COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

In the matter of
NEWMAN

1. This is an application relating to various defects in an Enduring Power of Attorney.

The background

2. [The judge then set out in paragraphs 2-4 the personal details of the donor]

3. […..]

4. […..]

5. On 12 April 2004 the donor signed an Enduring Power of Attorney ("the EPA"), in which he appointed his wife and three children to be his attorneys, with general authority to act on his behalf in relation to all his property and affairs.

6. The donor did not cross out either of the alternatives specifying whether the attorneys were to act jointly or jointly and severally, but he did state that "all documents requiring signature shall be signed by at least two of the aforementioned Attorneys."

7. Nor did the donor cross out either of the following alternatives:
   - with general authority to act on my behalf
   - with authority to do the following on my behalf.

8. According to a recent Assessment of Capacity form (COP3) completed by a psychiatrist with the Community Mental Health Services in [locality]:

> "[Mr Newman] suffers from a severe degree of cognitive impairment probably due to a dementia in Alzheimer's Disease, mixed type (ICD 10 code F00.2). He is completely disorientated in time and place. His attention, concentration and short term memory are all poor. He has difficulties in understanding information. He is not able to recall them and arrive at an informed decision."

9. On 11 January 2012 the attorneys applied to the Office of the Public Guardian ("the OPG") to register the EPA.

10. On 13 March 2012 the OPG wrote to Attorney A saying:

> "Unfortunately having checked the application, we have identified some problems with the EPA which mean that it cannot be registered.
>
> Where two or more attorneys are appointed "jointly and severally" and the Donor has stated a condition that the attorneys must carry out certain actions "jointly" (e.g. the sale of real property), this makes the instrument invalid and cannot be registered without the approval of the Court of Protection. I am therefore returning the original EPA to you."

The application

11. On 30 March 2012 Attorney A wrote to the court enclosing an application form (COP 1) on which he sought the following order:

> "I wish the court to decide that I, my mother, my sister, and my brother should be able to act jointly and severally as attorneys for my father [the donor], who has advanced dementia and is in residential care. The EPA instrument that currently exists specifies that the attorneys can act jointly and severally, but there is a clause in the document that contradicts this so the OPG will not register the instrument.
>
> I would ask the court to order the severance of the offending clause, or alternatively to direct the OPG to register the instrument.
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> The order would benefit [the donor] in that all his financial affairs can be managed by his family members, as he wished them to act in this capacity when he was mentally capable. It was for this reason that he originated the EPA instrument in 2004."

12. The application was accompanied by a witness statement (COP24), also dated 30 March 2012, in which Attorney A said much the same as he had said in the application form.

The Public Guardian's position statement

13. On 13 June 2012 I made an order requesting the Public Guardian to file with the court and serve on the applicant a position statement in relation to the application by Friday 13 July 2012.

14. On 6 July 2012 Jill Martin of the OPG made a position statement. From paragraph 6 onwards she said as follows:

> [6] The Public Guardian wishes to address two issues: (i) whether the donor's instrument is capable of creating an EPA, and, if it is, (ii) whether the restriction should be severed.
>
> [7] On the first issue, paragraph 20(1) of Schedule 4 of the Mental Capacity Act 2005 ("the MCA") states that: "An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act – (a) jointly, or (b) jointly and severally." By failing to strike out either option on the prescribed form, the donor has not appointed his attorneys to act either jointly or jointly and severally.
>
> [8] Paragraph 2(4) of Schedule 4 states 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 or expression." This cannot apply to the defect in question in view of the mandatory wording of paragraph 20(1) of Schedule 4.
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> [9] The Public Guardian's position is that the donor's failure to indicate how his attorneys are to act means that the instrument cannot create an EPA. At most it could create an ordinary power of attorney which would be revoked by his loss of capacity.
>
> [10] However, this is subject to the possible application of the doctrine of rectification. I attach some summaries of Court of Protection decisions on rectification of instruments intended to be EPAs, taken from the website of the Office of the Public Guardian. I draw attention to the case of *Re Sawyer* 11663762, where the donor's instrument also omitted to indicate whether the attorneys were appointed to act jointly or jointly and severally. In that case the court was satisfied on the evidence that the donor had intended to appoint

the attorneys to act jointly and severally, and directed that the EPA should be construed as if the "jointly" option had been deleted.

[11] In the present case the application does not include any evidence to substantiate that it was the donor's intention to appoint the attorneys jointly and severally (or jointly). Unless the applicant can produce such evidence, the doctrine of rectification is inapplicable and the Public Guardian's position is that the instrument cannot be an EPA.

[12] If the doctrine of rectification does not assist, no other issue arises. If, however, there is evidence of the donor's intention to appoint the attorneys jointly and severally (or jointly), the next point to consider is the effect of the donor's failure to indicate whether or not the attorneys had general authority to act.

[13] It is not the Public Guardian's practice to refuse registration where the donor has failed to delete either "with general authority to act on my behalf" or "with authority to do the following on my behalf", assuming the instrument is otherwise valid. Where the donor has not set out any details in the space below the second option, it may be assumed that he intended to give the attorneys general authority to act. In the present case the donor did indicate that the attorneys had authority "in relation to all my property and affairs", and this may support the inference that he intended them to have general authority. The donor's omission may be regarded as "immaterial" within the meaning of paragraph 2(4) of Schedule 4 of the MCA.

[14] The final issue is the validity of the restriction. If the instrument can otherwise be a valid EPA, this restriction should be severed whether the attorneys are appointed to act jointly or jointly and severally, as it is incompatible with the manner of either appointment.

[15] If there is evidence that the donor intended the appointment to be joint and several, a requirement that at least two of them must sign documents is incompatible with the entitlement of the attorneys to act alone. This is shown by the attached summaries from the website of the Office of the Public Guardian. Under the heading "Severance of restrictions incompatible with a joint and several appointment", I draw attention in particular to the case of *Re Wills*, where the court severed a restriction similar to the donor's in the present case.

[16] If, on the other hand, there is evidence that the donor intended the appointment to be joint, the restriction is incompatible because a joint appointment requires all attorneys to act together. This is shown by the attached case summaries under the heading "Severance of restrictions incompatible with a joint appointment." In the case of *Re Shepherd* the court severed a restriction to the effect that two out of three attorneys could sign.

[17] I refer also to the case of *Re E*. In that case the donor of a power appointing three attorneys to act jointly included a provision "save that any two of my attorneys may sign." Registration was refused by the Public Trust Office (which was then the registering authority). Master Lush (as he then was) decided that the instrument did not create an EPA because the provision to the effect that any two could sign meant that the attorneys were appointed neither jointly nor jointly and severally. The case went to the High Court on a different aspect and is reported in [2000] WTLR 383. An extract is attached and I draw attention to the second paragraph on page 387, where Arden J. stated that the power took effect at most as an ordinary power of attorney.

[18] In conclusion, the Public Guardian's position is that the effect of the donor's failure to indicate whether his attorneys were to act jointly or jointly and severally is that his instrument cannot be an EPA unless it may be rectified on production of evidence which enables the court to be satisfied that he intended them to be appointed jointly and severally (or jointly, as the case may be).

[19] If such evidence is available, the donor's failure to indicate whether or not his attorneys had general authority to act may be disregarded as immaterial.

[20] If such evidence is available, the restriction set out in paragraph 2 above must be severed as being incompatible with a joint or a joint and several appointment.

[Attorney A's] second witness statement

15. On 10 July 2012 Attorney A filed a second witness statement, in which he said as follows:

> "I wish to make a second statement to the court to offer evidence that [the donor] wished his attorneys to act jointly and severally with regard to his financial affairs.
>
> The EPA was drawn up by a solicitor who has now retired. I have enquired with the firm that took over the practice but they are unable to locate any archived paperwork relating to the case.
>
> I and the other attorneys can recall conversations with [the donor] in 2004 about how he had decided to appoint us. He was keen that the responsibility was shared and that decisions were made consultatively. He also wanted a degree of flexibility built into the EPA which is why he opted for the attorneys to act jointly and severally. These options were thoroughly discussed by [the donor] and the attorneys and once we had agreed how to proceed, [the donor] had the document drawn up by his solicitor.
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> Due to a degree of oversight on his part, and less than accurate guidance by the solicitor, [the donor] failed to delete one option on the EPA form. He may well have misunderstood the significance of the condition, but this cannot be clarified by the solicitor or it would not have been included in the EPA. It is a contradiction that would be obvious to anyone had it been pointed out.
>
> I am certain from the conversations we had with him in 2004 that his intention was to make a simple EPA which allowed his family to act on his behalf once he lost capacity. The situation has become complicated by the fact that the EPA form was incorrectly completes rather than [the donor's] wishes regarding his attorneys being complex in themselves."

Decision

16. I am grateful to Jill Martin for her position statement on behalf of the Public Guardian, which I accept as an accurate statement of the law, practice and procedure relating to the rectification of EPAs and the severance of ineffective provisions, and the circumstances in which differences from the prescribed form may be regarded as immaterial.

17. Having read Attorney A's second witness statement, I am satisfied that the donor intended to appoint the attorneys to act jointly and severally, and I rectify the EPA so that it shall for all purposes be read and construed as if he had appointed them to act jointly and severally in relation to all his property and affairs.

18. In my judgment, the restriction that "all documents requiring signature shall be signed by at least two of the aforementioned Attorneys" is ineffective as part of an EPA because it is incompatible with the joint and several appointment of the attorneys, and I sever the restriction and give notice to the Public Guardian that I have done so.

DENZIL LUSH
Senior Judge
30 July 2012