Neutral Citation Number: [2023] EWCOP 24

Case No: 13954400, 13954481, 1395459T, 13954446,
13954475, 1995443T, 13954383,
13954498, 13954423

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2023

Before:

MR JUSTICE HAYDEN

- -

IN THE MATTER OF:

PUBLIC GUARDIAN'S SEVERANCE APPLICATIONS

- -
- -

Mr Neil Allen (instructed by the Public Guardian**) for the Public Guardian**
Miss Ruth Hughes (instructed by the Official Solicitor**) as advocate to the Court**

Hearing dates: 19th April 2023
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE HAYDEN

The judge has given leave for this version of the judgment to be published.

MR JUSTICE HAYDEN:

1. This is an application brought by the Office of the Public Guardian (OPG), involving nine consolidated cases which raise issues relating to the scope and ambit of Lasting Powers of Attorney (LPA). The instant cases present interpretative questions relating to statute and regulations which have now recurred with sufficient frequency to cause the Public Guardian (PG) to seek clarification.

2. Much of the reported case law and jurisprudence of the Court of Protection reflects those cases heard at Tier 3, the High Court and concern medical treatment and complex 'health and welfare cases'. However, the overwhelming majority of the work of the Court, concerns Property and Affairs applications and is heard predominately by Tier 1 Judges. This tier of the Court, inevitably, does not generate the same volume of case law and there are a very limited number of authorities on the points raised in this hearing.

3. It is important to consider the role and obligations of the Public Guardian (PG). Section 57(4), (5) Mental Capacity Act 2005 (MCA) established a new officeholder, appointed by the Lord Chancellor, known as the Public Guardian. The statutory functions of the PG, in relation to the mental capacity jurisdiction are also proscribed by the MCA:

> ***58 Functions of the Public Guardian***
>
> *(1) The Public Guardian has the following functions—*
> *(a)establishing and maintaining a register of lasting powers of attorney,*
> *(b)establishing and maintaining a register of orders appointing deputies,*
> *(c)supervising deputies appointed by the court,*
> *(d)directing a Court of Protection Visitor to visit—*
> *(i)a donee of a lasting power of attorney,*
> *(ii)a deputy appointed by the court, or*
> *(iii)the person granting the power of attorney or for whom the deputy is appointed ("P"),and to make a report to the Public Guardian on such matters as he may direct,*
> *(e)receiving security which the court requires a person to give for the discharge of his functions,*
> *(f)receiving reports from donees of lasting powers of attorney and deputies appointed by the court,*
> *(g)reporting to the court on such matters relating to proceedings under this Act as the court requires,*
> *(h)dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney or a deputy appointed by the court is exercising his powers,*
> *(i)publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions.*

4. The PG currently receives 5,000-6,000 applications per day to register LPAs, across the jurisdiction of England and Wales. The increasing volume of these applications doubtless reflects an ageing demographic, advances in medical science and increasing public awareness of the work of the Court of Protection. To put these figures in context, when the MCA first came into force in 2007, there were fewer than 10,500 registrations for the entire year. Though the hub of the Court of Protection, at First Avenue House, is greatly impeded by under investment in digital services, the OPG, which I emphasise exists entirely independently from

the Court of Protection, has been able to design and implement a case management system to permit digital scanning and character recognition of documents. The Court of Protection's online case management pilot scheme, launched in 2021, has now been extended to all applications and has significantly shortened time between the issuing of an application and the making of an order. The digital shortcomings of the Court, however, still produce unacceptable delays which are not only entirely inimical to the welfare of P, but deeply stressful and distressing for many families. It is, I regret, necessary to set this background out as it highlights the context in which the issues in this case require to be addressed.

5. On 31st January 2023, Peel J identified the questions that required resolution. They are set out in his order.

6. As may already have become obvious, the nomenclature surrounding these appointments lacks clarity and consistency. The terms "donee" and "attorney" are used interchangeably. Sections 9-14 of the MCA refer to the "donee", in relation to LPAs whilst Schedule 4 (MCA) refers to the "attorney" (they are the same individual). However, the LPA forms, which I will consider further below, use the term "attorney" throughout. For convenience, I intend to refer to the individual who grants a LPA as the "donor" and the person appointed, as the "donee".

7. It is not necessary, with respect to those involved, to overburden this judgment with the minute detail of the nine conjoined cases. The issues raised in those applications will largely be resolved by the Court's conclusions on the submissions. The orders can then be drawn by the lawyers. The issues identified for determination have, properly and helpfully, been refined and honed, subsequent to Peel J's order. It is necessary to set them out. It is also important to highlight that the Official Solicitor (O.S.) has agreed to act as advocate to the court. I am grateful to her for doing so. The issues, as now refined, are agreed between the OPG and the O.S:

Lead donees

(i) *Whether it is lawful to give primary power to one attorney ahead of other attorneys when appointed on a joint and several basis;*

(ii) *Whether it is lawful to have joint and several appointments with instructions for attorneys to deal with separately defined areas of the donor's affairs or include restrictions to this effect;*

Majority rule

(iii) *Whether severance applications ought to continue to be made where instruments seek to instruct multiple (original or replacement) attorneys to act on a majority basis;*

(iv) *Whether "should" or similar words constitute a binding instruction or a non-binding preference on the part of the donor;*

Replacement donees

(v) *Whether it is lawful for the donor to replace a replacement attorney;*

(vi) *If not, whether a replacement attorney can be reappointed to act solely.*

Background

8. The history of the relevant background provisions needs to be set out. I am particularly grateful to Miss Hughes and Mr Allen for their careful research, provided in their recent supplemental written submissions.

9. Powers of attorney, where the authority of the attorney survives the loss of mental capacity of the donor, are creatures of statute. Enduring powers of attorney were first established under the Enduring Powers of Attorney Act 1985. There was no possibility of a replacement donee, acting under an Enduring Power of Attorney. There was also no possibility of a welfare Enduring Power of Attorney. It has not been possible to create an Enduring Power of Attorney since the coming into force of the MCA 2005 on 1st October 2007. However, there are still extant Enduring Powers of Attorney which operate effectively, created before that date.

10. The Law Commission identified a need to reform the Enduring Power of Attorney. This is discussed in their 1995 report *Mental Incapacity*. It led to the introduction of Lasting Powers of Attorney in the MCA. There are various differences between Enduring Powers of Attorney and Lasting Powers of Attorney, including:

    i. A Lasting Power of Attorney must be registered by the Public Guardian for it to become effective, whereas an Enduring Power is registered when the donor is or is becoming mentally incapable of managing their property and affairs;

    ii. The Lasting Power of Attorney has a requirement for a certificate provider;

    iii. 'Suitability' was a ground for the removal of an attorney under an Enduring Power but the Court's powers under section 22 of the MCA are more circumscribed.

LPA forms

The Secondary Legislation

11. The prescribed forms for LPAs, since the inception of the MCA, have seen four versions, each of which is mandated by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253 and amendments thereto. The first three versions of these forms refer to '*restrictions, conditions and guidance'*. In their current iteration (which came in to use on 1st July 2015), new language appeared, namely *"preferences and instructions".* These were introduced by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2015, SI 2015/899.

The Explanatory Memorandum to SI 2015/899

12. The Explanatory Memorandum indicates at [4.2] that

> *"Since the Regulations came into force, users have advised the Office of the Public Guardian of the difficulties they encounter in trying to find two certificate providers. Following a consultation, we are using this legislative opportunity to amend regulation 7 and remove the requirement for two certificate providers. Regulation 11 is also being amended to take into account the revision to the application to register form."*

13. As to the Policy Background, para [7.1] notes:

> *"The Mental Capacity Act 2005 came into force on 1 October 2007. The current prescribed forms for the creation of an LPA forms were introduced in October 2009 in response to criticisms of the original versions, but criticism is still received regarding their clarity and*

> *layout. The new forms to be introduced by these Regulations use simplified language."*

The Consultations

14. There were two relevant consultations conducted by The Ministry of Justice ("MoJ"). The first covered 27th July 2012 to 19th October 2012: **"Transforming the Services of the Office of the Public Guardian: A Consultation."** The second covered 15th October 2013 to 26th November 2013: **"Transforming the Services of the Public Guardian, Enabling Digital by Default."**

The first consultation

15. The first consultation revealed that:

> *"Emerging evidence has shown that, in practice, around 90% of individuals do nothing more complex than name an attorney or attorneys and give them authority to make decisions on their behalf. They do not generally place any specific restrictions on their attorney(s) or offer guidance or provide for a long list of notifiable persons".*

16. As to nomenclature, it was stated:

> *"Initial user testing during the development of the online process has shown us that there still may be issues with the language on the current forms… Reponses to [an earlier consultation in 2008] on the forms revealed that customers preferred the traditional legal terminology, as opposed to plainer English options which could be legally imprecise."*

17. The MoJ published a response to the first consultation in January 2013. Its indicated aims emphasised the desirability of reducing bureaucracy and making the forms simpler. Consultees suggested that more detail was required in respect of the MoJ's proposals. It indicated that a simpler version of the forms should be tested with users and stakeholders.

The second consultation

18. The second consultation included draft forms, by way of an annex. This included the altered wording *"preferences"* and *"instructions"*, diverging from the statutory language i.e., *"conditions or restrictions".* The objective was to promote clarity but in so doing, it introduced concepts which are, to my mind, distinctly different from the concepts identified in the statute.

19. The consultation paper focused on the importance of the need for both brevity and clarity in the forms, to ensure their efficiency:

> *"Since their inception, the design of the LPA forms has been subject to ongoing debate in terms of style, substance and length. A key aspect of the debate on the forms has been to balance the need to keep them short, whilst providing sufficient, clear information and guidance to make their completion as straightforward as possible."*

20. Miss Hughes has explained that feedback from the development of the digital LPA tool was used to assist in the redesigning of the existing forms. To support the work in developing and revising the forms the OPG held "stakeholder workshops", involving representatives from the public, a number of Government Departments, the legal profession, the judiciary, the Advice sector and others. That feedback generated what are regarded as far more user-friendly forms.

21. There were various suggestions concerning the proposed forms (including a proposal for a combined property and welfare form). However, rather surprisingly, none of the questions specifically addressed the departure from the wording of the statute, discussed above. Interestingly, in those passages of the consultation referring to "wet signatures" in the context of directions regarding life sustaining treatment, it was recorded that:

> *"Customer insight research conducted by the OPG has shown that many people struggle to understand what is meant by some of the technical language on the forms… In response to the consultation 'Transforming the Services of the Office of the Public Guardian', the majority of respondents state that they preferred to retain some legal terms in the current forms, given the legal nature of the LPA as a deed. As a result the OPG has redesigned the forms to contain language which attempts to balance legal terminology stemming from the Act, such as 'jointly and severally', with terms which provide a clearer explanation of what is required."*

22. Miss Hughes has carefully traced the evolution of the consultation. One of the questions asked of the consultees, which Miss Hughes draws my attention to, was *"Do you consider that the new language in the forms is more user friendly?"*. A post-consultation report was published by the MoJ: **"Transforming the Services of the Office of the Public Guardian Enabling Digital by Default".** The Executive Summary, at page 7, indicated that one of the two key objectives was *"to transfer the way its services [OPG] are delivered to the public in order to reduce bureaucracy, making its services to customers simpler, more efficient and accessible".* It was made clear that the OPG would, by April 2015, redesign LPAs which would include *"new language aimed at making the LPA easier to complete for lay donors".*

23. Miss Hughes highlights the following passages, in her supplemental written submission:

    i. *"Since their introduction in 2007, the LPA forms have been the subject of much discussion, ranging from the content to the length and language used in the forms. During a House of Lords oral question concerning LPAs on 11 November 2013 Baroness Turner of Camden [stated] "It is important that it (the LPA form) be really simplified so that people can take this job on." Following the introduction of revised forms in 2009, the OPG has continued to monitor customer feedback on forms. This, together, with the development of the online tool has enabled the OPG and the Government Digital Service (GDS) to redesign the existing forms…. We intend to implement in April 2015 those changes that received broad support."*

    ii. *The MoJ received a positive response to the proposed changes to the single forms. "Respondents agreed that the language was more suitable for donors who had little familiarity with the LPA form. After considering comments made by respondents and*

> *following further revision and user testing we have decided to introduce the redesigned single forms."*

24. Miss Hughes has also drawn my attention to the response to an oral question in the House of Lords (November 2013) by the late Baroness Boothroyd, who, with characteristic unambiguity described the forms in these terms: *"It is the most verbose document that I have had to deal with either for myself or for those I have represented in over 30 years in public life*". Miss Hughes characterises the PG's response to the consultation thus: *"As a result, the OPG redesigned the forms to contain language which attempts to balance legal terminology stemming from the Act, such as 'jointly and severally', with terms which provide a clearer explanation of what is required"*. The response to the amended form was positive and a majority of respondents agreed that the forms are greatly improved and far more accessible. That said, Miss Hughes submits that the decision by the MoJ to reword the language of the forms and thus to diverge from the language of the statute must have been intentional, even though it creates what she calls, *"an unsatisfactory tension".*

The Legislative Framework

25. If it appears to the Public Guardian that an instrument contains a provision which would be ineffective or would prevent it operating as a valid LPA, the Public Guardian must apply to the court to determine the matter under MCA ss.22-23:

> ***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.*
>
> *(3) Subsection (4) applies if the court is satisfied—*
> *(a) that fraud or undue pressure was used to induce P—*
> *(i) to execute an instrument for the purpose of creating a lasting power of attorney, or*
> *(ii) to create a lasting power of attorney, or*
> *(b) that the donee (or, if more than one, any of them) of a lasting power of attorney—*
> *(i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or*
> *(ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.*
>
> *(4) The court may—*

> *(a) direct that an instrument purporting to create the lasting power of attorney is not to be registered, or*
> *(b) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.*
>
> *(5) If there is more than one donee, the court may under subsection (4)(b) revoke the instrument or the lasting power of attorney so far as it relates to any of them.*
>
> *(6) "Donee" includes an intended donee.*
>
> ***23 Powers of court in relation to operation of lasting powers of attorney***
>
> *(1) The court may determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one.*
> *(2) The court may—*
> *(a) give directions with respect to decisions—*
> *(i) which the donee 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 donee would have to obtain from P if P had capacity to give it.*
>
> *(3) The court may, if P lacks capacity to do so—*
> *(a) give directions to the donee with respect to the rendering by him of reports or accounts and the production of records kept by him for that purpose;*
> *(b) require the donee to supply information or produce documents or things in his possession as donee;*
> *(c) give directions with respect to the remuneration or expenses of the donee;*
> *(d) relieve the donee wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as donee.*
> *(4) The court may authorise the making of gifts which are not within section 12(2) (permitted gifts).*
>
> *(5) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.*

26. The court has power to sever the offending provision or, alternatively, direct that the instrument is not registered. MCA Sch 1 para 11 provides:

> ***11 Instrument not made properly or containing ineffective provision***
>
> *(1) If it appears to the Public Guardian that an instrument accompanying an application under paragraph 4 is not made in accordance with this Schedule, he must not register the instrument unless the court directs him to do so.*

(2) Sub-paragraph (3) applies if it appears to the Public Guardian that the instrument contains a provision which—

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

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

(3) The Public Guardian—

(a) must apply to the court for it to determine the matter under section 23(1), and

(b) pending the determination by the court, must not register the instrument.

(4) Sub-paragraph (5) applies if the court determines under section 23(1) (whether or not on an application by the Public Guardian) that the instrument contains a provision which—

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

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

(5) The court must—

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

(b) direct him not to register the instrument.

(6) Where the court notifies the Public Guardian that it has severed a provision, he must register the instrument with a note to that effect attached to it.

27. The principal statutory provisions for the creation and validity of LPAs are set out in ss.9 to 14 of the Mental Capacity Act 2005 ('MCA'), which provide (with my emphases):

9 Lasting powers of attorney

(1) A lasting power of attorney is a power of attorney under which the donor ("P") confers on the donee (or donees) authority to make decisions about all or any of the following—

(a) P's personal welfare or specified matters concerning P's personal welfare, and

(b)P's property and affairs or specified matters concerning P's property and affairs, and which includes authority to make such decisions in circumstances where P no longer has capacity.

(2) A lasting power of attorney is not created unless—

(a) section 10 is complied with,

(b) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1, and

(c) at the time when P executes the instrument, P has reached 18 and has capacity to execute it.

(3) An instrument which—

(a) purports to create a lasting power of attorney, but

(b) does not comply with this section, section 10 or Schedule 1,

confers no authority.

(4) The authority conferred by a lasting power of attorney is subject to—

(a) the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests), and

(b) any ***conditions or restrictions*** *specified in the instrument.*

28. Section 10 outlines the procedure for the appointment of donees:

10 Appointment of donees

(1) A donee of a lasting power of attorney must be—

(a) an individual who has reached 18, or

(b) if the power relates only to P's property and affairs, either such an individual or a trust corporation.

(2) An individual who is bankrupt or is a person in relation to whom a debt relief order is made may not be appointed as donee of a lasting power of attorney in relation to P's property and affairs.

(3) Subsections (4) to (7) apply in relation to an instrument under which two or more persons are to act as donees of a lasting power of attorney.

(4) The instrument may appoint them to act—

(a) jointly,

(b) jointly and severally, or

(c) jointly in respect of some matters and jointly and severally in respect of others.

(5) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly.

(6) If they are to act jointly, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 prevents a lasting power of attorney from being created.

(7) If they are to act jointly and severally, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1—

(a) prevents the appointment taking effect in his case, but

(b) does not prevent a lasting power of attorney from being created in the case of the other or others.

(8) An instrument used to create a lasting power of attorney—

(a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor, but

(b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 13(6)(a) to (d) which has the effect of terminating the donee's appointment.

29. For completeness, it should be stated that there would appear to be no ambit of discretion available to the Public Guardian as to whether or not to register an LPA, see: XZ v Public Guardian *[2015] EWCOP 35*, per Senior Judge Lush:

> *"40. The Public Guardian's function under paragraph 11 of Schedule 1 to the Act is limited to considering whether the conditions and restrictions are (a) ineffective as part of an LPA or (b) would prevent the instrument from operating as a valid LPA.*
>
> *41. If he concludes that they cannot be given legal effect, then he is under a duty to apply to the court for a determination of the point under section 23(1). Otherwise, he has a duty to register the power."*

30. These statutory provisions are supplemented by rules provided by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007/1253).

Lead Donees

> *(i) Whether it is lawful to give primary power to one attorney ahead of other attorneys when appointed on a joint and several basis;*
> *(ii) Whether it is lawful to have joint and several appointments with instructions for attorneys to deal with separately defined areas of the donor's affairs or include restrictions to this effect;*

31. Section 10(4), as highlighted above (see para.28), provides three alternative bases on which donees may be appointed to take decisions for a donor. This can only be read as an exhaustive list and, as such, circumscribes only three alternatives: the donee may be appointed *"jointly"*; *"jointly and severally"* or *"jointly in respect of some matters and jointly and severally in respect of others"*. This wording is replicated in the relevant LPA application forms. As also highlighted above, Section 9(4)(b) constrains any authority conferred by an LPA within *"any conditions or restrictions specified in the instrument".* As has been discussed, the relevant LPA form (at Section 7), provides an option for the donor to incorporate *"preferences and instructions"* (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2005 2015/899). That these two phrases are substantially different in meaning, as I have already foreshadowed, strikes me, ultimately, as redundant of argument.

32. Though there is limited case law in this area, the tension between these two terms has already triggered judicial comment: Re Public Guardians Severance Applications *[2017] EWCOP 10*, at paras 45-47; Re DA v BP *[2019] Fam 27*, para. 9. In the latter case, Baker LJ, as he then was, observed:

> *"[9.] In The Public Guardian's Severance Applications [2017] EWCOP 10 at paragraphs 45 to 47, District Judge Eldergill compared and contrasted the new terminology in the latest versions of the prescribed forms with the statutory language in s.9(4). He observed:*
>
> > *"45. It is always risky to depart from the statutory language when drafting forms and the adoption of the headings 'Preferences' and 'Instructions' in the forms introduced by the Amendment Regulations is potentially misleading.*

> *46. The term 'instructions' is not synonymous with 'conditions or restrictions'.*
>
> *47. Equally, the term 'preferences' is not synonymous with 'best interests' or a donee's duty when deciding what is in the donor's best interests to consider anything written in section 7 of the form concerning the donor's wishes, feelings, beliefs and values, and the other factors to be considered by their donee(s): see s.4(6) of the 2005 Act."*

I respectfully agree with the district judge's observations. It may be that those responsible for drafting forms will wish to reconsider these changes in the light of his comments."

33. I also agree with District Judge Eldergill's observations in Re The Public Guardian's Severance Applications (supra):

> *"[45] It is always risky to depart from the statutory language when drafting forms and the adoption of the headings 'Preferences' and 'Instructions' in the forms introduced by the Amendment Regulations is potentially misleading.*
>
> *[46] The term 'instructions' is not synonymous with 'conditions or restrictions'.*
>
> *[47] Equally, the term 'Preferences' is not synonymous with 'best interests' or a donee's duty when deciding what is in the donor's best interests to consider anything written in section 7 of the form concerning the donor's wishes, feelings, beliefs and values, and the other factors to be considered by their donee(s): see section 4(6) of the 2005 Act."*

34. Baker LJ's encouragement to *"those responsible for drafting forms"* to revisit this terminology has gone unheeded. I echo his message and with greater volume. It is the wording of the MCA which must prevail and not the wording used on the form. How though, I ask rhetorically, can a litigant in person or indeed, a lawyer for that matter, be expected effectively to answer a different question, framed by the statute, from the one posed by the form. It is, self-evidently, a recipe for confusion. Moreover, having been guided through the history of these forms by Miss Hughes, it does not seem to me that the central objectives of clarity and accessibility, which the most recent iteration of the form has substantially established, would in any way compromised by realignment with the words of the statute.

35. In Miles, Beattie v Public Guardian, *[2015] EWHC 2960 (Ch)*, Nugee J, as he then was, identified the approach to the construction of both the statute and the facilitative Regulations in these terms.

> *"[19]…it does seem to me that it is right that the Act should be construed in a way which gives as much flexibility to donors to set out how they wish their affairs to be dealt with as possible, the Act being intended to give autonomy to those who are in a position where they can foresee that they may in the future lack capacity to specify who it is that they wish to act for their affairs. It would be unduly restrictive to require the Act to be interpreted in such a way in the circumstances which I have outlined, that is where a donor selects two people, A and B, to make a joint decision in*

> *relation to important decisions, that the donor should not be able in those circumstances to say that if one of them was unable to act she wished the remaining of the two original attorneys to make the decision alone."*

36. Later, Nugee J (at para. 22), referred to what he described as a *"purposive and beneficial interpretation of the Act"*. By this, he was reinforcing the undesirability of a restrictive interpretation which did not promote the central objective i.e., to ensure that donors are afforded the flexibility to indicate how they wish their affairs to be regulated. Nugee J emphasised the importance of the central premise of the MCA, namely, to protect and promote individual autonomy. This requires to be factored into the interpretation of the statute. Indeed, as Mr Allen has alluded to, the structure of the LPA is, in itself, a paradigm example of promoting P's capacity. It echoes the principles of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities:

> *"[5.] Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."*

37. I propose to highlight only the key, applicable, principles of statutory construction. The overarching requirement is that a court should give effect to the intention of the legislator, as objectively determined, having regard to all the relevant indicators and aids to construction: *per* Sales J (as he then was) in Bogdanic v Secretary of State for the Home Department *[2014] EWHC 2872 (QB) at [48].* The starting point is the ordinary linguistic meaning of the words used which are the "primary source by which meaning is ascertained" R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department *[2022] WLR 343 at [29] – [31].* A construction which flows from a reading based on correct drafting is to be preferred rather than one based on an assumption of error, see Spillers Ltd v Cardiff Assessment Committee *[1931] 2 KB 21 per* Lord Hewart CJ at 43.

38. Some of the identified issues raised before me can, it seems to me, be dispatched swiftly. Not least, because they have been addressed by the Court of Appeal and this Court is, of course, bound by their judgment.

39. Addressing the question as to whether it is lawful to give primary power to one donee ahead of others, when appointed on a *"joint and several"* basis, it seems to me that this point has been comprehensively resolved in Re DA (supra). Mr Allen has told me that since that decision, the PG's practice has been to apply for severance where there is an instruction for a primary/original attorney with others unable to act (save where the primary attorney ceases to do so). It is clear that if a donor appoints more than one attorney on a joint and several basis, it must be understood that equality prevails. Thus, a provision such as *"in the event of disagreement, A is to defer to B"* or *"B's decision will be final"* is irreconcilable with the phrase *"jointly and severally"*. The practice adopted by the PG is to be endorsed.

40. The question as to whether it is lawful to have joint and several appointments, with instructions for attorneys to deal separately with defined areas of the donor's affairs (or include restrictions to this effect), has proved to be more problematic. In one of the cases before me, the following is inserted into the instruction box on the form:

> *"Mr [P] must act as my attorney solely for my business interests and not for any personal areas, where my wife… must act solely"*

It strikes me that many donors might contemplate separate individuals being instructed to regulate different spheres of their financial affairs. Mr P is, manifestly, seeking to draw a distinction between the regulation of his business affairs and those of his, more personal, domestic life. This superficially reasonable division is however, to my mind, likely to be illusory in many cases. The funding of "personal areas of life" (which might, for example, incorporate extensive packages of care), will, invariably, be derived from, or at least inextricably connected with, the donor's 'business interests' i.e., the capital or the income producing assets. Ultimately, there is only one estate. A costly expenditure which is identified as within a "personal affairs" remit might, for example, conflict with the professional and competent regulation of the wider assets or *'business affairs',* to use Mr P's phrase. How then could this be resolved, in the absence of agreement? Analysed in this way, it strikes me that the instruction is incompatible with the concept of "joint and several". A "joint appointment" must, axiomatically, necessitate the involvement of both or all the attorneys. Here, what is really contemplated is two donees/attorneys, in effect, acting severally in relation to different areas of the funds. In my judgement, instructions of this kind are also irreconcilable with section 10(4)(c). The wording of section 10 cannot, readily, be reconciled with the intended division of responsibility in this way.

41. Bearing in mind Nugee J's observation that interpretation of the statutory provisions of the MCA should have regard to the central principle of the legislation i.e., to promote personal autonomy, I have asked myself whether section 10 can support a wider construction and whether such, properly analysed, would be *"purposive and beneficial".* Both Mr Allen and Miss Hughes submit that it cannot. It is to be noted that there is nothing to prevent the creation of more than one LPA. This can be viewed from two perspectives. On the one hand, the alternative option preserves the donor's autonomy, thus reconciling the central premise of the Act. On the other, if the donor's objectives can be achieved, in this rather more cumbersome and expensive manner, might the provisions in focus yield more readily to the 'purposive' approach? Ultimately, I am persuaded that the plain wording of the statutory provision does not support the burden of such purposive interpretation. Section 10(4) is strikingly short, succinct, and clearly intended, unambiguously, to be exhaustive. A 'purposive' interpretation would require, in effect, a significant rewriting of the statutory provision and offend each of the conventional principles of statutory construction that I have referred to above. Further, it may be, if I am correct in my analysis of the practical challenges involved in dividing personal and business responsibility for the donor's estate, that the need for separate LPAs will, in fact, provide a clearer and more effective route for the donor, requiring, of necessity, a more intense focus on the specific duties and obligations involved in each and a concentration on their ultimate feasibility. I am not persuaded that the wider interpretation would be either purposive or beneficial.

42. It becomes clear that divergence between the language of the statute and the language of the forms does not merely create *"an unsatisfactory tension"*, to use Miss Hughes's phrase, but something rather more dangerous than that. The donor who constructs their instructions around the language of the forms, rather than the language of the statute, risks invalidating the LPA altogether (as in the instant case). The words of the form may become a siren voice dragging the donor's preferences onto rocks which prevent the instrument from operating as a valid, lasting power of attorney. As I have set out above, the PG has no discretion in such an event, the LPA may not be registered. The consequence of this will be further delay, likely distress, and uncertainty, in a system which, for the reasons I have set out above, is already under very significant strain. It is in this context that I echo Baker LJ's entreaty that this aspect of the form should be revisited.

Majority rule

(iii) Whether severance applications ought to continue to be made where instruments seek to instruct multiple (original or replacement) attorneys to act on a majority basis;
(iv) Whether "should" or similar words constitute a binding instruction or a non-binding preference on the part of the donor;

43. I have not, ultimately, found this issue a difficult one to resolve, even though the conclusion I reach strikes me as having real potential to create a cumbersome and legally unattractive position. As DJ Eldergill noted in Re Public Guardian's Severance Applications, *[2017] EWCOP 10:*

> *"124. I cannot see that there is anything objectionable in the arrangement devised by JF or that it should be necessary to create two instruments in order to achieve a simple objective that can easily be achieved in one instrument with a few simple words. It is certainly not desirable. Under the general law of agency, a principal may appoint co-agents, giving power to a quorum to act on her or his behalf.* **It seems virtually eccentric that a person must authorise (say) four attorneys to all act jointly or all separately and cannot specify anything in between.** *The aim should be a statutory scheme that gives as much flexibility to donors to set out how they wish their affairs to be dealt with as possible.*

44. The emphasis in the above paragraph was the Judge's. In DA v BP (supra), Baker LJ scrutinised the above passages (at para. 46):

> *"In his comprehensive written submissions, Mr Rees also considered cases in which the instruments contain "preferences" (or, under the early regulations, "guidance") or "instructions" (or, under the earlier regulations, "restrictions and/or conditions") which are inconsistent with s.10(4). So far as "preferences" (or "guidance") are concerned, Mr Rees submits that such provisions are merely precatory in effect, do not impose any formal restriction on the attorney's powers, and cannot therefore cause the instrument to fail to comply with s.10(4). In contrast, "instructions" which are inconsistent with s.10(4) cause difficulties as the three bases upon which attorneys can be appointed under that subsection are exhaustive. Mr Rees submits that, notwithstanding that the donor could have achieved his or her purpose by the execution of two separate LPAs, this cannot be achieved by the execution of a single instrument. In The Public Guardian's Severance Application (supra), District Judge Eldergill suggested that there was nothing objectionable in an arrangement which provided that two of the attorneys must always agree on any decision jointly whereas the third could act independently and that it should not be necessary to create two instruments in order to achieve such an objective. Mr Rees acknowledges that the District Judge's view is consistent with the principle of flexibility but submits that it is contrary to the clear wording of the statute. Although I have not heard a full-contested argument on that point, it seems to me that Mr Rees' submission is well-founded."*

45. Baker LJ's remarks on this point are, in fact, obiter. Neither are they predicated on full, contested argument on the point. Before me, both Mr Allen and Miss Hughes agree, that a 'majority rule' provision, as they have termed it, must be severed as they contend that it is inconsistent with the statutory provision. Though they are agreed on the point, I have, as with

the previous issue, considered whether a purposive approach to the interpretation of the statute might be legitimate. Ultimately, however, I cannot conclude that it is, without compromising the logical integrity of my earlier analysis. The provisions of Section 10(4) are drafted so tightly that they leave very little, if any, scope for a purposive approach. This said, I find myself sympathetic to the frustration effervescing in DJ Eldergill's judgment.

46. In the case of Ms B, one of the cases before me, she provided that *"any decision should be made by a majority of attorneys"*. She did this in the context of having ticked the box on the form that indicated that she wanted to appoint her donees *"jointly for some decisions, jointly and severally for other decisions."* She did not specify which decisions were joint and which several. The result of which under section 10(5) would be that the donees were appointed jointly in relation to all decisions. The word 'should' is defined as 'suggesting that something is the proper, reasonable, or best thing to do'. I recognise that this does not sit comfortably within the wording of Section 10 because it is potentially ambiguous. Unfortunately, the form poses a number of alternatives, the first of which is expressed as *"decisions attorneys **should** make jointly"* (my emphasis). The donor has ticked that box and in the box that offers the opportunity to be more specific, she has simply repeated the words on the form i.e., by using the word 'should'. In my view, Ms B is manifestly granting, as would appear to be statistically most common, the power for the attorneys to make decisions either jointly or severally. A restrictive interpretation of the word 'should' in this context, itself taken from the wording of the form, risks occluding the donor's obvious intention i.e., that decisions should be made either by agreement or by majority. The issue here is not, properly analysed, one of statutory construction, it is concerned with identifying the donor's intentions. Here, in my judgement, they are clear and require to be respected. It does not require severance. Ms B's case presents stark and obvious facts. I am not intending to signal any wider guidance as to how the word 'should' is to be interpreted. It is highly fact specific and its significance and force will be dependent on context. I am, however, signalling that its use will not automatically give rise to severance. It is the wording on the forms that generates the ambiguity.

Replacement attorneys

(i) Whether it is lawful for the donor to replace a replacement attorney;
(ii) if not, whether a replacement attorney can be reappointed to act solely.

47. It helps to put this issue into practical context. In the case before me, E created an LPA for both Property and Affairs and a separate LPA for Welfare, in identical terms. Each contain the following: *"[G] is to be the first replacement attorney. Should [G] not be able to act or refuse to act as the replacement attorney, then [C] is to act as the replacement attorney"*. As set out at para. 28 above, Section 10(8) prohibits the donee from appointing a substitute or successor but the instrument itself may appoint a replacement donee, subject to Section 13(6)(a-d), which has the effect of terminating the donee's appointment.

> *"**13 Revocation of lasting powers of attorney etc.***
> *...*
> *(5) The occurrence in relation to a donee of an event mentioned in subsection (6)—*
> *(a) terminates his appointment, and*
> *(b) except in the cases given in subsection (7), revokes the power.*
> *(6) The events are—*

> *(a) the disclaimer of the appointment by the donee in accordance with such requirements as may be prescribed for the purposes of this section in regulations made by the Lord Chancellor,*
> *(b) subject to subsections (8) and (9), the death or bankruptcy of the donee or the making of a debt relief order (under Part 7A of the Insolvency Act 1986) in respect of the donee or, if the donee is a trust corporation, its winding-up or dissolution,*
> *(c) subject to subsection (11), the dissolution or annulment of a marriage or civil partnership between the donor and the donee,*
> *(d) the lack of capacity of the donee.*
>
> *(7) The cases are—*
>
> *(a) the donee is replaced under the terms of the instrument,*
> *(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 donee."*

48. Both Counsel submit that E's wording is susceptible to two interpretations either, that there is to be one replacement attorney (if G does not act) or G is the first replacement attorney who, if he is subsequently unable or refuses to act, may not appoint C as the second replacement, this being contrary to the provision of the statute. In Re Boff *(2013) MHLO 88*, Senior Judge Lush considered that this instruction fell foul of the provisions. Both the Official Solicitor and the OPG have encouraged me to revisit Senior Judge Lush's analysis. They were correct to do so.

49. Unlike in the earlier provisions that I have been considering, there is an inherent ambiguity in Section 10(8)(b). However, the language of the section clearly identifies that a secondary placement is permissible. This lets in the *"beneficial and purposive approach"* that I have analysed above, and which carries with it the necessity to focus on the principal purpose of the legislation i.e., to protect the autonomy of those who lack capacity. A secondary replacement attorney is, self-evidently, consonant with, the rationale of the MCA. Conversely, a scheme which prohibited the appointment of a secondary replacement might, equally logically, conflict with the objectives of the legislation.

50. It isn't necessary for me to work through each and every one of the principles of statutory construction that I have referred to above, but it does seem to me that a purposive interpretation, permitting the appointment of a second attorney identified by the donor, does not do violence to the ordinary linguistic meanings of the words used: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] WLR 343 at [29] – [31]. Nor do I consider that the interpretation requires me to assume an error of drafting: *Spillers Ltd v Cardiff Assessment Committee* [1931] 2 KB 21 *esp* Lord Hewart CJ at 43. Further, the interpretation promotes the required presumption of statutory interpretation that Parliament is to be deemed a rationale, reasonable and informed legislature, pursuing a clear purpose in a coherent and principled manner: *Bennion, Bailey and Norbury on Statutory Interpretation* [11.3]; see also *R (on the application of Quinatavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8], [10] [21] [49]. Lord Bingham:

> *"[8] The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also*

> *(under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So, the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."*

51. Though Senior Judge Lush recognised that Section 10(8)(b) is ambiguous, he, to my mind, concentrated the focus of his interpretation of the provisions rather too heavily on the pre-legislative material. That is undoubtedly permissible, but, as I have laboured to emphasise, it is only part of a much more extensive toolkit of aids to statutory construction. The Senior Judge considered the draft Mental Incapacity Bill, the Law Commission reports of 1983: The Incapacitated Principle; the Law Commission Report of 1995: Mental Incapacity. In my judgement, ambiguity should not be regarded as synonymous with drafting error. The two are crucially different. It does not strike me as rational for the legislature to facilitate a replacement attorney and actively to prevent a secondary placement. Further, the Explanatory Notes to the MCA cast some light on the interpretation of Section 10 (at para. 56):

> *"Subsection (8) allows a donor to provide for the replacement of the donee(s) on the occurrence of a specified event which would normally terminate a donee's powers. The specified events are: the donee renouncing his appointment, the donee's death or insolvency, the dissolution or annulment of a marriage or civil partnership between the donor and the donee or the lack of capacity of the donee. For example, an older donor might wish to appoint his spouse, but nominate a son or daughter as a replacement donee. A donee cannot be given power to choose a successor (subsection (8)(a)) as this would be inconsistent with the core principle that the donor is giving authority to a chosen attorney. A civil partnership is a registered relationship between two people of the same sex which ends only on death, dissolution or annulment, as provided for in the Civil Partnership Act 2004."*

52. This identifies a number of points. The MCA requires that the selection of the donee is always to be that of the donor. That is consistent with the promotion of autonomy. Any selection of a donee by an existing donee is expressly prohibited because that is not consistent with promoting the autonomy of the incapacitated person. It takes decision making entirely out of the donor's hands. Neither do the Explanatory Notes suggest that a secondary replacement attorney is expressly prohibited by the framework of the legislation. On the contrary, the Explanatory Notes emphasise, as I have sought to illustrate, the core principle of donor autonomy.

53. Accordingly, and for all these reasons, I am satisfied that an interpretation which permits the appointment of a secondary replacement attorney, is to be preferred. It follows, that the alternative question of reappointment is, in my judgement, otiose. Had it been necessary to resolve it, I would have concluded that such a reappointment can be made, for the same reasons I have already given in relation to the above issue.

54. Insofar as aspects of my analysis in this judgment might raise the prospect of the need for legislative amendment, I recognise the practical and political reality is such that it will not be possible in the near future. I hope that this judgment at least provides clarity for the time being. However, the clarifications required to the LPA forms do not, as far as I can see, provide quite the same difficulties. The amendments that they require are limited in scope and ought easily to be manageable. In many respects, they would serve to complete the constructive work that has already been done.

55. I should like to express my thanks to Counsel for the effort and industry that they have shown which I have found to have been of great assistance.