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13171934-01, 13137542-01, 13171289-01

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 October 2018

Before :

LORD JUSTICE BAKER

- -

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
AND IN THE MATTER OF DA AND OTHERS
AND IN THE MATTER OF BP AND OTHERS

Between :

THE PUBLIC GUARDIAN	**Applicant**
- and -	
DA (1)	**Respondents**
LB (2)	
PC1 (3)	
AG (4)	
CG (5)	
GT (6)	
MW (7)	

And between

THE PUBLIC GUARDIAN
-and
BP (1)
MP (2)
JR (3)
CW (4)

- -
- -

Thomas Entwistle (instructed by **the Public Guardian**) for the **Applicant**
The Respondents were not present nor represented
David Rees QC (instructed by **the Official Solicitor**) as **Advocate to the Court**

Hearing dates: 9 May 2018 and 13 September 2018

- -

Approved Judgment

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

.....

LORD JUSTICE BAKER

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

LORD JUSTICE BAKER :

1. This judgment concerns two test cases brought by the Public Guardian, by applications made under s.23 and Schedule 1 paragraph 11 of the Mental Capacity Act 2005, regarding the validity of words in lasting powers of attorney ("LPAs"). The first concerns words relating to euthanasia or assisted suicide, whereas the second concerns words as to the appointment of multiple attorneys. Although the substance of the issues to which the words are directed is very different in the two cases, there is considerable overlap in the legal argument, the active parties were the same in the two sets of proceedings (the Public Guardian and the Official Solicitor) represented by the same counsel, and it is convenient to consider both cases in one judgment.

Introduction

2. "A power of attorney is simply a formal arrangement, undertaken by deed, whereby one person ('the donor') entrusts to another person ('the attorney' or 'the donee') authority to act in his or her name and on his or her behalf. A power of attorney is a form of agency which has been recognised at common law and used for centuries to enable the affairs of the donor (the principal) to be conducted on his or her behalf by an attorney (the agent) while the donor is away on business, overseas or physically unwell" (Court of Protection Practice 2018, Lexis Nexis paragraph 3.1). At common law, a power of attorney is revoked by the supervening incapacity of the donor. Following an investigation report by the Law Commission, Parliament enacted the Enduring Powers of Attorney Act 1985 creating the "enduring power of attorney" which provided that a power of attorney that complied with certain statutory requirements as to format and registration would "endure" beyond the onset of incapacity. The Mental Capacity Act 2005 replaced enduring powers of attorney with new "Lasting Powers of Attorney", although all existing enduring powers of attorney continue in effect. The rationale for the change in the law, arising out of perceived problems with Enduring Powers of Attorney, is summarised at paragraph 3.56 of the Court of Protection Practice 2018. The principal statutory provisions are set out in ss 9 to 14 of the Act, and are supplemented by rules set out in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253 ("the 2007 Regulations").

3. S.57 of the Mental Capacity Act 2005 created a new statutory office-holder known as the Public Guardian to carry out a number of statutory functions concerning mentally incapacitated adults. Amongst those functions under s.58(1) are establishing and maintaining a register of lasting powers of attorney, receiving reports from donees of lasting powers of attorney, and dealing with representations about the way in which a donee of a lasting power of attorney is exercising his powers. The statutory provisions are supplemented by Part 4 of the 2007 Regulations and various Practice Notes. Under regulation 43, the Public Guardian "has the function of making applications to the [Court of Protection] in connection with his functions under the Act in such circumstances as he considers it necessary or appropriate to do so".

4. The relevant powers of the Court of Protection are set out in sections 22 and 23 of the Act. S. 22 provides inter-alia

> "(1) This section and section 23 apply if

(a) a person ("P") has executed or purported to execute an instrument with a view to creating a lasting power of attorney, or

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

(2) The court may determine any question relating to

(a) whether one or more of the requirements for the creation of a lasting power of attorney have been met;

(b) whether the power has been revoked or has otherwise come to an end."

S.23(1) provides:

"The court may determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one."

5. An LPA is defined in s.9(1) of the 2005 Act as

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

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

(b) P's property and affairs or specified matters concerning P's property and affairs,

and which includes authority to make such decisions in circumstances where P no longer has capacity."

Under s.9(2), an LPA

"is not created unless

(a) s.10 is complied with,

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

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

6. S.9(3) provides that

"An instrument which

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

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

confers no authority."

S.9(4) provides that

"the authority conferred by [an LPA] is subject to

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

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

7. Under Schedule 1 para 1(1), "an instrument is not made in accordance with this Schedule unless (a) it is in the prescribed form (b) it complies with paragraph 2, and (c) any prescribed requirements in connection with its execution are satisfied." Paragraph 2 of the Schedule specifies certain requirements as to the content of an instrument, including that it must include prescribed information about the purpose of the instrument and the effect of an LPA, certain statements by the donor and donee, and a certificate "by a person of a prescribed description" certifying that, at the time when the donor executed the instrument, he or she understood the purpose of the instrument and the scope of the authority conferred under it, that no fraud or undue pressure was being used to induce its creation, and that there is nothing else which would prevent an LPA from being created by the instrument.

8. The prescribed requirements for the execution of an LPA are set out in regulation 9 of the 2007 Regulations. The prescribed forms are contained in Schedule 1 to the 2007 Regulations. Since the introduction of LPAs in the 2005 Act, three versions of the property and affairs form and three versions of the health and welfare form have been prescribed. The current version 3 has been valid since 1 July 2015. The prescribed forms contain provisions for the donor to insert. In the first two versions, these provisions were described as "restrictions and/or conditions" and "guidance". In version 3, these labels have been changed respectively to "instructions" and "preferences". The notes to section 7 of the form explain that "your attorneys don't have to follow your preferences but they should keep them in mind" whereas "your attorneys will have to follow your instructions exactly". The scheme in effect requires that "instructions" are matters which the attorney must follow, whereas "preferences" are matters which the attorney must consider when exercising his powers, but is not obliged to follow.

9. In *The Public Guardian's Severance Applications* [2017] EWCOP 10 at paragraphs 45 to 47, District Judge Eldergill compared and contrasted the new terminology in the latest versions of the prescribed forms with the statutory language in s.9(4). He observed:

"45. It is always risky to depart from the statutory language when drafting forms and the adoption of the headings 'Preferences' and 'Instructions' in the forms introduced by the Amendment Regulations is potentially misleading.

46. The term 'instructions' is not synonymous with 'conditions or restrictions'.

47. Equally, the term 'preferences' is not synonymous with 'best interests' or a donee's duty when deciding what is in the donor's best interests to consider

anything written in section 7 of the form concerning the donor's wishes, feelings, beliefs and values, and the other factors to be considered by their donee(s): see s.4(6) of the 2005 Act."

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

10. Paragraph 3 of Schedule 1 to the Act provides:

> "(1) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form, it is to be treated by the Public Guardian as sufficient in point of form and expression.
>
> (2) The court may declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the agreement intended it to create a lasting power of attorney."

11. Paragraph 4 of the Schedule contains provisions as to applications and the procedure for registration of LPAs. Paragraph 4(1) stipulates that an application to the Public Guardian for the registration of the instrument must itself be made in the prescribed form and must include any prescribed information. Paragraph 5 provides that, subject to paragraph 11 to 14, the Public Guardian must register the instrument as an LPA at the end of the prescribed period.

12. Paragraph 11 provides as follows:

> "(1) If it appears to the Public Guardian that an instrument accompanying an application under paragraph 4 is not made in accordance with this Schedule, he must not register the instrument unless the court directs him to do so.
>
> (2) Sub-paragraph (3) applies if it appears to the Public Guardian that the instrument contains a provision which
>
> (a) would be ineffective as part of a lasting power of attorney, or
>
> (b) would prevent the instrument from operating as a valid lasting power of attorney.
>
> (3) The Public Guardian
>
> (a) must apply to the court for it to determine the matter under s.23(1) and
>
> (b) pending the determination by the court, must not register the instrument.
>
> (4) Sub-paragraph (5) applies if the court determines under s.23(1) (whether or not on an application by the Public Guardian) that the instrument contains a provision which
>
> (a) would be ineffective as part of a lasting power of attorney, or

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

(5) The court must

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

(b) direct him not to register the instrument.

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

13. The precise powers of the Public Guardian when considering whether or not to register an LPA were considered by the court in *Re XZ; XZ v The Public Guardian* [2015] EWCOP 35. XZ executed an LPA which stipulated a number of restrictions and conditions designed to ensure that his attorneys did not act until his incapacity had been unequivocally confirmed by two psychiatrists, whose opinion was subject to review by a "protector", and had endured for a minimum period of 60 days. The Public Guardian refused to register the LPA because he considered that the conditions imposed an unreasonable fetter on the attorneys' power to act and were, therefore, ineffective as part of an LPA. The court, (Senior Judge Lush), granted a declaration that the LPA did not contain any provisions which would render it ineffective and made an order that the Public Guardian register the instrument. The court held that the Public Guardian's function under paragraph 11 of Schedule 1 to the Act was limited to considering whether the conditions and restrictions in an LPA were ineffective as part of an LPA or would prevent the instrument from operating as a valid LPA. If he concluded that they could not be given legal effect, then he was under a duty to apply to the court for determination of the point under s.23(1). Otherwise, he had a duty to register the power. Neither the court nor the Public Guardian was concerned with whether a restriction that does not contravene the terms of the 2005 Act might pose practical difficulties in its operation. In this case, the Public Guardian had failed to identify any specific provision of the Act or the 2007 Regulations or the common law of agency that had been infringed by the provisions in XZ's LPA.

The proceedings

14. On 9 November 2017, the Public Guardian filed nine applications in form COP1 in respect of instruments purporting to create a lasting power of attorney which had been submitted for registration to his office. Each of the instruments contained provisions relating to euthanasia or assisted suicide. On 27 November 2017, the Public Guardian filed nine further applications in respect of other instruments, each of which contained provisions said to give rise to issues concerning the validity of the purported appointment of multiple attorneys. In each application, he sought a determination by the court pursuant to s.23(1) of the 2005 Act "as to whether it was appropriate to register the instrument as drawn, to register the instrument with amendments, or whether the Public Guardian must not register the instrument".

15. On 1 February 2018, I gave directions on paper listing the first series of applications for a preliminary oral hearing for case management directions. I directed that notice of the hearing should be given to the respondents but none of them was required to attend unless he or she so wished. I further directed that copies of the applications and

the order be served on the Official Solicitor with an invitation to consider whether he would act as Advocate to the Court. On 8 February 2018, I gave similar directions on paper in respect of the second series of applications. I also made transparency pilot orders in respect of both cases. At a hearing on 27 February, I gave case management directions in the first series of applications, in which I provided that each of the respondents could, if he or she so chose, make a statement setting out their position in respect of the application and attend the final hearing. I also granted the Public Guardian permission to withdraw two of the applications in respect of which agreement had been reached. At a further hearing on 1 March, I gave similar directions in the second series of applications, including giving permission to the Public Guardian to withdraw five of the applications in that series. The Official Solicitor duly accepted the invitation to act as Advocate to the Court.

16. The hearing of the first series of applications took place on 9 May 2018, and the hearing of the second series on 14 September 2018. At both hearings, the Public Guardian was represented by Mr Thomas Entwistle and the Official Solicitor by Mr David Rees QC. None of the respondents attended the hearings, although some of them submitted written responses. Both Mr Entwistle and Mr Rees prepared detailed written submissions on the issues for each hearing. I am extremely grateful to both of them for the clarity of their submissions and the insight which each has brought to the issues.

The first series of cases – Re DA and others

17. In the first series of cases, all the applications concerned provisions in LPAs for personal welfare which contemplate euthanasia or assisted suicide by the attorneys. In some cases, the provisions are expressed in mandatory terms which appear to render them "instructions", whereas in other cases they are expressed as wishes rendering them non-binding "preferences". I was informed by Mr Entwistle on behalf of the Public Guardian that about 120 cases of this sort arise every year and at present there is a substantial backlog. Mr Entwistle submitted that it is desirable to avoid having to refer every such LPA to the Court. The aim of the Public Guardian in bringing these applications is to be put in a position to provide guidance as to whether provisions of this sort are lawful and likely to be severed by the court. While it would be open to donors to take their own legal advice, or require an application to be made to the Court, it is anticipated that most cases would be resolved by agreement. This seems to me to be eminently sensible. I was told that until recently it had been the practice of the Public Guardian to write to donors of LPAs containing provisions of this nature inviting them to agree that they should be severed, but that this practice had been discontinued in the light of observations of District Judge Eldergill in *The Public Guardian's Severance Applications* [2017] EWCOP 10. Having read the District Judge's judgment, I do not think that he was intending to disapprove of this practice.

18. S.62 of the 2005 Act provides:

> "For the avoidance of doubt, it is hereby declared that nothing in this Act is to be taken to affect the law relating to murder or manslaughter or the operation of s.2 of the Suicide Act 1961 (assisting suicide)."

S. 2 of the 1961 Act, as amended, provides, in so far as relevant, as follows:

> "(1) A person ('D') commits an offence if
>
> (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and
>
> (b) D's act was intended to encourage or assist suicide or an attempt at suicide.
>
> (1A) The person referred to in subsection (1)(a) need not be a specific person (or class of persons) known to, or identified by, D.
>
> (1B) D may commit an offence under this section whether or not suicide, or attempt at suicide, occurs.
>
> ….
>
> (4) No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions."

19. In *R (Purdy) v DPP (Society for the Protection of Unborn Children intervening)* [2009] UKHL 45 [2010] 1AC 345, the House of Lords held that

> (1) the right to respect for a person's private life under article 8(1) of ECHR related to the way in which she lived, which included the way in which she chose to pass the closing moments of her life;
>
> (2) the requirement of article 8(2) that there should be no interference with the right under article 8(1) except such as was in accordance with the law required the court to consider whether there was a legal basis in domestic law for any such interference, whether the law or rule in question was sufficiently accessible to the individual affected and sufficiently precise to enable her to understand its scope and foresee the consequences of her actions so that she can regulate her conduct without breaking the law, and whether it was being applied in a way that was arbitrary or disproportionate;
>
> (3) the Code for Crown Prosecutors then in force did not satisfy the article 8(2) requirements of accessibility and foreseeability for a person seeking to identify the factors which were likely to be taken into account by the DPP in exercising his discretion under s.2(4) of the 1961 Act, and accordingly
>
> (4) the DPP was under a duty to clarify his position as to the factors which he regarded as relevant for and against prosecution in such a case and he would be required to promulgate an offence-specific policy identifying the facts and circumstances which he would take into account in deciding whether a prosecution under s.2(1) of the 1961 Act should be brought.

20. Following this decision, the DPP duly published a revised policy for prosecutors in respect of cases of encouraging or assisting suicide, which identified certain factors to be taken into account in determining whether prosecution was in the public interest. Mr Entwistle draws attention to a number of factors tending in favour of prosecution, including

- that the victim did not have the capacity to reach an informed decision to commit suicide

- that the victim had not reached a voluntary, clear, settled and informed decision to commit suicide

- that the victim had not clearly and unequivocally communicated his or her decision to commit suicide.

21. In ss.24-6 of the 2005 Act, Parliament has sanctioned the use of advance decisions to refuse medical treatment. S.24(1) defines an advance decision as:

> "a decision made by a person ("P"), after he has reached 18 and when he has capacity to do so, that if
>
> (a) at a later time and in such circumstances as he may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for him, and
>
> (b) at that time he lacks capacity to consent to the carrying out or continuation of the treatment,
>
> the specified treatment is not to be carried out."

Particular safeguards are provided in the case of life-sustaining treatment by s.25(5) and (6):

> "(5) An advance decision is not applicable to life-sustaining treatment unless
>
> (a) the decision is verified by a statement by P to the effect that it is to apply to that treatment even if life is at risk, and
>
> (b) the decision and statement comply with subsection (6).
>
> (6) A decision or statement complies with this subsection only if
>
> (a) it is in writing,
>
> (b) it is signed by P or by another person in P's presence and by P's direction,
>
> (c) the signature is made or acknowledged by P in the presence of a witness, and
>
> (d) the witness signs it, or acknowledges his signature, in P's presence."

Parliament chose not to extend the scheme of advance decisions to a decision by P to terminate his life.

22. The Public Guardian and the Official Solicitor agree that the issue to be determined in respect of the first series of cases is whether in each case the provision is ineffective within the meaning of Schedule 1 paragraph 11(2)(a) of the 2005 Act. It is important to stress that this case does not concern cases involving the giving or refusing of

consent to life-sustaining treatment. The effect of s.11(7)(c) and s.11(8) of the 2005 Act is to permit an LPA to include an express provision authorising an attorney to give or refuse consent to the carrying out or continuation of life-sustaining treatment, subject to any conditions or restrictions in the instrument. All of the individual LPAs under consideration in this case included a provision giving the attorneys the authority to give or refuse consent to such treatment. The issue arising is on a different question, whether instructions or expressed preferences as to actions which bring about the end of the donor's life are ineffective within the meaning of Schedule 1 paragraph 11(2)(a).

23. There is a substantial measure of agreement between the Public Guardian and the Official Solicitor as to the approach to be adopted by the court in determining that question. On behalf of the Official Solicitor, Mr Rees put forward a series of propositions, the majority of which were accepted by Mr Entwistle on behalf of the Public Guardian. Unless the instrument contains a provision which would be ineffective as part of a LPA, or would prevent it from operating as a valid LPA, the Public Guardian is under a statutory duty to register it. There is no residual discretion which permits him to decline to register an instrument merely because he considers that it would not be in P's best interest to do so: *Re XZ*, supra. If an LPA contains an instruction requiring the attorney to act in a manner that is inconsistent with the Act or the general law, it will generally be ineffective as part of the LPA. If the words used in a "preference" are purely precatory, then this expression of a wish cannot prevent the instrument from operating as a valid LPA, even if the wish is not capable of being given effect within the confines of the attorneys' current powers. Equally, words in "preferences" should not be considered to be "ineffective as part of an LPA" if they are capable of providing assistance to the attorneys as to how they should seek to exercise their powers, notwithstanding that the expressed wishes go beyond what the attorneys are permitted to do under the LPA. In oral submissions, Mr Rees warned against too prescriptive an interpretation of the statutory provisions, stressing that the court should not be striving to set aside or sever powers under an LPA unless it is clear that they meet the conditions for doing so under Schedule 1 paragraph 11. In this context, he reminded me of the observation of Nugee J in *Miles v The Public Guardian; Beattie v The Public Guardian* [2015] EWHC 2960 (Ch) at paragraph 19:

> " … It does seem to me that it is right that the Act should be construed in a way which gives as much flexibility to donors to set out how they wish their affairs to be dealt with as possible, the Act being intended to give autonomy to those who are in a position where they can foresee that they may in the future lack capacity …."

24. On the other hand, an attorney cannot use an LPA as a basis for carrying out an illegal act. As such, the Public Guardian and the Official Solicitor agree that a "preference" that the attorneys carry out an act which would on its face be a criminal offence should generally be treated as "ineffective as part of an LPA". Thus both an instruction to end a donor's life, or to assist in that process, and a preference that the attorney should do something amounting to ending the donor's life, or assisting in that process, are both ineffective. Such an instruction or preference, if complied with, would lead the attorney to act unlawfully, rather than act in a way which merely exceeds his powers.

25. The Public Guardian and the Official Solicitor part company on two points. First, Mr Rees on behalf of the Official Solicitor submits that the interpretation of an instruction or preference in an instrument is a matter of construction to be considered by reference to the words used by the donor. If the words used are expressed in mandatory terms, they should usually be seen as instructions, even if contained in the box on the form specified for preferences. Conversely, words used by the donor to indicate merely an expression of a preference should be regarded as such, even if contained in the box specified for instructions. On this point, Mr Entwistle demurs. He submits that the starting point should be the printed words on the form which stipulate, in respect of preferences, that "your attorneys don't have to follow your preferences but they should keep them in mind" and, in respect of instructions, "your attorneys will have to follow your instructions exactly".

26. Secondly, Mr Rees argued that a distinction should be drawn between those cases where a wish for the attorneys to carry out an illegal act is expressed in general terms, and those where the carrying out of the wish is contingent upon there being a change in the law. He submitted that, in the latter case, the provision is not "ineffective" but can rather be viewed as a valid expression of wishes intended to govern a contingency that may arise in the future if circumstances, and the law, change. Mr Rees submitted that there was no good reason why a donor should not express a wish that his life be ended if circumstances and the law so permitted and that such an interpretation was consistent with the flexible approach advocated by Nugee J in the ***Miles*** case as necessary to protect the personal autonomy of donors. On behalf of the Public Guardian, however, Mr Entwistle submitted that such provisions should nevertheless be severed. Although he acknowledged that questions about euthanasia and assisted suicide are matters of widespread public debate and the subject of serious proposals for reform, Mr Entwistle submitted that any relevant change in the law would have to provide, not merely that assisted suicide was no longer unlawful, but would have to permit an attorney to comply with an instruction or expressed preference in an LPA to bring about the donor's death. He argued that there is no prospect of the law being changed so as to allow an attorney to sanction the termination of the donor's life in this way. As a result, an interpretation that permitted all provisions made in contemplation of a change in the law would present the Public Guardian with difficult questions of construction and significant practical problems in seeking to identify those provisions in LPAs that were or were not ineffective.

27. I agree with the combined view of the Public Guardian and the Official Solicitor that an instruction or preference in an LPA directing or expressing a wish that an attorney takes steps to bring about the donor's death is instructing or encouraging someone to commit an unlawful act and therefore ineffective.

28. On the first issue between the parties, I prefer Mr Rees' argument. Applying Nugee J's approach requiring flexibility to ensure that the donor's autonomy is fully respected, I agree that an instruction is a direction in mandatory terms wherever it appears on the form. Thus, a stipulation in the "preferences" box that is clearly mandatory should be interpreted as an instruction. Equally, a provision in the "instructions" box may be couched in terms that make it clear that it is intended to be a preference.

29. On the second point, however, I accept Mr Entwistle's submission that instructions and preferences predicated on a change in the law are ineffective. It seems to me that

the ways in which the law could be changed in this field are so many and varied that permitting an LPA to be registered when containing an instruction or preference as to the attorney's actions should the law change would lead to uncertainty and confusion. Towards the end of oral submissions, Mr Rees suggested that a clause which stipulated that "if at any point it becomes permitted as a matter of English law for my attorney to make a decision that my life should be terminated in certain circumstances and those circumstances arise, then I express a wish for my attorney to make a decision that terminates my life" would meet the objections raised on behalf of the Public Guardian. But in the event that Parliament at some future point permits an attorney to take steps to terminate the donor's life, any change in the law is likely to be subject to detailed statutory provisions and guidance in a Code of Practice, the terms of which cannot at this stage be predicted. In those circumstances, for this court to give the green light to the inclusion in LPAs of any such provision at this stage would be likely to cause uncertainty and confusion. In those circumstances, the right course is to declare all such provisions, whether they be instructions or preferences, ineffective.

30. I now turn to the specific cases. In the light of my decision on the general principles, I can deal with the issues relatively briefly. In giving case management directions prior to the hearing, I gave permission for each of the respondents to the applications, namely the donors and their attorneys, to file a statement in response to the Public Guardian's application. Two of the donors duly filed statements, and I consider their responses below.

31. *DA* - In the preferences box, DA has written: "Should a vegetative existence arise (i.e. no prospect of a reasonable quality of life is possible) then life is to be terminated." Although inserted in the preferences box, this is expressed in mandatory terms. It is a straightforward instruction to the attorneys to carry out an unlawful act and is therefore ineffective.

32. *LB* – In the preferences box, LB has written: "If my life is impaired in such a way that my quality of life would be severely restricted, I would wish my attorneys to make the necessary arrangements which would lead to my demise."

33. In the case of LB, the donor replied to the direction for responses. She said that she had taken the wording from her mother's LPA and had subsequently drawn it to the attention of doctors treating her mother after she developed dementia and suffered a debilitating stroke. It was taken into account when decision was made to place her mother on palliative care. LB commented: "I thoroughly reject the comments made by the Office of the Public Guardian regarding this wording. It does not entice illegal behaviour. Rather it placed on me the responsibility to share the document with family members and with her medical team. My role was one of making the document, and her wishes, known so that the appropriate action could be considered."

34. In expressing a wish (i.e. a preference) for her attorneys to make the necessary arrangements which would bring about her demise (i.e. her death), LB is encouraging them to commit an unlawful act. The provision is therefore ineffective. It should be noted that LB has elsewhere in the LPA authorised her attorneys to give or refuse consent to the carrying out or continuation of life-sustaining treatment. Thus the contingency to which LB referred when discussing her own mother's treatment is provided for.

35. *PC1* – In the instructions box, the donor has written: "At the time of writing these instructions, assisted dying is not permitted under UK law but my Attorney must be aware that it is my wish that, when the time comes, I can choose to end my life on my own terms, whether or not this means travelling outside of the UK to a country where assisted dying is legal".

36. In his response to the Public Guardian, PC1 wrote: "Having full regard to the fact that whilst the Suicide Act 1961 decriminalised suicide it remained a criminal offence to 'encourage or assist the suicide or attempted suicide of another', I gave careful consideration to my wording … to avoid any possibility that it might be interpreted that I was requesting assistance in ending my own life. This was certainly not my intention. It will be my decision to end my life if and when the time is right and I am not asking my attorney to make this decision, merely to be aware of my wishes." On behalf of the Public Guardian, however, Mr Entwistle submits that the instruction clearly envisages the attorney assisting in ending the donor's life and is therefore ineffective as requiring the attorney to commit an unlawful act. Alternatively, in so far as it merely reiterates the donor's determination to make his own decision, it is has no effect as an instruction and should thus be declared ineffective on that ground.

37. In this case, I accept the Public Guardian's alternative submission. It seems to me that the statement in the form is neither an instruction nor a preference as to how the attorney should exercise his powers but rather a statement that the donor wishes to make his own decision. On that ground, it is therefore ineffective as part of an LPA.

38. *AG* – In the preferences box, the donor has written: "If the option is available at the time and my pain and suffering is unbearable and there is no prospect for an improvement, my preference is for active euthanasia to end my life with dignity in peace". In the instructions box, he has written: "Please do NOT try and keep me alive if the end result means I'll be nothing more than a vegetable". The preference is couched in ambiguous terms – "if the option is available" could mean that euthanasia is legal or merely that it is practically available. Whatever the intention, the preference is ineffective for the reasons already stated. Any expressed preference for an attorney to do an act that is unlawful is ineffective. As stated above, the ambit of a future change in the law is so unclear that any preference contingent on a change in the law is also ineffective.

39. *CG* – In this case, the donor, who is AG's wife, has used the same words as her husband, but switched boxes. Thus in the preference box she has written "Please do NOT try and keep me alive if the end result means I'll be nothing more than a vegetable" and in the instructions box she has written "If the option is available at the time and my pain and suffering is unbearable and there is no prospect for an improvement, my preference is for active euthanasia to end my life with dignity in peace". This is a clear example of a provision described as an instruction but using language which indicates that it should be interpreted as a preference. In any event, however, it is ineffective for the same reasons as the provision in her husband's LPA.

40. *GT* – In the preferences box, the donor has written: "In the event of my having a long-term diagnosis for a painful or incapacitating or undignified, but not necessarily terminal, condition, I wish my Attorney to do all possible to transit to Dignitas (in Switzerland) or similar". This provision clearly contemplates the attorney acting unlawfully since it is illegal, and a factor which the DPP considers justifying

prosecution, for anyone to take steps to bring about the death of another person at a point where the victim did not have the capacity to reach an informed decision to commit suicide. As set out above, Parliament has chosen not to extend the scheme of advance decisions to a decision by a person to end his own life. The preference expressed by GT is therefore ineffective.

41. *MW* – In the preferences box, the donor has written: "My attorneys should consider, if possible, aiding the end of my life should I become incapacitated to the extent that I have no ability to affect or comprehend my situation or environment". The phrase "if possible" contains the same ambiguity as the words used by AG and CG. Furthermore, as the cases on the disorders of consciousness show, the question whether a person has the ability to affect or comprehend his situation or environment is often difficult to determine. In any event, asking the attorney to consider aiding the end of the donor's life is expressing a wish that he consider an unlawful act. For all these reasons, this provision is ineffective.

42. I therefore accept the Public Guardian's submission that all of the provisions in the first series of cases are ineffective and should be severed.

The second series of cases – Re BP and others

43. The second series of cases all concern the appointment of attorneys in terms which are said to be inconsistent with the statutory provisions about such appointments. As with the first series of cases, the aim of the Public Guardian in bringing these applications is to be put in a position to provide guidance as to whether provisions of this sort are likely to be severed by the court. Originally there were nine such applications, but five have been withdrawn following agreement leaving four to be determined by the court. Some of the LPAs relate to property and affairs, and others to health and welfare. In two of the cases, the forms used were under the earlier regulations which invited the donors to place "restrictions and/or conditions" on the attorneys or to include "guidance". The two other cases involve the latest iteration of the form which uses the terminology "instructions" and "preferences" considered above.

44. The relevant statutory provisions are set out in s.10 of the 2005 Act and in particular subsections (3) to (5):

> "(3) Subsections (4) to (7) apply in relation to an instrument under which two or more persons are to act as donees of a lasting power of attorney.
>
> (4) The instrument may appoint them to act
>
> (a) jointly,
>
> (b) jointly and severally, or
>
> (c) jointly in respect of some matters and jointly and severally in respect of others.
>
> (5) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly."

The current version of the prescribed form includes, at section 3, under the heading "How should your attorneys make decisions?" a series of tick boxes enabling the donor to elect one of the options provided by s.10(4).

45. Both the Public Guardian and the Official Solicitor submit, and I accept, that the three options provided for in s.10(4) are exhaustive and that, if an instrument purports to appoint the attorneys to act on a different basis to those prescribed by the subsection, then it does not comply with s.10 and consequently, under s.9(2)(a), no LPA is created and, under s.9(3), the instrument confers no authority at all. It follows, as Mr Rees submits on behalf of the Official Solicitor, that, where the appointment of the attorneys is, under s.10(4)(c), to act jointly in respect of some matters and jointly and severally in respect of others, it is essential that the donor identifies the decisions that are to be taken jointly. Under s.10(5), a failure to do so would lead to an assumption that the attorneys are appointed act jointly. At the same time, the Public Guardian, and the Court, must, as Nugee J emphasised in the ***Miles*** case (supra), construe the Act in a way which gives as much flexibility as possible to donors to set out how they wish their affairs to be dealt with, in order to give proper respect to a donor's autonomy. Just as I consider the wording of the instrument to be more important than the boxes in which the wording appears, so I consider that, in the absence of evidence to the contrary, where there is an internal inconsistency in an LPA between the way in which the donor has ticked the box in section 3 of the form and the detailed instructions contained in section 7, it is the latter which should take precedence.

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

47. Finally, Mr Rees addresses the situation where an LPA requires the attorney to obtain the consent of a third party before acting. Mr Rees contends that there is nothing inherently objectionable in such a provision. As set out above, s.9(4) provides that the authority conferred by an LPA is subject not only to the provisions of the Act, in particular the general principles and the provisions as to best interests but also to any conditions or restrictions stipulated in the instrument. Mr Rees submits that there is nothing in the Act to prevent the donor imposing all kinds of restrictions upon the

exercise of the attorney's powers including a requirement to obtain the consent of a third party before the powers are exercised. Although such a restriction potentially limits the attorney's powers to act, it does not turn the third party into an attorney or alter the attorney's status as the person who ultimately makes the decision on behalf of the donor. I agree with Mr Rees' submissions on this issue. Restrictions of this kind are consistent with the underlying principle that respect must be given wherever possible to the donor's autonomy.

48. I now turn to the individual cases in this series.

49. *BP and MP* – These donors are husband and wife and their LPAs are in the same terms and it is therefore convenient to consider their cases together. They have made LPAs for health and welfare and separate LPAs for property and affairs. It is these LPAs that have been made using the 2007 prescribed forms in which the donors are invited to place "restrictions and/or conditions" on the attorneys or to include "guidance".

50. All four LPAs appoint two attorneys (including the other) to act jointly and severally, but each imposes a restriction that:

> "If my spouse is capable of acting, my attorneys other than my spouse shall not act in any manner unless my spouse is unable to act on their own in that matter."

51. The Public Guardian submits that this restriction is inconsistent with the power being exerciseable jointly and severally. In addition, he submits that it is unclear what is meant by "unable to act on their own in that matter". He therefore contends that s.10 has not been complied with so that none of the instruments creates a valid LPA. The Official Solicitor agrees that this instruction means that all the instruments breach s.10(4) and are thus not capable of taking effect as LPAs. Mr Rees observes that it would be possible for BP and MP to give effect to their stated intentions by the creation of a single LPA under which they appointed their spouse as the sole attorney and then appointed the remaining attorneys to act as replacement attorneys under s.10(8)(b). The Official Solicitor has considered whether it would be possible for the court to construe the instruments in this way, but has concluded that such a construction is probably unrealistic.

52. I agree with the submissions made on behalf of the Public Guardian and the Official Solicitor. The instruction that "if my spouse is capable of acting, my attorneys other than my spouse shall not act in any matter unless my spouse is unable to act on their own and that matter" means none of the instruments complies with s.10(4) and does not therefore create an LPA. I am informed that both BP and MP have indicated that they are content for the offending words to be severed by the Court.

53. *JR* - This case concerns an LPA for health and welfare under which the donor appointed his wife and two others as attorneys to act jointly and severally. The instrument, however, also included the following instruction:

> "The Primary Power of Attorney is Mrs [JR] should she survive her husband and be of sound mind and will be the decision-maker. [The other two attorneys] are secondary PAs should Mrs [JR] not be of sound mind or deceased."

54. The Public Guardian submits that this instruction is inconsistent with the nature of a joint and several appointment. The Official Solicitor agrees. Again, Mr Rees points out that the donor could have achieved his aim by appointing his spouse as sole attorney and the others as replacement attorneys.

55. Once again, I agree with the submissions made on behalf of the Public Guardian and the Official Solicitor. The instruction means the instrument does not comply with s.10(4) and does not therefore create an LPA. I am informed that JR has indicated that he is content for the offending words to be severed by the Court.

56. *CW* - In this case, the donor executed a document which purported to be a property and affairs LPA in which she appointed her husband as a sole attorney and named her two children as replacement attorneys. The instrument also included the following instruction in section 7 of the form:

> "In the event that I no longer have mental capacity and cannot take decisions I direct my principal Attorney [her husband] to obtain the consent of both of my children (mentioned above) before doing the following:
>
> 1. Sale, mortgage or other major disposition of my family home.
>
> 2. In the choice of a nursing home for me if that becomes necessary for my welfare.
>
> 3. Spending more than £10,000 per annum of my money."

57. It will be seen that this clause is drafted in a way that requires the attorney to obtain his children's consent before taking certain steps. It does not turn the children into attorneys or alter the attorney's status as the person who ultimately makes the decision on behalf of the donor. On behalf of the Public Guardian, Mr Entwistle submits that this provision should be construed as a condition or restriction specified in the instrument within the meaning of s.9(4)(b) and therefore does not require severance and should be allowed to stand. On behalf of the Official Solicitor, Mr Rees agrees with the general proposition. Both counsel point out, however, that the second matter mentioned in the instruction – the choice of a nursing home for the donor if it becomes necessary for her welfare – relates to a personal welfare decision as opposed to a property and affairs decision is therefore ineffective as part of a property and affairs LPA, and should therefore be severed.

58. I agree with both advocates that the provision requiring the attorney to obtain the children's consent before taking certain steps should be construed as a condition or restriction specified in the instrument within the meaning of s.9(4)(b) and therefore does not require severance. But I agree with Mr Rees's submission that the words relating to the nursing home must be severed but in every other respect the instruction is valid and the instrument may be registered as an LPA.

59. I would be grateful if counsel would agree a form of words for an order or orders reflecting my decisions on the issues in these two series of cases.