

Re ALLEN
A decision of the Senior Judge on 21 July 2009

This case concerned an objection by the attorney's brother to the registration of an Enduring Power of Attorney on the ground that the attorney was unsuitable to be the donor's attorney. In particular the objector stated that the attorney made decisions about the donor (his mother) without involving him. He claimed that the attorney had failed to consult with him, but was under a duty consult him, by virtue of section 4(7)(b) of the Mental Capacity Act 2005, as someone who is interested in his mother's welfare.

The Senior Judge made the following observations on the duty to consult under the Mental Capacity Act, which will be of assistance in other cases:

“In support of his argument relating to his right to be consulted under section 4(7)(b), the objector quoted the following passages from the Mental Capacity Act 2005 Code of Practice: paragraphs 5.13, 5.32, 5.37, 5.49, 5.51, 5.54, 5.61, 5.64, and 5.67. In paragraph 5.54, for example, the Code states ‘everybody’s views are equally important – even if they do not agree with each other.’ And paragraph 5.61 says that decision-makers cannot simply impose their own views, ‘They must have objective reasons for their decisions – and must be able to demonstrate them. They must be able to show they have considered all relevant circumstances and applied all elements of the best interests checklist.’ The objector claims that the attorney fails to engage in any proper debate, and merely expresses an opinion, without justifying it or explaining the reasons for it.

As I suggested to the objector at the hearing, whereas attorneys acting under a lasting power of attorney have a duty ‘to have regard to’ the Code of Practice (Mental Capacity Act 2005, section 42(4)(a)), attorneys acting under an enduring power of attorney do not, largely because it was considered inappropriate to impose the requirements of the new legislation retrospectively on them. Nevertheless, his arguments raise interesting issues regarding the extent to which any attorney should be reasonably be expected to consult with someone who, in all reality, will treat every single issue upon which he is likely to be consulted as a bone of contention or stumbling-block. In such circumstances, the process of consultation would become both burdensome and futile.

The first line of section 4(7) provides that any best interests decision-maker ‘must take into account, if it is practicable and appropriate to consult them, the views of’ various categories of individuals. In my judgment, where any attempt at consultation will inevitably be unduly onerous, futile, or serve no useful purpose, it cannot be in P’s best interests, and it would be neither practicable nor appropriate to embark on that process in the first place.”

Applying these principles, the Senior Judge was not satisfied that the attorney was unsuitable, and directed registration.

