**That’s not what the donor wants!**

Consideration of how an adviser should handle instructions from an attorney which conflict with the wishes of the donor of a lasting power of attorney

*By Caroline Bielanska*

*Under the Mental Capacity Act 2005 (MCA 2005), which operates in England and Wales, attorneys acting under a registered Lasting Powers of Attorney (LPAs) must follow the framework for assessing capacity and making decisions as set out in the Act. There are two types of LPAs, one for the management of property and financial affairs and the other for health and welfare decision making. This article will focus on the attorney acting under a property and affairs power, and whilst it applies specifically to the law in England and Wales, it may have application in other jurisdictions which adopt a best interest approach to decision making by delegated decision makers. The LPA needs to be registered with the Public Guardian before it can be validly used. Registration is not evidence of the donor’s capacity, and unless there is a restriction within the power, the attorney can act both when the donor has capacity and when he lacks capacity. This article focuses on what the adviser should do, if instructions are given by the attorney which appear to conflict with a previously known view or wish of the donor of the power.*

***Attorney acting as an agent of the donor***

Advisers are required to give advice which is in the best interests of their ‘client’. It can be confusing as to who is the client, when the person whose affairs are required to be managed is not directly giving instructions, perhaps because they lack mental capacity or because they physically are not in a position to give instructions.

A lasting power is a vehicle of agency and as such the attorney acts as the agent for the donor, who is the principal. The MCA 2005 Code of Practice provides guidance for attorneys which includes their duties under the law of agency. Paragraph 7.58 summarises these responsibilities:

‘An attorney takes on a role which carries a great deal of power, which they must use carefully and responsibly. They have a duty to:

• apply certain standards of care and skill (duty of care) when making decisions

• carry out the donor’s instructions

• not take advantage of their position and not benefit themselves, but benefit the donor (fiduciary duty)

• not delegate decisions, unless authorised to do so

• act in good faith

• respect confidentiality

• comply with the directions of the Court of Protection

• not give up the role without telling the donor and the court.

In relation to property and affairs LPAs, they have a duty to:

• keep accounts

• keep the donor’s money and property separate from their own.’

The attorney is, in particular, protected from liability against the donor, provided he is carrying out the donor’s instructions, acting in good faith and not taking advantage of his position. If the attorney were to go against the donor’s known wishes or instructions he would be in breach of his fiduciary duty and the donor would have a right of action against the attorney for any resulting loss or damage.

***The attorney must follow the requirements of the Mental Capacity Act 2005***

In addition to the responsibilities of agency, the MCA 2005 creates specific responsibilities on the attorney, who:

* must follow the statutory principles set out in s1 and make decisions in the best interests of the donor who lacks capacity under s4 (s9(4)(a));
* must respect any conditions or restrictions that are contained in the LPA (s9(4)(b));
* may make a gift of the donor’s money or belongings to people who are related to or connected with the donor (including the attorney) on customary occasions, including, births or birthdays, weddings, wedding anniversaries, civil partnership ceremonies or anniversaries, or any other occasion when families, friends or associates usually give presents, or to charities to whom the donor made or might have been expected to make gifts, provided in all cases, the value of such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate (s12);
* must have regard to guidance in the Code of Practice that is relevant to the decision that is to be made (s42(4)(a)).

***Provide information and guidance to the attorney***

As can be seen above, it is important that the attorney should be provided with guidance and advice, so he is aware of his responsibilities.

Applying the widely recognised ‘Nudge Theory’ to attorneys: when the LPA was created, the adviser should signpost the appointed attorney to the relevant chapters of the MCA 2005 Code, and provide guidance as to how he should make decisions, which should result in the attorney making MCA 2005 compliant decisions.

Nudge Theory is credited to Nobel Prize winner, Richard Thaler, Professor of Behavioural Science and Economics at the University of Chicago Booth School of Business and Daniel Kahneman, an American psychologist, which promotes positive reinforcement and indirect suggestions achieve non-forced compliance and will influence the motives, incentives and decision making. It has been shown to be more effective than direct instruction, legislation, or enforcement.

***Obtain instructions from the donor***

There is nothing to prevent the adviser seeking instructions directly from the donor, if he has capacity. It may be that the donor’s views have changed, but if his instructions are such that there is a clear conflict, the adviser can refuse to act under the attorney’s instructions, as he will be on notice that the attorney is not acting within the donor’s express authority. At the same time, the donor will need to consider whether to retain or revoke the power, and take appropriate action.

***The requirement to follow the principles and make a best interest decision***

The MCA 2005’s first principle is that people must be assumed to have capacity to make a decision or act for themselves unless it is established that they lack it (s1(2)). The person should be supported to make those decisions they are capable of making (the second principle (s1(3)). People with capacity are able to decide for themselves what they want to do and can choose an option that other people do not think is in their best interests. That is their choice and does not, in itself, mean that they lack capacity to make the decision (the third principle in s1(4)).

Any decision made, or act done on behalf of a person who lacks capacity must be made or done in that person’s best interests (the fourth principle in s1(5)). Working out a person’s best interests is only relevant when that person has been assessed as lacking, or is reasonably believed to lack capacity to make the decision in question or give consent to an act being done. Attorneys acting under an LPA are specifically required to apply ‘the best interest framework’ set out in s4(1) - (7) when making a decision (s4 (8)(a)).

The best interest framework requires the attorney to do the following:

1. not make unjustified assumptions about the donor’s best interests simply based on his age, appearance, condition or behaviour;
2. consider whether the decision can wait until the donor regains capacity (if this is likely);
3. do whatever is possible to permit and encourage the donor to take part, or to improve his ability to take part, in making the decision;
4. identify all the relevant circumstances that the donor would consider if he were making the decision;
5. ascertain the donor’s views including, his past and present wishes and feelings (these may have been expressed verbally, in writing or through behaviour or habits), any beliefs and values (e.g. religious, cultural, moral or political) that would be likely to influence the decision in question, and any other factors the donor would be likely to consider if he were making the decision;
6. if it is practical and appropriate to do so, consult other people for their views about the donor’s best interests and to see if they have any information about the donor’s wishes and feelings, beliefs and values. In particular, the attorney should try to consult with: –

(a) anyone previously named by the donor as someone to be consulted on either the decision in question or on similar issues;

(b) anyone engaged in caring for the donor, such as close relatives, friends or others who take an interest in the person’s welfare; and

(c) any co-attorney.

Having gone through this process, to comply with the fifth principle, the attorney must consider if there are other options that may be less restrictive of the donor’s rights and freedoms (s4(6)) and then weigh up these factors to work out what is in the donor’s best interests. A least restrictive option must always be in the donor’s best interest, so effectively the best interest principle ‘trumps’ the least restrictive principle.

***The weight to be attached to the donor’s views and wishes***

The adviser should make the attorney aware of the donor’s views or wishes as known to him and the appropriate weight to be attached to those views. HH Hazel Marshall QC in the Court of Protection case of *Re S v S* [2008] COPLR Con Vol 1074, regarding the weight to be attached to the views of the person who lacks capacity (which the MCA 2005 refers to as ‘P’) said at paragraph 59:

‘Where P can and does express a wish or a view which is not irrational (in the sense of being a wish which a person with full capacity might reasonably have), is not impractical in so far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P’s resources (i.e. whether a reasonable person with full capacity who has such resources might reasonably consider it worth using the necessary resources to implement his wish) then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this.’

She pointed out at paragraph 55:

‘What, after all, is the point of taking great trouble to ascertain or deduce P’s views, and to encourage P to be involved in the decision-making process, unless the objective is to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself.’

The aim of the best interests’ approach was noted by Lady Hale in the Supreme Court case of *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67,

‘The purpose of the best interests’ test is to consider matters from the patient’s point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient’s wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament’.

***Changing views***

It may very well be the case, that the donor’s views have changed, in which case, the adviser may want to know how those views were obtained and the circumstances which may have influenced the change, as there may be a risk to accepting them at face value. On this point, in relation to an elderly lady’s current views about the proposed beneficiaries of her statutory will, Mr Justice Charles in the matter of *JKS and ADS v DSM* [2017] EWCOP 8 at paragraph 15 said,

‘…… an approach to the respective weight to be given to expressions of P's testamentary wishes that failed to take account of P's capacity when they were made and so, amongst other things:

i) P's ability at the relevant times to take account of relevant past and present circumstances,

ii) the factual accuracy of reasons expressed by P at the relevant times,

iii) any influences to which P may be subject at the relevant times, and

iv) the way in which P's wishes and feelings had been obtained

would not comply with the approach dictated by the MCA.’

Mr Justice Charles provided guidance at paragraph 81, which can be applied to any professional involved in obtaining the donor’s views, with the effect that so far as is practicable:

1. the donor should be seen in circumstances that would reduce family influences;
2. the history obtained should be balanced, applied with care and in a way that recognises the difference between fact and assertion; and
3. the explanations, questions and prompts given to the donor are appropriately framed, so it can be established as to why the donor is expressing the views that he has and what he remembers about relevant parts of his family history.

***Compliance with the UN Convention on the Rights of Persons with Disabilities***

If the matter were to come to the Court of Protection for a best interests’ order, the Court would take into account the United Nations’ Convention on the Rights of Persons with Disabilities (‘CRPD’), which came into force on 3 May 2008 and was ratified by the UK on 8 June 2009. Although it does not form part of domestic law, it is increasingly having judicial interpretative influence. Article 12 of the CRPD sets out the right of persons with disabilities to enjoy legal capacity on an equal basis with others and the need to give sufficient recognition to the person’s wishes and feelings. The Court increasingly makes the point that if the person’s wishes and feelings can be achieved, this must be respected, as to do otherwise would interfere with his rights under the CRPD, and Article 8 of the European Convention on Human Rights, which provides a right to respect for one's ‘private and family life, his home and correspondence’.

***Going against the donor’s wishes because it’s the right decision***

The adviser will need to consider whether there has been a change of views and whether the attorney has given sufficient weight to the donor’s views in the current circumstances. This does not mean that the attorney has to do what the donor wants, as the attorney must consider ‘all the relevant circumstances’. These are the circumstances which the attorney is aware, and which it would be reasonable to regard as relevant (s4(11)). Taking into account the donor’s views is just one factor which the attorney must consider. If the current circumstances are such that to do what the donor wants would result in a decision which would not be in the donor’s best interests, the attorney cannot and should not follow the donor’s wish.

***Going against the donor’s wishes which is not in the donor’s best interests***

The donor has chosen his attorney to make decisions on his behalf, and it can usually be assumed that the attorney will be acting in good faith in making a best interest decision. However, if the adviser is concerned that the attorney is going to make a decision which is manifestly not in the donor’s best interests, the adviser can contact the Office of the Public Guardian who can investigate the matter. If the Public Guardian forms the view that the attorney has acted, is acting or proposes to act in a way that either exceeds his authority or is not in the donor’s best interests, an application can be made to the Court of Protection for the removal of the attorney under s22(3) and (4) of the MCA 2005, which provides:

‘(1) This section and section 23 apply if —

(a) ……

(b) an instrument has been registered as a lasting power of attorney conferred by P.

(2)……

(3) Subsection (4) applies if the court is satisfied—

(a) …..

(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) ……

(b) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.’

***Raising a concern v confidentiality***

Arguably raising a concern breaches the adviser’s duty of confidentiality which is owed to the donor. Guidance on access to and disclosure of an incapacitated person’s will, drafted in conjunction with and approved by the Court of Protection, OPG, Legal Ombudsman, The Law Society and STEP provides some useful reassurance for the adviser. Under the heading ‘*concerns about an attorney or deputy’* it states:

‘The nature of a concern raised to the Office of the Public Guardian will require disclosure of confidential information and is likely to be justified from a professional conduct perspective.’[[1]](#footnote-1)

The OPG rely on whistle-blowers to raise concerns for which they investigate. It would deter concerns being raised and so undermine the Public Guardian’s functions if the whistle-blower was identified to the attorney.

The adviser’s duty is owed to the donor, and not the attorney, so it is hard to see the donor complaining that his confidentiality has been breached to safeguard him. To avoid this risk, advisers may obtain their clients’ advance consent for the disclosure of limited confidential information, to allow necessary and appropriate steps to be taken to safeguard the donor and/or his property. The information disclosed would only be provided to people working in a professional capacity, for example those working in social, health, environmental health, housing, police, financial institutions, the Office of the Public Guardian and the Court of Protection. A template for advance consent is at the bottom of this article.

***Limits on the Court of Protection powers***

The Court may remove an attorney who has made a decision which it considers is not in the donor’s best interests. But it may not be possible to force the attorney’s hand and change the decision as happened in the case of *Martins v Kirk* [2016] EWCOP 45. In 2013, Manuel Martins, an elderly man of Madeiran origin made an LPA, where he appointed his sister, Teresa Kirk and a friend to act as his attorneys.

In 2014, Mr Martins was moved by Mrs Kirk from his longstanding home of over 50 years in Devon to live with her in another part of England. In September 2014, Devon County Council commenced proceedings in the Court of Protection as to whether it was in his best interests to live with Mrs Kirk or live in a care home in Devon and for revocation of the LPA. During the early stage of the proceedings, Mrs Kirk without any notice to the professionals in the case took him to Portugal, where he took up residence in a care home. Mrs Kirk subsequently returned to her home in England without him. The LPA was revoked and over the next 18 months’ various orders were made, all designed to ensure Mr Martins was returned to Devon by Mrs Kirk. She did not do so, and eventually she was subject to contempt proceedings, where in due course the Judge ordered she be imprisoned for 6 months. The Court of Appeal ([2016] EWCA Civ 122) subsequently ruled that Mrs Kirk should not have been imprisoned for contempt of court.

Lord Justice McFarlane expressed concern at what had happened and said at paragraph 27,

*‘I am bound to record that I find the circumstances of this case to be of significant concern. The Court of Protection has sentenced a 71-year-old lady to prison in circumstances where the lady concerned is said to be of previous good character and where, as the Judge acknowledged, she has been acting on the basis of deeply held, sincere beliefs as to the best interests of MM for whose welfare she is, as the Judge found, genuinely concerned. The ultimate purpose of her incarceration is to achieve the removal of an 81-year-old gentleman, who has suffered from dementia for a number of years, from a care home in one country to a care home in Devon which is near his longstanding home and within a community where he is well known. Those stark facts, to my mind, plainly raise the question of whether the COP was justified, on the basis that it was in MM's best* *interests to do so, in making an order which placed Mrs Kirk in jeopardy of a prison sentence unless she complied with it..’*

***Court proceedings with a conflict of interest***

There may be occasions where the attorney gives instructions, where there is an obvious conflict of interest, for example the making of a statutory will or large gift for which the attorney or a close family member is proposed to be a beneficiary.

In this situation, the adviser may act for the attorney, but it will be in his personal capacity, rather than as an attorney. The Court of Protection will usually appoint the Official Solicitor or another independent person to act as litigation friend to represent the interests of the donor, which avoids professional conflict of interest.

Another situation in which conflict arises is identified in the Law Society Practice Note on Meeting the Needs of Vulnerable Clients (2 July 2015) at paragraph 5.3 - where the attorney seeks advice and representation regarding an investigation by the Public Guardian. In which case, the adviser will be deemed to be acting for the attorney rather than the donor.

***The risk for the adviser as a co-attorney***

The costs of making a property and affairs application are usually met out of the donor’s estate (Court of Protection Rules 2017, rule 19.2). However, this is always subject to the discretion of the judge who may depart from the general rule, taking into account amongst other things, the conduct of the parties. This is likely to happen, where the Public Guardian is seeking to remove the attorney or where an application is made without merit.

Professional advisers may be appointed as attorney to act with a lay attorney on a joint and several basis. The professional attorney is rightly expected to have knowledge of the law, have oversight of her co attorney’s decisions and advise correctly.

In the case of MM, 13th September 2016 (unreported), District Judge Batten was heavily critical of a professional attorney who had not supervised her co - attorney, which enabled gifts of £324,000 to be made to the co- attorney’s wife and interfered with the donor’s testamentary plans. The attorney had failed in her role as professional attorney to provide sufficient oversight of her co- attorney and ensure that he was acting in the best interests of the donor. She had also failed to advise that the funds should be repaid and instead advised they should be ring fenced, and sought the Court’s retrospective authority for the gifts.

The gift exceeded the reasonable amount that could be given relying on s12 MCA 2005; there was evidence the donor would have been opposed to the gift; and it potentially left the donor with insufficient funds for the remainder of her life. Payment of the firm’s bill of over £20,000 for the retrospective application was made from the donor’s estate, without the professional attorney appreciating that the Court had not made any order as to costs. The professional attorney had demonstrated a lack of knowledge of the law. The Court removed both attorneys and revoke the power and ordered the lay attorney pay all the costs, except for £4,000 towards the costs of the Official Solicitor, which was paid from the donor’s estate.

*Conclusion*

Taking on the role of an attorney is a huge responsibility. Whether the attorney is going to act immediately or whether it is to be for a future time, to comply with the requirement to act in the donor client’s best interest, it is essential the attorney is aware of his responsibilities and how to go about the process of making best interest decisions. By providing relevant information and guidance to the attorney, early in the process, the greater the chance he will make legally compliant decisions. However, over time circumstances change as do views, so the adviser must consider this before taking steps which he considers are necessary to safeguard the donor.

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| **A close up of a sign  Description generated with very high confidence**  **ADVANCE CONSENT**  **TO SAFEGUARD YOU AND/OR YOUR PROPERTY**  There might be a time in the future, when you are less able to protect yourself and/or your property because for example, you lack mental capacity or are vulnerable to abuse of trust, coercion, duress, manipulation, or undue influence from another person, or you may be unintentionally neglecting yourself.  Solicitors must not disclose confidential information without their client’s consent. Confidential information includes records of meetings, advice provided and details of legal transactions.  Our legal practice is encouraging clients to consider whether to give consent to the disclosure of limited confidential information, which would allow your solicitor to take such steps as he or she considers is necessary and appropriate to safeguard you and/or your property.  The information disclosed would only be provided to people working in a professional capacity, for example those working in social, health, environmental health, housing, police, financial institutions, the Office of the Public Guardian and the Court of Protection. |

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| A close up of a sign  Description generated with very high confidence  **ADVANCE CONSENT**  **TO DISCLOSE CONFIDENTIAL INFORMATION**  I[*insert client’s full name and address]* **give my consent** to:  *[insert legal practice’s name and address]* (the legal practice) which includes any successive or amalgamated practice which has resulted in a change of its name or address:   1. To disclose any confidential information held or known in respect of me, to personnel working in social, health, environmental health, housing, financial institutions, the Office of the Public Guardian and the Court of Protection or other organisation which has a safeguarding role, for the purpose of protecting my interests, if it is reasonably believed that I am not in a position to safeguard myself and/or my property and harm may occur unless action is taken. 2. I understand that any confidential information disclosed will be limited to what is considered by the legal practice at the time to be necessary and appropriate.   Signed …………………………………………………………………………………………  Dated…………………………………………………………………………………………..  Permission to use and reproduce freely is given by Action on Elder Abuse and Caroline Bielanska |

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| *ABSTRACT*   * This article discusses what an adviser can do in the event an attorney acting under a Lasting Power of Attorney is proposing to make a decision which goes against the known wishes of the donor. * A Lasting Power is a vehicle of agency and as such the attorney must adhere to their fiduciary duties, in addition to their responsibilities under the Mental Capacity Act 2005. * Attorneys need guidance as to their duties, and in particular the weight to be attached to the donor’s views, recognising these may change and ensuring the views are obtained free from influence. * The attorney does not have to follow the donor’s wishes if it would not be in the donor’s best interests. * The adviser may be justified in breaching his duty of confidentiality to raise a concern with the Office of the Public Guardian, where the attorney is believed not to be acting in the donor’s best interests. * The adviser may act for the attorney in his personal capacity in a Court application which relates to the donor. * Professional attorneys should supervise and advise a co-attorney who is not acting in the donor’s best interests. |

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1. <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Access-to-and-disclosure-of-an-incapacitated-persons-will.page> [↑](#footnote-ref-1)