COURT OF PROTECTION **No.**

MENTAL CAPACITY ACT 2005

Re KITTLE

1. This is an application by the Public Guardian for me to reconsider a decision I made on the papers alone, without holding an attended hearing. In terms of the court's procedure, it is a good illustration of the interaction of rules 27 and 89 of the Court of Protection Rules 2007. Rule 27 permits the court to exercise its powers on its own initiative, and rule 89 allows the court to reconsider any orders that it has made on its own initiative. Her Honour Judge Hazel Marshall QC described this process rather well in paragraph 61 of her judgment in *Re S and S (Protected Persons)*, which was handed down on 25 November 2008. She said:

> Such a reconsideration is not an appeal. The processes in the Court of Protection are intended to give the court wide flexibility to reach a decision quickly, conveniently and cost effectively when it can, whilst still preserving a proper opportunity for those affected by its orders to have their views taken into account in full argument if necessary. To that end, on receiving an application, the court can make a decision on the papers, or direct a full hearing, or make any order as to how the application can best be dealt with. This will often lead to a speedy decision made solely on paper which everyone is content to accept, but any party still has the right to ask for a reconsideration.

2. The decision in question relates to a Mrs Kittle, who on 29 December 2008 executed a lasting power of attorney ("LPA") for property and affairs, in which she appointed her two sons jointly and severally to be her attorneys. A legal executive witnessed her signature and a few days later, on 5 January 2009, a man called Roy completed the certificate in Part B of the prescribed form. He put a cross in a box which says "I have known the donor personally over the last two years," and in response to the question "How do you know them?" said, "We are cousins." The attorneys applied to the Office of the Public Guardian to register the LPA, but the Public Guardian refused to do so because the certificate provider was "a family member of the donor."

3. On 29 April 2009 the attorneys applied to the Court of Protection for an order that it should review the Public Guardian's decision and accept Roy as the certificate provider "given that he is a remote member of the donor's family and was chosen by the donor to act in that capacity." Section 23(1) of the Mental Capacity Act 2005 ("the Act") enables the court to determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one.

The law relating to LPA certificates

4. Paragraph 2(e) of Schedule 1 to the Act states that an LPA must include a certificate ("an LPA certificate") by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument:

(i) the donor understands the purpose of the instrument and the scope of the authority conferred under it,

(ii) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney, and

(iii)there is nothing else which would prevent a lasting power of attorney from being created by the instrument.

5. Regulation 8(1) of The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (2007 No. 1253) says that, subject to regulation 8(3), the following persons may give an LPA certificate:

(a) a person chosen by the donor as being someone who has known him personally for the period of at least two years which ends immediately before the date on which that person signs the LPA certificate;

(b) a person chosen by the donor who, on account of his professional skills and expertise, reasonably considers that he is competent to make the judgments necessary to certify the matters set out in paragraph (2)(1)(e) of Schedule 1 to the Act.

6. These are respectively referred to in the prescribed form of LPA itself as Category A – Knowledge certification, and Category B – Skills certification.

7. Regulation 8(3) states that:

A person is disqualified from giving an LPA certificate in respect of any instrument intended to create a lasting power of attorney if that person is –

(a) a family member of the donor;

(b) a donee of that power;

(c) a donee of –
(i) any other lasting power of attorney, or
(ii) an enduring power of attorney,
which has been executed by the donor (whether of not it has been revoked);

(d) a family member of a donee within sub-paragraph (b);

(e) a director or employee of a trust corporation acting as a donee within sub-paragraph (b);

(f) a business partner or employee of –
(i) the donor,
(ii) a donee within sub-paragraph (b);

(g) an owner, director, manager or employee of any care home in which the donor is living when the instrument is executed; or

(h) a family member of a person within sub-paragraph (g).

8. “Family member” is not defined in regulation 2, which deals with the interpretation of the Regulations.

The decision being reconsidered

9. On 20 August 2009 I considered the matter on the papers alone, and gave a short written judgment. In the absence of any definition of “family member,” I suggested that it should be defined in an ordinary, commonsense way. I added that there clearly has to be some practical and convenient cut-off point at which people who are related by blood or marriage cease to be family members, and by way of example – admittedly, a rather extreme one - stated there is a very high probability that anyone living in England today, who has a predominantly English ancestry, is descended from King Edward III, who reigned from 1327 to 1377. All such persons are, in theory at least, related to one another and members of a very large family.

10. The significance of having a common ancestor – in her case, a grandparent - is unlikely to cut much ice as far as Mrs Kittle is concerned. She regards Roy as a distant or remote relative, rather than as a member of her family. He doesn’t visit her very often at her care home, and certainly does not do so with the same degree of regularity or frequency as her sons, or her sister and brother-in-law. Nor has she mentioned him in her will.

11. I went on to state that, “in my judgment, as the donor is the person who is required by regulation 8(1) to choose his or her certificate provider, so the donor should be the arbiter of who is or is not a member of his or her family for the purpose of regulation 8(3). Mrs Kittle does not consider that Roy is a “family member” and we should respect her opinion.”

12. The purpose of a formal document certifying the donor’s capacity to create a lasting power of attorney is twofold. The first is to remedy the situation in which a potentially vulnerable person with borderline capacity signs a power of attorney without adequate safeguards in place. The second is to provide evidence that may assist the court in the event of any future challenge to the validity of the instrument. In this case, Mrs Kittle’s signature was witnessed by a legal executive, who could equally well have acted as the certificate provider, and there were adequate safeguards in place as far as the validity of the instrument is concerned.

13. Accordingly, I was satisfied that, for the purposes of section 22(2)(a) of the Mental Capacity Act 2005, one or more of the requirements for the creation of a lasting power of attorney had been met, and directed the Public Guardian to register the instrument.

The Public Guardian’s application for reconsideration of the decision

14. On 22 September 2009, the Public Guardian applied for the following order:

The court is asked to reconsider the order made on 20 August and entered on 26 August, which was served on the Public Guardian on 2 September 2009. The application is made under Rule 89 of the Court of Protection Rules 2007, as the order was made without a hearing.

15. The grounds on which he sought the order were:

In the order made on 20 August 2009 the court directed the Public Guardian to register the instrument made by Mrs Kittle ("the donor") as a Lasting Power of Attorney. The Public Guardian had previously refused registration on the basis that the certificate provider, who was the first cousin of the donor, was a family member of the donor within the meaning of Regulation 8(3) of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007. The court decided that the donor is the arbiter of who is or is not a member of his or her family for the purpose of Regulation 8(3), and that the donor did not consider the certificate provider to be a family member.

The court is asked to reconsider the subjective approach to the meaning of "family member" and to rule that a first cousin is not a family member for the purpose of Regulation 8(3), or, alternatively, that a first cousin is a family member, without any need to seek evidence of the donor's opinion.

16. The application was accompanied by a witness statement, also dated 22 September 2009, in which the legal adviser to the Public Guardian, Jill Martin, said:

1. …
2. …

3. As the Regulations contain no definition, the Public Guardian has adopted a practice of refusing registration if the certificate provider is related to the donor in any of the ways specified on a list compiled from various statutory definitions of "relative" or "member of the family". This list has been published on the website of the Office of the Public Guardian, where it is stated to be subject to clarification by the court. The list includes first cousins. The Public Guardian declined for this reason to register the donor's instrument as an LPA, but was subsequently directed to do so by the order made on 20 August 2009.

4. The list was compiled by considering firstly paragraph 6 of Schedule 4 of the Mental Capacity Act 2005 ("MCA"). Paragraph 6 (replacing an identical provision in the Enduring Powers of Attorney Act 1985) lists "relatives" who are entitled to be notified of the attorney's intention to register. First cousins (expressed as "the children of the donor's uncles and aunts of the whole blood") are tenth and last in order of priority on that list.

5. Consideration was given to Practice Direction B to Part 9 of the Court of Protection Rules 2007, where paragraph 7 lists persons in order of priority (in order of presumed closeness in terms of relationship to "P") who should be notified of an application relating to "P". This list does not include cousins.

6. Consideration was also given to section 113 of the Housing Act 1985, which lists the persons who are to be treated as "a member of another's family" for the purpose of succeeding to a statutory tenancy. This list does not include cousins.

7. As they were included only in the list of "relatives" set out in paragraph 6 of Schedule 4 to the MCA and not in the other sources, first cousins were placed low on the Public Guardian's working list.

8. Although not taken into account in compiling the list, there is a definition of "relatives" in Regulation 3 of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008, which includes a first cousin as eleventh in a list of twelve.

9. Although the various statutory provisions differ as to whether cousins are included as "relatives" or "family members", and they are all directed to different situations, what they all have in common is that inclusion or exclusion is dependent on the existence of the relationship, with no subjective element.

10. The court is asked to consider the judgment of the Court of Appeal in *Langdon v Horton* [1951] 1 All ER 60. That case dealt with the question whether first cousins, who had lived together with the tenant for twenty-nine years, were to be treated as members of her family on her death for the purposes of succession to a Rent Act statutory tenancy under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. That Act contained no definition of "member of the tenant's family." Sir Raymond Evershed considered that the right approach was whether the "ordinary man" would consider the cousins to be members of the tenant's family, and held that they were not. He did not approach the question on the footing that the tenant's view of the matter was the governing factor. Singleton LJ drew a distinction between being a member of the family and a member of the "same family".

11. He concluded (page 62F): "I do not see that one can say that a cousin is a member of another cousin's family merely because she is a cousin. They are members of the same family or stock in the sense that they have the same maternal grandparents, but that is all. The mere fact of cousinship does not make every cousin a member of another cousin's family …. It cannot be said that they were members of her family even though they lived in the same house for many years."

12. In his judgment in the present case the Senior Judge said that, in the absence of a definition in Regulation 8, the expression "family member" should be "defined in an ordinary commonsense way". He concluded from the evidence that the donor regarded her cousin, the certificate provider, as "a distant, or remote relative, rather than a member of her immediate family." He noted that the cousin did not visit her regularly, nor was he included in her will. He held that "the donor should be the arbiter of who is or is not a member of his or her family for the purpose of Regulation 8(3)."

13. The Public Guardian submits that Regulation 8(3) disqualifies those who are members of the family of the donor, not just those who are members of the "immediate family" of the donor. The Public Guardian further submits that the question whether a particular person is a "family member" should be decided objectively, by asking the hypothetical "ordinary man" (as held in *Langdon v Horton*), and not by reference to the donor's views. The court may also wish to consider that, in cases where the donor has chosen a relative as certificate provider, it may not be because he or she has concluded that the relative is not a "family member", but is more likely to be because he or she is unaware of the prohibition on a "family member" acting as a certificate provider.

14. From a practical point of view, the Public Guardian as registering authority will be faced with a difficulty if the test is subjective, as he will have to make enquiries in cases where a donor has chosen a certificate provider who is a relative of some description, thus delaying the registration process. The enquiries could be difficult if the donor no longer has capacity.

15. Regulation 8(3) also disqualifies from acting as certificate provider any person who is a "family member" of the attorney (Regulation 8(3)(d)) or of "the owner, director, manager or employee of any care home in which the donor is living when the instrument is executed" (Regulation 8(3)(h)). If the test is subjective, then the attorney would be the arbiter of whether the certificate provider was a member of his or her family, and likewise the owner, director etc of a care home in relation to Regulation 8(3)(h). But the certificate provider is chosen by the donor, who would also, therefore, be obliged to consider the issue. These examples, it is submitted, show that the subjective test is not workable.

16. The court is requested to rule that, in the light of the decision in *Langdon v Horton*, the meaning of the expression "family member" is to be approached by considering its ordinary meaning, and that, on that approach, a first cousin is not a "family member" of the donor within Regulation 8(3). The effect would be that the donor's instrument in the present case would be a valid LPA without any examination of her subjective opinion, as evidenced by the frequency of the cousin's visits or the terms of the donor's will.

17. If the court does not so rule, it is requested alternatively to rule that the ordinary meaning of the expression "family member" includes first cousins, without any examination of the donor's subjective opinion.

Decision

In the Court of Protection, where the primary objectives are to ascertain whether an individual has the capacity to make a particular decision at a particular time and, if not, to determine what is in his or her best interests, judicial precedent can sometimes be a fetter. Ideally, the court's jurisdiction should be as flexible as possible, with a broad discretion that enables each case to be judged fairly on its own merits. Every time we set a precedent, the jurisprudence becomes slightly more rigid, and we lose some of that important flexibility.

How much easier it would have been simply to accept, at face value, that one particular woman, Mrs Kittle, does not consider that her cousin Roy is a member of her family, than to embark upon an exercise that will result in the court deciding that, in every case up and down the land, a cousin is or is not to be regarded as a member of the donor's family for the purpose of providing an LPA certificate.

I am grateful to Jill Martin for her review of the legislation. It would seem that, for some purposes, a cousin is a family member, and that for other purposes, he or she is not. I don't think I have ever come across anything that is quite so inconclusive, and I am not sure how helpful the "ordinary man" test is, either. The man on the Clapham omnibus nowadays may very well be a British citizen of South Asian, African or Caribbean ethnicity, with widely varying notions of who is or is not a member of their family.

We can distinguish the other legislation to which Jill Martin referred from the LPA, EPA, and PG Regulations in one important respect, namely choice. A Category A certificate provider is "a person chosen by the donor as being someone who has known him personally for at least two years…" and is not a "family member of the donor." Perhaps unwittingly, the requirement that the certificate provider be chosen by the donor personally introduces a subjective element into the decision whether or not that person is also regarded as a family member.

However, the main advantage of precedent is greater certainty, and I acknowledge that in arriving at my earlier decision I failed to appreciate the interests of the Public Guardian as the registration authority, which are entirely legitimate, and are summarised in paragraphs 14 and 15 of Jill Martin's witness statement. I am told and accept that a subjective approach to this issue is unworkable, and have decided that, in my judgment, the approach should be objective, and that, applying the decision of the Court of Appeal in *Langdon v Horton*, a cousin should not be regarded as "a family member of the donor" or, for that matter, a "family member of the donee" or a family member of "an owner, director, manager or employee of any care home in which the donor is living when the instrument is executed" for the purposes of regulation 8 of the LPA, EPA and PG Regulations.

If it is felt that this decision has relaxed an important safeguard for the donors of lasting powers of attorney, then the appropriate course of action would be to ensure that "family member" is clearly defined in the Regulations when they are next reviewed.

DENZIL LUSH
Senior Judge
1 December 2009