The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2022] EWCOP 22

Case No: 1361174T

IN THE COURT OF PROTECTION
Sitting in Newcastle-upon-Tyne

Date: 7th June 2022

Before :

MR JUSTICE POOLE

- -

Between :

The Public Guardian

Applicant

- and -

(1) RI
(2) D
(3) RS
(4) RO

Respondents

- -
- -

Katharine Elliot (instructed by the Office of the Public Guardian) for the Applicant
The Respondents in person

Hearing date: 25 May 2022

- -

JUDGMENT

Mr Justice Poole :

1. The sole question which this judgment addresses is whether the donor under a Lasting Power of Attorney for Property and Financial Affairs (LPA) executed in 2009 had capacity to execute it. I understand that although it is not uncommon for the courts to determine past capacity to execute an LPA, there is a dearth of published authority on the issue. I have been greatly assisted by an extract of a judgment of Senior Judge Lush in *In the matter of Collis*, unreported, 27th October 2010, available at http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/guidance/protecting-the-vulnerable/mca/re-collis.pdf, but no subsequent judicial authority has been brought to my attention. Although the issues are not complex, the lack of judicial authority has prompted me to publish this, suitably anonymised, judgment.

2. The LPA was purportedly executed on 17 December 2009, RD appointing his brothers, RI and RO, and his mother, V, to be his attorneys. The certificate provider was a legal executive, JH. There was compliance with all the requisite formalities. D is married to RI. She has taken a role in assisting the attorneys. J, who is not a party to the proceedings but who has provided helpful evidence to the court, is married to RO.

3. RD was born in 1961 and is now aged 60. He has a learning disability and a diagnosis of chronic schizophrenia for which he continues to receive treatment. At the time of the execution of the LPA he lived with his mother, V, but she died in 2015. In or around 2014, when V became unwell, RD moved to a care home where he continues to live. Members of his family have told the court of his love of the arts, his enjoyment of books, including at one point, a series of books about Queen Victoria, and his enjoyment of playing the banjo. When he lived with his mother he would go to the shops by himself, sometimes to buy ingredients with which he would cook them both a meal. He used local buses to travel around. He was and remains independent in many activities of daily living such as dressing, preparing and eating food, and personal hygiene. Sadly, since having to leave his home and following the death of his mother, he has more recently developed some behavioural problems, including disinhibited behaviour in public which has, on at least one occasion, come to the attention of the police. Currently he is subject to deprivation of liberty restrictions under which he cannot leave the care home without supervision.

4. In 2019, the manager of the care home contacted the Office of the Public Guardian with concerns about the management of RD's financial affairs. This appears to have been triggered by a refusal to pay for RD to have a holiday in Blackpool but the concerns expressed extended to the delegation by the surviving attorneys of their duties to RI's wife, D, and to the question of whether RD had received one-third of his mother's estate in accordance with her will. As it happens, those matters are not now of substantial concern to the Public Guardian or the court. I should emphasise that there is no suggestion that there has been any fraud or misconduct by the attorneys, or that RD was unduly influenced to make the LPA. I am satisfied that all concerned in this case have sought to act in RD's best interests at all times. However, when the care home manager raised the concerns, they prompted an investigation by the Office of the Public Guardian.

5. On 11 April 2019 a Court General Visitor, Mr Pratt, visited RD at his care home and produced a report in which he stated that RD had had a lifelong learning disability and did not have capacity to manage his finances or to revoke the LPA. He expressed concern that RD may not have had capacity when he executed the LPA. Accordingly, arrangements were made for RD to be medically assessed. On 9 July 2019 Dr Ntanda, Consultant in Old Age Psychiatry, visited and assessed RD and wrote a Medical Visit Report. He concluded that RD did not have capacity to manage his finances or to revoke the LPA and that it was "most likely" that RD had not had capacity to execute the LPA in 2009. Correspondence sent to the surviving attorneys – RI and RO – remained unanswered and so, on 24 April 2020, the Public Guardian applied to the Court of Protection for the court to consider that RD had not had capacity to create the LPA in 2009 as is required by s.9(2)(c) of the Mental Capacity Act 2005 (MCA 2005) and that, as such, a requirement for the creation of the LPA was not met – applying s.22(2)(a) MCA 2005. If the Court so found, the Public Guardian sought a direction that it must cancel the registration of the LPA - Schedule 1, paragraph 18 of the MCA 2005 - and an order appointing a deputy for RD to manage his property and affairs.

6. The relevant statutory provisions in the MCA 2005 are as follows:

> Section 22
>
> Powers of court in relation to validity of lasting powers of attorney
>
> (1)This section and section 23 apply if —
>
> (a) a person ("P") has executed or purported to execute an instrument with a view to creating a lasting power of attorney, or
>
> (b) an instrument has been registered as a lasting power of attorney conferred by P.
>
> (2)The court may determine any question relating to—
>
> (a) whether one or more of the requirements for the creation of a lasting power of attorney have been met;
>
> (b) whether the power has been revoked or has otherwise come to an end.
>
> Section 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.

Schedule 1, Paragraph 18

The court must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney if it—

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

7. Schedule 1 of the MCA 2005 provides, amongst other things, for regulations in relation to the execution of an LPA. Reg 9 of the Lasting Power of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007 (as amended) ("the Regulations") sets out the requirements for execution of an LPA. Execution involves the reading and signing of the instrument. In this case the correct form or instrument was used, the formalities were complied with, and the requirements for execution under the Regulations were met (on 17 December 2009). The LPA was then registered by the Office of the Public Guardian. RD was over 18 at the time of the execution and so the sole issue as to whether the execution was valid is whether RD had capacity to execute the LPA on 17 December 2009.

8. If RD did not have capacity to execute the LPA then no authority was given to the donees. Nevertheless, by section 14 of the MCA 2005 they are protected in relation to

their purported exercise of their powers under the LPA, unless they knew that an LPA was not created or that there were circumstances which would have terminated their authority to act as donees.

> Section 14
>
> Protection of donee and others if no power created or power revoked
>
> (1) Subsections (2) and (3) apply if—
>
> (a) an instrument has been registered under Schedule 1 as a lasting power of attorney, but
>
> (b) a lasting power of attorney was not created,
>
> whether or not the registration has been cancelled at the time of the act or transaction in question.
>
> (2) A donee who acts in purported exercise of the power does not incur any liability (to P or any other person) because of the non-existence of the power unless at the time of acting he—
>
> (a) knows that a lasting power of attorney was not created, or
>
> (b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated his authority to act as a donee.
>
> (3) Any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence, unless at the time of the transaction that person has knowledge of a matter referred to in subsection (2).

In the present case there is no suggestion that RI, RO or V knew that RD lacked capacity to execute the LPA. I accept that at all times they followed advice and relied upon the Legal Executive, JH. Nor does s.14(2)(b) apply. Therefore, in the event that I find that the LPA was not created, the protection under s.14 MCA 2005 applies to them.

9. The Public Guardian, relying primarily on the evidence of Mr Pratt and Dr Ntanda, contends that RD lacked capacity to execute the LPA in 2009. RI, RO and D contend that RD did have capacity at that time, that the Legal Executive, JH, clearly assessed RD's capacity at the relevant time, and that RD has deteriorated significantly since 2009 due to the dual impact of having to move out of the family home and the death of his mother. It is not disputed that RD does not now have capacity either to revoke the LPA or to execute a new LPA.

10. The proceedings have an unfortunate history. Following an initial decision by DJ Beckley on 10 June 2020 to suspend the LPA and appoint an interim Deputy, the Respondent RS, and to give directions, the case next came a Deputy District Judge on 19 October 2020. Without a hearing, the DDJ made an interim declaration under s.48 of the MCA 2005 that RD lacked capacity to manage his property and financial affairs and/or to revoke the LPA, made a full deputyship

order, and directed the Public Guardian to cancel the registration of the LPA. No determination was made as to RD's capacity to have executed the LPA in 2009. Further, the DDJ appears to have proceeded on the basis that there was no opposition from the donees. The family later became aware of the proceedings and made an application for reconsideration of the orders of 19 October 2020. That application was transferred to the North East hub and was heard by DJ Temple. On 2 March 2022 DJ Temple set aside the order of 19 October 2020 as having been erroneous in law and fact. In particular, there had been no declaration as to RD's capacity to execute the LPA and only an interim declaration about RD's capacity to manage his property and financial affairs. Directions were given, including that the hearing of the determination of past capacity should be on submissions only, without evidence. Due to the illness of the District Judge due to hear the case, the final hearing was re-listed before me on 25 May 2022.

11. Having regard to the applicable legal framework, the task of the court is to exercise its power under s.22(2)(a) of the MCA 2005 to determine the question of whether a requirement for the creation of the LPA was met, the relevant requirement in this case being that at the time of execution RD had capacity to execute it. If that requirement was not met, no authority was conferred on the donees and the LPA is and was always invalid. It does not require revocation because it was never valid. Upon any finding that RD lacked capacity to execute the LPA the court should record its determination and must then direct the Public Guardian to cancel the registration of the LPA. I am not persuaded that a declaration as to capacity under s.15 of the MCA 2005 is also required – what is required is a determination of past capacity to execute the LPA.

12. In considering a question of past capacity, the principles under ss.1 to 3 of the MCA 2005 apply to the specific decision at the specific time, but the court will have regard to all the evidence relevant to capacity at the material time, including evidence of matters that have come to light subsequent to the making of the decision in question. I have regard to all of those principles and provisions, including:

> Section 1
>
> <u>The principles</u>
>
> (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 to do so have been taken without success.
>
> Section 2
>
> <u>People who lack capacity</u>

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

…

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

Section 3

Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

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

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a)deciding one way or another, or

(b) failing to make the decision.

13. It is necessary to consider what is the relevant information in relation to executing an LPA. The Office of the Public Guardian's booklet 'Guidance for people who want to make a Lasting Power of Attorney' confirms that P (RD in this case) should be able to understand at the very least: what an LPA is; why they want to make it; who they are

appointing as attorney; why they have chosen that person or those people to be appointed; and what powers are being given to the attorney. The degree of understanding required to create an enduring power of attorney was considered by Mr. Justice Hoffmann in *Re K, Re F* [1988] 1 All ER 358. At page 363c-f, in the penultimate paragraph of his judgment, he said:

> "Finally, I should say something about what is meant by understanding the nature and effect of the power. What degree of understanding is involved? Plainly one cannot expect that the donor should have been able to pass an examination on the provisions of the 1985 Act. At the other extreme I do not think it would be sufficient if he realised only that it gave cousin William power to look after his property. Counsel as amicus curiae helpfully summarised the matters which the donor should have understood in order that he can be said to have understood the nature and effect of the power: first, if such be the terms of the power, that the attorney will be able to assume complete authority over the donor's affairs; second, if such be the terms of the power, that the attorney will in general be able to do anything with the donor's property which the donor could have done; third, that the authority will continue if the donor should become mentally incapable; fourth, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court. I do not wish to prescribe another form of words in competition with the explanatory notes prescribed by the Lord Chancellor, but I accept the summary of counsel as amicus curiae as a statement of the matters which should ordinarily be explained to the donor whatever the precise language which may be used and which the evidence should show he has understood.

At page 362j Mr. Justice Hoffmann said:

> I think that my conclusions are in accordance with what appears to be the general policy of the 1985 Act. In practice it is likely that many enduring powers of attorney will be executed when symptoms of mental incapacity have begun to manifest themselves. These symptoms may result in the donor being mentally incapable in the statutory sense that she is unable on a regular basis to manage her property and affairs. But, as in the case of Mrs F, she may execute the power with full understanding and with the intention of taking advantage of the Act to have her affairs managed by an attorney of her choice rather than having them put in the hands of the Court of Protection. I can think of no reason of policy why this intention should be frustrated.

14. In *In the matter of Collis* (above) Senior Judge Lush referred to those passages from the judgment of Hoffmann J, whose judgment preceded the passing of the MCA 2005, and said,

> However, in my judgment, the criteria in *Re K, Re F* are not entirely applicable to LPAs because of some fairly major differences between

EPAs and LPAs, and would need to be adapted in several respects. For example:

- the donor would need to understand that the LPA cannot be used until it is registered by the Public Guardian. This is simply not the case with an EPA.

- one would expect to see a change of emphasis between the creation of an LPA for personal welfare and an LPA for property and affairs; and, in particular, the donor would need to understand that the attorney under an LPA for personal welfare can only make decisions that the donor is contemporaneously incapable of making for him- or herself.

- unlike an EPA, the donor can revoke an LPA at any time when he or she has the capacity to do so (section 19(2)), without the court having to confirm the revocation.

- the authority conferred by an LPA, unlike an EPA, is subject to the provisions of the Mental Capacity Act 2005 and, in particular, sections 1 (the principles) and section 4 (best interests) (section 9(4)).

- the statutory definition of capacity in section 3(4) of the Act specifically requires the donor to be aware of the foreseeable consequences of not executing an LPA, whereas in Re K, Re F Mr Justice Hoffmann did not include an understanding of the effect of not making an EPA in his summary of the matters which should ordinarily be explained to the donor.

15. Schedule 1, para. 2(1) of the MCA 2005 sets out requirements as to the content of instruments which include the prescribed information about the purpose of the instrument and the effect of an LPA, and a statement by the donor to the effect that he has read the prescribed information or a prescribed part of it or has had it read to him and intends the authority conferred under the instrument to include authority to make decisions on his behalf. The LPA form in this case contained "Information you must read" which included information about the purpose of the LPA, when the attorneys could act (only after registration but thereafter whether RD had or did not have mental capacity, unless a restriction was included in the LPA), that the MCA 2005 limited the powers of the attorneys, and that it could be cancelled by RD for so long as he had capacity to do so. RD signed to confirm that he had read that information.

16. Having regard to these authorities and matters, and the helpful submissions of Ms Elliot, I proceed on the basis that the relevant information in relation to the execution of an LPA is:

    a. The effect of the LPA.
    b. Who the attorneys are.
    c. The scope of the attorneys' powers and that the MCA 2005 restricts the exercise of their powers.

d. When the attorneys can exercise those powers, including the need for the LPA to be executed before it is effective.
e. The scope of the assets the attorneys can deal with under the LPA.
f. The power of the donor to revoke the LPA when he has capacity to do so.
g. The pros and cons of executing the particular LPA and of not doing so.

17. In the present case, one complicating feature of the relevant information was that part of RD's assets would be a sum likely to be inherited under V's will but which would be held on trust for RD's benefit.

18. I now turn to the evidence. The evidence is relatively sparse. The approach of the Court of Protection being more inquisitorial rather than adversarial, I did consider whether I should proceed on the evidence available or adjourn in the hope of securing further and better evidence on which to make the decision. However, the proceedings have already become much too protracted, my order following this determination would be the tenth in the proceedings, and the parties have had ample opportunity to put relevant evidence before the court. It would have been preferable to have had a response from Dr Ntanda to the family's evidence about RD having deteriorated. Perhaps further enquiries could have been made to track down JH who has not been traced. However, the parties come to the court to make a decision, no party invited the court to adjourn to seek further evidence, and I decided that I could proceed fairly to a conclusion on the issue in dispute on the evidence before me.

19. On the face of the LPA form, JH had entered, "Executive in Legal firm – Long term experience in creating EPA's and LPA's and ability to assess donor's capacity to understand what an LPA is – it's [sic] importance – and the effect of the powers that are being given." I have no information about JH. The firm he worked for no longer exists. I do not know if he is still in practice or whether he would be able to assist the court as to his experience, in 2009, of dealing with donors with a learning disability, of his usual practice, or of the specific events involving RD.

20. J, who is RO's wife and RD's sister-in-law, gave evidence under affirmation and was questioned by Ms Elliot on behalf of the applicant. Although previously the court had directed a hearing on submissions only, J was in attendance, her written statement begged some questions, and it appeared to me to be necessary to hear from her, allowing Ms Elliot and the other parties to ask her questions. In J's short witness statement she says of events in December 2009,

> My Mother-in-Law, V, asked me to make an appointment to see a solicitor to arrange a discussion regarding her Will and how best to ensure that RD's financial interests were taken care of, apparently with her health deteriorating she was becoming concerned and had been advised to get professional advice by her brother. I made an appointment to see JH a solicitor at S& J, I believe he was chosen at random on the proximity of their premises. We both attended the initial meeting with JH without RD, where her concerns were addressed, her will was fairly straightforward with a Trust created for RD to be included in the distribution of her assets and an LPA was suggested. We were asked to return the following week with RD in order for the Lasting Powers of Attorney to be created. The following week I picked V up at her home

> and met RD near the solicitor's office {an indication of his capabilities at that time} I believe he was fully aware of why he was at the solicitors and later that day would announce he had been out to sign a very important paper.
>
> Initially JH engaged in general conversation with him then asked him if he was happy to go to a different room to answer some questions and sign some papers. Neither RD's mother nor I were present at their private meeting.

In her oral evidence J said that the meeting in private between JH and RD had lasted about 30 minutes. She did not witness JH giving any advice or explanation of the LPA to RD. She thought that RD had understood the LPA because he had said over coffee afterwards that he had signed a very important paper and he was aware that RI and RO would be looking after his money. She said that in 2009 RD travelled independently on local buses, went shopping on his own, and was independent within the home he shared with his mother. He would handle "pocket money" given to him rather than managing all his finances himself. He had deteriorated significantly in recent years.

21. RO corroborates J's evidence about the change in RD from 2009 to the present day. In his statement he says,

> … at the time of the making of the LPA, RD was aware of what was happening, he was sociable, able to engage in conversation and quite independent, he could travel freely on the buses to the local areas and shop for himself and his mother if she needed anything. RD also attended the Multi-Purpose centre where he engaged in numerous activities. In marked contrast to his Mental State now, where he is not allowed out without a carer hence the DOLS due to his behavioural problems in the community, a comparison of RD from then with a 10-year gap does not stand up to scrutiny. In that time, he had a lost his mother, moved out of the family home and had to become used to a different lifestyle, all quite traumatic.

22. Mr Pratt, a General Visitor, reported on his visit to RD in April 2019 that,

> The Care Home Manager showed me documentation within the care plan which stated that RD has been assessed to function at the level of a 4-year old, which is why he requires supervision and care. Despite RD's learning disabilities, I was informed that he is high functioning in terms of meeting his personal care needs; He dresses himself appropriately and eats and drinks independently. RD is fully continent. He occasionally requires some prompting regarding changing his clothes and staff provide support in the preparation of meals and prompting regarding taking his medications but RD is able to make himself sandwiches and cups of tea and coffee without supervision. RD has been assessed and

> deemed safe to go out into the village unaccompanied most days. However, I was informed that he will compulsively buy sweets and toys so his pocket money is rationed each day. The Care Home Manager stated that RD will spend whatever he has in his pocket and has been caught shoplifting on several occasions.

As already noted, unfortunately RD is not now permitted out unaccompanied due to continuing incidents. At the time of his report, Mr Pratt was relaying what he was told but also giving his impression. The assessment of adult functioning by reference to a child's age may be regarded as rather crude and insensitive, but the information given to Mr Pratt indicates that although RD could function relatively well in respect of activities of daily living, his learning disability was severe. Mr Pratt observed that,

> Based upon the Donor's presentation and the fact that I was informed that he appears to have had lifelong learning disabilities, I was surprised to learn that he was deemed to have the relevant mental capacity to make the LPA in the first instance.

23. Dr Ntanda, Consultant Old Age Psychiatrist says in his Medical Visit Report of 9 July 2019 that he has been registered with the General Medical Council since 2005 , is listed on the Specialist Register in Old Age Psychiatry, is approved by the Secretary of State as an Approved Clinician under the Mental Health Act, and has been appointed by the Lord Chancellor to be a Specialist Visitor to the Court of Protection. He reviewed RD's GP records, noting diagnoses of Learning Disability, Mixed Anxiety Disorder, and a history of chronic schizophrenia (however currently on a reducing regime of his treatment with haloperidol). There appeared to be a misunderstanding during the hearing about the term "chronic" – it does not mean severe, it means long-lasting. Dr Ntanda reports,

> I asked [RD] about the LPA and he said "I can remember signing something when my mom was with us. They were doing this will thing and they wondered how long it would be and whatever at the time". I tried to explain what an LPA was he still didn't understand or retain the information I presented to him.
>
> He was not aware that both RO and RI were his attorneys. He stated that RI sorted out his money, and that he had nothing to do with his wife. He wasn't aware that RO was also an attorney.
>
> He didn't understand what authority an LPA had.
>
> Why it is necessary or expedient to revoke the power.
>
> He didn't want the LPA revoked and said that even if he can't go on holiday to Blackpool he wouldn't want anyone else to look into his finances.

24. Dr Ntanda performed an Addenbrooke's Cognitive Examination and reports that RD's overall score was 58/100 with 11/26 for memory – these are low scores. Dr Ntanda was not called to give oral evidence and so his experience, as a specialist in Old Age Psychiatry, of adults with learning disability, or of the suitability of using the Addenbrooke's Cognitive Examination to assess an adult with a learning disability, was not scrutinised.

25. He was asked whether he believed the donor had the relevant capacity to execute his LPA on 17 December 2009. Dr Ntanda appended to his report the relevant principles and provisions of the MCA 2005 and some guidance on capacity to execute LPAs published jointly by the British Medical Association and the Law Society. He responded to the question as follows,

> The nature of learning disabilities is that you have developmental problems from birth which persist through life. The deficits are static and I would expect similar problems with understanding and memory that were evident then and now. I think on the balance of probability he was advised to sign the LPA form by his mother and family at the time and she would rightly have had influence in convincing him to sign this document, and I am not sure if he understood the implications of the same.

Later he re-addressed the question of whether he believes RD had capacity to execute the LPA in 2009, answering,

> No I do not; the nature of learning disabilities is that you have developmental problems from birth which persist through life. The deficits are static and I would expect similar problems with understanding and memory that were evident then and now.

Dr Ntanda also writes in his report that, "I feel it most likely that he did not have capacity at that time."

26. Dr Ntanda reported in July 2019 but there is no updating evidence from him nor any response to the evidence subsequently given by members of RD's family.

27. The burden of proof is on the Public Guardian who alleges that RD did not have capacity to execute the LPA in 2009. I have to determine RD's capacity to execute the LPA in December 2009, over 12 years ago. Ideally, where there is a dispute about past capacity which the court is required to determine, it would he helpful to have evidence as to,

a. The certificate provider's experience - in particular in making a sufficient assessment of the capacity of a prospective donor who is known to have a learning disability or other impairment which might affect their capacity to execute an LPA – their usual practice or their specific recollections of the making of the LPA;
b. Evidence from carers and family members relevant to P's capacity to execute an LPA at the relevant time and to any changes in P's condition, relevant to capacity, over time.
c. Medical evidence, capacity assessments, assessments for benefits, records from carers or activity centres, or other professional evidence roughly contemporaneous with the relevant date when the LPA was executed.
d. An assessment by a suitably qualified and experienced person of P's current capacity and reasoned opinion as to their capacity to execute the LPA at the relevant time, such opinion being informed by review of relevant medical records, contemporaneous assessments, and the evidence from carers and family members.

In the present case Dr Ntanda did not have the advantage of evidence from family members and has not responded to their evidence. There are no contemporaneous records, save for GP records which Dr Ntanda has briefly summarised. Efforts to trace the certificate provider have proved fruitless and there is no evidence from his former firm to assist the court. Nevertheless, the enquiries have to be proportionate, I do not criticise the parties in this case, and the evidence provided is sufficient for the court to make a determination.

28. In considering RD's capacity to execute the LPA I apply the principles in sections 1 to 3 of the MCA 2005 which I have set out, and I have regard to the relevant information which RD would need to understand, retain, weigh and use, and communicate to make decisions about executing the LPA. The court should not set the bar too high. Furthermore, RD, like many people, relied on a lawyer and his family for explanation and advice. The fact that he may not have understood every provision in the LPA or every possible consequence of making it or not making it, does not necessitate a finding that he could not have understood explanations given to him in a way that was appropriate to him, for example by the use of simple language.

29. There is evidence for and against the case that RD did not have capacity to execute an LPA in 2009. There is a properly completed LPA form signed by a certificate provider who states on the form that he had experience of assessing capacity to make an LPA. The evidence to displace the presumption that RD had capacity to execute the LPA comes primarily from Dr Ntanda. The contrary evidence comes primarily from J and RO.

30. There is no dispute that RD has a learning disability which has been lifelong. He also has a diagnosis of chronic schizophrenia. Dr Ntanda is a specialist in Old Age Psychiatry and I have had some hesitation in accepting that he was an appropriate expert to advise in this case. However, his cv satisfies me that he has a sufficient level of qualifications and experience to assist the court in this case, his report is cogent, and he has had proper regard to the provisions of the MCA 2005. All agree that RD could not live independently. In 2009 he lived with his mother but, when she was unable to look after him, he moved to his present care home. I accept the evidence of

Dr Ntanda that RD has an impairment in the functioning of his brain which affected him in 2009. However, every person with a learning disability (and every person with schizophrenia) is an individual with their own characteristics. The evidence in this case is that RD is independent in many activities of daily living, he enjoys reading, arts, crafts, and playing the banjo. However, when interviewed by Dr Ntanda, and even though Dr Ntanda attempted to explain matters to him, RD could not understand what an LPA was, he had not recalled who his attorneys were, and he could not understand what authority they had. Dr Ntanda's assessment of RD and his evidence as a whole provide compelling evidence that at the time of his assessment RD lacked capacity to execute an LPA.

31. Dr Ntanda's opinion was the RD's learning disability will have been static and that it is likely that RD would have also lacked capacity to execute an LPA in December 2009. The family's evidence is not persuasive that RD's ability to understand, retain, weigh and use the relevant information would have been materially different in December 2009 than at the time of Dr Ntanda's assessment. They speak to a deterioration over time in RD's behaviour, and perhaps also in his mental state, but not to any change in his level of understanding or capacity to make decisions. The evidence provided as to the events surrounding the making of the LPA does not weigh heavily against Dr Ntanda's professional opinion that RD would not have had capacity at that time. RD may have understood that he was signing something important, that it was to do with money, and that RI and RO were to look after his money for him, but the evidence tends to show that he had no understanding of the scope of their powers, when they could be used, or what would be the foreseeable consequences of his not signing the important document. There is no suggestion of undue influence being brought to bear on him, but the evidence does show that his mother, V, decided that she wanted to make financial arrangements to protect RD in the event of her death, and that she was advised that an LPA should be made. RD was then asked to come to the solicitor's office to sign the documentation. He did not instigate the process but was compliant with a process instigated by his mother.

32. The evidence shows that RD's learning disability is severe and that he has chronic schizophrenia. It is his learning disability which is, and has been, the predominant cause of his difficulties with decision-making. It renders him incapable now of managing his property and financial affairs. He would not have capacity now to revoke the LPA or to execute an LPA. In 2009, JH, the certificate provider, did not mention on the form that RD had a learning disability. JH did write that he had experience of assessing capacity, but there is no evidence about his experience of dealing with donors with a learning disability. There is no evidence as to what advice or explanation JH gave to RD in the 30 minutes they spent together in private at the solicitor's office. I could infer that during that time JH explained the LPA to RD rather than engaging in small talk but, given the other evidence in this case, I cannot infer that, if the relevant information was explained to RD at that meeting, he was able to understand it, retain it, or weigh and use it. The evidence from the family, from Mr Pratt, and from Dr Ntanda, persuades me that at that time RD did not have that ability due to an impairment in the function of his brain. The evidence displaces the presumption of capacity and I conclude that on the balance of probabilities RD lacked capacity to execute the LPA in 2009.

33. For the reasons given, my determination under s.22(2)(a) of the MCA 2005 is that one of the requirements for the creation of the LPA has not been met, namely the requirement under s.9(2)(c) of the MCA 2005 that when RD executed the instrument he had capacity to execute it. Hence, under para. 18 of Sch 1 of the MCA 2005 I direct the Public Guardian to cancel the registration of the LPA.

34. An interim deputy, RS, is in place and has been for over 18 months. She will continue to act as RD's deputy for his property and financial affairs until a full deputy is appointed. Consideration of the identity of deputy(s) will now follow this judgment.