Discussion paper on access and disclosure of an incapacitated person’s will

Background:

1. Whether it is possible to disclose the will of a person who lacks mental capacity to their court appointed deputy or attorney continues to create much debate within legal forums and is one of the most common questions asked of me, as a legal trainer, author and consultant. In 2012, the Court of Protection’s Users’ Group (on which I sit) established a sub committee to discuss this further and recommendations were made, which included seeking involvement of the Law Society. Following discussions with the Chair of the Wills and Equity Committee of the Law Society, a way forward was agreed, which included circulating this paper to relevant organisations and committees for their input, as the problem is not limited to solicitors, as wills may be held by a range of people and organisations, including social services, hospitals, banks, will writers, financial advisers and a copy may be requested by organisations as part of their safeguarding functions, such as the Office of the Public Guardian, the police or social services. It would be helpful to agree the legal position- and where it needs clarification. Initial comments can be sent to me, which can be collated and a decision made as to whether it merits establishing a bigger project, involving a range of participants or whether it should be limited to the legal profession. A list of people and organisations to whom this paper is circulated is set out at the end.

Access to personal information: An overview of the legal position

2. A person with capacity can consent to the disclosure of their confidential personal information. If consent has been refused, then third parties have no automatic right to that information. However, in exceptional circumstances personal information may be disclosed, for example it is required by law, such as the person having a notifyable disease or there is a Court order requiring the information to be given.

3. The Mental Capacity Act 2005 (MCA) requires those who make decisions on behalf of someone who lacks capacity consult with a wide range of people, including other professionals, friends and relatives. Information will often need to be gathered from a range of sources by the decision maker, but not all the information needed will be readily available to all the parties. If a third party holds information which the decision maker needs in order to be satisfied that they are making the right decision, the decision maker will need to satisfy the third party that if the information is disclosed it is both lawful and justified even though there is no available consent from the actual person that this information is being disclosed. Any third party should not disclose any more information than is necessary.

4. Access to personal information is regulated under:
   - The Data Protection Act 1998 (DPA)
   - The common law duty of confidentiality
   - Professional codes of conduct on confidentiality
Data Protection Act 1998

5. Individuals have the right to see most information stored about them on any relevant filing system, which includes electronic and manual data. Information can be obtained by making a written request to the data controller with payment of a fee. The individual is entitled to be given a copy of the information in an intelligible and permanent form, unless this would involve ‘disproportionate effort’. The data controller must comply with the request for access as soon as possible and, in any event, within 40 days of the request.

6. The DPA does not allow information to be disclosed which at common law could not lawfully be disclosed because it is confidential, unless there is a common law or statutory exception available. If information relates to an identifiable third party, that person’s consent is required prior to disclosure unless it is reasonable in all the circumstances to not require consent.

7. Where an application is made on behalf of a child or an incapacitated adult, the data controller may withhold any information that was provided on the understanding that it would not be disclosed to the person requesting the information. The third party must have legal authority to act on the data subject’s behalf, such as a person acting under an order of the Court of Protection or acting within the terms of a registered enduring or lasting power of attorney. An example of how this operates is set out in paragraph 16.15 of the MCA Code of Practice:

Mr Yapp is in the later stages of Alzheimer’s disease. His son is responsible for Mr Yapp’s personal welfare under a Lasting Power of Attorney. Mr Yapp has been in residential care for a number of years. But his son does not think that the home is able to meet his father’s current needs as his condition has recently deteriorated. He wants specific information about his father’s care provided so that he can make a decision about his father’s best interests. But the manager of the care home refuses saying that the Data Protection Act stops him from releasing personal information. Mr Yapp’s son points out that he can see his father’s records because he is his personal welfare attorney and needs the information to make a decision. The Data Protection Act 1998 requires the care home manager to provide access to personal data held on Mr Yapp.

Exemption from disclosure to health and social care records

8. Access to health records of living individuals may be refused or limited access be given, after consulting the ‘appropriate health professional’ by the data controller, where disclosure would be likely to cause serious harm to the physical or mental health or condition of the data subject or another person or where giving access would

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1 s.29-37.
2 s.7 DPA 1998.
disclose information relating to or provided by a third person who had not consented to the disclosure. ³ Similar provisions exist in relation to social work records, although the decision rests with the social services department of the local authority, with no obligation to consult any other professional. ⁴

Common law approach

9. Where a person lacks capacity to consent to disclosure, under the common law a balance has to be reached between the public interest and the individual’s private interests in maintaining confidentiality and the public and private interest in disclosing. Guidance was given on this point in the case of S v Plymouth County Council & C ⁵ which established ‘... a clear distinction between disclosure to the media with a view to publication to all and sundry and disclosure in confidence to those with a proper interest in having the information in question.’

10. Consideration will need to be given as to whether it is in the best interests of the person who lacks mental capacity to discuss relevant matters with the person who seeks disclosure. A balance needs to be struck between the individual's right to confidentiality and the rights of the person who seeks disclosure, to be able to exercise their responsibilities. As such, a local authority deputy may disclose the contents of the will, where appropriate, relying on the Plymouth case.

11. The MCA Code of Practice at paragraph 16.26 suggests that it will often be more difficult to obtain financial information via the Code than health information as the bank manager

‘is less likely to:

- know the person lacking capacity,

- be able to make an assessment of the person’s capacity to consent to disclosure, and

- be aware of the carer’s relationship.

So they are less likely than a Doctor or social worker to be able to judge what is in the person’s best interests and are bound to keep clients’ affairs confidential .It is likely that someone wanting financial information will need to apply to the Court of Protection for access to that information. This clearly does not apply to an attorney or deputy appointed to manage the person’s property and affairs, who will generally have the authority (because of their appointment) to obtain all relevant information about the person’s property and affairs.’

12. The MCA Code of Practice suggests that the solution may be for the person seeking financial information about someone who lacks capacity to apply to

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³ s. 10 (1) DPA; The Data Protection (Subject Access Modification) (Health) Order 2000: SI 2000/413
the Court of Protection for a single order or a financial deputyship authorising access to the information.

13. Chapter 16 of the MCA Code of Practice provides a helpful summary of questions to ask when asking for information about someone who may lack capacity:

- Am I acting under a LPA or as a Deputy with specific authority?
- Does the person have capacity to agree that information can be disclosed/ have they previously agreed to disclose the information?
- What information do I need?
- Why do I need it?
- Who has the information?
- Can I show that I need the information for me to make a decision that is in the best interests of the person I am acting for, and
- The person does not have the capacity to act for themselves?
- Do I need to share the information with anyone else to make a decision that is in the best interests of the person who lacks capacity?
- Should I keep a record of my decision or action?
- How long should I keep the information for?
- Am I acting under a LPA or as a deputy?
- Do I have the right to request the information under Section 7 of the Data Protection Act 1998?

The Code of Practice also suggests that a person who is asked to disclose the information should ask themselves the following questions:

- Is the request covered by section 7 of the Data Protection Act 1998?
- Is the request being made by a formally authorised representative?
- Is the disclosure legal?
- Is the disclosure justified having balanced the person’s best interests and public interest against the person’s’ right to privacy?

*Professional Codes of Conduct*
14. Different professionals follow different codes of conduct, for example, solicitors follow the Solicitors’ Regulation Authority’s (SRA) Code of Conduct 2011, barristers follow the Bar Standards Code of Conduct, and Society of Trusts and Estate Practitioners members follow their Code of Conduct. All of these codes contain the specific duty to keep the client’s affairs confidential.

15. Unlike any other Code of Conduct, the SRA’s Code is very detailed on the issue of confidentiality, which states:

‘You must achieve these outcomes:

O(4.1) you keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents;
O(4.2) any individual who is advising a client makes that client aware of all information material to that retainer of which the individual has personal knowledge;
O(4.3) you ensure that where your duty of confidentiality to one client comes into conflict with your duty of disclosure to another client, your duty of confidentiality takes precedence.’

16. When taking instructions for lasting powers of attorney, the Law Society’s Practice Note on LPAs (October 2011) contains the following advice:

‘Solicitors are under a duty to keep their clients’ affairs confidential (Chapter 4 on Confidentiality and disclosure, SRA Code of Conduct 2011). However, the attorney(s) may need to know about the contents of the donor's will in order to avoid acting contrary to the testamentary intentions of the donor (for example, by the sale of an asset specifically bequeathed, when other assets that fell into residue could be disposed of instead). The question of disclosure of the donor's will should be discussed at the time of making the LPA, and instructions should be obtained as to whether disclosure is denied, or the circumstances in which it is permitted – which should be incorporated into the LPA. For example, the donor may agree that the solicitor can disclose the contents of the will to the attorney(s), but only if the solicitor thinks that disclosure of the will is necessary or expedient for the proper performance of the attorney’s functions. This type of discretionary power would need to be included in section 6 of the prescribed form under ‘restrictions and/or conditions’. The attorney(s) also has a common law duty to keep the donor's affairs (including the contents of a will) confidential.’

Disclosure of a will to a deputy or attorney

17. The Court of Protection has made it clear that property and financial affairs deputies and attorneys owe a duty, so far as is reasonably possible, when making financial decisions, not to interfere with the succession plans made by the person for whom they act.6 This duty can only be fulfilled if the deputy or attorney is aware of the contents of the will and so must create an obligation on them to make effort to

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6 Attorney-General v The Marquis of Ailesbury (1887) App Cas 672; Re Joan Treadwell (30th July 2013); Schedule 2, paras 8 & 9 MCA, which ensure the preservation of an interest in property disposed of by an order of the Court of Protection, on behalf of a person lacking capacity and is compatible with the least restrictive principle set out in S1(6) MCA.
check it’s terms. Having knowledge of the contents, means the deputy or attorney is in a position to act in the best interests of the person for whom them act and may:

(i) take appropriate professional advice; and
(ii) apply to the Court for an order under paragraph 8 of Schedule 2, MCA to avoid the ademption of a specific legacy, where disposal of the asset is required; or
(iii) apply to the Court for a statutory will to ensure that it reflects the intentions of the person who lacks mental capacity and the relevant circumstances; or
(iv) arrange for safekeeping and storage of the asset.

The solicitor’s dilemma

18. The testator’s will remains a confidential document notwithstanding their mental incapacity. It can be disclosed if the client (at a time when they had mental capacity) specifically authorised disclosure. Which leaves unanswered, whether the will can be disclosed to the deputy or attorney, where it has not been specifically authorised and creates a professional dilemma – non disclosure may result in the professional not acting in the best interests of the person who now lacks mental capacity. Significant numbers of people will not have specifically authorised disclosure usually because they were ignorant of the possible need or advisors failed to raise the matter with them.

19. The duty of confidentiality is owed to ‘the client’, which is defined in s87 of the Solicitors Act 1974 to include ‘any person who as a principal or someone acting on behalf of another in any other capacity who has power to retain a solicitor’. On this basis the deputy or an attorney fall within the definition of ‘client’. The SRA’s Code of Conduct, make no reference to the position where an agent is acting.

20. The general rule is that the client’s incapacity ends the solicitor’s retainer. In the recent case of Blankley v Central Manchester & Manchester Children’s University Hospitals NHS Trusts,7 Phillips J confirmed this proposition when he said, ‘The intervening incapacity of a party does not frustrate or otherwise terminate a solicitor's retainer. Whilst such incapacity does have the effect of removing the authority of the solicitor to act on behalf of the party lacking capacity for the duration of that incapacity, such authority can be restored when a deputy is appointed and provides instructions to the solicitors in that capacity, or otherwise if and when the claimant regains capacity. There is no reason, as a matter of authority or legal principle, why an inability to instruct solicitors in the intervening period (which may be quite short) should be taken to have the effect of immediately ending a solicitor's retainer.’ The effect of this is that if a deputy or attorney is appointed to act, the client’s retainer can continue or new instructions can be given on behalf of the person for whom they act.

21. The relationship of solicitor and client does not exist between the solicitor and the receiver (now deputy) as he is the statutory agent of the person who lacks mental capacity (P).8 In such cases, it is clear that the solicitor owes his duty of care to P, and

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7 [2014] EWHC 168 (QB).
8 Re EG (1914) 1 Ch 927.
this must also apply to attorneyships, where the duty of care is owed to the donor. There is strong argument for the purpose of exercising the solicitor’s duty of care, that providing there is no known conflict between the principal and agent, they should be treated as one and the same.

22. The SRA’s Code of Conduct, Chapter 4 states, ‘The duty of confidentiality to all clients must be reconciled with the duty of disclosure to clients. This duty of disclosure is limited to information of which you are aware which is material to your client’s matter. Where you cannot reconcile these two duties, then the protection of confidential information is paramount.’ The last sentence is aimed at situations where a conflict of interest arises. This means that where disclosure of material information relevant to the retainer is required in the best interests of the client, it must be disclosed. By way of illustration, if a solicitor is instructed in respect of the sale of a property, and behind the title deeds, there exists an unregistered declaration of trust which affects the value of the property or who is entitled to the proceeds of sale, this must be disclosed to the attorney, as it would to the donor, so that the attorney is able to undertake the role for which he has been appointed. Failure to do so would not be in the best interests of the donor, and could give rise to a claim of negligence against the solicitor.

23. The SRA’s Code of Conduct makes no distinction as to the nature of the information, which as it is not limited, must include the will. However, it must be left to the solicitor to consider whether it is necessary and in the client’s best interests for the will’s contents to be disclosed, and thus it is a logical step to expect the solicitor if he has possession of the will to check its terms and inform the attorney or deputy of sufficient detail to ensure they do not act to undermine the testator’s testamentary intentions.

Is the will the person’s property and affairs?

24. It may be that this is not an issue about confidentiality and disclosure, but about whether a will forms part of the property and affairs, which a financial deputy or financial attorney are authorised to manage. In F v West Berkshire Health Authority,9 Lord Brandon stated that ‘property and affairs’ means ‘business matters, legal transactions and other dealings of a similar kind’. This could be interpreted widely to include a will. Most powers of attorney are unrestricted, enabling the attorney to step into the shoes of the donor, subject to any statutory or common law limits, and make those decisions, which the donor could do. The wide empowered deputyship order for decision making purposes brings the deputyship regime in line with attorneyship and would appear to cover obtaining a copy of the will.

25. Is it relevant that a will speaks from death, and the attorney or deputy is not managing the will of the donor or P? Although a will speaks from death, inherently a deputy and attorney need to have sufficient information to go about the business of making decisions, and as they must have sight of the will to meet their duty, there is argument that it is inherent in the authority vested in them as deputy and attorney to have a copy of the will. It seems incongruous of the law to expect the deputy or

attorney to be obliged to act in a particular way, and then for there to be a legal obstacle which prevents them from carrying out their duty.

**Limited disclosure permitted?**

26. An applicant deputy only becomes the statutory agent on their appointment by the Court. The deputyship application requires a copy of the will of the person to whom the application relates to be annexed,\(^{10}\) which might give rise to an implied authority to disclose the will to the applicant. It is understood the purpose of this requirement in the application is so the Court can be satisfied that all the important people in P’s life are aware of the application, rather than ensuring that either the order made by the Court or the applicant deputy do not operate to frustrate the will’s terms.

27. *Heywood & Massey on Court of Protection Practice* at paragraph 20.004 advises that the deputy should obtain an order from the Court for disclosure of the will. This assumes of course the deputy (and similarly the attorney) knows that they should seek a copy of the will, which would be impossible without some level of prior disclosure. Obtaining a Court order incurs time and expense, which many would see as disproportionate to the outcome, as the vast majority of professionally drafted wills are broad in nature and are unlikely to result in a change in the way a deputy or attorney makes decisions.

28. Although the Court of Protection Practice Direction 9D specifically sets out a shortened process for disclosure of a will to an attorney (para 5(d)) it does not follow that it means that it can only be obtained with a court order, as the MCA is not prescriptive on this point. It should be noted the examples in that Practice Direction for attorney applications are not identical to deputy applications, as there is no mention of a deputy seeking authority for a copy of P’s will through this shortened process, possibly because the empowerment deputyship order is wide enough to allow them possession of the will. Such an application would in any event, need partial disclosure, as the deputy or attorney must be given enough information to know they have to make an application to the Court.

29. Limited disclosure would apply in those cases where it is clear from the face of the will and the circumstances which the adviser is aware that a decision might be made which could frustrate the terms. This would extend to telling the attorney/deputy there is a will, and they should apply to the Court for authority to see it. It might also include the general thrust of the terms, for example- ‘the testator has made a specific gift of XYZ and so you should not dispose of it without seeing the will as it may be appropriate to apply to the Court for a new will or an order to preserve the gift etc...’.

30. Failing to give at least limited disclosure puts the professional at risk of a complaint. The testator (if able) might complain that their intention had been frustrated by non-disclosure; the attorney or deputy might complain that they had not been assisted in their duty to manage the affairs, causing them to act unwittingly against the interests of the testator and those who would expect to inherit; and a

\(^{10}\) Form COP1A, section 3.2-3.4.
beneficiary might complain that non disclosure had resulted in their inheritance being deemed.

**Handing over the will**

31 The duty to protect confidential information continues despite the end of a retainer and even after the death of the client. The SRA Code of Conduct 2011, Indicative behaviour 4.6, states ‘disclosing the content of a will on the death of a client unless consent has been provided by the personal representatives for the content to be released’ is indicative of not following the Code of Conduct Principles or the duty to retain confidentiality. In that case, the personal representatives have the authority vested in them to agree disclosure to third parties. A distinction must be drawn between disclosing the contents of a will and handing over the will. As a will speaks from death, it would be hard to think of a situation where the original will should be passed to the deputy or attorney, without the consent of the client with capacity or where they lack capacity, an order from the Court of Protection.

Discussion paper written by Caroline Bielanska, Solicitor, TEP, and Independent Consultant 27.2.14

**List of people and organisations this paper has been circulated to:**

- Richard Roberts
  Chair of the Wills and Equity Committee, Law Society

- Simon Leney
  Chair of the Private Client Committee, Law Society

- Susan Thompson
  Chair of the Mental Health and Disability Committee, Law Society

- Chris Belcher
  Chair of Solicitors for the Elderly

- Henry Frydenson
  Chair of The Association of Contentious Trusts and Estate Practitioners

- George Hodgson
  Deputy Chief Executive, Society of Trusts and Estate Practitioners

- Senior Judge Lush
  Court of Protection

- Timothy Fancourt QC
  Chair of the Chancery Bar Association c/o May Maughan

- Jen Matthews
  Court of Protection Manager

- Alan Eccles
  Public Guardian

- Lesley Cullen
  Association of Public Authorities Deputies

- Alex Ruck Keen
  39 Essex Street

- Members of the Court of Protection Users’ Group
- Age UK
- Alzheimer’s Society
- British Bankers Association
- Building Societies Association