What is the position if a lasting power or copies have been lost or destroyed? This is dealt with by reg 19 which provides that, in those circumstances, the person required to deliver up the document must provide to the Public Guardian in writing:

(a) if known, the date of the loss or destruction and the circumstances in which it occurred;

(b) otherwise, a statement of when he last had the document in his possession.

Chapter 4

Lasting Powers of Attorney – Revocation

SIGNPOSTS

- There are some events which will cause the automatic revocation of a lasting power (see **4.1**).
- The registration of a lasting power will probably be cancelled if there is evidence of misbehaviour by the attorney (see **4.1–4.3**).

REVOCATION OF LASTING POWERS OF ATTORNEY AND CANCELLATION OF REGISTRATION

Focus

There are some events which will cause the lasting power to be revoked, such as the lack of mental capacity of the attorney.

It is also possible to apply to the Court of Protection for an order cancelling the registration of the lasting power on the ground that the attorney has been misbehaving.

4.1 There are some events which will cause a lasting power of attorney to be revoked. Other events will cause the appointment of an attorney to lapse, but the power remains valid as far as another attorney is concerned.

A lasting power of attorney can be revoked in the following circumstances (Mental Capacity Act 2005, s 13):

- The donor may revoke a power at any time as long as he has capacity.
- The bankruptcy of the donor revokes the power so far as it relates to the property and affairs of the donor. However, where the donor is bankrupt because of an interim bankruptcy restrictions order, the power is suspended, so far as it relates to the donor's property, for so long as the order has effect.

- The disclaimer of the appointment by the attorney in accordance with the prescribed requirements: see reg 20 discussed below.
- The death or bankruptcy of the attorney, or, if the attorney is a trust corporation, its winding-up or dissolution. However, the bankruptcy of the attorney does not terminate the appointment, or revoke the power insofar as his authority relates to the donor's personal welfare. If the attorney is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the appointment and the power are suspended, so far as they relate to the donor's property and affairs, for so long as the order has effect.
- The dissolution or annulment of a marriage or civil partnership between the donor and the attorney, but this will not apply if the instrument provides that the dissolution or annulment of a marriage or civil partnership is not to terminate the appointment of the attorney or revoke the power.
- The lack of capacity of the attorney.

The appointment of the attorney does not terminate if:

(a) the attorney is replaced under the terms of the instrument, or

(b) he is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining attorney (Mental Capacity Act 2005, s 13(7)).

So, if the power appoints A as attorney, with B as substitute, and A becomes bankrupt, then the appointment of A terminates, but the power remains valid as far as B is concerned.

In addition, if more than one attorney is appointed, and it is a joint and several appointment, then if one attorney becomes bankrupt, the appointment terminates as far as that attorney is concerned, but not as far as the other attorneys are concerned.

Paragraph 17 of Sch 1 to the Mental Capacity Act 2005 requires the Public Guardian to cancel the registration of an instrument as a lasting power of attorney on being satisfied that the power has been revoked:

(a) as a result of the donor's bankruptcy, or

(b) on the occurrence of an event mentioned in s 13(6)(a)–(d) (see **3.2**).

If the Public Guardian cancels the registration of an instrument, he must notify:

(a) the donor, and

(b) the attorney or donees.

The court must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney if it (Mental Capacity Act 2005, Sch 1, para 18):

(a) determines under s 22(2)(a) that a requirement for creating the power was not met,

(b) determines under s 22(2)(b) that the power has been revoked or has otherwise come to an end, or

(c) revokes the power under s 22(4)(b) (fraud etc).

One situation where the court might order the Public Guardian to cancel the registration is where the attorney is abusing his position. So, if the court concludes that the attorney proposes to behave in a way that would contravene his authority or would not be in the donor's best interests, the court can order the Public Guardian to cancel the registration. However, this can only be done if the donor is not capable. If the donor is capable, then of course he can revoke the power himself if he is not happy with what the attorney is doing.

Paragraph 19 applies where the court determines, under s 23(1), that a lasting power of attorney contains a provision which:

(a) is ineffective as part of a lasting power of attorney, or

(b) prevents the instrument from operating as a valid lasting power of attorney.

In that situation, the court must:

(a) notify the Public Guardian that it has severed the provision, or

(b) direct him to cancel the registration of the instrument as a lasting power of attorney.

Paragraph 20 provides that, on the cancellation of the registration of an instrument, the instrument and any office copies must be delivered up to the Public Guardian for cancellation.

Regulation 20(1) of the Regulations provides that the donee of an instrument must use form LPA005 to disclaim his appointment as donee. Regulation 20(2) provides that the donee must send the completed form to the donor, and a copy of it to the Public Guardian and any other donee who, for the time being, is appointed under the power. Form LPA005 is reproduced in **Appendix 2**.

Regulation 21 deals with revocation by a donor of a lasting power of attorney. Regulation 21(1) provides that a donor who revokes the lasting power of attorney must notify the Public Guardian that he has done so, and notify the donee, or if more than one, each of them, of the revocation. On receipt of

such notice, the Public Guardian must cancel the registration of the instrument creating the power if he is satisfied that the donor has taken such steps as are necessary in law to revoke it (reg 21(2)). Regulation 21(3) provides that the Public Guardian may require the donor to provide such further information, or produce such documents, as the Public Guardian reasonably considers necessary to enable him to determine whether the steps necessary for revocation have been taken. If the Public Guardian does cancel the registration of a lasting power of attorney, he must notify the donor and the donee or, if more than one, each of them (reg 21(4)).

Regulation 22(1) provides that the Public Guardian must cancel the registration of an instrument as a lasting power of attorney if he is satisfied that the power has been revoked as a result of the donor's death. If the Public Guardian does so cancel the registration of an instrument, he must notify the donee or, if more than one, each of the donees of the cancellation.

Implied or express revocation

4.2 It is a moot point whether a later LPA will revoke an earlier EPA or LPA. The best practice, if a donor has executed a previous power of attorney, is for the donor to execute a deed revoking all previous powers.

In *Cloutt* (*Probate Magazine*, January 2009, Denzil Lush) the donor executed an enduring power of attorney in 2000. The attorney applied to register the power in February 2008, and it was duly registered on 31 March 2008. On 3 April 2008 the donor executed a deed of revoking the enduring power of attorney, and she also executed a lasting power of attorney appointing a first cousin once removed to be her sole attorney.

A solicitor and a consultant in old age psychiatry witnessed the signature on the deed of revocation, and the consultant was the Part B certificate provider. He failed to cross the two boxes at the beginning of the certificate.

An application was made to the court for an order that the donor had mental capacity to revoke the enduring power of attorney, and directing the Public Guardian to cancel the registration of the enduring power of attorney.

It was held that, although the consultant in old age psychiatry had been the Part B certificate provider, the court needed clear evidence that the donor was mentally capable of revoking the enduring power of attorney.

On submission of further evidence, it was held that the donor did have mental capacity to revoke the enduring power.

Cases

4.3 There have been many cases where application has been made to the Court of Protection to cancel the registration of a lasting power of attorney on the ground that the attorney is misbehaving.

In *In the matter of Harcourt* (2012), Mrs H appointed her daughter A as her attorney under a lasting power of attorney. C was the owner and manager of a care home in which Mrs H was resident.

C became concerned about the non-payment of care home fees, and that A was giving her very little pocket money. C was also uneasy about a letter that Mrs Harcourt had received from Lloyds TSB confirming a loan to her of £5,000, and correspondence that she had received from Capital One and Marks & Spencer Money confirming that her credit card applications had been accepted.

A complaint was made to the OPG. Yun Ding of the OPG provided a witness statement stating that, among other things:

- on 4 November 2011 the care home arrears were £4,717.30;
- a Marks & Spencer card, Capital One Credit Card and a Lloyds Bank overdraft had been taken out in Mrs Harcourt's name;
- there were sums unaccounted for, including transfers of £3,927 to 'J' and 'K'; and
- there had been frequent, sometimes daily, cash withdrawals of £300 since August 2009.

A would not cooperate with the OPG investigation.

It was held that Mrs H lacked capacity. A was removed as attorney.

Lush SJ said:

> *'Decision*
>
> 50. For the purposes of section 23(3) of the Mental Capacity Act I am satisfied that Mrs Harcourt lacks the capacity to give directions to the attorney with regard to the production of reports, accounts, records and any other information relating to the management of her property and financial affairs.
>
> 51. I am also satisfied that she lacks the capacity to examine any financial records or, more realistically, to instruct someone else, such as a book-keeper, auditor or forensic accountant, to examine the accounts on her behalf and raise requisitions on them.

52. Accordingly, the court has discretion to intervene on the donor's behalf to require the attorney to provide accounts and supporting documentation.

53. In cases of this kind it is never particularly easy to apply the best interests checklist set out in section 4 of the Act. Nonetheless, any difficulty encountered in applying the checklist does mean that decisions such as requiring an attorney to account, investigating an attorney's conduct, or suspending or terminating an attorney's appointment are not in the donor's best interests.

54. For the purposes of section 4(3) of the Act, I am satisfied that it is unlikely that Mrs Harcourt will ever regain sufficient capacity to be able to manage her financial affairs and revoke the LPA herself, should she wish to do so.

55. For the purposes of section 4(4) the Court of Protection Visitor sought, so far as reasonably practicable, to permit and encourage Mrs Harcourt to participate as fully as possible in the decision-making process, but unfortunately to no avail.

56. As regards section 4(6), I am conscious that it was Mrs Harcourt's past wish, when she had capacity, that her daughter should be her attorney and manage her property and financial affairs. As far as her present wishes and feelings are concerned, she believes that the care home manager, C, or her husband, L, is looking after her pension for her and seems quite content with that belief. I am not aware of the possible impact upon her (if any) if she were to be told that her daughter may not have been acting in her best interests and that she could even be a victim of crime.

57. As regards section 4(7) and the views of others who are engaged in caring for Mrs Harcourt or who are interested in her welfare, I have taken into account the views of A, who believes that she is still the most appropriate person to look after her mother's finances. I am unaware of the views of Mrs Harcourt's elder daughter in [locality], who has not taken any part in these proceedings. I have also taken into account the views of C, who is keen to ensure that the care home fees are paid on time, that Mrs Harcourt gets an adequate personal allowance, and that Mrs Harcourt is treated with respect.

58. Section 4(2) of the Act requires me to consider "all the relevant circumstances" and section 4(11) states that relevant circumstances include "those which it would be reasonable to regard as relevant."

59. I consider it is reasonable to regard as relevant the fact that A is an auditor. She is not a typical member of the family acting as an attorney, but a person whose job involves checking the accuracy of financial records. In the context of paragraph 7.67 of the Code of Practice, she could be described as a "financial expert." It would be reasonable to expect a higher standard of care from her in terms of an awareness of her fiduciary duties and the need

for exactitude in presenting accounts and promptness in delivering them. Another relevant circumstance is that it would be reasonable to expect that this particular donor's finances are relatively straightforward.

60. The factor of magnetic importance in determining what is in Mrs Harcourt's best interests is that her property and financial affairs should be managed competently, honestly and for her benefit.

61. Although the OPG has been unable to complete its investigation because of the attorney's reluctance to co-operate, what it has managed to unearth so far has resulted in a successful challenge to her competence and integrity. Even if she has behaved honestly, she has not managed her mother's finances well. Otherwise, there would be no outstanding arrears of care home fees or complaints that Mrs Harcourt is not receiving an adequate personal allowance.

62. In my judgment, the attorney is deliberately obstructing any investigation into the donor's financial affairs by the OPG and she has failed to comply with an order of the court.

63. By refusing to co-operate with the court and the OPG for the purpose of resolving the outstanding issues regarding the manner in which she has conducted her mother's affairs, the attorney is not behaving in Mrs Harcourt's best interests.

64. For the purpose of section 42(5) of the Act the attorney's failure to comply with the directions of the court, and thereby her failure to comply with a provision of the code of practice, is a relevant factor that must be taken into account in deciding the matter.

65. For the purpose of section 22(4)(b), I am satisfied that Mrs Harcourt lacks capacity to revoke the LPA and I propose to revoke it on her behalf but, before doing so, I must consider section 1(6) of the Act, which states as follows:

> "Before the act is done, or the decision is 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."

66. The purpose for which a decision of the court is needed is to enable Mrs Harcourt's financial affairs to be managed competently, honestly and for her benefit. Prior to the suspension of her powers, the attorney was not managing the donor's affairs satisfactorily. The donor did not appoint a replacement attorney; although, surprisingly, a finding of the court that an attorney is behaving in a way that contravenes his authority or is nor in the donor's best interests is not, in fact, an event that would trigger the appointment of a replacement attorney under section 13(6) of the Act. Accordingly, a deputy needs to be appointed to manage Mrs Harcourt's

financial affairs, and the overall objective cannot be achieved as effectively in a less restrictive manner.

Article 8 rights

67. The Human Rights Act 1998, section 3(1) requires the court, so far as it is possible to do so, to read and give effect to the Mental Capacity Act 2005 in a way that is compatible with the European Convention on Human Rights and Fundamental Freedoms 1950. The principal right engaged in this case is Article 8, the right to respect for private and family life.

68. Article 6, the right to a fair trial, is also engaged, but I am satisfied that attorney has been given ample opportunity to produce proper accounts and to explain her actions. She has had six months to do so, during which time, at her request, three adjournments and extensions of time have been granted: on 12 March, 12 April and 18 June 2012. A fourth application, made on 15 July 2012, for an indefinite adjournment was refused. Her lack of candour has generated deeper concerns that she has something to conceal and that she may have financially abused her mother. Mrs Harcourt also has Article 6 rights, and it is in her interests that these outstanding issues are resolved as soon as possible.

69. Article 8 states that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

70. In *K v LBX and others* [2012] COPLR 411, at paragraph 35, Lord Justice Thorpe said:

> "I conclude that the safe approach of the trial judge in Mental Capacity Act cases is to ascertain the best interests of the incapacitated adult on the application of the section 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Article 8 rights and whether that violation is nonetheless necessary and proportionate."

71. In the absence of appropriate safeguards, the revocation by the court of a Lasting Power of Attorney, which a donor executed when they had capacity and in which they chose a family member to be their attorney, would be a violation of their Article 8 rights. For this reason the Mental Capacity Act has been drafted in a labyrinthine manner to ensure that any decision by the court to revoke an LPA cannot be taken lightly.

72. In this case, I believe that the revocation of the LPA in order to facilitate the appointment of a deputy is a necessary and proportionate response for the protection of Mrs Harcourt's right to have her financial affairs managed competently, honestly and for her benefit, and for the possible prevention of crime.

Revocation of Lasting Power of Attorney

73. Accordingly, I revoke the Lasting Power of Attorney and direct the Public Guardian to cancel its registration.'

In *In the matter of Buckley, The Public Guardian v C* (Court of Protection No. 12228697), B was born in 1931 and in September 2010 executed a lasting power of attorney appointing her niece, C, as her attorney. Her friend Shirley was the named person.

The OPG received a complaint about the way in which the attorney was handling the financial affairs of B. A Visitor saw B, and was of the opinion that B lacked capacity. She also reported that B considered that C only came to see her when she wanted money.

The application was accompanied by a witness statement made on 22 October 2012 by Yun Ding, an investigation officer with the OPG, which can be summarised as follows:

(1) Miss Buckley's house had been sold for £279,000 on 28 April 2011.

(2) Between 17 January 2011 and June 2012 the attorney had withdrawn £72,000 from Miss Buckley's funds to set up a reptile breeding business. The attorney claimed that this was a short-term investment which would generate a 20% return over a two-year period.

(3) The attorney admitted that she had used at least £7,650 of Miss Buckley's capital for her own personal benefit.

(4) The attorney said she visited Miss Buckley once a week, but this was contradicted by the nursing home, who said that she had not visited her at all until 16 October 2012, when she appears to have obtained Miss Buckley's signature on some unknown documentation.

(5) At one stage, there had been daily cash withdrawals of £300 (the maximum amount) from Miss Buckley's Nationwide Building Society account.

(6) The Special Investigation Department at the Nationwide had alerted Social Services in April 2012 and the matter was also referred to the police, who interviewed the attorney in July 2012.

(7) Miss Buckley's estate may have incurred a total loss of approximately £150,000.

> 'It is a one-sided instrument … and, although it was argued that a different law should be applied to the document depending upon whether the court was considering the formation, the extent, the operation or the termination of the power, I am satisfied that the proper law for an English court to apply is the law of the country in which the power is to operate—that is to say, English law.'

The Contracts (Applicable Law) Act 1990 gives the force of law to various conventions concerning which law governs a contract where there is a choice. The Act applies if there is a contract between the donor and the donee, but the question of whether an agent is able to bind a principal is specifically excluded (Sch 1, Art 1, para 2(f)).

Chapter 9

Duties and Rights of Attorneys and Deputies

SIGNPOSTS

- A gratuitous attorney is under no duty to act, but an attorney may be under a contractual obligation to do so. A deputy is under a duty to act (see **9.1–9.2**).
- An attorney owes a duty of utmost good faith to the donor (see **9.4**).
- An attorney must keep accounts (see **9.5–9.9**).
- An attorney may be under a duty to disclose all relevant facts (see **9.10–9.14**).
- An attorney must not make secret profits (see **9.15–9.17**).
- An attorney must not exceed the authority conferred by the power (see **9.18–9.19**).
- An attorney must take care and be skilful; the degree of care and skill required depends on various factors (see **9.20**).
- The attorney of an enduring power must apply for registration of the power if he has reason to believe that the donor is or is becoming mentally incapable (see **9.21**).
- An attorney is entitled to be indemnified against all expenses properly incurred in the performance of his duties (see **9.27**, **9.29**, **9.30**).
- An attorney may be entitled to remuneration (see **9.28**, **9.29**, **9.30**).
- An attorney may be entitled to a lien. Deputies have similar duties (see **9.31**).

Focus

The duties of an attorney depend on whether there is a contractual relationship.

9.1 Frequently, the grant of a power of attorney is a family affair, where the donor does not expect to remunerate the attorney, the attorney does not expect to be remunerated by the donor, and neither party intends to enter into a contractual arrangement. This will usually be the case when a parent grants a power of attorney to his child, or a spouse or civil partner grants a power to the other spouse or civil partner. However, if a client asks a professional person like a solicitor or accountant to act as attorney, there will almost invariably be a contract between the donor and the attorney of the power.

Both paid and unpaid attorneys owe similar duties to the donor of the power, although the duties do differ in certain minor respects, and in one major respect.

It should be stressed that, if there is a contract between parties, the duties of the parties will depend on the express or implied terms of that contract. However, the courts are reluctant to imply terms into a contract; in *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378, Scrutton J at page 380 stated:

> 'I read them (the earlier authorities) as deciding (1) that the first thing to consider is the express words the parties have used; (2) that a term they have not expressed is not to be implied because the court thinks it is a reasonable term, but only if the court thinks it is necessarily implied in the nature of the contract the parties have made.'

Despite this reluctance to imply terms into a contract, it is more than likely that terms will have to be implied. If a solicitor or accountant is appointed to act as attorney by a client, it is possible that the parties will not agree any express terms, so terms may have to be implied.

DUTY TO ACT

Focus

A contractual attorney is under a duty to act. A gratuitous attorney is under no duty to act.

9.2 It is this aspect where there is a major difference between an attorney under a contract and an attorney who is not acting pursuant to any contract. An attorney who is not acting under any contract does not have to act under the power of attorney. Of course, the donor and attorney will often be related in this situation, and the attorney will usually want to exercise the power. However, an attorney who is acting under a contract may be under a contractual duty to act. If a client gives a solicitor or an accountant a power of attorney, there will usually be a duty on the solicitor or accountant to act. If the attorney is under a contractual obligation to act, the attorney may have to continue acting until the contractual obligation has been discharged.

Whilst the general rule is that a voluntary attorney is under no duty to act, there are circumstances where they cannot refuse to act.

These circumstances are where the donor has become or is becoming mentally incapable, so that the attorney acting under an enduring power of attorney is under a duty to register. In that situation, the attorney cannot disclaim without giving notice to the court. Similarly, once the power is registered, no disclaimer of the power is valid unless and until the attorney gives notice of it to the court (Mental Capacity Act 2005, Sch 4, para 4).

Someone who is appointed as a deputy is under a duty to act. What action can be taken against a deputy who refuses to act? Presumably, the court will remove them as deputy and appoint someone else.

DUTIES IMPOSED BY THE MENTAL CAPACITY ACT 2005

9.3 Some specific duties are imposed by the Act itself. Attorneys acting under a lasting power of attorney have a duty to:

- act in accordance with the Act's principles;
- act or make decisions in the donor's best interests;
- have regard to the guidance in the Code of Practice; and
- act within the scope of their authority as attorney.

Deputies owe similar duties.

UTMOST GOOD FAITH TO THE DONOR

Focus

The duty of utmost good faith sums up all the duties.

9.4 The attorney owes a duty of utmost good faith to the donor of the power.

In *Rothschild v Brookman* (1831) 2 Dow & C1 188, 6 ER 699, at page 198, 703, Lord Wynford said:

> '... and I think it fit that your Lordships should say, in language which cannot be misunderstood, that in these transactions of trust and confidence there must be, on the part of the person trusted, that most marked integrity, that uberrimae fides, which cannot leave a doubt as to the fairness of the transaction'.

Many of the duties discussed in this section are illustrations of this rule, but for convenience they are dealt with separately.

DUTY TO KEEP A SEPARATE ACCOUNT FOR THE DONOR

Focus

An attorney should have a separate bank account for the donor, and should keep accurate records of income and expenditure.

9.5 The attorney should keep the money of the donor separate from that of the attorney. This means that the attorney should have separate bank accounts for the donor and the attorney. However, there are some situations where this would not be appropriate. Spouses may have a joint bank account. They may appoint each other as attorney. If that is the case, perhaps it is not necessary for there to be a separate bank account for the donor.

However, as the court can order the attorney to produce accounts, it may be that, even in the case of husband and wife who appoint each other attorney, separate accounts should be maintained if one becomes mentally incapable.

DUTY TO KEEP ACCOUNTS

9.6 Subject to the preceding paragraph, it is essential that the attorney keeps accurate accounts and records.

All powers of attorney

9.7 In *Gray v Haig* (1855) 20 Beav 219, 52 ER 587, Sir John Romilly MR said at pages 238 and 239, 594 and 595:

> 'It cannot, however, be too generally known or understood, amongst all persons dealing with each other, in the character of principal and agent, how severely the court deals with any irregularities on the part of the agent, how strictly it requires that he who is the person trusted shall act, in all matters relating to such agency, for the benefit of his principal, and how imperative it is upon him to preserve correct accounts of all his dealings and transactions in that respect, and that the loss and still more destruction of such evidence, by the agent, falls most heavily upon himself.'

An attorney who is a solicitor will of course be bound by the Solicitors' Accounts Rules, and will in any event have to keep accurate records.

If the attorney combines the property of the donor with his own, so that it is not possible to determine what belongs to the donor, the whole will be taken to belong to the donor (*Lupton v White* (1808) 15 Ves 432, 33 ER 817).

Lasting powers of attorney

9.8 With regard to lasting powers of attorney, the court has power to give directions with regard to the accounts and records that the attorney must keep. The attorney can also be required to supply information and produce documents (Mental Capacity Act 2005, s 23(3)).

The Mental Capacity Act Code suggests that the donor could appoint someone to audit the accounts of the donor periodically. Whilst this may be a good idea, in the view of the author there will be very few lasting powers of attorney which will contain such a provision. Most donors will trust the person appointed as attorney, and will not want to introduce this element of formality. However, parents appointing children as attorneys may not trust them completely and, if that is the case, it might be desirable to include such a provision.

Enduring powers of attorney

9.9 The court has similar powers with regard to enduring powers of attorney. Once an enduring power is registered, under para 16(1)(b)(ii) of Sch 4 to the Mental Capacity Act 2005 the court may give directions with respect to the rendering of accounts by the attorney and the production of records kept by him for the purpose, and under para 16(2)(c) the court may require the attorney to furnish information or produce documents or things in his possession as attorney.

DUTY TO DISCLOSE ALL RELEVANT FACTS IN CERTAIN TRANSACTIONS

Focus

An attorney can buy the assets of the donor, as long as full disclosure is made to the donor.

If the donor lacks capacity, application for approval should be made to the Court of Protection.

Position if donor still has capacity

9.10 The attorney of a power of attorney is not prohibited from purchasing the property of the donor of the power, or selling his own property to the donor, provided that he makes full disclosure of all material facts (*Dunne v English* (1874) LR 18 Eq 524 and *Armstrong v Jackson* [1917] 2 KB 822).

In *Dunne v English,* Sir George Jessel MR said at page 533:

> 'It is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell him all the material facts. He must make full disclosure.'

In *McPherson v Watt* (1877) 3 App Cas 254 HL, a Scottish advocate purchased property belonging to two ladies for whom he was agent in the name of his brother. Lord O'Hagan listed (at page 266) the requirements for such a transaction to be upheld; the agent must be able to show that:

(a) he has acted with the most complete faithfulness and fairness;

(b) his advice has been free from all taint of self-interest;

(c) he has not misrepresented or concealed anything;

(d) he has given an adequate price;

(e) his client has had the advantage of the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded; and

(f) if the purchase is to be made in the name of another, this fact has been disclosed.

Similar principles govern the following transactions between the donor and donee of a power of attorney:

- loan of money by donor to attorney;
- loan of money by attorney to donor;
- the grant of a mortgage by the donor to the attorney;
- the grant of a mortgage by the attorney to the donor;
- the grant of a lease by the donor to the attorney; and
- the grant of a lease by the attorney to the donor.

This is not an exclusive list, and there may be other transactions which are governed by the same principles.

Even after the power of attorney has terminated, the attorney may still be under a duty to disclose all relevant facts. In *Alison v Clayhills* (1907) 97 LT 709, Parker J at page 711 said:

> 'It appears to me to be quite clear that a solicitor is not wholly incapacitated from purchasing or taking a lease from his client, but, where the relationship of solicitor and client exists, the onus of upholding the vitality of such a transaction will rest upon the solicitor. It is, I think, equally clear that although the relationship of solicitor and client in its strict sense has been discontinued, the same principle applies as long as the confidence naturally arising from such a relationship is proved or may be presumed to continue.'

Position if donor lacks capacity

9.11 What happens if the donor of the power has become mentally incapable? Obviously, disclosing all relevant facts to the donor is not going to be of much use if the donor is mentally incapable. The correct procedure in this type of case is to apply to the Court of Protection.

Lasting powers

9.12 Under s 23(2) of the Mental Capacity Act 2005 the court may:

(a) give directions with respect to decisions–

  (i) which the attorney of a lasting power of attorney has authority to make, and

  (ii) which P lacks capacity to make;

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

By virtue of s 23(4), the court may authorise the making of gifts which are not within s 12(2) (permitted gifts). However, it cannot order an attorney to make a gift.

Enduring powers of attorney

9.13 Once an enduring power has been registered, the court in effect stands in the shoes of the donor, and under para 16 of Sch 4 to the Mental Capacity Act 2005 the court may give directions with respect to the management or disposal by the attorney of the property and affairs of the donor. The court

may give any consent or authorisation to act which the attorney would have to obtain from a mentally capable donor, and may authorise the attorney to act so as to benefit himself or other persons than the donor (but subject to any conditions and restrictions contained in the instrument).

Lasting and enduring powers of attorney where the donor is mentally incapable and transactions with the attorney

9.14 There may be situations where it is appropriate for an attorney to purchase the house of the donor. It may be that the donor's house is a very attractive property, and it may have some sentimental value. If that is the case, then the attorney may want to purchase it. If the attorney is the only child of the donor, it may be in order for the attorney to purchase it, as long as the attorney pays full market value. If the attorney is one of several children, then if they are all adult and of full mental capacity and agree, then again it may be in order for the attorney to purchase the house, as long as the attorney pays full market value. However, even in this situation it may be best to obtain the sanction of the court. This is because of the attitude of the HMRC. If there is any element of gift which is not authorised, the HMRC will argue that whatever is unauthorised is still part of the donor's estate for tax purposes. There could also be issues with the deprivation of capital rules if there is any element of gift and the donor becomes resident in a care home with the local authority funding the care home fees, either in whole or in part.

An attorney has very limited powers to make gifts under the Mental Capacity Act 2005 (see **8.17**). The gifts must also be reasonable having regard to the size of the estate. What is the position if the donee of a lasting or an enduring power of attorney makes unauthorised gifts? Do they have to be taken into account when calculating the amount of the donor's estate? According to the next case, the answer is yes.

In *McDowall v IRC* [2004] WTLR 221 the donor of a power of attorney became mentally incapable. The attorney made gifts which were not authorised by the power of attorney. It was held that these unauthorised gifts had to be included in the estate of the donor for IHT purposes.

Thus, if the attorney acting under an enduring power, which has been registered, or a lasting power where the donor is mentally incapable, wants to enter into some transaction concerning the property of the donor, such as purchasing or leasing property belonging to the donor, it is desirable that he should obtain the consent of the court.

It should be noted that, if the donor is still mentally capable, the attorney need not obtain the consent of the court.

DUTY NOT TO MAKE SECRET PROFITS

Focus

An attorney must not make secret profits without full disclosure to the donor or the approval of the Court of Protection.

Position if the donor still has capacity

9.15 The Mental Capacity Act Code says that the attorney must not make any profit for themselves, when acting as an attorney, at the expense of the donor.

It is also a principle of agency law that the attorney must not make any profit from acting as attorney. However, under agency law, there are exceptions to this basic rule, for example if the attorney discloses any profit he makes from dealings with the assets of the donor.

In *Turnbull v Garden* (1869) 38 LJ Ch 331 at page 334, James V-C said:

> 'What appears in this case shows the danger of allowing even the smallest departure from the rule that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting.'

For example, if the attorney insures the property of the donor, and receives commission from the insurance company, he would have to disclose this commission to the donor of the power. Even if full disclosure is made, the attorney may still have to account for the commission unless the donor agrees that the attorney can retain it.

However, if the donor delays taking action to recover secret profits, the agent will be allowed to keep them. In *Great Western Insurance Co v Cunliffe* (1874) LR 9 Ch App 525, an insurance company in New York appointed a firm of merchants in London as its agents. The agents arranged reinsurance, and were paid a commission of 5 per cent, and in addition 12 per cent of certain profits. The insurance company discovered what was happening in 1866, but did not object until 1868. It was held that it could not recover the commissions.

Position where the donor lacks capacity

9.16 What is the position if the donor is mentally incapable?

If the attorney under a registered enduring power or under a lasting power where the donor is incapable wants to receive any profit or commission as a

threatening and controlling behaviour on the part of the son, and obtained an injunction protecting the couple from their son. The son appealed, arguing that the Mental Capacity Act and its supporting code were a comprehensive statutory provision, and that the High Court had no jurisdiction over persons who did not come within the legislation.

It was held that the High Court did have jurisdiction over adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the Mental Capacity Act.

Chapter 18

Points for Practitioners

This chapter is intended to be a checklist for practitioners when instructed by clients with regard to lasting powers.

Readers who are solicitors are referred to the Law Society's Practice Note on Lasting Powers of Attorney.

1. Who is the client?

Sometimes, it is the adult children who will ask a solicitor to see parents about lasting powers of attorney. It is, of course, the parents who are the clients, and they are the persons to whom client care letters should be addressed.

2. Capacity

It is essential that the practitioner should be satisfied that the client has capacity. This issue is discussed in **7.22**.

3. Coercion/undue influence

Elderly parents may have been put under pressure by adult children to grant a lasting power in their favour. The parents may not trust one or more children. This issue is discussed in more detail in **7.18–7.19**.

4. Choice of attorney

Donors can choose whoever they like to be the attorney, although there are some exceptions. This is discussed more fully in **3.2**.

5. Giving the certificate

Some practitioners take the view that it is wrong to give the certificate on the ground that, if the power is invalid for some reason and the donor or a third party suffers loss, the practitioner will be liable for that loss.

In the opinion of the writer, if a practitioner is instructed to draft a lasting power of attorney, the practitioner must form a judgment as to whether the client has capacity and has been coerced into granting the lasting power. If the power is invalid, the practitioner will be liable, whether or not the practitioner has given the certificate.

6. Completing the form and ensuring that it is signed in the correct order

7. Charging clause

If a client appoints a practitioner as an attorney, there is an implied right for the attorney to be remunerated. However, it is desirable that a charging clause should be included in the lasting power, and the donor should be made aware of the charges.

The Law Society's Practice Note on Lasting Powers of Attorney provides:

> '9.4 Solicitor-attorneys and costs
>
> Where you are appointed as the attorney of an LPA you should discuss with the donor your current terms and conditions of business (including charging rates and the frequency of billing) and have these approved by the donor at the time of granting the power.
>
> You should ensure that the donor is aware that there is a likelihood that the costs provided may change with time. The donor should also be provided with sufficient information regarding the options for appointing a lay attorney, such as a family member.'

8. Disclosure of donor's will/lasting power

It is desirable to take instructions about when the lasting power of attorney and the donor's will can be disclosed to the attorney. This could be included in the lasting power, or in a separate note signed by the donor.

9. Investment business

If the donor has an investment portfolio, it is desirable to authorise the attorneys to delegate discretionary management functions to a broker, as an attorney cannot delegate management decisions or the exercise of discretion.

10. Money laundering

If appropriate, the practitioner must comply with any money laundering regulations.

Appendix 1

Lasting Power of Attorney Instruments

Contents