

complaint

The estate of Mrs D has complained Lloyds Bank plc accepted a lasting power of attorney for managing Mrs D's accounts which she never signed. This resulted in a number of transactions over three years being made without Mrs D's authority.

The estate is represented by one of Mrs D's daughters, Ms D.

background

Mrs D died in February 2018. Ms D was concerned someone her mother had lived with (who I'll call Mr R) had been allowed to take money from Mrs D's Lloyds' accounts.

For an extended period Ms D and one of her sisters had fought to get control of her mother's personal care after her mother had a stroke at the end of 2012. They believed, whilst their mother was unable to consent, a Lasting Power of Attorney (LPA) for finance and property issues was set up by Mr R for Mrs D. This had been registered by the Office of The Public Guardian (OPG) in March 2013 and lodged with Lloyds in April 2013. Mr R had then been issued with a debit card for use on Mrs D's account.

Ms D didn't believe Mr R was acting in line with the LPA which required all transactions to be made for the benefit of Mrs D. In August 2016 the Court of Protection reviewed a petition by the OPG that Mrs D didn't have mental capacity when the LPA was reputedly signed on 24 January 2013. The LPA was declared void. A Deputy for property and affairs was appointed. The Deputy worked for a firm of solicitors. They wrote to Lloyds in October 2016 to confirm this appointment. Lloyds amended their records on 24 October 2016. Lloyds has not been able to confirm what steps it took to ensure Mr R had no further access to Mrs D's account.

Ms D believes a number of transactions were made without her mother's – or her representative's – proper authority. She complained to Lloyds about these and about a cheque paid out for funeral expenses to another person (who I'll call Mrs D1 and is another of Mrs D's daughters).

Lloyds believed they'd acted in good faith in accepting the LPA in 2013 as it had been approved by the OPG. They also confirmed they'd received a receipt for funeral expenses from Mrs D1 along with a copy of the will and had carried out their required ID checks. They wouldn't agree to reimbursing money to the estate. They didn't believe there was any evidence the money spent from Mrs D's accounts wasn't for her benefit.

Ms D brought her complaint to the ombudsman service. She provided extensive material in support of her claim that her mother had been mistreated by Mr R. There was limited evidence about whether the transactions were authorised or not for her mother's benefit.

Our investigator felt there was evidence Lloyds should have done a better job of checking the LPA. He asked Lloyds to make an offer of what transactions it felt were not for Mrs D's benefit. He suggested half of the transactions could fall into that category as he accepted there would have been expenditure over three years on Mrs D's living expenses.

Neither Lloyds nor Ms D, on the estate's behalf, accepted this outcome.

Ms D provided further evidence to support the estate's claim. This included evidence which showed:

- A doctor had agreed they'd had a conversation with Mrs D to establish she understood what the LPA was. That was subsequently proven not to be the case;
- An employee from a solicitor who'd drawn up the LPA had been censured;
- There had been a police investigation into her mother's care and subsequent consideration by the Independent Office for Police Conduct into this;
- Mrs D's state of health and concern by carers about the daily care she was receiving; and
- Concerns Ms D had raised with a number of other public bodies about what had happened.

The estate's complaint has been referred to an ombudsman for a decision. I completed a provisional decision on 27 July 2020 explaining why I didn't believe it would be fair to ask Lloyds to repay any money to Mrs D's estate.

Lloyds had no further comments to make.

Ms D, on behalf of the estate, provided further documentation. Some of this was evidence that had already been provided to our service but also included:

- Images of Mrs D's physical condition after her stay in hospital in 2012-13;
- A further copy of Mrs D's Power of Attorney showing Mrs D1 had signed whilst Ms D didn't believe she could be an independent witness;
- Mrs D's care and medical records from 2013-16;
- Information about expenditure on Mr R's property which Ms D didn't believe her mother should have been paying for; and
- Details of cheque payments made in 2013 to Mrs D1 signed by the attorney, Mr R.

Ms D's detailed comments on the provisional decision amounted to 11 pages. Ms D didn't believe the issue about the incorrect date of birth and lack of signature had been covered in the provisional decision, although both issues had been covered under the section on *Lasting Power of Attorney*. She also drew our attention to a number of errors she believed had been included in the provisional decision, as well as querying why there was so much reliance on the Payment Services Regulations.

Ms D further believed that the judge when reviewing the Court of Protection application didn't have all the evidence available to them although a finding had been made that expenditure was in Mrs D's best interests.

Ms D has continued to correspond and provide information which she believes may be relevant to the decision I'm making. This has included further information on what checks she believes a bank must complete when receiving a Power of Attorney.

I now have all the information I need to complete a final decision.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I've reached a similar

conclusion to the one I reached provisionally. I'll lay out my arguments below explaining why. Where relevant I will respond to further issues raised by Ms D on the estate's behalf.

I'm very aware that I've summarised this complaint above in far less detail than Ms D and I've done so using my own words. I'm not going to respond to every single point made by Ms D. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome. I will, however, refer to those aspects which impact the decision I'm making.

It's worth confirming this service has received many detailed emails and correspondence from Ms D and I've reviewed these carefully in coming to my decision.

Where there is a dispute about what happened, I have based my decision on the balance of probabilities. In other words, on what I consider is most likely to have happened in the light of the evidence.

When considering what is fair and reasonable, I'm required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

The Payment Services Regulations (PSRs) are the relevant law here. These primarily require banks to refund customers if they didn't make or authorise payments themselves. Certain other circumstances do apply but nothing that's had an impact on the decision I'm making here. So when we look at whether a bank has acted fairly in rejecting someone's fraud complaint, one of the things we consider is whether the customer made the transactions themselves or allowed them to be made. If they did, then we generally wouldn't ask the bank to refund them.

However the PSRs do not cover cheque payments so – although I have considered the general principles of this legislation – it doesn't apply to some of the payments in dispute within this complaint.

Ms D has questioned which regulations I am relying on when considering whether payments were authorised.

In broad terms, the starting position in law is that a bank is expected to process payments and withdrawals that a customer authorises it to make without undue delay, in accordance with the terms and conditions of the customer's account. I consider Lloyds should fairly and reasonably:

- Have been monitoring accounts and any payments made or received to counter various risks, including anti-money laundering, countering the financing of terrorism, and preventing fraud and scams.
- Have had systems in place to look out for unusual transactions or other signs that might indicate that its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer.

- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

In this case, I need to decide whether Lloyds acted fairly and reasonably in its dealings with Mrs D, or whether it should have done more than it did.

So to help me decide what happened, I've looked at the evidence of the transactions, as well as what Lloyds and Ms D have told us. Lloyds provided us with statements for all of Mrs D's accounts for the period 2012 to 2018.

I can see the timeline of events and Ms D's testimony were covered in our investigator's view of 14 October 2019. I don't intend to repeat everything that was said there. I will, of course, refer to those aspects which form the basis of my decision. I can reassure Ms D and Lloyds I've read the detailed file thoroughly.

Ms D has alleged her mother was subject to emotional, financial and physical abuse when she lived with Mr R. Mrs D was in her 80s by this stage and Mr R was not much younger. I don't have the powers of a court so I can't consider evidence from all the parties involved in this dispute (so, for example, Mr R and Mrs D1). Nor is it my role to make a decision on whether abuse took place.

Lasting Power of Attorney

A Lasting Power of Attorney was lodged with Lloyds by Mr R on 11 April 2013. At the time Lloyds noted the incorrect date of birth had been used but didn't believe this invalidated the document as it was clear this identified Mrs D as the donor. The LPA had been registered by the OPG. Lloyds also noted there was no full signature from Mrs D, just a cross. This had been witnessed by Mrs D1. A doctor and a legal executive had also signed the LPA to show all the appropriate checks had been carried out.

Ms D has said Mrs D1 isn't an independent witness. I've reviewed the government website on this issue and I don't believe Mrs D's understanding is correct. This states:

"Who can be a witness or certificate provider

Witnesses and certificate providers must be 18 or over.

Attorneys can witness each other sign, but they cannot:

- *witness you (the donor) sign*
- *sign as the certificate provider*

You cannot be a witness if you're the person appointing an attorney."

From my understanding this doesn't state Mrs D1 couldn't witness her mother's signature (or cross, as in this case).

Lloyds no longer has a copy of what their procedure would have been in 2013 when receiving LPAs. Nor can they provide me with information on what they assume that would have been nor what checks they did carry out.

I'm aware there was guidance from the trade body at the time (the British Bankers' Association) available for customers who may want to manage someone else's account.

This provided information on lodging a LPA with a bank. I've shared a copy of this with Ms D. This doesn't specify any additional checks which a bank would be expected to make over and above ensuring they have a formally completed LPA and have checked the ID of the donor and attorney (if they didn't already have this on record).

I don't think there's any evidence to indicate Lloyds should have done more than what was specified in this guidance. Lloyds can't confirm whether they would have carried out any further checks over and above knowing the OPG had registered the LPA. Having considered this, I think it's more than likely they carried out any relevant name and address checks for Mr R. This would have been in line with industry guidance. Despite Ms D's conviction on this, I see no reason why they'd be expected to do more.

I also note it's unlikely the OPG was carrying out validity checks into the donor and attorney – what they were doing was registering a properly-completed form and maintaining a register. But in so doing, the LPA becomes a legal document allowing the attorney to act on the donor's behalf.

The OPG also deal with complaints and concerns about the misuse of money or decisions made by the attorney that are not in the interests of the donor. But I accept this generally happens after something has occurred which may cause concern amongst the interested parties.

Overall I'm not sure I agree that Lloyds should have done more. They will have had a formal signature from Mrs D on record. But there's evidence they had also been aware that Mrs D had been in hospital so wouldn't necessarily have been surprised she signed with a cross.

Ms D has argued Lloyds should have done more as they'd known Mrs D had been in hospital. Although they were aware of this, I can see no evidence Lloyds knew of the severity of Mrs D's condition. It wouldn't have been their responsibility to check the state of Mrs D's health.

Mr R was given a debit card to use on Mrs D's account and cheque books were issued to show Mr R was the attorney under the LPA.

Ms D confirmed she complained to Lloyds in May 2013 about the LPA. They have no record of this complaint but I don't doubt what she says. However the bank wouldn't have been in a position to revoke or question the LPA. This could only have been managed through the OPG. Ms D and other family members didn't start the process to query whether her mother had consented to the LPA until later.

Whether Mr R was misusing Mrs D's money was not an issue for Lloyds to consider under the PSRs. The PSRs talk about authentication and consent as forming authorisation of a payment. I'm in no doubt – knowing Mr R used his card at cash machines – that proper authentication under the PSRs took place. I've also seen copies of cheques signed by him. The LPA provided formal consent for Mr R to carry out transactions on Mrs D's behalf. I believe as there was an LPA in place, the transactions were properly authorised by Mr R from April 2013 onwards. I consider below whether Lloyds should have identified any unusual activity was taking place.

Court of Protection

However that's not the end of the issue as District Judge Ralton in the Court of Protection decided Mrs D had no capacity to enter into the LPA and declared it void on 22 August 2016. I believe Mrs D's Deputy then provided a copy of this judgement to Lloyds. I can see from Lloyds' copy that it was lodged as received on 7 October 2016.

Lloyds told us they were *"unable to confirm when we received the documents and what action we took, however ... an LPA and a Deputyship order can run alongside each other"*.

The judgement in the Court of Protection stated:

"A requirement under Section 22(2)(a) of Mental Capacity Act 2005 for making both Lasting Powers of Attorney have not been met, therefore it is declared under s.15 that the grants of Lasting Powers of Attorney are void. Accordingly the Public Guardian shall cancel the registration of both Lasting powers of Attorney under paragraph 18(a) of Schedule 1 of the Mental Capacity Act 2005."

This indicates that in this case the LPA and Deputyship didn't run alongside each other.

I also note evidence to the Court from the Public Guardian said:

"under section 58(1)(h) of the MCA 2005, this has not identified any concerns over the decision made by the attorney, all decision and actions appear to of (sic) been made in the donor's best interests".

Mr R would therefore have no authority to continue to make transactions after 22 August 2016. The appointed Deputy did not notify Lloyds of the revised arrangements, however, until 6 October 2016. Their records show everything was updated on 24 October 2016 although they are unable to confirm, as noted above, what steps they actually took.

The Deputy – on Mrs D's behalf – could have authorised Mr R to continue using Mrs D's account but I can't see further transactions made with the debit card previously issued to Mr R were made after this 24 October 2016. I think it's most likely Lloyds stopped the card Mr R had used.

However the same principles referred to above – that authority under the PSRs would have existed by virtue of the LPA – would apply here. A court had granted a Deputy authority to conduct Mrs D's property and affairs. Therefore transactions after that date were authorised in terms of the PSRs. I have already confirmed to Ms D that this would be the case for transactions completed after a Deputy was appointed.

I know she has concerns about transactions made to pay car insurance whilst she doubts Mr R was using his car to transport Mrs S. But I've confirmed she'll need to raise her concerns with the appointed Deputy.

the disputed transactions

Ms D supplied Lloyds with a three-page breakdown of transactions she was querying on her mother's accounts. This included a number of cheques, debit card payments and direct debits. As our investigator confirmed to Ms D there would be no reason to ask Lloyds to refund direct debits and standing orders that were initiated in 2012 before Mrs D's stroke.

Although some of these direct debits may have continued to run and pay for services after Mrs D no longer required them, this doesn't mean they weren't initially set up and authorised by her.

I've been in contact with Ms D. She's confirmed that all transactions between April 2013 and 2016 have been disputed. The three-page breakdown was just a snapshot of the disputed transactions.

I've noted that when the Court of Protection sat, the LPA was declared void. This means that no formal authority existed for the transactions Mr R made from 11 April 2013 onwards. But just because transactions weren't authorised by Mrs D doesn't, in itself, mean they should all be refunded to the estate.

I also need to consider whether if Mrs D had been in a position to authorise these, she would have. I also need to take account of what would normally have been spent on her living expenses. To help me assess this I've reviewed Mrs D's normal expenditure in 2012 before she fell ill. I've also looked at the expenditure that took place once the Deputy took control of Mrs D's accounts.

Firstly I note the Court of Protection did not demur from the evidence presented by the OPG. The judgement stated:

"investigated the decisions of [Mr R] acting as attorney and having found none to be to be (sic) contrary to the best interests of [Mrs D]"

I appreciate this doesn't differentiate between health, welfare or financial issues. I also appreciate the strength of feeling Ms D has on this issue. I'm aware Mrs D's property was sold and Ms D doesn't believe this should have taken place. But I find it hard to ignore the decision of a court when considering whether any transactions were inappropriate. I am satisfied that the transactions made after April 2013 were stated by a Court to have been made in Mrs D's interests and therefore it would not be fair and reasonable to ask Lloyds to refund them.

Ms D also mentioned there was expenditure of nearly £105,000 over a six month period at the beginning of 2016. She felt this should have caused alarm bells to ring with Lloyds. A year earlier I can see there was a payment from solicitors into Mrs D's account of nearly £175,000 which also didn't cause Lloyds to be alerted. But quite a lot of the transfers that concerned Ms D were either from or to one of Mrs D's savings accounts also held with Lloyds. I don't think I'd have expected Lloyds to have identified any unusual patterns here.

It's certainly true that money was moved from Mrs D's account at a faster rate than had been the case. I can also see from Lloyds' notes they had discussions with Mr R, as the attorney, during this period. He talked to them about the costs for Mrs D's personal care on a few occasions. Mrs D's statements show there were rising care costs during this time. So I don't think it's the case Lloyds didn't take action to assess what was going on with Mrs D's accounts. And based on what they discovered, I believe they took steps to check how Mrs D's account was being used.

funeral costs

Ms D has complained Lloyds allowed money to be paid out of her mother's account to pay for her funeral expenses. But I don't think Lloyds did anything wrong here. They had a copy

of the will which showed Mrs D1 to be one of the beneficiaries and they also had a copy of the funeral bill. I believe they also took the extra step to verify this invoice with the funeral directors as they were already aware of the potential for a familial dispute. Overall I believe they did what was fair and reasonable to allow Mrs D's funeral costs to be paid.

Ms D has mentioned a few times that Mrs D's will didn't say she wished to be buried so why should Lloyds pay out costs which included those for a burial. I don't think there's any requirement on Lloyds to question whether the wishes of a will are being followed or not on this issue. I don't believe they did anything wrong here.

I know Ms D will be bitterly disappointed by my conclusion but overall I don't think it would be fair and reasonable to ask Lloyds to refund any transactions the estate disputes. I don't believe at the time they were undertaken they were unauthorised. Although subsequently the LPA may have been shown to be invalid, I've not seen sufficient evidence that makes me believe I should challenge the view of the Court of Protection that transactions made during that time were not in Mrs D's best interests.

my final decision

For the reasons I've given, my final decision is not to uphold the estate of Mrs D's complaint against Lloyds Bank plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs D to accept or reject my decision before 20 June 2021.

Sandra Quinn
ombudsman