**COURT OF PROTECTION** **No. 12338771**

**MENTAL CAPACITY ACT 2005**

**In the matter of**
**RUTH MINNA BOFF**

**BETWEEN:**

**THE PUBLIC GUARDIAN**

**Applicant**

**- and -**

**(1) RUTH MINNA BOFF**
**(2) JAMES CHARLES BOFF**

**Respondents**

## *Introduction*

1. Can the donor of a Lasting Power of Attorney ('LPA') appoint a replacement attorney to succeed another replacement attorney?

2. The answer depends on how one interprets section 10(8) of the Mental Capacity Act 2005, which says as follows:

> "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, but
> (b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 13(6)(a) to (d) which has the effect of terminating the donee's appointment."

3. The Public Guardian insists that replacement attorneys cannot succeed replacement attorneys. The respondents are equally adamant that they can and, to prove the point, have appointed three replacement attorneys in a row: A followed by B, followed by C, followed by D.

## *The background*

4. Dr Ruth Minna Boff was born in 1952 and is a retired research scientist.

5. She lives with her husband, James Charles Boff, in Pinner, Middlesex.

6. She has two sons: Arthur, who was born in 1982, and Edward, who was born in 1986.

7. She also has a niece, Sarah, who was born in 1982 and is the daughter of her twin sister.

8. On 9 September 2012 Dr Boff executed an LPA for property and financial affairs, in which she appointed her husband to be her sole attorney, and then proceeded to appoint three replacement attorneys in the following order of succession:
    (1) Edward,
    (2) Arthur, and
    (3) Sarah.

9. In section 4 of the LPA she stated:

> "I have appointed three replacement attorneys but it is my intention that they should neither act jointly nor jointly and severally nor jointly for some decisions and severally for other decisions. It is my intention and direction that my first named replacement attorney should act alone and only if he does not wish to act or is permanently unable to act then my second named replacement attorney should act alone and only if he also does not wish to act or is permanently unable to act, then my third replacement attorney should act alone."

10. In a witness statement she filed later on in the proceedings, Dr Boff gave the following reasons why she had made an LPA in this way:

> "Because, until five years ago, I had been an attorney for my mother, under an enduring power of attorney that gave joint and several responsibility to me and my siblings, I had some experience to guide me in how I wanted my lasting power of attorney to be executed.
>
> Despite my mother's enduring power of attorney being one giving joint and several powers, my experience was that nearly all financial institutions required attorneys to sign, and sometimes be present in person, causing considerable difficulties in managing my mother's affairs. Even though the financial institutions were in the wrong, the reality of the experience did not match the legal theory of joint and several responsibility, and so I am determined that my lasting power of attorney shall only grant power to one person at a time.
>
> It is my wish that any power of attorney I grant shall only grant powers successively to the persons I name in that power of attorney, and that the succession be determined according to my clearly expressed wishes."

11. In section 5 of the LPA she imposed a restriction that the instrument was not to be used until she lacked mental capacity, and in section 6 she set out the following guidance for the first replacement attorney only:

> "If my first named replacement attorney is acting then I direct that he should consult with my second named replacement attorney (provided that he is not permanently unable to act) as to all proposed actions that my first replacement attorney is considering taking on my behalf although (for the avoidance of doubt) ultimately the power to act rests with the first replacement attorney. This direction only applies in the first named replacement attorney acting."

12. Her husband made a virtually identical LPA on the same day and they applied to the Office of the Public Guardian ('OPG') to register the instruments.

13. On 7 November 2012 the OPG wrote to her solicitors saying:

> "Thank you for your application to register a Lasting Power of Attorney (LPA) for property and financial affairs. However, having checked the LPA, we have identified problems with the application which need to be addressed before we can register it. The donor's restriction relating to the replacement attorney is not workable as replacement attorneys cannot replace other replacement attorneys."

14. The OPG was prepared to register the LPAs, but only if the ineffective provisions were severed by the Court of Protection.

## *The application*

15. On 5 June 2013, Jill Martin, the senior legal adviser at the OPG, applied to the court for the following order:

> "The court is asked to sever the provisions identified in the attached form COP24 from the instrument under Schedule 1 paragraph 11 of the MCA 2005 and to direct the Public Guardian accordingly."

16. The application was accompanied by a witness statement (form COP24), in paragraphs 8 to 13 of which Ms Martin said as follows:

> 8. The relevant provision is section 10(8)(b) of the MCA, which provides that an instrument may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 13(6)(a) to (d) which has the effect of terminating the donee's appointment. The issue is whether "donee" includes a replacement attorney.
>
> 9. The solicitors' letter dated 10/12/12 asserts that section 10 does not preclude donors from prescribing the order in which replacement attorneys will act. The letter from the donor and her husband dated 30/3/13 asserts that there is nothing in the MCA to preclude successive appointments.
>
> 10. The Public Guardian accepts that there is no express provision in section 10(8)(b) to the effect that only an original attorney may be replaced, but draws the court's attention to paragraph 7.22 of *Mental Incapacity*, Law Com No. 231. In that paragraph the Law Commission stated as follows: "We suggested in the consultation papers that, in contrast with the present law, donors should also be permitted to appoint an "alternate" attorney to act if the original fails or ceases to act for some reason. Respondents agreed that there would be advantages in allowing for such a possibility. In order to ensure consistency with the registration system we describe below, replacement attorneys should only be available in circumstances where the original donee has ceased to act for a reason which can be established by objective evidence."
>
> 11. Included in Exhibit JM4 are extracts from the two Law Commission Consultation Papers referred to in footnote 55 of Law Com No 231. They discuss the appointment of "alternate" attorneys in the field of personal care and medical treatment and refer only to a replacement for the "original" or "first" attorney. Also included is a copy of paragraph 4.38 of *Cretney & Lush on Lasting and Enduring Powers of Attorney* (6th edition, 2009), where it is stated that the donor "can only appoint a replacement for an original attorney, not a replacement for a replacement attorney."
>
> 12. The Public Guardian submits that references by the Law Commission to a replacement for an "original" attorney show that there was no intention to propose any wider provision enabling a replacement attorney to replace an attorney who was not an original attorney. In the absence of any evidence to the effect that Parliament, when enacting section 10(8)(b) of the MCA, intended to take a wider view than that expressed by the Law Commission, it is submitted that the word "donee" in section 10(8)(b) refers only to an original attorney.
>
> 13. In any event, there is no need for a provision enabling donors to appoint a series of replacement attorneys to act one after the other. If the donor is concerned that the original attorney(s) and the first named replacement attorney should cease to be able to act during the

donor's lifetime, the solution would be to appoint two or more replacement attorneys to act jointly and severally, coupled with non-binding guidance expressing a wish (not a restriction) that they should act in turn.

## *Dr Boff's response*

17. In an acknowledgment of service dated 28 June 2013, Dr Boff objected to the application. She said, "The application is contrary to law for the reasons set out in the accompanying witness statement," and she proposed that "the court order the OPG to register the LPA in the form originally applied for."

18. The court deals with a steady volume of severance applications – there were exactly 1,200 in the year 2012 – and this is the first time that either a donor or an attorney has ever formally objected to an application by the OPG to sever an ineffective provision from an LPA.

19. In her accompanying witness statement, dated 28 June 2013, Dr Boff said:

> "There is nothing in the wording of the MCA that precludes successive appointments, and indeed this is conceded by the applicant at paragraph 10 of the applicant's witness statement. The court is asked to accept this concession by the applicant.
>
> In paragraphs 10-13 of the applicant's witness statement the applicant seeks to look at the legislative, and indeed pre-legislative, history to limit the plain wording of the MCA.
>
> The applicant asks that the law be interpreted to permit only the original attorney to be replaced on the basis that the Law Commission reports … use the word "original" in the context of changes to the law permitting replacement attorneys.
>
> I submit that concentrating on the specific language used in a pre-legislative report to limit the workings of a statute is not a sound approach to legislative interpretation. Where the statute has a clear meaning, where that clear meaning does not lead to an absurdity, and where that clear meaning deals with the problem the law was meant to address, then the clear meaning should be applied, and there is no basis to restricting that clear meaning to the narrowest scope possible to address said problem.
>
> Since lasting powers of attorneys are documents that may be in existence for many years before being exercised, the applicant's interpretation simply shifts the problem in time.
>
> Suppose, the donor appoints a first attorney, and a replacement attorney, and when the LPA needs to be exercised neither the first attorney nor replacement attorney are available to act. The LPA will then be ineffective, and the problem that a power of attorney ceases to have useful effect just when it is needed, is not solved. This situation might have occurred had I, for example, chosen to appoint my husband as attorney, and my twin sister as a replacement. In, say, 30 years' time when the power might be needed to be exercised (my current age is 61 and my mother lost capacity at the age of 90), there could well be no attorney with capacity to act. Thus the applicant's interpretation fails to completely deal with the problem addressed in the pre-legislative history of the MCA.
>
> Further, although the Law Commission Report No. 231 mentioned the problems with the previous law, it gave no indication of any problem that might arise should successive replacement be allowed. If there were seen to be any such problems with successive replacement, the Law Commission Report would have been more explicit, and indeed would have proposed a form of wording for the Bill which would exclude such a possibility."

## *The hearing*

20. The hearing of the Public Guardian's application took place on 1 August 2013 and was attended by Jill Martin on behalf of the Public Guardian, and the two respondents, Dr Ruth Boff and Mr James Boff.

## *Section 10(8)(b)*

21. The appointment of successive attorneys used to be an area where angels feared to tread.

22. In 1983 the Law Commission recommended the introduction of Enduring Powers of Attorney ('EPAs') in a report called *The Incapacitated Principal*. In footnote 214, on page 50 of that report, the Law Commission said:

> "We do not recommend that an instrument should be able to provide for successive EPAs; that is, one or more attorneys who would replace the original attorney or attorneys should he or they cease to act. Our main reason for this is that the benefit to be gained by including successive EPAs ... would be out of all proportion to the complexity that such powers would create in relation to some of the more detailed areas of our scheme. In any event, successive EPAs are rendered largely unnecessary because a joint and several EPA would permit the continuation of the EPA in the event of one of the attorneys ceasing to act."

23. However, twelve years later, when it announced its recommendations for LPAs to supersede EPAs, the Law Commission had changed its mind on successive appointments. Paragraph 7.22 of its report on *Mental Incapacity* (1995), which incidentally referred to what we now call an LPA as a 'continuing power of attorney' ('CPA'), stated as follows:

> "The present law makes special provision for multiple attorneys, specifically allowing "joint" or "joint and several" attorneys. We suggested in the consultation papers that, in contrast with the present law, donors should also be permitted to appoint an "alternate" attorney to act if the original fails or ceases to act for some reason. Respondents agreed that there would be advantages in allowing for such a possibility. In order to ensure consistency with the registration system we describe below, replacement attorneys should only be available in circumstances where the original donee has ceased to act for a reason which can be established by objective evidence.
>
> We recommend that a donor may, in a CPA, appoint a person to replace the donee in the event of the donee disclaiming, dying, becoming bankrupt or becoming divorced from the donor."

24. In an annex to its report the Law Commission set out a draft Mental Incapacity Bill, clause 20(1) of which was intended to give effect to paragraph 7.22. However, almost certainly by accident rather than by design, it did not specifically refer to 'the original donee.' Clause 20(1) provided as follows:

> "An instrument creating a continuing power of attorney –
> (a) cannot give the donee power to appoint a substitute or successor; but
> (b) may itself appoint a person to replace the donee in the event of his disclaiming or in any such event as is mentioned in section 18(1)(c)(ii) or (iii) above."

25. I imagine that the omission arose because the person who drafted the Bill simply gathered together all the recommendations that the Law Commission had made in its report. It will be

noted that, notwithstanding the discussion and reasoning preceding it, the actual recommendation at the end of paragraph 7.22 did not refer to 'the original' donee.

26. Clause 20(1) of the draft Bill was subsequently enacted as section 10(8) of the Mental Capacity Act 2005, the principal changes being the name of the power of attorney and the reference to more than one donee. I have set out section 10(8) in paragraph 2 above.

## *The OPG's guidance*

27. The OPG produces two booklets:
    (1) LPA 111, *Guidance for people who want to make a lasting power of attorney for health and welfare*; and
    (2) LPA 112, *Guidance for people who want to make a lasting power of attorney for property and financial affairs.*

28. The front cover of each booklet says "Read this guidance book first!" which I imagine Dr Boff did.

29. The following statement appears on page 15 of LPA 111 and on page 16 of LPA 112:

> "If you have appointed more than one original attorney and more than one replacement attorney, you should set out the order in which the replacements should act. For example, if you appoint your spouse and child as your original attorneys and your grandchildren as the replacements, you could say that your grandchildren are to replace the first original attorney who is unable to act or they are to step in only when both original attorneys are unable to act."

30. The following statement also appears on page 15 of LPA 111 and page 16 of LPA 112 in bold type for additional emphasis:

> **"You cannot appoint a replacement attorney:**
> - **to make decisions for you when your attorney is still able to act (for example, when on holiday, or unavailable for some reason)**
> - **to take over from another replacement attorney."**

31. This is crystal clear, but it is only guidance produced by the OPG and does not have the same effect as legislation.

## *The prescribed form*

32. What does have statutory force, of course, is the prescribed form of LPA itself.

33. Paragraph 1(3) of Schedule 1 to the MCA 2005 states that "prescribed" means prescribed by regulations made by the Lord Chancellor, and the relevant regulations are the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2008/1253), as amended by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2009 (SI 2009/1884).

34. To some extent, section 3 on page 4 of the prescribed form ('About appointing replacements if an attorney can no longer act'), perpetuates the lack of precision in section 10(8)(b) of the MCA. It says:

> "Replacement attorneys will only act once your attorney can no longer act for you."

35. It should have been obvious to Dr Boff that something was wrong when she was completing the box in section 4 on page 5 of the prescribed form. Where donors appoint more than one attorney or replacement attorney, section 4 requires them to tick a box stating how the attorneys are to act. There are three alternatives:

> Jointly ❑
> Jointly and severally ❑
> Jointly for some decisions, and jointly and severally for other decisions ❑

36. Beneath the last of these three boxes is the following statement in bold type:

> "Only if you have ticked the last box above, now tell us in the space below which decisions your attorneys must make jointly and which decisions may be made jointly and severally."

37. Even though she had not placed a tick in the last box, Dr Boff nevertheless launched into a statement in the space below: the statement that I set out in paragraph 9 above, beginning with the sentence, "I have appointed three replacement attorneys but it is my intention that they should neither act jointly nor jointly and severally nor jointly for some decisions and severally for other decisions."

38. Dr Boff's husband appointed her to be his attorney and I assume that she read the "Part C declaration by each attorney or replacement attorney" on page 11 in the prescribed form of LPA for property and financial affairs.

39. However, as her husband appointed her to be his original attorney, rather than as a replacement attorney, she may have overlooked the "Further statement of replacement attorney", which appears on the same page. It says as follows:

> "If an original attorney's appointment is terminated, I will replace the original attorney, if I am still eligible to act as an attorney.
>
> I have the authority to act under this lasting power of attorney only after an original attorney's appointment is terminated and I have notified the Public Guardian of the event."

40. This couldn't be much clearer.

41. There are two earlier decisions of the court on whether a replacement attorney can replace a replacement attorney - *Re Baldwin* (14 May 2009) and *Re Martin* (14 February 2013) – summaries of which can be found on the OPG's website. I have not considered them here because they were, in effect, consent orders. There was no argument contrary to the submissions made by the Public Guardian and there was no written judgment of the court.

## *Decision*

42. I disagree with the respondents that the meaning of section 10(8)(b) of the Mental Capacity Act 2005 is clear. In my judgment, it is ambiguous and, if its meaning were obvious, there would be no scope for intelligent people like Dr Boff and her husband to come up with an interpretation that conflicts with that of the Public Guardian, whose function it is to register LPAs.

43. I also disagree with Dr Boff's submission that recourse to the pre-legislative history of that subsection is neither necessary nor appropriate. In *Pepper v Hart* [1993] 1 All ER 42, at pages 49 and 50, Lord Griffiths commented:

> "I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament"

44. The ambiguity seems to have arisen in the Law Commission's report on *Mental Incapacity* itself, where clause 20(1) of the draft Mental Incapacity Bill failed to give effect to the true intention of the legislation, which was that replacement attorneys should only be available in circumstances where the original donee has ceased to act for a reason which can be established by objective evidence. Clause 20(1) was later enacted as section 10(8)(b) of the Mental Capacity Act 2005.

45. What is striking is the complete absence of any reference, anywhere, to the possibility that a replacement attorney can replace a replacement attorney. Not only in its 1995 report, but also in its earlier report in 1983, the Law Commission spoke only of replacing the original donee, and there is no suggestion of the possibility that a replacement attorney might replace a replacement attorney either in the prescribed forms of LPA or in the guidance published by the OPG.

46. Having regard to all the circumstances, therefore, and considering the LPA scheme as a whole, including the wording of section 10(8)(b), its pre-legislative history, the guidance published by the OPG and the prescribed forms of LPA, I find that a replacement attorney can only replace an original attorney and cannot replace a replacement attorney.

47. I respectfully disagree with Jill Martin's suggestion that the solution to Dr Boff's problem "would be to appoint two or more replacement attorneys to act jointly and severally, coupled with non-binding guidance expressing a wish (not a restriction) that they should act in turn" because this defeats Dr Boff's object as expressed in paragraph 9 above.

48. To achieve what she intended within the existing legislative framework, Dr Boff should have made two LPAs: one appointing her husband to be the sole attorney and her son Edward to be the sole replacement attorney; and the other appointing her son Arthur to be the sole attorney and her niece Sarah to the sole replacement attorney, with a condition that the second instrument will not come into effect until the first instrument has ceased to be operable for any reason. I realise that this could involve the payment of an additional 'application to register' fee, but there would be no immediate need to register the second LPA, and it may never need to be registered and used, in any event.

## *Further observations*

49. In her witness statement Dr Boff said:

> "Although the Law Commission Report No. 231 mentioned the problems with the previous law, it gave no indication of any problem that might arise should successive replacement be allowed. If there were seen to be any such problems with successive replacement, the Law Commission Report would have been more explicit, and indeed would have proposed a form of wording for the Bill which would exclude such a possibility."

50. I agree with the first, but not the second, sentence. The appointment of successive attorneys creates complexities that were never properly addressed by either the Law Commission in its report number 231 on *Mental Incapacity* (1995) or by the Parliamentary draftsman in the Mental Capacity Act 2005.

51. The following are some of the practical problems that arise with the appointment of replacement attorneys:
    (1) When the donor or an attorney makes an application to register an LPA, the named persons are not informed of the identity of any replacement attorneys on form LPA 001; they are only given the names and addresses of the original attorneys.
    (2) There is no formal registration process for replacement attorneys and no facility whereby a named person, donor or co-attorney can object to the appointment of a replacement attorney, either when the original application is made to register the instrument, or when an event under section 13(6) of the Mental Capacity Act 2005 activates the replacement.
    (3) Replacement attorneys are really only viable where the donor appoints a sole original attorney or more than one original attorney to act jointly and severally.
    (4) Although a replacement attorney can replace an original attorney who has been appointed to act jointly, the outcome is unlikely to be what the donor intended. For example, if the donor appointed A and B to act jointly, and C to act as a replacement attorney, A's bankruptcy, death or disclaimer would terminate A and B's joint appointment, and C would become the sole attorney, rather than act jointly with B. Although the OPG guidance refers to this at the foot of page 19 of LPA 112, the prescribed form itself does not warn donors of the implications of appointing a replacement attorney where they have appointed their original attorneys to act jointly, or jointly for some decisions, and jointly and severally for other decisions.

52. These are some of the reasons why the appointment of successive attorneys was traditionally regarded as a no go area.

## *Provisions that need to be severed*

53. Section 10(5) of the Mental Capacity Act 2005 applies in relation to an LPA in which two or more persons are appointed to act as attorneys or replacement attorneys, as happened in this case. It states that:

> "To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly"

54. At the hearing on 1 August 2013 the respondents said that, if the decision went against them, then, rather than be left with three replacement attorneys who were required to act jointly by virtue of section 10(5), they would prefer the appointment of the second and third replacement attorneys to be severed also.

55. Accordingly, the following provisions need to be severed from their LPAs:

(1) the appointment of the second and third replacement attorneys on continuation sheet A1;
(2) the provision in section 4;
(3) the guidance in section 6, which would be otiose in the circumstances and therefore confusing to any third parties dealing with the attorney; and
(4) the Part C declarations made by the second and third replacement attorneys.

DENZIL LUSH
Senior Judge
16 August 2013