LASTING POWERS OF ATTORNEY

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Can the capacitous views of an individual about who they wish to make decisions on their behalf in the event that they lose capacity be overridden? The answer, in short, is yes. In this article I will discuss the recent decision of *Re KC; LCR v SC* [2021], an unusual case of a pre-emptive refusal to register a lasting power of attorney (LPA) on the grounds of irreconcilable differences.

Summary of the case

The proceedings concerned KC, who was 85 years old at the time of the hearing. KC has a diagnosis of Alzheimer's dementia and a consequent moderate degree of cognitive impairment. KC resides with her daughter (LCR) and LCR's husband and has done so since 24 February 2018.

On 16 August 2017, KC appointed all of her four adult daughters (SC, AC, CP and LCR) to act jointly and severally as her attorneys for both property and affairs and health and welfare. KC's capacity was assessed on 8 August 2017 and she was considered to be capacitous to execute the LPAs. The assessor recorded that:

> *Although [KC] has early signs of dementia, she is able to discuss her finances and any other health issues. She was able to give clear instruction regarding the LPA and who should be named. At the time of the assessment [KC] does have capacity to sign the LPA.*

KC sought to register the LPAs. LCR refused to sign the LPAs and issued an application by way of Form COP7 to object to the registration of the LPAs on the basis that she did not accept that KC had capacity to execute the LPAs on 16 August 2017.

During the proceedings (on 3 June 2020), it was agreed between the parties and determined by the court that there was insufficient evidence to rebut the presumption of

capacity at the date that the LPAs were executed by KC. The court made final declarations pursuant to s15 Mental Capacity Act 2005 (MCA) that KC now lacks capacity to:

- conduct the proceedings;
- make decisions about where she shall live;
- make decisions as to her care;
- make decisions about her contact with others; and
- make a decision to revoke the LPAs.

There was a longstanding acrimonious relationship between KC's adult daughters, with SC, AC and CP on the one side, and LCR on the other. Despite the parties reaching agreement as to KC's capacity (which had been the basis of the initial objection and the basis upon which the proceedings commenced), LCR continued to object to the registration of the LPAs.

The evidence before the court as to KC's capacitous decision-making was clear, as was the evidence as to her incapacitous wishes. It was accepted by the parties that KC wished for her daughters to have decision-making authority in respect of her property and affairs and her health and welfare, and that her wishes were clear that she wanted *all* of her daughters to make decisions together. The court was referred to the evidence as to KC's wishes and feelings:

> *The court was referred to the attendance note of KC's solicitor Mr Maguire from his visit to KC on 17 July 2019. When asked about the term LPA and what she understands it to mean she said: 'It means you want them to see to things for you'. When asked who she would wish to manage her affairs KC said: 'well, they'd all have to do it. I'd have them all involved. You know there is four of them and you don't want to leave any of them out. Lynda is the oldest.' When asked if she trusts her daughters she said: 'they know what I want and they would do their best to give that to me. I am close with them.' When asked if she thought they were close with one another she said: 'I don't know how to say it. Sometimes they argue and sometimes they're not close. They're sisters and they keep things to themselves. I wish they were close. Some families are very close. If anything was happening to me though they would pull together.*

The issue

The issue for the court to determine was whether the LPAs executed by KC should be registered.

The court considered the legal framework and applicable statutory provisions in great detail at paras 10-27 of the judgment. The court noted that a power of attorney intended to be an LPA for the purposes of the MCA 2005 must be made in two stages for it to be valid as an LPA: the drawing up and execution of the instrument followed by its formal registration by the Public Guardian. Until both stages have been completed, a properly completed and duly executed instrument has no legal effect. The court was clear to note that, while the LPA in respect of LCR could *not* be registered because she had refused to

execute it, this did not prevent the court from registering the LPAs in respect of KC's other daughters, who all executed the LPAs.

Section 19(7) MCA provides that if donees are to act jointly and severally, a failure, as respects one of them, to comply with the requirements of subsection (1) or Part 1 or 2 of Sch 1:

- prevents the appointment taking place *in their case*; but
- does not prevent an LPA from being created in the case of the other or others.

The court was clear that it had the option to register the LPA in relation to AC, SC and CP but not LCR.

The court's powers in this context are found in ss22 and 23 MCA 2005. Section 22(2) gives the court the power to determine any question relating to whether one or more of the requirements for the creation of an LPA have been met or whether the power has been revoked or has otherwise come to an end. By s22(4)(a) MCA 2005, the court may direct that an instrument purporting to create the LPA is not to be registered or, if P lacks capacity to do so, revoke the instrument or the lasting power of attorney. The court's power under s22(4)(a) is triggered if the court is satisfied (emphasis by the judge):

> - *That fraud or undue pressure was used to induce P –*
>   - *to execute an instrument for the purpose of creating a lasting power of attorney, or*
>   - *to create a lasting power of attorney, or*
> - ***That the donee (or, if more than one, any of them) of a lasting power of attorney***
>   - *has behaved, or is behaving, in a way that contravenes their authority or is not in P's best interests, or*
>   - ***proposes to behave in a way that would contravene their authority or would not be in P's best interests**.*

Decision

The court noted that there are no previously reported cases where the court has had cause to consider the prospective behaviour of attorneys in deciding whether to register (or revoke) LPAs. Section 22(4)(a) makes plain that, when considering whether to exercise its powers under s22(3), the court can consider whether the way in which the donee(s) propose to behave would be in P's best interests.

The court considered and agreed with the decision in *Re J* [2011], where HHJ Hazel Marshall QC considered the statutory construction of s22 at paras 73 and 75 and in particular the approach that should be taken if an attorney or proposed attorney is considered to be unsuitable:

> *It appears to me that the general thrust of s.22(3)(b) is that the court can revoke an LPA if it is satisfied that the attorney cannot be trusted to act in the*

> *matter and for the purpose for which the LPA was conferred upon him/her… Further, if there is sufficient evidence that the attorney is behaving in contrary to P's best interests, even in a different context, then it seems to me that that might quite reasonably provide a sufficient reason to revoke an LPA, perhaps because of conflict of interest.*
>
> *[…]*
>
> *In my judgment, the key to giving proper effect to the distinction between an attorney's behaviour as attorney and his behaviour in any other capacity lies in considering the matter in stages. First, one must identify the allegedly offending behaviour or prospective behaviour. Second, one looks at all the circumstances and context and decides whether, taking everything into account, it really does amount to behaviour which is not in P's best interests, or can fairly be characterised as such. Finally, one must decide whether, taking everything into account including the fact that it is behaviour in some other capacity, it also gives good reason to take the very serious step of revoking the LPA.*

Interestingly, the court referred to and commented on the notes contained within the Court of Protection Practice:

> *The notes to the Court of Protection Practice state that no case has yet been brought before the courts on the ground of the future behaviour of a donee or donees and state that 'an application to revoke a lasting power of attorney on such grounds requires a high standard of proof to show why the behaviour of the attorney is not in the donor's best interests.' Insofar as this comment requires the court to undertake a proper analysis of the available evidence, looking at factors such as the context of any evidence, the overall evidential picture and the inherent probabilities (or improbabilities) of the evidence as it relates to the past behaviour of the donee and, applying this analysis, to what it establishes about the likely future behaviour of the donee(s) and whether this is likely to be in P's best interests, I agree. Insofar as this comment suggests that there is somehow a higher standard of proof, or that the seriousness of the matters or the seriousness of the consequences should make any difference to the standard of proof, I respectfully disagree. In the present case, as with any case before this civil court, the standard of proof is to a balance of probabilities.*

The court was clear to point out (and rightly in my view) that the standard of proof in applications of this nature is the civil standard, the balance of probabilities. There is no discrete higher standard of proof in applications of this nature. In this case, the court had to determine whether, on the balance of probabilities, the donees proposed to behave in a way that would not be in KC's best interests.

The court described the 'nub' of this case to lie in whether, if the court ordered the registration of the instruments, the daughters would be able on a day-to-day basis to apply the factors set out in s4 MCA when determining what is in KC's best interests. Those factors would include taking into account KC's wishes and feelings (which were that all

four of her daughters be involved in making decisions about her future care, finances etc) and the views of anyone engaged in caring for KC or interested in her welfare:

> *In other words, there would need to be a degree of co-operation, engagement and, where possible, agreement, between all four of KC's daughters. SC, AC and CP would be required when making decisions and considering their mother's best interests to work with LCR.*

The court was satisfied that this would *not* happen. The court concluded that, in light of the level of acrimony between the daughters, there was clear evidence that the donees would not act in KC's best interests if the LPAs were registered:

> *There is abundant evidence that for whatever reason LCR on the one hand and SC, AC and CP on the other, have a difficult, fractured and acrimonious relationship based on mistrust, conflict and what at times has appeared to this court to be dislike. If anything, the entrenched positions and conflict has intensified as these proceedings have progressed and as, sadly, KC's health has deteriorated. At a time when she has most needed her daughters to all pull together the chasm between them has if anything deepened and widened. It was KC's hope that her daughters would pull together and make decisions together. In my judgment, the evidence strongly indicates that sadly there is no prospect of that happening. I do not intend to make any findings as to where the rights and wrongs lie as between the Applicant on the one hand and the Respondents on the other. It is not necessary for the court to do so for present purposes. Furthermore, I am of the very clear view that it would not be in KC's best interests for the court to enter such territory.*

The court directed that the LPAs should *not* be registered and made an order for the appointment of a professional deputy to manage KC's property and affairs.

Why this case is significant and its implications

As noted above, this is the first reported decision from the Court of Protection where the court has considered and made a determination in relation to the prospective conduct and prospective decision-making of proposed donees. In the vast majority of cases where the court has to consider the conduct of donee(s) (and unfortunately there are many), the court has had to consider the previous conduct which invariably includes allegations of undue influence or allegations of financial, physical or emotional abuse.

This case is significant as it demonstrates the court's approach to the potential future conduct of donees and the requirement for donees to comply with s4 MCA 2005. Here, it was abundantly clear that KC's past and present wishes were for all four of her daughters to work together and to make decisions collectively on her behalf. However, the court had to consider whether they, as attorneys acting jointly and severally, could act in her best interests. In the circumstances of this case, it was plain that KC's daughters would be unable to comply with the provisions of s4 MCA, for example, s4(7) provides that in taking

a decision in a person's best interests the decision-maker must take into account, if it is practicable and appropriate to consult them, the views of:

- anyone named by the person as someone to be consulted on the matter in question or on matters of that kind;
- anyone engaged in caring for the person or interested in their welfare; and
- any donee of an LPA.

The court was clear in its assessment that KC's daughters, as a result of the acrimony between them, would not be able to effectively consult one another and would not therefore be able to comply with the provisions of s4.

Practitioners (for good reason) typically associate applications of this nature with allegations of abuse or wrongdoing as opposed to issues solely relating to conflict between P's family members. There is an increasing number of cases where relatives of P are unable to effectively work together to make decisions on behalf of P as a consequence of, as was the case here, deep-rooted family conflict. It is imperative therefore that when practitioners are providing advice in relation to LPAs and there is a clear family conflict, consideration and advice is given as to whether, in light of the conflict, the proposed attorney(s) would be able to comply with the provisions of s4. While in the case of KC, the court had to consider whether the daughters could work together as attorneys, the same consideration would apply where a person proposes to appoint a single family member to act as attorney, looking at whether that relative would be able to consult with any other relative or person who would fall under s4(7) MCA.

Although this case is unusual as it is the first of its kind to be reported, the difficult family dynamics and the conflict between what KC wanted to happen and the reality of it being impossible are not uncommon. Both will need to be considered at the point at which an LPA is executed to ensure that:

- the person's wishes can actually be accommodated; and
- any person executing an LPA is aware of the approach that the court may take in relation to any application to revoke the LPA, where there is an entrenched family dispute that may impact the attorney's ability to consult.

Cases Referenced

- Re J [2011] COPLR Con Vol 716
- Re KC; LCR v SC & ors [2021] WTLR 229 CoP

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