

Depression, recent loss of partner, limited friends or social network,

Lives alone

No off-spring or limited contact with family

## Preventative measures – scams and abuse by 3<sup>rd</sup> party

Register with CIFAS - £25 for 2 years	Restriction on incoming calls
TPS Register - telephone preference service	Call blocking device or phone
MPS Register - mail preference service	Redirect post to a trusted third party
Change telephone number	Open new bank account
Ensure bank has signed up to Voluntary Code of Practice (28 May 2019)	Turn off telephone or online banking services

## Preventative measures – abuse by known person

- ▶ Register alert at OPG
- ▶ Register with Experian, etc
- ▶ HMLR
  - ▶ Ensure land is registered
  - ▶ Sever joint tenancy
  - ▶ Register property alert ([propertyalert@landregistry.gov.uk](mailto:propertyalert@landregistry.gov.uk)  
T: 0300 006 0478)
  - ▶ Put a restriction on title to prevent sale
- ▶ Appointeeship
- ▶ Grant an LPA (consider an LPA bond)
- ▶ Make application to appoint a D – if P lacks capacity

### 3. Recognise the 'early' warning signs - financial

Unexplained withdrawals from bank account

Inability to pay bills/care costs

Unusual spending patterns

Recent addition or authorised signatory to bank account

New credit in P's name

Significant transfer of assets

Others using P's bank cards

Others having access to P's online banking or statements

## 'Early' warning signs - social

New friend or carer taking interest in financial affairs

Meeting with GP for capacity assessment

Restrictions on access to P/missing activities

Recent bereavement/isolation

Misuse of P's home

Good income but lives frugally or has no savings

Reduction in care provision

Change of usual advisors

Sudden wish to grant LPA or make new will

Missing valuables/gifts

# Coercive and controlling behaviour

- 
- Humiliating, intimidating, patronising, infantilising
  - Punishing/ frightening behaviour
  - Isolating from friends/threat of abandonment
  - Isolating from support or services
  - Preventing a person from expressing a choice or opinion
  - Preventing someone from meeting their religious or cultural needs
  - Failure to respect privacy

## 4. Prepare for the worst

- ▶ Allows you to provide a quick and coherent response where allegations are raised
- ▶ If not, may be chaotic, disjointed response – could miss vital evidence
- ▶ Know your available internal resources and their limits
- ▶ Have a list of external contacts you can call on to assist (private investigator, forensic accountant)

## 5. Best practice when investigating abuse

- ▶ Preliminary investigation
- ▶ Preliminary assessment of the evidence
- ▶ Preserve and collate evidence
- ▶ Analysis of the evidence
- ▶ Conduct interviews/prepare witness statements
- ▶ Prepare a report presenting the final picture

## What are you looking for:

Claiming excessive expenses	Non-payment of care home fees
Making gifts to themselves or other family members	Sale or purchase at an undervalue
Loan to A/D or family member	Not keeping P's finances separate
Receiving benefit or pension payments into own account	Not keeping P's finances separate from their own
Transferring property into deputy or attorney's name	Placing proceeds of sale/capital into their own bank accounts or in account in their own name

## Preliminary investigation

- ▶ What is the scope of the potential abuse?
- ▶ Do you have sufficient evidence?
- ▶ What evidence do you need to prove/disprove?
- ▶ Who can obtain that evidence?
- ▶ Do you need help from third parties to investigate  
i.e. private investigator?
- ▶ Reliance on statutory body to investigate?

## Preliminary assessment

- ▶ Is there reason to believe funds have been taken without authority?
  - S.19(7) and s.12 MCA
  - MJ and JM v Public Guardian [2013] EWHC 2966
  - In the Matter of Treadwell 2013 WL 4788832
- ▶ Is it mismanagement or financial abuse?
- ▶ If mismanagement is removal necessary? Can it be resolved by:
  - ▶ Application for retrospective authority – let the court decide on appropriateness/reasonableness of past gifts/transactions?
  - ▶ Education?
  - ▶ Replacing A with deputyship order (supervision by OPG and security bond)?
  - ▶ Additional protective measures added to deputyship? Level of supervision by OPG?

## Preliminary assessment (2)

- ▶ If financial abuse should you report it to a statutory body? If so which?  
When?
  - ▶ Police
  - ▶ Social Services
  - ▶ OPG
  - ▶ CQC
  - ▶ Other health authority
  - ▶ Trading standards (stranger scams)
- ▶ What can you expect?

## Preserve and collate evidence

▶ Where is the evidence:

Invoices/receipts	Contracts	Cheques	Bank statements
Care home visitor records	Computers (emails)	Mobile phones (text, Whatsapp, calls)	Credit card statements
Diaries	Tracker devices	Social Media posts	

- ▶ Need to act quickly – try to secure before perpetrator knows you are aware/suspect the fraud
- ▶ How will you keep it secure, record, store and collate?

## Analyse the evidence

- ▶ Are you going to investigate and make application to remove?
  - ▶ How complex is the abuse or fraud?
  - ▶ Do you have the **resources** and **skills** to carry the investigation internally?
  - ▶ Can your client fund the investigation?
  - ▶ Would it be beneficial to employ the services of an external specialist i.e. private investigator, forensic accountant?
  - ▶ Who will be able to carry out the task quickly/cost effectively (to stop the abuse/avoid dissipation)?
- ▶ Are you going to wait for statutory body for it to investigate/make application to the CoP?

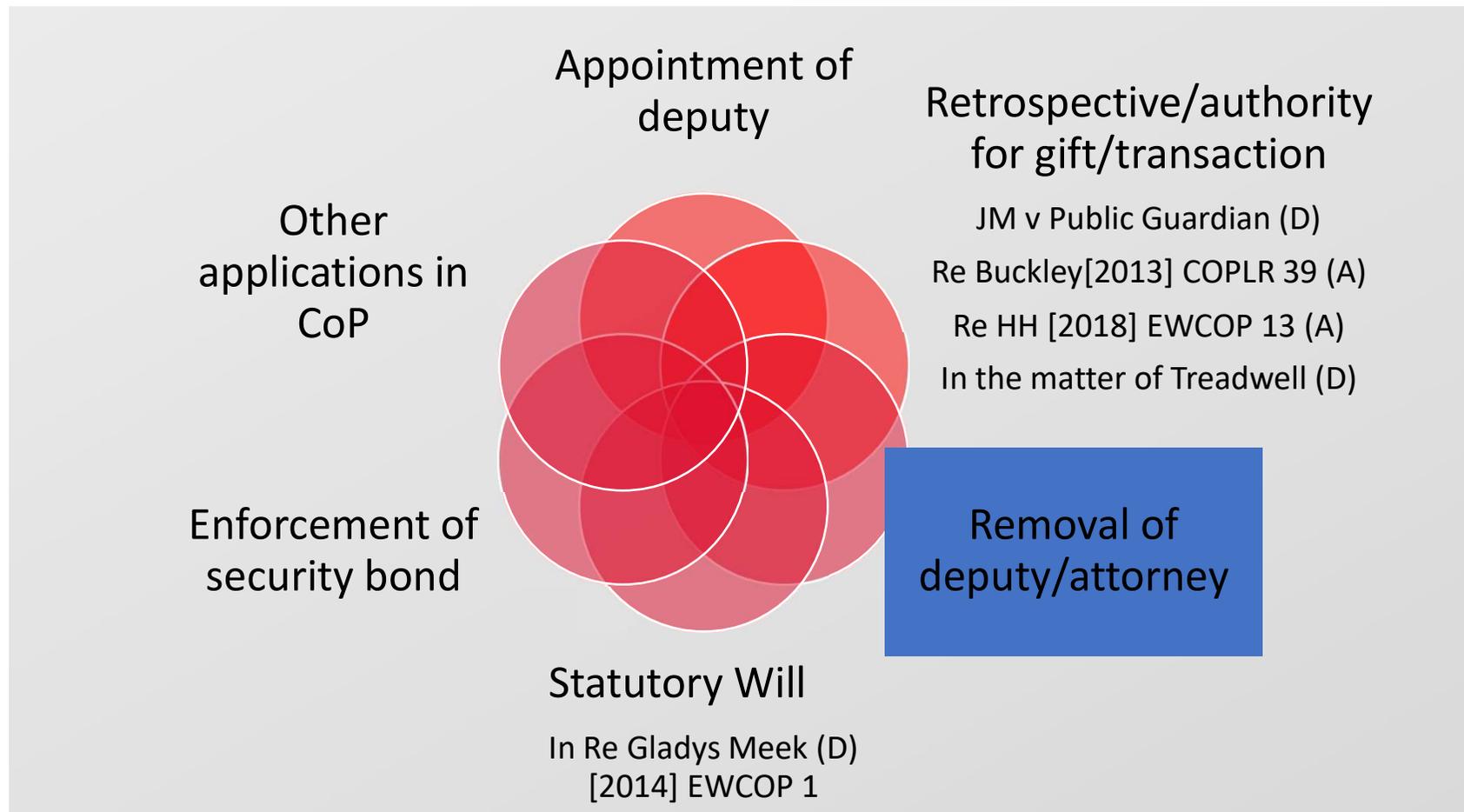
## Interview/witness statements

- ▶ Interview/obtain witness statements
- ▶ From:
  - ▶ Whistleblower
  - ▶ Anyone else who might have insight, neighbours, carer, care home, friends or family
- ▶ Can anyone either corroborate or explain the evidence
- ▶ Ascertain if just suspicions or first hand evidence to support concerns
- ▶ Evidence from the P – wishes and feelings, consultation, etc
- ▶ Consider best way to obtain evidence if any vulnerable witness
  - ▶ Special measures
  - ▶ Consider video evidence if elderly or frail

## Prepare a report with final analysis

- ▶ Interim deputy is usually required to prepare a report on state of P's finances on appointment
- ▶ Good practice to follow same approach
- ▶ Chronology or timeline of events
- ▶ Scott Schedule to identify alleged loss/suspect transactions:
  - ▶ Separately list each or each group of transactions/allegations
  - ▶ Separates facts from opinion
  - ▶ Enables you to check the evidence for each allegation

## 6. Identify best CoP remedy



## Other applications in the Court of Protection

- ▶ Declaration as to capacity (manage finances, marry, contact with others, access to social media/internet)
- ▶ Best interest decision:
  - ▶ Restrict contact with others
  - ▶ Restrict access to social media/internet
- ▶ Require A/D to account to new deputy
- ▶ Restriction to be imposed at Land Registry (preventing sale)
- ▶ Impose limits on deputyship order
- ▶ Level of security bond: **Baker v H [2010] 1 WLR 1103**
- ▶ Authority to bring civil proceedings on behalf of P

## Enforcement of bond

- ▶ Alternative remedy against a defaulting D
- ▶ Immediate repayment by bond provider of amount directed by CoP
- ▶ No need for P or estate to take separate civil proceedings
- ▶ Avoids issue of solvency/enforcement of judgment from civil proceedings
- ▶ Personal representative of estate can seek an order enforcing bond up to discharge - usually two years after death: LPA, EPA and PR Regulations 2007, reg 37
- ▶ Risk: bond may be less than the amount taken

## Enforcement of bond (2)

- ▶ Case law:
  - In Re Gladys Meek [2014] EWCOP 1
  - Enfield LBC v Matrix Deputies [2018] EWCOP 22
- ▶ Procedure:
  - ▶ Applicant to provide a report identifying alleged losses with supporting evidence
  - ▶ Applicant must establish loss on balance of probability
  - ▶ Serve on former/deputy alleged to have caused the loss
  - ▶ Deputy has opportunity to respond
  - ▶ Discretion whether to have oral hearing
  - ▶ Court makes a summary determination of the loss and calls in for that amount

## Non COP remedies

### Application under inherent jurisdiction

- If P has capacity – CoP has no jurisdiction
- Can injunct perpetrator:
  - *A local authority v DL* [2012] EWCA Civ 253
  - *Southend BC v Myers* [2019] EWHC 39
- Rare

### Application under Family Law Act s.63

- Predatory marriage
- Lack of capacity to marry: *DMM* [2017] EWCOP 32
- Consider:
  - FMPO
  - Caveat pursuant to s.29 Marriage Act 1949

## Non COP remedies

### Client to grant an LPA

- Does P have capacity
- Will this provide sufficient protection
- Other protective measures at the same time

### Bank

- Bank may freeze sole or joint account
- Won't stop direct debits or standing orders
- Assess how P's needs will be met pending appointment of D
- Potential complaint to Financial Ombudsman

## Non COP remedies

### Separate liability/recovery proceedings (civil/criminal)

- Cost of proceedings
- Delay
- Authority from the CoP
- Is it in best interests of P?
- Enforcement of judgment

### Claim against professional/deputy

- Need authority from CoP
- Limited cases involving professional deputy
- Cost of negotiating with insurer
- Delay in recovery

Thank you! Any questions?



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