COURT OF PROTECTION **No. 12228697**

MENTAL CAPACITY ACT 2005

In the matter of
BUCKLEY

BETWEEN:

THE PUBLIC GUARDIAN

Applicant

- and -

C

Respondent

1. This is an application by the Public Guardian for the court to revoke a Lasting Power of Attorney ('LPA') and to direct him to cancel the registration of the LPA.

The background

2. Miss Buckley was born in 1931 and lives in Kent.

3. Since July 2011 she has been a resident in a nursing home, at which the fees are £985 a week. She is fully self-funded and is not currently eligible for NHS Continuing Healthcare.

4. On 7 September 2010 Miss Buckley executed an LPA for property and affairs, in which she:
   - appointed her niece, C, who was born in 1954, to be her sole attorney;
   - did not appoint a replacement attorney; and
   - named her close friend, Shirley, as the only person who was to be notified when an application was made to register the LPA.

5. Miss Buckley's solicitor witnessed her signature and was the Part B certificate provider.

6. A month later an application was made to the Office of the Public Guardian ('the OPG') to register the LPA, and it was registered on 17 January 2011.

The General Visitor's report

7. On 20 April 2012 the OPG received a complaint about the way in which the attorney was handling the donor's finances, and it opened a formal investigation into the matter.

8. As is standard procedure in investigations of this kind, the OPG sent a Court of Protection General Visitor to see Miss Buckley. The Visitor saw her on 6 August 2012 and concluded that she lacked the capacity to instruct the attorney to account for her dealings under the LPA, and that she also lacked the capacity to revoke the LPA. The Visitor also commented as follows:

> "We talked about her niece C (POA). She had a vague recollection of a niece and said she visited her home when she was ill and took everything she wanted and then did not bother with her any

more. She said she only visited when she wanted money and indicated this by rubbing her fingers together. The manager was present during this conversation and believed the client's memory of some matters was quite reliable and that the client appeared to recollect her niece wanting money previously and no longer being bothered with her now. When asked whether she wanted the niece to manage her money she indicated very negatively. When asked if she had wanted her niece to use her money for anything special she said she didn't trust her and had only ever wanted her money."

The application

9. On 22 October 2012 Marion Bowgen, of the Compliance Unit at the OPG, applied to the court for the following interim orders:

    1. The finance & property LPA registered on 17 January 2011 appointing C as the sole attorney to Miss Buckley to be suspended until further order.

    2. C to be prohibited from dealing with or encashing any investment or other asset in the name of Miss Buckley, pending further orders from the court.

    3. Miss Buckley's Nationwide Building Society accounts (*numbers*) and National Savings & Investments Premium Bonds (*numbers*) to be frozen, whereby access to her bank accounts should be limited to payment of her care home fees only.

    4. C to be directed to provide a full account of her dealings under the LPA for the period 17 January 2011 to present, within 21 days of the date of service of this order. She is to provide explanations for all the transactions within all bank accounts held in the sole or joint name of Miss Buckley, and submit copies of receipts/invoices to support her explanations.

    5. The Public Guardian to file and serve a further COP24 regarding his current investigation into these matters within 8 weeks of the date of this order.

10. The application was accompanied by a witness statement made on 22 October 2012 by Yun Ding, an investigation officer with the OPG, which can be summarised as follows:

    (1) Miss Buckley's house had been sold for £279,000 on 28 April 2011.
    (2) Between 17 January 2011 and June 2012 the attorney had withdrawn £72,000 from Miss Buckley's funds to set up a reptile breeding business. The attorney claimed that this was a short-term investment which would generate a 20% return over a two year period.
    (3) The attorney admitted that she had used at least £7,650 of Miss Buckley's capital for her own personal benefit.
    (4) The attorney said she visited Miss Buckley once a week, but this was contradicted by the nursing home, who said that she had not visited her at all until 16 October 2012, when she appears to have obtained Miss Buckley's signature on some unknown documentation.
    (5) At one stage there had been daily cash withdrawals of £300 (the maximum amount) from Miss Buckley's Nationwide Building Society account.
    (6) The Special Investigation Department at the Nationwide had alerted Social Services in April 2012 and the matter was also referred to the police, who interviewed the attorney in July 2012.
    (7) Miss Buckley's estate may have incurred a total loss of approximately £150,000.

11. On 23 October 2012 I made an order in the terms sought by the OPG, set a timetable for the filing of evidence, and listed the application for hearing on 19 December 2012.

The Special Visitor's Report

12. Although his report was unavailable when the OPG made its initial application to the court, on 21 October 2012 a Court of Protection Special Visitor, Dr Andrew Barker, examined Miss Buckley and prepared a report of his findings. He had been asked by the OPG specifically to assess Miss Buckley's capacity to make the following decisions:
    (1) to revoke or suspend the LPA;
    (2) to make a new LPA;
    (3) to manage her financial affairs;
    (4) to direct the attorney to make decisions on her behalf regarding the management of her financial affairs;
    (5) to instruct the attorney to provide an account of her dealings under the LPA; and
    (6) to choose or say who she would like to manage her affairs should she not be happy with the existing attorney.

13. Dr Barker concluded his report as follows:

> "Miss Buckley has a history of multiple strokes, leading her to be unable to look after herself, then needing residential and then nursing care. A hospital outpatient clinic letter following admission refers to a diagnosis of dementia. Her cognitive impairment leads her to need a rigid routine, suffer anxiety with sustained concentration, and have significant memory impairment. A general visitor found her to be generally confused, with a short concentration span, appearing disorientated, and could not participate in conversation beyond a very basic level.
>
> My interview with Miss Buckley was time limited due to her increasing anxiety. I was told by Nurse Adams that she tended to get agitated if she had to concentrate very long. She also had some expressive and receptive dysphasia, making communication difficult. She was unable to recognise some simple words, and often unable to express herself fully. She was disorientated in time and place, had poor short and long term memory, impaired concentration and difficulties understanding even mildly complex abstract concepts.
>
> Her documented history and my assessment are in keeping with Miss Buckley suffering with moderately severe vascular dementia. This is of a severity to affect her understanding of information, impair her recall and make her unable to weigh information in the balance, for any significant decision. She was unable to understand the nature and effects of an LPA to a sufficient degree or to choose an attorney, was not aware of her financial dealings and could not recall detail sufficiently well or concentrate long enough to weigh information in the balance to come to decisions about an attorney or to direct or instruct an attorney."

Yun Ding's second witness statement

14. On 13 December 2012 Yun Ding made a second witness statement, the primary purpose of which was to exhibit Dr Barker's report and to update the court on the OPG's investigation as required by the directions order of 23 October. She concluded the statement as follows:

> "From the evidence gathered so far, I estimate that Miss Buckley has contributed at least £87,682.53 towards the reptile investment venture described by C. In the absence of any contrary evidence, the Public Guardian maintains that Miss Buckley's finances may have been used to heavily subsidize what appears to be a reptile breeding business, without any formal guarantee or security or her share of the alleged investment returns. C also appears to have misappropriated £43,317.47 of her aunt's estate without obtaining consent, contrary to what she had told the police. I have therefore re-referred this matter back to the police to conduct further enquiries.

In the light of the above and the content of my COP24 dated 22nd October 2012, the Public Guardian believes that it would not be in Miss Buckley's best interests for C to continue as her finance and property attorney. Therefore, the Public Guardian would like to request the court to revoke and cancel the registered LPA executed by Miss Buckley under section 22(4)(b) of the Mental Capacity Act 2005. Should the court decide to appoint a deputy in the interests of Miss Buckley, the Public Guardian would like to highlight that the deputy may need to take action against the former attorney in order to restore Miss Buckley's estate to a more realistic level. The care manager of (*a named local authority*) has confirmed that the council is willing to consider applying to become Miss Buckley's property and affairs deputy."

The attorney's response

15. On 17 December 2012 C made a witness statement, in which she said:

1. I make this statement in connection with proceedings in the Court of Protection following the Office of the Public Guardian's (OPG) investigation into my actions under a Lasting Power of Attorney (LPA) over my aunt, Miss Buckley.

2. The OPG has raised concerns that I may have been using my aunt's money for my own purposes and not acting in her best interests. They have made an application to the court, requesting that the LPA be revoked.

3. I would like to say that I do not object to the LPA being revoked provided that my aunt's property and affairs will be looked after. However, I would like to make my position very clear that I have not acted contrary to my aunt's best interests and that in my view the investments I have made are in her best interests.

4. I love my aunt and would never do anything to hurt her. I am very upset that these allegations have been made about me and would like to put forward my views for the benefit of the court and the OPG.

5. I apologise that I have missed the deadline for filing this evidence and would be grateful if the court would consider this statement despite the fact that it has been filed out of time. I have only recently been able to obtain legal advice (6 December 2012) and was not previously aware that I had to file a statement as I had provided all the documentation I had to the OPG.

6. I will set out the background to this matter briefly and my response to the statement made by Yun Ding dated 22 October 2012.

7. My aunt executed an LPA in relation to her property and affairs appointing me as her attorney on 7 September 2010. This was done through her solicitors and I did not have any active involvement in that matter other than to agreeing to act as attorney and sign the necessary forms.

8. My aunt has a close friend, Shirley, who has assisted her with her affairs for some time. She had been unable to continue to do so and it was her and four others that recommended I take over. I was reluctant to do so, but wanted to help my aunt as much as possible and therefore agreed to this.

9. My aunt has been suffering with strokes, is incontinent and blind in one eye and nearly blind in the other. I was not aware of any formal diagnosis, however I note that the OPG has confirmed that she suffers from dementia.

10. Myself and Shirley first became concerned about my aunt when she started wandering around and giving money to people she did not know. She would often think that she had run out of the things she needed and would ask people to get them for her. Shirley would look after her as I was unable to travel due to illness.

11. I exhibit at C1 a letter from Shirley to myself dated 30 October 2010 in which she confirms that she was assisting with finding homes for my aunt and that the house would need to be sold. Shirley assisted my aunt with the sale of her house and solicitors were involved with this.

12. I did state at this time that I would have my aunt living with me if I could, but due to space constraints in my home, which is a council property, I would not have been able to.

13. The LPA was registered on 17 January 2011 and I began to assist my aunt with her affairs at that time. I had regular contact with my aunt through Shirley who visited her weekly.

14. I was advised by Shirley that I should invest some of her money.

15. I investigated this and found a company which specialises in breeding reptiles. I dealt with (*name*) who runs the company and felt that this would be a good investment for my aunt and was told that this would return her money plus 20% interest within 2 years. My aunt loves animals and I felt that this would be an investment which she would be happy with.

16. It is stated that I did not provide evidence that the investment was made in the name of my aunt. I would like to state that I was not aware that the investment had to be made in her name and was concerned about signing on her behalf. I agree that perhaps I should have opened the investment in her name, but my intention has always been that the returns from the investment will go back to my aunt. The only reason that I transferred any money to my son's account was because I did not know how to transfer money abroad using "CHAPS" and he did. I kept receipts for the transfers and provided these to the OPG.

17. I agree that my aunt lacks capacity to manage her own financial affairs and in my view she has become increasingly confused and is unable to understand the information relevant to deciding how to handle her finances or retain that information.

18. In relation to the withdrawals from my aunt's account, all the large amounts were invested in the reptile company and I admit that some of the money was used for my own benefit but only with my aunt's permission. She has given me money in the past and this was not unusual for her as we were very close.

19. I have been investigated by the police who I understand have stated that I was naïve but that no crime had been committed. I only invested in the reptiles because I thought this would be what my aunt wanted.

20. It is stated in paragraph 8 that I wrote that I visited my aunt once per week, however, I would like to point out that the specific question I was asked was, "how often do you or any other person visit Miss Buckley." When I answered this question, I was referring to the fact that Shirley visits my aunt weekly and this is confirmed in the court visitor's report at exhibit YM2 to the OPG's statement.

21. In relation to the question regarding my visit to my aunt, the only paperwork I signed was a form which the nurse had asked me to fill out and she had also asked me to discuss her funeral plans with her. I was very upset at this suggestion, but explained this to my aunt and did this for her. I exhibit at C2 a copy of a post-it note at the time when she wrote down her name and some details of funeral directors for me.

22. I am very upset that my aunt has suggested that I was after her money. I do wonder whether she was confused and may have been referring to my cousin, Pam, who had cleared her belongings from her house for her over two days. When I visited my aunt, she told me that in her will she has left her assets to a dogs home and donkey sanctuary as she "did not want anyone else to get hold of it."

23. I am happy with my aunt's choice in relation to where her property should go and I know that she loves animals so I would support the choice.

24. To conclude, I do not oppose the OPG's application to revoke the LPA. I am very upset at the allegations that have been made and did not intend to hurt my aunt in any way. While I maintain the view that the investment is a good one and that I had my aunt's interests at heart, I do feel that the responsibility is too much for me to continue with, especially as I am unwell myself.

25. I have only ever had my aunt's interests at heart and would like the court to note that, while I agree to step down as attorney, I do not agree that I have done anything wrong by investing my aunt's money in this way.

26. If a deputy is to be appointed by the court, I would be grateful if I could be notified so that I can arrange for any money coming in from the investment to be returned to my aunt as intended.

The hearing

16. The hearing took place on Wednesday 19 December 2012, and lasted an hour and a half. Marion Bowgen attended on behalf of the OPG accompanied by Alan Eccles, the Public Guardian.

17. Two days earlier, on 17 December 2012, C's solicitors had written to the court saying:

> "We have been instructed to advise and assist C in this matter. C apologises for missing the deadline for filing her evidence as she did not realise she needed to do so and, unfortunately, she was only able to obtain our assistance on 6 December 2012.
>
> C instructs us that she is unable to attend the hearing on 19 December 2012 due to illness. We are not instructed to represent C at any hearing and cannot go on record as acting for her, but please note our involvement as legal advisors."

The law relating to applications of this kind

18. In *Re Harcourt* (31 July 2012), an anonymised transcript of which can be found on the OPG's website, I summarised the following areas of the law:
    (1) the donor's capacity in the context of an investigation by the OPG;
    (2) the Public Guardian's powers in relation to LPAs;
    (3) the Court of Protection's powers in relation to LPAs;
    (4) best interests;
    (5) the law regarding compliance; and
    (6) the donor's and the attorney's rights under Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

19. I do not propose to repeat what I said in *Re Harcourt* here, but I shall use this opportunity to discuss an issue which did not arise in that case, namely the responsibilities of an attorney acting under an LPA when investing the donor's funds.

The investment of funds by an attorney

20. There are two common misconceptions when it comes to investments. The first is that attorneys acting under an LPA can do whatever they like with the donors' funds. And the second is that attorneys can do whatever the donors could - or would - have done personally, if they had the capacity to manage their property and financial affairs.

21. Managing your own money is one thing. Managing someone else's money is an entirely different matter.

22. People who have the capacity to manage their own financial affairs are generally not accountable to anyone and don't need to keep accounts or records of their income and expenditure. They can do whatever they like with their money, and this includes doing nothing at all. They can stash their cash under the mattress, if they wish and, of course, they are entitled to make unwise decisions.

23. None of these options are open to an attorney acting for an incapacitated donor, partly because of their fiduciary obligations and partly because an attorney is required to act in the donor's best interests. The Mental Capacity Act 2005, section 1(5), states that, "an act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests."

24. Mr Justice Lewison (as he then was) commented on this point in *Re P (Statutory Will)* [2009] EWHC 163 (Ch), [2009] COPLR Con Vol 906. At paragraph 42 he said:

> "I would add that although the fact that P makes an unwise decision does not on its own give rise to any inference of incapacity (section 1 (4)), once the decision making power shifts to a third party (whether carer, deputy or the court) I cannot see that it would be a proper exercise for a third party decision maker consciously to make an unwise decision merely because P would have done so. A consciously unwise decision will rarely if ever be made in P's best interests."

25. Attorneys hold a fiduciary position, which imposes a number of duties on them. Like trustees and other fiduciaries, they must exercise such care and skill as is reasonable in the circumstances when investing the donor's assets and this duty of care is even greater where attorneys hold themselves out as having specialist knowledge or experience.

26. Although it does not expressly apply to attorneys, the Trustee Act 2000, section 4, requires trustees to have regard to what are known as the "standard investment criteria" when exercising any power of investment. There are two standard criteria, namely:
    (1) the suitability of the investments; and
    (2) the need to diversify the investments, in so far as it is appropriate in the circumstances.

27. Trustees are also required to review the investments from time to time and consider whether, having regard to the standard investment criteria, they should be varied.

28. Section 5 of the Trustee Act requires trustees, before exercising any powers of investment or reviewing the investments, to obtain and consider proper advice about the way in which, having regard to the standard investment criteria, their power should be exercised. In this context, "proper advice" means the advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment. There is an exception to this general rule, and trustees need

not obtain such advice if they reasonably conclude that it is unnecessary or inappropriate to do so.

29. Before the Mental Capacity Act 2005 came into force on 1 October 2007, both the Court of Protection and the antecedents of the Office of the Public Guardian (the Public Trust Office and later the Public Guardianship Office) were actively involved in the investment of patients' funds. There was a discrete Investments Branch, which issued in-house guidance for staff, *Investing for Patients*, and much of the discussion that follows has been taken from that guidance.

30. The court used to set an investment code for every patient. There were four short term (ST) codes and eight long-term (LT) codes, which were devised following consultation with the Lord Chancellor's Honorary Investment Advisory Committee ('HIAC'). HIAC, which was rebranded as the Strategic Investment Board in 2001 before finally being abolished in 2008, was a committee of six distinguished financial experts from the City who met with *ex officio* members from the Lord Chancellor's Department five times a year to consider issues relating to the investment of patients' funds including strategy, performance measurement and the setting of appropriate benchmarks.

31. Two of the most important factors when considering the suitability of investments are the donor's age and life expectancy. Most donors are older people. Their average age is 80 years and 11 months and, in this respect Miss Buckley, who is 81½, is a typical LPA donor.

32. Short-term investment codes are generally more appropriate where an individual has an anticipated life expectancy of five years or less, and the guidance to court staff suggested that, "without clear medical evidence it would be prudent to consider a life expectancy of less than five years for *new* patients aged 80 or over."

33. There is no need for me to consider long-term investments for the purposes of this decision, but the short-term investment codes in *Investing for Patients* were as follows:

Investment Code	**Approximate Value**	**Investment requirement**	**Usual investment strategy**
ST1	£0-£50,000	Available quickly – safe	Special Account only
ST2	£50,001 - £100,000	All or part available quickly – very little risk acceptable	Special Account with the option of purchasing short-dated gilts if the returns are more favourable
ST3	Over £100,000	All or part available quickly – very little risk acceptable	A portfolio based on short-dated gilts, provided their anticipated returns compare favourably with Special Account or accounts with building societies
ST4	Over £50,000 with existing portfolio	Aim to make all or part available quickly – reducing risk commensurate with the	Rationalisation and usually gradual reduction of longer-term investments in

		patient's requirements	the portfolio within the scope of the annual CGT allowance and prudent investment advice

34. It has never been possible for attorneys to keep funds on Special Account in the Court Funds Office, but a broadly similar outcome would be achieved from depositing the funds in an interest-bearing account offering instant access (or reasonably instant access) with a reputable bank or building society, or with National Savings and Investments ('NS&I'), where there is a 100% guarantee from HM Treasury on all deposits.

35. The last edition of *Investing for Patients* was drawn up fifteen years ago in 1998 following the decision of the House of Lords in *Wells v Wells* [1999] 1 AC 345. Circumstances have changed since then and the investment codes need to be revised.

36. Generally speaking, attorneys acting under an LPA should ensure that any investment products or services they acquire on a donor's behalf are provided by individuals or firms who are regulated by the Financial Services Authority. One of the advantages of this course of action is that the donor's investments will be covered by the Financial Services Compensation Scheme ('FSCS'), in which eligible deposits are protected up to a maximum of £85,000.

37. Accordingly, taking this and other factors into account, the short-term investment codes recommended in *Investing for Patients* could possibly be rewritten along the following lines:

Investment Code	**Approximate Value**	**Investment requirement**	**Usual investment strategy**
ST1	£0-£85,000	Available quickly – safe	Cash deposit that provides a competitive rate when compared with base rates and NS&I returns
ST2	Over £85,000	All or part available quickly – very little risk acceptable	Cash deposits with different financial institutions, including NS&I, which stay below the FSCS limits and/or a gilt portfolio to provide returns that compare favourably with base rates
ST3	Cash with an existing portfolio	Aim to make all or part available quickly – reducing risk commensurate with P's requirements	Depending on the nature of the portfolio, a liquidation process should be adopted using the annual CGT allowance. The cash funds should be retained in cash deposits with different financial institutions, including NS&I, which stay within the FSCS limits and/or a gilt portfolio to provide returns that compare favourably with base rates

38. *Investing for Patients* suggested a few other factors that may need to be considered, such as:
    (a) whether any major items of expenditure are anticipated or should be planned for;

(b) whether any gifts or payments to dependants are likely to be made. This will usually involve an application to the Court of Protection for authorisation to make gifts in excess of the limits imposed by section 12 of the Mental Capacity Act in order to reduce the impact of Inheritance Tax;
(c) the type of return required. For example, whether a high income is needed from the investments, or whether the capital can be left to grow, or whether a mixture of the two would be more appropriate;
(d) risk: whether absolute safety is required for the investment or whether some risk is acceptable in exchange for the possibility of getting a better return; and
(e) whether there is an existing portfolio and, if so, the tax and cost considerations that may affect decisions about whether to change it and how quickly.

39. The guidance also considered the interests of beneficiaries under the patient's will or intestacy, which included asking the following questions:
    (a) whether it is likely that the investments will be sold when the patient dies, or whether the beneficiaries of the patient's estate are likely to want the investments as they then stand; and
    (b) whether there are any provisions in the patient's will which affect the composition of the investments, such as a specific bequest of an investment or the creation of a trust in which income and capital go to different beneficiaries.

40. In this respect, *Investing for Patients* concluded that, "it will probably only be worthwhile to consider in depth the interests of those who will benefit on death if the following conditions all apply:
    (a) the capital available for investment is over £100,000;
    (b) there is no reason to believe that the patient's state of health is life-threatening; and
    (c) the capital, when invested, will adequately satisfy the patient's current and future income and capital requirements."

41. Until such time as the Office of the Public Guardian issues its own guidance to attorneys and deputies on the investment of funds, I would suggest that, as they have fiduciary obligations that are similar to those of trustees, attorneys should comply with the provisions of the Trustee Act as regards the standard investment criteria and the requirement to obtain and consider proper advice. I would also recommend that attorneys and their financial advisers have regard to the criteria that were historically approved by the court and the antecedents of the OPG in *Investing for Patients*, albeit with some allowance for updating, as suggested in paragraph 37 above.

42. There are three further points I must mention relating to the fiduciary nature of the relationship between the donor and the attorney. The first is that attorneys should keep the donor's money and property separate from their own or anyone else's: Mental Capacity Act Code of Practice, paragraph 7.68. This applies to investments and, wherever possible, all investments should be made in the donor's name. If, for any reason, it is not possible to register the investment in the donor's name, the attorney should execute a declaration of trust or some other formal record acknowledging the donor's beneficial interest in the asset.

43. The second point is that, subject to a sensible *de minimis* exception, where the potential infringement is so minor that it would be disproportionate to make a formal application to the court, an application must be made to the court for an order under section 23 of the Mental Capacity Act 2005 in any of the following cases:
    (a) gifts that exceed the limited scope of the authority conferred on attorneys by section 12 of the Mental Capacity Act;
    (b) loans to the attorney or to members of the attorney's family;

(c) any investment in the attorney's own business;
(d) sales or purchases at an undervalue; and
(e) any other transactions in which there is a conflict between the interests of the donor and the interests of the attorney.

44. The final point is one that has been made in the past, but needs to be repeated. Attorneys should be aware of the law regarding their role and responsibilities. Ignorance is no excuse. I am not suggesting that attorneys should be able to pass an examination on the provisions of the Mental Capacity Act 2005, but they should at least be familiar with the "information you must read" on the LPA itself and the provisions of the Mental Capacity Act 2005 Code of Practice. Section 42(4)(a) of the Act expressly stipulates that it is the duty of an attorney acting under an LPA to have regard to the code.

45. Commenting on the conduct of an attorney in *Re W (Enduring Power of Attorney)* [2000] Ch 343, at page 350 Mr Jules Sher QC said:

> "… she ought to have known the law if she was to take on the responsibility of such an important fiduciary position, particularly as one of the few things expressly stated in part of the power itself is the following sentence: "I also understand my limited power to use the donor's property to benefit persons other than the donor.""

46. Mr Sher was referring to an Enduring Power of Attorney. The declaration in Part C of Miss Buckley's Lasting Power of Attorney, which her attorney signed, is far more explicit. It says:

> "By signing below, I confirm all of the following:
>
> Understanding of role and responsibilities
>
> I have read the section called 'Information you must read' on page 2 of this lasting power of attorney.
>
> I understand my role and responsibilities under this lasting power of attorney, in particular:
> - I have a duty to act based on the principle of the Mental Capacity Act 2005 and have regard to the Mental Capacity Act Code of Practice
> - I can make decisions and act only when this lasting power of attorney has been registered
> - I must make decisions and act in the best interests of the person who is giving this lasting power of attorney
> - I can spend money to make gifts but only to charities or on customary occasions and for reasonable amounts
> - I have a duty to keep accounts and financial records and produce them to the Office of the Public Guardian and/or to the Court of Protection on request."

Decision

47. Subsections (3) and (4) of section 22 of the Mental Capacity Act provide that the court may revoke an LPA if:
(1) it is satisfied that the attorney has behaved or is behaving in a way that contravenes his or her authority or is not in the donor's best interests, or is proposing to behave in such a way; and
(2) the donor lacks capacity to revoke the LPA.

48. I am satisfied that C has contravened her authority and has acted in a way that is not in Miss Buckley's best interests.

49. Even if one were to be generous and believe C and accept at face value her description of the way in which she has applied Miss Buckley's funds as an 'investment', it was a highly unsuitable investment to make and she broke almost every rule in the book in making it.

50. She did not obtain and consider proper advice from someone who is qualified to give investment advice. One can hardly describe a man who runs a reptile breeding business as someone who is qualified to give investment advice by his ability in and practical experience of financial and other matters relating to investment.

51. The investment was very high risk. When investing funds on behalf of older people, the perceived wisdom is that the investments should be safe and that very little risk is acceptable as can be seen from the short-term investment tables set out above. Even when investing funds long-term on behalf of a younger person, a hazardous and speculative investment of this kind would have been inappropriate for anyone in a fiduciary position to make.

52. The attorney invested in her own business, which was in breach of her fiduciary duty. Paragraph 7.60 of the Mental Capacity Act Code of Practice states that:

> "A fiduciary duty means attorneys must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. They also must not allow any other influences to affect the way in which they act as an attorney. Decisions should always benefit the donor, and not the attorney. Attorneys must not profit or get any personal benefit from their position, apart from receiving gifts where the Act allows it, whether or not it is at the donor's expense."

53. The investment was also made in the attorney's name. This was in breach of the guidance to attorneys given in paragraph 7.68 of the Code of Practice to keep the donor's money and property separate. The attorneys' admission in paragraph 16 of her witness statement - "I would like to state that I was not aware that the investment had to be made in her name and was concerned about signing on her behalf – is no excuse.

54. C's use of £43,317.47 (according to Yun Ding's second statement) of Miss Buckley's capital for her own personal benefit was way beyond the very limited authority to make gifts conferred on attorneys by section 12 of the Mental Capacity Act 2005. The attorney's comments paragraphs 17 and 18 of her witness statement are no defence:

> "I agree that my aunt lacks capacity to manage her own financial affairs and in my view she has become increasingly confused and is unable to understand the information relevant to deciding how to handle her finances or retain that information. … I admit that some of the money was used for my own benefit but only with my aunt's permission."

55. As regards Miss Buckley's capacity, I am satisfied that she is incapable of revoking the LPA herself. I accept the opinion of the Court of Protection Special Visitor, Dr Andrew Barker, who stated:

> "She was unable to understand the nature and effects of an LPA to a sufficient degree or to choose an attorney, was not aware of her financial dealings and could not recall detail sufficiently well or concentrate long enough to weigh information in the balance to come to decisions about an attorney or to direct or instruct an attorney."

56. In deciding whether it is in Miss Buckley's best interests to revoke the LPA on her behalf, I am satisfied that:

(a) it is unlikely that she will ever regain sufficient capacity to be able to manage her financial affairs and revoke the LPA herself, should she wish to do so; and
(b) by engaging her in conversation, the Court of Protection General Visitor sought, so far as reasonably practicable, to permit and encourage Miss Buckley to participate as fully as possible in the decision-making process.

57. It was Miss Buckley's past wish, when she had capacity, that her niece should be her attorney and manage her property and financial affairs. However, as far as her present wishes and feelings are concerned, the General Visitor reported that:

> "When [Miss Buckley was] asked whether she wanted the niece to manage her money she indicated very negatively. When asked if she had wanted her niece to use her money for anything special she said she didn't trust her and had only ever wanted her money."

58. As regards the views of others who are engaged in caring for Miss Buckley or who are interested in her welfare, I have taken into account the views of her friend, Shirley, who visits her once a week and was the only person named by Mrs Buckley to receive notice of the attorney's application to register the LPA. In an e-mail to Yun Ding dated 17 October 2012, in the context of the attorney's visit to Miss Buckley in her current nursing home on 16 October 2012, Shirley said:

> "I am so worried that (Miss Buckley's) money will get stolen and that she won't be able to stay in the nursing home. I have been asked not to get in touch with C both by social services and by the police. I find this very difficult. I must have given two years of my full attention – selling her house for her – setting up the Nationwide to pay the (nursing home) monthly. Finding a decent retirement residence (from which she had to move for health reasons) then I found her the nursing home but it's nearly £1000 per week. She cannot afford for her money to be taken. She needs every penny."

59. Having regard to all the circumstances, therefore, I am satisfied that:
(a) the attorney has contravened her authority and acted in a way that is not in Miss Buckley's best interests;
(b) Miss Buckley is incapable of revoking the LPA herself;
(c) the revocation of the LPA in order to facilitate the appointment of a deputy is both a necessary and proportionate response for the protection of Miss Buckley's right to have her financial affairs managed competently, honestly and for her benefit, and for the prevention of crime; and
(d) it is in Miss Buckley's best interests that the court should revoke the LPA.

60. Accordingly, I revoke the LPA under section 22(4)(b) and direct the Public Guardian to cancel the registration of the instrument under paragraph 18 of Schedule 1 to the Mental Capacity Act 2005.

DENZIL LUSH
Senior Judge
22 January 2013