

Handling financial abuse cases

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A top-rated barrister and mediator, and his combination of skill, expertise and excellence in a professional manner is evidenced time and again on every instruction."

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The typical case

- Decd is vulnerable and shows signs of cognitive impairment
- Two adult children (A and B). A lives close by, acts as carer, and assists with finances (typically using an LPA). B lives elsewhere.
- Decd enters into lifetime transactions, typically involving transfer of property/cash, in favour of A
- Decd dies leaving a will appointing A and B as executors and dividing estate equally between them
- B discovers lifetime transactions and seeks to set them aside, typically for lack of capacity/undue influence/breach of duty as attorney



Blythe v. Blythe [2023] EWHC 1085 (Ch)



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- Unsuccessful counterclaim by D to challenge lifetime gift of £200k
- Capacity:
 - Test is *Re Beaney* (confirmed by *Kicks v. Leigh* [2015] 4 All ER 329)
 - D fails to evidence Decd's financial position at time of gift in 2015
 - D unable to discharge burden of proving incapacity; no expert evidence.
- Undue influence
 - No relationship of influence as C used LPA from 2016 onwards: c.f. *Paull v. Paull* [2018] EWHC 2520
 - Gift was explicable



Azam v. Molazam [2023] EWHC 2202 (Ch)

- C transfers house to D at undervalue
- C successful at 1st instance in setting aside transfer on basis of presumed undue influence; but overturned on appeal (Sir Paul Morgan)
- “Having reviewed the authorities which refer to a case where there is a vulnerable party, I conclude that the relevant question is whether there is a relationship of influence by reason of that vulnerability. Put another way, it is not enough simply to the point to the existence of a vulnerability where there is no resulting relationship of influence”

Other causes of action

- Good example: *Hodson v. Hodson* [2006] EWHC 2878 (Ch) (Patten J)
- Breach of fiduciary duty - by son/attorney and wife/carer “who have not discharged the burden of showing that the transactions were fair and freely entered into on the basis of proper advice”
- Breach of son/attorney’s duty to act in Decd’s best interests
- Wife liable in any event as knowing recipient
- Solicitor liable in negligence for failing to advise Decd of the dangers involved in transfers



Standing to bring/funding the claim



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- Where donor is dead, claim vests in estate
- Problems therefore arise if D is an executor and/or beneficiary
- Possible solutions:
 - *Beddoe* order – if C and D are both executors and beneficiaries, and the claim is a strong one: *Re Dhillon* [2019] EWHC 2442 (Ch)
 - Derivative claim: *Lines v. Wilcox* [2019] EWHC 1451 (Ch)
 - Application to remove D (or his solicitor/nominee) as executor: *Re Folkes* [2017] EWHC 2559 (Ch)

Possible defences

- Limitation Act unlikely to apply in view of s.21(1)(b) (no limitation period for claims to recover trust property) which applies to fiduciaries such as attorneys: *Williams v. Bank of Nigeria Ltd* [2014] 1 AC 1189
- Equitable defences of laches/acquiescence: c.f. *James v. Scudamore* [2023] Ch 391 (probate laches)
- N.B. uncertainty over whether incapacity renders transaction void or voidable: *Sutton v. Sutton* [2009] EWHC 2576 (equitable defences only available if the latter).



Predatory marriage: the typical case

When a person is faced with the upsetting news of a diagnosis of dementia, or other degenerative illness affecting the brain, they will often be keen to maintain their independence for as long as possible. This means that they are often unwilling to accept the care services that they may need as well as familial support which will also protect them and keep them safe from being targeted. Many elderly people become isolated as they are unable to carry out the daily activities they once enjoyed. Alongside this, the well documented limited availability of social care services increases the scope for an opportunist fraudster to befriend such individuals. A common trend is for the vulnerable person to be alienated from their other relatives and as they are then married in secret the families do not become aware of the marriage until after their loved one has passed away.

(Jemma Garside, “Exploring Predatory Marriages” (Feb 2022), Family Law 200)

The current legal framework

- Section 18 of Wills Act 1837: “...a will shall be revoked by the testator’s marriage” (exception: will made in contemplation of marriage)
- Section 12(1)(c) Matrimonial Causes Act 1973: “A marriage ... shall be **voidable** on the following grounds only, that is to say – ... (c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, **unsoundness of mind** or otherwise”
- Section 16: “A nullity of marriage order granted in respect of a voidable marriage shall operate to annul the marriage only as respects any time **after** the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time”

Consequences

- A voidable marriage revokes a will even if the marriage is subsequently annulled:
Re Roberts [1978] 1 WLR 653
- If “victim” also lacks testamentary capacity, beneficiaries under the will have to fall back on:
 - Statutory will application: *Re Davey* [1981] 1 WLR 164
 - Intestacy rules
 - 1975 Act claim, if eligible (and limited to maintenance)
- If predator is surviving spouse, likely to have authority to decide on funeral/burial

Law Commission

- Supplementary Consultation Paper issued in October 2023 noted the apparent rise in predatory marriages
- Para 3.36: “Our current view is that, rather than attempting to resolve problems through exceptions to the general rule, the rule itself must be more closely considered. The fundamental question is whether a marriage (or civil partnership) should revoke a will. The majority of consultees were not in favour of abolition of the rule in 2017; however, we wonder if their views have changed.”
- New spouse left with 1975 Act claim

Some possible solutions

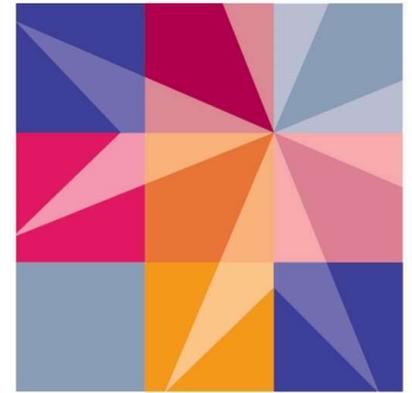
- Before the marriage:
 - Dissent from publication of banns
 - Caveat
 - Declaration/injunction
 - N.B. uncertainty over test for capacity to marry: *Re DM* [2017] EWCOP 32
- After the marriage:
 - Statutory will (above)
 - *Latimer v. Karamanoli* [2023] EWHC 1524 (Ch) – arguable that will should be construed (or rectified) to have been made in contemplation of marriage
 - 1975 Act claim

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