

IN THE COURT OF PROTECTION

IN THE MATTER OF H

Before District Judge Ralton on 24th January 2012

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This is an approved judgement handed down on 24th January 2012

DISTRICT JUDGE RALTON

Background

1. Mrs H, to whom I shall refer as “the Donor” was born on 29th December 1920 so she is now 91 years old.
2. The Donor retained XYZ Solicitors to draw up a lasting power of attorney and Mr X of that firm acted as both solicitor and certificate provider. (The Donor’s husband retained Mr X for the same purpose at the same time but I am not concerned with that power of attorney). On 23rd July 2008 the Donor signed an instrument purporting to be a Lasting Power of Attorney Property and Affairs in the then standard statutory form under which A and B were to be her joint and several attorneys without restriction in relation to her property and affairs.
3. In July 2010 the Attorneys applied to the Public Guardian to register the instrument. The Public Guardian refused to register the instrument for two reasons:
 - (1) The Donor had not ticked either of the alternative boxes at box 10 of the instrument to confirm that she had read or had read to her the prescribed information set out in pages 2, 3 and 4 of the instrument;
 - (2) The Certificate Provider had not ticked the box at the bottom of page 16 of the instrument to confirm that he was completing the certificate straight after discussing the instrument with the Donor.
4. I shall refer to these omissions as the first and second defects respectively.
5. At this time the Office of the Public Guardian informed the solicitors that either:
 - (1) The Donor could make a new lasting power of attorney if she had capacity so to do or

- (2) An application may be made to the Court of Protection for an order under paragraph 3(2) of Schedule 1 of the Mental Capacity Act 2005 which reads as follows:

“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”

6. The first named attorney, A, has chosen to take the second course (I was told today that the Donor has lost capacity) and made an application for such an order to the Court of Protection in October 2010. She has filed a short statement in support of the application from Mr X dated 24th January 2011.
7. Further to directions given on 17 November 2011 the final hearing of the application is before me today and the Public Guardian has filed written submissions dated 4th January 2012. Today I heard from Mr X (unsworn) and allowed him to add an attendance note to his evidence.

General Position

8. I set out below those parts of the Mental Capacity Act 2005 relevant to the hearing before me
9. Section 9(2)(b) states that:

A lasting power of attorney is not created unless -:

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

10. Paragraph 1(1) of Schedule 1 reads as follows:

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*

11. The Public Guardian may still register an instrument if the differences between the instrument and the prescribed form are immaterial in form or expression but material differences prevent the Public Guardian from registering without an appropriate order of the Court of Protection.

The First Defect

12. Paragraph 2(b) of Schedule 1 provides that:

The instrument must include –

- (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*

13. This requirement of the primary legislation is repeated and reinforced by paragraph 9(2) of The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 SI Number 1253 which provides for the purpose of execution:

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

The prescribed information is set out in the form in Schedule 1 of the regulations.

14. The failure to tick the box on the form does not mean that the Donor did not read or have read to her all the prescribed information but there is no statement by her to that effect.
15. The statement of Mr X, the solicitor retained by the Donor to draw up a lasting power of attorney (and certificate provider) is brief and not supported by attendance notes or suchlike; he says:

“I am the principal of XYZ Solicitors and I was asked to act in the preparation and execution of the Lasting Power of Attorney dated 23rd July 2008. In addition I was requested to give advice personally to Mrs H as Certificator. Although on the original lasting Power of Attorney section 10 has not been completed I did discuss the document in detail with Mrs H at her home at the time of signing in the capacity of certificator and a copy of the draft was provided to Mrs H prior to the signing. I therefore confirm to the best of my knowledge information and belief that Mrs H read and fully understood the content of the Lasting Power of Attorney dated 23rd July 2008.”

16. The attendance note does little to flesh out the evidence. There is a note that *“We discussed the prescribed information. They both seemed to know the nature and effect of the document, and that attorneys must act in their best interest. The documents would remain in force if either/ both of them became mentally incapable and that either could revoke so long as he/she remained competent”*
17. In oral submission Mr X told me that he did not read the prescribed information word for word but summarised it and described it. He told me he was sure he dealt with all the prescribed information in this way. He told me that the Donor had had a draft and was able to read but that, of course, does not mean that the Donor read the information.
18. There is no other evidence.
19. Therefore the evidence given to the court supports the following conclusions:
 - (1) Mr X summarised at least the majority of the prescribed information and gave the Donor advice **BUT**
 - (2) It is not possible to find on the balance of probability that the Donor read or had read to her the prescribed information being the information in the prescribed wording.

20. The above is a failure of execution rather than form.
21. So far as form is concerned I can exercise a discretion under paragraph 3(2) and I suspect that I would have been minded so to do if I had persuasive evidence that regulation 9(2) had been complied with such that the failure to tick box 10 amounted to no more than oversight.
22. However, regulation 9(2) has not been complied with and my discretion under paragraph 3(2) of Schedule 1 extends to form not execution; see that paragraph and Re Hurren (on the Public Guardian website) a decision of Senior Judge Lush made 28 September 2011. For the avoidance of doubt I would not exercise my discretion favourably with respect to the Donor's failure to tick box 10.

The Second Defect

23. Surprisingly there was no written evidence with respect to Mr X's omission to tick the box to confirm that regulation 9(4) of the regulations had been complied with; this regulations states:

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

- (a) *the person giving an LPA certificate, or*

...

Must complete the LPA certificate at part B of the instrument and sign it.”

24. At first Mr X told me he signed Part B before the Donor signed Part A. He then corrected himself to confirm that he signed Part B after the Donor signed Part A. He referred to the attendance note to confirm that the Donor, first named attorney and himself all signed on 23rd July 2008 and that the instrument was then forwarded to the second named attorney for his signature.
25. I accept this evidence and can thus conclude that Regulation 9(4) as to execution has been complied with. In those circumstances I would exercise my discretion favourably with respect to form and I would declare that notwithstanding the absence a completed box at the bottom of page 16 that the instrument is to be treated as if in the prescribed form.

Conclusion

26. I appreciate fully that this is a case where the instrument has been, in effect, struck down for want of compliance with technicalities rather than merit but I observe that the Donor can still have the decision makers of her choice if a deputyship application is made and unopposed.
27. The application is refused.