

Cretney & Lush on Lasting and Enduring Powers of Attorney

Eighth Edition

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Foreword

I began preparing Enduring Powers of Attorney for clients on Monday 10 March 1986 – the day that the Enduring Powers of Attorney Act 1985 came into force – and must have drawn up hundreds of them while I was still a solicitor in private practice.

In April 1996 I was appointed as Master of the Court of Protection. My job title changed to Senior Judge when the Mental Capacity Act 2005 (MCA) was implemented in October 2007, and I retired in July 2016. During those 20 years at the court I adjudicated on issues relating to over 1,000 Enduring Powers of Attorney (EPAs) and over 5,000 Lasting Powers of Attorney (LPAs).

In addition to 30 years' experience of dealing with powers of attorney, both as a practitioner and a judge, I have also been one of the authors of this book, but I have never made an EPA or LPA myself, and an explanation is both due and overdue.

In a nutshell, I have seen so much of the pathology associated with powers of attorney and the causes and effects when things go pear-shaped, that I find it difficult to recall cases where powers have operated smoothly and to the credit of everyone involved.

During the financial year 2016/17, there were 648,318 applications to the Office of the Public Guardian ('OPG') to register LPAs and EPAs and the year ended with 2,478,758 current instruments on the register.

LPAs are clearly popular. Their popularity is the result of a vigorous and effective campaign by the OPG and the Ministry of Justice to promote them, but I am sorry to say that this crusade has involved demonising the appointment of deputies by the Court of Protection.

For example, LPA9, one of the leaflets published by the OPG, asks the question, 'What could happen if I don't create an LPA?' and gives the following answer:

'If you lose mental capacity, through illness or injury, and haven't created an LPA:

- you'll no longer be able to decide who makes decisions for you (you can only make your LPA while you still have mental capacity)
- people you don't know could end up making crucial decisions for you instead – such as whether to accept medical treatment to keep you alive, or about what you eat and wear and where you live
- your family or friends might have to go to court to make decisions on your behalf – which can be a lot more expensive and time-consuming than making an LPA.

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If you still have mental capacity, LPAs are a simple and legally robust way of giving someone you trust power to make decisions for you – temporarily or for a longer time.’

In mentioning only the problems that can arise if you don’t make an LPA, this leaflet is disingenuous because it fails to mention the risks if you do make one, or to inform you that, if something does go wrong, putting it right will be significantly more expensive and time-consuming than applying to the court for the appointment of a deputy in the first place.

One of the reasons why I haven’t made an LPA personally is that I have greater confidence in deputyship as a means of managing someone’s property and financial affairs. I accept that deputyship is more costly, more onerous and more time-consuming than making an LPA, but there are other entries on the balance sheet, which, in my opinion, are factors of magnetic importance:

- (1) The autonomy principle whereby ‘you decide’ who to appoint has consistently been overstated. Unless there is a cogent reason why someone should not be your deputy, it is likely that the Court of Protection will appoint as your deputy the person whom you would have appointed to be your attorney, if you had the capacity to do so. In deciding what is in your best interests, the court has a duty under the MCA to consider your past and present wishes and feelings, beliefs and values, and any other factors that you would be likely to consider. The true beneficiaries of the autonomy principle are the attorneys, who can basically do as they please.
- (2) A deputy is required to account annually to the OPG and a deputyship usually starts with the preparation of an inventory of assets and liabilities, which acts as a focal point on which to base and audit all future accounts. Attorneys are also expected to keep accounts, receipts, invoices, bank statements and other financial documents, but generally speaking nobody ever calls for them or routinely scrutinises them, so most attorneys don’t bother to maintain proper records. I was astonished by how few of them were able to produce accounts when they were asked to do so by the court or the OPG. This is unacceptable.
- (3) Deputyship is more structured and disciplined than attorneyship. The Public Guardian has a statutory duty to supervise deputies, but he is under no obligation to supervise attorneys. Supervision involves more than just checking accounts. It includes educating, supporting and visiting deputies and, if necessary, admonishing them. No comparable service exists for attorneys, who have exactly the same need as deputies for instruction, back-up and the occasional reprimand.
- (4) A deputy is generally required to give security to cover the possibility that he or she could act incompetently or dishonestly. A few years ago, there was a notorious case which illustrates this point perfectly. It was widely reported in the national press and also appeared in the formal law reports under the titles *Re GM* [2013] COPLR 290 and *Re Gladys Meek; Jones v Parkin and Others* [2014] COPLR 535. Gladys Meek was a 94-year-old widow who lived in Heanor, Derbyshire. Her late husband’s niece and great niece were appointed as her deputies for property and affairs and they went on a spending spree with her money. They bought themselves a Mini Countryman, a Ford Fiesta, an Apple laptop computer, a Sony laptop, Rolex and Omega watches, handbags

by Vivienne Westwood, Alexander McQueen and Mulberry, season tickets to watch Derby County Football Club and expensive rings and perfume, and then started buying presents for other members of their families. The court was able to call in a security bond for £275,000, which just about covered the extent of their defalcation. This would not have been possible if they had been Gladys Meek's attorneys, because a security bond would neither have been required nor available.

- (5) For all the talk of deputyship being costly and time-consuming, the average life-expectancy of a case in the Court of Protection is only 3½ years. The OPG's annual deputy supervision fee is currently £320, so in most cases the expenditure on supervision fees is likely to be around the £1,000 mark, to which should be added, of course, the application fee to the court and the annual premium payable in respect of the security bond. Hence, for a relatively modest outlay over a fairly short period of time, a person's property and financial affairs can be more adequately safeguarded than if he or she made an LPA.
- (6) Finally, it has been suggested – and I fully understand why – that the main problem with deputyship is the time it takes to obtain an order appointing a deputy, which can cause difficulties if there is an urgent need to access someone's funds. Judges of the Court of Protection have power to make interim orders instantly in an emergency because the rules allow them to shorten or extend any time limits. The Public Guardian has no comparable powers to reduce the period for registering an LPA, so in theory, at least, obtaining an order from the Court of Protection should be quicker than applying to the OPG to register an LPA.

There is another key reason why I haven't made an LPA, and that's the devastating effect it can have on family relationships. The lack of transparency and accountability causes suspicions and concerns, which tend to rise in a crescendo and eventually explode. I have seen it happen in a family related to mine by marriage.

In October 2016, Dr Gillian Dalley and her colleagues at Brunel University presented a report to the Dawes Trust on *Financial Abuse of People Lacking Mental Capacity*. In chapter 4 of the report they analysed 34 of my judgments, which had been published on the BAILII website in 2015, and came up with the following observations:

- (1) 'Having to take responsibility for the property and financial affairs of a relative, often a parent, seems to have one or other of two negative aspects – that it poisons pre-existing relationships further, or that it precipitates bad feeling where none existed in the past.'
- (2) 'Misuse of a donor's funds did not, it appears, always result from a fraudulent impulse; sometimes it was grounded in naïve incompetence, bitter intra-family disputes, or the pressure of personal problems.'
- (3) 'It was striking to see that in a number of cases, attorneys, who had been appointed jointly, or jointly and severally, failed to observe their co-operative responsibilities. The tensions that are shown time and time again to exist within families do not necessarily sit comfortably with their duties to work jointly often imposed by the deputyship. And those self-same arrangements may exacerbate pre-existing tensions that had not surfaced before.'

- (4) ‘Reports of cases often included statements from the attorneys involved in tones that ranged through contrition, faux surprise, apparent amazement, brazen self-justification to argumentative contestation of the judge’s view.’
- (5) ‘The assumptions often embedded in public discourse about the “family” – goodwill, mutual support, blood being thicker than water – are often challenged by behaviour and attitudes revealed in court.’

I know precisely whom I would appoint as my attorney, if I had any intention of making an LPA for property and financial affairs. She is a family member and a practising solicitor and the most honest person I know, but I would rather she acted as my deputy than as my attorney. This would ensure that there is accountability on her part and that she gets all the support she needs from the OPG, but the main advantage is that there is a greater likelihood that her relationship with her siblings will remain cordial, rather than turn sour.

I haven’t made an LPA for health and welfare because, in most cases, I don’t think they’re necessary. The people, who, according to LPA9, ‘don’t know you’ and ‘could end up making crucial decisions for you, such as whether to accept medical treatment to keep you alive’ are usually qualified health-care professionals, who will make these decisions in your best interests after consulting you and your nearest and dearest.

Mr Justice Jonathan Baker expressed this elegantly in *G v E* [2010] CO-PLR Con Vol 470, at paragraph [57]. When describing health and welfare decision making, where the issues that need to be addressed are quite different from those relating to the management of someone’s property and financial affairs, he said:

‘The Act and the Code are therefore constructed on the basis that the vast majority of decisions concerning incapacitated adults are taken informally and collaboratively by individuals or groups of people working together. It is emphatically not part of the scheme underpinning the Act that there should be one individual who as a matter of course is given special legal status to make decisions about incapacitated persons.’

When I retired from the Court of Protection, I was invited to become a trustee of the national charity Action on Elder Abuse. Its chief executive, Gary Fitzgerald, has expressed his concern that what safeguards there are in respect of LPAs have been consistently eroded in recent years because of the Public Guardian’s drive towards creating and registering LPAs online. Caroline Bielanska raises similar concerns in the Preface and I agree with her and Gary Fitzgerald.

I apologise if this has been a rant rather than a heart-warming homily, but I need to voice these concerns, which I suppressed in the past because they were difficult to express while I was in office. I hope that in future the media, the Ministry of Justice, the OPG, and professional advisers will be more judicious when advising people to make an LPA. There is a perfectly viable alternative, which is by no means as unattractive as they have hitherto portrayed it.

I am delighted that Caroline Bielanska has agreed to edit the eighth edition of this book. I have known her for many years and appreciate the estimable efforts she has put into keeping another work that is dear to my heart, *Elderly*

Foreword

Clients: A Precedent Manual, up-to-date and accessible to the legal profession and the general public.

Denzil Lush
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