IN THE COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF CLARKE

Before Senior Judge Denzil Lush

19th September 2011

Mrs Clarke signed an LPA for health and welfare, appointing her husband and her three daughters, A, B and C as attorneys. She also signed an LPA for property and financial affairs, appointing her husband and A as attorneys and B and C as replacement attorneys. Mrs Clarke signed the instruments, and Option A in the health and welfare instrument, by making her mark. The witness to all signatures was W. Mrs Clarke's GP acted as certificate provider for both LPAs, and Mr Clarke accompanied his wife to her GP's surgery for this purpose. When an application was made to register the instruments, Mr Clarke objected on the ground that the power purported to be created by each instrument was not valid as an LPA.

The objection was based partly on the fact that Mrs Clarke was suffering from Alzheimer's disease at the time of signing, and partly on the ground that the instruments had not been validly witnessed by W. Mr Clarke claimed that his wife had signed at the dining room table in the presence only of A, who then took the documents to W to sign as witness. He claimed that W did not see Mrs Clarke sign the documents. Mr Clarke also claimed that his wife lacked capacity to sign the instruments, and that the doctor had not discussed the contents of the LPAs with her but had merely asked her if she was happy with the documents. At a directions hearing the Senior Judge directed the Public Guardian to register the instruments pending the determination of the application.

At the hearing the Senior Judge considered the evidence and concluded as follows:

The law relating to the execution of an LPA

An instrument intended to create an LPA must be:
- in the prescribed form, and
- executed in accordance with regulation 9 of The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 ("the LPA Regulations").

There is no question that Mrs Clarke's LPAs were not in the prescribed form, and for the purposes of this decision, the essential parts of regulation 9 are:
- 9(2) - "The donor must read (or have read to him) all the prescribed information;"
- 9(3)(b) -"The donor must … sign part A of the instrument in the presence of a witness;"
- 9(9) - "A person witnessing a signature must - (a) sign the instrument; and (b) give his full name and address;" and
- 9(10) - "Any reference in this regulation to a person signing an instrument (however expressed) includes his signing it by means of a mark made on the instrument at the appropriate place."

The Mental Capacity Act 2005 and the LPA Regulations say nothing about the meaning of the words "in the presence of", as in the expression "in the presence of a witness." Old authorities on the execution of a will, such as *Shires v Glasscock* (1688) 2 Salk 688, and *Casson v Dade* (1781) 1 Bro CC 99, 28 ER 1010 have held that the witness must have been in such a position as to see the signing if he had chosen to look. In *Casson v Dade* it was held that the two parties do not need to

be in the same room so long as there is a "line of sight" through a window. The facts of that case were as follows. Miss Honora Jenkins went to her solicitor's office to execute her will. She signed the will but then felt faint and was taken outside to sit in her carriage with her maid. The witnesses to the will remained in the office and gave their signatures to the will. The maid gave evidence that at the moment the witnesses were signing the carriage horses reared up, causing the carriage to move into a line of sight with the office window. The maid stated that, had Miss Jenkins looked through the window she could have seen the witnesses sign.

The law relating to capacity to create an LPA

Section 1(2) of the Mental Capacity Act 2005 states that, "A person must be assumed to have capacity unless it is established that he lacks capacity."

Section 1(3) of the Act provides that, "A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success."

Section 2 defines "people who lack capacity" as follows:

> (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
>
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.

Section 3(1) sets out the following guidance on the meaning of the phrase "unable to make a decision":

> "For the purposes of section 2, a person is unable to make a decision for himself if he is unable:
> (a) to understand the information relevant to the decision,
> (b) to retain that information,
> (c) to use or weigh that information as part of the process of making the decision, or
> (d) to communicate his decision (whether by talking, using sign language or any other means)."

A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means) (section 3(2)).

The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision (section 3(3)).

The information relevant to decisions in general includes information about the reasonably foreseeable consequences of:

- deciding one way or another (section 3(4)(a)), or
- failing to make the decision (section 3(4)(b)).

Accordingly, in the context of creating an LPA, the relevant information should include information about the consequences of not executing an LPA.

The information specifically relevant to the execution of an LPA includes the prescribed information about the purpose of the instrument and the effect of LPA (Schedule 1, paragraph 2(1)(a)), which is contained in the prescribed form of LPA itself.

The degree of understanding required to create an Enduring Power of Attorney ("EPA") was considered by Mr. Justice Hoffmann (as he then was) in *Re K, Re F* [1988] 1 All ER 358. [The Senior Judge then cited extracts from *Re K, Re F*, and extracts from *Re W (Enduring Power of Attorney)* [2000] 3 WLR 45, which was affirmed by the Court of Appeal on 11 December 2000, and reported at *Re W (Enduring Power of Attorney)* [2001] 1 FLR 832, CA.]

Decision

There is conflicting evidence as to what exactly happened when Mrs Clarke executed the LPAs, and I have to say from the outset that, wherever there is such a conflict, I prefer W's and A's version of events to Mr Clarke's. This is not only because W's and A's accounts tend broadly to corroborate each other's recollections, but also because they are consistent and credible, and accordingly more reliable. I regret to say that, in my judgment, Mr Clarke's conduct in this matter has been both disingenuous and lacking in credibility.

For example, Mr Clarke says that his wife allegedly signed the LPAs at some time during the evening of Tuesday, 9 March 2010. A says that her mother signed them during the afternoon. Who should I believe? A says she had taken the day off to visit her mother. She had an hour and a half's journey back home and had to go work the following day. She would not have left as late as 7 or 8 in the evening. I prefer A's account. It makes sense.

Another example is in paragraphs 3 and 4 of his second witness statement, dated 25 July 2011, where Mr Clarke asserted that W was nowhere near the property when Mrs Clarke signed the LPAs, and that A took the forms to his house – some five miles away - for him to sign on her way home.

In paragraph 3 of her witness statement dated 20 August 2011, A commented:

> "This statement by the Applicant can only be described as lies. W, his wife and myself were astounded to read this statement as we had thought that the Applicant's witness statement of 21st October 2010 implied that W was not present in the room, not that W was not present at the property at all. W is outraged by the Applicant's statement which in effect accuses him of lying."

If W and A were lying, it is absurd that they would have left open the contentious issue of whether W actually saw Mrs Clarke sign the documents. He was in the living room or lounge, whereas Mrs Clarke was sitting with A at the table in the dining room when she executed the LPAs. If they were fabricating the story, they would surely have claimed that W was sitting at the table in the dining room with Mrs Clarke and clearly saw her make her mark.

As far as the execution of Part A of the LPAs is concerned, I am satisfied that the donor had had read to her all the prescribed information. Discussions regarding these two LPAs had taken place on several occasions over several months, and A explained the prescribed forms to Mrs Clarke before she attempted to sign them. W confirms that A "clearly explained" to her mother what she was signing.

I am also satisfied that Mrs Clarke signed the LPAs "in the presence of the witness", W. Even though he was sitting in the adjacent room, there were clear glass doors with "Georgian bars" between the two rooms, and he had a clear line of sight through those glass doors. Equally importantly, although we cannot know for certain because she is not competent to give evidence on the point, Mrs Clarke would have been able to see W witness the LPAs by means of the same line of sight through the glass doors. I have no difficulty in relying on a very old legal authority like

Casson v Dade. The fact that the judgment is over two hundred years old simply means that it is basic commonsense and has stood the test of time.

As regards the completion of Part B of the prescribed forms, from the accounts I have heard or read regarding Mrs Clarke's mental state and capacity on 9 March 2010, when she completed Part A of the prescribed forms, and on 31 March 2010, when she went with her husband to see her GP, who completed the certificate in Part B of the prescribed forms, I am not satisfied that she lacked capacity to create powers of attorney at the material time.

Although symptoms of mental incapacity may have manifested themselves for several years, and although in practical terms Mrs Clarke was almost certainly incapable of managing her property and financial affairs, she knew who the attorneys were. She knew that they would be able to assume control over her affairs and she knew that they would be able to make whatever decisions she could have made personally if she still had the capacity to do so.

The GP stated: "At this time I was happy that she was giving her consent freely and did understand the basic concepts." W said: "Mrs Clarke's daughter, A, clearly explained what she was signing and I am confident that she was a willing participant to the agreement, stating that she wanted "her girls" to have a say in her future." A believes that her mother had the requisite capacity at the material time, and at the hearing on 8 September 2011 her sister, C, who occasionally encounters capacity issues in the course of her own work, stated that she had seen her mother at least twice a month for a whole day at a time during the relevant period and that she had no doubt that her mother had the capacity to make a Lasting Power of Attorney at that time.

I mentioned during the hearing that at a meeting nearly twenty years ago I had shocked some of the luminaries of The Law Commission by suggesting that, in practical terms, there is often a difference between the manner in which an assessor carries out a capacity assessment, when they are satisfied that family members are united in their belief that a particular course of action is in a person's best interests, and the way in which they conduct the assessment if they have reason to believe that the matter is controversial or potentially litigious. I must make myself clear. There is only one test for assessing an individual's capacity to make a particular decision at a particular time, and that is the test set out in section 3 of the Mental Capacity Act 2005. The relevant information that a person needs to understand and retain, and use or weigh, will differ according to the nature of the transaction itself, and several discrete common law tests exist, which explain what information needs to be imparted and understood. The decision in *Re K, Re F*, which I cited above, is an example. The point I am making is about the manner in which an assessor applies that test.

I have considerable sympathy with the GP, who was expected to complete the certificate in Part B of both LPAs. The average length of an appointment a patient has with their GP is ten minutes. A few years ago the British Medical Association suggested that maybe double this length of time is needed for consultations with the elderly. Some would argue that even twenty minutes is inadequate for the purpose of assessing an individual's capacity to create an LPA.

I do not believe that Mr Clarke's recollection - that "The only question I can recall the GP asking my wife is "Are you happy with the documents?" to which my wife replied "Yes"- necessarily reflects the totality of the interview with the GP, and the final sentence of the GP's own witness statement contains a delightful hint of pique:

> "Mr Clarke, who was present during my discussion with his wife, at no time expressed any concern as to the way in which the interview had been conducted or my assertion that I felt his wife had capacity."

This illustrates what I mean about the manner in which an assessor may apply the test for capacity. I imagine the GP took a fairly broad brush approach, consistent with the ten minutes allocated to her for seeing her patient. She was presented with a situation in which there appeared to be a united and harmonious family, all of whom would be sharing in the decision-making process on her patient's behalf. The proposed course of action (as she perceived it) was in her patient's best interests, and she had no reason to suppose that anyone would ever consider challenging her assessment. Had she known that her assessment would be the subject of litigation, she would almost certainly have taken more time. Her questioning would have been more thorough and focussed, and her report of the interview would have been more detailed. But that does not necessarily mean that she would have arrived at a different conclusion.

Without wishing to be disrespectful, the evidence of Mr Clarke's solicitor is neither here nor there. The fact that Mrs Clarke could not recall executing the LPAs two months after she had done so, and six weeks after she had seen the GP for her capacity to be assessed, does not *ipso facto* mean that she lacked the capacity to create the LPAs at the material time. Section 3(3) of the Mental Capacity Act 2005 expressly states that:

> "The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision."

I also have grave doubts as to whether Mrs Clarke really "wants Mr Clarke to be able to deal with her things and does not want the girls to be able to overrule him." The circumstances in which she expressed this view to Mr Clarke's solicitor need to be viewed with extreme caution. Her husband had handed the phone to her so that she could speak to the solicitor. He may very well have coached her to make these remarks and, in any event, they have no bearing on her capacity to execute the LPAs.

For these reasons I dismiss Mr Clarke's application.

[The Senior Judge then set out the Rules on costs.]

Decision on costs

I am going to depart from the general rule on costs in this case. As I said earlier, I consider that the application was disingenuous and, whenever there was a conflict of evidence, I tended not to prefer Mr Clarke's version of events. I do not believe that Mr Clarke has acted in good faith. The application was made for his benefit, rather than his wife's, and I believe it would be unjust to order his wife to pay his costs.

DENZIL LUSH
Senior Judge
19 September 2011