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EXPLORING FINANCIAL ABUSE AS A FEATURE OF FAMILY LIFE: AN ANALYSIS OF COURT OF PROTECTION CASES

The financial abuse of older people, especially of those lacking capacity, can take many forms – committed by strangers, in person, on the doorstep, on-line or by telephone (especially scams of various sorts), or by family, friends or acquaintances. Of all these, financial abuse within the family is perhaps the most morally charged – and the most difficult to identify. The case analysis reported here, focusing on intra-family financial abuse – is part of a broader piece of research looking at the financial abuse of adults lacking capacity, of all ages, and the ways in which different agencies and institutions – local councils, the Courts, police and charities – respond to the challenge to prevent, identify or deal with it.[1] The project as a whole used a mix of qualitative and quantitative methods in its investigation involving scrutiny of national and local statistics, interviews with professional experts and a focused study of one local area. The data presented here show how analysis of cases heard in the Court of Protection[2] can enhance understanding of one type of financial abuse. The aim was to explore a research proposition that suggested that difficult intra-family relationships may be a significant source of risk to vulnerable people who are dependent on family members for support and protection.

Court of Protection (CoP) cases

One of the functions of the Court of Protection (CoP), in England & Wales, is dealing with applications relating to attorneyships and deputyships acting for donors lacking capacity. There has been a significant increase in the numbers of Lasting Powers of Attorney (LPAs) registered by the Office of the Public Guardian in recent years (e.g. a 34% increase from 295,000 in 2013/14 to 395,000 in 2014/15[3]) and a parallel increase in the numbers of applications to the CoP for the revocation of some of them, the appointment of new deputies to replace them or other remedial action. In recent years, Senior Judge Lush has reported a steady increase over several years[4]. In particular, he dealt with 313 safeguarding applications from the Public Guardian (PG) in 2014 as compared to 185 in 2013.

Case sample

From the 63 cases heard in the Court of Protection during the period 1 January – 9 November 2015 and posted on the BAILII website[5], we selected 34, 32 heard by Senior Judge Lush, which appeared to deal with matters relating to the exercise of power of attorney, both proper and improper, in matters to do with property and financial affairs. We rejected 27 cases as not relevant (14 because they dealt with deprivation of liberty orders and 13 dealing with medical treatment issues). Two were inadvertently overlooked.

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[1] The research was funded by the Dawes Trust.
[2] A superior court of record established under the Mental Capacity Act 2005 with a statutory jurisdiction for making a range of decisions on behalf of people who lack capacity, sitting in England and Wales.
[3] Office of the Public Guardian Annual Report & Accounts 2014-15 https://www.gov.uk/government/publications/officeof-the-public-guardian-annual-report-and-accounts-2014-to-2015
[4] Lush, D (2014) *Financial crimes committed against the elderly and infirm: a review of its increasing prevalence and how effective practitioners, public bodies and the Courts are at tackling it*, delivered to a STEP [Society of Trust and Estate Practitioners] seminar, London.
[5] www.bailii.org/ew/cases/EWCOP/

Case characteristics

The 34 subjects of the cases (donors) were predominantly female (74%). Most were elderly, i.e. 70+ years, (79%) and, of the remaining seven, three were under 30 and another four between 30 and 69. Most had dementia (25) with a small number having mental health conditions (2), acquired brain injury, including one who also had dementia (4) or learning disabilities (1). In two cases, the donors was found not to lack capacity. Twenty-one of the donors were living in care homes, while 12 were living either in their own home or with their family.

Most cases were applications for the appointment, reconsideration, affirmation or revocation of attorneyships or deputyships. A majority (Table 1) were brought by the Public Guardian (PG), usually after investigation by the OPG into the way in which a power of attorney had been exercised. In most other cases, family members were the applicants, often in challenges to other family members as a result of their dissatisfaction with current or proposed arrangements in which the other relative(s) were thought to be (or would be in the future) taking material advantage of their position as attorneys (in ways that either clearly damaged the interests of the donor – or, more veiled, furthered their own personal interests).

Table 1 Number of cases x applicant category

Applicant	-n	%
Public Guardian (PG)	18	53
Donor	1	3
Family (incl two cases + donor)	13	38
Council	2	6
Total cases	34	100

In terms of those responding to applications (Table 2) most were members of donors' families (26 solely family members and 3 family members with others):

Table 2 Number of cases x respondent category

Respondent	-n	%
PG	1	3
Donor	1	3
Donor + CICA (Criminal Injuries Compensation Authority)	1	3
Family	26	76
Family + donor	1	3
Family + lawyer	1	3
Council + family	2	6
Deputy	1	3
Total	34	100

According to our own assessment of case accounts, 18 of the 34 cases showed signs of possible financial misbehaviour. Table 3 shows the distribution – with most cases (13) being those where the PG was the applicant:

Table 3 Cases where potential financial abuse (FA) was identified or claimed x applicant category

Applicant	Cases
PG	13
Family	4
Council	1
Total	18

Intra-family disputes often characterised cases brought by families themselves (9), but many of the cases where the PG was the applicant (13) also displayed similar behaviour (Table 4):

Table 4 Cases characterised by intra-family disputes or disagreements x applicant category

Applicant	Cases
PG	13
Family	9
Council	1
Total	23

In 14 cases overall, there were indications of both *financial misbehaviour* and *intra-family* disputes co-occurring.

Case details: the range of misbehaviour

Of the 34 cases, our analysis indicated that 18 involved financial misbehaviour by attorneys or deputies which constituted, in the opinion of the Senior Judge, a breach of their fiduciary duty, the contravention of their authority and/or a failure to act in the donor's best interests. As we shall see, this misbehaviour seemed in a number of cases to indicate financial abuse, involving apparently intentional fraud or misappropriation of funds.

Complicity between attorneys was sometimes involved, with a co-attorney remaining wilfully or lazily ignorant of the actions of the other(s) and shuffling off responsibility for becoming involved in managing the donor's affairs. In other cases, an attorney alone might have acted badly, without reference to co-attorneys either jointly or severally responsible. Misuse of a donor's funds did not necessarily imply fraudulent intent; instead it might be grounded in naïve incompetence, bitter intra-family disputes or the pressure of personal problems.

Case reports often included statements by respondents expressed in tones ranging from contrition, faux surprise, apparent amazement, brazen self-justification to argumentative contestation of the judge's view. One respondent's self-serving justifications, for example, included: the shock and legal costs of a drink driving charge and the need for money for his son's university fees and air flights. Senior Judge Lush however, found something rather different: the man's purchase of property for himself out of his mother's funds and the pocketing of the rental income (c 55).

In other cases, the key players were apparently contrite and apologetic for their behaviour:

> "I apologise for this communication after the hearing. I was a bit out of my depth …..I would also like to apologise for the invoice sent to the OPG. It was a hot-headed attempt born out of frustration …… Thank you again for your time and understanding during the hearing. I will not trouble you again," para 28, c 21.

Overall, we identified the following range of financial misbehaviour:

- failure to provide accounts to the Court or OPG;
- arrears in the payment of care home fees;
- failure to provide the donor, resident in a care home, with a weekly personal allowance;
- lack of separation of the attorney and donor's funds (co-mingling);
- spending on purchase of or repairs to property not the donor's;
- holding donor's money in an account in own name;
- gifting to self and own family above permissible levels without CoP approval;
- unjustified and false claims as to why donor's money had been spent;
- chaotic incompetence in managing the property and financial affairs of the person lacking capacity.

Analysis suggests that this range falls into two broad categories:

- behaviour that points to *possibly* abusive behaviour and therefore should be classified as alerts (*triggers*) of suspicion; and
- behaviour which *in itself* appears to be abusive.

Thus, the existence of care home arrears, as Senior Judge Lush remarked several times, relates to the *former*, while evidence of gifting by the attorney of large amounts of a donor's money to self or relatives is a case of the *latter*.

Types of suspicion triggers

Failure to keep and provide accounts

The Mental Capacity Act Code of Practice[6], (para 7.67, in relation to attorneys; para 8.56, in relation to deputies) states that accounts of transactions made on the donor's behalf must be kept and provided to the CoP on request.

In at least 12 cases, the Senior Judge noted that failure to keep or provide accounts had been at issue. For example:

> "Their failure to keep accounts of the transactions carried out on the donor's behalf or to produce any record of her income and expenditure would alone be sufficient to warrant the revocation of their appointment. However in this case both attorneys, and in particular DA, have compounded their culpability by taking colossal advantage of their position and obtaining personal benefits far in excess of the limited power that attorneys have to make gifts of the donor's property…. DA has also failed to keep the donor's money and property interest separate from her own interests" para 34, c 41.

Sometimes, ineptitude, affection and mismanagement all went hand in hand. In a case reconsidering revocation, where the attorney had failed in his fiduciary duty by co-mingling

[6] Mental Capacity Act 2005, Code of Practice, Issued by the Lord Chancellor on 23 April 2007 in accordance with sections 42 and 43 of the Act.

funds, failed to keep and provide accounts, and allowed care home fees to fall into arrears, he claimed:

> "I am a kind and caring person and of good character who has devoted as much time as possible to a man who deserved to be looked after by his family in the best possible way…..I still have his best interests at heart and visit him as often as I can usually once a week and make sure he has everything he needs," para 23, c 2.

The Senior Judge however, in confirming the revocation, concluded:

> "He may be an affectionate and attentive stepson but that's not the point. He has been a hopeless attorney and has broken almost every rule in the book and I sense that he has done so wilfully," para 36, c 2.

Failure to fulfil an attorney's responsibilities because of personal pressures is rarely accepted as an excuse:

> "I appreciate that BW is married with five children, two of whom have special needs; that he works full time as a civil servant; that the time he has to deal with his father's affairs is very much limited and that he is currently stressed, but these are reasons for disclaiming the attorneyship rather than persisting in performing it inadequately," para 28, c 9.

Care home arrears and failure to provide a personal allowance

We found 10 cases of care home fees in arrears (out of the 21 cases where the donor was resident in a care home, Table 4). They were often linked with the withholding of a personal allowance from the resident by the attorney or deputy, an abuse in itself in terms of financial and personal neglect. Senior Judge Lush frequently drew attention to the association between these failures and other misbehaviour:

> "As I have said elsewhere "with almost unerring monotony in cases of this kind, a failure to pay care fees and a failure to provide a personal allowance are symptomatic of more serious irregularities in the management of an older person's finances," " para 28, c 19.

> "As is frequently observed in cases of this kind, failure to pay care home fees, a failure to provide an adequate personal allowance, a failure to visit, and a failure to produce financial information to the statutory authorities, go hand in hand with the actual misappropriation of funds," para 38, c 55.

Senior Judge Lush also remarked that using the excuse (as seems to be common) that the attorney is waiting for the outcome of a decision on NHS Continuing Care eligibility is no excuse for withholding payment of fees:

> "While attempts to resolve the dispute are taking place, the attorney should continue to pay the donor's care fees. If it transpires that the donor qualifies for NHS Continuing

> Care and has been eligible for some time, the NHS will refund any overpayment of care fees," para 36, c 55.

Of the 10 cases where care home fees were in arrears, 8 seemed to show evidence of some financial misbehaviour amounting to abuse. For example, in c 68, where there were care home arrears of £29,000, the donor's son, her attorney, had charged his mother a daily rate of £400 for visiting her and, according to the OPG investigation officer, had also paid himself over £49,000 from her funds, claiming it was for time he had spent pursuing a claim against the local health board in Wales on her behalf. Further, in his witness statement and contesting the need to replace him as attorney by a panel deputy, he said:

> "I am the sole heir and because of my mother's dementia and current poor health, there is no need to protect the estate's financial interests which are effectively mine," para 28, c 68.

Senior Judge Lush made his view very clear:

> "The Public Guardian believes the amount of £117,289 is an excessive amount to claim for out of pocket expenses. I would put it more strongly than that. I believe that charging one's elderly mother a daily rate of £400 for visiting her and acting as her attorney is repugnant" para 41, c 68.

Co-mingling of funds

Failure on the part of attorneys to keep the donor's funds separate from their own is often found to be one of a wider set of misdeeds. C 41 (already cited) is a case in point where the main issue was the over-gifting from the donor's funds to themselves – from funds that were held together with the attorney's own funds. Reasons for doing so vary. Attorneys may mix up donor funds with their own deliberately to draw a veil over what is going on. Alternatively, they may argue, perhaps disingenuously, that it is a result of incompetence or mismanagement:

> "I knew that my duties as attorney required me to keep my mother's funds separate from my own. This was the sole reason I opened the account…… I had opened the account so that the account name read Mr BW [the attorney's initials] re (name of property) and I believed that this was sufficient to fulfil my duties. The intention has always been that this was my mother's account and that I was simply managing it on her behalf. I confess to not realising that I also ought to ensure the name was my mother's and not my own," para 35, c 19.

Senior Judge Lush gave this short shrift:

> "I simply don't believe it," para 36, c 19.

In other cases, it appears that taking on the role of attorney is too much for some individuals who then claim 'mistakes happen'. In a case (c 27) where the Senior Judge decided to revoke an LPA, he did so on the basis of a list of failures: that one of two attorneys had mixed her own funds with those of the donor (her mother); had gone on to use her mother's funds for her

own benefit; had also allowed care home fees arrears to accumulate; had spent the donor's money on herself, her husband and sons; and had failed to account to the PG. The attorney, a woman suffering severe physical health problems herself, claimed:

> "As I have said all along, I love my mum and my family with all my heart and I'm heartbroken to think other people think otherwise….. It's such a shame that bad situations, a lack of good communication, and confusion has thrown everything up in the air and comes down in a mess……. The last few years have been a nightmare for me, mentally and physically; what with losing my mum to this dreadful illness, trying my best to get the help she needed ….then all this Court of Protection mental stress, and my physical pain getting worse …. My head is about to blow and I don't know how much more I am expected to take….Please trust me. I could not be more sincere and honest about this if I tried. This has all been a case of grief, sadness confusion and mix ups" paras 21/22, c 27.

The Senior Judge pointed out that her son, a joint attorney with her, should have taken some responsibility in ensuring his grandmother's affairs were managed properly. Both attorneys, he concluded, had failed to act in the donor's best interests.

Sometimes, though, there seems to have been wilful ignoring of their duties as attorneys to keep funds separate. In c 72, Senior Judge Lush stated that the respondent had failed in her fiduciary duty as attorney by continuing to pay herself an allowance for caring for her mother *after* her mother's admission to a care home. Moreover, she had failed to account satisfactorily for the transactions she had carried out on her mother's behalf and had:

> "………contravened her duty to keep her money separate from the donor's. She had defiantly opened an account in her and [her mother] D's joint names soon after her brother Martyn assumed overall control of the management of D's property and financial affairs" para 43, c 72.

Abusive behaviour

Gifting to self and others

Inappropriate gifting, or allegations of it, occurred in at least 10 cases. Discovery of such payments was often the result of investigations by OPG investigators after complaints had been made although in one case (c 6), inappropriate gifting was discovered almost accidentally. The local authority had taken an interest in the donor after being alerted by the police who had found her wandering at night. On the council's discovery that £75,000 had passed to the family, the donor's daughter claimed her mother had had capacity at the time she had made the decision to gift it to them. Sceptical, the OPG on further investigation applied to the CoP for revocation of an LPA which had been registered. Senior Judge Lush found as fact that the cheques totalling £75,000 had been signed by the daughter in her capacity as attorney. He stated that she, and another attorney, had contravened their authority as well as breaching their fiduciary duty in taking advantage of their position as attorneys.

In c 30, another instance of attorneys making gifts to themselves "far in excess of the limited authority conferred upon attorneys generally by section 12 of the Mental Capacity Act" was presented. A witness statement by an OPG investigation officer described how both siblings regarded their mother's assets as theirs:

> "CS (the daughter) had received £22,553.31 and PL (the son) had received £19,925.63 from the account…. Both attorneys regard the money in their mother's account as their inheritance and consider that they are entitled to dip into it during her lifetime," para 16, c 30.

In another case (c 41), unacceptable large-scale gifting was alleged to have taken place and the attorneys (two sisters) described as having "used their power carelessly and irresponsibly" – with the donor's maisonette house being sold for £730,000, one of the attorney's mortgage paid off and the property rented out, and £80,000 being spent on building works at another attorney's own property. Despite the sisters denying wrongdoing, Senior Judge Lush found that they had acted in contravention of their authority and had:

> "compounded their culpability by taking colossal advantage of their position and obtaining personal benefits far in excess of the limited power that attorneys have to make gifts of the donor's property …. And failed to keep the donor's money and property interests separate from her own interest," para 33 & 34, c 41.

A third sibling, a brother, who had not been appointed as attorney with his 2 sisters, and who wanted to be appointed deputy in their place, did not escape the judge's criticism either:

> "I sense that [rather than thinking of his mother's interests] he is motivated partly by a desire to salvage his own inheritance and partly by a craving for revenge against his sister and brother," para 38, c 41.

Incompetence

The question of whether misbehaviour has taken place through incompetence is often at issue. This may result from ignorance (wilful or inadvertent) of the duties and authority conferred on attorneys on appointment, or from their general unsuitability. In c 70, for example, Senior Judge Lush pointed to the ignorance one of the attorneys had exhibited:

> "Audrey had some strange ideas about the functions and duties of an attorney acting under an LPA. ….I asked Audrey a few basic questions about the principles of the Mental Capacity Act 2005, best interests decision-making and the fiduciary duties of an attorney….. the answers to these questions required no more knowledge than the information that is already contained in in Part C of the LPA which Audrey signed ….. she didn't have a clue …….." para 38/39, c 70.

But he went on to comment:

> "what concerns me however is that Audrey has no intention or desire to learn about the principles ….. or best interests decision-making or her fiduciary duties as an

> attorney. One of her personality traits is inflexibility or rigidity in thought and behaviour. …..” para 40, c 70.

Ignorance of the nature of fiduciary duties was seen again in c 14, where the daughters of PL were objecting to the appointment of their brother as deputy for property and financial affairs:

> “the striking feature of this case was that neither the applicant nor the respondents had any idea about the fiduciary duties and practical responsibilities that a deputy is expected to undertake and the roles of the Court of Protection and the Office of the Public Guardian in ensuring his compliance,” para 24, c 1.

Reflections on cases

The poisonous effect of intra-family dynamics

Intra-family dynamics are often at the heart of much of the financial misbehaviour revealed in this analysis. Conflicting attitudes to family relationships and their associated expectations and obligations, between and within generations, involving caring responsibilities, mutual support and reciprocity, inheritance rights and expectations of honourable behaviour are all seen to play a part.

From time to time, the proprietorial attitudes and assumed entitlements of some adult children towards their parents' assets (“their inheritance”) were revealed. In a case of possible large-scale gifting (to self and brothers), the OPG investigating officer alleged the attorney had said “if EG [her mother] doesn't mind and she is well-cared for, what's the harm,” para 10, c 6. In c 68 already noted above, the attorney's attitude to his mother and her estate was described by the Senior Judge as “callous and calculating” and his behaviour as “repugnant.”

While financial abuse was not alleged or found in every case where intra-family hostility was present – we identified 14 cases where both were present – there is no doubt that the existence of disputatious bad feeling meant that the appropriate exercise of attorney or deputy responsibilities was often compromised. Suspicions and jealousies, often to do with money, undermined good intentions and honourable behaviour. As one daughter said about her siblings:

> “they are not the slightest bit interested or concerned with my father's welfare. They are interested in his money. They have already shown no inclination to agree that essential payments be made for his wellbeing and if they were made joint deputies, I fully expect they would stand in the way of such essential payment [in this case the installation of a shower and a stair-lift]”, para 19, c 14.

Senior Judge Lush despaired of intra-family hostility of this sort saying that, in this case, none of the three sibling deputies had “any idea about the fiduciary duties and practical responsibilities that a deputy is supposed to undertake,” and that “unfortunately some deputies take advantage of their position and family members are often the worst offenders,” para 23, 31, c 14.

Disputes between siblings often centred on the failure of one or other of them to fulfil what they saw as their mutual obligations to love and care for their ageing parent. Sometimes a sibling would make these allegations only to be found to be wanting in exactly the same areas of failure. In case 61, a daughter, Stephanie, claimed that her brother:

> "……..was controlling our mum's finances without legal authority. He has made no money available for her personal needs." para 15, c 61.

But their sister responded saying:

> "Social services have proof of this. Stephanie has only visited my mother 4-6 times in four and a half years. I don't believe Stephanie has my mum's best interests at heart," para 19, c 61.

The impact of public policy

Assumptions about the right to inherit parental estates engender strong feelings within families and, in relation to this, public policy may exert a strong influence on the behaviour of some family members. Means-tested social care is one example. Families are sometimes tempted to avoid their dependent relatives' liability to pay for social care by disposing of their assets (known as 'deprivation of assets') in order to conserve the estate (c 6, for example, involved a local council arguing that the family had knowingly running down their parent's assets). A second example is that of NHS Continuing Care, whereby, depending on the level and degree of non-hospital care required, the NHS may take on responsibility for its cost (c 55 for example). The existence of arrears in payments to be made to care homes occurred in several cases, triggering, in turn, suspicions of wider financial misappropriation and misbehaviour. These policy 'traps' often colour and sour relationships within families, sometimes leading to financial misbehaviour, and are frequently noted in public debate.

Conclusion

The role of the family, and society's view of it, is central to many of the cases coming before the CoP. The Court of Protection recognises that family members are most often the best people to act as attorneys and to be appointed as deputies (with close friends the next best alternative).[7] But at the same time, the CoP also recognises, through direct experience drawn from individual cases, that family behaviour can sometimes be imperfect.

At best, family members will assume responsibility for the property and financial affairs of a relative, often a parent, impeccably. At worst, taking up the responsibility has one or other of two *negative* impacts – either it poisons pre-existing intra-family relationships further, or it

[7] "The CoP has ……traditionally preferred to appoint a relative or friend as deputy …. rather than a complete stranger out of respect for their relationship ……now reflected in Article 8 of the European Convention on Human Rights but there are other more practical reasons for choosing a family member.

A relative will be familiar with P's affairs and aware of their wishes and feelings. Someone with a close personal knowledge of P is also likely to be in a better position to meet the obligation of a deputy to consult with P and to permit and encourage them to participate ….. as fully as possible in any act or decision affecting them," paras 37 & 38 , c 58.

precipitates bad feeling where none existed in the past. Several cases showed families fighting openly amongst each other following a pattern established years previously while in other cases, hostility had broken out only after the issue of attorneyships had taken centre stage.

To conclude, analysis of the cases reveals the complexity of family life and shows how conventional expectations of good behaviour may often go unrealised, to the detriment of the individual at the centre of the case (the donor). In the light of behaviour and attitudes revealed to the Court, commonly-held assumptions about the 'family' – of goodwill, mutual support, 'blood being thicker than water' – often prove to be unfounded. This suggests that vulnerable people who lack capacity – together with their assets – are often at greater risk from their relatives than is generally assumed.

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