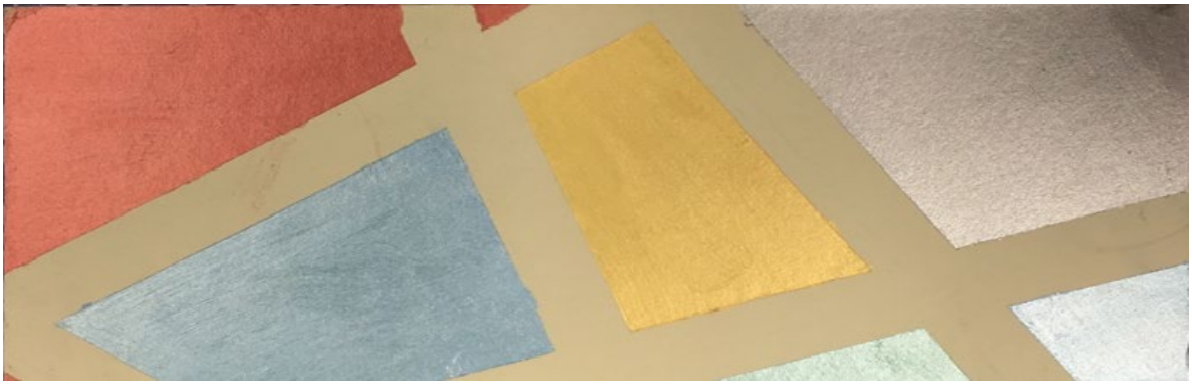

Welcome to the October 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: time-specificity of capacity (again), a Welsh primer on key caselaw and urban myths around s.4B MCA 2005;

(2) In the Property and Affairs Report: two guest articles from new members of the Court of Protection on attorney elephant traps;

(3) In the Practice and Procedure Report: the purpose of transparency and the length of restrictions, and the contempt consequences of being found to have capacity;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the CRPD and the United Kingdom in a stand-off;

(5) In the Children's Capacity Report: the Law Commission's Disabled Children's Social Care report and improving the outcomes of children in complex situations.

(6) In the Scotland Report: an update on AWI reform.

We do not have a Wider Context Report this month, but the progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page here.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

Editorial note

We are delighted to publish two guest articles by new members of the Court of Protection team, Alex Cisneros and Matthew Wyard, highlighting different issues relating to Lasting Powers of Attorneys.

Multiple LPAs

We have been asked about situations where a donor has created multiple Lasting Powers of Attorney (LPAs) dealing with the same thing (i.e. health and welfare decisions or property and affairs decisions). The Office of the Public Guardian (OPG) has not issued guidance specifically on the complications that may arise in such circumstances, and so here we attempt to grapple with some of the key issues.

Can you have more than one LPA for the same thing?

There is nothing in the MCA 2005 or in regulations or the Code of Practice which prohibits the creation of more than one LPA. In fact, the Office of the Public Guardian's own materials envisage that this may be desirable in some cases. The LP12 guidance states: *"You may want to make two LPAs for property and financial affairs, one for your personal finances, and another for your business affairs, so that different attorneys can look after different things."*

This makes clear that donors are permitted to execute multiple LPA instruments, rather than being limited to appointing several attorneys within a single document. A common example is the so-called "business LPA," in which a donor appoints someone to manage their company interests, while reserving personal property and financial decisions to family members or close friends.

Issues

While this division of responsibility may make sense in theory, the coexistence of multiple LPAs can be fraught with practical difficulties:

- Confusion about scope – Attorneys may be unclear about who has authority to act in relation to particular decisions. This confusion can make financial institutions, care providers, or others reluctant to accept the attorney's authority.
- Conflicting instructions – Different instruments may contain instructions that pull attorneys in opposite directions. Attorneys would be unable to comply with both simultaneously, leaving them exposed to challenge or the instructions could be severed.
- Increased risk of dispute – Multiple instruments create more opportunities for disagreement between attorneys, family members, or third parties about who should be acting. Such disputes often need to be resolved by the Court of Protection, increasing delay, stress and cost.

Tips

In practice, the following considerations may help donors and their advisers:

- Consider necessity – Ask whether multiple LPAs are really needed, or whether the same objective could be achieved through using tailored instructions within a single instrument.
- Ensure clarity – *"The extent of an attorney's authority turns primarily on the wording of the power itself"*[1]. This means that if a donor does decide to create multiple LPAs, the drafting must be absolutely clear about the scope of each attorney's authority and how the instruments are intended to work together. The donor should:
    1. set out in each instrument exactly which decisions are covered;
    2. specify any limits on authority; and
    3. consider providing a supporting letter of guidance to explain the practical division of responsibilities.
- Anticipate agency interaction – Different attorneys may need to deal with different organisations in practice. For example, an attorney under a business LPA might need to liaise with the company's bank or accountant, while a personal property and affairs attorney may need to speak with HMRC, social services, or the donor's personal financial adviser.

To avoid duplication or confusion, it is sensible for donors to provide a separate guidance note for attorneys, setting out which agencies each is expected to contact and how information should be shared between them.

Alex Cisneros

Stumbling blocks in revocation cases

The bulk of work coming before the Court of Protection concerns the management of the property and financial affairs of protected parties. One such application which is commonplace, but often fiercely litigated, is an application to revoke a lasting power of attorney ("an LPA") appointed to allow an attorney to manage property and financial affairs ("an LPA PFA"). Many such applications are brought by the Public Guardian following an investigation, but they may also be brought by local authorities or family members. This article will address three key stumbling blocks that often arise in such applications when brought by local authorities and family members.

Stumbling block 1: applying on the wrong basis

The first stumbling block that local authorities often fall at is applying to revoke the LPA on the basis that the appointment is not in P's best interests.

The court's power to revoke a LPA is found at section 22(4) of the Mental Capacity Act 2005 ("the Act"). Read in conjunction with section 22(3) of the Act the court may, if P lacks capacity to do so, revoke the instrument or the LPA, where the court is satisfied that either:

(1) fraud or undue pressure was used to induce P to execute an instrument for the purpose of creating a LPA, or to create a LPA, or

(2) that the attorney (or if more than one, any of them) has behaved, is behaving, or proposes

[1] *The Public Guardian's Severance Applications (DH)* [2017] EWCOP 10 [§11]

> to behave in a way that contravenes his authority or is not in P's best interests.

In order to revoke an LPA therefore, an application must be premised on wrongdoing by another - either in the creation of the LPA in the first place (i.e. where P was fraudulently or unduly influenced in executing the LPA, often but not exclusively by the attorney) – or on an act, or proposed act, of wrongdoing by the attorney in carrying out their functions (i.e. where they have acted beyond the scope of their authority or is acting against P's interests, thereby breaching one of the fundamental principles of the Act).

Of note for practitioners is what the court does not have the power to do. When considering the revocation of an LPA, the court does not have an unfettered power to revoke an LPA where it feels that the appointment is contrary to P's best interests, something that the court does have when considering an application to discharge a deputyship order (see *CL v Swansea Bay University Health Board & Ors* [2024] EWCOP 22).

The reason for that distinction is straightforward. A deputyship order is made by the court in P's best interests where P lacks capacity to appoint someone to make decisions on his behalf and is, as such, a product of the court's best interest decision making jurisdiction. An LPA on the other hand is executed by a capacious individual having autonomously selected the attorney and, on occasions, restricted the scope of their power to act. Therefore, rather than overriding P's autonomy by revoking an LPA simply because the court disagrees with the choice made by P at a time when he had capacity, the court will only revoke an LPA in order to protect P.

How does a practitioner ensure that any removal application focuses on the correct test? That starts with ensuring that the reasons for wanting to remove an attorney fall within the scope of sections 22(3)-(4) of the Act. Where they do, the allegations should be particularised in sufficient detail within the application witness statement that the attorney can understand them and is in a position to respond to them in due course. Where the allegations are vague statements concerning the attorney's general suitability, rather than specific and evidenced allegations of wrongdoing, then the application may be falling victim to stumbling block 2.

Stumbling block 2: Particularising wrongdoing

The second stumbling block in revocation applications is not understanding what wrongdoing is applicable and only relying on their actions as attorney.

In most cases, the alleged wrongdoing relied upon will be a (sometimes fairly obvious) action taken, or proposed action to be taken, by the attorney on P's behalf in their capacity as attorney. For instance, two examples from my own practice, where an attorney sells P's home and rather than passing the proceeds of sale to P to pay off care home debts, gifts the proceeds to her husband, or where P's son acting in his capacity as attorney spent a considerable sum of P's money on a speed boat.

But what about the less obvious scenario of alleged wrongdoing that is not done by the attorney in their capacity as attorney. For instance, the situation of warring siblings, or where an attorney is hostile towards professionals and those caring for P? It is often thought that such matters are irrelevant in applications to revoke an LPA PFA, but that is not so.

The question of whether actions done by attorneys outside of their role as attorney could be taken into account in revocation applications was considered by HHJ Hazel Marshall QC in *Re: J* [2011] COPLR Con Vol 716. At [73] the court considered the scope of conduct under section

22(3)(b) of the Act, confirming that "*if there is sufficient evidence that the attorney is behaving contrary to P's interests even in a different context… that might well quite reasonably provide a sufficient reason to revoke an LPA*". In considering such conduct, the court considered at [75] that the following process should be followed: (1) identify the alleged offending behaviour or prospective behaviour, (2) look at all the circumstances and context and decide whether, taking everything into account, it really does amount to behaviour which is not in P's best interests and (3) decide whether, taking everything into account, including the fact that the behaviour is in some other capacity, it also gives a good reason to take the step of revocation.

Therefore, *Re: J* can be relied on as authority for the proposition that behaviour by an attorney acting outside of their capacity as attorney, can be relied upon to revoke an LPA. Accordingly, *Re: J* was relied upon in *Re Harcourt* [2013] COPLR 69 to revoke a LPA due to the failure of an attorney to cooperate with the court. In *Re EL* [2015] EWCOP 30 and *Re RM* [2016] EWCOP 25 the court relied upon *Re J* to revoke an LPA in circumstances where joint attorneys could not work together and that was causing harm to P's interests. In *LCR v SC* [2020] EWCOP 62 the court refused to register a LPA because poor familial relations meant that appointing the attorneys as sought was effectively setting the situation up to fail.

Notwithstanding those example, in my view, *Re J* should be approached with some caution. Firstly, it is a decision by a Tier 2 judge and, as such, has limited precedential value. Secondly, the facts of *Re: J, Re EL* and *Re: RM* all concerned revocation in circumstances where the warring siblings were co-attorneys and therefore the submission that the conflict impeded decision making on P's behalf was straightforward. That situation is not so clear in respect of cases where the dispute is brought by non attorney siblings against an attorney sibling and, as such, decision making may not be so clearly impeded.

Stumbling block 3: Pursuing the matter to trial

The third stumbling block is not understanding the court process in removal applications or, more precisely, not understanding the methods available to the parties to bring about a revocation without a contested final hearing.

The idea of having two parties disputing something but the court preventing a contested trial would be an alien concept to most lawyers. However, in revocation cases it is worth remembering that there are two other options open to parties to bring about a swifter, and often more cost effective, resolution to the dispute.

One, seeking a Dispute Resolution Hearing ("a DRH"). The DRH is a concept enshrined at paragraph 3.4 of Practice Direction 3B. It is a without prejudice hearing at which parties attend to be told the likely outcome of the proceedings by a judge (who will not then hear the final hearing should it be required) before having the opportunity to try and negotiate a settlement of the matter. Similar to a Financial Dispute Resolution hearing in the Family Court, a DRH is most effective when the parties attend at least an hour in advance of the hearing to discuss and narrow the issues, and then where time is made post hearing, but whilst still at court, for further discussion. To allow for that, parties should be mindful of the constraints with listing and, in the author's experience, request at least a 2-hour hearing for the DRH (rather than the one hour typically listed by default). The benefit to the additional hour is that it facilitates inter party discussions post judicial indication and, if needed, allows the parties to return before the court with an agreed order for approval, or for further indications on the merits.

Two, seeking for revocation of the LPA on a summary basis, without a contested final hearing. In revocation applications the court has the power, and often does exercise it, to summarily determine the application without the need for a contested final hearing. The legal basis for the power is proportionality. Rule 1.1(1) of the Court of Protection Rules 2017 ("the CoPR") requires the court to deal with cases justly and at a proportionate cost which includes, as set out at Rule 1.1(3)(a)&(c) expeditiously, fairly and proportionately, whilst Rule 1.3(1) requires the court to further the overriding objective by actively managing cases. Therefore, in many revocation cases where either the allegations are clearly proven on the documentary evidence, or other factors are at play that mean a contested final hearing would be wasteful and unnecessary, the court should be asked to determine the application summarily. Sometimes such a request will be successful, sometimes not, so any practitioner making such a request should be armed with directions to set the matter down for a contested final hearing or, if more appropriate, a DRH (see above).

Conclusion

The above addresses the three key stumbling blocks that I see arise regularly in practice: (1) not knowing the correct legal basis for revocation, (2) not understanding the breadth of the test and (3) doggedly pursing a contested final hearing in circumstances where resolution can be obtained far easier. Hopefully this will be a useful source of guidance for practitioners making revocation applications in the future.

Matthew Wyard

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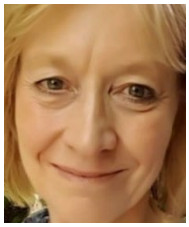

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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