

**IMPORTANT NOTICE**

**This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of their families must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.**

**Neutral Citation Number: [2019] EWCOP40**

Case No: Various

**COURT OF PROTECTION**

**MENTAL CAPACITY ACT 2005**

First Avenue House  
42-49 High Holborn,  
London, WC1V 6NP

Date: 20<sup>th</sup> September 2019

**Before :**

**Her Honour Judge Hilder**

**IN THE MATTER OF**

**VARIOUS LASTING POWERS OF ATTORNEY**

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Hearings: 11<sup>th</sup> December 2018 & 4<sup>th</sup> February 2019

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Mr. Cisneros, instructed by and for the Public Guardian

The hearings were conducted in public subject to a transparency order made on 10<sup>th</sup> October 2018.

The judgment was handed down to the parties by e-mail on 20<sup>th</sup> September 2019. It consists of 34 pages and an annex, and has been signed and dated by the judge.

The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

These Proceedings

1. The Office of the Public Guardian receives applications to register Lasting Powers of Attorney. By fifteen COP1 applications variously dated 5<sup>th</sup> or 6<sup>th</sup> July 2018 the Public Guardian applied for the Court to determine the meaning and effect of words set out in certain instruments which he has been asked to register. The applications are brought expressly on the basis that:

“The Public Guardian has not had sight of any evidence to rebut the presumption of capacity in these cases and has not made any investigation as to the capacity of the fifteen donors... The court is asked to make decisions on the validity of the instruments as opposed to exercising its decision-making powers on behalf of the donors.”

2. By order made on 10<sup>th</sup> October 2018 District Judge Marin linked these applications together and listed them for a directions hearing before me on 11<sup>th</sup> December 2018. On that occasion, the Public Guardian was represented by Mr. Cisneros and a family member of one of the donors (GRH 13264918) attended in person. Directions were given for the filing of evidence by any of the donors or attorneys if they so wished, and the Official Solicitor was invited to act as advocate to the court. The matter was listed for further hearing in February 2019.
3. The Official Solicitor declined the Court’s invitation to act for the reason that his costs could not be met. At the hearing on 4<sup>th</sup> February 2019, only the Public Guardian attended or was represented.
4. Some of the applications have been withdrawn. Eleven separate matters remain before the Court. The common theme across these applications is the expression by the donor of an intention that the appointed attorney use the donor’s funds to benefit someone other than the donor:
  - a. All eleven instruments express such intention as an ‘instruction’ and one also expresses it as a ‘preference;’
  - b. The persons to receive benefit are variously specified as daughters (4), sons (2), children (3), mother (1) and wife (1) of the donor, and a named person with no further explanation of the relationship given (1);
  - c. In at least one of the cases (MS 132652070), the person to receive benefit is also the appointed attorney.
5. Through his Counsel, Mr. Cisneros, the Public Guardian has filed position statements dated 29<sup>th</sup> November 2018 and 30<sup>th</sup> January 2019, and further written submissions dated 7<sup>th</sup> February 2019. None of the donors or attorneys has filed any written submissions.

#### The individual cases

6. The cases before the court are as follows:

- a. PS 1317340T: The Donor was born on 10<sup>th</sup> March 1944 and is therefore now 75. On 14<sup>th</sup> February 2017 she executed an instrument [B1] in which she appointed her son SS to be her sole attorney, with authority to act only when she lacks mental capacity. At section 7 of the instrument under the heading 'Preferences' the donor entered the words "The needs of [LS] before anyone else.' Under the heading 'Instructions', she entered the words "The attorney [SS] must ensure that the needs of my daughter [LS] are taken care of..."
  
- b. AIQ 13262561: The Donor was born on 24<sup>th</sup> March 1931 and is therefore now 88. On 27<sup>th</sup> October 2016 she executed an instrument [B21] in which she appointed JQ to be her sole attorney, with authority to act as soon as the instrument is registered. At section 7 of the instrument under the heading 'Instructions', she entered the words "Must make sure that you continue to look after my son [M] in the same way that I do."
  
- c. MS 13265207: The Donor was born on 11<sup>th</sup> December 1942 and is therefore now 76. On 23<sup>rd</sup> March 2017 she executed an instrument [B39] in which she appointed DW to be her sole attorney with authority to act as soon as the instrument was registered, and RT as her replacement attorney. At section 7 of the instrument under the heading 'Instructions' she entered the words "...[DW] lives with me in my own home. She must continue to be allowed to live there in the event that I have gone into fulltime care."
  
- d. LT 13262578: The Donor was born on 13<sup>th</sup> June 1972 and is therefore now 47. On 11<sup>th</sup> March 2018 he executed an instrument [B57] in which he appointed DFP to be his sole attorney, with authority to act as soon as the instrument was registered. At section 7 of the instrument under the heading 'Instructions', he entered the words "My attorney is to make sure my daughter [OAT] is given whatever financial help she needs from my estate..."
  
- e. DJS 13265242: The Donor was born on 18<sup>th</sup> January 1940 and is therefore now 79. On 2<sup>nd</sup> February 2017 he executed an instrument [B116] in which he appointed WJS, KC and HG to be his attorneys, with authority to act jointly and severally as soon as the instrument was registered. At section 7 of the instrument under the heading 'Instructions', he entered the words "If I am currently making payments towards either of my daughters' living expenses then my Attorneys must carry on with those payments which are currently made out of my excess income. If there is insufficient excess income these payments should come from capital."

By COP5 Acknowledgment dated 20<sup>th</sup> August 2018 DJS has indicated consent to the application and given further clarification of his intentions in the following terms: "I have been making, continue to make and intend that I should continue to make financial provisions for my daughters by way of gifts from my excess income on a monthly basis..... I intend that as long as I have capacity to do so I will continue making these gifts and would wish them to continue from my resources after any incapacity until my death. I accept that if there has been a break in those payments prior to my incapacity that they cannot be resumed on my behalf."

- f. WJS 13265265: The Donor was born on 21<sup>st</sup> January 1942 and is therefore now 47. She is married to DJS. On 2<sup>nd</sup> February 2017 she too executed an instrument [B136] in which she appointed her spouse, KC and HG to be her attorneys, with authority to act jointly and severally as soon as the instrument was registered. At section 7 of the instrument under the heading 'Instructions', she entered the same words: "If am currently making payments towards either of my daughters' living expenses then my Attorneys must carry on with those payments which are currently made out of my excess income. If there is insufficient excess income these payments should come from capital."

She too has filed a COP5 Acknowledgment dated 20<sup>th</sup> August 2018, giving the same clarification of her intentions as her husband.

- g. DG 13264890: The Donor was born on 23rd March 1977 and is therefore now 42. On 14<sup>th</sup> April 2017 he executed an instrument [B156] in which he appointed KG to be his sole attorney with authority to act as soon as the instrument is registered, and CG as his replacement attorney. At section 7 of the instrument under the heading 'Instructions', he entered the words "All property must be transferred into my wife's name. Attorney must ensure my children are provided for."

- h. CO 13262549 : The Donor was born on 6<sup>th</sup> September 1967 and is therefore now 51. On 9<sup>th</sup> January 2018 she executed an instrument [B176] in which she appointed JS and HS to be her joint attorneys, with authority to act only when she lacks capacity. At section 7 of the instrument under the heading 'Instructions', she entered the words "My attorneys must ensure that money put aside in my accounts for university is used for any remaining university or equivalent for [H] and [T] or if they choose not to study to help towards any employment/housing set up costs. Any remaining money after end of uni course can be used for whatever needs that person has."

- i. EF 13264878: The Donor was born on 24<sup>th</sup> August 1979 and is therefore now 39. On 21st August 2017 she executed an instrument [B220] in which she appointed HF to be her sole attorney with authority to act as soon as the instrument is registered, and AF as her replacement attorney. At section 7 of the instrument under the heading 'Instructions', she entered the words "If my mother is still alive my attorneys must use any of my funds that are available to ensure she lives comfortably and independently."
  
- j. GRH 13264918: The Donor was born on 9<sup>th</sup> March 1963 and is therefore now 56. On 26<sup>th</sup> May 2017 he executed an instrument [B262] in which he appointed JH and DH to be his attorneys, with authority to act jointly and severally as soon as the instrument was registered. At section 7 of the instrument under the heading 'Instructions', he entered the words "I want my two sons to be supported financially when and if required."

His wife informed the Court by e-mail that GRH "has dementia which is progressing at a considerable speed," that neither he nor she would attend the hearing but their son DH would, and their younger son TH has autism.

- k. LS 13265138: The Donor was born on 30th December 1980 and is therefore now 38. On 6<sup>th</sup> July 2017 she executed an instrument [B282] in which she appointed MS to be her sole attorney with authority to act as soon as the instrument is registered, and SB as her replacement attorney. At section 7 of the instrument under the heading 'Instructions', she entered the words "My attorney MUST ensure that any children (when over 18) are financially supported with my finances in any educational aspirations they may have. This MUST be equally distributed."

## The Law

7. It was long ago recognised at common law that people need not always do for themselves things that change their legal relations with the world – they may instead authorise someone else to do those things for them. In law, this is the notion of 'agency.' The person who gives authority to act on their behalf is 'the principal'; and the person who agrees to act is 'the agent.'

8. Agency is not unlimited. Some rights, privileges, powers and duties are conferred on an individual personally. So, for example, a will may not be executed through an agent<sup>1</sup> and

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<sup>1</sup> Wills Act 1837 s9.

neither may a function which arises out of the principal's office or which is of a personal nature.<sup>2</sup> Except for purposes which statute or other relevant rule requires to be done personally however, at common law an agent may be authorised to do on behalf of the principal any act which the principal himself may do.<sup>3</sup>

9. It is implicit in a conferral of authority that the principal intends the agent to exercise the relevant powers in the interests of the principal. An agent who deliberately or recklessly exercise his powers against the interests of the principal therefore acts without authority<sup>4</sup>.
  
10. The relationship between the principal and the agent gives rise to certain obligations. Fundamentally, the agent is bound to act in accordance with the terms of the authority given<sup>5</sup>. In so doing and because the relationship is one of trust, fiduciary duties derived from equity also apply, including
  - a. a duty to avoid conflict of interest unless with consent<sup>6</sup>; and
  - b. a duty not to profit from the position as agent except with consent<sup>7</sup>.
  
11. Because of the fiduciary nature of the relationship, where an agent purports to enter into a contract or transaction on behalf of the principal with himself in his personal capacity, he will need express authority to do so.<sup>8</sup>
  
12. A power of attorney is a form of agency. The principal ('the donor') executes a deed whereby he grants authorities to the agent (the 'donee' or 'attorney'). The general principles of agency apply.
  
13. At common law, a power of attorney is generally treated as revoked by the supervening incapacity of the donor<sup>9</sup>. The rationale behind this principle is said to be "quite

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<sup>2</sup> Examples are given at page 213 of Court of Protection Practice 2019.

<sup>3</sup> Bowstead & Reynolds on Agency (2018) at 2-17

<sup>4</sup> Bowstead & Reynolds on Agency (2018) at 3-011

<sup>5</sup> Rothschild v. Brookman (1831) 2 Dow & Cl. 188; Bowstead & Reynolds on Agency (2018) at 6-002

<sup>6</sup> Bowstead & Reynolds on Agency (2018) at 6-046: "An agent must not put himself in a position or enter into a transaction in which his personal interest, or his duty to another principal, may conflict with his duty to his principal, unless his principal, with full knowledge of all the material circumstances and of the nature and extent of the agent's interest, consents."

<sup>7</sup> Parker v. McKenna (1874) LR 10 Ch. App. 96; Bowstead & Reynolds on Agency (2018) at 6-073: "An agent must not profit from his position as agent, except with the principal's consent."

<sup>8</sup> See Bowstead & Reynolds on Agency (2018) at 6-062: "Where an agent purports to enter into a contract or transaction with himself on behalf of the principal, he will need express authority to do so. In the absence of such authority, the dealing may be void at law and will be voidable *ex debito justitiae* at equity."

straightforward<sup>10</sup>": since an act carried out by an attorney is treated in law as an act carried out by the donor, and the attorney can only properly act within the given authority, for the agency to operate efficiently third parties need to be able to deal with the attorney on the basis of assumption (in the absence of evidence to the contrary) that the principal is able to know and approve of what is being done in his name. Once the principal lacks relevant capacity, such assumption is no longer safe and so the agency must end. Thereafter, the only way to deal properly with the affairs of a person lacking capacity would be by recourse to the court.

14. The court's relevant powers have varied over time but are currently set out in the Mental Capacity Act 2005 ("the Act"). Pursuant to section 16, the Court of Protection may either make the decision on behalf of the incapacitated person itself, or appoint another person (a "deputy") to do so.

**16 Powers to make decisions and appoint deputies: general**

- (1) This section applies if a person ('P') lacks capacity in relation to a matter or matters concerning –
- a. P's personal welfare, or
  - b. P's property and affairs.
- (2) The court may –
- a. By making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
  - b. Appoint a person (a 'deputy') to make decisions on P's behalf in relation to the matter or matters.
- (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).

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15. Many people would prefer to avoid the prospect of formal judicial process. They would sooner make their own arrangements, whilst they have capacity to do so, for management of their affairs if and when they lose capacity. So the common law limitation on powers of attorney after supervening incapacity left a social need unmet. A response to this need was required. A Law Commission report, *The Incapacitated Principal*<sup>11</sup>, led to the Enduring Powers of Attorney Act 1985. That statute created a new type of power of attorney which would function in the same way as a common law power but, subject to a basic registration process, would 'endure' beyond the onset of the donor's incapacity.

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<sup>9</sup> See Bowstead & Reynolds on Agency (2018) at 10- 020

<sup>10</sup> Court of Protection Practice 2019 at page 211

<sup>11</sup> Cmnd 9877, July 1983

16. Over time, drawbacks of enduring powers of attorney became apparent too. The Law Commission again considered perceived failings, this time in the context of the review of the law relating to mental incapacity. Its report, *Mental Incapacity*<sup>12</sup>, led to the Mental Capacity Act 2005. Section 66 preserved those enduring powers of attorney which had already been created (with Schedule 4 taking effect in relation to them in place of the 1985 Act) but the Act also created a further new type of agency - called a 'continuing power of attorney' in the pre-legislative phase, but enacted as a 'lasting power of attorney.'
17. The statutory framework of lasting powers of attorney is contained in sections 9 - 14, 22 and 23, and Schedule 1, of the Mental Capacity Act 2005.
18. The Public Guardian must maintain a register of lasting powers of attorney.<sup>13</sup> The current applications are brought by the Public Guardian in accordance with his statutory duty pursuant to schedule 1 paragraph 11(3)(a) of the Act:

11(1) ...

- (2) Sub-paragraph (3) applies if it appears to the Public Guardian that the instrument contains a provision which –
- (a) would be ineffective as part of a lasting power of attorney, or
  - (b) would prevent the instrument from operating as a valid lasting power of attorney.
- (3) The Public Guardian –
- (a) must apply to the court for it to determine the matter under section 23(1), and
  - (b) pending the determination by the court, must not register the instrument.

19. The parameters of this duty on the Public Guardian were considered by Senior Judge Lush in *Re XZ; XZ v. The Public Guardian* [2015] EWCOP 35. At paragraph 39 he agreed with counsel's submission that:

*"With respect to the Public Guardian, it is no part of his statutory duties to police the practicality or utility of individual aspects of an LPA. In the context of section 23 and Schedule 1, paragraph 11 of the MCA 2005 the phrase "ineffective as part of a lasting power of attorney" clearly means "not capable of taking effect, according to its legal terms as part of an LPA." Examples of provisions which would be ineffective as part of a power of attorney would include:*

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<sup>12</sup> No. 231

<sup>13</sup> Section 58(1) of the Act



*(a) a provision which purported to permit the attorney to make gifts which go beyond the statutory restrictions found at section 12 MCA 2005.*

*(b) a provision which purported to go beyond what a person can do by an attorney (such as make a will or vote).*

*(c) a provision which purported to permit the attorney to consent to a marriage on behalf of the donor (see MCA section 27(1)(a)).*

*Neither the court nor the Public Guardian are concerned with whether a restriction that does not contravene the terms of the MCA 2005 may pose practical difficulties in its operation."*

20. Senior Judge Lush concluded that:

*"40. The Public Guardian's function under paragraph 11 of Schedule 1 to the Act is limited to considering whether the conditions and restrictions are (a) ineffective as part of an LPA or (b) would prevent the instrument from operating as a valid LPA.*

*41. If he concludes that they cannot be given legal effect, then he is under a duty to apply to the court for a determination of the point under section 23(1). Otherwise he has a duty to register the power."*

21. The court's power to determine the meaning or effect of a lasting power of attorney instrument derives from section 23(1) of the Act:

**23 Powers of court in relation to operation of lasting powers of attorney**

(1) The court may determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one.

22. If the court determines that a lasting power of attorney does indeed contain a provision which is ineffective as part of a lasting power or would prevent the instrument from operating as a valid lasting power then, pursuant to schedule 1 paragraph 11(4), (5) and (6) of the Act, the consequences are mandatory:

- **Either** the court must notify the Public Guardian that it has severed the offending provision (whereupon the Public Guardian must register the instrument with a note to that effect attached to it);
- **or** the court must direct the Public Guardian not to register the instrument.

- 11(4) Sub-paragraph (5) applies if the court determines under section 23(1)(whether or not on an application by the Public Guardian) that the instrument contains a provision which –
- (a) would be ineffective as part of a lasting power of attorney, or
  - (b) would prevent the instrument from operating as a valid lasting power of attorney.
- (5) The court must –
- (a) notify the Public Guardian that it has severed the provision, or
  - (b) direct him not to register the instrument.
- (6) Where the court notifies the Public Guardian that it has severed a provision, he must register the instrument with a note to that effect attached to it.

23. For an instrument to take effect as a valid lasting power of attorney the statutory requirements must be met. Section 9 of the Act sets out the basic parameters:

### **9 Lasting powers of attorney**

- (1) A lasting power of attorney is a power of attorney under which the donor ('P') confers on the donee (or donees) authority to make decisions about all or any of the following –
- a. P's personal welfare or specified matters concerning P's personal welfare, and
  - b. P's property and affairs or specified matters concerning P's property and affairs,
- and which includes authority to make such decisions in circumstances where P no longer has capacity.
- (2) A lasting power of attorney is not created unless –
- a. Section 10 is complied with,
  - b. An instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1, and
  - c. At the time when P executes the instrument, P has reached 18 and has capacity to execute it.
- (3) An instrument which –
- a. purports to create a lasting power of attorney, but
  - b. does not comply with this section, section 10 or Schedule 1,
- confers no authority.

- (4) The authority conferred by a lasting power of attorney is subject to –
  - a. The provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests), and
  - b. Any conditions or restrictions specified in the instrument.

24. It is clear from section 9(1) that an attorney's authority derives from the donor but also clear from s9(4) that the authority conferred is *subject to* the statutory provisions of the Act, "in particular" the principles and section 4:

### **1 The Principles**

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

### **4 Best interests**

*(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—*

- (a) the person's age or appearance, or*
- (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*

*(2) The person making the determination must consider all the relevant*

*circumstances and, in particular, take the following steps.*

*(3) He must consider—*

- (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
- (b) if it appears likely that he will, when that is likely to be.*

*(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*

*(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.*

*(6) He must consider, so far as is reasonably ascertainable—*

- (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*
- (b) the beliefs and values that would be likely to influence his decision if he had capacity, and*
- (c) the other factors that he would be likely to consider if he were able to do so.*

*(7) He must take into account, if it is practicable and appropriate to consult them, the views of—*

- (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*
- (b) anyone engaged in caring for the person or interested in his welfare,*
- (c) any donee of a lasting power of attorney granted by the person, and*
- (d) any deputy appointed for the person by the court,*

*as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).*

*(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—*

- (a) are exercisable under a lasting power of attorney, or*
- (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.*

*(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.*

(10) *“Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.*

(11) *“Relevant circumstances” are those—*  
*(a) of which the person making the determination is aware, and*  
*(b) which it would be reasonable to regard as relevant.*

25. It is perhaps now trite to observe that the concept of ‘best interests’ is to be understood widely. Mr. Cisneros referred me to the decision of Senior Judge Lush in *Re A* [2015] EWCOP 46. Considering an application by a professional deputy for authority to use a protected person’s funds to pay school fees for her sibling, he noted at paragraph 35 that:

*“In considering A’s best interests at a particular time, the decision-maker must take a holistic approach and consider her welfare in the widest sense, not just financial, but social and emotional.”*

26. In the current context, subsection 6 of section 4 of the Act requires particular consideration. This provision *requires* (“must”) an attorney who is trying to determine what is in his donor’s best interests *to consider* the donor’s past and present wishes, feelings, beliefs and values, in so far as they can be ascertained. In particular, it requires the attorney to consider any *relevant written statement* made by the donor when he had capacity.

27. In the process of reaching a best interests decision, how much weight is to be given to this particular consideration? In the matter of *S and S (Protected Persons)* [2008] COPLR Con Vol 1074, Her Honour Judge Hazel Marshall QC gave an early consideration to that question. She stated that

*“55. In my judgment it is the inescapable conclusion from the stress laid on these matters in the Act that the views and wishes of P in regard to decisions made on his behalf are to carry great weight. What, after all, is the point of taking great trouble to ascertain or deduce P’s views, and to encourage P to be involved in the decision making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have capacity to achieve it for himself?*

*56. The Act does not of course say that P’s wishes are paramount, nor does it lay down any express presumption in favour of implementing them if they can be ascertained. Indeed the paramount objective is that of P’s best interests. However, by giving such prominence to the above matters, the Act does in my judgment recognise that having his views*

*and wishes taken into account and respected is a very significant aspect of P's best interests. Due regard should therefore be paid when doing the weighing exercise of determining what is in P's best interests in all the circumstances of the case."*

28. Subsequent authorities have continued in the same vein. Most notably, Lady Hale considered the import of the protected person's wishes and feelings in best interest decision-making in *Aintree University Hospitals NHS Foundation Trust v. James* [2013] UKSC 76 at paragraph 45:

*"The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament..... But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being."*

29. As I have noted before<sup>14</sup>, it is beyond serious doubt that the concept of best interests is not restricted to self-interest. The Code of Practice to the Act addresses this at paragraph 5.48:

5.48 The Act allows actions that benefit other people, as long as they are in the best interests of the person who lacks capacity to make the decision. For example, having considered all the circumstances of the particular case, a decision might be made to take a blood sample from a person who lacks capacity to consent, to check for a genetic link to cancer within the family, because this might benefit someone else in the family. But it might still be in the best interests of the person who lacks capacity. 'Best interests' goes beyond the person's medical interests.

For example, courts have previously ruled that possible wider benefits to a person who lacks capacity to consent, such as providing or gaining emotional support from close relationships, are important factors in working out the person's own best interests. If it is likely that the person who lacks capacity would have considered these factors themselves, they can be seen as part of the person's best interests.

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<sup>14</sup> PBC v. JMA & Ors [2018] EWCOP 19 at paragraph 46

30. In Re G(TJ) [2010] COPLR Con Vol 403, Mr Justice Morgan observed at paragraph 35 that

*“... the word ‘interest’ in the best interests is not confined to matters of self-interest, or, putting it another way, a court could conclude in an appropriate case that it is in the best interests of P for P to act altruistically.”*

31. However, in addition to importing into lasting powers of attorney the ‘best interests’ obligation, the Act also *restricts* the authority which may be granted to attorneys in a number of other ways. Those restrictions set out at section 11 of the Act are not relevant to the applications currently before the court but section 12 provides specific restrictions in respect of making gifts:

**12 Scope of lasting powers of attorney: gifts**

(1) Where a lasting power of attorney confers authority to make decisions about P’s property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor’s property by making gifts except to the extent permitted by subsection (2).

(2) The donee may make gifts –

- a. on customary occasion to persons (including himself) who are related to or connected with the donor, or
- b. to any charity to whom the donor made or might have been expected to make gifts,

if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor’s estate.

(3) ‘Customary occasion’ means –

- a. the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or
- b. any other occasion on which presents are customarily given within families or among friends or associates.

(4) Subsection (2) is subject to any conditions or restrictions in the instrument.

32. The statutory restrictions on gifting are of two types: firstly to the circumstances specified in s12(2), and secondly in accordance with “conditions or restrictions in the instrument.”

The latter restriction must be understood to mean that a donor can place more stringent conditions on gifting than those set out in s12(2) and (3). A donor cannot however extend an attorney's authority to gift beyond the statutory limitation.<sup>15</sup> Only the court (pursuant to section 23(4) of the Act) can authorise gifts beyond the limits of section 12. The Court also has a general power (pursuant to s23(2)(b) of the Act) to authorise any act for which an attorney would have to obtain the donor's consent if the donor had capacity to give it:

**23 Powers of court in relation to operation of lasting powers of attorney**

....

(2) The court may –

(a) ....

(b) Give any consent or authorisation to act which the donee would have to obtain from P if P had capacity to give it.

(3) ...

(4) The court may authorise the making of gifts which are not within section 12(2) (permitted gifts).

...

33. Mr. Cisneros has drawn my attention to a number of unreported decisions about a donor's instructions and the scope of section 12. The accounts of these decisions are drawn from an archived page of the Ministry of Justice website.<sup>16</sup> Several of them are also cited in *Heywood and Massey Court of Protection Practice*. Essentially, they are summaries of orders made by the court. They clearly do not represent the entirety of orders made in the timespan of the webpage (1<sup>st</sup> October 2007 to 28<sup>th</sup> June 2012) but there is no explanation given as to methodology used to select cases for inclusion. Mr. Cisneros refers to them as examples of how the then Senior Judge viewed some particular provisions in lasting powers of attorney.
34. In each of the following, the donor's provision was determined to be in breach of section 12:
- a. *Re Forrest* 2<sup>nd</sup> March 2012: "I hereby express the wish that my Attorneys will continue to pay my contribution to the school fees of my granddaughters, A and B, as per my previous pattern of contributions."

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<sup>15</sup> In accordance with the ordinary meaning of s12(1), which would otherwise be rendered meaningless, and as noted on page 689 of *Court of Protection Practice* 2019.

<sup>16</sup> <https://webarchive.nationalarchives.gov.uk/20141006175609/http://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act/orders-made-by-the-court-of-protection/lasting-powers-of-attorney>



- b. *Re Drew* 4<sup>th</sup> April 2012: “If my father is still alive then my trustees should continue with my contributions to his care (my records make clear from which account) and assume my role in financial responsibility for him.”
- c. *Re O’Brien*, 18<sup>th</sup> May 2012: “My handicapped son should be adequately provided for.”
- d. *Re Sykes*, 9<sup>th</sup> July 2009: “annual or monthly gifts already being made by me at the date of my signing this LPA by regular bank standing orders or direct debits.”

35. Mr. Cisneros also identified from the same source two further unreported decisions of Senior Judge Lush which considered provision for a third party otherwise than as a gift:

- a. *Re Bloom*, 16<sup>th</sup> March 2012: the donor’s provision that “I direct my attorneys to use such of my income as they shall at their discretion deem necessary to make provision for my wife’s maintenance and benefit” was subject only to severance of the words “and benefit” as contravening section 12. The order included a recital that the donor had a common law duty to make provision for his wife’s maintenance.
- b. *Re Strange*, 21<sup>st</sup> May 2012: the donor’s provision of maintenance for her husband was allowed to stand. The order recited that

*“In the context of clauses in an LPA in which the donor makes provision for the maintenance of his or her spouse, there should be no distinction between male and female spouses and, in principle, such clauses should be treated as valid on the basis of specific maintenance obligations imposed by statutes such as National Assistance Act 1948, section 24(1)(b) and Social Security Administration Act 1991, section 1005(3), and the absence of any distinction between husband and wife in other legislation, such as the Matrimonial Causes Act 1973 and the Inheritance (Provision for Family and Dependants) Act 1975.”*

36. In the seven years or so since these decisions there has of course been further development in the approach to issues of capacity and incapacity. On a practical level, the forms which donors use to create lasting powers have been changed; and the effect of donor’s provisions has been considered at a higher level in the decision of Baker LJ in *The Public Guardian v. DA & Ors* [2018] EWCOP 26.

37. The form of the instrument intended to create a lasting power of attorney is prescribed by Schedule 1(1) of the Act and regulation 5 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007. The prescribed forms contain boxes for the donor to complete particular provisions. Since

the introduction of the Act, there have been three versions of the forms prescribed. In the first two versions, the forms described the provisions as “restrictions and/or conditions” and “guidance”; in the current form (used by all the donors in the cases currently before the court), the terms “instructions” and “preferences” are used instead. (The difficulties of this departure from the statutory language have already been noted elsewhere<sup>17</sup>.) The notes to section 7 of the current forms explain that “your attorneys don’t have to follow your preferences but they should keep them in mind” whereas “your attorneys will have to follow your instructions exactly.”

38. In *The Public Guardian v. DA & Ors* [2018] EWCOP 26 at paragraph 28 Baker LJ agreed with the submissions on behalf of the Official Solicitor as advocate to the court that

*“the interpretation of an instruction or preference in an instrument is a matter of construction to be considered by reference to the words used by the donor. If the words used are expressed in mandatory terms, they should usually be seen as instructions, even if contained in the box on the form specified for preferences. Conversely, words used by the donor to indicate merely an expression of preference should be regarded as such, even if contained in the box specified for instructions.”*

So, *“an instruction is a direction in mandatory terms wherever it appears on the form.”*

39. It is noted in the judgment of Baker LJ that certain other propositions were common ground between the parties, namely:

- a. If a lasting power of attorney contains an instruction requiring the attorney to act in a manner that is inconsistent with the Act or the general law, it will generally be “ineffective as part of the LPA”; but
- b. If the words used by the donor are purely precatory (“an expression of a wish”), and even if that wish is not capable of being given effect within the confines of attorney’s permitted powers, then they
  - i. cannot prevent the instrument from operating as a valid LPA; and
  - ii. should not be considered as “ineffective as part of an LPA.”

40. Baker LJ further noted the submissions of the Official Solicitor’s counsel who

*“warned against too prescriptive an interpretation of the statutory provisions, stressing that the court should not be striving to set aside or*

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<sup>17</sup> See Baker LJ’s encouragement to reconsideration in *The Public Guardian v. DA & Ors* [2018] EWCOP 26 at paragraph 9.

*sever powers under an LPA unless it is clear that they meet the conditions for doing so under Schedule 1 paragraph 11. In this context, he reminded me of the observation of Nugee J in Miles v. The Public Guardian; Beattie v. The Public Guardian [2015] EWHC 2960 (Ch) at paragraph 19:*

*'...It does seem to me that it is right that the Act should be construed in a way which gives as much flexibility to donors to set out how they wish their affairs to be dealt with as possible, the Act being intended to give autonomy to those who are in a position where they can foresee that they may in the future lack capacity...'*

#### The questions to be determined

41. The Public Guardian has brought these applications because it appears to him that the provisions which express the donor's intention that the attorney(s) use the donor's funds to benefit someone other than the donor ("The Provisions") may be "ineffective as part of a lasting power of attorney" or may "prevent the instrument from operating as a valid lasting power of attorney."
42. Specifically, the Public Guardian asks the court to determine whether The Provisions are:
  - a. invalid, as purporting to authorise gifts in contravention to section 12 of the Act; or
  - b. valid, as instructing attorneys to provide for persons whom the donor has a legal obligation to maintain; or
  - c. valid.
43. Where the person intended to benefit from The Provisions is also the attorney, the Public Guardian further asks the court to determine if The Provisions are:
  - a. invalid, since attorneys owe fiduciary obligations which would normally preclude them from benefitting on the basis that this would give rise to a conflict; or
  - b. valid, because any conflict has necessarily been authorised by the donor and the attorney must in any event act in accordance with the donor's best interests.

#### Discussion

44. It is instructive to look back to how enduring and lasting powers of attorney were conceived when their respective statutory provisions were framed. Although there are many similarities between these two schemes of agency, there are also significant differences, one of which is the extent to which the relevant statute specifies the attorney's power to benefit others:

- a. as set out above, the authority which may be granted by lasting power of attorney is restricted in respect of gifting (s12) and by reference to best interests (s4);
- b. in contrast, the authority which could be granted by enduring power of attorney was restricted in respect of gifting (s3(5)) and in respect of 'benefit[ing]...persons other than the donor...' Pursuant to section 3(4) of the Enduring Powers of Attorney Act 1985, an attorney acting under an enduring power of attorney could use the donor's funds to benefit others only to the extent that the donor might be expected to "provide for" or "meet" that person's "needs":

**Enduring Powers of Attorney Act 1985**

3(4) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further, that is to say—

(a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively; and

(b) he may do whatever the donor might be expected to do to meet those needs.

3(5) Without prejudice to subsection (4) above but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further, that is to say—

(a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including himself) who

are related to or connected with the donor, and

(b) he may make gifts to any charity to whom the donor made or might be expected to make gifts,

provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

45. An explanation of this difference may be found in the Law Commission reports which preceded each Act:

- a. *The Incapacitated Principal (Cmnd 8977, July 1983)*, which led to the Enduring Powers of Attorney Act 1985, set out as follows:

*“4.25 The consultation in response to our Working Paper reflected conflicting views so far as gifts were concerned. At one end of the spectrum some people thought that no special provisions were needed to restrict the attorney’s authority: by contrast others felt that the attorney should never be permitted to make any disposition other than for full consideration.*

*4.26 Our recommendations fall between these two extremes. We feel that to deny the attorney any authority to use his EPA to benefit persons other than the donor would deprive the EPA of much of its practical utility. Indeed we feel that it would be sensible for attorneys to have a limited authority in this area. On the other hand we feel it would be undesirable to allow attorneys unrestricted authority.*

*4.27 We accordingly recommend that all attorneys should have statutory authority to use their EPA to provide for the needs of anyone (including themselves) for whom the donor might have been expected to provide had he then been capable. This authority would be limited to doing whatever the donor might have been expected to do to meet those needs had he then been capable. We also recommend that all attorneys should have statutory authority to use their EPAs to make gifts of the donor’s property provided that such gifts were either*

*(a) gifts of a seasonal nature or on the occasion (or anniversary) of a birth or marriage made to persons (including the attorney) who are related to or connected with the donor, or*

*(b) gifts to any charity to whom the donor had made donations (or might have been expected to make had he then been capable)*

*provided (in either case) that the value of each such gift was not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.*

*4.28 We recommend that attorneys should have both the authority to provide for needs and the authority to make gifts without the need for any enabling provision in the EPA itself and both authorities would be exercisable whether or not the donor was incapable and without the need for the attorney to obtain anyone's consent. Both authorities would, however, be subject to any provision in the EPA that had the effect of restricting or excluding them. Thus if the donor provided in the EPA that the attorney was not to use the power for anyone's benefit apart from the donor's, the statutory authorities which we recommend would be excluded. And the same result would arise if the authority specified in the EPA were so limited as to exclude any possibility that other persons were to be benefited. Thus if, for example, the authority were merely to collect income and pay debts the attorney would not be authorised to maintain the donor's relatives or make any gifts.*

*4.29 We accept that these limitations on the attorney's authority may be considered by some people either unnecessary or arbitrary. Not for the first time in this project, however, we have had to balance considerations of simplicity and freedom of action against the need to protect donors against exploitation. On balance we feel that limitations are necessary. As for the limitations being arbitrary we have endeavoured to give such authority as we think most attorneys would be ever likely to need."*

b. In contrast, *Mental Incapacity (No 231)* which lead to the Mental Capacity Act 2005 set out as follows:

*"7.11 The general law in relation to fiduciary obligations restricts an ordinary attorney from acting so as to benefit himself or herself. The 1985 Act, however, made specific provision relaxing the common law restriction so as to allow the attorney (1) to benefit persons other than the donor and (2) to make gifts in some circumstances. In view of our recommendation that an attorney under a CPA should be subject to the same duty to act in the donor's best interests as any other decision-maker, we see no need for comparable provisions in the new legislation. **The power to act in the donor's best interests is a more flexible and slightly wider power than the power of an ordinary attorney at common law. Since it requires the attorney to consider the wishes and feelings of the donor and the factors he or she would have taken into account, the attorney would in appropriate cases be quite able to meet another person's needs (including the attorney's own needs) or***

***make seasonal or charitable gifts, whilst still acting within the parameters of the best interests duty.” (emphasis added)***

46. It is clear from these extracts that the Law Commission considered specific provision in respect of using the donor’s funds to benefit others (including the attorney) to be unnecessary for lasting powers of attorney because, in appropriate circumstances, the concept of ‘best interests’ is itself wide enough to allow that.
47. On a previous occasion<sup>18</sup>, the Public Guardian apparently suggested that the absence of specific provision in respect of using the donor’s funds to benefit others indicated Parliament’s intention that attorneys should no longer have such power. The District Judge on that occasion was not so persuaded. I agree with him. In my judgment paragraph 7.11 of *Mental Incapacity (No. 231)* puts it beyond doubt that “The decision not to include the old clauses reflects... the different statutory frameworks”<sup>19</sup> of the Acts. In the current proceedings, the Public Guardian was also “broadly in agreement” with that conclusion.
48. So, what are the “appropriate cases” in which an attorney under a lasting power of attorney may use the donor’s funds to benefit someone other than the donor? It is notable that, even whilst referring to requirements to consider “the wishes and feelings of the donor and the factors he or she would have taken into account”, the extract from *Mental Incapacity* only concludes that “meet[ing] another person’s needs (including the attorney’s own needs)” would be within the parameters of the best interests duty. Is there to be inferred any limitation of the parameters of ‘best interests’ to ‘meeting needs’ of others? The decisions of Senior Judge Lush referred to in paragraphs 35 and 36 above suggest that this has been the approach previously taken.
49. On consideration, I have come to a different view. In my judgment there is no basis to limit the parameters of ‘best interest’ considerations so that an attorney can only use a donor’s funds to benefit someone else if in doing so the benefit is meeting ‘needs’ (of a type which the donor might be expected to provide for, or otherwise.)
50. This conclusion rests on the following grounds:
- a. The extract from *Mental Incapacity* refers to ‘meeting needs’ only in order to set out why a previous statutory provision in those terms need not be replicated. It says essentially ‘the 1985 Act relaxed the common law position by express provision in relation to ‘needs’; and the 2005 Act relaxes the common law by reference to ‘best interests’ which is a wider concept.’ The emphasis is on the later Act encompassing, not being limited by, the older approach. The limitations on what an attorney under a lasting power may be

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<sup>18</sup> See *The Public Guardian’s Severance Applications [2017] EWCOP 10* at paragraph 138.

<sup>19</sup> *Ibid* at paragraph 141

authorised to do are the limitations of common law/fiduciary duties, the instrument itself, and the Mental Capacity Act (in this context, gifting and best interests).

- b. The “purpose” of the best interests requirement is to consider the matter from the protected persons point of view. The notion of limiting an attorney’s authority to benefit others only to the extent that the donor “might be expected to meet their needs” is wholly at odds with that understanding of ‘best interests.’ Instead of considering matters from the protected person’s point of view, it would mean considering matters from the point of view – the ‘expectation’- of an unidentified other. The point of individuality is that it permits deviation from standard expectations. An individual may choose to live their life according to a sense of responsibility which is not the expectation of the law or the general populace. If, to accommodate this, it is suggested that the ‘needs’ could be understood as meaning ‘needs as the donor sees them’, then the stipulation of ‘needs’ at all is effectively meaningless – we may as well simply say, ‘as the donor sees fit.’ A capacitous principal can authorise a common law attorney to apply his funds for the benefit of someone else; and it is entirely in keeping with the concept of ‘best interests’ - with a requirement to consider wishes, feelings, beliefs and values inbuilt by s4(6) - that the donor of a lasting power of attorney should be able to authorise their attorney in the same way.
  
- c. The concept of ‘best interests’ is recognised as wide enough to encompass altruism. Altruism goes beyond doing ‘what one might be expected to do’ to meet another person’s ‘needs’.
  
- d. Any attempt to define ‘needs’ (so as to make it a workable description of the parameters of authority, and therefore particularly to distinguish payments to meet needs from ‘gifts’) rapidly disintegrates when subject to the testing of real-life interpretations. The District Judge in *The Public Guardian’s Severance Applications* [2016] EWCOP 10 made a brave attempt in the following terms:

*“...marriage and equivalent relationships typically create a relationship of interdependence and mutual support, and dependence*



*is commonly created by the presence either of children or a family member with a significant disability. Such relationships commonly generate needs met by other loved ones within the circle. In general terms, gifts lack the regularity of weekly, monthly and other periodic payments to meet the needs of family members and dependants, and often are not supported by a history of frequent similar periodic payments predating the outset of incapacity”<sup>20</sup>*

However, in his position statement Mr Cisneros points out that “not all marital or equivalent relationships create a relationship of interdependence and not all relationships of interdependence can be said to be akin to marriage. The MCA 2005 is not prescriptive about different types of relationships and clearly the appropriateness of providing for an individual’s maintenance will depend on the individual circumstances of the case and the relationship that the proposed recipient has with the donor.” I agree. Furthermore, one person’s concept of necessity is not necessarily the same as another’s.<sup>21</sup> Moreover, a capacitous person may make gifts regularly (for example as part of tax planning from excess income); and needs may arise intermittently (for example, capital provision for aids and equipment.)

51. In my judgment an approach which limits the authority of an attorney under a lasting power to benefit others only to the extent of meeting ‘needs’ is impracticably delineated and unduly restrictive. However, an attorney’s authority to benefit others is undoubtedly restricted by section 12, the statutory limit on gifting. So, a further question must be addressed: when is a benefit not a gift?
52. It has been suggested that the term ‘gift’ encompasses all payments made from a donor’s estate other than those for consideration<sup>22</sup>. In my judgment, that suggestion was rightly dismissed. It would significantly limit the usefulness of lasting powers of attorney. The extract from *Mental Incapacity* quoted above demonstrates that this was not the conception of attorney’s authority when lasting powers of attorney were being considered.
53. The Cambridge English Dictionary defines ‘gift’ as ‘a present or something that is given.’ Other definitions freely searchable online import specifically a notion of voluntariness, without obligation.
54. In my judgment, an attorney’s use of his donor’s funds to benefit someone else is not a ‘gift’ when it is not linked to a ‘customary occasion’ as defined by s12(3) of the Act, and

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<sup>20</sup> At paragraph 152(f)

<sup>21</sup> For example, in *Re Cameron (Deceased)* [1999] Ch 386 Lindsay J concluded that using the donor’s funds to pay for his grandson’s private education constituted meeting a ‘need’ within the meaning of the Enduring Powers of Attorney Act 1985 “and not the less so by reason of the fact that the state would have provided it had private provision for it not been found. Indeed, the state provides it because it is so fundamentally a need.”

<sup>22</sup> *The Public Guardian’s Severance Applications* [2016] EWHC COP 10 at paragraph 147.

the attorney is under a degree of obligation in respect of it. The obligation may come from the general law (as in spousal maintenance obligations recognised by Senior Judge Lush in *Re Bloom* and *Re Strange*). Or it may be the effect of s4(6) of the Act: when making best interests decisions, the attorney “must consider, so far as is reasonably ascertainable” the donor’s “past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity).” If the donor includes in the instrument an expression of a wish that his funds be used in a certain way, the attorney under a lasting power of attorney is obliged to have regard to those wishes when exercising his authority under the instrument.

55. This obligation on a best interests decision-maker is however not absolute, in the sense that the duty is only to *consider* wishes, feelings, values and beliefs; it is not to give them effect. So, the attorney would only be acting within his authority to use the donor’s funds to benefit someone else in accordance with the donor’s wish expressed in the instrument if the attorney also reasonably considers it to be in the best interests of the donor at the time of the contemplated payment.<sup>23</sup> As acknowledged in paragraph 28 above, we cannot always have our own way. So, the donor’s wishes may have to yield to circumstance. If a donor’s estate no longer stretches to protecting his own interests and also conferring benefit on someone else, the attorney’s ‘best interests’ decision may conclude that the wish cannot be given effect.<sup>24</sup>
56. If an attorney under a lasting power must be free in appropriate circumstances reasonably to determine that it is in the donor’s best interests not to give effect to his [the donor’s] desire to benefit someone else, it follows that the realisation of that desire cannot be a condition of authority under the instrument. In other words, the donor’s desire cannot be expressed in mandatory terms. To do so would be to fail to account for the attorney’s duty to act in accordance with the statutory principle of best interests. It would therefore be ineffective as part of a lasting power of attorney<sup>25</sup>. A donor can go no further than to express his wish in precatory terms (and trust to his chosen attorney’s ability to weigh that appropriately in the balance of best interest decision-making.)
57. This understanding of an attorney’s authority may encompass the donor’s funds being used to benefit the attorney himself. Clearly this creates potential for a conflict of interest. *Mental Capacity* expressly contemplated this at paragraph 7.11 without demur.

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<sup>23</sup> Pursuant to section 4(9) of the Act

<sup>24</sup> It is difficult to conceive of a scenario where it would be reasonable to conclude that it is in the best interests of the donor for his funds to be used to confer third party benefit *instead of* to meet his own needs. An attorney contemplating such a ‘best interests’ conclusion would be well advised to make an application to the court for prior approval.

<sup>25</sup> If the court severed the provision, the Public Guardian would be required to register the instrument with a note to that effect attached. The words would not be a condition of the instrument but they would still be “a written statement of wishes” which the attorney would be required to consider pursuant to s4(7) of the Act when making best interests decisions about the use of the donor’s funds.

58. Mr. Cisneros points out that paragraph 7.60 of the Mental Capacity Act Code of Practice provides that

*“A fiduciary duty means attorneys must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. They must also not allow any other influences to affect the way in which they act as attorney. Decisions should always benefit the donor, and not the attorney. Attorneys must not profit or get any personal benefit from their position, apart from receiving gifts where the Act allows it, whether or not it is at the donor’s expense.”*

59. In my judgment this is something of an overstatement.<sup>26</sup> As set out in paragraph 10 above, at common law an agent’s duty to avoid conflicts of interest and not to profit from his position is qualified where the principal gives informed consent.

60. Mr. Cisneros has drawn my attention to Article 12(4) of the Convention on the Rights of Persons with Disabilities, which states that

*“States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, wills and preferences of the person, **are free of conflict of interest** [emphasis added] and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.”*

61. This Article was considered by Senior Judge Lush in *Re JW* [2015] EWCOP 82. At paragraph 31 he observed that

*“Conflicts of interest are ubiquitous in any mental capacity jurisdiction and it would be unrealistic, if not impossible, to eradicate them entirely. I am not sure that the CRPD expects us to do that anyway. It simply requires States Parties to “ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.”*

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<sup>26</sup> As recently observed by the Vice President, “...the Code of Practice is not a statute. It is an aid to the interpretation of the law, not a primary source of law”: *Re Lawson, Mottram & Hopton* [2019] EWCOP 22 at paragraph 16.

62. The UNCRPD has been ratified by the UK but it has not been given direct effect in English law, so a degree of caution is appropriate in reference to it when seeking to interpret the domestic statute.<sup>27</sup> I agree with Senior Judge Lush that the reference in the Article to measures being “free of conflict of interest” must be understood in the context of the rest of the Article, including “respect for the rights, wills and preferences of the person” and the reference to proportionality. An absolute prohibition against conflicts of interest on the part of an attorney may indeed constitute a safeguard to prevent abuse of the incapacitated person, but only at the cost of restricting the options available to his former capacitous self. Donors commonly choose their attorneys from those persons closest to them, and therefore attorneys are often in the particular group of persons other than himself whom a donor would be most likely to want to benefit. An absolute prohibition on conflict of interest would render impermissible the very arrangement for management of their affairs after loss of capacity which many people would like to make whilst they retain capacity.
63. The relevance of conflict of interest is of course the risk it represents to the donor’s interest: if an attorney has a duty to act in the donor’s best interests but also a personal interest in directing funds to himself, the danger is in the temptation to prioritise personal gain over donor’s interests. The balancing exercise of the best interest determination may be skewed.
64. The Court of Protection is accustomed to managing such conflicts in the context of deputyship. In *Re JW*<sup>28</sup> Senior Judge Lush noted that “*conflicts of interest frequently arise in family situations but that doesn’t mean that a family member is automatically disqualified from being appointed as deputy.*” He identified a number of ways in which the Court ‘manages’ such conflict, and made just such provision to meet the needs of the case. Moreover after appointment, a deputy is subject to supervision by the Public Guardian, being required to submit reports as and when requested. The opportunity for that degree of management and oversight is not ordinarily part of the attorneyship scheme (and, as already noted, that is for many people one of its chief attractions.)
65. However pursuant to section 23(3)(a) of the Act, the court does have power, if the donor lacks capacity to do so, to direct an attorney to render accounts or produce records, information or documents. In the course of these proceedings I asked if the Public Guardian would be able and willing to receive regular reports from attorneys if the court were to make such an order, with a view to importing into attorneyship in appropriate cases (for example, where there is potential for conflict of interest) a degree of supervision or scrutiny akin to deputyship.

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<sup>27</sup> See the discussion in *Re Lawson, Mottram & Hopton* [2019] EWCOP 22 at paragraph 45.

<sup>28</sup> [2015] EWCOP 82 at paragraph 41

66. The Public Guardian has confirmed that he would not have the resources to review and supervise attorneys in this way. He suggests that “if there is sufficient concern” the court could make an order under s23(3)(a) requiring reports to be provided direct to the court for review. That is of course the case, but such an approach could not be the ‘norm’. Court resources too are limited. Moreover ‘supervision’ is outside the functions of the court even in respect of deputyship.
67. So how is the potential for conflict of interest on the part of the attorney to be managed? In my view there is already one aspect of lasting powers of attorney scheme which addresses this – the requirement for a certificate provider, who certifies that the donor understands the purpose of the LPA, the scope of the authority conferred under it and that no fraud or pressure is being used to induce the donor to create the LPA<sup>29</sup>. There is no equivalent in the enduring power of attorney scheme. Providing this certificate is an important role, and the provider may be called to account for his opinion. Particularly where provisions in the instrument include expression of a wish that the donor’s funds be used to benefit others (including the attorney), both donor and attorney should consider carefully who is asked to be the certificate provider, and how the certificate provider formed his opinion.
68. A proportionate approach has to be taken to considerations of conflict of interest, balancing the risk of abuse against the objective of facilitating autonomous decision making. In my judgment, where the donor whilst he had capacity used his own funds to benefit another (including the attorney) in the way contemplated, or where there is an express statement in the instrument of the donor’s wish that his funds be used in the way contemplated, there should be no requirement for the attorney to seek prior authority from the court to use the donor’s funds to benefit another, even if the attorney is in a position of conflict of interest. However, in the absence of either capacitous demonstration of such beliefs and values, or express statement of wishes in the instrument, where the use of funds under contemplation gives rise to a conflict of interest on the part of the attorney, the attorney should make an application to the court for prior authority pursuant to section 23(2) of the Act.

### Conclusions

69. These discussions lead, in my judgment, to the following conclusions in respect of the matters currently before me and the questions posed by the Public Guardian:
- a. No, provisions within an LPA that provide for attorneys to use the donor’s funds to benefit persons other than the donor are not invalid as purporting to authorise gifts in contravention of section 12 of the Act, as long as they are not linked to a ‘customary occasion’ as defined by s12(3) of the Act;

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<sup>29</sup> There is a long and complicated history to the decision to incorporate this requirement in the lasting powers of attorney scheme. (See Cretney & Lush on Lasting & Enduring Powers of Attorney, chapter 6.)

- b. No, provisions within an LPA that provide for attorneys to use the donor's funds to benefit persons other than the donor are not valid if and because they relate to provision for a person whom the donor has a legal obligation to maintain;
- c. Yes, provisions within an LPA that provide for attorneys to use the donor's funds to benefit persons other than the donor may be valid as a written statement of the donor's wishes as long as they are expressed in precatory terms, but they would be ineffective as part of a lasting power of attorney if they were expressed in mandatory terms;
- d. No, provisions within an LPA that provide for attorneys to use the donor's funds to benefit the attorney themselves, are not invalid because of fiduciary obligations;
- e. Yes, provisions within an LPA that provide for attorneys to use the donor's funds to benefit the attorney themselves are valid because any conflict has been authorised by the donor and the attorney must in any event act in accordance with the donor's best interests.

70. These conclusions of course will be applied in the day to day context of lay people making arrangements for management of their funds and acting as attorney. In the hope of making this more straightforward, I have summarised them in the form of a 'decision tree,' attached to this judgment as annex 1. For convenience referring to the disposition of funds in question as 'X', it sets out the thinking process to be followed by an attorney contemplating whether he may use his donor's funds to benefit someone other than the donor.

#### The individual cases

71. Applying these conclusions to the eleven cases currently before the court leads to the following determinations:

- a. PS 1317340T: At section 7 of the instrument under the heading 'Preferences' the donor entered the words "The needs of [LS] before anyone else.' Under the heading 'Instructions', she entered the words "The attorney [SS] must ensure that the needs of my daughter [LS] are taken care of..."

The first of these provisions is an expression of wishes. It does not contravene the Act. It is not ineffective as part of the lasting power of attorney, and it would not prevent the instrument from operating as a valid lasting power of attorney. Its inclusion in the instrument is not a problem.

The second of these provisions is in mandatory terms. As a condition of authority, it would prevent the attorney from properly making a best interests decision. It is therefore ineffective as part of a lasting power of attorney. If severed, the instrument can operate as a valid lasting power of attorney.

I sever the second provision and direct the Public Guardian to register the instrument with a note to that effect attached.

- b. AIQ 13262561: At section 7 of the instrument under the heading 'Instructions', the donor entered the words "Must make sure that you continue to look after my son [M] in the same way that I do."

This provision is difficult to interpret without further information about how the donor 'looks after' her son. However it is expressed in mandatory terms. It therefore imposes a condition which is incompatible with the statutory obligation to make a best interests decision. If severed, the instrument can operate as a valid lasting power of attorney. The donor, if she has capacity to do so, may wish to consider making a more detailed written statement about how she would wish her attorney to use her funds to benefit M.

I sever the provision and direct the Public Guardian to register the instrument with a note to that effect attached.

- c. MS 13265207: At section 7 of the instrument under the heading 'Instructions' the donor entered the words "...[DW] lives with me in my own home. She must continue to be allowed to live there in the event that I have gone into fulltime care."

This provision is in mandatory terms. It is incompatible with the statutory obligation to make a best interest decision. If severed, the instrument can operate as a valid lasting power of attorney. The donor, if she has capacity to do so, may wish to consider making a more detailed written statement about how she would wish her attorney to use her funds to benefit DW.

I sever the provision and direct the Public Guardian to register the instrument with a note to that effect.

- d. LT 13262578: At section 7 of the instrument under the heading 'Instructions', the donor entered the words "My attorney is to make sure my daughter [OAT] is given whatever financial help she needs from my estate."

This provision is loosely phrased in respect of the actual benefit to OAT ("whatever financial help she needs") but it is in mandatory terms ("is to make sure"). It is incompatible with the statutory obligation to make a best interest

decision. If severed, the instrument can operate as a valid lasting power of attorney. The donor, if he has capacity to do so, may wish to consider making a more detailed written statement about how he would wish his attorney to use his funds to benefit OAT.

I sever the provision and direct the Public Guardian to register the instrument with a note to that effect.

- e. DJS 13265242: At section 7 of the instrument under the heading 'Instructions', the donor entered the words "If I am currently making payments towards either of my daughters' living expenses then my Attorneys must carry on with those payments which are currently made out of my excess income. If there is insufficient excess income these payments should come from capital."

By COP5 Acknowledgment dated 20<sup>th</sup> August 2018 DJS has indicated consent to the application and given further clarification of his intentions in the following terms: "I have been making, continue to make and intend that I should continue to make financial provisions for my daughters by way of gifts from my excess income on a monthly basis..... I intend that as long as I have capacity to do so I will continue making these gifts and would wish them to continue from my resources after any incapacity until my death. I accept that if there has been a break in those payments prior to my incapacity that they cannot be resumed on my behalf."

This provision is in mandatory terms and so is incompatible with the statutory obligation to make a best interest decision. If severed, the instrument can operate as a valid lasting power of attorney.

I sever the provision and direct the Public Guardian to register the instrument with a note to that effect.

- f. WJS 13265265: At section 7 of her instrument, the donor replicated the provision made by her husband in (e) above. She too has filed a COP5 Acknowledgment (dated 20<sup>th</sup> August 2018) giving the same clarification of her intentions.

As above, I sever the provision and direct the Public Guardian to register the instrument with a note to that effect.

- g. DG 13264890: At section 7 of the instrument under the heading 'Instructions', the donor entered the words "All property must be transferred into my wife's name. Attorney must ensure my children are provided for."

This provision is in mandatory terms. It is incompatible with the statutory obligation to make a best interest decision. If severed, the instrument can



operate as a valid lasting power of attorney. The donor, if he has capacity to do so, may wish to consider making a more detailed written statement about how he would wish his attorney to use his funds to benefit his wife and children.

I sever the provision and direct the Public Guardian to register the instrument with a note to that effect.

- h. CO 13262549 : At section 7 of the instrument under the heading 'Instructions', the donor entered the words "My attorneys must ensure that money put aside in my accounts for university is used for any remaining university or equivalent for [H] and [T] or if they choose not to study to help towards any employment/housing set up costs. Any remaining money after end of uni course can be used for whatever needs that person has."

This first sentence of the provision is in mandatory terms. It is incompatible with the statutory obligation to make a best interest decision. The second sentence is in precatory terms but makes little sense in isolation. If the provision is severed, the instrument can operate as a valid lasting power of attorney. The donor, if she has capacity to do so, may wish to consider making a more detailed written statement about how she would wish her attorney to use her funds to benefit H and T.

I sever the provision and direct the Public Guardian to register the instrument with a note to that effect.

- i. EF 13264878: At section 7 of the instrument under the heading 'Instructions', the donor entered the words "If my mother is still alive my attorneys must use any of my funds that are available to ensure she lives comfortably and independently."

This provision is in mandatory terms. It is incompatible with the statutory obligation to make a best interest decision. If severed, the instrument can operate as a valid lasting power of attorney. The donor, if she has capacity to do so, may wish to consider making a more detailed written statement about how she would wish her attorney to use her funds to benefit her mother.

I sever the provision and direct the Public Guardian to register the instrument with a note to that effect.

- j. GRH 13264918: At section 7 of the instrument under the heading 'Instructions', the donor entered the words "I want my two sons to be supported financially when and if required."

The provision is in precatory terms. It cannot prevent the instrument from operating as a valid LPA and should not be considered as ineffective as part of the LPA. The Public Guardian must register the instrument.

- k. LS 13265138: At section 7 of the instrument under the heading 'Instructions', the donor entered the words "My attorney MUST ensure that any children (when over 18) are financially supported with my finances in any educational aspirations they may have. This MUST be equally distributed."

This provision is in mandatory terms. It is incompatible with the statutory obligation to make a best interest decision. If severed, the instrument can operate as a valid lasting power of attorney. The donor, if she has capacity to do so, may wish to consider making a more detailed written statement about how she would wish her attorney to use her funds to benefit her children.

I sever the provision and direct the Public Guardian to register the instrument with a note to that effect.

HHJ Hilder

20<sup>th</sup> September 2019