

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

In the matter of STAPLETON

BETWEEN:

THE PUBLIC GUARDIAN

Applicant

- and -

**(1) STAPLETON
(2) ABC BOROUGH COUNCIL**

Respondents

1. This is an application by the Public Guardian to revoke an Enduring Power of Attorney (“EPA”).

The background

2. [The judge then set out in paragraphs 2-7 the personal details of the donor and the attorney.]
3. [.....]
4. [.....]
5. [.....]
6. [.....]
7. [.....]
8. On 7 August 2007 Mrs Stapleton executed an EPA in which she appointed her son D to be her sole attorney with general authority to act on her behalf in relation to all her property and affairs.
9. The Office of the Public Guardian (“the OPG”) registered the EPA on 24 November 2009.

The application

10. On 12 January 2012 Angela Johnson, Head of Practice and Compliance at the OPG, applied to the Court of Protection for the following order:

1. An order under Schedule 4 paragraph 16(4)(g) for the revocation and cancellation of the registered EPA made by Mrs Stapleton.
 2. An order directing that a panel deputy be approached and invited to make an application for his or her appointment to manage Mrs Stapleton's property and financial affairs.
11. The application was accompanied by a witness statement dated 9 January 2012 from Clare Smith of the OPG stating, amongst other things, that ABC Borough Council had first raised concerns about the attorney's conduct with the OPG on 7 September 2011. The outstanding care fees were £15,531.35, and the attorney had sold the donor's house for £188,000, and bought another property for £141,250 in his own name. He had also used £4,995 of the donor's funds to purchase a pick-up vehicle, which was registered in his sole name.

Directions order of 8 February 2012

12. On 8 February 2012 I made an order:
- o directing the Public Guardian to serve a copy of the application on the attorney within seven days;
 - o directing the attorney to respond by 16 March 2012;
 - o requiring the matter to be referred again to a judge on or after 23 March 2012.

The attorney's response

13. EFG Solicitors act for D, who, on 28 February 2012, completed an acknowledgment of service (COP5), in which he said he opposed the application and sought the following order:
1. That the application made by the Office of the Public Guardian be dismissed.
 2. That the costs of the respondent shall be payable from the estate of Mrs Stapleton.
14. The acknowledgment of service was accompanied by a witness statement, also dated 28 February 2012, in which D defended his actions. I shall not summarise his submissions here because they appear in his skeleton argument and position statement, which are set out fully below.

Directions order of 22 May 2012

15. ABC Borough Council also filed an acknowledgment of service requesting to be joined as a party to the proceedings, and on 22 May 2012 I made the following directions order:

UPON the application of the Public Guardian for an order to revoke the Enduring Power of Attorney executed by Mrs Stapleton and registered on 24 November 2009

AND UPON ABC Borough Council wishing to be joined as a party to the proceedings

IT IS ORDERED that: -

1. The hearing of this application will take place before Senior Judge Lush at the Court of Protection, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL at 10.30 AM on Friday 29 June 2012 with an estimated duration of one hour.

2. If any party wishes to file further evidence they may do so on form COP 24 and file it with the court and serve a copy on the other parties by 4 PM on Friday 22 June 2012 at the latest.

16. The following witness statements were filed:

- o Clare Smith's second witness statement, dated 24 May 2012; and
- o Solicitor H's witness statement, filed on behalf of D, on 21 June 2012.

The hearing

17. The hearing took place on Friday 29 June and was attended by:

- o Marion Bowgen and Clare Smith, from the OPG;
- o H (solicitor), D and his wife; and
- o Christopher Clark (barrister) for ABC Borough Council.

D's skeleton argument and position statement

18. In anticipation of the hearing, EFG Solicitors filed both a skeleton argument and a position statement on behalf of D.

19. In the skeleton argument EFG Solicitors stated as follows:

"The strongest accusation that could be labelled against D in his administering his mother's financial affairs is that he has not maintained a clear differentiation at all times between his mother's monies and property and his own. D will now take whatever steps are necessary to rectify this.

Despite this mixing of monies, D has accounted for his mother's monies and property (to the Public Guardian) and no money has been lost to Mrs Stapleton.

The dispute, such as it was and is, concerns how D went about administering his mother's assets and the Public Guardian has raised these concerns: the selling and purchasing of a property and D's motivation for doing this; the purchase of a pick-up vehicle (for less than £5,000); the dispute with ABC Borough Council concerning care home fees; the dispute with the care home concerning care home fees; the purchase of appliances and a bed for the new property and the payment of rent on that property.

Property

It has always been Mrs Stapleton's wish to relocate to [county where new property situated]. Her going into hospital and respite care was seen as the opportunity to effect this wish. D is adamant that this was the motivation for the sale and purchase.

Pick-up vehicle

This was used to transport Mrs Stapleton's furniture and possession between the [old] and [new] properties, used when D worked on both properties and used to transport elderly relatives to see Mrs Stapleton.

[Former care home] fees

Mrs Stapleton was placed at this home by ABC Borough Council without the agreement or wish of Mrs Stapleton or D on her behalf. There was thus a live legal issue of how, from a contractual

point of view, Mrs Stapleton or D were to be held liable for the care home fees incurred. D saved Mrs Stapleton's estate almost £10,000 in properly negotiating this point.

[Current care home] fees

ABC Borough Council have paid out fees for Mrs Stapleton's stay at the care home after the liquid assets of Mrs Stapleton were depleted. It is not said that these will not be repaid; the question is by whom and when; we say this will properly be in full by the local PCT following conclusion of the NHS Continuing Healthcare matter but if wrong and that claim is ultimately unsuccessful, then the local authority will be able to recoup its money by the sale of Mrs Stapleton's [currently owned] property upon which they are at liberty to place a notice restricting sale.

[Currently owned] property

D is averse to charging his daughter (Mrs Stapleton's granddaughter) rent to stay at his mother's property as this would have "appalled" Mrs Stapleton. Likewise, the items of expenditure on a bed and appliances should be seen in this light.

Unsuitability

Is D unsuitable to be his mother's attorney

As an attorney is an agent, I would suggest that this will depend on not just what, from an objective point of view, a perfect professional attorney would do, but also, from a subjective point of view, what D's mother, as donor of the power, would have wanted D to do or might well have wanted D to do had she thought or been able to think about these decisions.

Objective measure

There has been no obvious substantial loss to Mrs Stapleton's estate's value. D had protected the estate by proper negotiation of the [former care home] bill. There were transactional costs to the property sale and purchase but these are inevitable and D seems to have maximised the value of the sold property to the benefit of the estate.

Although not stated in terms, the clear implication of the Public Guardian's position is that the [previously owned] property ought not to have been sold, but that it should and the proceeds of sale used to pay care home fees. Again, not stated, it has to be assumed that the full requested fees from [the former care home] would have been paid (given that this was part of the grounds of claim on the first COP24 of Clare Smith) and that the proceeds of sale would have been applied on an on-going basis to pay the [current care home] fees.

It has not been suggested by the Public Guardian that a claim for NHS Continuing Healthcare ought to have been pursued.

On the objective measure it is submitted that D has done a good job of protecting his mother's assets thus far.

Subjective measure

Has D done anything that his mother did not want him to do or would not have wanted him to do?

It is submitted that Mrs Stapleton would have:

- o wanted D to contest the diminishing value of her estate by challenging the bill from [the former care home] and pursuing a claim for NHS Continuing Healthcare funding;

- been at least open to the possibility of her relocation to [county where new property situated] and what D did in furtherance of this;
- wanted her granddaughter to live in her home with suitable appliances rent-free;
- been open to the purchase of a vehicle to assist in the remediation works to the sold property and relocation of furniture and possessions to the new property and assisted her in receiving family visits.

On both measures, D has not shown himself to be an unsuitable attorney for his mother, merely one who has gone about his role in an alternative way and arguable a good (or suitable) attorney will be one who fights to preserve the assets of the donor.

20. In their position statement on behalf of D, EFG Solicitors stated as follows:

1. D will do whatever the court orders or directs him to do with respect to his mother's financial affairs. D believes that he has behaved reasonably as his mother's attorney but he will make good any defaults that he should. A potential example that has been pointed out to him by the Public Guardian is to ensure that his mother's property at [address of new property] is re-registered at the Land Registry into his mother's sole name. D had registered it in his name as he was told by the professional conveyancer that he could do this. If advised to re-register, he will do so.
2. D appreciates that he is not a professional deputy and so he may not have been perfect in administering his mother's financial affairs but he has sought to take legal advice in matters that he thought he should, e.g. when consulting his present solicitors on an application for NHS Continuing Healthcare funding. He would continue to seek the advice of the OPG and/or a solicitor if he had any questions regarding his role as his mother's attorney.
3. D has not in any way defrauded anyone, least of all his mother. He has sought to protect her assets. This has included challenging the legal basis upon which care home fees were charged for his mother's stay at [the former] care home. D's solicitor assured ABC Borough Council that the fees owing to them will be paid, it is just a matter of by whom and when (D is in the process of challenging a NHS Continuing Healthcare funding assessment, which, if successful, will mean that the local PCT will pay these fees). D is more than open to the council placing a notice on the [currently owned] property to secure their interest until the NHS Continuing Healthcare matter has been determined. Thus there is no prejudice to the council's position in D's actions.
4. It was the intention and motivation of D in selling his mother's property in [location] and in purchasing more suitable property in [location] that his mother, daughter, wife and he should be able to live together in the new property. It was not until March 2011 that it became inescapably clear that this was not going to be possible. D was advised by his conveyancer to place the new property in his name.
5. D has acted in administering his mother's affairs in either the way that she would have wished and/or objectively in a suitable fashion and will continue to do so but will be guided by this court and seek advice as appropriate in doing so.
6. We seek a dismissal of the Public Guardian's application and an order that D's costs be met from Mrs Stapleton's assets subject to detailed assessment by the SCCO.

Decision

21. The Public Guardian's application is for an order under paragraph 16(4)(g) of Schedule 4 to the Mental Capacity Act 2005. Schedule 4 contains provisions applying to EPAs and paragraph 16(4) provides that:

“The court must direct the Public Guardian to cancel the registration of an instrument registered under paragraph 13 in any of the following circumstances: ...

- (g) on being satisfied that, having regard to all the circumstances, and in particular the attorney’s relationship to or connection with the donor, the attorney is unsuitable to be the donor’s attorney.”

22. The reported case law on the unsuitability of an attorney - namely, *Re E (Enduring Powers of Attorney)* [2000] 3 WLR 1974; *Re W (Enduring Power of Attorney)* [2001] 2 WLR 957; and *Re F* [2004] 3 All ER 277 - has tended to focus on unsuitability in the context of inter-sibling rivalry, which is not an issue in this case. In *Re F*, for example, at page 284f, Mr Justice Patten said:

“It seems to me that to remove a chosen attorney because of hostility from a sibling or other relative, in the absence of any effective challenge to his competence or integrity, should require clear evidence either that the continuing hostility will impede the proper administration of the estate or will cause significant distress to the donor which would be avoided by the appointment of a receiver. Neither of these conditions is satisfied by the evidence in this case.”

23. In this case there has been an effective challenge to the attorney’s competence and integrity. He has financially abused his mother.

24. On its website, the charity *Action on Elder Abuse* describes financial abuse in the following terms:

“Financial Abuse is another name for stealing or defrauding someone of goods and/or property. It is always a crime but is not always prosecuted. Sometime the issue is straightforward, for example a care worker stealing from an older person’s purse, but at other times it is more difficult to address. This is because very often the perpetrator can be someone’s son or daughter, or age prejudice means that other people assume it is not happening or that the older person is to blame.

Two common issues that come to our attention are (a) sons or daughters attempting to justify their actions on the basis that they are simply obtaining their inheritance in advance and (b) the extensive misuse of Powers of Attorney.

What are the signs of financial abuse?

- Signatures on cheques etc that do not resemble the older person’s signature, or signed when the older person cannot write.
- Sudden changes in bank accounts, including unexplained withdrawals of large sums of money by a person accompanying the older person.
- The inclusion of additional names on an older person’s bank account.
- Abrupt changes to, or the sudden establishment of, wills.
- The sudden appearance of previously uninvolved relatives claiming their rights to an older person’s affairs or possessions.
- The unexplained sudden transfer of assets to a family member or someone outside the family.
- Numerous unpaid bills, or overdue rent, when someone else is supposed to be paying the bills.
- Unusual concern by someone that an excessive amount of money is being expended on the care of the older person.
- Lack of amenities, such as TV, personal grooming items, appropriate clothing, that the older person should be able to afford.
- The unexplained disappearance of funds or valuable possessions such as art, silverware, or jewellery.

- Deliberate isolation of an older person from friends and family, resulting in the caregiver alone having total control.”
25. A similar list of signs that an attorney may be exploiting the donor or failing to act in the donor’s best interests appears in paragraph 7.70 of the *Mental Capacity Act Code of Practice*. Neither list is exhaustive.
26. Not all of these signs of abuse were present in this case, but several were, for example:
- the unexplained sudden transfer of assets to a family member. D bought [the currently owned property], in his own name using £141,250 of his mother’s money;
 - the inclusion of additional names on an older person’s bank account. He transferred some of his mother’s funds into an account he held jointly with his wife; and
 - numerous unpaid bills; in particular, the care home fees.
27. This is not a case where there has been an inadvertent intermingling of funds. It is a wholesale assumption of dominion over Mrs Stapleton’s estate by her attorney, as if she were dead and he had come into his inheritance and, of course, there has been no substantial diminution of her assets because to all intents and purposes they are now the attorney’s and he is very careful with his money.
28. The *Action on Elder Abuse* website refers to sons or daughters attempting to justify their actions, and D has made attempts to justify his actions, which only serve to demonstrate his disregard for ethical values and principles.
29. I am not convinced that Mrs Stapleton’s sudden lifelong desire to relocate to [county where new property situated] from [county where old property situated], where she was born and bred and has always lived, is any justification for D using her money to buy a property in [location of new property] in his name.
30. Nor am I persuaded that he had the property registered in his name because a professional conveyancer told him he could do so. I don’t believe that any professional person, who was fully aware of the circumstances, would give such advice and, even if they did, it is still no excuse for D to act upon advice that any reasonable person would recognise as morally bankrupt.
31. In any event, the idea of Mrs Stapleton living together with her son, daughter-in-law and granddaughter in [location of new property] was a non-starter. The specialist social work assessment dated 1 June 2011 states that:

“[Mrs Stapleton’s] son D agrees that she requires 24 hour care. The past situation had been extremely difficult between [Mrs Stapleton] and her son and, as [her] condition deteriorated, it was decided that she required 24 hour care following a hospital admission. D reports there was a long history of violence towards him from [Mrs Stapleton] and that she was very unpredictable. He states that she once smashed him over the head with her zimmer frame with no warning. ...

D said he does not like to visit [Mrs Stapleton] alone in the bedroom as he states she may try and “pull him into bed with her.” He states she has no awareness at times that he is her son and can be sexually inappropriate towards him. ...

D feels that her behaviour and risk of violence is critical and that she requires skilled care and intervention in order to manage this.”

32. I do not believe it was in his mother's interests for the attorney to spend £4,995 on a pick-up vehicle - with her money but again registered in his name - to transport her furniture and possessions from [county where old property situated] to [county where new property situated] and to transport elderly relatives to see her. There are much cheaper ways of achieving these objectives, such as hiring a removal van for a weekend and paying the occasional taxi fare.
33. Nor am I persuaded that his aversion to charging his daughter rent to stay in the [new] property because the idea of charging rent would have appalled his mother is a reasonable justification for failing to act in his mother's best interests. What it demonstrates is that, when faced with such a patent conflict of interests, he has blithely subordinated his mother's interests to those of his daughter, who is in full time employment in a managerial position.
34. The ongoing dispute with the NHS about Continuing Healthcare has really only been a smokescreen to deflect his reluctance to pay his mother's care home fees and ultimately to maximise his own inheritance.
35. D's offers to re-register the title to the property in his mother's name, if the court so orders, and to rectify his other defaults are too little, too late. They have come at the end of an extensive investigation carried out by the Office of the Public Guardian and to exonerate him would undermine the role played by the investigators.
36. For these reasons, I am satisfied that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney. By his own admission, his mother does not know who he is, so the appointment of a panel deputy is unlikely to cause her any distress.

The law relating to costs in Court of Protection proceedings

37. The primary source of law on costs in Court of Protection proceedings is the Mental Capacity Act 2005, sections 55 and 56.
38. The secondary sources of law relating to costs in the Court of Protection are:
 - o Part 19 (rules 155 to 158) of The Court of Protection Rules 2007 (Statutory Instrument 2007 No. 1744 (L. 12)); and
 - o two practice directions – 19A and 19B – which supplement Part 19 of the Court of Protection Rules. The practice directions are not of assistance on this occasion. Practice Direction 19A is concerned primarily with modifications to the Civil Procedure Rules 1998, and Practice Direction 19B is about fixed costs.
39. Only two rules need to be considered in this case: namely, rules 156 and 159, which provide as follows:

Property and affairs – the general rule

156. Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings, or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to his estate.

Departing from the general rule

159. – (1) The court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances, including:

- (a) the conduct of the parties;
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
- (c) the role of any public body involved in the proceedings.

(2) The conduct of the parties includes:

- (a) conduct before, as well as during, the proceedings;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular issue;
- (c) the manner in which a party has made or responded to an application or a particular issue; and
- (d) whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response.

(3) Without prejudice to rules 156 to 158 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.

Decision on costs

40. In my judgment, a departure from the general rule is justified in this case. It would be unreasonable to expect Mrs Stapleton to pay the costs of these proceedings because of D's conduct both before, as well as during, the proceedings. Accordingly, I order him to pay his own costs.

DENZIL LUSH
Senior Judge
3 July 2012