COURT OF PROTECTION **No. 11964340**

MENTAL CAPACITY ACT 2005

In the matter of PUTT

Introduction

1. This is an application by the Public Guardian regarding two Lasting Powers of Attorney ("LPAs") made by the same donor, and involves two points of law. The first is whether the person who provided the certificate in Part B of the LPAs was disqualified from doing so. And the second is whether clauses in both LPAs that allow the attorneys to delegate their functions prevent the instruments from operating as valid LPAs and need to be severed.

2. On 5 August 2010 Mrs Putt ("the donor") executed an LPA for property and financial affairs and an LPA for health and welfare, in both of which she appointed a family member (A) and two solicitors (B and C), to be her attorneys. B and C are partners in XYZ LLP.

3. The LPA for health and welfare contained the following clause permitting the attorneys to delegate their functions:

   "My attorneys (or any of them) may delegate in writing any of his, her or their functions to any person and shall not be responsible for the default of that person (even if the delegation was not strictly necessary or expedient) provided that he, she or they took reasonable care in his, her or their selection and supervision."

4. The LPA for property and affairs contained the same clause, but with the additional words "and my attorneys (or any of them) may vest my property in any person as nominee, and may place my property in the possession or control of any person."

5. D, an associate solicitor at one of the offices of XYZ LLP, witnessed the donor's signature and provided the certificate in Part B of both LPAs.

6. It should be noted that regulation 8(3)(f) of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 provides that:

   "A person is disqualified from giving an LPA certificate in respect of any instrument intended to create a lasting power of attorney if that person is a business partner or employee of (i) the donor, (ii) a donee within sub-paragraph (b).

7. An application was made to the Office of the Public Guardian ("OPG") to register the LPAs and there was subsequently correspondence between the OPG and XYZ LLP regarding:
   (a) whether an associate solicitor can be a Part B certificate provider when members of the Limited Liability Partnership that employs her are appointed as attorneys; and
   (b) whether the clause permitting the attorneys to delegate was too wide to be valid.

8. As regards the eligibility of the certificate provider, XYZ LLP contends that:

   "As this firm is an LLP, our view is that all employees are employees of the body corporate formed by incorporation, and not employees of individual partners (members). Our further view is that an associate solicitor could not be considered as a business partner of the partners. Our view is therefore than Regulation 8(3)(f) does not make the certificate provider ineligible."

9. As regards the clause authorising the attorneys to delegate their functions, XYZ LLP submits that:

"… although the default position is that an agent cannot delegate his function; this can be overridden by express authority granted by the donee of the Lasting Power of Attorney. We enclose, by way of authority, the Mental Capacity Act Code of Practice which sets out the default position, but allows for this to be expressly overridden."

10. This correspondence concluded with XYZ LLP's agreement that, at no cost to the donor, the OPG would make an application to the Court of Protection to determine both issues, and it did so on 10 March 2011.

The Public Guardian's submissions

11. Jill Martin is a legal adviser at the OPG, and in a witness statement also dated 10 March 2011 she said as follows:

    (1) …

    (2) The first matter which the Public Guardian wishes the court to consider is the eligibility of the certificate provider. The attorneys B and C are both partners at XYZ LLP, and the certificate provider in both instruments was D, an associate solicitor of this practice. Regulation 8(3) of the LPA, EPA and PG Regulations 2007 ("the Regulations") disqualifies a "business partner or employee" of the donor or of an attorney under the instrument from being a certificate provider. If the firm had operated as a common law partnership, the certificate provider, being an associate solicitor at the same firm where two of the attorneys are partners, would be ineligible to act, as being the employee of the partners.

    (3) However, the firm is an LLP (Limited Liability Partnership). Section 1(2) of the Limited Liability Partnerships Act 2000 states that: "A limited liability partnership is a body corporate (with a legal personality separate from that of its members) which is formed by being incorporated under this Act." The Public Guardian had at one time reluctantly accepted that regulation 8(3) did not apply where the practice was an LLP. This acceptance was reluctant because the purpose of regulation 8(3) is to ensure that the certificate provider should not feel obliged to provide the certificate because their employer, who is also the attorney, has requested it. If this is the rationale of regulation 8(3), it equally applies to LLPs and common law partnerships.

    (4) The Public Guardian now considers that the decision of the Employment Appeal Tribunal in *Tiffin v Lester Aldridge LLP* [2010] UKEAT 0255_10_1611 (Exhibit JM3) may enable him to conclude that a solicitor certificate provider is ineligible even though the attorneys are members of an LLP.

    (5) The decision just cited does not concern an LPA. The question there was whether a solicitor who was a salaried partner and then a fixed share partner in a firm which became an LLP was an "employee" or a "partner" for the purpose of his employment law rights.

    (6) It is clear from the judgment of Mr Justice Silber that the status of "partner" exists even though the practice operates as an LLP. The court is referred in particular to paragraphs 5, 6 and 12 of the judgment. The EAT held that the claimant was a "partner" within the meaning of section 1(1) of the Partnership Act 1890, which provides that "Partnership is the relation which subsists between persons carrying on a business in common with a view to profit."

    (7) So it appears to the Public Guardian that the attorneys B and C are partners in XYZ LLP and that D is an associate solicitor, and the website of the practice so describes them (Exhibit JM4), although their correspondence clearly states that "Any reference to a partner in relation to XYZ LLP means a member of XYZ LLP."

    (8) However, regulation 8(3)(f) applies where the certificate provider is an employee of the attorney, and it may be that, in the case of an LLP, an associate solicitor is employed by the LLP rather than by the member/partners. That is the view of attorney C expressed in the correspondence (Exhibit JM5).

    (9) If the court does not accept that regulation 8(3)(f) applies in relation to a practice which is an LLP, the court is asked to consider whether the certificate provider in this case was "independent". Part B includes the statement "I confirm that I act independently of the attorneys and of the donor." This is additional to the confirmation that she is not a business partner or paid employee of the donor or any of the attorneys.

(10) The other matter which the Public Guardian asks the court to consider is whether severance is necessary. In section 5 of the Property and Financial Affairs instrument the donor stated as follows: "My attorneys (or any of them) may delegate in writing any of his, her or their functions to any person and shall not be responsible for the default of that person (even if the delegation was not strictly necessary or expedient) provided that he, she or they took reasonable care in his, her or their selection and supervision and my attorneys (or any of them) may vest my property in any person as nominee, and may place my property in the possession or control of any person." (The donor then provided that the attorney should be authorised to view her will, which the Public Guardian does not ask the court to sever). The validity of the delegation provision is discussed in paragraphs 13 to 15 below. The Public Guardian does not seek severance of the direction that the attorneys may vest the donor's property in a nominee, but it is doubtful whether it is open to a donor to provide that attorneys may place her property in the possession and control of any person.

(11) In section 6 of the Health and Welfare instrument the donor stated as follows: "My attorneys (or any of them) may delegate in writing any of his, her or their functions to any person and shall not be responsible for the default of that person (even if the delegation was not strictly necessary or expedient) provided that he, she or they took reasonable care in his, her or their selection and supervision." (The donor then provided that the attorney should be authorised to view her will, medical records and other records, which the Public Guardian does not ask the court to sever).

(12) In section 6 of the Health and Welfare instrument the donor also directed that: "I wish only A to make decisions relating to life-sustaining treatment and not B or C." Although the attorneys were appointed to act jointly and severally, the Public Guardian does not ask the court to sever this provision because it is expressed as a wish and so may be treated as guidance only.

(13) The Public Guardian considers that the delegation provisions set out in paragraphs 10 and 11 above are too wide and need to be severed. They go beyond the limited delegation recognised by the MCA Code of Practice, which states (at paragraph 7.61): "Attorneys cannot usually delegate their authority to someone else. They must carry out their duties personally. The attorney may seek professional or expert advice (for example, investment advice from a financial adviser or advice on medical treatment from a doctor). But they cannot, as a general rule, allow someone else to make a decision that they have been appointed to make, unless this has been specifically authorised by the donor in the LPA."

(14) In this case the donor has specifically authorised delegation in the LPA, but the question is whether it is open to the donor to provide that, in effect, the entire function can be delegated. Section 10(8)(a) of the MCA provides that the instrument "cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor." It is submitted that the provisions set out in paragraphs 10 and 11 above do purport to give the attorneys power to appoint a substitute, either permanently or for an indeterminate period. Section 10(8)(a) does not say "permanent substitute" and is, therefore, applicable to a provision purporting to authorise the attorney to delegate his or her entire function, whether or not this is expressed to be permanent.

(15) In a letter dated 20 October 2010 from XYZ LLP (please see Exhibit JM6) it is argued that the clause is delegation rather than substitution. The writer attaches precedent 148 from the Encyclopaedia of Forms and Precedents, which reads: "My attorney[s] may appoint any agent to do any business which [he is (or) they are] unable to do [himself (or themselves] or which can more conveniently be done by an agent." The Public Guardian submits that this precedent falls far short of a delegation of the whole function of the attorney. The Public Guardian, therefore, asks the court to sever the delegation provision in both instruments.

(16) The donor does not lack capacity. It is confirmed in a letter dated 30 November 2010 from her solicitors that she wishes the Public Guardian to apply to the court to seek a determination of the validity of the delegation clauses (Exhibit JM7). This letter does not refer to determination of the question whether the certificate provider was eligible to act because this issue was not being considered at that time. However, the letter from the donor's solicitors dated 2 March 2011 indicates that the donor is content for the Public Guardian to refer this matter to the court at no cost to her, and wishes to be informed of the outcome. As the donor and attorneys do not wish to be involved in the application the Public Guardian has not served it on them, but will do so if directed by the court.

(17) In summary, the Public Guardian requests the court to decide whether the certificate provider was eligible to act, either on the basis that she was employed by the attorneys within regulation 8(3)(f) or, if not, that she was not acting independently of the attorneys, as required by the prescribed form. If the court decides that the certificate provider was not eligible to act, the court is requested to direct cancellation of the registered Property and Financial Affairs instrument and to direct the Public Guardian not to register the Health and Welfare instrument.

(18) If the court considers that the certificate provider was eligible to act, it is requested to sever the words set out in paragraph 10 above from "My attorneys (or any of them" to "supervision and" and the words "and may place my property in the possession and control of any person" from the Property and Financial Affairs instrument. It is also requested to sever the words in inverted commas set out in paragraph 11 above from the Health and Welfare instrument pursuant to paragraph 11(5)(a) of Schedule 1 of the MCA.

(19) As the Property and Financial Affairs instrument has already been registered, the court is requested to direct severance under section 22(2)(a) of the MCA (if it wishes to sever the clause in question) and to direct that the instrument be returned to the Public Guardian to be stamped accordingly.

Decision on the eligibility of the certificate provider

12. In paragraph (2) of her witness statement, Jill Martin suggested that the purpose of regulation 8(3) was "to ensure that the certificate provider should not feel obliged to provide the certificate because their employer, who is also the attorney, has requested it." She may be right, but, having searched in vain through several consultation papers and the responses to them, I have failed to establish the precise legislative intent underlying regulation 8(3)(f), other than "remedying the situation where a potentially vulnerable person with borderline capacity is asked to sign a power of attorney without proper safeguards," which appears in *Lasting Powers of Attorney – forms and guidance: Response to consultation*, CP(R) 01/06, at page 25. Be that as it may, regulation 8(3)(f) expressly disqualifies anyone who is a "business partner or employee" of the donor or donee from giving an LPA certificate.

13. The words "business partner or employee" are ordinary words of the English language and should be construed in the way that an ordinary sensible person would construe them. The choice of the word "business" is designed to distinguish partnership as an economic relationship from partnership of a more personal and intimate nature. I assume that Parliament was looking at the substance rather than the form and intended to include all kinds of "business partner" under this umbrella term – equity partner, salaried partner, fixed-share partner, and so on – and that, if it had intended to treat business arrangements under the Limited Liability Partnership Act 2000 any differently from those under the Partnership Act 1890, it would have expressly said so in the regulations. The word "employee" probably denotes no more than a person who is employed and remunerated by the business and is generally, though not necessarily, of a junior or subordinate status to the attorney.

14. On this broad analysis, it would seem that the wording of regulation 8(3)(f) is not entirely foolproof if the desired objective is to provide certain safeguards, and would allow, for example, an employee to be appointed as attorney and his or her employer or a fellow employee to act as the certificate provider. However, despite these shortcomings, the prescribed form itself requires the certificate provider to state, "I am acting independently of the person making this LPA (the donor) and the person(s) appointed under the LPA," in addition to confirming that he or she is not a person listed in regulation 8(3) who cannot provide a certificate. In paragraph 5 of his judgment in *Tiffin v Lester Aldridge*, Mr Justice Silber said it was "common ground that the claimant was either a 'partner' or an 'employee' and that he could not be an independent contractor." The same applies here. The certificate provider, D, was not an "independent" contractor.

15. In my judgment, the wording of regulation 8(3)(f) cannot be construed as making any distinction between a partnership under the Partnership Act 1890 and the Limited Liability Partnership Act 2000 for the purpose of providing an LPA certificate and that, as D was an employee of XYZ LLP, she was ineligible to provide the certificates in Mrs Putt's LPAs.

16. Accordingly, pursuant to section 22(2)(a) of the Mental Capacity Act 2005 the court determines that one the requirements for the creation of an LPA has not been met, and pursuant to section 22(4)(a) it directs that the instruments purporting to create the LPAs are not to be registered.

Decision on the delegation clause

17. Strictly speaking, because of my finding above, there is no longer any need for me to consider the validity of the delegation clause. However, as Jill Martin on behalf of the Public Guardian has taken the trouble to set out her submissions, and as XYZ LLP has included this clause in other LPAs, as a matter of courtesy I shall address the issue.

18. One of the basic rules of the law of agency is that an agent cannot delegate his authority. In the past this rule was expressed by the maxim *delegatus non potest delegare* and its application is based on the personal nature of the relationship which exists between a principal and an agent. A few exceptions to the general rule are permitted in the context of ordinary powers of attorney (those which do not continue to remain in force after the donor has lost capacity), such as:
    (a) where the act delegated is purely ministerial in nature and does not involve any confidence or discretion;
    (b) from the conduct of the parties;
    (c) where delegation is the usual practice in the trade, business or profession of one or both of the parties; and
    (d) through necessity of unforeseen circumstances.

19. Delegation and substitution are not synonymous. A delegate merely deputises for the attorney, whereas a substitute completely replaces him, and in appointing a substitute the attorney irrevocably parts with his authority under the power.

20. Section 10(8)(a) of the Mental Capacity Act 2005 provides that:

    "An instrument used to create a lasting power of attorney - (a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor."

21. A similar provision applied to enduring powers of attorney under section 2(9) of the Enduring Powers of Attorney Act 1985, which has been re-enacted as paragraph 2(6) to Schedule 4 of the Mental Capacity Act 2005:

    "A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power."

22. The origin of this prohibition can be found in the Law Commission's report, the *Incapacitated Principal* (1983), which led to the enactment of the Enduring Powers of attorney Act 1985. At paragraph 4.22 of that report the Law Commissioners stated:

    "*Delegation and substitution*. As in the case of ordinary powers the EPA attorney would have implied power to delegate any of his functions which were not such that the donor would have expected the attorney to attend to them personally. Any wider power to delegate would have to be provided for expressly in the instrument. We would not wish, however, the attorney to be enabled to appoint a substitute or successor to himself. This would be contrary to the special relationship of trust subsisting between the EPA donor and attorney and would undermine some of the safeguards which we recommend in this Report. We accordingly propose that no power that enabled the attorney to appoint a substitute or successor should be capable of being an EPA."

23. The delegation clause in Mrs Putt's health and welfare LPA states that:

    "My attorneys (or any of them) may delegate in writing any of his, her or their functions to any person and shall not be responsible for the default of that person (even if the delegation was not strictly

necessary or expedient) provided that he, she or they took reasonable care in his, her or their selection and supervision."

24. This clause authorises the attorney to delegate any of his functions. Theoretically, it would enable him to delegate all his functions, which certainly would be a substitution. Even if this sub-delegation were not, strictly speaking, a substitution (because the clause implies that there could be ongoing supervision by the attorney), I consider that, as a matter of policy, the attorney's ability to delegate his functions in circumstances in which it is not strictly speaking necessary or expedient to do so, and the fact that he is exonerated from any default of the substitute or sub-delegate, so long as he took reasonable care in the selection and supervision of that person, are not simply contrary but almost repugnant to the special relationship of personal obligation and faith that one might reasonably expect to exist between a donor and the attorney of an LPA; particularly in a health and welfare power of attorney in which the donor (as is in Mrs Putt's case) has given the attorney authority to give or refuse consent to life-sustaining treatment on her behalf.

25. Whereas the use of such a clause might be acceptable in a commercial agency agreement, it undermines some of the safeguards in the Mental Capacity Act 2005 and its inclusion in an LPA cannot really be in the donor's best interests.

DENZIL LUSH
Senior Judge
22 March 2011