The scope of LPAs in England and Wales

Synopsis: The Office of the Public Guardian (OPG) for England and Wales has brought an application to the England and Wales Court of Protection (EWCOP) asking for judgments on nine consolidated cases. The cases raise issues relating to the scope and extent of lasting powers of attorney (LPAs).

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Background

The Public Guardian (PG) currently receives 5,000-6,000 applications per day to register LPAs, across the jurisdiction of England and Wales.

The increasing volume of these applications reflects an ageing demographic, advances in medical science and increasing public awareness of the work of the Court of Protection. When the Mental Capacity Act 2005 (the MCA) first came into force in 2007, there were fewer than 10,500 registrations for the entire year.

The cases

Each case deals with a situation that has occurred often enough to require clarification of the relevant statute and regulations in the MCA, which introduced LPAs and appointed the OPG to administer them in England and Wales.

There were six points for which the OPG requested a hearing, encompassing issues relating to lead donees, majority rule and replacement donees.

In respect of lead donees, it asked if it is lawful for a LPA donor to give primary power to one attorney ahead of others, when appointed on a joint and several basis. Further, it asked whether it is lawful to have joint and several appointments with instructions for attorneys to deal with separately defined areas of the donor's affairs, or for the LPA to include restrictions to this effect.

In terms of majority rule, the OPG queried whether severance applications should continue to be made if instruments seek to instruct multiple attorneys to act on a majority basis. It also asked whether a LPA including the word 'should', or similar words, constitutes a binding instruction or a non-binding preference on the part of the donor.

On the point of replacement donees, it asked if it is lawful for the donor to replace a replacement attorney. If not, it queried if a replacement attorney could be reappointed to act solely.

The outcome

The judge held that primary power cannot be given to one donee ahead of others when appointed on a joint and several basis. He noted that if a donor appoints more than one attorney on a joint and several basis, then equality prevails.

However, the question as to whether it is lawful to have joint and several appointments, with instructions for attorneys to deal separately with defined areas of the donor's affairs, was more problematic. Ultimately, the judge considered that that the wording of the statutory provision does not support the burden of such a purposive interpretation. The divergence between the languages of the statute and the forms was actually 'dangerous', he said, and needed to be revisited.

A 'majority rule' provision must be severed as is inconsistent with the statutory provision. The judge considered whether a purposive approach to the interpretation of the statute might be legitimate, but said...

"Ultimately, however, I cannot conclude that it is, without compromising the logical integrity of my earlier analysis. The provisions of Section 10(4) are drafted so tightly that they leave very little, if any, scope for a purposive approach."

On the use of the word "should", the judge concluded that the issue is not one of statutory construction, it is concerned with identifying the donor's intentions. He said...

"I am not intending to signal any wider guidance as to how the word 'should' is to be interpreted. It is highly fact specific and its significance and force will be dependent on context. I am, however, signalling that its use will not automatically give rise to severance. It is the wording on the forms that generates the ambiguity."

On the point of replacement donees, the judge pointed out that the MCA requires that the selection of the donee is always to be that of the donor. That is consistent with the promotion of autonomy. He said...

"Any selection of a donee by an existing donee is expressly prohibited because that is not consistent with promoting the autonomy of the incapacitated person. It takes decision making entirely out of the donor's hands. Neither do the Explanatory Notes suggest that a secondary replacement attorney is expressly prohibited by the framework of the legislation. On the contrary, the Explanatory Notes emphasise, as I have sought to illustrate, the core principle of donor autonomy.

Accordingly, and for all these reasons, I am satisfied that an interpretation which permits the appointment of a secondary replacement attorney, is to be preferred. It follows, that the alternative question of reappointment is, in my judgement, otiose. Had it been necessary to resolve it, I would have concluded that such a reappointment can be made, for the same reasons I have already given in relation to the above issue."

You can read the full responses here.

Comment

It is good to get clarity, where possible, for Attorneys dealing with the affairs of others, especially with the ever-increasing number of LPAs registered.