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TA v The Public Guardian [2023] EWCOP 63

Recording: TA v Public Guardian [2023] EWCOP
63 - the duties of the certificate provider

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The facts



- P (KA)
- 92 year old woman
- Three children, including TA (the appellant)

- 2019 – LPA executed, appointing all three children
- 2020 – LPA revoked
- 2021 – 2 further LPAs registered appointing TA as the sole attorney. Both LPAs had the same certificate provider (X)

- HC (KA’s son) sought to revoke the two LPAs in appointing TA and execute new LPAs in favour of all three children
- KA deemed to lack capacity
- June 2022 - LPAs suspended



The issue

Mental Capacity Act 2005 - Schedule 1 (2)(e)

The instrument 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 else which would prevent a lasting power of attorney from being created by the instrument.

The decision

HHJ McCabe



- *[37] The certificate provider is required to provide an opinion, not just to witness a signature*
- *[38] reading the above section as ‘ordinary words’ plainly requires the certificate provider, in order to provide the certificate, to take some steps to satisfy themselves of the matters set out in section 2 (e)*
- *[39] If the Court is asked, as I am, to exercise its powers under section 22 of the MCA [...] it follows that the Court must be entitled to look for evidence that the requirements have been met.*
- *[41] An opinion provider must, as a matter of basic common sense, never mind legal sense, satisfy themselves that their opinion is reasonably held, otherwise they are acting in a plainly unreasonable way.*
- *[42] What use is the provision of a certificate at all if there is no requirement for the opinion to be based upon anything reasonable?”*

The decision

Mrs Justice Lieven

- *[29] on a pure black letter law approach, a valid certificate must be based on an opinion as to those three matters.*
- *[30] It therefore follows from the words themselves that the Court is entitled to check that the requisite opinion has actually been formed [...] The mere provision of a certificate in the right form cannot be sufficient on its own.*
- *[32] The nature of the scheme is that validity turns not merely on the provision of certain documents, but that those documents themselves provide reassurance on a number of key matters.*
- *[33] Paragraph 2(1)(e) does not merely concern whether the donor has capacity. It is also there to provide some safeguards that the donor understands the instrument, is not subject to fraud or undue pressure and there are no other barriers to the LPA.*

The consequences

- Valid certificate = evidence of a valid opinion that is 'properly formed'
- More difficult for lay individuals (and GPs) to act as the certificate provider.
- Many LPAs likely to now be formally invalid even where donor retained capacity, not subject to duress etc.
- Easier (and cheaper?) to challenge the validity of the LPA under para 2(1)(e) than under the capacity ground?

Thank you

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