



# Albion Chambers COURT OF PROTECTION

## Money

### Whose is it anyway?

**A**s a society we are all ageing, some quicker than others. However, the sad reality is that as people are living to an older age, more people are susceptible to diseases such as dementia (including Alzheimer's) and they also suffer accidents which can cause irreparable frontal lobe damage. These conditions affect all areas of capacity, not least people's capacity to manage their money.

The Court of Protection only becomes involved if the person lacks capacity. The test for capacity is set out in the The Mental Capacity Act and is very clear. Everyone is assumed to have capacity and, where it comes to financial matters Section 1(3) is most personed, namely, "A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success and (4) a person is not to be treated as unable to make a decision mainly because he makes an unwise decision."

The issue of capacity is decision- and time-specific – it is not a "one-size-fits-all" approach.

In terms of "all practicable steps" there is clear distinction to be drawn between that and someone who, with the best intentions in the world, exerts "undue influence".

In terms of financial applications, the inability to make decisions are defined in Section 3, namely if he is unable:

- (a) "to understand the information relevant to the decision;
- (b) to retain that information;
- (c) to use or weigh that information as part of the process of making the decision; or

(d) to communicate the decision, whether by talking, using sign language or any other means."

It is also clear that in accordance with the basic principle namely, a person is assumed to have capacity unless established that they do not, that if a person requires information to be given in simple form, namely, simple language, visual aids etc. then that person is not to be regarded as not being able to understand the information and, most importantly, as set out in subsection (3) "the fact that the person is able to retain the information relevant to a decision, for a short period only does not prevent him from being regarded as able to make the decision. (4) The information relevant to the decision includes information about the reasonably foreseeable consequences of –

- (a) deciding one way or another, or
- (b) failing to make the decision.

#### How does this impact on Financial Matters?

The concern that society has regarding incapacitated individuals has been longstanding and in recent times resulted in the Law Commission's report which ended up enacting the 'Enduring Powers of Attorney' Act 1985 which came into force on 10 March 1986. This Act created the term 'Enduring Power of Attorney' which functioned in the same way as a conventional Power of Attorney but with one major exception. This was subject to a basic registration process which would continue or "endure" beyond the onset of incapacity (EPAA 1985 Section 1(A), and now MCA 2005 Schedule 4 Para 1). This was the case so long as the formalities were complied with. That meant a third party dealing with the attorney could assume that the attorney

had a valid form of authority from the donor (EPAA 1985 Section 9(3) now MCA 2005 Schedule 4 Para 18 (3)).

However, note that since the implementation of the Mental Capacity Act 2005 which came into force on 1 October 2007, no new EPAs may be made after 1 October 2007 albeit all existing EPAs will continue to remain effective. Thus, existing EPAs operate under the same legal basis under which they were created but within the framework of the new 2005 Act with one additional obligation – the Attorney for the donor must act within the donor's best interests as defined in Section 4 of the MCA 2005 and must also comply with the statutory code of practice. For full details of the existing EPAs these are all now incorporated into Schedule 4 of the 2005 MCA.

#### What has the MCA created in its place?

The MCA 2005 has expressly created a new type of Lasting Power of Attorney (LPA) as defined in Section 9 MCA 2005. Such LPAs can consider personal welfare or specified matters concerning P's personal welfare and also, that of property and affairs or again, specified matters concerning P's property and affairs. An LPA is defined as "a power of attorney" under which one party (the donor) confers on another party (the donee) authority to make certain decisions.

The essential provisions of MCA 2005 subsections 1 and 2 apply – that is to say the person must be assumed to have capacity unless it can be established that they lack capacity and that the capacity is relative to the matter and the time at which capacity needs to be determined thus, in essence, assume the person has capacity unless the contrary is shown and the decision for which capacity is, or is not made out, is both time- and decision-specific. In relation to property and affairs, the criteria for registration is not "does the donor lack capacity" but, "does the Power need to be used?" If it does need to be used then the Power can be registered by the donor or the donee. Thus, there is a more holistic and collaborative approach with LPAs – the donor does not

need to lack capacity whereas with an EPA the presumption is the donor is incapable of managing the full extent of his or her property and affairs.

However, in relation to welfare matters, although the LPA can be registered at any point, the LPA can only be used where the donor lacks capacity to make the decision in question (MCA 2005 Section 11(7)(a)). Where a doctor or another person treating the donor seeks to rely on the authority of the donee to make a valid decision, that doctor or treating person must ensure that (i) there is a valid (registered) LPA in place and (ii) the donor lacks capacity to make the decision.

One of the key matters concerning property and affairs relates to the application of the “best interests” to the donee’s will. A whole range of factors must be taken into account and only one of which might be the likely wishes of the donor. The criteria set out in section 4(7) and also section 9(4) are applicable.

Difficulties can arise as time marches on and in particular, where the circumstances in which an LPA was created, comes under scrutiny. The most recent case concerning this is that of *Re DP (Revocation of Lasting Power of Attorney)* [2004] COPLR 188 – the decision of Senior Judge Denzel Lush in February of this year. It is a case which will resonate with many of us, particularly those with elderly relatives. DP was aged 89 and resident in a care home and it was the Public Guardian who applied to the Court to revoke and direct the cancellation of a registration of an LPA which DP had created in 2011 in favour of her former gardener and to appoint a panel deputy to manage her financial affairs. Concerns had arisen of the gardener’s conduct by a social worker in January 2012 and also by Aviva UK Life financial crime team 2013 when the gardener had paid himself a gift of £38,000 and had used substantial amounts of DP’s money for his own benefit, including, the payment of a salary to himself of £7,300 for house clearance and funding a motability car for his wife. The gardener had argued that if the motability car was removed then he could no longer be able to see DP and to take her out on outings or visits to DP’s husband’s grave. The Court had no difficulty revoking the LPA under section 22(4)(b) of the Mental Capacity Act 2005 and in accordance with Paragraph 18, Schedule 1 of the MCA 2005 directed to the Public Guardian to counsel registration of the instrument and appointed panel deputy for DP. Senior Judge Lush recorded at Paragraph 29 of his judgment “to be able to revoke an LPA on the basis of the attorney’s past performance the Court needs to be satisfied that:

1. the attorney has contravened his authority or
2. the attorney has not acted in the donor’s best interest and
3. the donor lacks capacity to revoke the LPA.”

In accordance with the MCA 2005 he first considered whether or not the donor lacked capacity, and he accepted the evidence of a person who was an approved social worker under the Mental Health Act 1983, and has been, for the last four years, a Court of Protection General Visitor. The Visitor had produced a lengthy report and in fact that the diagnostic test for dementia existed and went on to consider the second stage functional test.

In terms of the Attorney’s conduct, Senior District Judge Lush at Paragraph 39 found that the making of a gift of £38,000 to himself contravenes section 12 of the Mental Capacity Act 2005 which sets out the limited circumstances in which an attorney may make gifts to persons who are related to or connected with the donor including himself. The Judge considered that in order for a gift of that magnitude to have been made to him, he should have applied to the Court of Protection for formal authorisation pursuant to section 23(4) of the Act. In terms of charging himself a salary, the Judge noted that the LPA form Section 7 quote about paying your attorney was left blank, and that, accordingly, he had no authority to charge for his services under the LPA itself and if he wished to receive a salary he again should have applied to the Court of Protection for directions under Section 23(3)(c) of the Act in which the Court can authorise an attorney’s remuneration or expenses.

The Court was extremely critical of the gardener’s failure to keep proper accounts and financial records and found that he was in breach of his fiduciary duties as an attorney.

Equally, he was most scathing in relation to the provision of the motability vehicle and he linked the £38,000 gift to surprise that the gardener said he had insufficient resources to keep the payments on the motability vehicle. It is interesting to note that the police concluded there was nothing further to investigate and no case to answer whereas the Office of Public Guardian considered otherwise, but noted at paragraph 45 “an investigation by OPG is concerned primarily in establishing whether an attorney or deputy has contravened his authority under the Mental Capacity Act 2005, or has acted in breach of his fiduciary duties under the common law agency or has behaved in a way that is not in the best interest of a person who lacks capacity. Standard of proof wrote, on the balance of probabilities, is lower than the criminal standard.”

What is clear from the above case is that whilst the Court of Protection will become involved in such matters, it does require an application to be made, and in this case it was the Office of the Public Guardian. However, this is extremely rare – in fact District Judge Lush recorded, in paragraph 47 of his judgment that in the year 2012-2013 whilst the Public Guardian received a total of 2,982 safeguarding referrals only 136 resulted in an application to the Court of Protection, for the removal of an attorney or deputy. However, it is not at all uncommon for families, and arguably dysfunctional families, to be involved in litigation before the Court of Protection concerning the behaviour of one or more attorney.

These applications are not straightforward and will form the basis of the next article from the team.

**Claire Wills-Goldingham QC**

## The one great principle of the English law

*“The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.”*

**S**o wrote Charles Dickens in *Bleak House*. That was in 1853. Things have changed, but in a recent case in the Court of Protection, Mr Justice Peter Jackson suggests that the change is not yet complete. In *Cases A and B (Court of Protection:*

*Delay and Costs)* [2014] EWCOP 48, decided on 25 November 2014, Peter Jackson J loosed a well-aimed arrow at the dual targets of delay and costs. This will come as no surprise to public law family practitioners, the judge in question having in *re C (Costs)* [2012] EWHC 1637

(Fam) concluded his judgment as follows: *"To eliminate delay, the court will, where appropriate, need to use every weapon at its disposal. The sword of costs may need to be more frequently unsheathed in both private law and public law proceedings."*

The imaginatively-named *A and B* was a consolidated "judgment" following the conclusion of two separate cases. Although headed with the word "judgment" it is really a warning to those of us involved in CoP work to the effect that:

(a) we need to pay attention to the overriding objective as set out in Rule 3 of the CoP Rules 2007 and to Rules 4 ("the parties are required to help the court to further the overriding objective") and 5 (the court's duty to manage cases), and

(b) a CoP equivalent to the Public Law Outline might well be coming down the track before very long.

The two cases considered by Jackson J involved the arrangements for young men who (obviously) lacked capacity. Neither, said the judge, was exceptional of its kind. Case A lasted 18 months, involved eight hearings before three different judges and featured costs of around £140,000 of which £69,000 came out of P's damages. Case B lasted 5 years, had 18 hearings before seven different judges (and six orders made with no attendance) and costs of some £530,000. P was legally-aided to the tune of £250,000. A family member spent £110,000 on lawyers before running out of money.

Jackson J said, perhaps unnecessarily, *"The objective contained in the Court of Protection Rules 2007 was not remotely achieved in either case."*

Just as we were told for some years before the recent reforms in the family jurisdiction, Jackson J reminds us that delay causes stress, "human misery" for the parties. It is a drain on the time and energy of social workers and medical professionals "who have to service the needs of the proceedings alongside their normal responsibilities." Costs are a huge issue, whether the money comes from the public purse or, and particularly so, "when we are deciding that an incapacitated person's money should be spent on deciding his future, whether he likes it or not."

The judge identifies factors that lead to delay and to increased cost. He tells us we should be looking for "a sensible solution, not the pursuit of perfection" and cautions against rejecting "decent but imperfect solutions" whilst expending time and money on the search for the ideal.

He reminds us of the words of Mrs Justice Parker in *Re PB* [2014] EWCOP 14: "Those who represent the vulnerable who

cannot give them capacitous instructions have a particular responsibility to ensure that the arguments addressed are proportionate and relevant to the issues, to the actual facts with which they are dealing rather than theory..." and he cautions against heckling from the sidelines whilst being unable to offer a constructive alternative.

Jackson J concludes as follows: "I therefore believe that the time has come to introduce the same disciplines in the Court of Protection as now apply in the Family Court. Accordingly, and at his request, I am sending a copy of this judgment to the President of the Court of Protection, Sir James Munby, for his consideration."

When Sir James first aired his proposed reforms of the family justice system he openly warned that if the courts and lawyers were unable to reduce delay and costs there was a real risk that government would move to replace whole swathes of family court work with some form of tribunal-based dispute resolution. He famously said of his reform programme, with particular reference to the need to resolve care proceedings within 26 weeks, "It can be done, it must be done, it will be done."

You have been warned.

#### Note re online resources

Court of Protection work is one of those areas of law where there is a real sense of community, with experienced practitioners always willing to share their knowledge and expertise. The team at Albion Chambers tries to make its own contribution to this, but as part of acknowledging that we don't exist in a vacuum here are just a few pointers to invaluable online sources of information.

On Twitter – follow Clarke Willmott's CoP team @CWCOP

On LinkedIn – join the **Court of Protection Practitioners' Association group**

Follow Alex Ruck Keene's blog at [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk)

All of the above have been of use to me within the last month or so. Lots of other resources are available, and I apologise to anybody, any firm who thinks they should be on the above list. Let me know who you are and we'll include you next time.

Stuart Fuller

## Cases of interest

### Re CS [2014] EWCOP 47

A father's three sons were in dispute as to which of the three should be made his deputies. The father suffered from Alzheimer's disease and lived in a care home. It was held that the nearer two brothers would be preferred over the brother who lived further away and had a less meaningful relationship.

### Re X [2014] EWCOP 35

An NHS Trust applied for a declaration to the effect that it was not in the patient's best interests to be subject to further detention and treatment for anorexia, but was in her best interests to be not provided with nutrition and hydration with which she did not comply. After consideration of the unanimous medical evidence the court agreed, treatment should not be compelled.

### Re JL (Revocation of Lasting Power of Attorney) [2014] EWCOP 36

The Public Guardian applied for an order suspending the patient's, JL's, daughter as attorney. She had been appointed by the patient's execution of a digital lasting power of attorney. The Guardian also applied to revoke and cancel the financial affairs created. The Court held it would be in JL's best interests

to appoint the authorised officer as her substantive deputy.

### Barnsley Metropolitan Borough Council v GS and another [2014] EWCOP 46

The Court gave a preliminary ruling that they were barred by neither reg 17A of the Children's Home Regulations 2001, SI 2001/3967, or para 3.19 of the National Minimum Standards for Children's Homes from authorising a deprivation of liberty if it concluded that the deprivation pursued a legitimate aim and was necessary, proportionate and in P's best interests.

### Derbyshire County Council v AC and others [2014] EWCOP 38

The patient was born with significant learning disabilities. In 2012, aged 20, she presented to medical services as pregnant. The LA decided that the patient required the protection of the MCA 2005 and to move her into residential care, and if necessary, deprive her of her liberty. The CoP agreed that she should be so moved. It also held that although she lacked capacity to make decisions in respect of contact with others, she had capacity to enter into sexual relations.

# Albion Chambers Court of Protection

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Call 1988 QC 2012  
Mental Health Review  
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**Claire Rowsell**  
Call 1991  
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**Charlotte Pitts**  
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**Benjamin Jenkins**  
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**Monisha Khandker**  
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**Stuart Fuller**  
Call 2007



**Emily Brazenall**  
Call 2009



**Kevin Farquharson**  
Call 2011



**Alexander West**  
Call 2011



**Alexander Small**  
Call 2012

## Re BIM, DM and AM [2014] EWCOP 39

The Applicants, the patient's brother-in-law and his wife applied to be appointed as deputies in place of the patient's husband who had suffered from a stroke. The court dismissed the application holding that the appointment of two named solicitors to be appointed as deputies for property and affairs. The circumstances were that there were allegations of misconduct on the Applicants' part.

## Re PC [2014] EWCOP 41

The Patient executed a lasting power of attorney in favour of her two sons. One conceded that he had intermingled his mother's money with his own. The other had also similarly benefitted. The Patient lacked capacity to revoke the LPA herself, the Court allowed the Public Guardian's application to revoke the LPA and appointed a member of the panel of deputies.

## Re PMB [2014] EWCOP 42

The Applicants were the Patient's youngest and second-eldest daughters applied to be appointed as deputies. Her eldest daughter opposed the application on the basis that it had been made maliciously and was not in her best interests. The CoP held that the application was in the patient's best interests.

## Rochdale Metropolitan Borough Council v KW and others [2014] EWCOP 45

Article 5 of the ECHR was not engaged in circumstances where a person was looked after in their own home by an independent contractor, despite the fact that the Local Authority had paid for and made the arrangements for looking after them, as there was no deprivation of liberty. (The same arrangements could have been paid for by her family.)

## Alec Small

Any comments made or views expressed on the law within any articles in this newsletter are the views of the writer and are not necessarily the views of any other member of chambers and should not be relied upon as legal advice.



## Court of Protection Seminar

The Albion Chambers Court of Protection Team Seminar will be held on **Friday, 6 February 2015** from 1.30pm-5.00pm at The Thistle Grand Hotel, Bristol. Members of the Albion Court of Protection Team will cover:

- **The Mental Capacity Act:** current developments and how we move forward: *Claire Wills-Goldingham QC*
- **The interface between care proceedings and the Court of Protection:** *Stuart Fuller*
- **Deprivation of Liberty:** The latest practice direction, procedural issues and case law summary: *Kevin Farquharson*
- **Contact with the family:** practice, procedure and Case Law: *Emily Brazenall*
- **The Mental Capacity Act:** Capacity Assessments: *Dr George Hibbert*

A sandwich lunch will be served from 1.30pm. The seminar will begin at 2.00pm. The cost of the seminar will be £30.00 plus VAT per delegate and the event will be accredited with 3 CPD hours. Our course providers' reference is ACO/ALCH.

The seminar will be held at The Thistle Grand Hotel, Broad Street, Bristol, BS1 2EL.

Please click here to reserve your place(s), or to enquire about further information.

*"Very informative" "Always excellent value for money" "Good presentations with personable and approachable speakers".*