Lasting Powers of Attorney

This section contains summaries of orders made by the Court of Protection under the Mental Capacity Act in LPA cases.

Severance of restrictions incompatible with an LPA

Re Parsonage (an order of the Senior Judge made on 1 April 2011)

The donor of an LPA inserted the following restriction: "My replacement attorneys under this lasting power shall not have authority to do any act, or take any decision, under this lasting power except in those circumstances where I lack capacity or where the replacement attorneys reasonably believe that I lack capacity or when I have signed that I wish the lasting power to come into effect by signing the lasting power again." On the application of the Public Guardian the words "or when I have signed that I wish the lasting power to come into effect by signing the lasting power again" were severed on the ground that re-execution of the LPA by the donor after completion and registration would contravene the execution requirements for an LPA.

Re Batchelor (an order of the Senior Judge made on 2 April 2012)

The donor of a property and financial affairs LPA included the following provision: "I would ask my attorneys to have regard to any separate guidance note which I may make from time to time and place with this Lasting Power of Attorney." On the application of the Public Guardian the provision was severed on the ground that it contravened the requirements of regulation 9 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, which do not permit additions to be made to an LPA.

Re Darlison (an order of the Senior Judge made on 9 July 2012)

The donor made an LPA for property and financial affairs. In the guidance section she stated: "Oversee X's financial welfare. X is [my] daughter." On the application of the Public Guardian the guidance was severed on the ground that the donor of an LPA cannot authorise the attorneys to act in relation to the financial affairs of another person.

Re Norris (an order of the Senior Judge made on 25 July 2012)

The donor made LPAs for property and financial affairs and for health and welfare and included the following guidance in both LPAs: "At all times to make decisions in the best interests of [my wife] during her lifetime." On the application of the Public Guardian the provision was severed as being potentially inconsistent with the requirement in section 1(5) of the MCA that any act done or decision made must be done or made in the donor's best interests.

Re Hart (an order of the Senior Judge made on 6 February 2013)

The donor made an LPA for property and financial affairs. He was also the sole attorney under an EPA made by his wife and registered. In his LPA he authorised his attorneys to have access to his will and medical records, and then continued as follows: "This also applies to acting as Attorneys for my wife, whose EPA has been registered." On the application of the Public Guardian this provision was severed because an LPA may not be used to add anything to someone else's EPA. (The donor appears to have wrongly assumed that his own attorneys could take over his role as attorney for his wife.)

Severance of restrictions incompatible with a Health and Welfare LPA

Re Spaas (an order of the Senior Judge made on 2 April 2013)

The donor of a Health and Welfare LPA included the following provision: "If I become completely mentally or physically incapable for example being unable to recognise my daughter then I wish steps to be taken to end my life as quickly and painlessly as possible. It that was not possible, I would wish the minimum medical intervention possible. I would not want my life unnecessarily prolonged." On the application of the Public Guardian the words from "steps to be taken" to "I would wish" were severed. The donor may have been envisaging assisted suicide, which is unlawful (see Re Gardner, above) or even expressing a wish for her life to be terminated by others in circumstances which would involve a criminal offence.

Re Baxter (an order of the Senior Judge made on 10 April 2013)

The donor of a Health and Welfare LPA included the following provision: "My attorneys shall have no power to act until they have reason to believe that I have become or that I am becoming mentally incapable of managing my own affairs or that I have become physically handicapped to such a degree that I cannot look after my affairs without significant inconvenience discomfort or difficulty." On the application of the Public Guardian the words "or that I am becoming" and "or that I have become" to "difficulty" were severed. Section 11(7)(a) of the MCA provides that decisions concerning the donor's health and welfare may not be made under an LPA "in circumstances other than those where [the donor] lacks, or the donee reasonably believes that [the donor] lacks, capacity." As previously held in Re Azancot (above), the donor may not provide for decisions to be made by the attorney when the donor lacks physical capacity but not mental capacity. The words "or that I am becoming" were also inconsistent with section 11(7)(a) because the donor must lack capacity (or be reasonably believed to lack capacity). It is not sufficient that the donor may be "becoming" mentally incapable. The wording of section 11(7)(a) may be contrasted with paragraph 4(1) of Schedule 4 of the MCA, which imposes a duty to apply for registration on an attorney under an EPA when the donor "is or is becoming" mentally incapable.

Re Azancot (an order of the Senior Judge made on 27 May 2009)

The donor of a personal welfare LPA inserted a restriction that her replacement attorneys "may only act under this power in the event that the donor is physically or mentally incapacitated and there is written medical evidence to that effect". The words "physically or" were severed on the application of the Public Guardian, as the effect of section 11(7) of the MCA is that a personal welfare attorney may not make a decision unless the donor lacks mental capacity to make it.

Re Gardner (an order of the Senior Judge made on 6 July 2011)

The donor included the following statement in the guidance section of the instrument: "If I am suffering from a terminal illness I would ask that my attorneys assist me in travelling to a country where it is legal for me to take my own life should I choose to do so." On the application of the Public Guardian the court severed the guidance for the following reasons: (i) section 62 of the MCA 2005 provides that nothing in the Act is to be taken to affect the law relating to murder or manslaughter or the operation of section 2 of the Suicide Act 1961 (assisting suicide); (ii) the donor was purporting to authorise the attorneys to commit the criminal offence of assisting suicide, and the fact that a person who assists a suicide is not always prosecuted in England and Wales does not detract from the fact that it remains a criminal offence; (iii) although the statement appeared in the guidance section, it is not open to a donor to provide guidance to the attorneys relating to the commission of a criminal offence.

Re Stewart (an order of the Senior Judge made on 9 November 2011)

The donor included the following direction in the guidance section: "I authorise my attorneys to refuse or consent to my deprivation of liberty." The Public Guardian applied for severance on the ground that: "The deprivation of the donor's liberty is only lawful if ordered by the court or done in accordance with the procedures prescribed by law under the Mental Capacity Act 2005 as amended by the Mental Health Act 2007. The donor does not have power to authorise her attorneys to consent to the deprivation of her liberty in the absence of a court order or going through the Deprivation of Liberty Safeguarding procedures." The court determined that the direction was invalid for the reasons given by the Public Guardian.

Re McGregor (an order of the Senior Judge made on 16 November 2011)

The donor appointed attorneys to act jointly in some matters and jointly and severally in others, and directed as follows: "Jointly - decisions on sale of house. Decisions on type of care received if no longer able to stay in own home. Severally - financial matters regarding bank accounts and general cash flow." On the application of the Public Guardian the words "decisions on sale of house" and "Severally - financial matters regarding bank accounts and general cash flow" were severed because they purported to give Health and Welfare attorneys authority to make decisions regarding the donor's property and financial affairs. (The result would be that, by implication, the attorneys would be able to decide jointly and severally all matters other than the type of care the donor would receive if no longer able to stay in his own home.)

Re Kerron (an order of the Senior Judge made on 4 July 2012)

The donor made an LPA for health and welfare, and imposed the following restriction: "If assessed as requiring nursing/residential care I would like to move promptly to a home jointly chosen by myself and my attorneys." On the application of the Public Guardian the words "jointly" and "myself and" were severed on the ground that a health and welfare LPA can only be used when the donor lacks capacity, and if the donor lacked capacity she would not be able to choose a nursing or residential care home.

Re Sheppard (an order of the Senior Judge made on 25 July 2012)

The donor of a health and welfare LPA included the following guidance: "My attorneys are to maintain the health and welfare needs of X." On the application of the Public Guardian the provision was severed as it is not open to a donor to require attorneys to make health and welfare decisions on behalf of a third party.

Severance of restrictions relating to life-sustaining treatment

Re Hodgkiss (an order of the Senior Judge made on 25 August 2011)

The donor of a Health and Welfare LPA selected Option B, which states that the attorneys have no authority to give or refuse life-sustaining treatment. He then directed as follows: "Attorneys must consent to any life sustaining treatment if I am in a persistent vegetative state." On the application of the Public Guardian this provision was severed as being incompatible with his selection of Option B. The court added that, if the donor had wished to give his attorneys authority to consent to life-sustaining treatment if he were in a persistent vegetative state, he should have selected Option A.

Severance of restrictions incompatible with a Property and Financial Affairs LPA

Re Cranston (an order of the Senior Judge made on 18 February 2011)

The donor appointed attorneys to act jointly in some matters and jointly and severally in others. He included in the list of matters which should be decided jointly "changing my will". On the application of the Public Guardian these words were severed on the ground that an attorney has no authority to change a donor's will. An attorney may apply to the court for an order authorising the execution of a statutory will if a donor lacks testamentary capacity.

Re Wheeler (an order of the Senior Judge made on 25 July 2011)

The Public Guardian applied for the severance of an invalid clause in the LPA. The Senior Judge considered that another clause was also invalid, which was severed on the court's own initiative. The donor had provided the following guidance: "My attorneys may act on the contents of my will." The court's reason for severing the guidance was as follows: "The court considers that the meaning of this guidance is unclear and that it is probably void for uncertainty. Potentially it authorises the attorneys to distribute the donor's estate during his lifetime as if he were dead, which would be not only contrary to public policy but also contrary to the provisions of section 12 of the Mental Capacity Act 2005. A will speaks from death, and it is not a function of an attorney to act as the executor of the donor's will."

Severance of restrictions incompatible with a joint and several appointment

Re Jenkins (an order of the Senior Judge made on 2 September 2008)

The donor had appointed the attorneys of a property and affairs LPA to act “together and independently”. She then directed that they must act together in relation to any bills, payments or costs exceeding £2,000 in any one calendar month and in relation to any single payment greater than £1,000 in any calendar month. The donor had also appointed a replacement attorney, and directed that she should act if the original attorneys were “not available through travel or living abroad or any other circumstances that may prevent or restrict their capacity to act on my behalf as attorneys”.

The court ordered the severance of both clauses, on the application of the Public Guardian. The directions in the first clause were incompatible with an appointment to act “together and independently”. The directions in the second clause were invalid because a replacement attorney may only act on the occurrence of an event mentioned in section 13(6)(a) to (d) of the MCA, for example where an original attorney disclaims, dies or loses mental capacity.

Re P (an order of the Senior Judge made on 9 June 2009)

The donor appointed three attorneys to act jointly and severally, and imposed the following restriction: "I require that two attorneys must act at any one time so that no attorney may act alone." On the application of the Public Guardian the court severed the restriction on the ground that it was ineffective as part of an LPA.

Re Bratt (an order made by the Senior Judge on 14 September 2009)

The donor appointed two attorneys, A and B, to act jointly and severally, and directed that "B is only to act as attorney in the event of A being physically or mentally incapable of acting in this capacity". On the application of the Public Guardian this provision was severed as being inconsistent with a joint and several appointment. The Senior Judge added that, to have achieved the desired objective, the donor should instead have appointed B to be a replacement attorney.

Re D'Argenio (an order of the Senior Judge made on 9 June 2010)

The donor made a property and financial affairs LPA and a health and welfare LPA. In both she appointed six attorneys to act

jointly and severally. In the property and affairs LPA she imposed the following restriction: "My atorneys must act jointly in relation to decisions about selling my house. They may act jointly and severally in everything else." In the health and welfare LPA she imposed the following restriction: "My attorneys must act jointly in relation to decisions I have authorised them to make about life-sustaining treatment and where I live. They may act jointly and severally for everything else." On the application of the Public Guardian the court severed both restrictions as being incompatible with a joint and several appointment.

Re P Crook (an order of the Senior Judge made on 2 July 2010)
The donor appointed one primary attorney and three replacement attorneys, the latter to act jointly and severally. He then imposed the following restriction: "Provided I have more than two attorneys capable of acting under this power then any decision as to the exercise of any power or discretion reached by the majority of such attorneys (acting in their capacity as attorneys) shall bind all my attorneys to the extent that no attorney of mine can take issue with the decision reached by that majority." On the application of the Public Guardian the court severed the restriction as being incompatible with a joint and several appointment.

Re Davies (an order of the Senior Judge made on 5 July 2010)
The donor appointed two attorneys, A and B, to act jointly and severally. He then imposed the following restriction: "If in the unlikely event of A and B not being wholly in agreement, B is to defer to the wishes of A." On the application of the Public Guardian the court severed the restriction as being incompatible with a joint and several appointment.

Re Cotterell (an order made by the Senior Judge on 3 August 2010)
The donor appointed two attorneys to act jointly and severally, and imposed the following restriction: "My second named attorney may only act as my attorney if a general medical practitioner certifies that I am mentally incapable of managing my affairs and in this instance, if my first attorney is alive and mentally capable, may only act on my behalf in relation to a sale of the property which at that time is deemed to be my principal place of residence. If however my said first named attorney has passed away or is deemed by a general medical practitioner as incapable then my second named attorney may act generally on my behalf subject to no restrictions." On the application of the Public Guardian the restriction was severed as being incompatible with a joint and several appointment.

Re Lan (an order of the Senior Judge made on 10 August 2010)
The donor appointed two attorneys to act jointly and severally. She then imposed the following restriction: "Any major decisions should be discussed between my attorneys so that a joint agreement to the matter can be achieved." On the application of the Public Guardian this restriction was severed as being incompatible with a joint and several appointment.

Re Ferguson (an order of the Senior Judge made on 26 October 2010)
The donor appointed three attorneys, A, B and C, to act jointly and severally. She then imposed the following restrictions: "I wish my attorneys to act as follows: A to act independently. B and C to act only in the event that A is deceased or unable to act. In these circumstances B and C may act independently." "I wish my attorneys to act only when I lack capacity to act. A may judge for himself when I lack capacity to act. B and C must agree together that I lack capacity to act. Alternatively, should either of them wish, then at my expense they may seek medical and, if necessary, legal advice as to whether or not I have capacity to act." On the application of the Public Guardian both restrictions were severed as being incompatible with a joint and several appointment.

Re Hartup (an order of the Senior Judge made on 28 October 2010)
The donor appointed two attorneys, A and B, to act jointly and severally, and two replacement attorneys. He then imposed the following restriction: "My wife A is to take the lead in all decisions." On the application of the Public Guardian the restriction was severed as being incompatible with a joint and several appointment. (See further under the heading "Severance of invalid restrictions as to how a replacement attorney may act".)

Re Wormsley (an order of the Senior Judge made on 24 October 2011)
The donor appointed two primary attorneys and two replacement attorneys, and directed them to act jointly and severally. He further directed as follows: "If a replacement attorney is required to replace an original attorney, the two replacement attorneys shall decide which one of them shall serve as attorney." On the application of the Public Guardian the court severed the provision as being inconsistent with the joint and several appointment of the replacement attorneys.

Re Wormsley, above, may be contrasted with Re Griggs (an order of the Senior Judge made on 17 June 2013)
In Re Griggs the donor appointed two primary attorneys and three replacements, to act jointly for some decisions and jointly and severally for other decisions. The donor directed that "My Remaining attorney is to choose which replacement attorney is to act as my other attorney." Although the provision could be viewed as incompatible with the manner of appointment, the court severed the provision for the reason given in the Public Guardian's application, which was that the donor should not leave it to the attorneys or replacement attorneys to decide which replacement is to act.]

Re Williams (an order of the Senior Judge made on 16 November 2011)
The donor appointed three attorneys, A (the eldest), B and C, to act jointly and severally. He then directed as follows: "If my attorneys shall disagree on any matter then the eldest attorney's decision shall be final. Priority of attorneys is therefore as follows: 1. A; 2. B; 3. C." On the application of the Public Guardian the direction was severed as being incompatible with a joint and several appointment.

Re Dowden (an order of the Senior Judge made on 20 July 2012)

The donor made two LPAs in which she appointed a professional attorney and a lay attorney to act jointly and severally. She directed that the professional attorney should be paid fees "in keeping with the charging rate in force at the time the work is undertaken". She then directed that the lay attorney should be paid a reasonable hourly fee and stated that any sum paid "must be with the approval of my Solicitor/Attorney" and "will be at such rate as he feels is appropriate". On the application of the Public Guardian the provision relating to the lay attorney's fees being approved and set by the professional attorney was severed as being incompatible with a joint and several appointment. The judge added that, to have achieved the desired objective, the donor should have appointed the attorneys to act jointly for some decisions (in this case on agreeing an appropriate level of remuneration for the lay attorney) and jointly and severally for other decisions.

Re Davies (an order of the Senior Judge made on 4 December 2012)

The donor appointed four attorneys, A, B, C and D, to act jointly and severally, and imposed the following restriction: "The appointment of C and D shall not take effect unless I am mentally and/or physically incapable of managing my affairs and the appointment of C shall not take effect unless she has been in my employment within the period of one month preceding my loss of capacity to manage my affairs." This restriction was severed on the ground that the appointments of co-attorneys cannot be activated at different times.

Re Black (an order of the Senior Judge made on 11 January 2013)

The donor, a solicitor, appointed A and B as attorneys, to act jointly and severally. She imposed the following restriction: "A has been appointed solely to manage ABC Solicitors to enable continuing management of the Practice. B has been appointed to deal with all other financial matters both personal and business related, which do not specifically require a Solicitor of the Supreme Court." On the application of the Public Guardian the restriction was severed because it was incompatible with a joint and several appointment.

Re Bishop (an order of the Senior Judge made on 28 February 2013)

The donor appointed attorneys to act jointly and severally and included the following provision: "I direct that my attorneys shall endeavour to act jointly on decisions wherever possible. They must only act severally when all practicable steps to act jointly have been made without success. If an attorney must act severally then that attorney must consult the other before making the decision and keep the other informed of any decision made." On the application of the Public Guardian the provision was severed as being incompatible with a joint and several appointment. Although in the guidance section, it was expressed in mandatory terms and was in substance a restriction.

Severance of restrictions incompatible with a joint appointment

Re Clarke (an order of the Senior Judge made on 18 November 2009)

The donor appointed three attorneys, A (his wife), B, and C, to be his attorneys. They were appointed to act jointly in some matters and jointly and severally in others. He then stated that the attorneys were to act independently for transactions not exceeding £5,000 "but together in respect of all other decisions subject to my wife A's opinion prevailing in the event that my attorneys are not unanimous in any decision involving property or expenditure exceeding £5,000". On the application of the Public Guardian, the words "subject to my wife A's opinion" onwards were severed on the ground that they purported to facilitate one of the three attorneys being able to act independently in relation to matters that had been specified as subject to the joint decision of the attorneys.

Re Warner (an order of the Senior Judge made on 31 August 2010)

The donor made an LPA appointing A as the original attorney and B and C as replacement attorneys, the latter to act jointly. She imposed the following restriction in relation to the replacement attorneys: "If for any reason one of my replacement attorneys is unable or unwilling to act, the remaining replacement attorney is then permitted to act solely under my LPA". On the application of the Public Guardian the restriction was severed as being incompatible with the joint appointment of the replacement attorneys.

Re Moore (an order of the Senior Judge made on 26 October 2010)

The donor appointed three attorneys to act jointly. She then imposed the following restriction: "At least two attorneys to act on any transactions". On the application of the Public Guardian the court severed the restriction as being incompatible with a joint appointment.

Re Pugh (an order of the Senior Judge made on 13 July 2011)

The donor appointed three replacement attorneys to act jointly. She then completed the box on page 5 of the form (which should be completed only if the attorneys are to act jointly in some matters and jointly and severally in others) and directed as follows: "Where by this power I have appointed three replacement attorneys to act jointly on all occasions then I direct that if there is a dispute it is the majority decision of my three replacement attorneys that is to be followed and in the event that by reason of death or incapacity or other reason I only have two of my three replacement attorneys who are capable of acting then in the event of a dispute between my two continuing replacement attorneys it is the decision of the eldest that is to be followed." On the application of the Public Guardian the court severed the restriction as being incompatible with a joint appointment.

Severance of restrictions incompatible with an appointment to act jointly in some matters and jointly and severally in others

Re Weyell (an order of the senior Judge made on 2 December 2010)

The donor appointed three attorneys, A, B and C, to act jointly for some decisions and jointly and severally for others. He then imposed the following restrictions:

(1)"Two out of three of my attorneys must act jointly in relation to any transaction with a value in excess of £5,000 and my attorneys may act jointly and severally in relation to everything else."
(2)"I direct that when acting jointly and severally where possible my attorneys are to act in the following order of priority: firstly A, then B and then C."

On the application of the Public Guardian the first restriction was severed as being incompatible with the joint aspect of the appointment. In the application the Public Guardian submitted that, while a direction that attorneys appointed to act jointly and severally must act in an order of priority would normally be regarded as incompatible with a joint and several appointment, the addition of the words "where possible" made the direction in effect a statement of wishes only. The court accepted this submission and did not sever the second restriction.

Re Warren (an order of the Senior Judge made on 10 December 2010)

The donor appointed four attorneys, A, B , C and D, to act jointly for some decisions and jointly and severally for others. She imposed the following restriction: "All decisions will be made by my first attorney A unless and until such time that he no longer has the mental capacity to do so. Should A no longer have the mental capacity to make decisions the remaining attorneys will jointly make decisions regarding the house and property and jointly and severally make decisions concerning finance." On the application of the Public Guardian the words preceding "attorneys will jointly" were severed on the ground that, where attorneys were appointed to act jointly in some matters and jointly and severally in others, it was not open to the donor to provide that one attorney should act alone for so long as he was able to do so. The Senior Judge added that, to have achieved the desired objective, the donor should have appointed A as the sole attorney and the three others as replacement attorneys.

Re Parker (an order of the Senior Judge made on 18 February 2011)

The donor of a Health and Welfare LPA appointed X and Y as attorneys to act jointly in some matters and jointly and severally in others. He then directed as follows: "I wish the prime responsibility for decisions in respect of my health to vest in X. My attorneys need only act jointly in the event of serious and/or life threatening conditions. In this case X should endeavour to contact Y but if she is, for whatever reason, unable to do so she may act on her own (severally) despite the serious and/or life threatening condition." On the application of the Public Guardian the last sentence of this direction was severed as being incompatible with the appointment to act jointly in some matters.

Re Freeman (an order of the Senior Judge made on 17 August 2011)

The donor appointed A and B as attorneys to act jointly in some matters and jointly and severally in others. He specified that they were to act as follows: "Major capital expenses jointly. Day to day expenses A." In his application the Public Guardian submitted that the donor had not specified any decisions to be made jointly and severally and so the words "Day to day expenses A" should be severed, with the effect that decisions not specified to be taken jointly should by implication be taken jointly and severally. The court was also asked to sever the word "Major" on the ground of uncertainty. The court accordingly severed these words so that the attorneys were appointed to act jointly for "capital expenses" and (by implication) jointly and severally for everything else.

Re Ingham (an order of the Senior Judge made on 15 August 2011)

The donor appointed four attorneys to act jointly for some decisions and jointly and severally for others. She then directed as follows: "A. While all attorneys are acting: 1. All may complete any transaction with a value not exceeding £2,500. 2. All must complete any transaction with a value exceeding £2,500. B. In the event that only two or three Attorneys remain capable of acting those Attorneys are bound by A1 and 2 above. C. In the event that only one Attorney remains capable of acting that Attorney has full powers to complete transactions of any value." On the application of the Public Guardian directions B and C were severed on the ground that they were incompatible with the joint aspect of the appointment: if one attorney ceased to act, the matters to be decided jointly would not be able to be decided by the continuing attorneys.

Re Llewelyn (an order of the Senior Judge made on 2 May 2012)

The donor appointed attorneys including her husband to act jointly in some matters and jointly and severally in other matters. She stated that decisions were to be made jointly and severally apart from a list of specified decisions which were to be made jointly, but added a proviso to the effect that, provided her husband was able to act as one of her attorneys, all decisions could be made jointly and severally. On the application of the Public Guardian the proviso was severed as being incompatible with an appointment to act jointly in some matters and jointly and severally in others.

Re Edmonds (an order of the Senior Judge made on 12 November 2012)

The donor appointed a sole attorney and then two replacements, the latter to act jointly for some decisions and jointly and severally for others. She then directed as follows: "I would like my replacement attorneys to act jointly as much as possible and always where any transaction is valued at more than £5,000." On the application of the Public Guardian the words "as much as

possible and always" were severed on the ground that they were uncertain and incompatible with the appointment type.

Severance of restrictions fettering an attorney's authority

Re Begum (an order of the Senior Judge made on 24 April 2008)

On the application of the Public Guardian, the court directed the severance from a Property and Affairs LPA instrument of the following clauses, on the ground that they were ineffective as part of an LPA:

All decisions about the use or disposal of my property and financial resources must be driven by what my Personal Welfare Lasting Power of Attorney(s) believe will support my long term interests.

Any decisions affecting assets (individually or together) worth more than £5,000 at any one time must be discussed and agreed with Dr X.

In the event of there being any disagreement between my Personal Welfare Lasting Power of Attorney(s) and/or Dr X this should be resolved by these parties appointing an independent advocate to adjudicate.

Re Steiner (an order of the Senior Judge made on 17 October 2011)

The donor appointed two attorneys to act jointly. She then gave the following guidance: "Should the need arise relating to the management of my financial affairs and my business interests, whoever at the time is acting for me personally as my accountant or solicitor shall adjudicate over my personal financial interests and whoever is acting professionally for me in respect of my business interests either my accountant or solicitor shall adjudicate over my business interests." On the application of the Public Guardian the court severed the provision from the LPA on the ground that it could potentially oust the jurisdiction of the court.

Re Reading (an order of the Senior Judge made on 25 June 2009)

The donor appointed her husband and two of her children as original attorneys and a third child as replacement attorney. She added a restriction to the effect that, if her husband should predecease her, any decisions "must be agreed by all four of my children". The fourth child had not been appointed as attorney or replacement attorney. On the application of the Public Guardian the restriction was severed as being ineffective as part of an LPA, because it was not open to the donor to require that a person who was not an attorney should join in the making of decisions by the attorneys.

Re Scott (an order of the Senior Judge made on 11 January 2011)

The donor made an LPA for property and financial affairs, appointing A and B to act jointly and severally. She then imposed the following restriction: "In the event of there being any disagreement between A and B (as the attorneys for property and financial affairs) and C (as the attorney for health and welfare) over expenditure on my health or welfare then C's decision is to prevail." The Public Guardian applied for this restriction to be severed on the basis that Re Reading (above) showed that a donor could not require that a person who was not an attorney under the instrument should join in the making of decisions by the attorneys. The court dismissed the Public Guardian's application, considering that there was no reason in law why the donor of two seperate LPAs should not be able to provide that, in the event of a disagreement between the attorneys for property and financial affairs and the attorney for health and welfare, the decision of the attorney for health and welfare should prevail.

Re Scragg (an order of the Senior Judge made on 1 February 2011)

The donor of a property and affairs LPA (who lived abroad) gave detailed instructions to his attorney relating to all of his assets in the event of a return to England, and added that these instructions were "subject to the written consent of my daughter" (who was the replacement attorney and also the attorney under his Health and Welfare LPA). On the application of the Public Guardian the words "subject to the written consent of my daughter" were severed because the requirement that the attorney should obtain the consent of a third party before exercising his powers imposed an unjustifiable fetter on his authority.

Severance of invalid restrictions as to when a replacement attorney may act

Re Jenkins (an order of the Senior Judge made on 2 September 2008)

The donor had appointed the attorneys of a property and affairs LPA to act “together and independently”. She then directed that they must act together in relation to any bills, payments or costs exceeding £2,000 in any one calendar month and in relation to any single payment greater than £1,000 in any calendar month. The donor had also appointed a replacement attorney, and directed that she should act if the original attorneys were “not available through travel or living abroad or any other circumstances that may prevent or restrict their capacity to act on my behalf as attorneys”.

The court ordered the severance of both clauses, on the application of the Public Guardian. The directions in the first clause were incompatible with an appointment to act “together and independently”. The directions in the second clause were invalid because a replacement attorney may only act on the occurrence of an event mentioned in section 13(6)(a) to (d) of the MCA, for example where an original attorney disclaims, dies or loses mental capacity.

Re Patel (an order of the Senior Judge made on 1 December 2008)

The donor appointed a replacement attorney to act if the original attorney should be “mentally or physically incapable” or if the original attorney “is not in England at any time that my personal or financial affairs require attention”. The words in bold were severed on the application of the Public Guardian on the ground that a replacement attorney may only act on the occurrence of an event mentioned in section 13(6)(a) to (d) of the MCA, for example where an original attorney disclaims, dies or loses mental capacity.

Re Bates (an order of the Senior Judge made on 3 December 2008)

The donor appointed two original attorneys and a replacement attorney, who would assume office in the following circumstances: “She may act at any time at the election of either attorney”. These words were severed on the application of the Public Guardian on the ground that a replacement attorney may only act on the occurrence of an event mentioned in section 13(6)(a) to (d) of the MCA, for example where an original attorney disclaims, dies or loses mental capacity.

Re Noel (an order of the Senior Judge made on 31 January 2011)

The donor appointed two attorneys to act jointly in some matters and jointly and severally in others. He then appointed X as replacement attorney. He directed that a decision to sell a named property " must be made jointly by all surviving attorneys including X". On the application of the Public Guardian the words "including X" were severed, as being incompatible with the manner in which the attorneys and replacement attorneys had been appointed. The court added that, to have acheived the desired objective, the donor should have appointed all three as attorneys (rather than two attorneys and a replacement) and directed them to act jointly in some matters and jointly and severally in others.

Re Hamilton (an order of the Senior Judge made on 25 October 2011)

The donor appointed one primary attorney and one replacement attorney. On page 5 of the LPA the donor inappropriately ticked the box indicating that the attorneys were appointed to act jointly for some decisions and jointly and severally for other decisions, and continued: "My No 1 Attorney will make all decisions re my everyday expenses and decisions [and] will make joint decisions with the Replacement Attorney in reference to any large decisions re the selling of investments, property and the eventual need of a nursing home etc." On the application of the Public Guardian the provision was severed on the ground that, having appointed the attorneys to act successively, the donor could not authorise them to make any decisions concurrently, whether jointly or jointly and severally.

Re Evans (an order of the Senior Judge made on 24 November 2011)

The donor appointed A (his wife) and B as attorneys, to act jointly and severally, and C as replacement attorney. He then directed as follows: "My replacement attorney will replace both my attorneys and act alone if and when my wife becomes unable or unwilling to carry out her duties as my attorney." On the application of the Public Guardian the direction was severed because the donor was attempting to provide for attorney B to be replaced even though one of the triggering events for his replacement listed in section 13(6)(a)-(d) of the MCA had not occurred.

Re Tucker (an order of the Senior Judge made on 9 December 2011)

The donor appointed one attorney and one replacement attorney and then directed as follows: "My replacement attorney shall only act if my attorney is unable to act by virtue of:- (a) the power to the attorney is revoked by me; or (b) the power is terminated by reason of the death, disclaimer or other incapacity of my attorney to act as my attorney; whichever shall first occur. For the avoidance of doubt my replacement attorney shall act alone if my attorney is not able to act." On the application of the Public Guardian the words "by virtue of:- (a) the power to the attorney is revoked by me; or (b) the power is terminated" were severed because revocation of the attorney's appointment is not one of the events listed in section 13(6)(a)-(d) of the MCA that trigger the activation of the appointment of a replacement attorney.

Attorney or replacement attorney under 18

Re Mckenna (an order of the Senior Judge made on 1 February 2011)

The donor purported to appoint a replacement attorney who, at the date the donor signed the instrument, was 16 years old. The donor added the following restriction; "My replacement attorney shall only act if she is over the age of 18." On the application of the Public Guardian the appointment of the replacement attorney was severed as it contravened section 10(1)(a) of the MCA 2005, which provided that an attorney must have reached 18.

Re Brindley (an order of the Senior Judge made on 11 May 2011)

The donor appointed three attorneys, A, B and C, to act jointly and severally. She then imposed the following restriction: "C does not attain the age of 18 until 21.12.2012 upon which date along with A and B she will act jointly and severally as attorney." On the application of the Public Guardian the appointment of C was severed as invalid on the basis that it contravened section 10(1)(a) of the MCA.

Severance of invalid restrictions as to how a replacement attorney may act

Re Hartup (an order of the Senior Judge made on 28 October 2010)

The donor made two LPAs, one for property and financial affairs and the other for health and welfare. In both instruments he appointed A (his wife) and B as primary attorneys, to act jointly and severally, and C and D as replacement attorneys. In the

property and financial affairs instrument he imposed the following restriction: "Should my wife be unable to continue to act severally as my attorney, then B and my two replacement attorneys are to act on my behalf. They must act jointly in relation to decisions about selling my house or they may act jointly and severally in everything else." In the health and welfare instrument he imposed the following restriction: "Should my wife be unable to continue to act severally as my attorney, then B and my two replacement attorneys are to act on my behalf. They must act jointly in relation to decisions I have authorised them to make about life-sustaining treatment and where I live. They may act jointly and severally for everything else." On the application of the Public Guardian the court severed these restrictions on the ground that, where the original attorneys had been appointed to act jointly and severally, the donor could not change the nature of the appointment by directing that the surviving original attorney should act in a different manner when the other original attorney had been replaced.

Survivor of original joint appointment cannot act with replacement

Re Druce (an order of the Senior Judge made on 31 May 2011)

The donor made LPAs appointing A and B as her attorneys, to act jointly, and C and D to be her replacement attorneys. She then imposed the following restriction: "Both C and D should jointly replace the first attorney who needs replacing so that on the first replacement there will be 3 acting attorneys. No further replacements will be needed." On the application of the Public Guardian the court severed the restriction. There is nothing in section 10(8)(b) of the MCA, which deals with the appointment of replacement attorneys, to displace the fundamental principle that the survivor of joint attorneys cannot act. Where one of the original joint attorneys can no longer act, the replacement(s) will step in and act alone, to the exclusion of the surviving original attorney. This ruling reflects what is stated to be the "better view" in paragraph 4.44 of Cretney and Lush on Lasting and Enduring Powers of Attorney (6th edition).

Re Salter (an order of the Senior Judge made on 18 August 2011)

The donor appointed primary attorneys to act jointly in some matters and jointly and severally in others, and also appointed replacement attorneys. She then directed as follows: "For decisions where my attorneys must act jointly, replacement attorney 1 should replace attorney 1, when he is unable to act and replacement attorney 2 should replace attorney 2 when he is unable to act." On the application of the Public Guardian this provision was severed because the effect of one primary attorney ceasing to act would be that the other primary attorney could no longer act in the matters to be decided jointly, but the direction contemplated that the first replacement would act with the surviving primary attorney.

Re Krajicek (an order of the Senior Judge made on 12 July 2012)

The donor made two LPAs appointing two attorneys, A and B, and two replacement attorneys, C and D, and directed them to act jointly for some decisions and jointly and severally for other decisions. She provided that "If either of the original attorneys is unable to act then C should step in. D is to step in if the second attorney is unable to act." On the application of the Public Guardian the provision was severed because it appeared to provide for the replacement attorney to act jointly with the survivor of the original attorneys, which was incompatible with the appointment of the attorneys to act jointly for some decisions.

Severance of invalid restrictions relating to gifts

Re Sykes (an order of the Senior Judge made on 9 July 2009)

The donor of a property and affairs LPA imposed a restriction stating that no gifts of any of her assets should be made other than "annual or monthly gifts already being made by me at the date of my signing this LPA by regular bank standing orders or direct debits". On the application of the Public Guardian the court severed this restriction on the ground that the gifts envisaged by the donor exceeded the attorney's authority to make gifts as set out in section 12 of the MCA 2005.

Re Jass (an order of the Senior Judge made on 26 October 2010)

The donor of a property and affairs LPA included the following provision: "I hereby authorise my attorneys to give gifts on my behalf at my attorneys' discretion up to the exempt amount permitted by sections 19 (Annual Exemption), 20 (Small Gifts) and 22 (Marriage/Civil Partnership Gifts) of the Inheritance Act 1984 (or such other legislation or provision as may supersede these sections) for the time being in force." On the application of the Public Guardian the provision was severed on the ground that it contravened section 12 of the MCA 2005.

Re Baker (an order of the Senior Judge made on 12 November 2010)

The donor of a property and affairs LPA included the following provision: "I authorise my Attorneys to make gifts from my assets on such terms and conditions as they think fit, for the purposes of inheritance tax planning, including but not restricted to the making of gifts in line with the annual lifetime gift allowance." On the application of the Public Guardian the provision was severed on the grounds that it contravened section 12 of the MCA 2005.

Re Munn (an order of the Senior Judge made on 28 January 2011)

The donor of a property and affairs LPA included the follwoing provision in the guidance section; "My finances should be managed so that X can continue to live at [a named property] for as long as she wishes and receives income from all investments and holiday lettings." On the application of the Public Guardian the provision was severed on the ground that it contravened section 12 of the MCA 2005. Although expressed as guidance, it was more in the nature of a direction.

Re Wheatley (an order of the Senior Judge made on 31 January 2011)
The donor of a property and affairs LPA included the following provision in the guidance section; "My attorneys will continue to make contributions to my grandchildrens' Child Trust Funds and any other saving/pension plans that I fund for their benefit." On the application of the Public Guardian the provision was severed on the ground that it contravened section 12 of the MCA 2005. ALthough expressed as guidance, it was more in the nature of a direction.

Re Careford (an order of the Senior Judge made on 16 February 2011)
The donor of a property and affairs LPA included the following provision in the guidance section; "While my husband is my attorney, he may use my own money and property for his benefit in any way he wishes. My replacement attorneys may use my money and property for the benefit of my husband in any way they think fit. All of my attorneys may make gifts to my husband from my estate." On the application of the Public Guardian the provision was severed on the ground that it contravened section 12 of the MCA 2005. Although the provision was expressed as guidance, it was not open to the donor to give guidance about gift making in terms going beyond the statutory power.

Re Knight (an order of the Senior Judge made on 18 February 2011)
The donor of a property and affairs LPA included the following provision in the guidance section; "I wish my attorneys, if they think fit, to pay my sister by way of gift the sum of £3,000 annually and to pay by way of gift the sum of £250 annually to my brother in law, my nephew, his spouse and all my nieces including spouses (other than to X), my great nephew and great niece, all of whom are listed on page A2 being the amounts of gifts exempt from inheritance tax under the current inheritance tax laws or such other annual sums by way of gift as shall for the time being be exempt from inheritance tax or other tax payable on death." On the application of the Public Guardian the provision was severed on the ground it contravened section 12 of the MCA 2005.

Although the provision was expressed as guidance, it was not open to the donor to give guidance about gift making in terms going beyond the statutory power, and although it might be possible for the attorneys to make the desired gifts on "customary occasions", the donor did not appear to have been contemplating customary occasions at all.

Re Walker (an order of the Senior Judge made on 20 July 2011)
The donor of a property and affairs LPA included the following provision in the guidance section: "To help my son X financially from my funds as and when he requires." On the application of the Public Guardian the provision was severed on the ground that it contravened section 12 of the MCA 2005.

Re Fisher (an order of the Senior Judge made on 28 July 2011)
The donor included the following provision in his LPA: "I direct that if I lack mental capacity or for any other reason am unable to deal with my day to day financial affairs then my Attorney is to pay from my business the sum of £4,000 per calendar month into the bank account of my wife." On the application of the Public Guardian the provision was severed on the ground it contravened section 12 of the MCA 2005.

Re Jackson (an order of the Senior Judge made on 17 August 2011)
The donor of a property and affairs LPA included the following guidance: "If my attorneys believe I lack mental capacity or am becoming mentally incapable of managing and administering my property and financial affairs then I wish them to realise all my stocks, shares and other investments and transfer the proceeds and the balances from all bank and other accounts in my sole name into a joint account in the names of myself and my wife to ensure that my wife has full access to all funds." On the application of the Public Guardian the guidance was severed because it contravened section 12 of the MCA 2005.

Re Temple (an order of the Senior Judge made on 10 August 2011)
The donor of a property and affairs LPA included the following guidance: "My attorney is authorised to grant gifts of up to £5,000 for family and also to provide interest free loans of up to £10,000 for extreme need. Where possible loans to be repaid within one year with flexibility of terms allowed at my attorney's discretion." On the application of the Public Guardian the guidance was severed because it contravened section 12 of the MCA 2005.

Re Gee (an order of the Senior Judge made on 22 August 2011)
The donor of a property and affairs LPA included the following guidance: "Although I authorise my Attorneys to make gifts of money to either grandchild in cases of extreme need (for which I rely on my Attorneys' discretion) no benefit directly or indirectly should go to my daughter. If my house has to be sold I authorise my Attorneys to distribute any furniture, household and personal effects to X, Y and my grandchildren as if I had died." In making the application the Public Guardian referred the court to the view expressed by the Law Commission in its report on Mental Capacity (Law Com. No. 231) to the effect that an LPA attorney could provide for the needs of others as part of his duty to act in the donor's best interests, even in the absence of an express provision such as is conferred on EPA attorneys. The Public Guardian asked the court to consider whether the view of the Law Commission could be relied on in cases where the donor contemplated that the attorneys could provide for the needs of others in circumstances outside the statutory gifting power. However, the court severed the guidance on the ground that it contravened section 12 of the MCA 2005.

Re Dhir (an order of the Senior Judge made on 15 November 2011)
The donor set out eight restrictions, one of which was: "My attorney must not sell any of my properties unless it is required for my wife's medical treatment." On the application of the Public Guardian the restriction was severed on the ground that it authorised

the attorneys to make gifts beyond the scope of the statutory power set out in section 12 of the MCA 2005.

Re Forrest (an order of the Senior Judge made on 2 March 2012)

The donor included the following guidance: "I hereby express the wish that my Attorneys will continue to pay my contribution to the school fees of my granddaughters, A and B, as per my previous pattern of contributions." On the application of the Public Guardian the guidance was severed on the ground that it contravened section 12 of the MCA 2005.

Re Bloom (an order of the Senior Judge made on 16 March 2012)

The donor of a property and financial affairs LPA included the following direction: "I direct my attorneys to use such of my capital and income as they shall at their discretion deem necessary to make provision for my wife's maintenance and benefit." The Public Guardian asked the court to sever either the entire direction or just the words "and benefit". The court severed only the words "and benefit" on the ground that they contravened section 12 of the MCA 2005. The order recited that the donor had a common law duty to make provision for his wife's maintenance.

Re Strange (an order of the Senior Judge made on 21 May 2012)

The donor of a property and financial affairs LPA included the following guidance: "I wish my attorneys to provide for the financial needs of my husband in the same manner that I might have been expected to do if I had capacity to do so." The Public Guardian asked the court to consider whether the guidance needed to be severed as potentially contravening section 12 of the MCA 2005. In the application the Public Guardian referred to the case of Bloom (above), noting that a wife had no common law duty to maintain her husband and that the husband's common law duty would be abolished when section 198 of the Equality Act 2010 came into force, but noting also that various other legislation (see below) imposed a duty on a wife to maintain her husband. The court did not sever the guidance and explained the position in the following terms: "In the context of clauses in an LPA in which the donor makes provision for the maintenance of his or her spouse, there should be no distinction between male and female spouses and, in principle, such clauses should be treated as valid on the basis of the specific maintenance obligations imposed by statutes such as National Assistance Act 1948, section 24(1)(b) and Social Security Administration Act 1992, section 105(3), and the absence of any distinction between husband and wife in other legislation, such as the Matrimonial Causes Act 1973 and the Inheritance (Provision for Family and Dependants) Act 1975."

Re Drew (an order of the Senior Judge made on 4 April 2012)

The donor of a property and financial affairs LPA included the following guidance:" If my father is still alive then my trustees should continue with my contributions to his care (my records make clear from which account) and assume my role in financial responsibility for him." [The reference to "trustees" should have been to "attorneys".] The court severed the provision on the ground that it contravened section 12 of the MCA 2005. The order recited that the case of Bloom (above) was distinguishable because in the present case the donor had no common law duty to make provision for her father's maintenance.

Re O'Brien (an order of the Senior Judge made on 18 May 2012)

The donor of a property and financial affairs LPA included the following guidance: "My handicapped son should be adequately provided for." On the application of the Public Guardian this provision was severed on the ground that it contravened section 12 of the MCA 2005.

Re Burdock (an order of the Senior Judge made on 2 July 2012)

The donor made an LPA for property and financial affairs and included the following guidance: "(1) If the house is sold I intend to pay off Z's student loan completely. (2) I also intend to give my three daughters, or their issue, as follows: X £30,000, Y £30,000, Z £50,000. (3) The remainder to be used for my care and needs." On the application of the Public Guardian the provision was severed as it gave the attorneys greater gift making powers than are permitted under section 12 of the MCA 2005.

Re Barac (an order of the Senior Judge made on 20 February 2013)

The donor made an LPA for property and financial affairs which included the following provision: "After having taken full regard for my financial welfare and security I want my attorneys to take sensible steps to protect my estate from the effects of taxation [e.g. Inheritance Tax] and be able to create Trusts where beneficial." On the application of the Public Guardian the provision was severed on the ground that it contravened section 12 of the MCA 2005.

Re Rider (an order of the Senior Judge made on 20 February 2013)

The donor made an LPA for property and financial affairs which included the following provision: "No political donations to be made other than to the conservative party." On the application of the Public Guardian the provision was severed on the ground that it contravened section 12 of the MCA 2005. While section 12(2)(b) permits the making of gifts to charities (subject to certain conditions), donations to the conservative party, or any other political party, would not fall within that provision.

Re Buckley (an order of the Senior Judge made on 22 February 2013)

The donor made an LPA for property and financial affairs and included the following provision: "Assets should be used firstly to ensure the well being and comfort of [my wife] and secondly to meet any urgent need of the families of the Attorneys and thereafter managed until distributed in accordance with the terms of my will." On the application of the Public Guardian the provision was severed. Although the attorneys would have power to maintain the donor's wife (see Re Bloom above), this should not be the priority of the LPA because section 1(5) of the MCA provides that "An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests." The attorneys had no authority to meet

the needs of their families, as the donor was not under any legal obligation to maintain them. Any maintenance of the families would be a gift which would potentially fall outside section 12 of the MCA 2005.

Severance of unreasonable, impractical or uncertain conditions

Re Saunders (an order of the Senior Judge made on 30 March 2010)

The donor appointed two attorneys and a replacement attorney. He stated that the replacement should act only if the power given to the original attorneys "is revoked by me" or terminated by death, disclaimer or incapacity. He further stated that the power of his attorneys "shall only come into force only if and when my attorneys have presented medical evidence to the Court and the Court are satisfied that I am or am becoming incapable by reason of mental disorder of managing and administering my property and affairs". On the application of the Public Guardian the condition requiring the attorneys to present medical evidence to the court was severed because, although it was not invalid, it imposed an unreasonable and impractical fetter on the attorneys. The words "is revoked by me" were also severed as being incompatible with section 10(8)(b) of the MCA (revocation of an attorney's appointment is not an event upon which a replacement attorney may act).

Re Thrussell (an order of the Senior Judge made on 12 October 2010)

The donor directed her attorneys to consult with X "in respect of any major decision". On the application of the Public Guardian the court severed this provision on the grounds that it was so uncertain as to be unworkable.

Whether the instrument is in prescribed form

Re Nazran (an order of the Senior Judge made on 27 June 2008)

The certificate provider had not completed the first two boxes in Part B of the instrument to confirm that he was acting independently of the donor, was not ineligible to provide a certificate, and was aged 18 or over. The attorneys applied to court for a declaration that the instrument was a valid LPA or, alternatively, that the instrument was to be treated as valid under MCA Schedule 1 paragraph 3(2). [Paragraph 3(2) provides that the court may declare that an instrument which is not in the prescribed form may be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney].

The court, in the exercise of its discretion under Schedule 1 paragraph 3(2), declared that the instrument was to be treated as if it were an LPA and registered accordingly. The Public Guardian does not have this discretion.

Re Ker (an order of the Senior Judge made on 21 September 2009)

The donor in Part A of the LPA form omitted to tick the box to confirm that he had chosen his certificate provider himself. The Public Guardian refused registration on the ground that the instrument was not in prescribed form. On the attorney's application, the court exercised its discretion under paragraph 3(2) of Schedule 1 to the MCA 2005 and declared that the instrument, although not in the prescribed form, was to be treated as if it were a lasting power of attorney. Registration was directed accordingly.

Re Murdoch (an order of the Senior Judge made on 30 October 2009)

The donor executed an instrument intended to be a personal welfare LPA. It contained the following defects: (i) the certificate provider had failed to tick the first two mandatory boxes in Part B, (ii) the attorney had failed to tick any of the boxes in Part C, although he had dated and executed it, and (iii) the replacement attorney had ticked the appropriate boxes in his Part C but had not dated or executed it. The Public Guardian refused to register the instrument, and the donor subsequently lost capacity. On the attorney's application, the court directed the Public Guardian not to register the instrument, because "the errors in its execution are too fundamental".

Re Helmsley (an order made by the Senior Judge on 30 November 2009)

The donor executed two instruments intended to be LPAs. In Part A of both instruments she omitted to tick the box to confirm that she gave her attorneys authority to act on her behalf in circumstances when she lacked capacity. The Public Guardian refused registration on the ground that the instruments were not in prescribed form. On the attorneys' application, the court exercised its discretion under paragraph 3(2) of Schedule 1 of the MCA 2005 and declared that the instruments, although not in prescribed form, were to be treated as if they were. Registration was directed accordingly.

Re Lane (an order of the Senior Judge made on 24 January 2012)

The donor made an LPA on 3 May 2011 using the 2007 prescribed form. The transitional provisions of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment Regulations) 2009, which introduced new prescribed forms, provide that an instrument executed by the donor before 1 April 2011 on the 2007 prescribed form is capable of being a valid lasting power of attorney. The Public Guardian made an application to the court for the severance of an invalid restriction, and drew the court's attention to the date of execution, submitting that the 'old' forms were not materially different from the 'new' forms. The court accepted that the 'old' forms differed from the 'new' forms in an immaterial respect and were accordingly within paragraph 3(1) of Schedule 1 of the MCA, which provides that an instrument which differs in an immaterial respect in form or mode of expression from the prescribed form is to be treated by the Public Guardian as sufficient in point of form and expression.

Re Gunn (an order of the Senior Judge made on 8 August 2012)

The donor made LPAs for property and financial affairs and for health and welfare. The donor's signature was witnessed in both

LPAs, but in the health and welfare instrument the witness failed to state his address and registration of this LPA was refused by the Office of the Public Guardian. On the attorney's application for an order that the instrument should be treated as if it were in the prescribed form, the court exercised its discretion under paragraph 3(2) of Schedule 1 of the MCA and declared that the instrument was to be treated as if it were an LPA for health and welfare. The court considered it relevant that the witness had stated his full address in the LPA for property and financial affairs which was executed on the same day.

Appointment of office holder as attorney

Re McGreen (an order of the Senior Judge made on 19 April 2012)

The donor appointed A as attorney and B as replacement attorney and then provided as follows on the A2 continuation sheet: "If my Replacement Attorney is no longer a partner in the firm of XYZ Solicitors, I appoint in his place a suitably qualified partner of that firm or firm which has succeeded that firm and carries on its practice, to be my Replacement Attorney." (Only A and B had signed Part Cs.) The Public Guardian applied for severance of the provision on the ground that it was not possible to appoint a replacement attorney to take over from a replacement attorney (see Re Baldwin, below, under the heading "Replacement for replacement attorney".) The court severed the provision for that reason and also for the following reason: "Section 19(2) of the Mental Capacity Act 2005 states that, in respect of the appointment of deputies, 'the court may appoint an individual by appointing the holder for the time being of a specified office or position'. However, there is no comparable provision in the Act that permits the donor of an LPA to appoint an office holder to be his or her attorney. Section 10(1) states that the donee of an LPA must be an individual who has reached 18 or, if the power relates only to the donor's property and affairs, either such an individual or a trust corporation."

Whether the instrument has been correctly executed

Re Sporne (an order of District Judge S E Rogers made on 13 October 2009)

The instrument had two defects: (i) the certificate provider had failed to tick the first two mandatory boxes in Part B, and (ii) the attorney had executed Part C before the certificate provider had signed Part B, contrary to Regulation 9 of the LPA, EPA and PG Regulations 2007. The Public Guardian's normal practice in such a case is to request fresh Parts B and C, but the donor had lost capacity. The attorney applied to court for the determination of the validity of the instrument. The court order recorded that, while the court could have exercised its discretion under paragraph 3(2) of Schedule 1 of the MCA in respect of the defect in Part B of the instrument, it could not exercise any discretion to validate a significant procedural error in respect of the requirements for the completion and execution of Parts A, B and C. It further recorded that the errors could not now be rectified as the donor had lost capacity. The court, therefore, refused to direct registration of the instrument. [The terms of paragraph 3(2) of Schedule 1 of the MCA are set out in the summary of Re Nazran above].

Re M Crook (an order of the Senior Judge made on 16 July 2010)

The donor's Health and Welfare LPA included an invalid restriction. A further defect was that she had not entered the date on which she executed Part A of the instrument in section 10, nor had she dated section 5 when selecting Option A. The Public Guardian does not regard a failure to execute the Options section as invalidating the instrument, but a failure to date Part A will normally do so. However, in this case the Public Guardian was prepared to infer that both sections had been executed on 13 October 2009, as Continuation Sheet A1 had been signed on that date, and so was the Part B certificate. In addition, the certificate provider had witnessed the Part A signatures. When applying for severance of the invalid restriction, the Public Guardian requested the court to direct that Part A was to be treated as having been signed on 13 October 2009, to avoid any challenges by third parties. The court accordingly included a provision in the order to the effect that sections 5 and 10 of Part A were to be treated as having been executed on 13 October 2009.

Re Hurren (an order of the Senior Judge made on 28 September 2011)

The Public Guardian refused to register the instrument as an LPA because the Part B certificate had been signed before the donor signed Part A, in contravention of Regulation 9 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007. (The donor had subsequently lost capacity.) On the attorney's application, the court declared in the exercise of its discretion under paragraph 3(2) of Schedule 1 of the MCA 2005 that the instrument was to be treated as if it were in the prescribed form and directed registration. The Public Guardian applied to set aside the order on the ground that paragraph 3(2) did not apply in the case of defective execution. The court set aside the order, and confirmed that the discretion given to the court under paragraph 3(2) applies only to an instrument which is not in the prescribed form and does not apply to any prescribed requirements in connection with its execution.

Re Clarke (an order of the Senior Judge made on 19 September 2011)

The donor made an LPA for property and financial affairs, appointing her husband and daughter as attorneys and her other two daughters as replacement attorneys. She also made an LPA for health and welfare, appointing her husband and three daughters as attorneys. When an application was made to register the instruments, the husband objected on the ground that the instruments had not been properly witnessed. He alleged that the witness had not been in the house when the donor signed, but had added his signature later. The court preferred the evidence of the witness and one daughter, to the effect that the donor had signed at the dining room table and that the witness was in an adjacent room and could see her sign through glass doors separating the two rooms. Applying the old case Casson v Dade (1781), the court held that the instruments had been properly witnessed. (The husband also objected on the ground that the donor lacked capacity to make an LPA, but this was also dismissed. The donor's

GP had acted as certificate provider and the court commented on the difficulties facing GPs who act as certificate providers within the time constraints of an appointment at the surgery).

You can view an extract from the judgment on both issues in the section "Other orders of interest made by the Court of Protection since 1 October 2007"

Re H (an order of District Judge Ralton made on 24 January 2012)

The donor used the 2007 version of the LPA prescribed form and failed to tick the box to confirm that she had read (or had read to her) the prescribed information on pages 2, 3 and 4. On the attorney's application the court was unable to find on balance of probability that the donor had read (or had read to her) the prescribed information. This was a failure of execution and the court had no discretion to uphold it.

You can view an extract from the judgment in the section "Other orders of interest made by the Court of Protection since 1 October 2007"

Re Smith (an order of the Senior Judge made on 1 March 2012)

The donor appointed two attorneys to act jointly and severally. The LPA was registered by oversight even though one attorney's signature had not been witnessed. The attorney applied for a declaration of validity, and the evidence was that the witness had been present when the attorney signed, but had not signed under the attorney's name. The court dismissed the application, holding that it had no jurisdiction to declare that the LPA was valid. The applicant was directed to return the instrument to the OPG so that his appointment could be marked as invalid in accordance with section 10(7) of the MCA 2005.

Attorney's date of birth missing

Re John (an order of District Judge Ralton made on 14 October 2010)

The donor made an LPA using the "old" form prescribed in 2007. She appointed an original attorney and a replacement attorney, but the replacement attorney's Part C omitted his date of birth, and it could not be inferred from the instrument that he was at least 18. The usual practice of the Public Guardian in such a case is to request a fresh Part C, but this could not be done because the donor had lost capacity (see Re Sporne, above). The instrument was registered, with registration being limited to the original attorney, but the attorney then applied to court to have the defective Part C "reinstated". The Public Guardian was joined as a party.

The court ruled that the LPA was not in the prescribed form because of the failure to include the replacement attorney's date of birth. As the court was satisfied on the evidence that the replacement attorney was in fact at least 18, it exercised its discretion under paragraph 3(2) of Schedule 1 of the MCA (which is set out in the summary of Re Nazran, above) to declare that the LPA was to be treated as if it were in the precribed form.

(Note: in the case of LPAs made using the 2009 prescribed form, the attorney's date of birth must be included in Part A, so the practice of requesting a fresh Part C is not applicable, although limited registration may be possible if there is another attorney whose date of birth has been given.)

Re Dadd (an order of District Judge Hilder made on 17 November 2010)

The donor made an LPA using the "new" form presribed in 2009. She appointed two attorneys but provided no date of birth for either. The Public Guardian was willing to register in favour of one attorney because her title was given as "Mrs", so that it could reasonably be inferred that she was at least 18. It was overlooked that the other attorney was described in the instrument as the donor's husband. On the attorney's application the court directed registration. As it could be inferred from the instrument that both attorneys were at least 18, the instrument differed from the prescribed form in an immaterial respect within paragraph 3(1) of Schedule 1 of the MCA 2005.

Re Cretney (an order of the Senior Judge made on 24 February 2011)

The donor made an LPA on the "new" form prescribed in 2009 but omitted the attorney's date of birth in Part A. The Public Guardian refused to register on the ground that the instrument differed materially from the prescribed form. On the application of the attorney (who was over 18) the court declared in the exercise of its discretion under paragraph 3(2) of Schedule 1 of the MCA that the instrument was to be treated as if it were in the prescribed form.

Donor's surname missing

Re Baker (an order of the Senior Judge made on 4 February 2011)

In Part A of the instrument the donor put his middle name in the box for "Last Name" and omitted his surname completely. As his middle name could have passed for a surname, this error was not noticed by anybody and the instrument was registered. The attorney applied for a declaration that the LPA was to be treated as valid under paragraph 3(2) of Schedule 1 of the MCA 2005, under which the court may declare that an instrument is to be treated as if it had been made in the prescribed form even though it differs in a material respect from the prescribed form. The court exercised its discretion under paragraph 3(2) because, although

the error was material, it was satisfied that the instrument was intended to be an LPA. The Public Guardian was directed to amend the register and attach a note to the instrument to this effect.
[Note: for a similar case concerning an EPA, see Re Orriss, under the "Rectification" heading.]

Attorney or replacement attorney as a “named person”

Re Howarth (an order of the Senior Judge made on 29 July 2008)

The donor had named the replacement attorney as the only person to be notified of an application to register. MCA Schedule 1 paragraph 2(3) provides that a person who is “appointed as donee under the instrument” may not be a named person. If there was no effective named person, the instrument could only be valid if it contained two Part B certificates, but it contained only one. On the application of the Public Guardian the court directed the severance of the appointment of the replacement attorney on the ground that a replacement attorney was a person “appointed as donee under the instrument” who could not, therefore, be a named person. As the appointment of the replacement attorney was severed, the named person was not an attorney and so the instrument could be registered.

Re McAdam (an order of the Senior Judge made on 29 March 2010)

The donor had named X, one of two original attorneys (who had been appointed to act jointly and severally), as the only named person. On the application of the Public Guardian the court severed the appointment of X as attorney on the ground that the MCA does not permit an attorney to be a named person. The instrument was directed to be registered as an LPA appointing only the other attorney.

Eligibility of Certificate Provider

Re Kittle (a judgment of the Senior Judge given on 1 December 2009)

Regulation 8(3) of the LPA, EPA and PG Regulations 2007 sets out categories of persons who cannot act as certificate provider. Included in the list is "a family member" of the donor or of the attorney (or of the owner, director, manager or employee of any care home in which the donor is living when the instrument is executed). In this case the certificate provider was the donor's first cousin. The Public Guardian declined to register the instrument on the ground that a first cousin was a family member of the donor. The court ruled that a first cousin is not a family member, and so the LPA was valid.

You can view the full judgment in the section Other orders of interest made by the Court of Protection since 1 October 2007.

Re Phillips (an order of the Senior Judge made on 16 May 2012)

The donor appointed three attorneys, A, B and C. She did not name any persons to be notified, and so there were two certificate providers. The Public Guardian refused to register on the ground that one certificate provider, X, was a member of the family of A. He was the unmarried partner of A but did not live at the same address. In his Part B certificate X said: "I am the partner of A and have known the donor for 3 years." The attorney applied to court for a direction to register and the Public Guardian was joined as respondent. The court decided that X was to be treated as a member of the family of A, and so the instrument could not be registered. The judge said: "In my judgment, anyone who describes himself in this context as the attorney's partner is courting trouble and automatically disqualifies himself from being a person who can give an LPA certificate. This applies regardless of whether he describes himself as the attorney's partner intentionally or inadvertently, whether they live at the same address or at separate locations, whether the relationship is intimate or platonic, and whether the statement is true or false." Although it was unnecessary to the decision, the judge added that, even if X were not to be treated as a family member, he was not independent of the attorney, as required by the prescribed LPA form.

You can view the full judgment in the section on "Other orders of interest made by the Court of Protection since 1 October 2007".

Re Putt (an order of the Senior Judge made on 22 March 2011)

The donor appointed two partners of a firm of solicitors which was a Limited Liability Partnership (LLP) as attorneys in her property and affairs instrument and her health and welfare instrument. The certificate provider was an associate solicitor of the same LLP. Regulation 8(3)(f) of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 disqualifies a person from acting as certificate provider if that person is "a business partner or employee" of the donor or of an attorney under the instrument.

While this regulation clearly applies to a common law partnership, it does not expressly deal with LLPs. The Public Guardian made a severance application in relation to another matter (see below under the heading "Appointment of substitute by an attorney") and asked the court also to consider whether the instrument was invalid on the ground that Regulation 8(3)(f) applied to LLPs as well as to common law partnerships. The court ruled that the instrument was not a valid LPA because the certificate provider was ineligible to act. (By a separate order made on 12 April 2011 the court directed that the health and welfare instrument should not be registered and that registration of the property and affairs instrument, which had been registered before the defect was noticed, should be cancelled.)

You can view a copy of the full order in the section "Other orders of interest made by the Court of Protection since 1 October

2007".

Replacement for replacement attorney

Re Baldwin (an order made by the Senior Judge on 14 May 2009)

The donor appointed X as original attorney, Y as the replacement for X, and Z as the replacement for Y if Y was unable or unwilling to act. On the application of the Public Guardian the court directed the severance of the appointment of Z on the ground that the MCA does not permit a donor to appoint a person to take over as a second replacement attorney if the first replacement attorney starts to act and then becomes unable to act.

Re Martin (an order of the Senior Judge made on 14 February 2013)

The donor appointed two primary attorneys, A and B, to act jointly and severally, and three replacement attorneys, C, D and E. He included a valid provision to the effect that the D should replace B if B was unable to act, and then directed as follows: "In the event of my first attorney being unable to continue, E should act as Assistant to C (1st Replacement Attorney), and in the event of C being unable to continue, he should assume the power of Attorney." On the application of the Public Guardian this provision was severed because (applying Re Baldwin, above) the MCA does not permit a replacement attorney to be replaced, nor is it possible to direct an attorney or replacement attorney to act as assistant to another attorney or replacement attorney.

Re Boff (a judgement of the Senior Judge given on 16 August 2013)

The court subsequently confirmed in Re Boff, a contested application, that it is not possible to appoint a replacement for a replacement attorney.

Appointment of substitute by an attorney

Re Swift (an order of the Senior Judge made on 30 March 2010)

The donor had been appointed to act as attorney under LPAs made by his wife. In his own LPA for property and financial affairs he stated as follows: "In the event that I become incapacitated and am unable to take decisions in my role as Attorney to my wife, I appoint both my Attorneys as Guardians of my wife in order that they may, together, take decisions about her property and affairs." He included an equivalent provision in his LPA for health and welfare. On the application of the Public Guardian the court severed these provisions as being ineffective because the MCA does not permit an attorney to appoint a substitute or successor to himself.

Re Williams (an order of the Senior Judge made on 1 December 2010)

The donor appointed three attorneys to act jointly. She then added: "The attorneys are only to make decisions jointly and should any of the attorneys die within my lifetime I wish for their personal representative to take over as my attorney in their place." On the application of the Public Guardian the court severed this provision on the ground that section 10(8)(a) of the MCA provided that an LPA instrument could not give the attorney power to appoint a substitute or successor.

[Note: The provision could also be viewed as incompatible with the nature of a joint appointment.]

Re Putt (an order of the Senior Judge made on 22 March 2011)

The donor appointed a family member and two solicitors in her property and affairs and health and welfare instruments. In both instruments she directed as follows: "My attorneys (or any of them) may delegate in writing any of his, her or their functions to any person and shall not be responsible for the default of that person (even if the delegation was not strictly necessary or expedient) provided that he, she or they took reasonable care in his, her or their selection and supervision." The Public Guardian applied for severance of the direction on the ground that it was too wide and in effect enabled the attorneys to appoint a substitute. The court ruled that the clause was invalid as being "not simply contrary but almost repugnant to the special relationship of personal obligation and faith that one might reasonably expect to exist between a donor and the attorney of an LPA." (The LPAs were in any event invalid: see above under the heading "Ineligibility of certificate provider".)

You can view a copy of the full order in the section "Other orders of interest made by the Court of Protection since 1 October 2007"

Re Clare (an order of the Senior Judge made on 8 September 2011)

The donor made two LPAs, each appointing an attorney and a replacement attorney. In each she directed as follows: "My Attorney may at any time appoint a substitute to act as my Attorney and may revoke any appointment without giving a reason. Each appointment is to be in writing signed by my Attorney. Every substitute has full powers as my Attorney as if appointed by this Deed, except the power to appoint a substitute." On the application of the Public Guardian the provision was severed as being a plain breach of section 10(8)(a) of the MCA, which provides that an LPA cannot give the attorney power to appoint a substitute or successor.

Re Goodwin (an order of the Senior Judge made on 17 June 2013)

The donor appointed three attorneys and two replacements. Regarding the replacements, she directed that if one ceased to act

the other could act alone, and added: "She should also make every effort to find one or two replacement attorneys to take over her responsibilities in the event of her own death, or if she no longer has the mental capacity to carry on, so that there is a continuing 'Lasting Power of Attorney' in place during the donor's lifetime." On the application of the Public Guardian this provision was severed on the ground that section 10(8)(a) of the MCA invalidates any provision in an LPA giving an attorney power to appoint a substitute or successor.

Where attorney present when certificate provider interviews the donor

Re Gibbs (an order of the Senior Judge made on 9 September 2008)

The certificate provider ticked the box to confirm that he had discussed the LPA with the donor and that the attorneys were not present, and also ticked the box to say that the LPA had been discussed with the donor in the presence of other persons, identified as the attorneys. The court directed that the LPA was valid (the certificate provider having confirmed by letter that he had interviewed the donor on her own as well as with the attorneys present).

Re Bullock (an order made by the Senior Judge on 15 December 2009)

The certificate providers did not tick the box to confirm that they had discussed the LPA with the donor and that the attorney was not present. The donor was in hospital and the certificate providers had discussed the LPA with the donor at his bedside, the attorney being present throughout. The Public Guardian refused registration on the ground that the instrument was not in prescribed form. The court, in the exercise of its discretion, declared under paragraph 3(2) of Schedule 1 of the MCA 2005 that the instrument, which was not in the prescribed form, should be treated as if it were. Registration was directed accordingly.

[Note: There is no such requirement in the new LPA prescribed forms introduced on 1 October 2009]

Capacity to make an LPA

Re Collis (a judgment of the Senior Judge given on 27 October 2010)

An application was made to the court to direct the Public Guardian to cancel the registration of an LPA on the grounds that the instrument was not a valid LPA because the Donor lacked capacity to create an LPA at the date of execution. In the course of his judgment the Senior Judge set out the law relating to capacity to create an LPA.

You can view an extract from the judgment in the section 'Other orders of interest made by the Court of Protection since 1 October 2007.'

A, B & C v X & Z (a judgment of Hedley J given on 30 July 2012)

The court was asked to make declarations as to whether X had capacity to do various things, including entering into marriage, litigating, making a will, managing his affairs, and making or revoking an enduring or lasting power of attorney. Paragraph 38 is of interest on the question of fluctuating or qualified capacity:
"Let me then turn to the question of revocation or creation of enduring or lasting powers of attorney. First, I am not satisfied that it has been established that X lacked capacity to revoke the power of attorney in favour of the Applicants, even indeed if that was still a live issue given that the revocation has been accepted and the registration has been cancelled. I found the issue of power to create a new enduring* power of attorney very much more difficult for all the reasons that apply in relation to testamentary capacity. In the end, I have reached exactly the same conclusion. I am unwilling to make, on the evidence, a general declaration that he lacks capacity, but qualify that immediately by saying that the exercise of such a power, unless accompanied by contemporary medical evidence of capacity, would give rise to a serious risk of challenge or of refusal to register. It seems to me, for exactly the same reasons as I endeavoured to set out in relation to testamentary capacity, that X's capacity is likely to diminish in the future and there will be times when undoubtedly he lacks capacity, just as there will be times when he retains it."
[*The judge must have intended to refer to a new lasting power of attorney, as new enduring powers of attorney may not now be made.]

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