# COURT OF PROTECTION

# MENTAL CAPACITY ACT 2005

## In the matter of
## COLLIS

This was an application to the court to direct the Public Guardian to cancel the registration of a Lasting Power of Attorney ("LPA") on the ground that the power created by the instrument was not valid as an LPA because the donor lacked capacity to create an LPA. The following extract is taken from the judgment of the Senior Judge given on 27 October 2010:

## *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 was considered by Mr. Justice Hoffmann (as he then was) in *Re K, Re F* [1988] 1 All ER 358. At page 363c-f, in the penultimate paragraph of his judgment, he said:

> Finally, I should say something about what is meant by understanding the nature and effect of the power. What degree of understanding is involved? Plainly one cannot expect that the donor should have been able to pass an examination on the provisions of the 1985 Act. At the other extreme I do not think it would be sufficient if he realised only that it gave cousin William power to look after his property. Counsel as *amicus curiae* helpfully summarised the matters which the donor should have understood in order that he can be said to have understood the nature and effect of the power: first, if such be the terms of the power, that the attorney will be able to assume complete authority over the donor's affairs; second, if such be the terms of the power, that the attorney will in general be able to do anything with the donor's property which the donor could have done; third, that the authority will continue if the donor should become mentally incapable; fourth, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court. I do not wish to prescribe another form of words in competition with the explanatory notes prescribed by the Lord Chancellor, but I accept the summary of counsel as *amicus curiae* as a statement of the matters which should ordinarily be explained to the donor whatever the precise language which may be used and which the evidence should show he has understood.

At page 362j Mr. Justice Hoffmann said:

> I think that my conclusions are in accordance with what appears to be the general policy of the 1985 Act. In practice it is likely that many enduring powers of attorney will be executed when symptoms of mental incapacity have begun to manifest themselves. These symptoms may result in the donor being mentally incapable in the statutory sense that she is unable on a regular basis to manage her property and affairs. But, as in the case of Mrs F, she may execute the power with full understanding and with the intention of taking advantage of the Act to have her affairs managed by an attorney of her choice rather than having them put in the hands of the Court of Protection. I can think of no reason of policy why this intention should be frustrated.

However, in my judgment, the criteria in *Re K, Re F* are not entirely applicable to LPAs because of some fairly major differences between EPAs and LPAs, and would need to be adapted in several respects.

For example:

- the donor would need to understand that the LPA cannot be used until it is registered by the Public Guardian. This is simply not the case with an EPA.
- one would expect to see a change of emphasis between the creation of an LPA for personal welfare and an LPA for property and affairs; and, in particular, the donor would need to understand that the attorney under an LPA for personal welfare can only make decisions that the donor is contemporaneously incapable of making for him- or herself.
- unlike an EPA, the donor can revoke an LPA at any time when he or she has the capacity to do so (section 19(2)), without the court having to confirm the revocation.
- the authority conferred by an LPA, unlike an EPA, is subject to the provisions of the Mental Capacity Act 2005 and, in particular, sections 1 (the principles) and section 4 (best interests) (section 9(4)).

- the statutory definition of capacity in section 3(4) of the Act specifically requires the donor to be aware of the foreseeable consequences of not executing an LPA, whereas in *Re K, Re F* Mr Justice Hoffmann did not include an understanding of the effect of not making an EPA in his summary of the matters which should ordinarily be explained to the donor.

The burden of proof in cases where there is an objection that a power of attorney is not valid on account of the donor's incapacity was considered by Jules Sher QC in *Re W (Enduring Power of Attorney)* [2000] 3 WLR 45. At page 47G he said:

> The important point to notice is that the onus of establishing any of the grounds set out in subsection (5) is firmly laid on the shoulders of the objectors. Under subsection (6) it is only if the ground concerned is established to the satisfaction of the court that the court can refuse to register the power. Indeed, if the ground is so established the court must refuse. The contrary position is expressly made equally emphatic: if the court is not so satisfied it "shall register the instrument to which the application relates."
>
> Very few cases in these days turn on the onus of proof. In ordinary civil litigation the judge is nearly always able to form a view on a balance of probabilities as to whether an event did or did not happen. But the state of a woman's mind some three years before the court hearing is inherently an issue in respect of which it is quite likely that the judge may not be satisfied either way.

At page 49H he said this:

> I am not satisfied on the evidence that Mrs. W did not have this understanding. This does not mean that I am satisfied that she did have it. The point of this judgment is that this last issue is not the question before me. If, as is the case, I am not satisfied that she lacked the necessary understanding, it seems to me that I am bid by the Act to register the power.

And, finally, at page 50D Mr Sher QC said:

> To sustain the power, Mrs. X did not have to satisfy [the Master] that Mrs. W understood the nature of the power; the objectors have to satisfy him that she did not.

Mr Sher's decision was affirmed by the Court of Appeal on 11 December 2000, and is reported at *Re W (Enduring Power of Attorney)* [2001] 1 FLR 832, CA.

## *Decision*

Essentially, the issue is whether I prefer the evidence of the certificate provider (Miss Spurgeon) that Mr Collis had the capacity to create the LPA to that of Dr Ananthanarayanan, the Court of Protection Special Visitor, who hazarded a guess that he may have lacked such capacity at the requisite time.

Mental capacity is "issue-specific". This means that the capacity required to create an LPA is not the same as the capacity to manage one's property and financial affairs generally, or the capacity to make a will or a gift or a loan, or the capacity to decide on a certain course of medical treatment, or the capacity to decide whether to live in a residential care home.

Capacity is also "time-specific", focusing on the particular time when a decision is made or has to be made. The fact that, after just a few minutes, or on the following day, a person cannot recall having made a particular decision doesn't automatically mean that he or she lacked the capacity to make that decision, or that the decision is invalid.

In my judgment, the best evidence in this case is Miss Spurgeon's. I have described it as the "best" evidence, not because it is of superlative quality (which it isn't), but simply because it is the best evidence that the circumstances of this case will allow. It is the only evidence that is both issue-specific and time-specific, insofar as it addresses Mr Collis's specific ability to create an LPA, at a specific time, namely on 3 June 2010 and 9 June 2010.

Miss Spurgeon is an experienced solicitor of ten years' admission, and is familiar with the professional and ethical standards and safeguards that one needs to take into account when assessing whether an elderly person is capable of entering into a transaction of this kind. Her opinion is neither woolly nor equivocal. She was satisfied that Mr Collis understood the nature and effect of the LPA when he signed it. Dr Ananthanarayanan's opinion has the major disadvantage of being retrospective, and is thus neither time-specific nor issue specific.

I accept that it may seem unusual for the court to prefer the evidence of a solicitor to that of an experienced medical practitioner on what *prima facie* seems to be a clinical decision. However, this is not without precedent, and in *Birkin v Wing* (1890) 63 LT 80, for example, the judge preferred the evidence of a solicitor, who considered that his client was mentally capable of entering into a particular contract, to that of a doctor who said that he lacked capacity.

It is more than likely that Mr Collis was incapable of managing his property and affairs in a general sense in June 2009, but that doesn't mean that he was incapable of executing an LPA. This is precisely what Mr Justice Hoffman envisaged when he said that:

> In practice it is likely that many enduring powers of attorney will be executed when symptoms of mental incapacity have begun to manifest themselves. These symptoms may result in the donor being mentally incapable in the statutory sense that she is unable on a regular basis to manage her property and affairs.

In the circumstances, therefore, I am not satisfied that Mr Collis lacked the necessary understanding to create the LPA, and I dismiss the application.

For what it is worth, even if I had declared that the LPA was invalid for lack of capacity at the time of its creation, I would – without hesitation - have appointed [the attorney under the LPA instrument] as Mr Collis's deputy. There is clear evidence from various sources that it has been consistently Mr Collis's wish that [she] should manage his affairs whilst he is incapacitated. There is nothing irrational, impracticable or irresponsible about these wishes, and, as far as I can see, there would be no detrimental effect for him in implementing them.

**DENZIL LUSH**
**Senior Judge**
**27 October 2010**