COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

In the matter of
PHILLIPS

BETWEEN:

PHILLIPS

Applicant

-and-

THE PUBLIC GUARDIAN

Respondent

1. This is a case in which the Public Guardian has refused to register a Lasting Power of Attorney ("LPA") because the certificate provider was a member of the attorney's family.

2. [The judge then set out in paragraphs 2, 3 and 4 the personal details of the donor and the three attorneys, A, B and C]

3. [……..]

4. [……...]

5. On 26 January 2011 Mrs Phillips signed an LPA for property and affairs. It was a large print LPA, containing thirty pages plus five continuation sheets. In it she:
   (a) appointed the three attorneys;
   (b) did not appoint a replacement attorney;
   (c) directed the attorneys to act jointly and severally;
   (d) did not impose any restrictions or conditions on the scope of the attorneys' authority;
   (e) did not set out any guidance for the attorneys to consider;
   (f) did not agree that the attorneys could charge for their services; and
   (g) named nobody be notified when an application was made to register the instrument.

6. X witnessed the donor's signature and acted as one of the Part B certificate providers. On page 25 of the LPA he said, "I am the partner of [A], and have known [the donor] for 3 years."

7. Y was the other Part B certificate provider. She said, "I am a close family friend and I have known [the donor] for eight years."

8. On 19 February 2011 attorney A applied to the Office of the Public Guardian to register the instrument.

9. The Public Guardian refused to register the instrument because one of the certificate providers was a family member of one of the attorneys.

The application

10. On 19 September 2011 A applied to the court for an order:

> "To authorize the registration of the Lasting Power of Attorney so that I am able to manage my mother's affairs; the most urgent of which is to sign a deferred payment agreement with Z County Council on my mother's behalf so as to be able to go ahead with the payment of her care fees in the residential care home where she is resident."

11. Accompanying the application was a witness statement, also dated 19 September 2011, in which she said as follows:

> 1. I, A, am the daughter of [the donor] to whom this application relates. The facts in this statement come from my personal knowledge.
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> 2. [The donor] created a Lasting Power of Attorney, the registration of which was not accepted on the grounds that the certificate provider, X, was considered related as a partner to the attorney, myself.
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> 3. X is not related to me, he is my present boyfriend and not a long term partner, we do not live together or share the same address. X has been a family friend for a number of years.

The Public Guardian's position statement

12. On 10 January 2012, in response to a directions order I had made on 14 December 2011, Jill Martin, the legal adviser to the Public Guardian, filed a position statement. Paragraphs 1 to 6 set out the background to this application, which I have already described. From paragraph 7 onwards Ms Martin stated as follows:

> [7]. It appears from the order made on 14 December 2011 that the applicant, in her witness statement, stated that "[X] is not related to me." It is submitted that the question is whether he is a member of her family, which may not be the same question as whether he is "related" to her. She also says that he is her "current boyfriend and not a long term partner." It is submitted that the court should decide on [X's] eligibility by considering how he describes himself in the instrument ("partner") and not by considering later extraneous statement from the attorney which implies that it is a transient relationship.
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> [8]. OPG compiled a list of persons it considered to be "family members", subject to any ruling of the court, and placed it on the OPG website in 2008. The list, which represents OPG practice and does not purport to be a statement of the law, includes a "person who is not a spouse or civil partner but who has been living with the donor/attorney as if they were the spouse or civil partner."
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> [9]. It is for the court to interpret the meaning of "family member", and the court may consider that a relationship with the donor or attorney which is not on OPG's list disqualifies a person from acting as certificate provider, or may consider that a relationship which is on OPG's list does not disqualify a person from acting.
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> [10]. OPG's list was compiled from the following statutory sources. One was the list of "relatives" entitled to notification of an application to register an Enduring Power of Attorney, now found in paragraph 6 of Schedule 4 of the MCA. This does not include persons living together as spouse or civil partner. Another was paragraph 7 of Practice Direction B to Part 9 of the Court of Protection Rules 2007, which sets out a list of persons to be notified of proceedings on the basis of their "presumed closeness in terms of relationship to P." This list includes "person who is not a spouse or civil partner but who has been living with P if they were." Another source was section 113 of

the Housing Act 1985, which defines "members of another's family" for the purposes of Part IV of the Act (on secure tenancies) as including persons living together as husband and wife or as if they were civil partners. Although not one of the sources of the OPG's list, it may be helpful to refer also to the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008. In paragraph 3(2) there is a definition of "relative" which includes a "person living with the relevant person as if they were a spouse of civil partner."

[11]. The court will note that, in those statutory definitions which do include unmarried partners as relatives or family members, there is a requirement that they should be living together. In the present case the certificate provider was not living with the attorney.

[12]. It is submitted that a possible reason for the additional requirement of living together in the statutory definitions is that, from an evidential point of view, it is easier to establish whether persons are living together than to establish whether they have a sexual relationship. If so, it should not be assumed that persons who have a sexual relationship but do not live together are less connected to each other than those who do live together. Much depends on the purpose of the particular statutory definition.

[13]. Only one order has yet been made by the court of the meaning of "member of the family" in the Regulations. This was the case of *Kittle* 11711014 (1 December 2009), which was a decision on an application for reconsideration of a previous order. In that case the court decided that a first cousin of the donor was not a member of her family. The court followed the decision of the Court of Appeal in *Langdon v Horton* [1951] 1 All ER 60, where, in the context of the Rent Acts, the court adopted an objective approach to deciding the meaning of "member of the tenant's family". This approach required the court to consider whether the "ordinary man" would consider the relationship in question to fall within the meaning of "member of the family".

[14]. Applying the *Langdon v Horton* approach in the present case would require asking the hypothetical "ordinary man" whether he considered an unmarried partner to be a member of his partner's family. It is submitted that it would be necessary to explain to the hypothetical "ordinary man" the context in which the question was being asked. It is clear from the statutory definitions mentioned in paragraph 10 above that there is no universal meaning of the term "member of the family", and that the meaning varies according to the context and to the purpose of the statutory provision in question. If one were to explain to the "ordinary man" that a member of the family of the donor or attorney was disqualified from certifying that the donor had capacity to make an LPA and that no fraud or undue pressure had been used to induce the donor to make it, and then to ask whether an unmarried partner of the donor or attorney was a member of the family (of the donor or the attorney as the case may be), it may not be obvious what his answer would be. It is submitted that, if asked whether an unmarried partner living with an attorney was a member of the attorney's family, he would say: "Yes, of course." If asked whether an unmarried partner not living at the same address as the attorney was a member of the attorney's family, the position is more uncertain. However, he may well say yes if that person had described himself as the attorney's "partner", which signifies a more stable and permanent relationship than the term "boyfriend".

[15]. It is submitted that the policy behind the disqualification in the Regulations of a member of the family of the donor or the attorney from acting as a certificate provider is based at least in part on the premise that permitting such a person to provide the certificate could lead to the manipulation of a vulnerable donor in a situation where the would-be attorney is pressing for the creation of an LPA for his or her own purposes. A family member of the attorney may be willing to provide the certificate even if he does not think the donor has capacity or knows or suspects that fraud or undue pressure has been used to induce the donor to make the LPA. It is not suggested that this applies in the present case.

[16]. If the court should decide that an unmarried partner who does not live with the attorney or donor (as the case may be) is not a member of his or her family, there is another reasons why such a

person is not eligible to act as the certificate provider, namely that an unmarried partner is nor "independent" of the attorney or donor.

[17]. The prescribed forms for creating an LPA, which are part of the Regulations, require the certificate provider to confirm that they are acting independently of the donor and the attorney, and this is an additional requirement not to be disqualified by Regulation 8. In Part B of the form prescribed by the 2007 Regulations the certificate provider must tick a box stating that: "I confirm that I am acting independently of the person making this LPA (the donor) and the person(s) appointed under the LPA and in particular I am not a person listed in the above section 'Who cannot provide a certificate?'." If being independent was not an additional requirement, the certificate provider would only have been required to confirm that he was not a person listed as being unable to act. In the prescribed form introduced by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2009, the certificate provider is required to sign a confirmatory statement rather than to tick a box. The confirmatory statement includes the following: "Statement of acting independently. I confirm that I act independently of the attorneys and of the donor and I am aged 18 or over. I am not: [*this is followed by a list of those disqualified from acting*]." Again, this shows that acting independently is separate from not being disqualified, otherwise the certificate provider would only have been required to confirm that he was not on the list of people disqualified from acting.

[18]. In the case of *Putt* 11964340 (22 March 2011) the question before the court was the interpretation of Regulation 8(3(f) of the 2007 Regulations, which disqualifies from acting as certificate provider a person who is "a business partner or employee" of the donor or attorney. The issue was whether Regulation 8(3)(f) applied to a firm of solicitors set up as a Limited Liability Partnership in the same way as it applied to a common law partnership. The court held that it did. In paragraph 14 of the judgment the Senior Judge said that the wording of this part of the regulation was "not entirely foolproof if the desired objective is to provide certain safeguards, and would allow, for example, an employee to be appointed attorney and his or her employer or a fellow employee to act as the certificate provider. However, despite these shortcomings, the prescribed form itself requires the certificate provider to state, 'I am acting independently of the person making this LPA (the donor) and the person(s) appointed under the LPA' in addition to confirming that he is not a person listed in regulation 8(3) who cannot provide a certificate." The Senior Judge accepted, therefore, that the "independence" requirement was additional to the requirement of not being in the list of persons disqualified from acting by the Regulations. He then went on to conclude that the certificate provider was not an "independent" contractor.

[19]. In the case of *Nazran* 11601499 (27 June 2008) the certificate provider omitted to tick the box confirming that he was acting independently. The court exercised its discretion under paragraph 3(2) of Schedule 1 of the MCA, which enables the court to "declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney." This decision shows that the "independence" requirement is a material element, otherwise the court would have held that the instrument differed from the prescribed form in an immaterial respect under paragraph 3(1) of Schedule 1. In that case the certificate provider was able to demonstrate to the court that he was in fact independent. In the present case, if the court decides that the certificate provider was not independent, it would not be able to exercise any discretion under paragraph 3(2).

[20]. In conclusion, the Public Guardian's position is that the certificate provider, being the unmarried partner of the attorney, is to be treated as a member of her family and thus ineligible to act under Regulation 8(3) even though he does not live with the attorney. Alternatively, if the court does not consider that he is a member of the family of the attorney, the Public Guardian submits that an unmarried partner of the attorney cannot be regarded as acting independently of the attorney as required by the prescribed form. If such a person were to be allowed to act, this would dilute the legislative safeguards intended to protect vulnerable donors from possibly unscrupulous attorneys.

[Attorney A's] witness statement

13. On 6 March 2012 A made a second witness statement. The comments she made that were not in her first witness statement were as follows:

> [3]. X is not related to me in any way, he is my current boyfriend and not a long term partner, we do not live together or share the same address. X has been a family friend for a number of years and a person that my mother trusts a great deal.
>
> [4]. The donor was very clear about who she wanted to be involved in her Lasting Power of Attorney, especially due to the fact that her mental capacity was declining at that time and for that reason chose [her children] as attorneys and the two friends she trusted most as her certificate providers.

Jill Martin's witness statement

14. On 9 March 2012 Jill Martin made the following witness statement in response to the applicant's witness statement. The first two paragraphs described compliance with the directions order of 8 February 2012, and from paragraph 3 onwards, she stated as follows:

> [3]. In her second witness statement the applicant reiterates that the certificate provider is not related to her in any way, that he is her current boyfriend and not a long term partner, and that they do not live together. She adds that he is a trusted friend of the donor, who chose him to act.
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> [4]. The applicant's second witness statement only addresses the question whether X is a family member of the attorney.
>
> [5]. The Public Guardian's position is that, even if X is not to be treated as a family member of the attorney for the purposes of Regulation 8 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, he is not independent of the attorney as required by the LPA prescribed form, which is part of the Regulations.
>
> [6]. The Public Guardian's position is that a person who has a sexual (or similar intimate) relationship with an attorney at the time of acting as certificate provider is ineligible to act, and that it makes no difference whether the relationship is short term or long term, or whether the certificate provider lives with the attorney.
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> [7]. The Public Guardian further submits that the fact that the certificate provider is a trusted friend of the donor has no bearing on the question whether he was acting independently of the attorney.
>
> [8]. Nor does it make any difference that the certificate provider was chosen to act by the donor. This is a requirement in every case (being required by Regulation 8(1)(a) and by the wording of Part A of the prescribed form). If the certificate provider is ineligible to act, the fact that he or she was chosen by the donor does not assist.

The hearing

15. The hearing duly took place on Thursday 5 April 2012 and was attended by Jill Martin and A.

16. A stated that in January 2011, shortly before the LPA was created, her mother was diagnosed as having vascular dementia.

17. The donor had found it stressful to complete the form, which, as stated earlier, is thirty-five pages long, and wanted to keep matters as simple as possible. For this reason, she decided not to

name any persons who would be entitled to receive notification of an application to register the LPA.

18. A stated that X described himself as her "partner" because he was 55 years old at the time, and thought that it would be inappropriate to describe himself as her "boyfriend". She considers that he is neither a relation nor a family member. They have a relationship of sorts, but they are not a couple.

19. I decided to reserve judgment and, to alleviate any hardship pending the handing down of this judgment, on 11 April 2012 I made the following order:

    1. The applicant is authorised to sign a deferred payment agreement with Z County Council on behalf of [the donor].

    2. The applicant is authorised to instruct Barclays Bank to close [the donor's] account and to pay the closing balance on that account to [the donor's residential home].

The law

20. Paragraph 2(1)(e) of Schedule 1 to the Mental Capacity Act 2005 states that an LPA must include:

> "a 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 which would prevent a lasting power of attorney from being created by the instrument.."

21. Regulation 8 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (2007 No. 1253) states who can and cannot give a certificate for the purposes of paragraph 2(1)(e) of Schedule 1 to the Act ("LPA certificate").

22. Regulation 8(1) 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.

23. 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)."

24. "Family member" is not defined in regulation 2, the interpretation section, of the Regulations, and the practice and case law is as described by Jill Martin in the Public Guardian's position statement set out in paragraph 12 above.

Decision

25. The Office of the Public Guardian ("the OPG") currently receives approximately 175,000 applications to register Lasting Powers of Attorney each year and, although she did not say so in the position statement, Jill Martin suggested at the hearing that anything that would require the OPG to investigate and examine the nature, duration and intimacy of a relationship between an attorney and an LPA certificate provider would be impracticable and disproportionate.

26. I agree. The OPG and the Court of Protection should simply look at the wording of instrument itself and decide whether someone who describes himself as the "partner" of the attorney is eligible to act as an LPA certificate provider.

27. The disqualification of a "business partner" of the donor or attorney in regulation 8(3)(f) suggests that *a fortiori* a partner in the sense of someone who is a "life partner" or "significant other" should also be disqualified. The evidence is that X thought the term "boyfriend" was an inadequate description of his status. He considered he was more that that. He was A's partner.

28. In my judgment, anyone who describes himself in this context as the attorney's partner is courting trouble and automatically disqualifies himself from being a person who can give an LPA certificate. This applies regardless of whether he describes himself as the attorney's partner intentionally or inadvertently, whether they live at the same address or at separate locations, whether the relationship is intimate or platonic, and whether the statement is true or false.

29. Although the court can adequately dispose of this application on the basis of the plain meaning of the word used, the mischief rule is also relevant. The mischief Parliament was seeking to remedy when it required someone to certify the matters set out in paragraph 2(e) of Schedule 1 to the Mental Capacity Act 2005 was "the situation where a potentially vulnerable person with borderline capacity is asked to sign a power of attorney without proper safeguards": *Lasting Powers of Attorney – forms and guidance: Response to consultation*, CP(R) 01/06, at page 25.

30. The circumstances of this case are precisely the state of affairs the legislators had in mind. Mrs Phillips had recently been diagnosed as having vascular dementia. She found the exercise of completing the LPA "stressful." She wanted to "keep things simple", even though it was necessary to complete a large print version of the LPA, which instead of running to the usual

eleven pages, extended to thirty-five pages. And she chose "the two friends she trusted most as her certificate providers."

31. Mrs Phillips could have kept things a lot simpler, of course, if she had named X as the only person to be notified when an application was made to register the LPA. She would then have required only one Part B certificate provider, Y.

32. Although it is unnecessary for me to say so for the purpose of this decision, I also agree with Jill Martin's submission that, even if X were not to be treated as a family member, he is not independent of the attorney. In view of the expressed intention to avoid situations in which a potentially vulnerable person with borderline capacity is asked to sign a power without proper safeguards, "independence" has to include a strong element of detachment from the outcome of the opinions that the certificate provider is being asked to express. I do not believe that X was sufficiently indifferent to the outcome in this case.

DENZIL LUSH
Senior Judge
16 May 2012