

Preface

I intend this to complement Denzil's Foreword, which at first blush may appear to fly in the face of a book about enduring and lasting powers of attorney.

I have concerns about the path the Office of the Public Guardian (OPG) is travelling. The 2015 lasting power of attorney prescribed forms marked a sharp deviation in direction for the OPG: moving away from the Law Commission's vision for the replacement to the enduring power regime.

The Law Commission identified that most enduring powers were registered within a few weeks of their creation, as the attorney believed that either the donor lacked mental capacity or was becoming mentally incapable of managing his property and affairs, which begged the question, whether the donor understood what they were signing. It was for this reason the Mental Capacity Act 2005 requires an independent person to counter sign the donor's signature: to confirm that in his opinion the donor understands what he is signing and there is no fraud or undue pressure being used to get the donor to grant the power.

The role of the certificate provider is a vital safeguard at the point of creation of the power. Unfortunately, the 2015 prescribed forms have watered down this safeguard. It is unlikely the OPG would be able to identify whether the certificate provider is disqualified. Certificate providers may not know they cannot act as such, as the font size setting out those who are disqualified is so small; only those with perfect vision could possibly read it. No doubt the change has made the OPG's work easier.

The OPG no longer have any guidance aimed at the certificate provider to help him work out how to form his opinion. The legislation specifically requires the certificate provider to form an 'opinion', which I would suggest requires him to take some positive action in this regard. Yet, the 2015 prescribed forms do not require an opinion but rather passively state that this is, 'so far as I'm aware'. To quote District Judge Eldergill, in *The Public Guardian's Severance Applications (Rev 1)* [2017] EWHC COP 10, 'It is always risky to depart from the statutory language when drafting forms'. It has the potential for being misleading.

According to statistics published by the Ministry of Justice in March 2017, the single largest group of registered LPAs are for people aged between 81–90, followed not far behind by those aged between 71–80. The incidence of disability and cognitive impairment increases with age, and so statistically there is a high chance that many of these donors already had such difficulties when they made their lasting power. It is not uncommon in practice for family

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members to contact a professional adviser, to ‘get’ a power over their relative’s money: rather than wishing to be ‘given’ the power by their relative. The donor is rarely initiating the need to have the power. It is for this reason, I believe that professional advisers act as an important safeguard. They are able to provide impartial advice about the donor’s choice of attorney and how best to include appropriate provisions to ensure the attorney makes good decisions which are tailored to the donor’s needs and wishes.

The OPG intend to move forward with their plan to make the process fully digital: completing the creation and registration of the power without any wet signatures. I am not convinced that this provides any benefit for the donor, and may increase the risk of their personal data being used without their authority and without their knowledge to create a power. Whilst I appreciate this can happen now, the current practical obstacles are such that it acts as a deterrent.

The OPG have redesigned their deputyship supervision regime, utilising the ‘Nudge Theory’. Nudge Theory is usually credited to Richard Thaler, Professor of Behavioural Science and Economics at the University of Chicago Booth School of Business and Daniel Kahneman, an American psychologist. Nudge Theory argues that positive reinforcement and indirect suggestions to try to achieve non-forced compliance can influence the motives, incentives and decision making of groups and individuals alike, at least as effectively – if not more effectively – than direct instruction, legislation, or enforcement.

In effect, most people are compliant when they are told the rules; some need to understand the reasons behind the rules, before they are compliant; and a small number will ignore the rules, regardless of the consequences. If the Nudge Theory were applied to lasting powers, nearly all attorneys would make legally compliant decisions.

It is noticeable that there is very little useful information provided to attorneys at the point of creating the power. The prescribed forms make no reference to the need to consult the donor, co-attorney and those interested in the donor’s welfare when making decisions; and for financial attorneys, the need to keep accounts and the limited power to make gifts. It simply refers the parties to the legislation and its Code. There is a high risk that attorneys will exceed their authority and fail to follow the law.

Court of Protection cases which involve the removal of an attorney because they have unlawfully used the donor’s money, contain four common assertions made by the attorney. In many cases, the attorney is convinced they were acting appropriately.

Assertion 1: ‘Mum had capacity and said I could have the money’.

Although capacity is to be presumed, it is rebuttable where there is evidence to the contrary. Capacity to make a gift is complex, as it varies depending on the size of the gift and how the gift leaves the donor financially. Ideally, assessing capacity should be a simple and straightforward process, but as court judgments demonstrate – they can be anything but. How likely is it that the attorney has the skills to make that judgment?

The limited power to make gifts under s 12 of the Mental Capacity Act 2005, allows the attorney to make gifts to people associated with the donor (which includes himself), on customary occasion so long as the gift is reasonable both

in relation to its size and the circumstances. The attorney can make gifts where the donor lacks mental capacity, or if it is unrestricted, when the donor has mental capacity. Indeed, the donor may have wanted to make a gift beyond the sum allowed under s 12. The attorney cannot seek the court's approval to the gift, as the court lacks jurisdiction if the donor possesses mental capacity. Meaning, the donor is denied the ability to make the gift, through the vehicle of a lasting power. The nuance of this point tests specialist professionals – what chance has the lay attorney?

Assertion 2: 'Mum would have wanted me to have this money, if she had mental capacity'.

Families work in their own way and it may very well be the case that this assertion is the truth. There is nothing in the 2015 prescribed forms which draw to the attention of the attorney the limited powers to make gifts. The OPG have in recent years published specific guidance, but this must be drawn to the attorney's attention, by some mechanism, and before they make any gifts.

A best interest decision requires the attorney to take into account the donor's views, wishes and beliefs. If they were unaware of their limited power, it's easy to see an attorney concluding that making the gift is a best interest decision because they believe that's what the donor would have wanted.

Assertion 3: 'It will all be mine eventually'.

This is particularly likely, where the attorney is the only child of the donor and the only residuary beneficiary and may be linked to assertion 2 above. The attorney sees the use of the donor's funds as an advance on their eventual inheritance, and where they have pressing needs, do not consider it wrong.

Assertion 4: 'I deserve this for the sacrifice I am making'.

This assertion can arise where there is a primary attorney making most, if not all decisions. They can become resentful of the time and effort it takes to manage the donor's affairs, especially where other people will eventually inherit to the same extent as they do from the donor's estate. The attorney 'restores the equity' by utilising the donor's funds for their own benefit.

I believe it is possible to have the equivalent benefits of a deputyship by including appropriate conditions in the power, and by providing robust support and information to the attorney. For example:

- (i) Including a supervision clause, such as requiring the attorney to provide copies of financial statements to a non-attorney.
- (ii) Expressly providing for accounts to be produced.
- (iii) Expressly requiring the attorney to consult with the donor, co-attorneys and other named individuals.
- (iv) Arranging for financial statements to be sent to the less active or dormant attorney.
- (v) Providing information to the attorney about how they work with the donor to support decision making and working with their co-attorney in partnership to make good decisions.
- (vi) Explaining the consequence of poor decisions, such as the risk of their removal and publicity in the media.
- (vii) Identifying events, which trigger the need to get expert advice.

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(viii) Notifying interested people after the registration of the power with details of how to raise any concern they might have with the OPG.

Although there is no alternative to the advantage of the security bond under the deputyship regime, if the risk of things going wrong under the LPA is reduced, the benefit of the deputyship security bond over attorneyship is also reduced.

I am a fan of the health and welfare LPA. Medical professionals are not always fully aware of the complex health issues with which the patient lives. Whilst the attorney does not have any power to force a health professional to provide treatment, the LPA gives the attorney standing to be consulted and if the attorney considers it appropriate, the power to refuse consent to treatment.

I have been a welfare attorney for both my parents, which allowed me to ensure they continued to live and die in their home. I refused consent to my late father being given CPR, when he went into cardiac and respiratory failure. My father had severe dementia, various cancers and was extremely frail. CRP was unlikely to be successful and would have involved significant pain and injury to him, followed by an admission to hospital, where he was likely to die. When the paramedics arrived at his home, I refused consent for them to perform CPR so he could die in the comfort of his own bed, in his own home surrounded by his family.

The success of decision making under an LPA, relies on the donor making a good choice of attorney and the attorney knowing how to correctly go about the business of making decisions. Advisers must consider their advice in the context of the donor's circumstances, drafting the instrument and providing advice and support which will keep the attorney on the straight and narrow. I hope the updated edition of this book will help professionals achieve this.

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