

A White Paper on Elderly Fraud

How To Protect You And Your Family's

Hard-Won Wealth

By Justin Patten, Solicitor

This Guide provides a complete road map to help you protect you and your family's finances.

After reading this report you will be able to know:

- *What Is The Real Risk To Your/Your Loved One's Finances?*
- *What is A Lasting Power of Attorney and Should You Make One?*
- *Why The Current Law And The New Legislation Will Not Protect Your Family*
- *What Is The Law of Presumed Undue Influence And How Can It Help You?*
- *What Can You Practically Do To Prevent Your Family's Finances Being Abused?*
- *If The Worst Has Happened, How Can You Legally Fight Back?*

This guide will help you protect your wealth and help minimise the prospects of your wealth disappearing at the hands of a fraudster/false friend

What Is the Primary Threat to Your Loved One's Finances?

**“Sometimes the best hiding place
is the one that's in plain sight”**

Stephenie Meyer

Sadly, it is estimated that millions of older adults experience financial abuse each year, and the financial losses associated with this abuse can be devastating. According to the Office for National Statistics, approximately 1.5mn older adults in England experienced some form of financial abuse in 2020.

The main view in this White Paper is that contrary to media reporting(which focuses on scammers) and the view of society, the majority of elderly fraud is actually done by family members and/or those in position of trust.

In addition, often these false friends/fraudsters use perfectly valid legal documents such as Lasting Powers Of Attorneys and wills prepared by firms of solicitors to enact this fraud.

This step of “legalisation” makes both the fraud more difficult to detect but also more difficult to oppose once the facts come to light. With respect to a will done by a firm of solicitors, it is actually fairly difficult to challenge that Will even if it has been masterminded by a false friend.

From our experience, a number of people are fully aware of these vulnerabilities and have developed a well thought out and well implemented strategy which enables them to successfully obtain monies and assets from vulnerable people.

Until one has this thought in mind (and clearly our legislators and collective society have not), there will be a number of families who will be subject to elderly fraud and fighting an uphill battle to recover monies and obtain justice.

The purpose of this White Paper is to shine light on this trend and provide you with the tools to both prevent you/your loved ones from experiencing this fate and also to give you the methods to fight back if it has already happened.



What are the kinds of financial abuse?

Types of financial abuse include :

- Taking money out of bank accounts
- Preventing a person from accessing their own money or assets
- Change of wills to favour certain individuals
- Misuse of a power of attorney or deputyship
- Missing valuables from the home (e.g. jewellery, ornaments or art work)
- Deliberate isolation from friends and family
- Income missing or unaccounted for
- Suspicious payments to third parties

How is Elderly Fraud Done?

**“If you have an enemy, then learn and know your enemy,
don't just be mad at him or her.”**

Denzel Washington

In order to have a full understanding of elderly fraud, it is necessary to fully recognise the (simple) strategy of committing the act(s).

Once you understand the primary way that most fraudsters/false friends commit elderly fraud you can develop your own strategies to minimise the risk of this happening.

In fact, there is actually a fairly simple strategy for committing elderly fraud as we do see it often with our work.

It consists of a Fraudster/False Friend doing the following:

- Exercising strong influence on a vulnerable person – manoeuvring the vulnerable person to give sole control (or effective control) of his or her assets to that bad person. This can be getting control of that person's financial affairs and if a Lasting Power of Attorney(LPA) is done, becoming a sole attorney.
- It can also involve becoming sole effective sole executor of the vulnerable person's Will. It is more difficult to challenge a will executed by a solicitor and despite safeguards this is relatively

easy to do. Ironically the legal profession can be a very useful tool to enable a transfer of assets to manifest to a predator.

- Being both very self-serving and also, patient. Typically, other relatives (would be beneficiaries) under-estimate the lengths that the false friend will go to get what he or she wants. This puts the false friend at a fundamental advantage as they use any card possible to achieve their objectives.
- The false friend possesses good knowledge of the law. They know there are inherent weaknesses with the legal process which can be exploited. For example, it is difficult for other family members to challenge a Will prepared by solicitors. The individual knows that the Office of the Public Guardian(OPG, a possible safeguard) and indeed the police will be unlikely to intervene. As we will read later the OPG is not that effective in tackling elderly fraud as it is has a low successful enforcement rate.

What Is a Lasting Power of Attorney and Should You Have One?

One of the key decisions an elderly person has to make is whether to make a Lasting Power of Attorney(LPA)? They are also heavily promoted by the government and by the media.

The data from the Office for Public Guardian,(OPG) shows that in 2022, 848,896 LPAs were registered, which is up nearly 20% on 2021 figures. Over the five-year period between January 2018 to December 2022, a total 3.8 million LPAs were registered and on average 761,500 LPAs were registered each year

A LPA is a legal document appointing someone to deal with your affairs on your behalf, should you ever become unable to do this yourself through mental incapacity.

There are two types of LPA: one in respect of your property and financial affairs and one for your health and welfare decisions.

Once you have made an LPA, it can be registered with the OPG ready for use.



The main advantage if you were to become unable to manage your own affairs, your loved ones could face difficulties without an LPA as no-one would legally be able to make decisions on your behalf. If you have a property and financial affairs LPA in place, your attorney will be able to make sure your bills are paid, look after your home and ensure that your finances are properly managed.

Without an LPA, your family might need to apply for a deputyship order¹, which can take many months to process and is substantially more expensive to arrange than a LPA.

A deputy must provide an annual deputyship report to the Court, outlining the decisions you have made on the person's behalf. If you are a property and financial affairs deputy, you should also provide a summary of their accounts.

There are two types of deputyship – a property and financial affairs deputy and a personal welfare deputy.

On top of the application fee, you or your deputy must also pay annual fees. If the court decides the application demands a hearing, there will be further costs.

After the application, deputies must then officially inform the person they want to help, as well as three people who know the person, such as doctors or social workers. An annual report must be completed accounting for all decisions.

By having a LPA there is a good prospect of avoiding the cost and the hassle of a deputyship but an LPA has weak supervision which does provide a blind spot and enables the potential of financial abuse.

What is the Office of the Public Guardian (OPG) and Can It Help You?

The OPG sets up and manages a register of LPAs and a register of court orders that appoint Deputies.

It is relevant as a possible deterrent to fraud as the OPG's role will include investigating where there are concerns regarding abuse by the Attorney or Deputy and if necessary referring these concerns to other agencies including the Police and raising a safeguarding alert.

¹ <https://www.gov.uk/become-deputy>

However, the only sanction available to the OPG is referral of a case to the Court of Protection and therefore an OPG investigation should not be seen as an alternative to a criminal investigation.

The OPG keeps a register of Attorneys and Deputies these can be checked through a simple application to the OPG.

The OPG has a legal duty to investigate complaints or concerns about the actions of deputies, registered attorneys and people acting under an order of the Court of Protection.

We can say the numbers of successful prosecutions is small and is not a real deterrent due to the tiny number of people who complain. E.g. Fraudulent LPAs currently represent less than 0.1% of all registered LPAs, which exceed 6 million. ²

The OPG records the number of reported cases of fraud, but not the number that are passed to the police or the CPS on the death of an alleged victim. The OPG's legal authority ends upon the death of a donor (the individual who has created the LPA.) The only way the OPG can get involved after death is if you have a deputyship situation and they can get the deputy to produce a final report.

Where there is alleged fraud following the death of a donor, the OPG would advise the concern raiser to raise their concern directly with the police if they feel it is appropriate.³ The reality is that the police is unlikely to take action and will probably say this is a civil matter. E.g. it is up to you.

² The OPG has been recording data since April 2021 on concerns raised about LPAs that mention fraud. Since April 2021, there have been 178 initial concerns that mention fraud. From April 2019 to 31 October 2022, 15 fraudulently created LPAs were removed from the register. The Public Guardian referred the remaining 5 cases to the Court of Protection, which led to LPAs being removed.

³ <https://questions-statements.parliament.uk/written-questions/detail/2022-12-07/105551#:~:text=The%20OPG's%20legal%20authority%20ends,they%20feel%20it%20is%20appropriate.>

The New Legislation – Will It Give Your Family Protection?

“ The wrong way always seems the more reasonable.”

George A. Moore

The Powers of Attorney Act 2023 makes changes to how LPAs are made in future and will be implemented at some point in 2024.

The Act aims to make the LPA process easier to access, simpler and apparently more secure from fraud and abuse. The LPA changes will address such problems found out by an investigation by the BBC Radio 4 consumer programme, “You and Yours” who spoke to one victim whose empty home was targeted by fraudsters who obtained an LPA without any proper checks. The fraudsters briefly visited the woman’s home to change the locks and then tried to sell it using the LPA.

The government believes that switching to an online service from a paper service will streamline the process and reduce errors. It also seeks to address problems about LPA rejection. Almost 130,000 LPAs applications have been rejected between 2018-2023 due to mistakes.

Once the digital system is in place, those making a LPAs, known as donors, will need to register the document once it has been signed. They will be able to do this wholly online if they choose. There will also be the option to use a paper-based system or a mixture of online and paper.

Given many people do not think about LPAs until later on in life, it is apparently often the elderly who find themselves the victims of identity fraud which is a key focus of the Act.

The changes include :

- Only permitting the donor to apply to register an LPA, removing the ability for attorneys to do so under the current rules.
- Enabling the parties to an LPA (the donor, attorney(s) or certificate provider) to choose whether to sign the LPA digitally or on paper, or by a combination of the two.
- Widening the group of people who can raise objections, including people not named in the LPA.

- The OPG will take over notifying the list of 'people to be told' named in the LPA. It will be open to anyone with a valid concern to raise this with the OPG.
- Identity checks will be carried out on those applying to register an LPA for the new digital system.

The Act has received broadly support but in our view the fundamental problem with the reforms is that it does very little to focus on providing safeguards for valid LPAs and a mechanism for checking bank accounts and accordingly this provides a blind spot which makes the system of LPA fairly easy to abuse. Indeed, there have been clear warnings to both the legal profession and politicians from respected sources on this point.⁴ None of the changes within the new Power of Attorney Act will do anything to increase the level of scrutiny of valid LPAs in place.

What are the Key Steps Should You

Take If You Do an LPA?

PROVERB : "It's easier to stop something happening in the first place than to repair the damage after it has happened"

Fundamentally we do believe that having a LPA is a good idea as you can avoid a deputyship and get your affairs on a legal footing, but due to the lack of transparency you need to take additional steps including;

- Consider your LPA attorneys carefully. You could consider appointing one or more attorneys to act as a check and balance. The biggest error you can make is in your choice of attorney. Think if you really want a family member or not. Contrary to what most people might believe, a family member may not always be the best attorney for you. You may want to appoint a professional attorney too.
- If you do decide to appoint a relative, speak to them about it prior to drawing up the paperwork. Are they aware of the time commitment?

⁴ A SPECIFIC WARNING ABOUT LPAS From JUDGE DENZIL LUSH

The former Judge Mr Lush's who was one of the leading authorities on LPAS said giving someone the power to make decisions on another's behalf is leaving elderly people open to abuse. In the foreword to a book, Mr Lush said lack of transparency causes suspicions and concerns that 'rise in a crescendo and eventually explode.' He went on to criticise the Ministry of Justice as being "disingenuous" in its promotion of the legal document. Mr Lush said that he personally would prefer a Deputyship.

- Consider providing workable stipulations within your LPA but ensure they are practical and legal and not too time consuming. For example – providing bills and accounts to a third person, having yearly audits, or consulting a third party for big financial decisions such as selling your home to pay for care, so they are involved in the decision-making process.
- Make sure your affairs are in order to make it as easy as possible for your attorneys. E.g. Setting up standing orders for your bills for example – anything that will simplify your attorney’s job. Put yourself in their shoes: will they know who you bank with, how you pay for your utilities, and what benefits you receive for example?
- Keep your plans current – Make sure you keep your LPAs and your Wills are updated if your circumstances change. Your choices around the people you want to be responsible for your finances and wellbeing may change as time moves. Maintain a record of your online passwords which people can access.
- Seek professional advice where necessary – Shop-bought and online LPA kits may be suitable for those with very straightforward financial situations or with considerable legal experience. However professional legal advice can be a cost worth paying.
- Bullet Proof Your Will. Ensure that your wills are legally compliant. The goal is to provide a way to ensure that your loved one can have his or her affairs managed by trusted others in a practical way but also some controls are put in place. Consider communicating what you plan to do to your beneficiaries.

What To Do If Things Have Gone Wrong?

“Peace and justice are two sides of the same coin”

Dwight D. Eisenhower

If unfortunately the stable door has already bolted (and if you did object to the LPA that did not work) and you have access to the Donor’s Bank statements (not always easy to get), we suggest the following during the lifetime of the LPA Donor:

- You can report your concerns to the Office of Public Guardian. Anyone can report a deputy or attorney to the OPG if they have concerns about their actions. You can report by using their form OPG130 or by contacting the OPG directly the Office of the Public Guardian, PO Box 16185, Birmingham, B2 2WH safeguardingunit@publicguardian.gov.uk Tel : 0115 934 2777
- Go to Social Services - If there is no deputy or attorney in place, you can raise a Safeguarding Alert with the local Social Services Safeguarding Adults team, who should investigate allegations of financial abuse and, where appropriate, involve the relevant authorities. ⁵
- Consider approaching the bank. This link will take you to the Financial Abuse Code of Practice which many banks have signed up to – clause 6 refers to ‘sign posting’ / signs of financial abuse, but unfortunately this is only in relation to the actions of a someone appointed under a Power of Attorney or other registered third party – no reference is made to general suspicious activity on the elder’s back account such as for the (unusual) payment of ‘out of the ordinary expenses’ such as sudden expensive holiday payment or car purchase – especially when bank will be fully aware of their obligations. ⁶
- Consider a possible civil action for undue influence or a breach of trust and/or fiduciary duty claim and could extend to making an application for an injunction in order to prevent the former attorney from disposing of, or dealing with, assets. It may also be necessary to pursue civil proceedings in order to recover the funds.

⁵ <https://www.nhs.uk/service-search/other-health-services/local-authority-adult-social-care>

⁶ https://www.ukfinance.org.uk/system/files/2022-12/Financial-Abuse-Code-2021_Updated_2022.pdf

- Apply to the Court of Protection, including applications to appoint a deputy, for a declaration as to the vulnerable person’s capacity and for the removal of attorneys and deputies. The Court of Protection may assist to a certain extent by way of an order to repay funds to the donor of the LPA.
- Consider reporting to the police. It is unlikely to work, but can do.⁷

What is the Law of Elderly Fraud?

The Law of LPAs

The LPA attorney must:

- follow any instructions the donor included in the LPA
- consider any preferences the donor included in the LPA
- help the donor make their own decisions as much as they can
- make any decisions in the donor’s best interests
- respect their human and civil rights⁸

The general rule for deputies and attorneys about giving gifts is simple: apart from some exceptions, the law says you must not make gifts from the person’s estate. For attorneys acting under a registered property and financial affairs LPA, these exceptions are set out in section 12(2) of the MCA 2005.

To count as an exception, the gift must satisfy all three points below. It must be:

1. given on a customary occasion for making gifts within families or among friends and associates (for example, births, birthdays, weddings or civil partnerships, Christmas, Eid, Diwali, Hanukkah and Chinese new year)
2. to someone related or connected to the person or (if not a person) to a charity the person supported or might have supported
3. of reasonable value, taking into account the circumstances in each case and, in particular, the size of the person’s estate⁹

⁷ <https://todayswillsandprobate.co.uk/woman-found-guilty-of-abusing-power-of-attorney/>

⁸ <https://www.gov.uk/lasting-power-attorney-duties>

⁹ <https://www.gov.uk/government/publications/public-guardian-practice-note-gifts/public-guardian-practice-note-pn7-giving-gifts-web-version>

Evidence of an LPA attorney's excessive withdrawals from the donor's funds would be sufficient to mount a charge that she had abused her position under section 4 of the Fraud Act 2006, the Court of Appeal (Criminal Division) has held.¹⁰

Section 1 of the Theft Act 1968 provides the legal definition of theft who become closely and heavily involved to the exclusion of others.

Often the financial abuse is not discovered until the vulnerable person has died and you have the bank accounts of the vulnerable person.

This can lead you to focus to lifetime transactions.

The Law of Presumed Undue Influence

One of the key legal issues is there is a presumption of undue influence for lifetime gifts where there is:

- a relationship of trust and confidence is assumed in some incidences, namely that between parent and child, solicitor and client, medical practitioner and patient or trustee and beneficiary; and
- a transaction is of such a size or nature that it calls for an explanation.

Once these requirements have been satisfied, the burden of proof shifts to the person seeking to uphold the transaction to show that on the balance of probabilities the transaction was entered in to by the influenced person independently and free from influence.

If undue influence is proved, then the transaction is declared void.

A presumption of influence in certain categories of relationship, for reasons of public policy, there is a legal presumption of influence (as opposed to merely an evidential one).

A significant gift made by an elderly and/or vulnerable individual, particularly where that gift is substantial in the context of the individual's other assets is often a warning in these types of cases.

¹⁰ (R v TJC [2015] EWCA Crim 1276).

The law presumes that the person in the dominant position may have taken advantage of the other person's vulnerability or dependence.(ascendancy) The person claiming to be influenced does not need to prove the undue influence; they merely need to prove the existence of the relationship and that it was one of trust and confidence.

Some Legal Examples:

A legal case in respect of lifetime transactions is found in in Royal Bank of Scotland v. Etridge ¹¹in which it was established that if a person bringing the claim can show that there was a relationship of trust and confidence between the person alleged to have been unduly influenced and the alleged undue influencer, together with a transaction calling for an explanation, then the Claimant will have successfully discharged the burden of proof and the burden will pass to the Defendant to prove the unexplained transaction(s).

Lord Nicholl said *"A relationship where one has acquired over another a measure of influence or ascendancy of which the ascendant person then takes unfair advantage... without any specific acts of coercion."*

In another case, Hammond v Osborne ¹² a pensioner had never received independent advice in relation to the gift; The size of the gift was never brought to his attention; The pensioner did not seem to have given any consideration to his future needs and how the gift might affect this; Osborn had failed to disclose the gift to the pensioner's family and wrongly told them she had no papers relating to his estate.

Once a presumption of undue influence is raised, the burden is on person exercising influence to prove that the influenced person entered into the transaction of their own free will. In this case the judge, Ward LJ emphasised here that in cases of presumed undue influence, the courts interfere on the grounds of public policy and not because there is any finding that there has been actual undue influence.

In Violet Hackett v (1) Crown Prosecution Service (2) David Hackett ¹³(Admin) Power of attorney inevitably demonstrating relation of influence, in the circumstances. The presumption of undue influence was not rebutted.

¹¹ [2001] UKHL 44,

¹² [2002] EWCA Civ 885

¹³ [2011] EWHC 1170

A Conflict of Interest

In a removal of executor case, re Folkes decd, Griffin v. Higgs¹⁴ the executors were removed because a number of lifetime transfers made by deceased, at a time when she was suffering dementia, and with the assistance of the executors, required investigation. The resulting conflict of interest meant that the executors could not conduct the investigations themselves. The appropriate test to be applied to each allegation was *“whether there appears to be on the evidence before the court, or with such evidence that appears likely to be obtained at proportionate cost, the basis for a claim which has reasonable prospects of success, subject to consideration of potential defences. Such a claim must enhance the value of the estate relative to the costs of pursuing it.”*

Undue Influence & Persuasion

The law of unfair influence is more difficult to prove with respect to wills.

Sir James Hannen further defined undue influence in the context of probate in Wingrove v Wingrove (1885) as being *“To be undue influence in the eye of the law there must be – to sum it up in one word – coercion”*.

The case of Brennan v Prior & Others [2013] EWHC 287(ch) illustrated that persuasion was due influence in which Ms Brennan challenged the will alleging undue influence by the siblings. However, dismissing Ms Brennan’s challenge, the judge said that evidence did not support her accusations of dishonesty; there was nothing irrational about the testator’s bequests, and that while there ‘is plenty of evidence that [his sisters] had the opportunity to influence [the testator] in the making of his will...I find persuasion but not coercion.’

Knowledge and Approval

With Wills, the testator must know and approve the contents of the Will (this is not applicable to a statutory will).

A party seeking successfully to challenge a Will must produce evidence of circumstances which leaves the Court not satisfied that, on the balance of probabilities, the testator understood its nature and effect, and sanctioned the dispositions it made.

¹⁴ [2017] EWHC 2559 (Ch)

As a matter of policy, the Court is cautious about accepting such challenges. Wills frequently give rise to feelings of disappointment for would-be beneficiaries which can lead to contentions that the Will did not reflect the testator's true wishes. If judges were too ready to accept such contentions the principle of testamentary freedom could be undermined.

What Practical Legal Steps Can I Take?

We cover some of the practical steps within a separate guide¹⁵so briefly:

Lodging Caveats

Often a sensible first step is preventing a grant of probate to an unsuitable executor and that is to enter a caveat , since it generally stops a grant being made in respect of an estate.

Make A Larke v Nugus Request

A Larke v Nugus request can be made by any person who has a genuine concern regarding the validity of the Will and is often made when a client is looking to challenge the validity of the Will for reasons such as:

If you are making allegations against a Will drafted by a solicitor you need a Larke v Nugus Request done in which you write a series of questions to the solicitor who drafted the will.

Challenge the Will

Where you have evidence of coercion of the Deceased relating to the Will and/or lack of capacity you can consider getting it overturned.

Force the Current Executor To Renounce

The executor renounces as Executor and steps out of the picture. This allows the next entitled person to take a grant of probate. Renunciation is an ideal option (and very cost effective) but only a possibility where an executor is cooperative, since he or she cannot be forced to renounce.

¹⁵ <https://www.human-law.co.uk/Uploaded/1/Documents/Guide-To-Resolving-Inheritance-Disputes.pdf>

Inventory and Account

A quick way to force a very silent executor to account for his/her activities is to apply for an order that he or she exhibit an inventory and account of the administration. This should be done by applying to the Probate Registry. If the Estate is more complex make a Part 64 application for disclosure.

Removal of Executor

One of the most dramatic steps is you applying for the executor to be removed or replaced in the Chancery Division of the High Court using a Part 8 Claim Form and supported by written evidence. If there is more than one executor, the others must all be joined as parties, often together with the residuary beneficiaries. If a sole executor is being removed, a substitute should be sought otherwise the estate will be left unrepresented.

Suing as a Beneficiary

If you have suffered direct loss due to the conduct of an executor or attorney, you could suing in your capacity as a beneficiary of the Estate.

What's the Next Step?

If you have a live dispute Human Law has developed a 30-minute “dispute assessment” which we conduct over the telephone with you. What we accomplish in this no-nonsense session is an initial assessment of your case and the most cost-effective approach to resolving your dispute. The ‘dispute assessment’ is conducted by Human Law principal, Justin Patten, who as well as being an experienced solicitor is fully trained and qualified mediator. He is accredited by the Academy of Experts and a published author in this area of law.

For an introductory period (until 1st July 2024) the assessment is being provided free of charge. To secure a time for a consultation with Justin email Justin@human-law.co.uk or call 01279 215580 stating the nature of your dispute, and providing as much detail as possible so that we can maximise our time during the telephone consultation.

Resources

<http://www.lawbriefpublishing.com/product/elderlylaw/>

Our principal, Justin Patten has written a book on elderly law, “A Practical Guide To Elderly Law” which is available on the Law Brief Publishing website which have a series of books available for sale in the legal arena by leading experts in their field. The book is also available on Amazon.

<https://www.human-law.co.uk/Uploaded/1/Documents/Guide-To-Resolving-Inheritance-Disputes.pdf>

Our firm has written a guide on resolving inheritance disputes.

<https://academyofexperts.org/>

The Academy of Experts offers a useful “expert witness” and mediation finding service. Their free service contains a searchable directory of accredited experts from a wide variety of disciplines.

<https://wearehourglass.org/who-we-are>

Get Support from charity, Hourglass. The Hourglass mission is simple: end the harm, abuse and exploitation of older people in the UK.

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