



## **BUILDING A SYSTEM WE CAN TRUST**

IS THE MENTAL CAPACITY ACT FIT FOR  
PURPOSE 20 YEARS ON?

Mark Dunkley

## **About the author**

Mark Dunkley is a long-standing member of the Society of Conservative Lawyers who has previously served on the Executive Committee and as Hon Treasurer. He is a retired Solicitor and former Chair of the Society of Trust and Estate Practitioners (STEP) Worldwide Mental Capacity Special Interest Group Steering Committee.

The author is grateful for the contributions to this paper from Society members, Simon Randall CBE, a former Solicitor, and Tristan Honeyborne, a practising Solicitor.

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## FOREWORD

The infirmity of advancing years is a fact of life. Amongst the challenges to which it gives rise, is the management of an individual's affairs. The grant of a Power of Attorney is a common arrangement by which the affairs of a person of declining capacity are handled by a friend or relation. Of all the types of work handled by solicitors, the setting up, and occasionally supervising, of Powers of Attorney is one of the least publicised and least known about.

In most cases attorneys work diligently and faithfully, but not always. Cases do come to light in which an "attorney", often a friend or relation to whom power has been given, has acted not merely incompetently, but with outright dishonesty. What safeguards currently exist? And what safeguards ought to exist?

Those are the questions addressed in this paper by an expert in this field, Mark Dunkley, a past Chair of the Worldwide Mental Capacity Special Interest Group Steering Committee of the Society of Trust and Estate Practitioners, who argues persuasively that, after 20 years of the Mental Capacity Act 2005, the time is now ripe to review its effectiveness in this respect. He proceeds to suggest some sweeping reforms.

I am delighted the Society of Conservative Lawyers has found time to study an area which attracts too little public attention. I commend this paper to anybody interested in an important aspect of social law.

*The Rt Hon Lord Hunt of Wirral*

## BACKGROUND

The Mental Capacity Act 2005 (the "MCA")<sup>1</sup> came into force in 2007<sup>2</sup> to introduce Lasting Powers of Attorney ("LPAs"), replacing Enduring Powers of Attorney ("EPAs"<sup>3</sup>). Enduring Powers of Attorney cannot validly be created and executed post-30 September 2007, but if validly created and executed before 1 October 2007, they remain valid and effective.

Powers of Attorney are documents by which a Donor can formally, and legally, delegate authority to others to make decisions on their behalf in extreme situations, such as whether the Donor continues to receive life-sustaining medical treatment if the Donor has a terminal medical diagnosis. These powers and are incredibly important and are usually donated to friends, or close family. Powers of Attorney are 'creatures of statute', that is to say they exist entirely under a statutory framework, and they are the only way under English law for a Donor to give someone power to make decisions on their behalf should they lose mental capacity.

Twenty years on, practitioners and the public are now quite familiar with the scheme (there are, we believe, around four million LPAs in existence)<sup>4</sup>. The road has not been straightforward and this paper, by reference to some hard cases – i.e. difficult real-life examples – argues that the time is ripe to revisit and improve the system.

- **HARD CASE ONE: KAREN WAKELING (age 47)**

Between October 2009 and June 2019, Ms Wakeling stole nearly £90,000 from her mother, who was in her 80s and had dementia, and for whom she had been appointed as her Attorney.

According to reports in the Eastern Daily Press (30 January 2020) and the Daily Mail (11 June 2020), she had spent the money stolen variously on a luxury car, lingerie, beauty treatments, piercings, groceries, nights out, trips away and to pay off her credit card bills, as well as to pay for her 40th birthday party. Upon conviction, she was jailed for two years.

The system failed to prevent the abuse, and this is but one of many examples of similar cases that have made their way through the Courts (and into the media).

- **HARD CASE TWO: DAVID BICKEL (age 58)**

Mr Bickel was a former soldier specialising in bomb disposal and was appointed by his 78-year-old father to act as his Attorney under an LPA (Property & Financial Affairs). Over a six-year period (2015 to 2021), and while his father was living with Alzheimer's Disease, he stole almost £500,000, leaving his father with just 50p to his name.

The scale of his wrongdoing came to light when his father was evicted from his care home for non-payment of fees (there was more than £85,000 owing) and his father then died aged 84.<sup>5</sup>

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<sup>1</sup> *Mental Capacity Act 2005*, Section 9 [[www.legislation.gov.uk/ukpga/2005/9/section/9](http://www.legislation.gov.uk/ukpga/2005/9/section/9)]

<sup>2</sup> The change from Public Guardianship Office to the Office of the Public Guardian (OPG) was made by the *Mental Capacity Act 2005*, following the repeal of Part 7 of the *Mental Health Act 1983*.

<sup>3</sup> *Mental Capacity Act 2005*, Section 29 [[www.legislation.gov.uk/ukpga/2005/9/section/29](http://www.legislation.gov.uk/ukpga/2005/9/section/29)]

<sup>4</sup> Office of the Public Guardian. *Annual Report and Accounts 2023 to 2024*, 23 July 2024 [<https://assets.publishing.service.gov.uk/media/66a1092ffc8e12ac3edb03ff/opg-annual-report-and-accounts-2023-to-2024.pdf>]

<sup>5</sup> Reported in the *Eastern Daily Press*, 29 March 2024.

### ■ **HARD CASE THREE: DAVID EGGLETON (age 71)**

Mr Eggleton, acting under a Power of Attorney given to him in August 2017, squandered around £600,000 of his aunt's wealth variously on holidays, cars and buying Bitcoins. His aunt had resided at a care home in Wembley and when she became suspicious of him, she revoked her Power of Attorney in June 2020.

Unfortunately, her Standing Order payment for her home fees "bounced" and she died on 13 February 2021.

He was prosecuted for, and convicted of, Fraud and Perverting the Course of Justice and sentenced to 5 years and 6 months imprisonment for the Fraud offence, and a further 8 months (to run concurrently) for the Perverting the Course of Justice offence at Swindon Crown Court on 19 January 2024<sup>6</sup>.

These cases are but the tip of a significantly sized iceberg: the Office of the Public Guardian ("OPG") explained in its 2017/18 Annual Report<sup>7</sup> that it had received 5,245 safeguarding referrals of cases of possible and alleged abuse during that year. The number of cases investigated by the OPG reduced significantly during and immediately after COVID-19 (to 2,089 in 2021 from 3,099 the year before), which we may reasonably expect was due to the administrative hurdles caused by the COVID-19 lockdowns, rather than any significant real-world fall in incidences. In its 2024 Annual Report, the OPG confirmed it had investigated only 3,647 alleged financial and other abuse – it is likely that many thousands have been missed out.

## WHAT THE STATISTICS SAY

The Office for National Statistics ("ONS") has estimated that 2023, the amount stolen by fraud of all types was £2.3 billion<sup>8</sup>. In the context of increasing numbers of elderly people, those likely to be living with Alzheimer's Disease and other forms of dementia, Age UK analysed the Crime Survey for England & Wales 2017–18<sup>9</sup> and found that people aged 50+ in England and Wales became a victim of fraud every 40 seconds<sup>10</sup>. Previous Age UK research had found that 43% of people aged 65+ believed that they have been targeted by fraudsters<sup>11</sup>.

The Powers of Attorney Act 2023 introduced additional safeguards. These allowed:

- certain errors to be repaired online
- identity checks to be made to prevent fraud
- LPAs to be made digitally
- expedition of the Objections Process
- widened the class of people who could object to registration
- Chartered Legal Executives to certify copies of LPAs.

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<sup>6</sup> Reported on BBC News Online, 1 August 2024.

<sup>7</sup> Office of the Public Guardian. *Annual report and accounts 2017/2018*, 19 July 2018 [<https://assets.publishing.service.gov.uk/media/5b4c941e40f0b61869a245cb/opg-annual-report-and-accounts-2017-to-2018.pdf>]

<sup>8</sup> Office for National Statistics. *Crime in England and Wales: year ending September 2023*, 25 January 2024 [[www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2023](http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2023)]

<sup>9</sup> Office for National Statistics. *Crime Survey for England and Wales 2017–18*, 25 April 2019. 34, 715 people aged 16 and over living in households in England and Wales were interviewed about their experiences of crime in the 12 months prior to the interview (which were conducted between January – December 2018).

<sup>10</sup> Age UK. *Older person becomes victim of fraud every 40 seconds*, 30 July 2019 [[www.ageuk.org.uk/latest-press/articles/2019/july/older-person-becomes-fraud-victim-every-40-seconds](http://www.ageuk.org.uk/latest-press/articles/2019/july/older-person-becomes-fraud-victim-every-40-seconds)]

<sup>11</sup> Age UK. *Applying the brakes: slowing and stopping fraud against older people*, March 2018. [[www.ageuk.org.uk/siteassets/documents/reports-and-publications/reports-and-briefings/safe-at-home/rb\\_mar18\\_applying\\_the\\_brakes.pdf](http://www.ageuk.org.uk/siteassets/documents/reports-and-publications/reports-and-briefings/safe-at-home/rb_mar18_applying_the_brakes.pdf)]

However, it must be said that the Act represents a significant lost opportunity to radically improve, tighten and enhance the safeguards built into the fabric and schematic of the original legislation.<sup>12</sup>

Over the years, Age UK has undertaken substantial research and continues to provide advocacy in this field. Its 2015 report "Only the tip of the iceberg: Fraud against older people"<sup>13</sup> is well worth reading. Three key areas of potential financial abuse under Powers of Attorney are: (1) withholding money, (2) stealing money and (3) restricting the use of finances, or seeking to do so, including by using coercive and other control.

## WHAT THE PROFESSIONALS SAY

Solicitors have, for many years, noted and commented on the potential for abuse in the system and are obviously gatekeepers regarding reporting and raising awareness. Here is but a short list of interesting commentary:

- Jenny Carter of Coodes LLP, "Suspecting a Power of Attorney of financial abuse: what can you do?" (31 May 2022).<sup>14</sup>
- Sophie Mass of Kingsley Napley LLP, "Financial Abuse: What do you need to know?" (2 February 2024).<sup>15</sup>
- Sue Mitchell, an investigative journalist, reports on the BBC about Craybeck Law and a non-Solicitor Partner named Ron Hiller, which reveals chilling information and suggests the need for great care in choosing a suitable and reliable Attorney (9 December 2024)<sup>16</sup>

## WHAT SHOULD BE DONE?

My proposals for change are as follows:

1. **Merge the Court of Protection with the OPG**, to save the significant costs of running the two bodies in parallel and increase efficiency, flexibility and awareness between them. Any cost-savings achieved could then be directed to:
  - reduce the current excessive delays at both bodies,
  - better policing to root out wrongdoing,
  - make plainer their roles, responsibilities and the risks of acting,
  - education – introduction of and help towards funding mandatory annual training for Attorneys and Deputies.

A Court of Protection Deputy will need to be appointed upon application, if:

- no LPA or other valid, extant Power of Attorney is in place, and
- the relevant protected/mentally incapable person has lost, or never had, sufficient mental capacity to manage their Property & Financial Affairs generally.

Both the OPG and the Court of Protection should have similar aims to educate, inform and to raise

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<sup>12</sup> Human Law. *Why New Powers of Attorneys Act Will Not Stop LPA Fraud*, 7 February 2024 [[www.human-law.co.uk/\\_cmroot/human-law.co.uk/blog/why-new-powers-of-attorneys-act-will-not-address-fraud](http://www.human-law.co.uk/_cmroot/human-law.co.uk/blog/why-new-powers-of-attorneys-act-will-not-address-fraud)]

<sup>13</sup> Age UK. *Only the tip of the iceberg: Fraud against older people*, April 2015 [[www.ageuk.org.uk/siteassets/documents/reports-and-publications/reports-and-briefings/safe-at-home/rb\\_april15\\_only\\_the\\_tip\\_of\\_the\\_iceberg.pdf](http://www.ageuk.org.uk/siteassets/documents/reports-and-publications/reports-and-briefings/safe-at-home/rb_april15_only_the_tip_of_the_iceberg.pdf)]

<sup>14</sup> <https://coodes.co.uk/2022/05/suspecting-a-power-of-attorney-of-financial-abuse-what-can-you-do>

<sup>15</sup> [www.kingsleynapley.co.uk/insights/blogs/dispute-resolution-law-blog/financial-abuse-what-you-need-to-know](http://www.kingsleynapley.co.uk/insights/blogs/dispute-resolution-law-blog/financial-abuse-what-you-need-to-know)

<sup>16</sup> [www.bbc.co.uk/mediacentre/2024/sue-mitchell-returns-new-investigative-series-will-power-detectives-bbc-radio-4](http://www.bbc.co.uk/mediacentre/2024/sue-mitchell-returns-new-investigative-series-will-power-detectives-bbc-radio-4)

awareness of the law and to seek to highlight and prevent abuse.

2. **The current safeguards and protections are too easily circumvented and avoided by attorneys acting and continuing to act under General Powers of Attorney (GPAs).** These are not registrable and are entirely common-law documents that exist by virtue of a confusing, often competing and conflicting, Statutory framework. They can be prepared quickly, only need execution by the Donor and come into effect as soon as they are signed.

As a matter of law, a GPA becomes invalid once a Donor has generally lost mental capacity, dies or becomes bankrupt, the sole Attorney becomes bankrupt, or the Donor expressly revokes it by Deed. However, there is no rigorous or foolproof way of checking that the Donor still actually has mental capacity (and many third parties that rely on the power might not bother to check this).

Delays in administration by state authorities play an important role in encouraging the proliferation of GPAs. At present, it can take up to six months to register an LPA or up to a year to obtain a Deputyship Order, creating a lacuna that makes it more likely for people to use the older-form GPAs under the Powers of Attorney Act 1971<sup>17</sup> instead for reasons of speed, convenience and simplicity.

3. **The five general principles underpinning the Mental Capacity Act 2005, set out in Section 1 of the Act, are inadequate or insufficient for life in 2025.** To achieve better protection and safeguards, they need to be improved or re-framed to deter wrongdoing, malfeasance or misfeasance by those appointed in positions involving potential enormous wealth or very significant trust.
4. **Training for bank and financial institution staff.** Introduce and promote a structured and compulsory education and training course, maybe through professional bodies such as the Society of Trusts and Estates Practitioners (“STEP”).

The course would be supported and contributed to by the Court of Protection and the OPG, and delivered by a competent, appropriate and duly appointed commercial education provider on a cost-effective basis.

It would provide a consistent, reliable and legally compliant standard approach and treatment of Attorneys and Deputies when performing their duties, to better inform interactions, and avoid conflicts, misunderstandings or misrepresentations of the law.

It should cover awareness and responsibilities on gifting and warning signs. It should also include compulsory training for financial deputies and attorneys on statutory gifting and Statutory Will applications to the Court of Protection when these are relevant.

5. **Require attorneys acting under registered LPAs (and EPAs) to:**
  - i. **produce and file annual accounts** of all financial transactions made and arranged under the LPA or EPA, and
  - ii. **be bonded under Indemnity Bonds** with reputable insurers at the expense of the Donor's estate, as is required for financial deputies currently. This is to ensure that all are of sufficient financial means to honour and make good the Indemnity Bond amount, fixed for the particular case by the new proposed Court of Protection/OPG.
6. **Require attorneys or deputies to engage in and pass an annual CPD** (Continuing Professional Development), or equivalent, online training test to a required minimum level, particularly on gifting in accordance with the Giving Gifts Guidance, and Statutory Wills<sup>18</sup>.

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<sup>17</sup> Powers of Attorney Act 1971 [[www.legislation.gov.uk/ukpga/1971/27](http://www.legislation.gov.uk/ukpga/1971/27)]

<sup>18</sup> Office of the Public Guardian. *Legal guidance for deputies and attorneys on the rules about giving gifts on behalf of the person they act for*, 11 September 2024 [[www.gov.uk/government/publications/giving-gifts](http://www.gov.uk/government/publications/giving-gifts)]

7. **Establish regular dissemination of the outcomes of engagements between the Court of Protection and the OPG**, via the Public Guardian and the Senior Judge, the intention being to better protect Donors and vulnerable and protected persons.
8. **Improve understanding and awareness of the roles of the Senior Judge, the Court of Protection, the Public Guardian and the OPG**, through the use of online videos and social media, including awareness on the requirements and limits applicable to gifting in accordance with the Giving Gifts Guidance.
9. **Hold at least six-monthly full engagement sessions between the relevant professional bodies**. These include The Law Society, STEP, the Institute of Chartered Accountants, the Institute of Bankers, the Chartered Institute for Securities & Investment, local authorities and others with the Senior Judge at the COP and the Public Guardian.

This is to improve awareness and education as well as to receive progress reports and to increase understanding of relevant issues. Minutes and summaries of key points identified to be widely circulated in formats accessible to attorneys, deputies, bankers, solicitors, accountants, investment managers and all others engaged in this area and discipline.

## APPENDIX I:

### THE LEGAL MECHANICS OF HOW LPAs AND EPAs WORK, AND THEIR DIFFERENCES

1. EPAs only need to be registered at the OPG if the Donor has lost the capacity to generally manage his/her property and financial affairs. An EPA can only cover property and financial decision-making.<sup>19</sup>  
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2. LPAs can cover 'Health & Welfare' and/or 'Property & Financial' decision-making. In England and Wales these are two entirely separate deeds. Originally, the standard statutorily prescribed forms were 28 pages long for each, but since 2009 this has been reduced to 12 pages each.<sup>22</sup>
3. LPAs need to be registered at the OPG before they can be used by Attorneys. Although the prescribed waiting period for registration (to allow for any objections to be made) is now four weeks,<sup>23</sup> the OPG has for the last few years taken at least 20 working weeks from application to registration. The current backlog (at 31 March 2024)<sup>24</sup> is 149,400, and previously had been well over a truly shocking 200,000<sup>25</sup>. Apparently, there is a little-known (and not advertised), almost entirely opaque, process by which individuals have been able to apply for accelerated processing in cases where the donor is very unwell. The backlog may now be starting to significantly drop, according to some reports from the OPG.
4. Under an LPA for Health & Welfare, a Donor can also give an Attorney power to make life-sustaining treatment decisions on behalf of the Donor, always acting in the Donor's "best interests" if that option is chosen by the Donor in the deed (but see also below).

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<sup>19</sup> *Mental Capacity Act 2005*, Section 1 [[www.legislation.gov.uk/ukpga/2005/9/section/1](http://www.legislation.gov.uk/ukpga/2005/9/section/1)]

<sup>20</sup> Department for Constitutional Affairs. *Mental Capacity Act 2005: Code of Practice* [<https://assets.publishing.service.gov.uk/media/5f6cc6138fa8f541f6763295/Mental-capacity-act-code-of-practice.pdf>]

<sup>21</sup> See Fluctuating Capacity cases at item 16 in Appendix I of this document.

<sup>22</sup> Attorney and Public Guardian (Amendment) Regulations 2009 (SI 2009 No 1884) [[www.legislation.gov.uk/uksi/2009/1884/pdfs/uksi\\_20091884\\_en.pdf](http://www.legislation.gov.uk/uksi/2009/1884/pdfs/uksi_20091884_en.pdf)]

<sup>23</sup> The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2013 [[www.legislation.gov.uk/uksi/2013/506/made](http://www.legislation.gov.uk/uksi/2013/506/made)]

<sup>24</sup> See Footnote 4.

<sup>25</sup> Office of the Public Guardian. *Annual Report and Accounts 2022 to 2023*, 18 July 2023 [<https://assets.publishing.service.gov.uk/media/64b686a90ea2cb001315e4b8/OPG-annual-report-and-accounts-2022-to-2023.pdf>]



5. Under an LPA, successor Attorney appointments can be made (also possible under duly made EPAs but was initially put in doubt by the Court of Protection). If more than one Attorney is chosen by the Donor to act at the relevant time, the appointment can be made jointly (all to act), jointly and severally (any one or more to act), joint for some matters and joint and several for others. A hybrid power, such as with the intention to permit two of three appointed Attorneys to make decisions, is not permitted.
6. The registration fee currently is £82 per deed, although there are Fee Remissions and Exemptions for certain Donors, depending on their income/personal financial circumstances.

In Scotland, Donors also have the option of a Continuing Power of Attorney – a combined LPA for both Health & Care decisions and Property & Financial decisions. A simpler, shorter and different format for the Continuing Power is prescribed for use, and the fee payable for its registration is £87.

In Northern Ireland, EPAs are still in use with a £151 fee payable when registration becomes necessary.

7. LPAs must be executed by both the Donor and the Attorney(s) to be valid and before they can be registered for use.
8. Registration can be delayed, but it is not to be recommended, for if the Donor loses appropriate mental capacity between execution of the deed and application for registration the deed will not be valid for use. As, under the Powers of Attorney Act 2023<sup>26</sup>, only the Donor can apply for registration and appropriate identification will be required to be produced for registration to proceed.
9. There is both an online LPA-making and registration service, but a version of the deed still needs to be signed by the Donor.
10. Using an EPA or LPA, an Attorney cannot make a Will for a Donor without a Court of Protection Order, nor validly consent to marriage or enter into a registered civil partnership, nor divorce, nor adopt children, nor vote, nor consent to sexual relationships. As outlined below, under both deeds Attorneys have extremely limited powers of gifting on behalf of Donors.
11. In the case of both EPAs and LPAs, their operation can be limited by the Donor so that they can only operate and permit Attorneys to act if the Donor has generally lost mental capacity to manage his/her own affairs.
12. In the case of both EPAs and LPAs (post-registration), unless mentally incapable, the making of one does not stop the Donor making decisions for himself/herself.
13. Under a registered LPA for Health & Care Decisions, an attorney can only make a decision on behalf of a Donor if the Donor lacks sufficient mental capacity at the time to make the relevant decision for himself/herself.
14. Under both LPAs and EPAs, Attorneys have very limited powers of gifting on behalf of the Donor, but those powers are subtly different.

Under an EPA, the Attorneys can buy gifts or make gifts of money on behalf of the Donor, including gifts to charities (of limited amounts and in relation to the Donor's overall wealth and personal circumstances) and only to people who would normally receive gifts from the Donor on seasonal occasions, such as for birthdays, weddings, festival occasions, etc.

Under an LPA for Property & Affairs, an Attorney can make specific gifts of money or property, if it's in the Donor's best interests and in accordance with the five principles set out in the MCA. That is: (a) on customary occasions, such as at Christmas and weddings, (b) to someone related or connected

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<sup>26</sup> Powers of Attorney Act 2023 [[www.legislation.gov.uk/ukpga/2023/42/contents](http://www.legislation.gov.uk/ukpga/2023/42/contents)]

to the Donor or to a charity previously supported, or likely to be supported by the Donor, and (c) if the gift is of a reasonable value, given the overall size of the Donor's estate<sup>27 28</sup>.

15. The OPG, on 11 September 2024 (albeit 19 years late), published "Giving Gifts", a Guidance Document intended to inform and educate financial deputies acting under Court of Protection Deputyship Orders and Attorneys acting under both LPAs and EPAs. However, it remains to be seen, as of the date of writing this paper, as to how existing Deputies and Attorneys will be made aware of the content of this guidance. It is also unclear how the OPG intends to disseminate the guidance and deliver appropriate rigorous training, to ALL those currently registered to act, or who are already acting as Attorneys.
16. The five basic principles underpinning Section 1 of the MCA are:
  - i. An Attorney must only make decisions that are in the best interests of the Donor
  - ii. There is always a presumption of capacity, so that the Donor's independence is maximised, and the least-restrictive option to the Donor is taken
  - iii. The Donor is not to be treated as being incapable because he/she makes an unwise decision
  - iv. The Donor must always be treated with dignity and respect and cannot be assumed to lack mental capacity (unless it is established as a fact that is so). Attorneys must consult with the Donor (as practicable) and with his/her next-of-kin, taking all practical steps to try to encourage the Donor to reach a decision for himself/herself
  - v. Each decision must be treated as issue-specific, and Attorneys cannot assume that the Donor is generally incapacitated.
17. LPAs must always be registered before they can be used and there is no widely publicised or easily accessible (and therefore openly available) expedition mechanism for URGENT cases. (In Scotland, upon payment of a small fee, it is possible to request an expedited registration if certain criteria are met. The registration time in that legal jurisdiction can then be reduced from around 8 months to within 5 working days).
18. Despite (following the COVID-19 pandemic) extremely unfortunate registration delays, the OPG in England & Wales has expressed a desire to simplify and digitise the process of making and registering LPAs.

They have a long way to go, and there is general discontent among the solicitors' branch of the legal profession at its poor level of performance currently and, indeed, since 2007. This has largely been self-inflicted by the OPG. It was found by the Ministry of Justice to have been significantly over-charging registration fees (to the tune of £89,000,000) for a considerable period (1 April 2013 to 31 March 2017) (see Daily Mail Online Report dated 23 July 2017) and also to have been charging excessive Deputy supervision fees (1 April 2008 to 31 March 2015)<sup>29 30</sup>. This led to the repayment of the over-charged part of the fees on application being made. The OPG also wrongfully amended its guidance in 2015 to say that discretionary fund and asset management was not possible under an

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<sup>27</sup> *Mental Capacity Act 2005*, Sections 4 and 12 [[www.legislation.gov.uk/ukpga/2005/9/contents](http://www.legislation.gov.uk/ukpga/2005/9/contents)]

<sup>28</sup> *Mental Capacity Act 2005* paragraph 3(3) of Part 1 Schedule 4 [[www.legislation.gov.uk/ukpga/2005/9/schedule/4](http://www.legislation.gov.uk/ukpga/2005/9/schedule/4)] effectively inserting these provisions into the Enduring Powers of Attorney Act 1985.

<sup>29</sup> Ministry of Justice. *Annual Report and Accounts 2016–17*, page 47. [[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/630239/moj-annual-report-2016-17.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630239/moj-annual-report-2016-17.pdf)]

<sup>30</sup> STEP. *Refunds now available to people overcharged for deputy supervision in England and Wales*. 7 October 2019. [[www.step.org/industry-news/refunds-now-available-people-overcharged-deputy-supervision-england-and-wales](http://www.step.org/industry-news/refunds-now-available-people-overcharged-deputy-supervision-england-and-wales)]

LPA without a specific power being included in the LPA itself. It wasn't until 2022<sup>31</sup>, after threat of litigation, that this guidance was amended. The PG/OPG did not apologise for this volte-face and it is a pity that this incurred unnecessary expense and hassle for many.

19. In appropriate circumstances, an Attorney acting under an LPA for Property & Financial Affairs or a registered EP, can apply to the Court of Protection for an Order for a Statutory Will or Codicil to be made if the testator/Donor himself/herself lacks testamentary capacity to make the Will or Codicil. The Court of Protection is likely to require the Official Solicitor to become involved in those proceedings – to act on behalf of the Donor/Testator and in his/her best interests.
20. A "Living Will" or Advance Directive (also known as Advance Decisions) are documents addressed to a doctor and can include, for example, requests about the provision of life support in terminal illness situations. If the Donor makes a subsequent LPA for Health & Care then this latter deed will "trump" the earlier document and vice-versa<sup>32</sup>.
21. There is a significant amount of guidance for Donors and Attorneys on the OPG's regularly updated website, including the Code of Practice for the Mental Capacity Act 2005 and "Liberty Protection Safeguards" (DOLs). Attorneys and others also need to regard the DOLs, which came into effect under the MCA on 1 April 2009<sup>33</sup>, and provide a legal framework to try to ensure that people are deprived of their liberty only when there is no other way to care or safely provide treatment for them.
22. Under both EPAs and LPAs there remains no universal requirement for Attorneys to prove their suitability, capability or capacity to act as such. Nor is there a suitable insurance Indemnity Bond in case of financial losses being sustained by the Donor, whether through fraud, theft, malfeasance or negligence – whereas there is with Court of Protection Deputyships. There is no education or training of any kind for Attorneys on their roles and responsibilities to provide, keep or produce appropriate financial accounts. Nor is there any effective and appropriate policing or sanctions for failure to do so<sup>34</sup>.

## **APPENDIX II: THE IMPORTANT 'RED FLAGS' IN THE CRIMINAL CASES**

Set out below are various signs that financial abuse or similar may be present:

1. Missing personal possessions and unexplained/inexplicable financial withdrawals or transactions.
2. Unexplained levels of monetary balance or an inability to maintain a previous lifestyle.
3. An LPA obtained after an apparent loss of mental capacity or increased vulnerability.
4. Apparent evidence of undue pressure/coercion/duress/threats.
5. Arranging loans.
6. Denying access to bank accounts or State Benefits.
7. Moving in and living rent-free without agreement or under duress, so-called "cuckooing".

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<sup>31</sup> STEP blog. *LPAs no longer require discretionary investment express provision*, 17 March 2022. [<https://blog.step.org/2022/03/17/lpas-no-longer-require-discretionary-investment-express-provision>]

<sup>32</sup> Alzheimer's Society. *Advance decisions and Lasting power of attorney*, No Date [[www.alzheimers.org.uk/get-support/legal-financial/advance-decisions-lasting-power-attorney-lpa](http://www.alzheimers.org.uk/get-support/legal-financial/advance-decisions-lasting-power-attorney-lpa)]

<sup>33</sup> The Mental Capacity (Deprivation of Liberty: Monitoring and Reporting; and Assessments -Amendment) Regulations 2009 [[www.legislation.gov.uk/ukSI/2009/827/contents/made](http://www.legislation.gov.uk/ukSI/2009/827/contents/made)]

<sup>34</sup> See further on these topics: Mark Dunkley. "Financial Accountability for Attorneys", STEP Journal, 6 April 2021. [[read article](#)]

8. Apparent disparity between living conditions and financial resources, e.g. lack of food in the house, dishevelled appearance, change of demeanour without due reason, etc.
9. Unnecessary property repairs.
10. Rent/loan arrears and receipt of Eviction Notices, etc.
11. Recent changes in deeds of title to property.
12. Family members or others appear to show an unusual/inappropriate level of interest in assets, ownership of property or money and/or heightened and unexplained suspicions of others.
13. Hostile behaviours, inappropriate/unusual levels of anger or signs of stress.
14. Frequent and apparently inexplicable ATM withdrawals or similar apparently illogical/changed patterns of behaviour.
15. Emotional exploitation/abuse/unusual sexual interest which might point to ulterior motives or financial abuse.
16. Expensive, apparently inappropriate, unnecessary and unwarranted tax or trust planning.

Also be wary of apparently “uncaring” or overly and inappropriately familiar carers, family members, partners, neighbours, etc. Be wary and aware too of ingrained cultural sensitivities and behaviours and whether these behavioural patterns change. Be aware of the appropriateness, or otherwise, of Joint Accounts and changes in that regard, and that they will often permit any one of the joint holders to sign and give instructions alone and that generally those assets will pass by survivorship on a death.

### **APPENDIX III: THE KEY POTENTIAL CRIMINAL OFFENCES**

Clearly, the criminal offences of fraud by abuse of position, fraud, theft and false accounting are all relevant here and, for common law purposes, breach of fiduciary duty. For cases where abuses of this type may be suspected, Action Fraud and its Economic Crime Unit is the main point of contact on 0300 123 2040, or 0300 123 2050 for those with hearing impairments. In cases of immediate harm or danger dial 999.

Financial abuse can also constitute domestic abuse under the Domestic Abuse Act 2021. It is estimated that more than half of frauds are now perpetrated by cyber-related activities, and this poses an increased risk for those suffering from dementia and heightened levels of vulnerability due to age, infirmity, etc. It is likely that the levels of fraud and similar abusive behaviours mentioned above are gross under-estimates and are only “the tip of an enormous iceberg”.



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