

IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of her family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Neutral Citation Number: [2019] EWCOP 13

Case No: 13237114

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF BGO

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 5th April 2019

Before :

Her Honour Judge Hilder

Office of the Public Guardian

Applicant

and

1. PGO
2. MAB
3. MJD

Respondents

Hearing: 4th February 2019

Mr. Cisneros (instructed by the Office of the Public Guardian) for the Applicant
No attendance by any other party

The hearing was conducted in public subject to a transparency order made on 3rd January 2019. The judgment was handed down to the parties by e-mail on 5th April. It consists of 8 pages, and has been signed and dated by the judge.

The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

The Background

1. BGO is now 84 years old. In April 2016 she executed two separate instruments – one a lasting power of attorney for health and welfare [**B5**], the other a lasting power of attorney for property and affairs [**B25**] (“the LPAs”) – in which she appointed her husband and two solicitors as her attorneys, with authority to act jointly and severally. Both of the LPAs were registered by the Office of the Public Guardian on 21st June 2016.
2. Some time later one of the financial institutions to which the registered property and affairs LPA was sent noticed that BGO’s signature on the instrument had been witnessed by one of the attorneys (MAB), which is contrary to the requirements of Regulations.
3. By letter dated 31st January 2018, MAB properly drew this to the attention of the Office of the Public Guardian, at the same time informing that Office that BGO now lacked capacity to make new LPAs. MAB requested confirmation that, since the LPAs were registered, despite the irregularity in execution they could be relied upon by the attorneys.
4. The Public Guardian applied to the Court for a determination as to whether or not the requirements for creation of an LPA were met, and directions as to whether the Public Guardian should cancel the registration of the instrument.

The proceedings

5. The Public Guardian’s COP1 application [**A1**] was made on 4th April 2018, and initial directions were given on 11th April 2018 [**A8**]. There was then some delay with issues of service. On 3rd September 2018 MAB made a COP9 application seeking orders that the LPAs “remain in effect.” The matter was listed for a telephone hearing before a District Judge on 30th November 2018. On that occasion directions were given for the filing of further documents and, if no agreement was reached, the listing of a hearing before me on 18th January 2019.
6. Unfortunately, for reasons which are not clear, the Office of the Public Guardian was not aware of the hearing listed on 18th January 2019 until the day before. As a result,

a representative from the OPG attended but not the Counsel who had filed the position statement, and little substantive progress could be made. The matter was adjourned for further hearing.

7. In the course of the proceedings, the position of the Public Guardian has shifted significantly. I take the position set out by Mr. Cisneros as the Public Guardian's final position, and therefore need not dwell on other arguments previously made but no longer advanced.
8. I have considered a bundle of documents prepared for the hearing, including statements by Iain Dougall of the OPG [B1] and a statement by MAB [B56].

The Law

9. The legal framework for lasting powers of attorney is set out in sections 9 - 14 of the Mental Capacity Act 2005 ("the Act"), with the formal requirements set out in Schedule 1. The powers of the Court of Protection in relation to lasting powers of attorney are set out in sections 22 and 23 of the Act.
10. Section 22 of the Act confers on the Court powers in relation to validity of instruments conferring or purporting to confer lasting powers of attorney:

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 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) ...

The Public Guardian's COP1 application explicitly, and MAB's COP9 application implicitly, both ask the Court to exercise its power under section 22 to determine whether the requirements for the creation of a lasting power of attorney have been met in BGO's LPAs.

11. The requirements for creation of a lasting power of attorney are spread across statute and statutory instrument. The starting point for present purposes is section 9 of the Act:

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)

It is common ground that the requirements of s9(2)(a) and (c) are met in this case. The issue in this matter has its roots in subsection (b) - the requirement that the instrument is made and registered in accordance with Schedule 1.

12. Schedule 1 extends to 25 paragraphs. They begin with 'general requirements':

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)

(3) In this Schedule –

- a) ‘prescribed’ means prescribed by regulations, and
- b) ‘regulations’ means regulations made for the purpose of this Schedule by the Lord Chancellor.

Requirements as to content of instruments

2 (1) The instrument must include....

13. The ‘regulations’ which ‘prescribe’ requirements are the Lasting Power of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007 (as amended.)

14. Regulation 5 provides for forms:

5. Forms for lasting powers of attorney

The forms set out in Parts 1 and 2 of Schedule 1 to these Regulations are the forms which, in the circumstances to which they apply, are to be used for instruments intended to create a lasting power of attorney.

BGO’s LPAs use the forms prescribed. Mr. Cisneros confirmed to the Court unequivocally that all parties agree that the issue in this case is one of execution, not form. (As a result paragraph 3 of Schedule 1 does not apply. Paragraph 3 is headed “Failure to comply with prescribed form” and best understood as limited in application to the requirement identified in paragraph 1(1)(a). Any arguments on this point, as formulated by different Counsel for the ineffective hearing on 18th January, were abandoned - in my view correctly - by Mr. Cisneros.)

15. The prescribed requirements of execution are set out in Regulation 9:

9 Execution of instrument

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

....

(8) For the purposes of this regulation –

- a) the donor may not witness any signature required for the power;
- b) a donee may not witness any signature required for the power apart from that of another donee.

It is accepted that the execution of BGO's LPAs did not comply with Regulation 9(8)(b) because one of the donees (MAB) witnessed the signature of the donor (BGO). The Court's determination pursuant to section 22(2)(a) of the Act is therefore uncontentious – a requirement for the creation of a lasting power of attorney has not been met.

16. It follows from this accepted position that:

- a. pursuant to Schedule 1 paragraph 1(c), BGO's instruments were not made in accordance with the Schedule; and therefore
- b. pursuant to section 9(3), BGO's instruments confer no authority.

17. The consequence is set out in paragraph 18 of Schedule 1:

18 The court must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney if it –

- a) determines under section 22(2)(a) that a requirement for creating the power was not met.

The wording of paragraph 18 of Schedule 1 is mandatory. Because the requirements of execution have not been met, I must direct the Public Guardian to cancel the registration of BGO's LPAs.

18. For many donors, the failure of their LPA because of a defect in execution can be overcome by the relatively simple step of granting fresh powers, taking care to ensure

that the requirements are met – an irritation perhaps and an expense but not an insurmountable hurdle. However, that option is not open to BGO. Sadly, before this defect was identified, BGO’s capacity had deteriorated to the point where she is unable to execute fresh LPAs. The consequences of a direction to cancel the registration are therefore significant for her.

19. In the absence of attorneys to manage her property and affairs, the Court may appoint a deputy or deputies. In making such an appointment, the Court will take into account all that is known of BGO’s wishes and feelings in respect of who she would like to assist her, as demonstrated by the attempt to grant LPAs and otherwise.
20. In respect of health and welfare, the Court may also appoint a deputy or deputies if considered appropriate, although it does so much more rarely. However, pursuant to section 20(5) of the Mental Capacity Act 2005, a deputy cannot be given powers to refuse consent to the carrying out or continuation of life-sustaining treatment. In her welfare instrument, BGO had ticked the box to confirm that she wanted to give her attorneys this power. On the failure of her LPA, there is no means for the Court to give effect to her wishes in this respect.
21. I am mindful of authorities (such as *Miles & Beattie v. The Public Guardian* [2015] EWHC 2960, *Wye Valley NHS Trust v. Mr B* [2015] EWHC 60, *Briggs v. Briggs* [2016] EWCOP 53 and *The Public Guardian v. DA & Others* [2018] EWCOP 26) which together emphasise the empowering intention of the Mental Capacity Act 2005 and the “underlying principle that respect must be given wherever possible to the donor’s autonomy” [per Baker LJ in *PG v. DA* at paragraph 47]. The mandatory nature of Schedule 1 paragraph 18, particularly where it has consequences as it does for BGO, may appear to run in the opposite direction. However, it should be borne in mind that Lasting Powers of Attorney are powerful documents and inevitably therefore there will be those who seek to obtain powers wrongfully. There is no suggestion of such wrongful intent in the matter currently before me but, in different circumstances, insistence on an independent witness to the Donor’s signature is itself an important safeguard for the expression of genuinely autonomous decisions.

Conclusions

22. The requirements of Regulation 9(8)(b) not having been met, the instruments executed by BGO confer no authority and the Public Guardian shall be directed to cancel their registration.

23. The Respondents are invited to make an application for appointment as property and affairs deputies for BGO. Any requirement to file form COP1 is dispensed with. Forms COP1A, COP3 and COP4 should be filed within 28 days.
24. If the Respondents, or any of them, seek the appointment of a welfare deputy or deputies for BGO, they should also file at Court within 28 days a COP24 statement which sets out any welfare issues which require decisions to be made, why (having regard to s5 of the Mental Capacity Act 2005) an order is needed and why (having regard to section 16(4) of the Act) the decisions should be taken by a deputy rather than the Court.
25. The Public Guardian does not seek any costs for this application. If the Respondents seek costs, they should file written submissions within 28 days.
26. On receipt of the additional documentation, I will make such further orders as may be appropriate.

HHJ Hilder

21st March 2019