IN THE COURT OF PROTECTION

Sitting at Central London Civil Justice Centre

IN THE MATTER OF J

AND IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Before Her Honour Judge Hazel Marshall QC

6th December, 2010

An application was made to appoint a property and affairs deputy for P. Issues arose as to whether an LPA made by P was void for lack of capacity to create such an instrument and whether, if the LPA was valid, the appointment of one of two professional attorneys ("X") should be revoked on the ground set out in section 22(3)(b) of the MCA. The court found that the LPA was valid, and then proceeded to consider section 22(3)(b). The following anonymised extract is taken from the judgment:

(iii) Can and should the court nonetheless revoke the Lasting Power of Attorney on the grounds that X ought to be held to be unfit to be the donor's attorney?

1. This issue depends on the court's power to revoke an otherwise valid LPA contained in s 22 (3) (b) of the 2005 Act.

2. The Applicant's submissions, made, I understand, with some input from his former legal advisers, did not deal with this legal point, but simply raised various criticisms of X's behaviour as allegedly proving that she was not a suitable attorney for the donor. Indeed, he bluntly submits that X's behaviour is "incompetent at best and criminal at worst". In so doing, he is referring generally to X's conduct as the donor's litigation solicitor, as shown by his reliance on "concerns" expressed by solicitors, counsel and the courts during the various proceedings in which the parties have been engaged, and his final comment that "if she behaves in this way when she is regulated by the SRA and policed by the Courts, how will she behave when she is not?"

3. However, s 22 does not depend on a general or abstract notion of "unsuitability", but is narrower and more focussed. The court may only revoke an LPA if it is satisfied

22 (3) "(b) that the donee ….of a lasting power of attorney –

(i) has behaved 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. In addition, and in any case, the court can only revoke the power if it is not yet registered (which this is), or if the donor of the power lacks capacity to revoke it: see s 22 (4) (b) to which the court's power under s 22 (3) is subject. I assume without deciding, for present purposes, that this latter requirement would be met.

5. It is therefore for the Applicant to satisfy me, in the first place, that X's conduct falls within one of the above limbs.

6. This is not a case of exceeding a power, and therefore it is behaving, or proposing to behave contrary to the donor's best interests which is the relevant test. The first question is therefore the scope of such potentially disqualifying conduct, on the true construction of s 22 (3) (b).

7. Dr McCormick [for the Respondent] submits that the sub-section is obviously intended to respect P's choice of attorney by being a safety net, and is therefore intended to be relatively narrow; otherwise it would have used some wider concept such as general unfitness. He then submits that it is only behaviour of the attorney *in his capacity as attorney* which is the subject of the subsection, and not behaviour in any other capacity. The point of this is, he says, is that X's behaviour as the donor's litigation solicitor would not be within the scope of the subsection and would not give grounds for considering revoking the LPA. As all the criticisms of X are connected with her position as litigation solicitor, the application must, in effect, fall at this first hurdle.

8. In support of this, Dr McCormick submits that the four elements of s 22 (3)(b) must all relate to conduct of the same class, and since contravening authority can only apply to behaviour as (or at least purportedly as) P's attorney, behaving otherwise than in P's best interests must be limited in the same way.

9. I am not inclined to accept this submission. 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 there is evidence that the attorney cannot be trusted to act in the manner and for the purposes for which the LPA was conferred upon him/her. This does not require limiting the "behaviour" which can be considered to behaviour as, or in anticipation of acting as, P's attorney. Further, if there is sufficient evidence that the attorney is behaving contrary to P's interests even in a different context, then it seems to me that that might well quite

reasonably provide a sufficient reason to revoke an LPA, perhaps because of conflict of interest.

10. In addition, the construction of the sub-paragraph itself does not seem to me to lend the extent of support for his assertion that Dr McCormick claims. In the first place, the use of the very broad term "behave" is not what one would expect if the sub-paragraph is concerned only with the actions taken or purportedly taken in exercise of the power of attorney. If so, it would, in my judgment, have been far more natural to use the expression "exercise the power" rather than the word "behave". Second, it seems to me that Dr McCormick's argument does not fit at all well with the sub-paragraph (b) (ii) regarding prospective behaviour, where it is far more difficult to see why it should be limited to prospective behaviour as attorney, which might be very difficult to identify.

11. 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.

12. Dr McCormick reminds me, quite correctly, that the court is not obliged to revoke the power even if it finds behaviour or prospective behaviour by the attorney which can be so characterised. Sub-section 22 (4) is permissive ("may") and not mandatory, as to the revocation of the power of attorney. It is thus, in my judgment, at this last stage that the question whether the offending behaviour was as attorney or otherwise is relevant. It may be more likely that the court would feel it appropriate to revoke the power in the former situation, than in the latter.

13. Having regard to this approach, and noting the court's powers with regard to directing an attorney under s 23 of the Act, I therefore hold that, on the true construction of s 22 (3), the court can consider any past behaviour or apparent prospective behaviour by the attorney, but, depending on the circumstances and gravity of any offending behaviour found, it can then take whatever steps it regards as appropriate in P's best interests (this only arising if P lacks capacity), to deal with the situation, whether by revoking the power or by taking some other course.

14. I therefore turn to the substance of the Applicant's criticisms of X, whether I find any of them proved, whether any so proved do, in my

judgment, amount to behaviour contrary to the donor's best interests and if so, whether that behaviour ought to cause me to exercise my jurisdiction to revoke the LPA or to take some other steps and if so what.

[The court went on to conclude that there was nothing in the Attorney's behaviour to justify the conclusion that she had behaved contrary to P's best interests or might do so, rejected the application to revoke the Lasting Power of Attorney and gave certain directions to the Attorney under s23 of the Mental Capacity Act 2005.]