A closer look at financial abuse within the family: analysing Court of Protection cases

Although formal statistics are few, experts in the field suggest that a majority of cases dealing with financial abuse of people lacking capacity involve close family relationships and often reveal fractures and bitterness which in many cases led to actions that can be construed as abuse. These insights prompted our examination of a sample of cases heard by the Court of Protection in order to explore the characteristics of abuse that has occurred or is alleged to have occurred.

Case analysis

From the 63 cases heard in the Court of Protection during the period 1 January – 9 November 2015 and posted on the legal website BAILII (www.bailii.org/ew/cases/EWCOP/), we selected 34 which appeared to deal with matters that related to the exercise of power of attorney, both proper and improper, in matters to do with property and financial affairs (the subject of our enquiry). We rejected 27 cases as not relevant (14 because they dealt with deprivation of liberty orders and 13 dealing with issues to do with medical treatment). On checking once the analysis had been completed, we found that we had overlooked two which on further scrutiny would have been relevant.

Case characteristics

The subjects of the cases were predominantly female (74%) and elderly (over 70). A very small number were younger – three who were under 30 and another two between 31 and 60. In terms of the condition leading to their lack of capacity, most had dementia (25) with a small number having mental health conditions, acquired brain injury or learning disabilities. In another two cases, the donors in each case were found not to lack capacity – one who was inquiring about technical aspects of his LPA in terms of appointing successor attorneys in the future, and another who suffered from schizophrenia and during consideration of the case, was found to have fluctuating capacity to make decisions relevant to the issues being considered (where the case was dismissed because of this*).* 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 attorneyships or deputyships to be appointed, revoked or decisions about them to be reconsidered (decisions often made initially on the basis of the papers and not at an attended hearing). Some were applications to appoint attorneys which were contested by other members of the families. A majority of cases were brought by the Public Guardian, usually after investigation by the OPG into the way in which a power of attorney had been exercised*.* In the other major category, 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).

In terms of those responding to applications for revocation, most were members of donors' families (26 solely family members and 3 family members with others). Eighteen cases showed signs of financial misbehaviour (clear or potential) with most being cases where the PG was the applicant. Twenty-three cases were characterised by evidence of family disputes.

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

Case details

Of the 34 cases, 18 involved behaviour by attorneys or deputies which was alleged to constitute a breach of their fiduciary duty, the contravention of their authority and/or a failure to act in the donor (or P)'s best interests. In some cases, this alleged misbehaviour could indicate financial abuse involving, among other misdeeds, fraud or misappropriation of funds.

Common examples which either raised suspicions or indicated such misbehaviour included cases where there was:

- 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;
- no 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;
- 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.

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 might have acted alone, without reference to co-attorneys whether being jointly and severally responsible. Misuse of a donor's funds did not, it appears, always result from fraudulent impulse; sometimes it was grounded in naïve incompetence, bitter intra-family disputes or the pressure of personal problems.

Reports of cases often included statements from the attorneys involved in tones that ranged through contrition, faux surprise, apparent amazement, brazen self-justification to argumentative contestation of the judge's view.

One man, for example, used a number of self-serving excuses: the shock and distress of a drink driving charge and the associated legal costs along with the need for money to pay the deposit for his son's university fees in USA, plus the costs of flight and car insurance. Senior Judge Lush (who heard 32 out of the 34 cases we examined), 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. The judge remarked with surprise on the man's readiness to pursue action against the council on a 'deprivation of liberty' issue during the same period and also noted his use of a range of solicitors with the apparent intention of obfuscation:

> "I wonder whether this is a smokescreen to ensure that no one firm or company is fully aware of his ineptitude and deceit," para 43, and concluded "I am satisfied the

> revocation of the LPA is in accordance with the law and necessary for the prevention of crime," para 48, EWCOP55.

In one case – where it turned out that the senior judge did not need to consider an earlier order made on the papers because it was now apparent that BN had capacity – the applicant and respondents fell into dispute between themselves. Senior Judge Lush concluded:

> "I regret to say that the hearing degenerated into a slanging match between CN [the daughter] and her mother [the donor] and CN's daughter [one of the two attorneys]. Voices were raised and tears shed as either side trawled through decades of family history describing any incident that could possibly discredit the other. Fortunately there was no need for me to embark upon a fact-finding exercise because none of these incidents had the slightest bearing on the issue I was required to determine," para 26, EWCOP11.

In some cases, though, the key players were contrite and apologetic for their behaviour. In case 21 (see later), the respondent made several apologies:

> "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, EWCOP21.

Indicators of possible abuse

As far as abuse is concerned, analysis of the cases selected suggests that they are characterised by behaviour which falls into two broad categories –

- behaviour that *could be associated* with 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 remarks 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.

Suspicion triggers

Failure to keep and provide accounts

The Mental Capacity Act Code of Practice, para 7.67, states, in relation to attorneys, that:

> "Property and affairs attorneys must keep accounts of transactions carried out on the donor's behalf. Sometimes the Court of Protection will ask to see accounts….. The more complicated the donor's affairs, the more detailed the accounts may need to be"

while with respect to deputies, para 8.56 of the Code states that:

> "Deputies must carry out their duties carefully and responsibly. They have a duty to:
>
> • act with due care and skill (duty of care)

- not take advantage of their situation (fiduciary duty) ……
- …… indemnify the person against liability to third parties caused by the deputy's negligence
- comply with the directions of the Court of Protection.

Property and affairs deputies also have a duty to:

- keep accounts, and
- keep the person's money and property separate from own finances."

In situations where an LPA does exist, the OPG may be alerted (sometimes by another attorney, a council or an unconnected whistle-blower or concern-raiser) to alleged misbehaviour by an attorney, and an investigation may be mounted involving requests for accounts to be provided which remain unfulfilled. Where the OPG investigation officer remains unsatisfied that all is in order, the PG may apply to the CoP for revocation of the LPA.

The CoP itself may undertake investigations and request accounts to be provided – for example, in advance of hearings or when a hearing is postponed for further information to be gathered. Attorneys sometimes fail to respond, raising suspicions that there may be other issues to be concerned about. In the cases explored here, comments by the senior judge suggest that in some instances such failure may be part of a general failure to meet fiduciary duty which in some instances may result from incompetence or ignorance on the part of the attorney involved.

In the case of deputies, appointed by the CoP and supervised by the OPG when an individual has lost capacity and no LPA exists, part of their duties involves regular reporting back to the OPG, usually on an annual basis. Failure to do so may be one of the factors (others may be reports from whistle-blowers and family members or suspicions raised by local councils) that prompts the OPG to investigate the wider situation – leading usually, where concerns remain, to applications by the Public Guardian (PG) to the CoP for the deputy to be relieved of his/her duties.

In at least 12 of the cases, the senior judge noted that failure to keep or provide accounts had at some point featured in the case. The decision in one case describes the primrose path towards complete financial misappropriation, with the failure to account properly at the outset:

> "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, EWCOP41.

Sometimes, ineptitude, affection and mismanagement all go hand in hand. In a case where the PG was applying for a reconsideration of the revocation of an EPA made on the papers after the complaint by the attorney's sister (his co-attorney) that she was concerned about her step-brother's management of their father's affairs, it was clear that he had failed to

comply with a duty to keep and supply accounts and to produce them despite requests from the PG that he do so. He had also failed in his fiduciary duty by co-mingling his step-father's funds with his own in his own account, created a credit card for using his step-father's funds and let his care home fees fall into arrears. But 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, EWCOP2.

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, EWCOP2.

Sometimes an attorney's failure to comply with requests from the OPG for an account, appear to be the result of a total inability to fulfil the responsibilities of the role. But the senior judge is unlikely to accept this as an acceptable reason to excuse him from his duty to comply with the OPG's request:

> "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, EWCOP9.

Other cases were complicated, touching and warranted humane handling. In case 33, concerning HS, a 52 year old woman who had developed Huntington's disease in her late thirties, Senior Judge Lush was asked by the PG to reconsider two orders he had made the previous year – to revoke an EPA and to appoint the local council deputy for HS's property and affairs. HS's former partner RA, although subsequently married to KA, had been her attorney under the EPA but had been in fierce dispute with the council over the personal care he was providing to HS. He had also acknowledged he had not kept professional records and had allowed crossover of funds.

Some of the documents presenting RA's side of the case and pertinent to the previous hearing, had been mislaid and had not then been considered by the judge, but these were now available. Further, at this later hearing, as an addition, the 18-year old son, CA, was joined as party to the case. The senior judge was impressed with witness statements commending the commitment of CA to his mother's welfare and his overall maturity for one so young. Taking into account RA's long-term support and continuing concern for his former partner and considering CA's willingness to be appointed deputy rather than the (costly) alternative of a panel deputy being appointed – and with warm testimony in support of CA by a mental health nurse consultant and the likelihood that the PG would have no objection (despite his earlier position) – the senior judge appointed CA to be his mother's deputy for property and affairs.

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. Senior Judge Lush frequently drew attention to the association between these failures and other misbehaviour, as extracts from several cases makes clear:

> "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, EWCOP19.

> "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, EWCOP55.

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 (i.e. full payment of care home fees by the NHS) 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, EWCOP55.

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 case 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, EWCOP68.

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, EWCOP68.

He went on:

> "Martin suggested that the appointment of a panel deputy would be a waste of time and money because his mother's estate is effectively already his. I disagree. The panel deputy will, for the first time in eleven years, place Sheila at the centre of the decision-making process rather than view the preservation and enhancement of Martin's inheritance as the paramount consideration," para 42, EWCOP68.

In contrast, in case 10, while he revoked the LPA and appointed a panel deputy to act as SM's deputy for property and affairs, he was less condemnatory of the attorney's behaviour:

> "The statement that MO handed to me is the testimony of someone who is at breaking point. It is not in SM's best interests that her financial affairs should be continued to be managed by a person who is unable to cope and clearly finds the responsibility of acting as attorney overwhelming," para 32, EWCOP 27.

He also pointed out that SM's grandson, a fellow attorney, should have taken his responsibility seriously too:

> "he should have acted as a check and balance on MO rather than allow her to wreak havoc with SM's finances; his failure in this regard makes him partly responsible for the loss to her estate," para 33, EWCOP27.

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. Case 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. The reasons for doing so vary. Attorneys may mix up donor funds with their own deliberately to draw a veil over what is going on. On the other hand 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. As soon as I was informed ….. …that the account needed to be in my mother's name I went into my local Barclays branch to have it changed. The branch informed me that this was not possible," para 35, EWCOP19.

Senior Judge Lush gave this short shrift:

> "I simply don't believe it," para 36, EWCOP19.

In other cases, it appears that taking on the role of attorney is too much for some individuals and, they claim, mistakes happen. In a case (c 27) where the senior judge decided to revoke

an LPA, he did so on the basis 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 failed to account to the PG, and had spent the donor's money on herself, her husband and sons. The attorney, a woman suffering severe physical health problems herself, described her feelings about the mess she was in:

> "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, EWCOP27.

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 case 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, 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, EWCOP72.

Abusive behaviour

Gifting to self and others

The law permits an attorney to pay self and other family members (and others) small amounts from the donor's estate but for something more than this he must apply to the court for permission. A failure to do this may find the attorney in breach of his fiduciary duty or contravene his authority. Further, it may be associated with other mishandling of property and financial affairs.

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 on two occasions – once, when the donor had been found walking in the middle of the road late at night and then when she had been reported as a 'missing person'. The social services department contacted the family offering an assessment of the donor's care needs and at that point was informed by

one of the attorneys, the daughter, that their mother (the donor) had gifted £75,000 to the family. The daughter claimed that at the time her mother had capacity to make the decision to gift the money. The PG having been informed by the local authority investigated and applied to the court for the revocation of an LPA on the grounds that the two attorneys, a son and a daughter, appointed jointly and severally two years previously, had contravened their authority.

In his decision, 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:

> "These gifts far exceeded the limited authority to make gifts which conferred by section 12 (2) of the Mental Capacity Act 2005 and in this respect GB (the attorney) contravened her authority as attorney. SG (the brother, also attorney) was a party to the transaction and he also contravened his authority as attorney," para 32, EWCOP6.

He also stated that the two siblings had breached their fiduciary duty in taking advantage of their position as attorneys.

In case 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 described. Not unusually, disputes between the attorneys, a son and a daughter of the donor, figured in the details of the case which involved the affairs of a 91-year-old woman (EL) with assets in both the UK and Greece. A witness statement by an OPG investigation officer described how both siblings regarded their mother's assets as theirs – i.e. as their inheritance:

> "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, EWCOP30.

There had been a history of disagreements about managing their mother's affairs and most recently a failure to adhere to a Schedule of Agreed Responsibilities arrived at in a previous court hearing at Bournemouth County Court. Senior Judge Lush dismissed the suggestion that the son should be appointed sole deputy if the LPA were to be revoked, allotting most responsibility to him for the original breakdown in the attorneys' relationship. He revoked the LPA and invited a panel deputy to apply to be appointed as EL's deputy for property and affairs.

In case 41, the donor, a 77-year old woman diagnosed with vascular dementia, had executed LPAs for property and affairs and for health and welfare and appointed two of her three children as attorneys, jointly and severally. The PG applied for revocation of the property and affairs LPA on the grounds that the attorneys had "used their power carelessly and irresponsibly" after an investigation prompted by the elder son (who was not one of the attorneys) having contacted the OPG expressing concern at the sale of his mother's property.

The OPG investigation listed a range of concerns – the donor's maisonette being sold (for £730,000); one attorney's own mortgage being paid off with the donor's money and a monthly rental income of £850 being drawn on the vacated property; of another £80,000 of the donor's money being spent on building works at that attorney's own property; and the residual money in the donor's bank account having dwindled to £7,000.

The attorneys (the daughter in particular) argued that they had done everything in the interests of their mother who had gone to live with the daughter (in the house bought with the donor's own money and in which she and the two attorneys held shares (20% - the donor; 40% each - the 2 attorneys).
Senior Judge Lush was not persuaded. He stated:

> "I am satisfied that the attorneys have behaved in a way that contravenes their authority or is not in the donor's best interests. Their failure to keep accounts of the transactions carried out on the donor's behalf or to produce any record of her income or expenditure would alone be sufficient to warrant the revocation of their appointment. However, in this case both attorneys, and in particular DA (the daughter) 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 under section 12 of the Mental Capacity Act. DA has also failed to keep the donor's money and property interests separate from her own interest in respect of the property she owns in South Norwood," paras 33 & 34, EWCOP41.

But the third sibling (the elder brother who was not appointed as attorney) did not escape the judge's criticism:

> "As regards the appointment of ES as OL's deputy for property and affairs, I do not believe he has sufficient detachment or impartiality to manage his mother's affairs and to ensure that her interests and position are properly considered. I sense that 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, EWCOP41.

But every case is not what it seems at first. In case 29, an application was made by the PG for revocation of CC's appointment as deputy for his mother's property and financial affairs on the grounds he had contravened his authority and failed to act in the best interests of his mother. It was stated that following an OPG review of the annual deputyship report forms submitted over three years, questions were raised about payments to himself for caring for his mother, the estimate he made of the value of her house in Bristol, and substantial amounts spent on renovating the property and on her care fees, all in the absence of evidence to support the expenditure.

On the face of it, it was not dissimilar from other cases considered by the court. However, the senior judge took into account CC's witness statement along with those of his brother and sister. CC said:

> "I believe I have always been open and honest with my intentions with and in agreement of all the client's (his mother) other children as perceived as what the client would have wished. I honestly believe that I have acted in the client's best interests having paid due consideration to the client's various alternative care options and wishes," para 23, EWCOP29.

The senior judge gave retrospective approval of CC's decisions and authorised future payments from their mother's funds. He noted that there was no monetary gain in retaining the property on which the money had been spent and noted "the deputy and his siblings are retaining it simply out of respect for her wishes. The property is her pride and joy," para 32, EWCOP29.

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 case 70, 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 and I am inclined to agree with the Public Guardian that her actions are more a consequence of her ignorance rather than her own self-dealing…" paras 38 & 39, EWCOP 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, EWCOP70.

Resolution of the case was achieved by revoking the LPA and appointing Audrey as deputy thus enabling the OPG to provide some oversight to her management of her mother's property and financial affairs.

Ignorance of the nature of fiduciary duties was seen again in case 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, EWCOP14.

In case 2, referred to earlier, the senior judge considered the meaning of 'unsuitability' in response to the PG's application to reconsider the partial revocation of an EPA. He had found PB had contravened his authority and had failed to act in RG's best interests even though he "may have been an affectionate and attentive stepson…..[but] he had been a hopeless attorney" paras 35 & 36, EWCOP2.

Neglect and hoarding

Some studies have identified 'hoarding' as a category of financial abuse which could be relevant in the sort of cases investigated by the OPG (or PGO prior to 2005) and heard at the CoP. Hoarding as a form of financial abuse was described as "the hoarding of a vulnerable person's resources for future gain which is also a form of exploitation and may be associated with culpable neglect" (from Brown, H, Burns, S and Wilson, B (2005) *The role of the Public Guardianship Office in safeguarding vulnerable adults against financial abuse*, Canterbury Christ Church University College.)

While we did not find any clear examples of neglect and hoarding in our sample of 34 cases, we did come across cases where there may have been an element of interest in preserving the assets of a donor for, perhaps, the attorney's later benefit such as the denial of personal allowances by relatives of donors living in residential care homes – to their obvious disadvantage. Such neglect may be the result of pure carelessness and irresponsibility. On the other hand it might be an indication of a wider concern to conserve the donor's assets for their own benefit in the long-term (i.e. as their inheritance).

Ironically, we did find one case which at first sight might fit this category – of a deputy apparently conserving (possibly 'hoarding') the donor's funds, only to find it was anything but that. The PG was seeking a reconsideration of a decision made on the papers to revoke the appointment of the respondent, MP, as his partner's deputy and replace him with a panel deputy (case 21). CJ had suffered a heart attack and brain damage at the age of 52. Her partner had later been appointed her deputy to manage her property and financial affairs.

There were complicated issues involved and included evidence that the partner as deputy had failed to provide the OPG with accounts over a period of three years. There had been a substantial damages award made to CJ which had remained untouched in a special account in the Court Funds Office. Her deputy (her partner) said he wished to conserve this in the hope it could be used for future stem cell treatment (rather than use it now for her benefit and wellbeing).

The senior judge upheld the earlier decision to revoke the deputyship though stating he was certain there had been no "dishonest misappropriation" of CJ's funds and that "there was something faintly endearing about MP". He also went on to ask for the panel deputy, once appointed, to investigate:

> "whether it is in CJ's best interests that her damages award is retained to pay for future stem cell treatment (which may never become available in her lifetime) or

> whether it would be better to apply the award for the purpose for which it was intended when the settlement was agreed," para 44, EWCOP21.

Her best interests, he implied, would be best served by looking at using the funds now rather than conserving them.

Reflections on the cases

The Senior Judge's handling of cases – the mix of blunt observation and compassionate understanding

The senior judge was not averse to making clear and sometimes acerbic comments in expressing his view of individuals who have misused their powers under the law. His comments, already cited, in cases 68, 66 and 55 are examples.

But conversely, as in cases 21 and 33, analysis of cases shows that he also expressed empathy and understanding in dealing with cases where there was no fault or where there has been no intention or malice in failures to manage the donor's affairs appropriately. In certain cases he expressed his concern about the impact of any decision he might make on the individuals involved in the case and the financial health of the estate involved – often making careful calculations of the costs involved in placing someone in residential care, or bringing in home care; or the costs of appointing a panel deputy when dealing with estates of lesser value (cases 33, 67). Wherever possible, he makes appointments which are supportive – such as agreeing to the appointment of 'successive deputies' who can pick up fuller responsibility in due course (case 52); or revoking an LPA and appointing the former attorney as deputy – to ensure more oversight (through OPG supervision) of the management of the donor's property and affairs (case 70). In others, he will try to appoint a non-professional deputy to save on costs (of a professional) to the dwindling estate (cases 10, 57) or attorneys who may be family members, like the one being relieved of the duty, but who are more competent.

The poisonous effect of intra-family disputes

Many cases were characterised by intra-family suspicions and jealousies, often displayed between siblings (Table 8). In case 14, two sisters objected to their brother's application to be sole deputy for the management of their father's property and affairs, asking instead for all three of them to be appointed. There had been a history of allegations and counter-allegations of the abuse of their father between the siblings, with the sisters asking the county council to investigate their brother's actions. The council had investigated but dismissed their suspicions. In his witness statement to the court, the brother's view of his sisters was made clear:

> "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, EWCOP14.

Senior Judge Lush commented that the siblings, both applicant and respondents, did not "have any idea about the fiduciary duties and practical responsibilities that a deputy is supposed to undertake," para 24. Nor did he think it would be satisfactory or possible to appoint all three as deputies because of their patent inability to co-operate with each other.

He later remarked "unfortunately some deputies take advantage of their position and family members are often the worst offenders," para 31, c 14. His decision was to appoint the brother as sole deputy, and requiring him to obtain and maintain security of £550,000 – (their father's assets calculated as being £580,000).

Many of the cases displayed a confused mixture of incompetence, mutual suspicion between different family members and misuse of the donor's funds. In one case (c 49), five siblings were in disputation among themselves (three against two). Two of the daughters had been appointed deputies and one of the sons argued that he was being made to leave their father's property in which he had lived rent-free although their father had pledged he would always have a roof over his head. The two siblings who were deputies were seeking to sell the property in order to pay for care home fees now that the father had been placed in residential care. Their brother responded, claiming there was an Irrevocable Deed of Gift with regard to the property which protected his right to live there and that he was a victim of their "bullying and relentless harassment which was beginning to affect his health", bringing a case against them under the Family Law Act 1996 (para 26).

In affirming the two daughters as deputies, Senior Judge Lush criticised the applicants (their three other siblings) who sought to contest this and criticised their behaviour:

> "I am singularly unimpressed with the applicants' conduct. Having made the application they failed to follow it through. They didn't file any responses to the deputies' witness statements…….. They didn't turn up to the hearing and of course their application was unsuccessful. They lit the fuse and ran away. This is a case in which a departure from the general rule [on costs] is justified," para 47, EWCOP49.

He then went on to say that one of the applicants, along with the others, would be expected to pay her share of the costs despite the fact that normally she would have been likely to have been exempted (her husband was on welfare benefits), saying that this did "not grant her immunity from an order for costs being made against her," para 48, EWCOP49.

In several cases, disputes between siblings often centred on the failure of one or other of them to fulfil what they saw as their family 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, Stephanie claimed that:

> "her brother Paul was controlling our mum's finances without legal authority. He has made no money available for her personal needs. I suspect he is renting out her villa in Spain and keeping the proceeds even though he claims it has stood empty for years," para 15, EWCOP61.

Their sister Tina responded saying:

> "The villa is in my mum's and brother's name. 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, EWCOP61.

The senior judge preferred to appoint Tina as their mother's deputy saying that Stephanie was unsuitable because of her poor relationships with her siblings and with the management at the care home where her mother lived.

Intra-family disputes sometimes led to the involvement of the council and the police. In case 23, Donna, one of the applicants and granddaughter-in-law, claimed that the donor's son-in-law had been removing funds from the donor's savings. Allegations in relation to this abuse were made to the safeguarding team at the council, the care home and the police– but "none of them took it seriously". With regard as to whom to appoint as deputy, the senior judge said that the grandson, Alan, would be unsuitable because:

> "he is completely in thrall of his wife (i.e. Donna)" and that together "they have shown they have no intention of collaborating with other members of DC's family, or her care team or her social workers and for that reason alone they are unsuitable to be personal welfare deputies". Furthermore, ""I do not believe that it would be in DC's best interest to appoint Alan and Donna as her deputies partly on account of the hostility that exists between them and the rest of DC's family and the care staff who look after DC. I believe that such hostility would have an adverse impact on the administration of DC's property and affairs and that the appointment of an independent deputy would not only be preferable but would also be in DC's best interests" paras 32 & 33, EWCOP23.

The council was appointed deputy for property and financial affairs.

At this point it is important to note that not all cases where there is evidence of intra-family disputes show sign of financial abuse of the person lacking capacity. Assessment of the 23 cases where there were clear indications of family disputes and infighting (often involving arguments about who should act as attorneys or deputies), 14 appeared to display evidence of possible financial abuse – just over half.

Failures of attorneys to observe their joint responsibilities

It was striking to see that in a number of cases, attorneys, who had been appointed jointly, or jointly and severally, failed to observe their cooperative responsibilities as attorneys. Each attorney has to fulfil the responsibilities which fall to him or her. Where appointed jointly, this meant, for example in case 19, that:

> "BW should have acted jointly [as laid down in the LPA] with his brother rather than allow him to have a free rein in the management of their mother's property and financial affairs. For this reason he is jointly liable for any loss to ID's estate [their mother, the donor]. Furthermore, if MD turns out to be a man of straw, BW could find himself wholly liable for the loss to ID's estate and there is a potential conflict between his interests and his mother's interests" para 34, EWCOP19.

In another case, a grandson was not absolved of his responsibility as a co-attorney and was relieved of his attorneyship because:

> "he should have acted as a check and balance on MO, rather than allow her to wreak havoc with SM's finances; his failure in this regard makes him partly responsible for the loss to her estate," para 33, EWCOP27.

The tensions that are shown time and time again to exist within families do not necessarily sit comfortably with their duties to work jointly often imposed by attorney- and deputy-ship arrangements. And those self-same arrangements may exacerbate pre-existing tensions that had not surfaced before.

Comment

Family values

The role of the family, and society's view of it, is at the centre of most cases coming before the CoP. Family members are the key players in a majority of cases. Most people named as attorneys in LPAs registered with the OPG are related by birth or marriage to the donors involved. The notion that family members are the best people to act as attorneys and be appointed as deputies (with close friends the best alternative) is embedded in court practice and indeed most cases deal with cases involving family members (for good or ill). As Senior Judge Lush has pointed out, over 90% of cases he hears are uncontentious, so it is fair to accept that the notion of 'family is best' is a sound one. In line with that assertion, the senior judge remarked in one case:

> "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, EWCOP58.

and in another case:

> "The court has complete discretion as to whom it appoints as a deputy though generally speaking, in the absence of any good countervailing reason, it is in the best interests of the person who lacks capacity to appoint a relative or close friend in preference to a stranger," and "In this case there is no countervailing reason to prevent the court from appointing CA to be his mother's deputy for property and affairs," paras 45 & 47, EWCOP33.

As noted, friends too are important. Indeed, the senior judge was sympathetic to the case for a trusted friend to be appointed deputy rather than a relative in several instances but:

> "I should briefly summarise the law by saying that nobody (whether a family member or a trusted friend) has an automatic right to be appointed as deputy. The court has complete discretion as to whom it appoints but it must exercise it discretion judicially and in AW's best interests…. ,"para 52, EWCOP16.

He went on to point to the devotion of AW's friend (DB) as opposed to his relative (DW) and appointed the friend (DB).

The judge made a similar decision in another case. This time SB, a former neighbour and, it was suggested, her unmarried partner, was preferred as deputy over SB's two sons who had

> "abused his position of trust as an attorney benefitting from his office and by failing to act with honest and integrity (BB)" and
>
> "failed to safeguard his mother's finances from depredation by his co-attorney; to engage with the OPG; and comply with court orders (RB)," para 30, EWCOP7.

Decisions in both cases were based on positive views of family relationships and those who were closest.

For the same reason – that family is best, followed by trusted friends and others close to the person lacking capacity – panel deputies (drawn from a panel of officials) are regarded as deputies 'of last resort' (the phrase used in a number of the cases examined), which means that they would only be appointed where no other more suitable person existed. But this view notwithstanding, analysis of the cases reveals the varied and complex circumstances of family life and shows how these conventional assumptions may prove unfounded, or at least unreliable, to the detriment of the individual at the centre of the case (the donor, or P). The assumptions often embedded in public discourse about the 'family' – of goodwill, mutual support, blood being thicker than water – are often challenged by behaviour and attitudes as revealed in court.

Having to take responsibility for the property and financial affairs of a relative, often a parent, seems sometimes to have one or other of two negative impacts – that it poisons pre-existing relationships further, or that it precipitates bad feeling where none existed in the past. Several cases showed families fighting openly amongst each other following a pattern established years ago – bickering and near violence in court characterised two of them. In one case, the senior judge reported what one man said of his relationship with his sister:

> "In response to my enquiry about his and Julian's relationship with their sister Lisa, Gary said "My sister and myself can't abide each other. If she was dying in the street, I'd leave her there." He thought that Julian's relationship with her may be marginally better," para 25, EWCOP66.

In others, concern that their parent's assets might now be being mishandled by a sibling provoked suspicion and hostility where none had existed in the past. Composite, multi-generational families (made up from several marriages, with several siblings, half-siblings, grandchildren and in-laws all involved) sometimes complicated matters, although the way in which splits occurred did not necessarily follow expected patterns (case 23). Alliances might have been forged between a grandchild and an uncle, for example, rather than a grandchild and parent.

From time to time, the proprietorial attitudes and assumed entitlements of some adult children towards their parents' assets (seen as '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," c 6, para 10. In the case where the attorney was described by the senior judge as "callous and calculating" and his behaviour as "repugnant", the attorney had stated:

> "I see no need to replace myself [by a panel deputy]. 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……..I am the sole beneficiary of the estate and restitution I made [of money he had already misappropriated] would come straight back to me on my mother's death which considering her present state of health is likely to occur sooner rather than later," para 28, EWCOP68.

Assumptions about rights to inherit parental estates engender strong feelings within families. These can sometimes be exacerbated by official policy in an area of law different from family or mental capacity law.

Two such policy areas are reflected in some of the cases analysed here: one, is the liability to pay for social care which because it is means-tested may tempt families into financial action termed 'deprivation of assets', where, contrary to the law, they dispose of their relative's funds to their own benefit, bringing them down to below the means test level, thus avoiding having to pay the full cost of social care. Case 6 mentions this in para 20. GB had gifted £75,000 of her mother's money to herself and her brothers which the local council then decided to treat as deprivation of assets, assessing the donor has having notional capital of £92,465.54 at the time she was receiving social care services.

The second aspect relates to NHS Continuing Health Care arrangements, whereby individuals are entitled to have their whole care home fees paid out of NHS funding if their medical condition qualifies them. In general, people are not familiar with the rules that govern this right and it causes much resentment if their ailing relative fails to qualify. Disputes about paying care home fees often arise and payment is withheld. As already noted, the existence of such arrears often triggers suspicions of financial misappropriation.

These policy 'traps' often colour and sour relationships within families and are frequently noted in public discourse.

The involvement of other agencies

We noted that councils are sometimes involved in applications to the CoP and that in some cases they figure in arrangements for the appointment of deputies (we also noted one case (c 27) where the council, Milton Keynes, refused to act as deputy). They raise concerns with the OPG and may provide evidence when OPG make applications to the court. We noted cases where they had alerted the OPG to the possible occurrence of financial misbehaviour, in circumstances where they have come into contact with an individual who lacks capacity and is dependent wholly on the good faith of their family. We have not identified any relevant statistics to be able to quantify council actions.

In five cases (6,19,23,70,66), there were indications of police involvement but these mostly concerned incidents where disputing family members had made allegations and counter allegations about financial abuse taking place – which were not followed up by the police. Not all involved allegations of financial abuse. One call to the police was the result of a cup of tea

being thrown by one sibling over another and another one was of a daughter behaving badly when visiting her mother at a care home. In case 6, both police and council had been directly involved – the police finding the donor wandering at night and the council following this up to find evidence of financial abuse by family members.

We have not identified any statistics to quantify police involvement.

Dismissal of cases

It is important to note that applications made by the PG are not automatically confirmed by the court. We noted four that were dismissed and others were only partially upheld. On one occasions (c 10), the senior judge commented:

> "At the beginning of this Judgement, I said that this case was unusual, insofar as I rarely dismiss a safeguarding application made by the Public Guardian. It is also unusual because there is no evidence on the part of dishonesty of the part of the attorneys, and, although they failed to produce satisfactory accounts, I would be very surprised if any of them misappropriated their father's funds. The principal criticism is that they have been applying DT's funds towards the maintenance of their mother (his wife) who would otherwise be reliant on means-tested benefits," para 47, EWCOP10.

It would therefore be wrong to conclude that there is a sure and certain pathway through the process of applications and revocation.

The impact of legislation on human rights and the rights of people with disabilities

A theme that runs through the cases is the stress placed on compliance with human rights legislation. Decisions must reflect the Mental Capacity Act 2005 (under which the CoP was established) which is founded on a strong human rights framework. In addition, increasing emphasis is placed on rights under the European Convention on Human Rights (Cases 70, 62, 58, 16) and UN Convention on the Rights of People with Disabilities (Cases 70, 14), along with reminders to witnesses and others of the guidance provided in Mental Capacity Act Code of Practice (Case 72). Decisions must be made on the basis that they are the "least restrictive" on the person lacking mental capacity, that they are in their best interests and that their rights to autonomy and, where capacity is not lacking, to make "unwise decisions" must be respected. As we have noted elsewhere in the report, tensions may be encountered between expectations based on a human rights interpretation of the law relating to capacity and the perceived duties of the authorities to safeguard vulnerable people.

Conclusion

The case analysis reported in this chapter is part of a broader piece of research looking at the financial abuse of people lacking capacity from a set of differing but complementary perspectives. A feature of the research as a whole is that it focuses on abuse that takes place largely within the domestic, family setting – the private domain – and is therefore liable to be hidden from public view. Its occurrence, once revealed, challenges fondly-held assumptions about the nature of family life and also demonstrates the seriousness of some of the abusive behaviour that people lacking capacity are prey to. In contrast, much of the research on

financial abuse undertaken to date has investigated abuse committed by outsiders, in person, on-line or by telephone (especially scams of various sorts) – abuse which is serious indeed, but perhaps less morally-charged than the abuse of trust that is often involved in financial abuse within the family. Further, more is known about the character of abuse by strangers – the media are interested in pursuing it, and charities exist to supports its victims.

With respect to researching intra-family financial abuse, the distinctive contribution that analysing CoP cases makes is the way the court process can be shown to shine a light on the details of this often-hidden type of abuse. Witness statements and responses to questions asked by the judges during hearings provide a rich source of information which is readily available to the researcher. Findings of fact are made and decisions taken.

A number of interesting questions arise from the scrutiny that the court process makes possible. Some of the misbehaviour revealed before the court arguably amounts to crime (at least in the view of the lay person). But we have seen in earlier chapters that this is a complicated issue. A comment by Senior Judge Lush in relation to a case he heard in 2014 (the year before the cases examined in this report) explains the position:

> "There are significant differences between a police investigation and an investigation conducted by the OPG. When the police investigate an alleged crime, they need to consider whether there is sufficient evidence to present to the Crown Prosecution Service ('CPS') to guarantee a realistic prospect of conviction, which in this case would have been on a charge of theft or fraud by abuse of position. The CPS would have had to prove that JM was aware that he was acting dishonestly and they would have had to prove this 'beyond reasonable doubt', the standard of proof in criminal proceedings. The decision not to prosecute him simply means that the CPS was not totally confident that it would be able to prove JM's guilt so as to ensure a conviction. It does not imply that his behaviour has been impeccable." *Taken from: OPG v JM [2014] EWHC CoP B4*

As noted earlier, the issue of whether a case is referred to the police and whether the crown prosecution service decides to prosecute depends on several factors, particularly the standard of the available evidence, and specifically whether or not, as Senior Judge Lush remarks, it meets the standard of proof needed in criminal proceedings.

Further, in terms of redress, the CoP is not set up to pursue this beyond its own authority – for example, in one case which involved gifting of £640,000, the senior judge mentions that obtaining redress for money taken would have to be pursued in the Chancery division (case 41, para 19). The civil court is the main conduit for redress – or at least for the recovery of what has been taken. The CoP and the OPG have powers of investigation but their legal duty relates to whether the law protecting those lacking mental capacity is being breached and whether those given power under the Mental Capacity Act 2005 to act for such individuals contravene that authority and/or fail to act in the best interests of those for whom they act. The police and the crown prosecution service play very little part.

In this respect, it mirrors the experience of safeguarding teams in local councils where the police, although represented on adult safeguarding boards (and sometimes chairing them), pursue very few cases of financial abuse that the safeguarding process reveals. The police themselves report that they are unable to follow up cases because, too often, required levels

of proof are not met or other priorities imposed by higher authority (such as the Home Office) take precedence. As for the attorneys or deputies and other members of the family involved in abusive behaviour, little punitive action apparently seems to follow its revelation before the court, though we had no opportunity to follow up professional disciplinary or media reports. Revocation of an LPA and the appointment of deputies are the main means of protective intervention for the donor. Little beyond that seems to happen to the abuser.

Two big policy questions thus remain unanswered:

- how does a person lacking capacity and who has suffered financial abuse obtain redress, restitution and protection? and
- how can abusers be held to account for the misappropriation of money and other assets beyond being stripped of their appointment as attorney or deputy?

Drawn from: Gillian Dalley et al (2017) THE FINANCIAL ABUSE OF PEOPLE LACKING MENTAL CAPACITY, Brunel University of London,
[http://bura.brunel.ac.uk/bitstream/2438/15255/1/Fulltext.pdf]