

WealthBriefing

Power Of Attorney Still Fit For Purpose Amid The Big Intergenerational Wealth Shift - Lawyers

Tom Burroughes, Group Editor, London, 14 September 2017



The instrument of lasting power of attorney has come in for attack in recent weeks but lawyers say it is - mostly - a vital part of the legal toolbox.

Trillions of wealth is due to be transferred to the next generation in coming years and an ageing population is likely to bring more cases of Alzheimers's or other forms of cognitive decline and infirmity. These two forces at work mean that a long-established legal tool of managing affairs - the power of attorney, normally a lasting PoA, is going to be under even closer scrutiny than before.

And that scrutiny got a lot more intense recently when a retired senior judge, Denzil Lush, who had worked at the Court of Protection, which seeks to protect interests of those who were unable to look after themselves, said he would never sign a lasting power of attorney himself. Lush has reportedly said the "lack of transparency causes suspicions and concerns which tend to rise in a crescendo and eventually explode". (Source: BBC.) Lush went onto say that the UK's Ministry of Justice (MoJ) has been "disingenuous" in promoting them. He has claimed it could encourage children to take advantage of their aged parents, for example.

The judge's comments have already prompted something of a pushback by the legal profession in England and Wales (there is a slightly different system relating to power of attorney in Scotland). A question, however, is whether the present system, which last saw major reform about 10 years ago, continues to be fit for purpose.

There were a total of 650,000 applications to register such a power last year alone and there are a total of around 2.5 million registered LPAs in force at present.

"The increasing number of frail and elderly people living alone and far away from their families creates an obvious risk of abuse by those unscrupulous enough to take advantage of a lonely and vulnerable person. As abuse is by no

means confined to those outside the family circle; we could also ask ourselves more profound questions about the nature of society, and whether the protective bonds of family and social cohesion are generally loosening in a way that makes increased abuse inevitable. As always, the best protection is to plan well ahead, and take full advantage of the various ways in which our capacitated choices can bind those who act for us in the future,” [Sophia Roper, barrister at Serjeants’ Inn, London, told this publication.](#)

The Mental Capacity Act 2005 overhauled the system of decision making for incapable adults, scrapping enduring power of attorney and replacing them with lasting powers under which decisions about money and/ or health and welfare can be delegated to another person or more than one. The present framework sets out a number of principles to be followed by those who make decisions for those who cannot decide for themselves, including under an LPA. The guiding principle is that decisions must be made in the “best interests” of a person in mind, Julia Abrey, partner and head of elder law at [Withers](#), told this publication in a recent call.

If a person loses mental capacity to deal with matters but hasn’t made an LPA, decisions can then be made for them through the deputyship system. Unlike a LPA - where the person to make decisions is chosen by the person making the LPA - the deputyship system is, Julia Abrey said, more formalised. The deputy is chosen by the court and more closely supervised and safeguarded. They must have insurance cover to protect against loss in the event of mistakes. The Office of the Public Guardian, which oversees the deputyship system, requires deputies to be regularly monitored and to account for their actions. (In total, there are about 56,000 deputyships in place, according to [Boodle Hatfield](#), another law firm.)

With a LPA, there are three entities involved: the “maker” (who grants the power), an attorney and the provider of the power’s certificate who certifies that the maker understands the document and that they are not being forced into making it. LPAs must be registered with the Office of the Public Guardian before they can be used - they cannot just be signed up and used straight away, Julia Abrey continued. The OPG has powers to investigate and ask the Court to strike down a LPA that is being misused.

One reason why Judge Lush has become disenchanted with the LPA system may be that he tended to see cases where LPAs were being used to abuse, rather than the majority of cases where that wasn’t the case, Abrey said.

International

Arguably, a major area of concern for those advising clients, including high net worth individuals, is where a person living in one jurisdiction seeks to grant or obtain a power of attorney but finds that such powers aren’t recognised in law. Singapore has an up to date LPA system but this is, for example, not the case in Hong Kong and there are jurisdictions which do not have an LPA equivalent of any sort. Pushing forward with cross-border recognition of such powers is also an important issue, Abrey added, as the internationalisation of wealth means that being able to put appropriate representation in place in the right places is increasingly important.

Safe

“They [powers of attorney] are on the whole reasonably safe,” Mark Lindley, a private client partner at Boodle Hatfield, said.

Such powers are far preferable to an alternative situation where a court assigns such control to a professional whom is unknown to the immediate parties involved, he said. Deputyships are more expensive and potentially less flexible in how they work, he said.

It is true that there were abuses in the past, such as with the old enduring power of attorney system, but that was significantly changed in 2005, he said.

[Roper of Serjeants’ Inn in London](#) set out some data and suggested fears of PoAs being abused are exaggerated.

“The number of POAs created has rapidly increased since the Mental Capacity Act 2005 created the lasting power of attorney, in the wake of government publicity and encouragement,” she said. Roper said the OPG published its most recent figures for the year 2016/17, recording 2,478,758 currently registered POAs. In terms of suspected abuse, the OPG received 5,327 safeguarding referrals, of which they investigated 1,266, leading to 272 applications to the Court of Protection.

“There is undoubtedly abuse which goes unsuspected, but these figures suggest that the problem is not as widespread as feared,” Roper said.

“Anyone thinking about creating a power of attorney (POA) needs to be aware of the risk of abuse, and to ask themselves how likely their proposed attorney/attorneys are to misuse their money, and whether to take any measures within the existing framework to reduce the risk,” Roper continued.

“Appointing more than one attorney, and requiring some or all decisions to be made jointly, is one obvious possibility. Replacement attorneys can also be named in case one can no longer act. Donors can also use section 7 on the form, called ‘preferences and instructions’, to state their wishes and impose specific requirements on how the attorneys act. They can also name people to be notified when the application to register the LPA is made. All these steps are optional. Further compulsory checks could be introduced, as suggested, but there has to be a balance between any extra safeguards and the need to avoid making attorneyship too difficult (for family members) or too expensive (in the case of professionals) to work at all,” she said.

“The number of reported stories may reflect wider public awareness of the possibility of financial abuse, or simply be the product of the increase in LPAs after the introduction of the Mental Capacity Act,” Roper continued. “LPAs do in fact have greater safeguards than their predecessor, the enduring power of attorney (EPA), which can no longer be created (although an existing one can still be used).”

That the current system can be abused appears to be a genuine concern, although the scale of the problem may not yet warrant a further overhaul. What is clear, however, is that given the ageing of Western populations and the heavy transfers of assets, this is an issue likely to be important for wealth managers, and others who work with high net worth families, for years to come.