Power play

In the aftermath of Miles & Beattie v The Public Guardian*, the law is in a state of confusion in respect of what can be specified about a joint power of attorney in a lasting power of attorney.* ***Adam Boyle*** *looks in detail at the judgment*

Adam Boyle *is a barrister at St John's Chambers, Bristol. He acted for the appellants in* Miles & Beattie

The law concerning lasting powers of attorney (LPAs) is currently in a confusing state. This is somewhat surprising, given that Mr Justice Nugee, sitting in the High Court, has already adjudicated upon the key issue that is once again at the centre of attention: when a joint power of attorney comes to an end, through the death (or other invalidation) of one of the attorneys, is it possible to re-appoint, through advance specification in an LPA, the remaining initially appointed co-attorney, such that, going forward, they, acting alone, can make the decisions which previously had been made by the two together?

This relatively nuanced issue was raised before the court in the case of *Miles & Beattie v The Public Guardian* [2015] EWHC 2960 (Ch). One of the driving forces behind the appeal was the firmly held view of the solicitor for the appellants, David Satchell of Amicus Law (who instructed me as counsel in the case for the appeal), that the position which had been taken by both Office of the Public Guardian (OPG) and Senior Judge Lush at first instance was simply not fair on his clients. The reason for this is best explained through an example. I have chosen the following scenario because I expect that a large number of people are in a vaguely comparable situation, and/or have vaguely comparable views.

EXAMPLE

Let us say that there is a mother who has two sons, A and B. She has no other children or other relatives to speak of, and, in contemplation of her old age, she turns her mind to creating LPAs. The two most important decisions, in her view, to be included in the LPAs and potentially made on her behalf are:

1. when / if a life support machine keeping her alive is to be turned of; and
2. when / if her long-held family home is to be sold.

She wishes to appoint her sons as her attorneys; it is her two sons that she trusts the most. In respect of nearly all the decisions they are able to make, she is content for the decisions to be made on a joint and several basis, meaning that either son can make the relevant decision. However, in respect of the most important decisions, as outlined above, she wants to require, as at least a first preference, that her sons make the relevant decisions jointly. In other words, she wants them to be in agreement in respect of the decisions which are of the most importance to her.

However, and this is key, she is also clear in her mind that if one of her two sons were to predecease her unexpectedly (or be otherwise prevented from acting as her attorney), rather than her remaining son being rendered powerless in respect of these most important decisions, or it falling to someone whom she neither loved nor trusted in the same way to make them for her, she would like her remaining son to be able to make the relevant decisions alone. In other words, if A dies, she wants B to carry on the job that both of them were previously doing together. This, one would think, is an entirely predictable and reasonable state of affairs.

However, as indicated above, it had been both the approach of the OPG and the decision of Senior Judge Lush that this was, in effect, not something which could be achieved through an LPA. Indeed, this was the decision at first instance in relation to both Miles's and Beattie's LPAs. In the scenario outlined above, such a decision clearly poses a real problem.

MILES'S LPAS

It will be helpful to set out the key parts of Miles's LPAs in order to explain the case. Those parts are as follows (with the parts severed by the court on appeal struck through).

Property and affairs

'My attorneys may act jointly and severally save with regard to:

(1) any sale of my property at [address] (or any property which may subsequently replace it); and

(2) any transaction in excess of £10,000 when all surviving attorneys who are capable of acting (~~whether originally appointed or who have been appointed by and are acting in substitution~~) shall act jointly in so far as there may be more than one of them able to so but in the event that there is only one of them capable of acting I expressly re-appoint that attorney to act alone.

My replacement attorneys shall only act in the event that both of my originally nominated attorneys have died before me or are otherwise unable or unwilling to act or the appointment fails for any other reason.

~~In the event of any difficulty arising with the operation of the provisions above then my attorneys should act jointly and severally and in the event of any replacement attorney acting because of failure of the above provisions my originally nominated attorneys who are still capable of acting shall be reappointed to act with them insofar as it shall be possible to do so and on a joint and several basis~~.'

Health and welfare

'My attorneys may act jointly and severally save with regard to any decision as to the

withdrawal of life sustaining treatment when all surviving attorneys who are capable of acting (~~whether originally appointed or who have been appointed by and are acting in substitution~~) shall jointly act jointly insofar as there may be more than one of them able to do so but in the event that there is only one of them capable of acting I expressly re-appoint that attorney to act alone.

My replacement attorneys shall only act in the event that both of my originally nominated attorneys have died before me or are otherwise unable or unwilling to act or the appointment of them fails for any other reason ~~and I also expressly re-appoint any originally nominated attorneys who are still capable of acting and wish to do~~.'

[Paragraph 3 is the same as the failsafe provision at paragraph 3 in the Property LPA, as set out above.]

The appeal decision

Mr Justice Nugee found that these provisions, as amended (notably including the full strikeout of paragraph 3 in both LPAs), were viable in that they were sufficiently clear and permissible according to the law. While a full explanation of the route through the statute is not possible in this short analysis, in sum, section 10(8)(b) of the Mental Capacity Act 2005 (MCA 2005) states that it is permissible, in an LPA (form), to appoint 'a person to replace the donee (or, if more than one, any of them) on the occurrence of an event… which has the effect of terminating the donee's appointment'.

Evaluating this legislation in light of the problem experienced by the fictitious mother outlined above, the problem being that she could not choose to have one son 'survive' the other in terms of their joint appointment, which under ordinary circumstances ends if / when one of them dies or cannot act, the solution is to appoint (or reappoint) the remaining son to the position which is vacated when the jointly appointed first team, A and B together, has failed and come to an end. The original joint appointment of A and B is replaced by B alone.

Therefore, Mr Justice Nugee found that a person can specify in an LPA that, for example, their children can hold powers pursuant to an LPA jointly, as a first preference, and then following that, as a second preference, and if someone cannot continue to act, one of those appointed can continue to exercise the same powers alone.

Another facet of the decision is that paragraph 2 in each of the LPAs was also allowed. In my view, whenever the equivalent of paragraph 1 in the LPAs is utilised, it will be sensible to also include paragraph 2, if there are replacements waiting in the wings, in order to avoid confusion as to who is acting at each stage.

Finally, in respect of paragraph 3 in each of the LPAs, the court could be thought to have avoided the interesting question of whether 'failsafe' drafting is, in principle, permissible in LPAs, by finding that the paragraphs did not operate because no failsafe was required – given that paragraphs 1 and 2 in each LPA were effective. The 'failsafe' question is now one for another day.

> *Forms which were drawn up before an important decision in the law are now incorrectly informing legal professionals and lay people alike that they cannot do what a High Court judge has already found that they can*

The decision on appeal in *Miles & Beattie* does seem to represent a change in stance from the reliable intransigence which has typified the Court of Protection's approach in the past, to more creative, more personal and ultimately more protective, drafting in LPAs. Mr Justice Nugee indicated that a 'purposive' and 'beneficial' interpretation of the MCA 2005 was involved in his decision. It must be right that the act, the core tenet of which is empowering the vulnerable, is read in such a way wherever possible. That being so, perhaps *Miles & Beattie* represents the opening of a door to greater flexibility from OPG and the court in the future. We can, at least, hope so.

A CONFLICT

Why, then, did I open by saying that the law on this topic is in a confusing state? Well, as the administrative fates would have it, on the very same day that the appeal of *Miles & Beattie* was heard, the transitional imposition of the new LPA forms began. Since that time, the new LPA forms have, as I understand it, completely replaced the previous forms (which were discussed in *Miles & Beattie*). Forms such as these do change: *c'est la vie*. However, regrettably, the new forms include in them, by way of purportedly helpful guidance under the heading 'Be careful', the statement that, 'if one attorney dies or can no longer act, none of your attorneys will be able to make any of the decisions you've said should be made jointly', and further states that joint LPAs will stop working unless a replacement attorney is appointed, with the context implying that the appointed replacement would have to be someone new.

Thus the current situation is utterly unsatisfactory. Forms which were drawn up before an important decision in the law are now incorrectly informing legal professionals and lay people alike that they cannot do what a High Court judge has already found that they can. This is a sorry state of affairs. In my view, the forms must change; on my reading, they are wrong on the law. Further, it seems likely to me that *Miles & Beattie* is still good law which can be followed; however, unless and until the relevant forms change, anyone seeking to rely on this case should both seek advice and proceed with a healthy amount of caution.