COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

In the matter of
LODGE

This is an application for the court to reconsider an order made by District Judge S. E. Rogers on 6 August 2010.

The law relating to the reconsideration of court orders can be found in rule 89 of the Court of Protection Rules 2007.

The background

On 24 June 2004 Mrs Lodge signed an enduring power of attorney ("the EPA"), in which she appointed her son A and daughter B jointly and severally to be her attorneys, with general authority to act on her behalf in relation to all her property and affairs.

XYZ Solicitors drew up the EPA and solicitor C of that firm witnessed Mrs Lodge's signature.

Unfortunately, Mrs Lodge signed Part C of the prescribed form, rather than Part B.

On the following day, 25 June 2004, attorney A signed Part B (instead of Part C) and his signature was witnessed by his neighbour.

Attorney B executed a separate Part C on 28 June 2004.

In September 2009 the surviving attorney, B, applied to the Office of the Public Guardian to register the EPA.

The Public Guardian refused to register the EPA because Mrs Lodge had executed Part C of the instrument (the part that should be completed by the attorney(s)), and attorney A had executed Part B of the instrument (the part to be completed by the donor).

In a letter to the solicitors dated 30 September 2009 the Office of the Public Guardian stated:

> "We have identified that the EPA, Part B was executed by the attorney A and the donor executed Part C. I must advise you that due to this defect the Public Guardian have no power to register an instrument that has not been executed in the prescribed manner. I am therefore returning the EPA.
>
> Accordingly, given the defects in the instrument the attorneys will need to be advised on whether an application should be made to the Court of Protection under paragraph 4(5) of Schedule 4 to the Mental Capacity Act 2005 for a declaration as to the validity of the instrument, Alternatively, they can seek rectification of the instrument if there is evidence to support the granting of such remedy and direction to the Public Guardian to register."

The application

On 1 March 2010 attorney B (for whom XYZ Solicitors also act) applied to the court for an order "that the Enduring Power of Attorney be declared to be a valid instrument."

The application was accompanied by a witness statement (COP24) made by solicitor D on 3 March 2010, in which he said:

1. I am a solicitor employed by XYZ solicitors who represent attorney B.

2. This application relates to matters concerning Mrs Lodge who is the mother of attorney B.

3. The application concerns the validity of an Enduring Power of Attorney of Mrs Lodge.

4. An application was made to register the Enduring Power of Attorney but was originally returned to this office by the Office of the Public Guardian who requested a copy of the death certificate of attorney A one of the named attorneys who died 26th September 2009.

5. The original death certificate of attorney A was returned to the Office of the Public Guardian.

6. Following the return of the death certificate to the Office of the Public Guardian they wrote to this firm and a copy of their letter dated 30th September 2009 is attached hereto. As can be seen a query has been raised regarding the validity of the Enduring Power of Attorney and which has resulted in this application being made.

7. The Enduring Power of Attorney was dealt with by solicitor C, a solicitor who is no longer employed by this firm.

8. It appears as though the donor has, incorrectly, signed on page 4 of the form whilst the deceased attorney, A, has signed on page 3.

9. It is noted that the donor signed the Enduring Power of Attorney on 24th June 2004. On the same date she signed her will, a copy of which is attached hereto.

10. The following day attorney A signed as attorney whilst Attorney B signed on 28th June, a few days later. All signatures appear to have been correctly witnessed.

11. It appears as though pages 3 and 4 have unfortunately merely been reversed but, nevertheless, in all other respects the requirements of the Enduring Power of Attorney appear to have been complied with.

12. In the circumstances I therefore seek a declaration that the Enduring Power of Attorney is a valid instrument.

On 31 March 2010 the court wrote to solicitor D of XYZ Solicitors stating that the application had been put before a judge (District Judge S. E. Rogers) who had stated that "the solicitor who witnessed the EPA, even though left firm, must provide a detailed COP24 and exhibit any relevant documents."

XYZ Solicitors responded on 23 June 2010 enclosing a witness statement made by solicitor C on 21 June 2010, in which she said:

1. I was employed by XYZ Solicitors at the time that the Enduring Power of Attorney of Mrs Lodge was prepared a copy of which is annexed to this application.

2. I note that the validity of the Enduring Power of Attorney is in question as the signatures of Mrs Lodge and attorney A appear in the wrong order on the form.

3. I can confirm that I did attend Mrs Lodge and that her instructions were to appoint both attorney A and attorney B as her attorneys under the power and that she did sign the EPA before both of the Attorneys.

4. I remember this particular matter as Mrs Lodge had attended the offices with attorney A some time before to give instructions for the EPA and Will. At that time attorney A had not been well and when Mrs Lodge attended the offices to sign was not well enough to attend which is why the form was sent to him for signature. I was later advised that her son had been diagnosed with a condition from which he later died.

5. It appears from looking at the copy of the EPA form that the signature pages have simply been mixed and that Mrs Lodge and attorney A have signed in the wrong places. It was always the intention of Mrs Lodge that her son and daughter be appointed as attorneys.

6. I do recall being instructed at around this time to prepare a similar document for attorney A to sign and it may be that as the two forms were prepared the front covers were simply transposed and the front cover intended for attorney A was incorrectly attached to the EPA for Mrs Lodge.

7. I can also confirm that Mrs Lodge signed the form before the two attorneys.

The order of 6 August 2010

On 6 August 2010 District Judge S. E. Rogers made an order stating:

> IT IS RECORDED that:
>
> Having regard to all the evidence filed and the explanation given by those engaged in the execution of the Enduring Power of Attorney, the court however considers that the failure of the donor to correctly execute the instrument dated 24th June 2004 is a material defect.
>
> IT IS ORDERED that:
>
> (1) No order on application.
>
> (2) This order was made on the court's own initiative without hearing the parties, or giving them the opportunity to make representations. Any person who is affected by it may apply to the court within 21 days of the order being served for reconsideration of the matter.

The application for reconsideration

On 16 December 2010 attorney B applied:

> For the court to reconsider its order made by District Judge S. E. Rogers on 6th August 2010 stating that the failure of the donor to correctly execute the Enduring Power of Attorney was a material defect.
>
> The donor intended to execute a valid Enduring Power of Attorney but owing to the signature pages being transposed the donor [and] one of the attorneys (now deceased) inadvertently signed in the wrong places. Please see COP24 dated 21 June 2010.

The directions order

On 28 January 2010 I made the following directions order:

1. The Public Guardian is joined as a party and as the respondent to this application.

2. …..

3. …..

4. …..

5. The matter will be heard by Senior Judge Lush at Archway Tower 2 Junction Road London N19 5SZ on Monday 14 March 2011 at 2 PM with a time estimate of one hour.

The Public Guardian's position statement

On 18 February 2011 the Public Guardian filed a position statement. The first five paragraphs set out the background to the case, and from paragraph 6 onwards the statement said as follows:

6. Legal framework

Paragraph 2(1) of Schedule 4 to the Mental Capacity Act 2005 ("MCA") provides that: "….. *a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power –*
(a) is in the prescribed form,
(b) *was executed in the prescribed manner by the donor and the attorney …*"

Paragraph 2(2) provides that: "*In this paragraph "prescribed" means prescribed by such of the following regulations as applied when the instrument was executed –*
(a) the Enduring Powers of Attorney (Prescribed Form) Regulations 1986 (S.I. 1986/126),
(b) the Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (S.I. 1987/1612),
(c) the Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (S.I. 1990/1376,
(d) the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2000 (S.I. 2000/289).

The material regulations in this case are the Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (S.I. 1990/1376) ("the Regulations"), regulation 3(1) of which provides "*an enduring power of attorney in the form set out in the schedule to these regulations shall be executed by both the donor and the attorney, although not necessarily at the same time, in the presence of a witness, but not necessarily the same witness, who shall sign the form and give his full name and address*."

7. Paragraph 2 of Schedule 4 of the Mental Capacity Act 2005 provides that "*if an instrument differs in an immaterial respect in form or mode of expression from the prescribed form it is to be treated as sufficient in point of form and expression*."

8. Part B of the prescribed form requires the donor to sign up to giving the following communications; first, I intend this power shall continue if I become mentally incapable. Second, I have read or have had read to me the notes in Part A which are part of, and explain, this form.

9. In Cretney and Lush on Lasting and Enduring Powers of Attorney Sixth Edition at paragraph 16.62 which deals with material and immaterial differences in the EPA form on page 236 one of the examples given by P. D. Lewis ((1986) LSG 3455 and (1987) LSG 1219) of where the Court

10. The Court of Protection in the case of Mason (an order of District Judge Batten made on 17th January 2011) where, as in this case, unfortunately by mistake the donor signed Part C and the attorney signed Part B of the EPA instrument and the instrument was mistakenly registered on 28th August 2007, on the attorney's application for a declaration of validity the court held that the EPA was not a valid and subsisting enduring power of attorney when registration was effected. The Public Guardian was directed to cancel the registration of the EPA.

11. Additionally, in the case of Brooks (a decision of District Judge Eldergill made on 24th January 2011), the donor signed an instrument in which she purported to appoint two attorneys to act jointly and severally for the purposes of the Enduring Powers of Attorney Act 1985. The donors and the attorneys signed the instrument, but the witness to all their signatures failed to sign after the attorneys' signatures and the date on which one of the attorneys signed the instrument was not recorded. From the evidence presented the court found, as a matter of fact, that the witness had witnessed the attorneys signed the instrument. However, the court found that the omissions were not immaterial in point of form and expression. The court held that the instrument signed by Mrs Brooks was not executed in the prescribed manner and was insufficient to appoint the two attorneys for the purposes of the Mental Capacity Act 2005. [A copy of the order is attached for ease of reference]. This shows that the court has no discretion as failures of execution in the same way it has over errors relating to the form or mode of expression of this instrument.

Conclusion

12. The unfortunate failure by the donor to execute Part B of the EPA means that the donor failed to comply with the prescribed form and the mandatory requirements of the Regulations for the creation of a valid EPA. The decisions of District Judge Batten in the case of Mason, and District Judge Eldergill in Brooks, it is submitted, confirm that the failure to execute the instrument as prescribed by the Regulations is a material defect in the instrument and cannot be a valid EPA.

13. There is nothing in the MCA 2005, the Regulations, or at common law to support the proposition that a valid EPA can be created where the donor has not correctly complied with the prescribed execution requirements for a valid EPA which is a fundamental safeguard and protection for donors. It is submitted that the EPA is invalid and the Public Guardian should not be directed to register the instrument.

The hearing

The hearing took place on Monday 14 March 2011 but was attended only by Elaine Brown of the OPG.

Decision

Nobody emerges from this case covered in glory.

To put it bluntly, solicitor C, the solicitor who witnessed Mrs Lodge signature was negligent. This was not just a simple clerical error, but over a period of several days an ongoing breach of her duty of care to the client to ensure that the deed was executed in the prescribed manner.

The wording immediately around the place where Mrs Lodge signed the instrument should have made it obvious to anyone who was properly concentrating on the business being transacted that this was the space at which the attorney should sign, not the donor. The instrument says in bold letters:

> Part C: To be completed by the attorney(s)

The three statements to which Mrs Lodge actually subscribed say:

> I understand that I have a duty to apply to the Court for registration of this form under the enduring Powers of attorney act 1985 when the donor is becoming or has become mentally incapable.
>
> I also understand my limited power to use the donor's property to benefit persons other than the donor.
>
> I am not a minor.

It should have been apparent, if not to Mrs Lodge herself, then at least to the solicitor advising her and witnessing her signature that the first two of these statements apply to an attorney, but not to the donor.

The error was further compounded when solicitor C sent the form to attorney A and asked him to complete Part B, almost in the belief that two wrongs make a right. Someone, presumably solicitor C, wrote his initials in pencil marks at the place in Part B where he was supposed to sign. Surely at this stage, when sending him the form, solicitor C must have been aware that she had made a serious mistake. Even if she didn't realise it then, I am surprised that attorney A didn't pick it up. He is supposed to have subscribed to the statements:

> Part B: To be completed by the 'donor' (the person appointing the attorney(s))
> …
>
> I intend that this power shall continue even if I become mentally incapable.
>
> I have read or have had read to me the notes in Part A which are part of, and explain this form.

When attorney A returned the form, solicitor C must have realised the nature and extent of the mistake she had made, and surely she must have been aware of it when she sent the form to attorney B to sign, or when attorney B returned it to XYZ Solicitors.

Paragraph 2(1)(b) of Schedule 4 to the Mental Capacity Act 2005 provides that:

> "…. a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power –
> (b) was executed in the prescribed manner by the donor and the attorney."

In my judgment, this instrument was not executed in the prescribed manner by the donor and it was not executed in the prescribed manner by attorney A, one of the two attorneys. Accordingly, it cannot be an enduring power of attorney.

Nor does the Office of the Public Guardian ("OPG") emerge from this case covered in glory. Its letter of 30 September 2009 in which it made the following statement was erroneous:

> "Accordingly, given the defects in the instrument the attorneys will need to be advised on whether an application should be made to the Court of Protection under paragraph 4(5) of Schedule 4 to the Mental Capacity Act 2005 for a declaration as to the validity of the instrument, Alternatively, they can seek rectification of the instrument if there is evidence to support the granting of such remedy and direction to the Public Guardian to register."

It was mistaken to suggest that the court could somehow rectify the blunder and declare that the instrument was valid. The court has no such remedial power with regard to EPAs.

Paragraph 4(5) of Schedule 1 to the Mental Capacity Act 2005 merely provides that:

> The attorney –
> (a) may, before making an application for the registration of the instrument, refer to the court for its determination any question as to the validity of the power, and
> (b) must comply with any direction given to him by the court on that determination.

This provision applies where an attorney is not sure whether an instrument or part of an instrument is, in fact, valid as an Enduring Power of Attorney, and he seeks to have its validity determined by the court, rather than apply to the Public Guardian for registration.

Although it originally appeared as section 4(5) of the Enduring Powers of Attorney Act 1985, this provision is almost pointless now, because it is considerably more expensive to make an application to the Court of Protection (£400) than it is to apply to the OPG to register an EPA (£120).

This paragraph does not, however, enable the court to rectify an instrument which it considers to be invalid. It could, for example, enable the court to say that it would direct the Public Guardian register an otherwise valid instrument provided that an invalid or ineffective provision were severed from it.

In any event, in this case, the attorney applied first to the OPG, and subsequently sought the court's determination as to the validity of the power. Furthermore, by seeking reconsideration under rule 89, the attorney failed to comply with the direction given to her on the original determination.

The following observations come from an article by Gwynn Davis, "Research into enduring powers of attorney", which was published in *Family Law* in July 1991, five years after it became possible to execute an EPA in England and Wales.

> "Some solicitors were disenchanted with the procedural requirements associated with registration and with what they saw as the deficiencies of the EPA form (this was, in fact, amended shortly after we conducted our interviews). Many of the EPAs for which registration was sought proved to be defective in one way or another. Also, some of the early applications to register were inept. The standard improved as the procedure became better known, but there continued to be a large number of failures and abandonments. Those few solicitors who had much experience of registration admitted that they had made mistakes in creating powers and had had applications rejected. Indeed, one firm told us that all the applications which they had made to register to date had been rejected. They had since reverted to the standard law stationer's forms. As our informant put it: "I'm looking forward to the first registration with one of these to score a win for a change."

In order to resolve these difficulties, the Law Commission, in its report on *Mental Incapacity* (1995), recommended that the Court of Protection should have a "dispensing power", enabling it to declare that a document which is not in the prescribed form is to be treated as if it were, provided that the court is satisfied that the persons executing the instrument intended it to create a power of attorney. At paragraph 7.55 of the report the Law Commission said:

> "A number of our respondents expressed concern about the rejection of EPAs on "pettifogging" technical grounds. In some cases the donor will have suffered irreversible loss of capacity by the time the rejection of registration is made, with the result that a technically valid EPA can no longer be executed. The 1985 Act does provide that a document which "differs in an immaterial respect" from the prescribed form shall be treated as sufficient. This is a useful provision of general application and we have retained it in our draft Bill. Respondents did, however, give an enthusiastic welcome to our provisional proposal for a wider power whereby a judicial forum could "cure" technical defects in a document. This would enable the court to look at the intention of the donor in executing any document which fails to conform to all the prescribed formalities. We recommend that the court should have power to declare that a document not in the prescribed form shall be treated as if it were in that form if the court is satisfied that the persons executing it intended to create [a Lasting Power of Attorney]."

Accordingly, the Mental Capacity Act 2005, Schedule 1, paragraph 3, which is headed "Failure to comply with prescribed form", provides that:

> (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.

Unfortunately for Mrs Lodge, the court's power to declare that an instrument which is not in the prescribed form may be treated as if it were, and to "cure" technical defects in a document, applies only to LPAs, and not to EPAs. The legislators were unable to make retrospective changes to the existing legislation on EPAs, the Enduring Powers of Attorney Act 1985, and the position regarding applications of this kind remains exactly as was described by Gwynn Davis in his article of twenty years ago.

I hasten to add that, even with an LPA, it is most unlikely that the court would treat an instrument as if it were in the prescribed form where the donor had executed Part C of the form, instead of Part A. The remedial discretion given in paragraph 3(2) of Schedule 1 to the Mental Capacity Act applies to an instrument which is not in the prescribed form (as required by paragraph 1(1)(a) of Schedule 1), but not to "any prescribed requirements in connection with its execution" (as required by paragraph 1(1)(c) of that Schedule).

I mention in passing that on 1 February 2011 Mrs Justice Proudman handed down judgment in *Marley v Rawlings* [2011] EWHC 161 (Ch), where there was a claim for rectification of a will executed on 17 May 1999 by Alfred Thomas Rawlings. Mr Rawlings and his wife had executed mirror wills, but both testators managed to sign the wrong will without anybody noticing. Mrs Justice Proudman held that the will could not be retrospectively rectified. There is no particular point of law I wish to draw from that case, but I would echo her sentiments, and those of Sir James Hannen in *In the Goods of Hunt* (1875) LR 3 P&D 250, by saying in this case too "that much as I regret the blunder, I cannot repair it."

Accordingly, I affirm District Judge Rogers' order of 6 August 2010. The application was inept. However, I don't think there was any need for him on 31 March 2010 to require solicitor C to file a witness statement in circumstances in which there had been such a patently fundamental error.

DENZIL LUSH
Senior Judge
14 March 2011