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Case No: 13925684

COURT OF PROTECTION
MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2023

Before :

MRS JUSTICE LIEVEN

Between :

TA

Appellant

and

THE PUBLIC GUARDIAN

Respondent

Ms Faye Collinson (instructed by **Lanyon Bowdler**) for the **Appellant**
Ms Marisa Lloyd (instructed by **Office of The Public Guardian**) for the **Respondent**

Hearing dates: **20 November 2023**

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

This judgment is being handed down in private on 7 December 2023. It consists of 37 paragraphs. The judge does not give leave for it to be reported until it has been anonymised and approved by the judge.

Mrs Justice Lieven DBE:

1. This is an appeal from a decision of HHJ McCabe sitting at Wolverhampton in the Court of Protection. It raises a discrete but important point about the duties of a person who provides a certificate under paragraph 2(1)(e) Schedule 1 of the Mental Capacity Act 2005 (“MCA”).
2. The Judge found that that the Lasting Powers of Attorney (“LPAs”) were invalid and should be cancelled. The appeal is brought by TA who is the daughter of the donor, KA. TA is the sole attorney under the disputed LPAs. The Respondent is the Office of the Public Guardian (“OPG”).
3. The Appellant was represented by Faye Collinson and the OPG by Marisa Lloyd. I would like to thank both of them for their clear and to the point submissions.

The statutory scheme

4. Section 9 of the MCA sets out the requirements for a valid LPA:

“9 Lasting powers of attorney

(1) A lasting power of attorney is a power of attorney under which the donor (“P”) confers on the donee (or donees) authority to make decisions about all or any of the following—

(a) P's personal welfare or specified matters concerning P's personal welfare, and

(b) P's property and affairs or specified matters concerning P's property and affairs,

and which includes authority to make such decisions in circumstances where P no longer has capacity.

(2) A lasting power of attorney is not created unless—

(a) section 10 is complied with,

(b) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1, and

(c) at the time when P executes the instrument, P has reached 18 and has capacity to execute it.

(3) An instrument which—

(a) purports to create a lasting power of attorney, but

(b) does not comply with this section, section 10 or Schedule 1, confers no authority.

(4) The authority conferred by a lasting power of attorney is subject to—

(a) the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests), and

(b) any conditions or restrictions specified in the instrument.”

5. Section 9(2) therefore sets out three requirements for a valid LPA. Firstly, the appointment of valid donees under section 10 (s.9(2)(a)). Secondly, that the donor must be over 18 and have capacity (s.9(2)(c)); that the LPA must be made in accordance with Schedule 1 of the Act (s.9(2)(b)). It is this third requirement which is in issue in the present case.

6. Schedule 1 is headed “Lasting Powers of Attorney: Formalities”. Paragraphs 1 and 2 state:

“General requirements as to making instruments

1(1) An instrument is not made in accordance with this Schedule unless

(a) it is in the prescribed form,

(b) it complies with paragraph 2, and

(c) any prescribed requirements in connection with its execution are satisfied.

(2) Regulations may make different provision according to whether—

(a) the instrument relates to personal welfare or to property and affairs (or to both);

(b) only one or more than one donee is to be appointed (and if more than one, whether jointly or jointly and severally).

(3) In this Schedule—

(a) “prescribed” means prescribed by regulations, and

(b) “regulations” means regulations made for the purposes of this Schedule by the Lord Chancellor.

Requirements as to content of instruments

2(1) The instrument must include—

(a) the prescribed information about the purpose of the instrument and the effect of a lasting power of attorney,

(b) a statement by the donor to the effect that he—

(i) has read the prescribed information or a prescribed part of it (or has had it read to him), and

(ii) intends the authority conferred under the instrument to include authority to make decisions on his behalf in circumstances where he no longer has capacity,

(c) a statement by the donor—

(i) naming a person or persons whom the donor wishes to be notified of any application for the registration of the instrument, or

(ii) stating that there are no persons whom he wishes to be notified of any such application,

(d) a statement by the donee (or, if more than one, each of them) to the effect that he—

(i) has read the prescribed information or a prescribed part of it (or has had it read to him), and

(ii) understands the duties imposed on a donee of a lasting power of attorney under sections 1 (the principles) and 4 (best interests), and

(e) a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument—

(i) the donor understands the purpose of the instrument and the scope of the authority conferred under it,

(ii) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney, and

(iii) there is nothing else which would prevent a lasting power of attorney from being created by the instrument.

(2) Regulations may—

(a) prescribe a maximum number of named persons;

(b) provide that, where the instrument includes a statement under sub-paragraph (1)(c)(ii), two persons of a prescribed description must each give a certificate under sub-paragraph (1)(e).

(3) The persons who may be named persons do not include a person who is appointed as donee under the instrument.

(4) In this Schedule, “named person” means a person named under sub-paragraph (1)(c).

(5) A certificate under sub-paragraph (1)(e)—

(a) must be made in the prescribed form, and

(b) must include any prescribed information.

(6) The certificate may not be given by a person appointed as donee under the instrument.

Failure to comply with prescribed form

3(1) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form, it is to be treated by the Public Guardian as sufficient in point of form and expression.

(2) The court may declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney.”

7. The critical paragraph for present purposes is paragraph 2(1)(e).
8. Paragraph 1(1)(c) states that “*An instrument is not made in accordance with this schedule unless.... any prescribed requirements in connection with its execution are satisfied.*” The requirements are set out in regulation 9 of the Lasting Power of Attorney etc Regulations 2007 (2007/1253):

“Execution of instrument

9.—(1) An instrument intended to create a lasting power of attorney must be executed in accordance with this regulation.

(2) The donor must read (or have read to him) all the prescribed information.

(3) As soon as reasonably practicable after the steps required by paragraph (2) have been taken, the donor must—

(a) complete the provisions of Part A of the instrument that apply to him (or direct another person to do so); and

(b) subject to paragraph (7), sign Part A of the instrument in the presence of a witness.

(4) As soon as reasonably practicable after the steps required by paragraph (3) have been taken—

(a) the person giving an LPA certificate, or

(b) if regulation 7 applies (two LPA certificates required), each of the persons giving a certificate, must complete the LPA certificate at Part B of the instrument and sign it.

(5) As soon as reasonably practicable after the steps required by paragraph (4) have been taken—

(a) the donee, or

(b) if more than one, each of the donees, must read (or have read to him) all the prescribed information.

(6)...”

9. Section 22 sets out the powers of the court in relation to the validity of an LPA:

“22. Powers of court in relation to validity of lasting powers of attorney

(1) This section and section 23 apply if—

(a) a person (“P”) has executed or purported to execute an instrument with a view to creating a lasting power of attorney, or

(b) an instrument has been registered as a lasting power of attorney conferred by P.

(2) The court may determine any question relating to—

(a) whether one or more of the requirements for the creation of a lasting power of attorney have been met;

(b) whether the power has been revoked or has otherwise come to an end.

(3) Subsection (4) applies if the court is satisfied—

(a) that fraud or undue pressure was used to induce P—

(i) to execute an instrument for the purpose of creating a lasting power of attorney, or

(ii) to create a lasting power of attorney, or

(b) that the donee (or, if more than one, any of them) of a lasting power of attorney—

(i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or

(ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.

(4) The court may—

(a) direct that an instrument purporting to create the lasting power of attorney is not to be registered, or

(b) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.

(5) If there is more than one donee, the court may under subsection (4) (b) revoke the instrument or the lasting power of attorney so far as it relates to any of them.

(6) “Donee” includes an intended donee.”

The background and evidence

10. KA is 92 years old. She has lived in a care home since May 2021. She has three children, her daughter the Appellant TA, and two sons. She previously executed an LPA for property and affairs in favour of all three children on a joint and several basis on 5 June 2019. On 27 July 2020 KA revoked this LPA by a deed of revocation.
11. On 12 January 2021 KA made an LPA for property and affairs which was registered with the Public Guardian on 16 March 2021 and on 1 April 2021 she made an LPA for health and welfare which was registered on 22 June 2021. Both of these LPAs appointed TA as the sole attorney.
12. In respect of both LPAs the certificate provider was X. X is TA’s ex-mother in law, and a close family friend of KA. The certificate is in standard form.
13. In September 2021 KA’s son HC instructed solicitors with a view to revoking the LPAs in favour of TA, and executing new LPAs in favour of all three children. The solicitor attended KA and formed the opinion that she lacked capacity to execute new LPAs.
14. There was then an investigation undertaken by the OPG as to the making of the LPAs. The LPAs were suspended by order of DJ Grosse on 30 June 2022.
15. The OPG investigator asked X various questions and she replied in writing. The Judge at J27-30 sets out those communications and it is necessary to repeat them in full here.

“27. “I have known [KA] for over 50 years. She has been my friend for all of that time, and for a time, my son was married to her daughter, [TA]. Even though their marriage ended in divorce, [KA] has remained my friend, as has [TA]. The last time I spoke to [KA] before she made her LPA in January 2021, was December 2020. The last time I spoke to her before she made her health and welfare LPA, was March 2021. Regarding discussions I had with her about the LPAs, I just asked her if she was happy about it, and she was. I spoke to her about it on the phone, and I expect her partner was in the room with her during the conversation. I do not feel [KA] was under any pressure to make the LPAs as she sounded cheerful and was in good spirits. She sounded like her normal, usual self. [KA] did not express any particular wishes to me about who she wanted to be her attorneys. She did not express any wishes about how her attorneys should act. [KA]’s daughter [TA] has always been a wonderful, caring daughter to her mum They have always had a loving, close relationship. TA has always acted in her mum’s best

interests. I find it shocking that [TA]'s care for her mum is being questioned, as she has only ever been an amazing daughter to [KA]. I am currently having treatment for stage 4 lung cancer, which I was only diagnosed with very recently. I would appreciate it if I am only contacted about this matter if absolutely necessary."

16. This letter is dated 1 December 2021.
17. Rachael Heeley, in her capacity of a Court of Protection Visitor, visited KA on 7 December 2021 and had a conversation with her via Zoom. I set out below some sections of the record of the visit that appear to me to be relevant to the issue in this case. They are partial quotes, but there is no inconsistent content in the full note, KA saying the same thing on a number of occasions:

"I asked the donor who she would trust the most to help her to manage her money and she said "[HC]. He's an accountant and he's the eldest." I explained to the donor she had made an LPA and named [TA] as the only person who could manage her money for her. The donor said, "I want all three to agree on decisions." I asked her if she could explain why she might only have named [TA] on her LPA and the donor said she could not remember or offer any reason for doing so.... I reiterated to the donor that her daughter was the only person who had the authority to make decisions about her money and selling her house as she was the only person named on her LPA. I asked the donor if she was happy for [TA] to have this sole responsibility. The donor said, "I'd like the three of them, decisions should be made together, I've always said that... The donor was also unable to give any explanation for why she only named her daughter on her LPA despite telling me she had always said she wanted all three of her children to be able to make decisions together.... The donor consistently told me she believed her sons were also able to make decisions and could act on her behalf in the same way as her daughter."

The Judgment

18. The Judge carefully set out the relevant law and facts. She recorded the parties' submissions which albeit in shorter form were the same as those made to me. She set out her conclusions at J37-42:

"37. Despite what was argued forcefully on behalf of the Respondent, I consider that there are some aspects of the relevant legislation that provide clear guidance to a certificate provider as to what is expected of them. I start with section 2 (e) of schedule 1. The certificate provider is required to provide an opinion, not just to witness a signature, and it is an opinion that : i) the donor understands the purpose of the instrument and the scope of the authority conferred under it, ii) no fraud or undue pressure is being used to induce the donor to create a LPA, and iii) there is nothing else which would prevent a LPA from being created by the instrument.

38. *In my judgment, reading the above section as ‘ordinary words’ plainly requires the certificate provider, in order to provide the certificate, to take some steps to satisfy themselves of the matters set out in section 2 (e), otherwise they cannot be considered validly to provide the opinion. This opinion is one of the requirements for the creation of an LPA, and what is required is the provision of an opinion, not merely the witnessing of a signature.*

39. *If the Court is asked, as I am, to exercise its powers under section 22 of the MCA, namely to ‘determine whether one or more of the requirements for the creation of a LPA have been met’, it follows that the Court must be entitled to look for evidence that the requirements have been met. Such evidence has manifestly not been provided in the current case, limited as it is to simply the asking and answering of a question “are you happy with the LPA”?*

40. *When [KA] signed the two LPAs in the early part of 2021, she was not only creating a LPA, she was changing the arrangements that had previously been in place (and which, according to the visitor in December of that year she still very much wished to have in place, namely all three of her children making joint decisions together) It is difficult to understand how the certificate provider could conceivably have satisfied herself that [KA] ‘understood the scope of the authority, that there was no undue pressure or inducement, and that there was nothing else to prevent the LPA being created’ without asking the very questions of the donor that were set out in the enquiries by the OPG investigator.*

41. *An opinion provider must, as a matter of basic common sense, never mind legal sense, satisfy themselves that their opinion is reasonably held, otherwise they are acting in a plainly unreasonable way. This is not to open some vast floodgates, to import some highly technical or supremely onerous duties upon the certificate provider, just that which is basically to be expected in order to satisfy the provisions of section 2 (e). If they do not so satisfy themselves then they are outwith the requirements of that section.*

42. *I reject the suggestion that, absent a live issue questioning capacity or undue influence, there is simply no power for the Court to enquire into the circumstances of the provision of the certificate. The whole point of the certificate being a requirement of a valid LPA is that the certificate provider is standing at the gateway of enquiry as to whether there has been undue pressure or fraud. That is the very point that they are certifying, or certifying against to put it another way. What use is the provision of a certificate at all if there is no requirement for the opinion to be based upon anything reasonable?”*

The submissions

19. Ms Collinson submitted that the statutory scheme set out in clear terms what requirements needed to be met in order for an LPA to be valid. In respect of the

certificate provider the only requirement under paragraph 2(1)(e) was for the provision of the certificate. So long as that was provided then that was sufficient for the purposes of legality. She relied on the precise statutory language and said the Court should go no further.

20. She relied on the fact that this is a very detailed statutory scheme, not merely in the MCA itself but also in the Regulations. Regulation 9 gives a precise order of steps that are to be taken for the LPA to be valid but does not state that the certificate provider has to take any particular steps, or that the Court has to ensure that the requisite opinion is formed in any particular way.
21. She submits that the Judge erred in J37-38. Firstly, the Judge incorrectly suggested that the certificate providers had to “provide an opinion”, whereas in fact paragraph 2(1)(e) merely requires the provision of the certificate and not the provision of the opinion.
22. Secondly the Judge therefore wrongly considered “this opinion is one of the requirements of the creation of an LPA...”, which is (she submits) wrong because there is no requirement for the opinion.
23. Thirdly, the Judge wrongly introduced the concept that the opinion must be a “valid” one, see J43 and imposed various obligations on the certificate provider at J41, which do not appear in the statute. Ms Collinson submits that the Judge stepped far outside the parameters of the MCA and the Regulations.
24. She sought to draw a distinction between formal and substantive validity of an instrument. In this case the OPG is not challenging KA’s capacity at the time of the LPAs and therefore the substantive validity of the LPA is not in issue. The only issue is the “formal” validity and that is met under the statutory scheme by the fact of the certificate.
25. Ms Collinson submitted that the Judge’s approach undermines the scheme of the MCA. There is a presumption in the MCA in favour of the donor having capacity. The Judge’s approach is that even though the donor has capacity the LPA is still invalid because the certificate provider failed to undertake sufficient checks. This would set a troubling precedent and undermine the presumption of capacity.
26. Ms Lloyd, on behalf of the OPG, submitted that paragraph 2(1)(e) requires that the certificate provider has the requisite opinion. The Judge made no error in her approach. The certificate is fundamental to the formal validity of the LPA, and the requirements as to the opinion are not limited to the issue of capacity. She relies upon the terms of paragraph 2(1)(e) for the various matters that the certificate provider must have formed an opinion about.
27. She argued that if the Appellant’s submissions are taken at face value it would not be possible to make any enquiry about the opinion, for example whether the certificate provider had even spoken to the donor; knew anything about her wishes or intentions, or understanding; or did not speak the same language as the donor. Such a result would be absurd and would undermine the important protections set out in Schedule 1.

Conclusions

28. This is a case of statutory interpretation. As in any such case the Court has to consider the statutory language; the overall statutory scheme and the mischief or purpose to which the provision is aimed.
29. Paragraph 1(2)(e) requires the provision of a certificate, but it also requires that certificate to have particular content. The content is that the certificate provider has an opinion as to three specific matters. Therefore, on a pure black letter law approach, a valid certificate must be based on an opinion as to those three matters. If the evidence showed that the certificate provider did not have such an opinion because, for example, they had not spoken to the donor, then there would not be a valid opinion.
30. It therefore follows from the words themselves that the Court is entitled to check that the requisite opinion has actually been formed. If this stage of the analysis is not accepted, and Ms Collinson's argument is taken at its highest, then paragraph 1(e) becomes a nonsense. The mere provision of a certificate in the right form cannot be sufficient on its own.
31. I do not accept Ms Collinson's submission that the Court can only look at the existence of the certificate and no more. For the certificate to meet the requirement of the MCA it must be a certificate as to the matters in paragraph 2(1)(e). This follows from the terms of s.22, which allows the Court to determine whether any of the requirements for the creation of the LPA have been met.
32. It is then necessary to consider the statutory context and the mischief being addressed. The certificate is an important part of the procedure to ensure that a valid LPA has been entered into. The nature of the scheme is that validity turns not merely on the provision of certain documents, but that those documents themselves provide reassurance on a number of key matters. The whole purpose of the MCA is to make provision for the protection of those who have lost mental capacity, or who may do so, as we all may, in the future. The latter issue is dealt with, inter alia, through the making of Lasting Powers of Attorney. Those documents are of the utmost importance in the making of future decisions for people who subsequently lose capacity.
33. Paragraph 2(1)(e) does not merely concern whether the donor has capacity. It is also there to provide some safeguards that the donor understands the instrument, is not subject to fraud or undue pressure and there are no other barriers to the LPA. Plainly these matters go beyond capacity. The donor might have capacity, but not actually have read the LPA and therefore not understand its purpose or scope. This would not later be grounds to set aside on the basis of lack of capacity, but is an important safeguard in the process.
34. The scheme of the MCA, and paragraphs 2(1)(e) also gives protection to the donor at the stage of making the LPA. Although the power to set aside exists in s.22, in practice that power rests on someone raising the issue of validity after the making of the LPA. In many cases such an issue will not be raised, perhaps because there is no other person concerned and the OPG is not aware of the circumstances. Therefore the power in s.22 does not mean that a purposive and careful approach should not be taken to the safeguards in paragraph 2(1)(e).

35. For all these reasons I consider that the Judge's approach was correct.
36. It was not argued before me that if the Judge was correct in her analysis of the law, I should still uphold the LPA because the evidence showed X had formed the requisite opinion. Given that it was not argued, and I have accepted and agreed with the Judge's legal analysis, I do not consider this issue further and accept the Judge's conclusions on the facts.
37. I therefore refuse the appeal.