

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2023] SC EDIN 16

EDI-AW38-22

JUDGMENT OF SHERIFF ROBERT D M FIFE

Application under section 3(3)(a) of the Adults with Incapacity (Scotland) Act 2000 for a direction from the Sheriff

in relation to

A, "THE ADULT"

by

FIONA BROWN, PUBLIC GUARDIAN

Pursuer

**Pursuer: Ms Watt, solicitor, Anderson Strathern LLP, Edinburgh;
Mr Milne, solicitor, Thorntons LLP, Dundee for V;
W, party
Ms Jack, Safeguarder**

Edinburgh, 11 January 2023

Introduction

[1] This application concerns A, "the Adult" and her capacity to revoke a 2014 Power of Attorney and grant a new Power of Attorney in 2021.

[2] The sheriff, having resumed consideration of the cause, finds the following facts to be admitted or proved.

Findings in fact

[3] The Adult is x years old. Her date of birth is y.

[4] In terms of section 87(1) of the Adults with Incapacity (Scotland) Act 2000 (the Act), the Public Guardian is a person with an interest in the financial and property affairs of the Adult.

[5] On 9 May 2014, the Adult granted a continuing and welfare Power of Attorney (the first Power of Attorney) in favour of her son and one of her daughters. They consented to be attorneys under the first Power of Attorney.

[6] On 9 May 2014, the statutory certificate confirming the Adult's capacity to grant the first Power of Attorney was signed by her solicitor, S.

[7] In signing the said statutory certificate S confirmed that on the basis of her own knowledge she was satisfied that the Adult had capacity to grant the first Power of Attorney.

[8] The first Power of Attorney was submitted to the Office of the Public Guardian (the OPG) and registered on the OPG's Public Register on 21 June 2014.

[9] On 22 July 2021, the Adult had a meeting with S when she gave instructions that she wished to have all three of her children as attorneys, to revoke the first Power of Attorney and to grant a second Power of Attorney in these terms.

[10] On 30 September 2021 at the request of S, a general practitioner at Dalkeith Medical Practice, Dr G, carried out a capacity assessment of the Adult and concluded the Adult had capacity to revoke the first Power of Attorney and grant a new Power of Attorney.

[11] On 7 October 2021, the Adult granted a second continuing and welfare Power of Attorney (the second Power of Attorney) in favour of all three children. The Adult also signed the revocation of the first Power of Attorney.

[12] On 7 October 2021, the statutory certificate confirming the Adult's capacity to grant the second Power of Attorney was signed by S.

[13] In signing the said statutory certificate S confirmed that on the basis of her own knowledge she was satisfied that the Adult had capacity to grant the second Power of Attorney.

[14] On 16 November 2021, S submitted the second Power of Attorney deed to the OPG using the OPG's Electronic Power of Attorney Registration website (EPOAR).

[15] The OPG provides an EPOAR Attorney Declaration form as a means of the OPG being satisfied that a prospective attorney has confirmed they are willing to act as attorney.

[16] The existing attorneys on the first Power of Attorney, had not signed the EPOAR Attorney Declaration form before the second Power of Attorney deed was submitted by the solicitor to the OPG for registration using the EPOAR.

[17] On 17 November 2021, S sent an email to the OPG attaching an Expedited Registration Request Form.

[18] The Expedited Registration Request completed by S stated that it was now the Adult's wish to revoke the first Power of Attorney, to have all three children appointed as her attorneys and for the second Power of Attorney to be used as soon as possible.

[19] On 17 November 2020, the Adult was assessed by a consultant psychiatrist Dr Natalie Limet at Midlothian Community Hospital, when she was diagnosed with early stages of Alzheimer's Dementia. The Adult had a short-term memory of approximately 5-10 minutes.

[20] At a multi-disciplinary meeting of the Midlothian Dementia Clinic on 20 October 2021, concerns were expressed about the Adult's capacity. On 17 November 2021, Dr Anna Beaglehole, a community consultant psychiatrist with Midlothian Dementia Service, carried out a comprehensive assessment of the Adult. Dr Beaglehole concluded the Adult had advancing dementia and did not have capacity to make any decisions about her welfare.

[21] On 18 November 2021, Dr Beaglehole contacted S and informed her of the assessment and outcome, and that the Adult lacked capacity to make any decisions about any Power of Attorney.

[22] As a follow-up to the telephone call with the solicitor, Dr Beaglehole sent a letter to S dated 19 November 2021. The letter concluded that the Adult lacked capacity.

[23] Dr Beaglehole also contacted the general practitioner following the assessment on 17 November 2021 and informed them of the assessment and outcome, and that the Adult lacked capacity to make any welfare decisions about any Power of Attorney.

[24] Following the telephone call from Dr Beaglehole, the general practitioner sent a letter to S dated 19 November 2021.

[25] The letter stated the general practitioner had undertaken a capacity assessment of the Adult on 30 September 2021 in respect of revoking the first Power of attorney and adding one of her children on a second Power of Attorney and that on the information available to him at that time they concluded that the Adult had capacity to make that decision. The general practitioner had since received information, which made them uncertain about the conclusion they had reached and they wished to retract the decision he had made regarding the Adult's capacity on 30 September 2021.

[26] On 24 November 2021, the OPG registered the second Power of Attorney on the Public Register. The existing attorneys had not consented to act as attorneys when the second Power of Attorney was registered.

[27] There has been no revocation of the first Power of Attorney.

[28] The first Power of Attorney and the second Power of Attorney remain open on the Public Register.

Findings in fact and in law

[29] The registration of the second Power of Attorney dated 7 October 2021 did not comply with section 19(2) of the Adults with Incapacity (Scotland) Act 2000 as the existing attorneys had not consented to act as attorneys.

[30] The second Power of Attorney was not competent.

[31] Directs the Public Guardian to delete the second Power of Attorney registered on 24 November 2021 from the Public Register.

[32] Further, determines that the Adult did not have capacity to revoke the first Power of Attorney or grant the second Power of Attorney on 7 October 2021.

[33] Reserves all questions of expenses. The Sheriff Clerk will fix a hearing on expenses.

Witnesses***Debra Allison***

[34] Ms Allison was the Deputy Public Guardian. She adopted as her evidence in chief an affidavit dated 11 November 2022.

[35] The OPG provides two options for submitting a Power of Attorney for registration. One option is to send the Power of Attorney document, registration form and payment by post and the other option is to use the OPG's online digital service EPOAR. The EPOAR facility allows end users, mostly solicitor firms, to set up an account and then submit the Power of Attorney documents for registration and payment of the OPG fee online.

[36] The end user completes an online form which captures the personal details of the granter and attorney(s) as well as requiring confirmation that certain statutory requirements have been complied with including that the attorney(s) had consented to act in that role.

[37] On 9 May 2014, the Adult granted a continuing and welfare Power of Attorney in favour her son T and her daughter V, who both consented to be attorneys. The Power of Attorney was submitted by the Adult's solicitor, S, using EPOAR. The Power of Attorney was registered by the OPG on 24 June 2014 (the first Power of Attorney) see findings in fact [5], [6], [7] and [8].

[38] On 7 October 2021, the Adult granted a second continuing and welfare Power of Attorney in favour of T and V and adding her daughter W (the second Power of Attorney). T and V did not consent to be attorneys. S submitted the second Power of Attorney using EPOAR.

[39] The second Power of Attorney was registered by the OPG on 24 November 2021, following an Expedited Registration Request submitted by S on 17 November 2021 that the Adult wished to revoke the first Power of Attorney and to use the second Power of Attorney as soon as possible. There has been no revocation of the first Power of Attorney, see findings in fact [11], [12], [13], [14], [15], [16], [17], [18] and [22].

[40] On 30 November 2021, the OPG received an email from V challenging the capacity of the Adult to have granted the second Power of Attorney.

[41] V attached two letters sent to S: (i) 19 November 2021 from Dr Beaglehole, consultant psychiatrist, concluding the Adult lacked capacity to adjust the first Power of Attorney; and (ii) 19 November 2021 from the general practitioner that he had undertaken a capacity assessment of the Adult on 30 September 2021 and concluded the Adult had capacity to make that decision but he had since received further information which made him uncertain about his assessment and that he wished to retract the decision made on 30 September 2021, see findings in fact [22] and [25].

[42] In view of the uncertainty over the capacity of the Adult to grant the second Power of Attorney and that two Powers of Attorney had been registered on the Public Register, the Public Guardian decided to remit the matter to the court for a direction on what to do, being the current application.

Dr Natalie Limet

[43] Dr Limet was a consultant psychiatrist at Midlothian Community Hospital who had particular experience in old age psychiatry. An assessment of the Adult was carried out on 3 July 2020 due to concerns about deterioration in her memory. Using the ACE-III memory test, the Adult scored 82/100 which was borderline for dementia. A score of less than 82/100 would give a diagnosis of dementia. The Adult was diagnosed with mild cognitive impairment. The Adult had short-term memory.

[44] The Adult was reviewed by Dr Limet on 17 November 2020. W challenged some of the background information about the Adult as unreliable or false. That information had no impact on the capacity assessment. There had been a significant deterioration in the Adult's cognitive impairment. Using the ACE-III memory test, the Adult scored 75/100. The Adult was diagnosed with early stages of Alzheimer's Dementia. The Adult had short-term memory of approximately 5-10 minutes. Later on the same day, Dr Limet spoke with the Adult on the telephone. The Adult had no recollection of the lengthy conversation at clinic with Dr Limet.

[45] On reflection when giving evidence in November 2022, Dr Limet expressed the opinion that as at November 2020 the Adult was in the early to moderate stages of dementia. In the opinion of Dr Limet, the Adult was unlikely to have had capacity to grant any Power of Attorney as at November 2020 on the balance of probabilities.

Dr G

[46] Dr G was a General Practitioner who worked at Dalkeith Medical Practice two days a week.

[47] At the request of a colleague, Dr G dealt with a letter from S dated 7 September 2021 to carry out an assessment of the Adult whether she had capacity to revoke a Power of Attorney (the first Power of Attorney) and grant a new Power of Attorney (the second Power of Attorney). Dr G had some prior experience of carrying out capacity assessments.

[48] After contacting W to discuss arrangements and what was required, Dr G carried out the assessment on 30 September 2021. Dr G saw the Adult by herself. Dr G had not met the Adult before. The Adult wanted all three of her children to be her attorneys. He concluded the Adult had capacity to revoke the first Power of Attorney and grant a second Power of Attorney.

[49] On 19 November 2021, Dr G was contacted by Dr Beaglehole who had carried out a more detailed capacity assessment of the Adult on 17 November 2021. Dr Beaglehole had additional information about the family dynamics and how the Adult was in the community from the Community Health Team. Dr Beaglehole assessed the Adult as not having capacity. Dr G would defer to the opinion of Dr Beaglehole who had more experience and who had carried out a more detailed assessment.

[50] Dr G did not have the information about the family background which would impact on the Adult's decision making. The Community Health Team were better placed to make decisions about the Adult's mental wellbeing and functioning in the community. If Dr G had that information as at 30 September 2021, he would have requested additional information from the Community Health Team before completing the capacity assessment.

[51] The additional information from Dr Beaglehole caused Dr G to be uncertain about his conclusion that the Adult had capacity when he carried out the assessment and on 19 November 2021, he sent a letter to S retracting the decision made on 30 September 2021.

Dr Anna Beaglehole

[52] Dr Beaglehole had been a community consultant psychiatrist for 10 years. Dr Beaglehole worked for Midlothian Dementia Service and was a specialist in older age health. There were two consultant psychiatrists covering Midlothian.

[53] Dr Beaglehole became aware of the Adult's circumstances during a multi-disciplinary team meeting at the Midlothian Dementia Clinic on 20 October 2021 when Angela Bell, the Adult's CPN and a member of staff, raised concerns about family dynamics and the Adult's capacity to change a Power of Attorney. A GP, who had not met her before, had assessed the Adult as having capacity. The Adult's short-term memory was significantly affected. It was agreed at the meeting that one of the doctors in the team should assess her capacity as a second opinion. Dr Beaglehole agreed to carry out the assessment.

[54] Dr Beaglehole reviewed the Adult's medical records before the assessment. The key issue was her short-term memory. Dr Beaglehole noted a rapid deterioration in short-term memory from July to November 2020, latterly being 5-10 minutes which was a significant problem. Dr Beaglehole also received background information about the Adult from V some of which W challenged as unreliable or false. That information had no impact on the capacity assessment.

[55] Dr Beaglehole carried out a comprehensive assessment on 17 November 2021. The Adult expressed her wish that all three of her children should have an equal say in her

affairs. Dr Beaglehole concluded the Adult had advancing dementia and a markedly impaired short-term memory which impacted on the Adult's ability to retain information. The Adult was unable to retain relevant information long enough to make a capable decision about her welfare. The Adult did not have capacity to change her Power of Attorney.

[56] On 18 November 2021, Dr Beaglehole called S and explained the Adult very clearly lacked capacity to make decisions about any Power of Attorney. S was not interested in her assessment, as she already had a capacity assessment from Dr G and the second Power of Attorney was in the process of being registered.

[57] On 19 November 2021, Dr Beaglehole contacted the OPG for advice given the reaction from S to her concerns about the Adult's capacity. She also contacted Dr G and expressed her concerns about the Adult's capacity. At the end of the conversation, Dr G said he was no longer confident in his capacity assessment.

[58] On 19 November 2021, Dr Beaglehole sent a letter to S confirming the Adult lacked capacity to make an adjustment to the first Power of Attorney and lacked capacity to make welfare decisions.

S

[59] S was a solicitor in private practice. As a general practitioner, she covered wills, executries and residential conveyancing, and she specialised in family law.

[60] From 2014 when she first met them, S had carried out a number of instructions over the years for the Adult and her late husband. S was aware of the family dynamics and difficulties within the family that had existed.

[61] In 2014, S prepared and registered the first Power of Attorney granted by the Adult.

[62] In 2021, S received instructions from the Adult that she wanted to make all three of her children to have an equal say in managing her affairs. The Adult was aware T and V had “ganged up” against W. She wanted them to all work together but she realised that was not going to happen.

[63] S met with the Adult on 22 July 2021. The Adult knew her own mind, but she was quite repetitive.

[64] S was uncertain the Adult had capacity to revoke the first Power of Attorney and grant the second Power of Attorney so she arranged for an independent capacity assessment by a medical practitioner. Dr G carried out the assessment on 30 September 2021 and concluded the Adult had capacity.

[65] On 7 October 2021, the Adult signed the second Power of Attorney and S signed the statutory certificate that she was satisfied the Adult had capacity to grant the second Power of Attorney. The Adult also signed the revocation of the first Power of Attorney, see findings in fact [11] and [12].

[66] On 16 November 2021, S submitted the second Power of Attorney for registration using EPOAR.

[67] On 17 November 2021, S sent an email to the OPG with an Expedited Registration Request Form at the request of W. S could not recall the reasons for this.

[68] S accepted her advice was wrong when writing to the Adult on 10 November 2021 and advising her T and V did not require to sign the Attorney Declaration form to enable the registration of the second Power of Attorney. S did not have confirmation from T or V that they were willing to act as attorneys under the second Power of Attorney before submitting the second Power of Attorney for registration.

[69] S was contacted by Dr Beaglehole on 18 November 2021, when she advised that she had carried out a capacity assessment of the Adult and that the Adult did not have capacity to grant the second Power of Attorney. S did not take any action herself following that call. S said to Dr Beaglehole it was up to the family to take any action.

[70] Following that call, S received a letter from Dr Beaglehole dated 19 November 2021 stating she had assessed the Adult on 17 November 2021 and had concluded the Adult did not have capacity to make welfare decisions.

[71] S did not make contact with the OPG to explain what had happened. S received a letter from Dr G dated 19 November 2021 retracting the decision on 30 September 2021 that the Adult had capacity.

[72] As a consequence of the letters from Dr Beaglehole and Dr G, S did not submit the revocation of the first Power of Attorney to the OPG.

[73] On 25 November 2021, S sent a letter to the Adult advising she had received two letters: one from the Dr G informing her that he had revoked the earlier certification of her capacity; the other was from Dr Beaglehole who confirmed that the Adult did not have capacity. There were now two Powers of Attorney registered with the OPG. S informed the Adult she had sent letters to T and V suggesting they take legal advice.

Ms Karen Jack

[74] Ms Jack was a solicitor with 20 years' experience. Since 2017, she had been appointed to prepare reports as a Curator, Reporting Officer, Child Welfare Reporter and Safeguarder to adults and children. Ms Jack was appointed curator ad litem to the Adult in April 2022. Ms Jack adopted as her evidence in chief her report dated 27 April 2022.

[75] Ms Jack supported the opinion of Dr Beaglehole that the Adult did not have capacity to revoke the first Power of Attorney and grant the second Power of Attorney as at 7 October 2021.

W

[76] W adopted and read her written statement, which provided background information of family dynamics and various personal issues with T and V.

[77] W had acted at all times in the best interests of the Adult: "I will make sure my mother's voice is heard." The Adult wanted all three of her children to be her attorneys.

[78] It was W's position that, at the time the Adult granted the second Power of Attorney, the Adult had capacity. Dr G had independently assessed the Adult as having capacity as at 30 September 2021.

[79] Dr Limet and Dr Beaglehole had been influenced by what they had been told about the family situation by V that was one-sided, inaccurate and false. Dr Limet and Dr Beaglehole should have had the benefit of knowing W's position before completing any capacity assessment. The assessments by Dr Limet and Dr Beaglehole should be rejected as unreliable.

[80] W also read out an advocacy statement for the Adult from Hannah Saddington of Ears Advocacy dated 6 April 2022 that the Adult wanted all three of her children to have "an equal say" and "I want all of my children to agree to what happens to me finally".

Submissions

Submissions for Public Guardian

Preliminary

[81] In terms of section 19(2) of the Act, there is a statutory requirement on the Public Guardian to be satisfied that the persons appointed to act under a Power of Attorney are prepared to act for the purposes of registration.

[82] EPOAR has an Attorney Declaration form as a means of the OPG being satisfied that the named attorneys are willing to act in terms of the Power of Attorney.

[83] S submitted the second Power of Attorney for registration using EPOAR. T and V did not sign the EPOAR Attorney Declaration form before the second Power of Attorney was submitted for registration. T and V have never confirmed they are willing to act as attorneys in terms of the second Power of Attorney.

[84] S did not comply with the statutory requirements for registration of the second Power of Attorney. The second Power of Attorney was not competent and should be deleted from the Public Register in terms of crave 3(b).

If second Power of Attorney competent

[85] *Esto* the second Power of Attorney was competent and registered, it was a matter for the court to determine on the evidence if the Adult had capacity to revoke the first Power of Attorney and grant the second Power of Attorney and to make such other decisions as were appropriate in all the circumstances.

Submissions for V

[86] The statutory framework for the registration of Powers of Attorney had properly been created very carefully for a third party given extraordinary powers in relation to a person's welfare and financial assets.

[87] There was no evidence either of the attorneys T or V had accepted the appointment to act as attorneys under the second Power of Attorney. There had been non-compliance with a statutory requirement for registration, namely section 19(2) of the Act. Accordingly, the second Power of Attorney was incompetent.

[88] *Esto* the second Power of Attorney was competent, taking the evidence as a whole on the balance of probabilities, there was a lack of capacity on the part of the Adult to revoke the first Power of Attorney and grant the second Power of Attorney as at 7 October 2021 and the second Power of Attorney was not competently granted.

[89] The second Power of Attorney should be deleted from the Public Register.

Submissions for W

[90] The court should uphold the assessments by S and Dr G that the Adult had capacity to revoke the first Power of Attorney and grant the second Power of Attorney.

[91] S has known the family for some years and had an objective understanding of the family dynamics. She was best placed to assess the capacity of the Adult in October 2021.

[92] Dr G carried out an independent capacity assessment of the Adult and was not influenced by false information.

[93] The assessments by Dr Limet and Dr Beaglehole were influenced by false information. These assessments should be dismissed as unfair and invalid.

Note***Preliminary***

[94] It was acknowledged by all the witnesses and not in dispute that in 2021 the Adult consistently expressed the wish for all three children to be her attorneys.

[95] In these proceedings W has acted reasonably and in the best interests of the Adult.

[96] The parties helpfully agreed many of the facts in a Joint Minute, which significantly restricted the scope and length of the proof.

[97] The proof explored the context and circumstances of the revocation of the first Power of Attorney and the granting of the second Power of Attorney.

[98] The credibility and reliability of the witnesses who gave evidence was not a live issue as far as the court was concerned. All the witnesses assisted the court.

Decision and Reasons***Competency of second Power of Attorney***

[99] S was familiar with the family dynamics, having acted for the family for a number of years. She was aware of the difficulties between T and V on the one hand and W on the other hand. S had prepared and registered the first Power of Attorney in 2014 when T and V consented to act as attorneys and were appointed attorneys.

[100] The instructions from the Adult in July 2021 to revoke the first Power of Attorney and grant a second Power of Attorney appointing W, as an additional attorney along with T and V was a very significant change of circumstances given the family dynamics. S accepted she was in error in not obtaining the consent of T and V to act as attorneys before proceeding to register the second Power of Attorney.

[101] The registration of the second Power of Attorney dated 7 October 2021 did not comply with section 19(2) of the Adults with Incapacity (Scotland) Act 2000 as T and V had not consented to act as attorneys. The second Power of Attorney was not competent.

[102] Accordingly, I will make an order in terms of section 3(1) of the Act and crave 3(b) of the summary application directing the Public Guardian to delete from the Public Register the second Power of Attorney registered on 24 November 2021.

Capacity of the Adult as at October 2021 to make welfare decisions

[103] Notwithstanding the making of the order above, it is proper that the court also determines whether the Adult had capacity to revoke the first Power of Attorney and grant the second Power of Attorney on 7 October 2021.

[104] By at least November 2020, when the Adult was reviewed and assessed by Dr Limet, the Adult was in the early to moderate stages of dementia with a short-term memory of approximately 5-10 minutes.

[105] At the meeting with the Adult on 22 July 2021 to take instructions on making changes to the Power of Attorney, S was concerned about the Adult's capacity to change the Power of Attorney. S instructed a capacity assessment from the Adult's medical practice.

[106] On 30 September 2021, Dr G carried out an assessment of the Adult and concluded the Adult had capacity.

[107] At a multi-disciplinary meeting of the Midlothian Dementia Clinic on 20 October 2021 Angela Bell, the Adult's CPN, expressed concerns about the Adult's capacity having being informed by S of the Adult's intention to make changes to a Power of Attorney (the first Power of Attorney).

[108] On 17 November 2021, Dr Beaglehole carried out a comprehensive assessment of the Adult. Dr Beaglehole concluded the Adult had advancing dementia and did not have capacity to make any decisions about her welfare. The Adult did not have capacity as at 7 October 2021 to revoke the first Power of Attorney and grant the second Power of Attorney.

[109] Following that assessment Dr Beaglehole contacted Dr G and informed him of the assessment and that the Adult lacked capacity to make any decisions about any Power of Attorney. Dr G deferred to the opinion of Dr Beaglehole.

[110] On 19 November 2021, Dr G sent a letter to S. The letter stated that he had undertaken a capacity assessment of the Adult on 30 September 2021 in respect of her revoking an existing Power of Attorney and granting a new Power of Attorney adding one of her children, and that on the information available to him at that time he concluded that the Adult had capacity to make that decision. Dr G had since received information, which made him uncertain about the conclusion he had reached and he wished to retract the decision he had made regarding the Adult's capacity on 30 September 2021.

[111] I accepted the capacity assessment by Dr Beaglehole that as at 7 October 2021 the Adult was not capable of making any welfare decisions.

[112] I accepted the evidence of Dr G that once he was contacted by Dr Beaglehole following her capacity assessment on 17 November 2021, he could no longer support his assessment on 30 September 2021 that the Adult had capacity to make any decisions about any Power of Attorney. In these circumstances, it was proper for him to retract that decision.

[113] Accordingly, I have determined on the evidence and on the balance of probabilities the Adult did not have capacity to revoke the first Power of Attorney and did not have capacity to grant the second Power of Attorney on 7 October 2021.

[114] As requested, all questions of expenses are reserved. The sheriff clerk can fix a hearing to suit parties if required.