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Court of Protection Note

Severed Lasting Powers of Attorney

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1. This brief note summarises some of the Court of Protection decisions involving the severance of Lasting Powers of Attorney relating to the appointment of multiple attorneys/donees.[1] Section 10(4) of the Mental Capacity Act 2005 enables two or more donees to be appointed to act '(a) jointly, (b) jointly and severally, or (c) jointly in respect of some matters and jointly and severally in respect of others'. Jointly means 'together'; severally means 'independently'. A joint appointment therefore requires attorneys to act together, unanimously; whereas a joint and several appointment allows an attorney to act either with or independently of the others. Any uncertainty as to whether the appointment was on the basis of (a), (b) or (c) will be resolved on the basis that it was made jointly: MCA s.10(5).

2. The following decisions provide examples of donors making errors in the appointment of their attorneys.

(a) Joint appointments

3. A donor cannot permit joint replacement attorneys to act solely if one is unable or unwilling to act: *Re Warner* (31.8.10). Nor can s/he require at least two attorneys to act where three were appointed: *Re Moore* (26.10.10). Attempting to empower attorneys to jointly decide on "changing my will" would also be severed as there is no authority in the MCA to change a donor's will; if the donor lacks testamentary capacity the Court would have to make a statutory will: *Re Cranston* (18.2.11). "My attorneys may act on the contents of my will" was also severed in *Re Wheeler* (25.7.11) because:

> *"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."*

[1] We use the terms 'donees' and 'attorneys' interchangeable.

(b) Joint and several appointments:

4. If one of the attorneys is under 18 at the time of appointment, they will be severed due to MCA s.10(1)(a): *Re Brindley* (11.5.11). A donor cannot appoint attorneys to act "together and independently", only to then require them to act together: *Re Jenkins* (2.9.08). Nor can s/he appoint them jointly in relation to selling a house or deciding on life-sustaining treatment, and jointly and severally for everything else: *Re D'Argenio* (9.6.10). Nor can two of three attorneys be required to act at any one time when all are appointed on a joint and several basis: *Re P* (9.6.09). The following restriction in *Re Cotterell* (3.8.10) was held to be incompatible with a joint and several appointment:

> *"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."*

5. Similarly in *Re Ferguson* (26.10.10) both of the following restrictions were severed because they were incompatible:

> *"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."*

6. The donor cannot require a majority attorney decision: *Re P Crook* (2.7.10); or require one attorney to defer to the wishes of another: *Re Davies* (5.7.10); or to "take the lead in all decisions": *Re Hartup* (28.10.10); or require "major decisions" to be jointly agreed: *Re Lan* (10.8.10); or give priority to the eldest: *Re Williams* (16.11.11). However, for the donor to require the order of priority to be determined "where possible" may merely amount to a statement of wishes and avoid severance: *Re Weyell* (2.12.10).

7. A professional attorney cannot be required to determine the remuneration of a lay attorney where both are joint and several: *Re Dowden* (20.7.12).[2] Having jointly and severally appointed A and B, the donor cannot direct that "B is only to act as attorney in the event of A being physically or mentally incapable of acting in this capacity". To achieve that end, B should have been a replacement attorney: *Re Bratt* (14.9.09). Similarly, joint and several replacement attorneys cannot be invited to decide which shall serve as attorney: *Re Wormsley* (24.10.11). Nor can the donor appoint a replacement attorney to take over from a replacement attorney or appoint an office holder as it

[2] 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.

must be an individual or a trust corporation: *Re McGreen* (19.4.12).[3] Similarly an attorney cannot appoint a substitute or successor to him or herself: *Re Swift* (30.3.10).

8. A replacement attorney cannot be directed to act if the original attorneys are "not available through travel or living abroad or any other circumstances that may prevent or restrict their capacity to act"; they can only be replaced if an event identified in MCA s.13(6)(a) occurs: *Re Jenkins* (2.9.08) and *Re Tucker* (9.12.11).

(c) Joint for some, joint and several for others

9. A joint and several appointment requires the giving of joint and several powers; so "Major capital expenses jointly. Day to day expenses [attorney] A" would not suffice because attorney B has no authority to act independently of A: *Re Freeman* (17.8.11).[4] Where four attorneys are appointed, the donor cannot require one of them to act alone for so long as they are able to do so. The lawful approach would have been to appoint a sole attorney, with the remainder as replacement attorneys: *Re Warren* (10.12.10).

10. In *Re Ingham* (15.8.11), four attorneys were appointed jointly for some decisions, jointly and severally for others, with the following direction:

> *"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."*

Directions B and C had to be severed because they were incompatible with the joint appointment: if one attorney ceased to act, the matters to be decided jointly could not be decided by the continuing appointments.

11. Directing "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" was incompatible with a joint appointment and too uncertain so "as much as possible and always" was severed: *Re Edmonds* (12.11.12).

Fettering an attorney's authority

12. A donor cannot subject the decisions of their property and affairs attorney to the views of their personal welfare attorney or some other person, such as a doctor, or require an independent

[3] MCA s. 19(2) 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'.
[4] "Major" was also severed as the term was too uncertain.

advocate to adjudicate between them in the event of a dispute: *Re Begum* (24.4.08). Similarly, a third party cannot be joined in the decision-making process of the attorneys: *Re Reading* (25.6.08).

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