

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No.** CPC/3256/2015

**Before:** Mr. E Mitchell, Judge of the Upper Tribunal

**Decision:** The decision of the First-tier Tribunal (9 July 2015, Birmingham, file reference SC 024/14/03570) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Under section 12(2)(b)(ii) of the 2007 I re-make the First-tier Tribunal's decision as follows:

- (1) The appeal against the Secretary of State's decision of 20 July 2013 succeeds.
- (2) The Secretary of State's decision is replaced by the following decision:
  - a. Miss E's award of state pension credit is superseded on the ground of a change of circumstances.
  - b. As from 13 September 2012, Miss E was not entitled to an amount for severe disability within her award of state pension credit.
  - c. From 13 September 2012, Miss E was not in receipt of Attendance Allowance and did not therefore satisfy the conditions for the amount for severe disability in paragraph 1 of Schedule 1 to the State Pension Credit Regulations 2002.

**REASONS FOR DECISION**

**Introduction**

1. The main grievance of Mr B, who brings this appeal in his capacity as executor of his late Aunt Miss E's estate, is the Secretary of State's decision to make Birmingham City Council Miss E's social security appointee. When the council were made Miss E's appointee, Mr B held an enduring power of attorney authorising him to deal with her financial affairs. Appointment decisions do not attract a right of appeal to the First-tier Tribunal. Neither that tribunal, nor the Upper Tribunal, has jurisdiction to entertain an 'appeal' against an appointment decision. However, I do have some concerns about the way in which the council's appointment application was handled. I decide to express some views on that subject. My purpose is simply to provide some assistance to the DWP and local authorities in their efforts to operate the appointee system effectively and properly.

2. Birmingham City Council are a party to this appeal and were given the opportunity, which they did not take, to explain oddities in their application to be made Miss E's appointee. When the council made their application, Mr E held an enduring power of attorney that gave him authority to deal with Miss E's financial affairs.

3. In summary, I make the following observations:

(a) the Social Security (Claims and Payments) Regulations 1987 do not contain an express prohibition on making an appointment despite some other person holding an enduring or lasting power of attorney, in respect of the claimant, that extends to welfare benefits matters. However, the Secretary of State has a power to make an appointment, not a duty. It may be difficult to identify a justification for exercising the power of appointment in the face of opposition from a person with a lasting or enduring power of attorney that extends to welfare benefits matters. This would involve disrespecting the wishes of a claimant given at a time when the claimant had mental capacity to select a person to deal with his or her affairs;

(b) the Secretary of State has power to revoke an appointment. It may be difficult to identify a good reason for the DWP not revoking an appointment at the request of a person who holds a lasting or enduring power of attorney that extends to welfare benefits matters;

(c) an appointment has significant consequences for the claimant. Applications for appointment need to be scrutinised with care. In this case, the council's application form:

- was not supported by medical evidence even though a box was ticked on the form to indicate that it was;
- asked whether family members were aware of the application but the question went unanswered;
- contained a declaration that the local authority were not aware of any person legally appointed to administer the aunt's affairs. This is arguably surprising because, when the application was made, the local authority were funding the aunt's care home placement and one might expect a funding authority to be aware that a resident had granted an enduring or lasting power of attorney;
- appears, to my mind, to be unsigned. The signature box contains only a large hand-written circle.

None of these features were investigated by the DWP. The ‘official use’ section of the form was left blank and the decision record gave no reasons;

(d) for most benefits, appointments are made under the 1987 Regulations. But they are not where the benefit is one to which the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 apply. In contrast to the 1987 Regulations, the 2013 Regulations prevent an appointment where someone has a lasting or enduring power of attorney in respect of the claimant. The reason for the different approaches is not obvious and none has been given by the DWP in these proceedings.

4. Nothing I say about appointments forms part of the *ratio* of my decision. The legal issue, on which I do rule, concerns the date on which entitlement to the amount for severe disability, within state pension credit, ceases upon a claimant’s admission to a publicly-funded care home. Entitlement is linked to Attendance Allowance payment of which ought to end 28 days after a person’s admission to a publicly-funded care home. In this case, however, Attendance Allowance continued to be paid for a number of months after Miss E became resident in a care home. The Secretary of State now agrees that Miss B continued to be entitled to the amount for severe disability while she remained factually “in receipt” of Attendance Allowance.

## **Background**

### *Events before Miss E moved to a care home*

5. Miss E completed a state pension credit claim form on 12 March 2004, correctly answering ‘no’ when asked if she was living permanently in a care home. The form did not ask Miss E to inform the Department for Work & Pensions (DWP) if she began permanently to live in a care home.

6. On 12 June 2007, Miss E completed a form designed to create an enduring power of attorney under the Enduring Powers of Attorney Act 1985. The form provided for the appointment of Mr B, Miss E’s nephew, as her attorney. The form provided for no restrictions or conditions on Mr B’s powers under the instrument. Previously, Miss E had executed a will that provided for Mr B to be the executor of her estate.

7. Upon Miss E’s subsequent incapacity, on 21 September 2010 the attorneyship was registered with the Office of the Public Guardian. Beforehand, on 13 August 2010 Miss E’s

GP wrote to Mr B that, in the light of her mental state, it would be “perfectly reasonable” to register the Enduring Power of Attorney.

*Miss E’s admission to a care home*

8. According to a care home fax dated 18 February 2015, Miss E was admitted to the care home on 20 March 2012. A local authority document, which authorised funding of the care home placement, gave a “placement start date” of 20 March 2012. As is well known, local authority provision of care home accommodation is means tested. Where a local authority-funded resident receives welfare benefits, they may well be liable to pay at least some of their benefits income to their local authority.

9. Mr B supplied the First-tier Tribunal with copy diary entries indicating that he visited Miss E at her own home on 9 April 2012 (i.e. after the date on which the local authority said she entered the care home) and, then, at the care home on 22 December 2012.

*Why the local authority were made Miss E’s appointee*

10. On 27 June 2012, Birmingham City Council’s Appointee and Court Deputies Department applied to be made Miss E’s social security appointee. The application was made on DWP Form BF 56. A covering letter stated Miss E was “mentally incapable of managing [her] own financial affairs” and “please see medical evidence enclosed to support my application”.

11. Form BF 56, as completed by the council:

- Ticked ‘yes’ in answer to the question “Are you enclosing supporting evidence that the person you are applying to act for is incapable of managing their own affairs?”;
- Ticked neither ‘yes’ nor ‘no’ in response to the question “are other family members or next of kin aware of your application to become the appointee?”;
- Contained the declaration “**To the best of my knowledge no other person or organisation has been legally appointed** to administer the affairs of’ Miss E (bold in the original);
- Contained a signature box “to be signed at interview” where the application was made by an organisation. The ‘date of interview’ was given as 27 June 2012 (i.e. the same

date as the covering letter). To my mind, the form was unsigned. The signature box contained only a large hand-written circle;

- Was not accompanied by any supporting medical evidence (at least, no such evidence was supplied to the First-tier Tribunal).

12. Form BF 56 contains a section for completion by DWP officials but, on the copy supplied to the First-tier Tribunal, this was left blank.

13. On 8 August 2012, the DWP granted the council's application and they were made Miss E's appointee. The decision record does not explain why. The DWP began paying state pension credit to the council, as Miss E's appointee, from 23 August 2012. Until 26 September 2012 these payments included an additional amount for severe disability. I believe Mr B thinks some of the payments received by the local authority were used to defray part of the costs of Miss E's care home placement.

14. On 14 November 2012, Mr B wrote to the DWP asking why Miss E had not been paid state pension credit since 16 August 2012. In fact, payments continued but were made to the local authority as Miss E's appointee. Mr B also supplied the DWP with evidence that he was the donee of an enduring power of attorney granted by Miss E and registered with the Office of the Public Guardian. The DWP's response, on 13 December 2012, was "we are unable to discuss with you any details relating to [Miss E] as you are no longer the appointed representative" (in fact, there is no evidence that Mr B was ever the 'appointed representative').

#### *The DWP's decision*

15. Miss E sadly died on 25 February 2013. As mentioned above, Mr B is the executor of her estate.

16. By letter dated 18 July 2013, the DWP informed Mr B that (a) between 23 August 2012 and 27 February 2013, Birmingham City Council received £821.28 in state pension credit payments in their capacity as Miss E's appointee, and (b) they also received some £900 in Attendance Allowance payments. The letter added "we will need to carry out a review of [Miss E's] case as at the date of her admission to the nursing home and we will contact you shortly about this".

17. On 18 July 2013, the DWP decided that, from 20 April 2012, Miss E was not entitled to the severe disability amount within state pension credit. That date was chosen because, in the DWP's view, (a) it was four weeks after she was admitted to the care home, and (b) entitlement to the premium ceased on that date. On 25 July 2013, the DWP wrote to Mr B stating "we believe" Miss E was admitted to a nursing home on 20 March 2012. The letter enclosed a form PC2 and asked Mr B to complete it "as if doing so on 20 March 2012".

18. On 7 September 2013, Mr B informed the DWP by letter that he was unsure of the date of Miss E's admission to her care home.

19. On 18 September 2013, the DWP explained to Mr B that they decided Miss E was admitted to the care home on 20 March 2012 because "this was the date given to us by the [home] themselves". The DWP's letter also informed Mr B that Birmingham City Council applied to be made Miss E's appointee on 28 June 2012 and "at that time, we were not aware of any other person acting on [Miss E's] behalf".

20. On 18 September 2013, the DWP wrote to Birmingham City Council, in their capacity as Miss E's appointee, informing them that Miss had been overpaid state pension credit because her award had not been adjusted to take account of her admission to a care home. The DWP superseded Miss E's award, deciding that she was not entitled to pension credit between 19 April 2012 and 26 September 2012. This generated an overpayment.

### **Proceedings before the First-tier Tribunal**

21. In his notice of appeal to the First-tier Tribunal, made after Miss E's death, Mr B wrote:

(a) the DWP assumed, without clear supporting evidence, that Miss E was admitted to a care home on 20 March 2012 but that was inconsistent with her attendance allowance ceasing in August or September 2012;

(b) he wished to challenge the DWP's decision to make Birmingham City Council her appointee for social security purposes. That decision failed to take into account that he had a "registered Attorneyship".

22. The DWP argued that Miss E's state pension credit award was "superseded and reduced" from 19 April 2012 because, by then, she was no longer entitled to the additional amount for severe disability.

23. On 16 February 2015, the First-tier Tribunal made Birmingham City Council a party to the appeal. The council did not make any substantive submissions.

24. On 24 March 2015, the DWP supplied the First-tier Tribunal with a supplementary submission arguing that Mr B, as Miss E's attorney, failed to discharge a duty to inform the DWP that she had been admitted to a care home. The basis for this surprising assertion is not explained. Had he been Miss E's appointee, he may well have had such a duty but, of course, his underlying grievance was that someone else was made her appointee.

25. The final hearing was held on 11 June 2015. Mr B attended and gave oral evidence. The DWP were represented at the hearing but the council were not.

26. The First-tier Tribunal dismissed the appeal. According to the tribunal, the only issue was the date on which Miss E was admitted to her care home. Mr B's complaints about Birmingham City Council's appointment were outside the Tribunal's jurisdiction. The tribunal found that Mr B gave truthful evidence but his memory of visiting Miss E at her own home on 9 April 2012 was simply a mistake. Miss E began to reside in a care home on 20 March 2012. That was a material change of circumstances and the DWP correctly superseded Miss E's award of state pension credit, to remove the additional amount for severe disability four weeks after this date. The Tribunal's statement of reasons does not explain its decision by reference to any legislative provision.

## **Legislative Framework**

### *State Pension Credit legislation*

27. Section 2 of the State Pension Credit Act 2002 requires the guarantee credit element of state pension credit to be calculated by reference to a claimant's "appropriate minimum guarantee" (section 2(2)). This guarantee is the sum of the standard minimum guarantee and "such prescribed amounts as may be applicable" (section 2(3)). Section 2(7) requires the prescribed amounts to include an amount for a claimant with a "severe disability". "Prescribed" means specified in, or determined in accordance with, regulations (section 17(1)). Section 17(2) authorises regulations to "make provision...as to circumstances in which persons are to be treated as being or not being severely disabled".

28. Regulation 6(4) of the State Pension Credit Regulations 2002 ("2002 Regulations") requires an additional amount within the appropriate minimum guarantee "if the claimant is treated as being a severely disabled person in accordance with paragraph 1 of Part I of Schedule I" to the Regulations. Paragraph 1 provides that a claimant is severely disabled "if, and only if" certain circumstances apply. These include, for a claimant without a partner, that

the claimant is “in receipt of attendance allowance”, no adult normally resides with the claimant and no person “is entitled to and in receipt of” a carer’s allowance in respect of the claimant (paragraph 1(1)(a)).

29. I note that, in paragraph 1(1)(a), attendance allowance and carer’s allowance are dealt with differently. The claimant must be ‘in receipt of’ attendance allowance but, in the case of carer’s allowance, no one can be ‘entitled to and in receipt of’ that benefit.

30. Paragraph 1(2)(a) of Schedule 1 to the 2002 Regulations provides that, in certain cases, a claimant “shall be treated” as in receipt of attendance allowance even though she is not. For example, “for any period before an award is made but in respect of which the allowance...is awarded”.

#### *Attendance Allowance for care home residents*

31. Entitlement to, and payability of, Attendance Allowance is governed by sections 64 to 67 of the Social Security Contributions and Benefits Act 1992 and the Social Security (Attendance Allowance) Regulations 1991 (“1991 Regulations”). Section 64 provides for disability-related conditions of entitlement. Section 67(2) authorises regulations to provide that an attendance allowance shall not be *payable* to certain care home residents. In other words, regulations under section 67(2) do not deprive a person of entitlement to attendance allowance only of the right to be paid.

32. Regulation 7(1) of the 1991 Regulations, which have effect as if made under section 67(2) of the 1992 Act, provides that a person shall not be paid any amount of an attendance allowance for any period during which she is resident in a care home and the costs of “qualifying services” are borne out of local or public funds. It is agreed that regulation 7(1) applied to Miss E – her care home placement was funded by a local authority. By regulation 8(1), the regulation 7(1) prohibition on payment does not apply for the first 28 days of a person’s residence in a care home.

#### *Appointees*

33. The Social Security (Claims and Payments) Regulations 1987 apply to most social security benefits, including state pension credit and Attendance Allowance. Regulation 33 confers power on the Secretary of State, on written application, to appoint a “person” to exercise, on behalf of one who is unable to act, “any right to which that person may be entitled and to receive and deal on his behalf with any sums payable to him”. ‘Person’ clearly includes an artificial person, such as a local authority. See the definition of “person” in Schedule 1 to the Interpretation Act 1978 and regulation 33(1) (a “natural person” may not be appointed unless over the age of 18).

34. Regulation 33(3) permits anything required by the 1987 Regulation to be done by or to the person who is unable to act to be done by or to the appointee (or a deputy).



35. The Secretary of State has power, at any time, to revoke an appointment (regulation 33(2)(a)). The 1987 Regulations do not make this power conditional on the satisfaction of any condition.

36. The Secretary of State's general power of appointment is not exercisable if a deputy with power to claim or receive benefit on behalf of the person has been appointed under the Mental Capacity Act 2005 (or, in Scotland, the person's estate is being administered by a judicial factor or any guardian acting or appointed under the Adults with Incapacity (Scotland) Act 2000, with power to claim or receive benefit).

37. The prohibitions on appointment in the 1987 Regulations are less extensive than in the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 ("2013 Regulations"). Under the 2013 Regulations, while the existence of a deputy still prevents an appointment from being made, an appointment is also prohibited where there is:

“[an] attorney with a general power, or a power to claim or receive benefit, [who] has been appointed by [the claimant] under the Powers of Attorney Act 1971, the Enduring Powers of Attorney Act 1985, the Mental Capacity Act 2005 or otherwise”.

38. Had Miss E claimed a benefit to which the 2013 Regulations apply, such as Personal Independence Payment, the DWP would not have been permitted to make Birmingham City Council her appointee in relation to that benefit.

39. There is no right of appeal to the First-tier Tribunal against a decision specified in Schedule 2 to the Social Security & Child Support (Decisions & Appeals) Regulations 1999. Paragraph 5(s) of Schedule 2 refers to a decision under regulation 33 of the Social Security (Claims and Payments) Regulations 1987 (an appointment decision).

## **Proceedings before the Upper Tribunal**

### *Grounds of appeal*

40. Before the First-tier Tribunal, the case proceeded on the assumption that entitlement to the amount for severe disability was lost 28 days after a person became a resident in a care home. The conditions for the additional amount, however, require a person to be “in receipt of attendance allowance”. The state pension credits regulations do not, as some other social security regulations do, require a linked benefit to be “payable”.

41. The appeal papers suggested that Miss E continued to receive Attendance Allowance for a number of months after entering her care home. In those circumstances, the legal basis for the DWP's supersession of Miss E's award of state pension credit with effect from 19 April 2012

was unclear. Permission to appeal was granted on the ground that, arguably, the First-tier Tribunal misdirected itself in law.

42. For two reasons, these proceedings have taken some time to determine. Initially, Mr B argued that the First-tier Tribunal's hand-written record of proceedings was partly illegible. Since the presiding judge no longer sat as a First-tier Tribunal judge, the Upper Tribunal could not obtain a typed copy of the record of proceedings. I felt able to decipher the hand-written record myself and shared my version with the parties none of whom disputed its accuracy. There was also an extended round of written submissions.

### *The arguments*

43. The Secretary of State supports this appeal. The Secretary of State's representative concedes that Miss E's entitlement to the severe disability element of state pension credit was to be determined by reference to her factual receipt of Attendance Allowance, not by reference to the date of her admission to the care home. However, the representative's initial written response argued that the appeal should be allowed and the case remitted to the First-tier Tribunal for it to determine the period during which Miss E was in receipt of Attendance Allowance.

44. Birmingham City Council's written response stated: "as we believe this is a dispute between [Mr B] and the DWP we confirm that we do not support the appeal". That was an odd stance. As appointee, the council were potentially liable to repay any overpaid state pension credit. Why would they decide not to support an appeal which, if successful, would result in a finding that there was no or a much reduced overpayment?

45. In his written reply, Mr B disagreed with the DWP's suggestion that this case should be re-heard by the First-tier Tribunal. He argued there was sufficient evidence on which the Upper Tribunal could re-decide the appeal brought against the DWP's state pension credit decision.

46. Like Mr B, I could not understand the Secretary of State's invitation to remit this case to the First-tier Tribunal for re-hearing. The Secretary of State's representative accepted that the only live issue was the period for which Miss E was in fact in receipt of Attendance Allowance. Surely that could be determined by the DWP consulting departmental records. For that reason, I gave further case management directions requiring the DWP to supply this information.

47. I was also concerned about the apparent handling of the council's application to be made Miss E's appointee. I directed the Secretary of State to provide a supplementary submission setting out whether, in his opinion, the local authority's application was properly dealt with. My directions said I was considering making some observations about the handling of the council's appointee application in the interests of good administration. The local authority were also permitted to provide a supplementary submission.

48. The DWP's supplementary response:

(a) agreed that the Upper Tribunal should re-make the First-tier Tribunal's decision and, in so doing decide that Miss E remained entitled to an amount for severe disability until 12 September 2012. Mr B did not dispute this suggestion;

(b) suggested that the "extended loop", written within the appointee application form's signature box, might be a signature;

(c) the DWP's handling of the council's appointee application was adequate. Mr B's enduring power of attorney did not prevent the council from being made Miss E's appointee under the 1987 Regulations although the representative conceded that it would have done under the 2013 Regulations.

49. No party requested a hearing of this appeal.

### **Conclusions**

50. I decide that the First-tier Tribunal's decision involved an error on a point of law. The Tribunal misdirected itself in law by assuming that entitlement to the severe disability premium ceased automatically once Miss E had been resident in her care home for 28 days. The First-tier Tribunal's decision is set aside.

51. Under the 2002 Regulation, the question was whether Miss E continued to be "in receipt" of attendance allowance. As I have explained above, Miss E remained entitled to attendance allowance, after she had resided in her care home for 28 days, although she had no right to be paid after this date.

52. In my judgment, "in receipt of", as used in paragraph 1 of Schedule 1 to the 2002 Regulations, means what it says. It is not in this context synonymous with 'payable' a concept which has tended to be interpreted as meaning properly or lawfully payable (*SMcH v Perth & Kinross council* [2015] UKUT 126 (AAC); *JF v Secretary of State for Work & Pensions and DB* (CSM) [2014] AACR 3). The legislator could have used the term 'payable' in the 2002 Regulations and, by so doing, made a clear link with section 67(2) of the Social Security Contributions and Benefits Act 1992. The term 'payable' is fairly often encountered in this legislative field (see *SMcH* and *JF* for examples).

53. The literal meaning of 'in receipt of' is simply that Attendance Allowance payments are received. Departing from this meaning would only be legitimate if the legislative context demanded it (*SB v HMRC* [2015] UKUT 0286 (AAC)). In my judgment, giving 'in receipt of' its natural and literal meaning does not result in an unworkable or irrational result. And, in fact, the DWP do not argue for the term to be interpreted other than literally. I conclude that the legislator intended to link the additional amount for severe disability to factual receipt of attendance allowance rather than its payability.

54. With the parties' agreement, I re-make the First-tier Tribunal's decision rather than remit for re-hearing. As set out above, I decide that Miss E remained entitled to the amount for severe disability within her state pension credit award until 12 September 2012.

**Social security appointees: some observations**

55. There is no right of appeal against an appointment decision of the Secretary of State made under the 1987 Regulations (although some appeals can involve appointment questions, for example *CIS/812/1992* which concerned whether, in determining good cause for delay in claiming benefit, account could be taken of the conduct of an individual who had been appointed in respect of certain benefits but not the late-claimed benefit). Like the First-tier Tribunal, I have no jurisdiction to consider Mr B's attempted appeal against the decision to make Birmingham City Council Miss E's appointee.

56. Despite that lack of jurisdiction, the Upper Tribunal's role as the principal precedent-setting body for social security gives it a more general interest in the proper administration of welfare benefits. For that reason, I wish to make some observations about the way in which Birmingham City Council's application to be made Miss E's appointee was handled. I make these observations based on the written evidence within the First-tier Tribunal appeal papers none of which has been disputed by Birmingham City Council or the DWP.

*Medical evidence in support of an appointee application*

57. The Secretary of State cannot make an appointment unless a claimant is "unable to act". The 1987 Regulations do not define what it means for a claimant to be unable to act. If anyone needed to decide the point, I suspect it would be decided that it means, or at least includes, lacking mental capacity within the meaning of the Mental Capacity Act 2005 to take decisions about matters related to the social security benefit/s in question.

58. Whatever the precise meaning of 'unable to act', it is I think clear that in many, if not all, cases it poses a question with a medical dimension. That is surely why applicants for appointment are required by form BF56 to supply supporting medical evidence. The paper trail in this case suggests that no such evidence was supplied by the council despite the application indicating that it was. Birmingham City Council are a party to these proceedings as they were before the First-tier Tribunal. At no point have the council argued that, despite the absence of medical evidence from the appeal papers, they did in fact supply supporting medical evidence. It seems safe to assume they did not.

59. I have sympathy for Mr B's sense of grievance about the DWP's decision to make the council Miss E's appointee despite their application being unsupported by medical evidence and failing to answer the question whether family members were aware of the application. Appointments are not minor matters or bureaucratic technicalities. They have very significant consequences. The person entitled to benefit loses the sole right to be paid and also finds that someone else is permitted to step into their shoes and deal with matters arising in relation to their benefits. I am not saying that this happened in Miss E's cases but it would be quite wrong if the DWP were to lower the evidential bar for appointee applications from local authorities. I find it difficult to see how the DWP could justify making the local authority Miss E's appointee on the council's application.

*Enduring and lasting powers of attorney: 1987 Regulations compared with 2013 Regulations*

60. As noted above, there is a significant difference between the appointment provisions of the 1987 Regulations and the Universal Credit etc. Regulations 2013. In the former case, in England and Wales only the existence of a deputy appointed by the Court of Protection bars an appointment. In the latter case, appointment is also barred if one of various types of attorneyship exist including the enduring power of attorney granted to Mr B.

61. Statutory attorneyships are far more common than Court of Protection-appointed deputies. According to the Office of the Public Guardian annual report for 2015/16, at the end of that year the Office supervised 57,122 deputyship orders but it had registered 1,870,393 instruments of attorney. And, during 2015/16, the Office received 547,021 new applications for registration of lasting and enduring powers of attorney.

62. The reason for the different approaches of the 1987 and 2013 Regulations is not obvious. DWP have not explained the reason why in their written submissions. If there is no good reason for the different approaches, the Secretary of State may wish to bring forward amendments to align the regulations. If there is a concern that this might nullify thousands of existing appointments under the 1987 Regulations, that could be dealt with by, for example, applying any amendments only to new applications for appointment.

*Enduring and lasting powers of attorney: relevance under the 1987 Regulations*

63. When the council applied to be made Miss E's appointee, they made the following declaration: "**To the best of my knowledge no other person or organisation has been legally appointed** to administer the affairs of' Miss E" (bold in the original). At this point, the council were funding Miss E's care home placement; she had become their 'service user'. I

simply observe that it is surprising that the council official who completed the form was unaware that Mr B held an enduring power of attorney. Statutory guidance issued under the Care Act 2014 provides:

“8.18 At the time of the assessment of care and support needs, the local authority must establish whether the person has the capacity to take part in the assessment. If the person lacks capacity, the local authority must find out if the person has any of the following as the appropriate person will need to be involved:

- enduring power of attorney (EPA)
- lasting power of attorney (LPA) for property and affairs
- lasting power of attorney (LPA) for health and welfare
- property and affairs deputyship under the Court of Protection
- any other person dealing with that person’s affairs (for example, someone who has been given appointeeship by the Department for Work and Pensions (DWP) for the purpose of benefits payments).”

64. While this guidance was not in force when Miss E entered her care home, it must surely reflect what was generally accepted good practice in 2012. It is, in my view, important that officers in local authority appointeeship and deputy teams consult their adult social care colleagues before applying to be made an appointee in order to ascertain whether a claimant has an enduring or lasting power of attorney.

65. The 1987 Regulations do not prevent an appointment where a person has created an enduring or lasting power of attorney. Why, then, does the standard form ask the applicant to declare whether they know of any person (not just a deputy) who has been legally appointed to administer the affairs of a claimant?

66. An enduring or lasting power of attorney embodies a claimant’s choice of an individual to take certain decisions in the event that the claimant is unable to do so. Given the provisions of the Enduring Powers of Attorney Act 1985 and the Mental Capacity Act 2005 (which includes a type of re-enactment of the 1985 Act), that selection must have been made at a time when the claimant had the relevant mental capacity. Where an enduring or lasting power of attorney extends to welfare benefits matters, an appointment of someone else under the 1987 Regulations potentially disrespects those wishes. It may be difficult to justify exercising the power of appointment in the face of opposition from the holder of registered lasting or enduring powers of attorney. I do not however discount the possibility that, in individual cases,

an appointment will be capable of justification. For example, if proceedings are underway in the Court of Protection for de-registration of the instrument that created a power of attorney.

67. It follows that it may be difficult to justify refusing to revoke an appointment under the 1987 Regulations at the request of the holder of a lasting or enduring power of attorney that extends to welfare benefits matters. Again, to do so would disrespect the wishes of a claimant given at a time when he or she possessed mental capacity. In the present case, the DWP's response to evidence that Mr B held an enduring power of attorney was not to revoke the council's appointment but (a) to assert that Mr B had no right to any information about Miss E's benefits because he was 'no longer' her authorised representative, and (b) to argue that, as Miss E's attorney, Mr B had been under a duty to notify the DWP of her admission to a care home. I would hope the DWP reflect on whether these actions were appropriate.

**(Signed on the Original)**

E Mitchell  
**Judge of the Upper Tribunal**  
**4 February 2018**