COURT OF PROTECTION **No. 11613871**

In the matter of HARRIES

1. This is an application to the court to determine a question as to the validity of an enduring power of attorney.

The facts

2. Harries ("the donor") was born in 1924 and lives in South Wales.

3. On 7 September 2001 he executed an enduring power of attorney in which he appointed his son ("the attorney") to be his attorney.

4. A solicitor witnessed the donor's signature and another witness witnessed the attorney's signature on 14 October 2001.

5. Both witnesses wrote their full names and addresses in their own handwriting but, unfortunately, omitted to place their signatures above their names and addresses.

6. On 17 January 2008 the attorney applied to the Public Guardian to register the instrument, but the Public Guardian refused to register it because he regarded it as defective and technically invalid.

7. On 23 July 2008 the solicitor who had acted as witness applied to the court "to confirm the validity of the Enduring Power of Attorney so that an application to register the same can be finalised." A witness statement made by him on the same day accompanied the application.

8. Following a directions order made by me on 6 October 2008 further statements were filed by the Public Guardian on 27 February 2009 and the attorney on 24 March 2009

Decision

9. The material regulation in this case is The Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (SI 1990/1376), regulation 3(1) of which provides that, "an enduring power of attorney in the form set out in the Schedule to these Regulations shall be executed by both the donor and the attorney, although not necessarily at the same time, in the presence of a witness, but not necessarily the same witness, who shall sign the form and give his full name and address."

10. In this case, although the other formalities were properly complied with, the two witnesses did not sign the form as such, although they did write their full names and addresses in their own handwriting. Technically, the execution of the instrument was imperfect, but it seems harsh to make ruling that, as a consequence, the instrument is invalid.

11. In my judgment, whenever possible, the donor should be given the benefit of the doubt when any question arises as to the construction of an enduring power of attorney or lasting power of

attorney. In the recent case of *In the Matter of J (Enduring Power of Attorney)* [2009] EWHC 436 (Ch), Mr Justice Lewison observed, at paragraph 13, that "because the duty to register only arises when the donor has become or is becoming mentally incapable, the power of attorney is likely to be scrutinised for the first time by the Public Guardian at a time when, if it is invalid as an enduring power of attorney because of some technical defect, it is probably too late for the donor to execute another one. This, in turn, means that the donor's affairs will have to be administered by a deputy, which is likely to be more cumbersome, more expensive and more public than administration by attorneys of the donor's choice. One of the important policies of the Mental Capacity Act 2005 is that, so far as is possibly consistent with his best interests, a protected person's wishes should be taken into account and respected."

12. One of the common features between enduring powers of attorney and lasting powers of attorney is that the legislation provides that if an instrument differs in an immaterial respect in form or mode of expression from the prescribed form it is to be treated as sufficient in point of form and expression. The difference between the two regimes, however, is that, in the case of lasting powers of attorney the arbiter of immaterial differences is the Public Guardian, whereas in the case of enduring powers of attorney the arbiter is both the Court of Protection and the Public Guardian.

13. Having regard to all the circumstances, I am satisfied that the handwritten depictions of the witnesses' names are sufficient proof of their identity and their intent as to constitute signatures, and that the difference between an autograph (αυτο = self, γραφη = writing) or handwritten name and an actual signature is immaterial. I would have decided otherwise if, as is sometimes the case, the full names and addresses of the witnesses had been typed. I am not satisfied that the power purported to have been created by the instrument is not valid as an enduring power of attorney, and accordingly I direct the Public Guardian to register the instrument.

14. A separate order accompanies this judgment, which was made without holding an attended hearing. Pursuant to rule 89 of the Court of Protection Rules 2007 any person who is aggrieved by my decision may apply within 21 days of the date on which the order was served, to have it set aside.

DENZIL LUSH
Senior Judge
22 June 2009

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