**Can legal professionals do more to safeguard against the abuse of Lasting Powers?**

In August 2017, retired Senior Judge Denzil Lush spoke to the BBC’s Radio 4’s Today programme about the risk of abuse of Lasting Powers of Attorneys (LPAs), accusing the Office of the Public Guardian (OPG) of being ‘disingenuous’ in promoting the creation of LPAs and demonising deputyship. There was an immediate response from multiple legal practices, whose message was the same: a well drafted LPA appointing suitable Attorneys is preferable to a Deputyship, which is more expensive and time consuming to obtain, and in any event, few LPAs are abused.

***The risk of abuse is unquantifiable***

The prevalence of abuse is unknown and cannot be accurately ascertained. There were 2,478,758 registered lasting and enduring powers of attorney as at 31 March 2017. During 2016/17 the OPG received 5,327 safeguarding referrals, but only investigated 1,266 cases, of which 272 resulted in an application to the Court of Protection. It would appear on the face of these statistics that few powers are abused. This of course is not the true picture, as with all types of abuse, a victim or whistle blower must come forward to report the abuse. According to the OPG, most donors appoint a family member as their attorney. How likely is it that the OPG or the professional who drafted the LPA would be aware of its abuse - particularly as a donor who lacks capacity would not be able to raise a safeguarding concern and an errant attorney is unlikely to want to draw attention to his behaviour?

***LPAs are easy to make and easy to misuse***

Discussion of the prevalence of abuse takes us away from the simple fact: an LPA is easy to make and easy to abuse. It’s arguably the most important document anyone can make, because the consequence of a bad decision could be the donor losing all his assets. It raises the question, of whether professionals can do more to limit the risk?

***Older donors need professional advice***

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 donors already have such difficulties when they made their lasting power. It is not uncommon in practice for family 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 and there is an imbalance in the relationship between donor and potential attorney. Advice from a legal professional who can give tailored and objective advice, and who will draft the power to include some simple safeguards, should address this imbalance, particularly if they also act as the certificate provider and properly form an opinion of the donor’s understanding in line with the Mental Capacity Act 2005 (MCA) and case law.

***Choose a good decision maker: being trusted is not enough***

The donor should choose a good decision maker and not merely someone whom he trusts. Family attorneys do not appear to understand their role as an attorney- they see themselves by their relationship to the donor, which can result in poor decisions. Errant attorneys appearing in the Court commonly justify their misuse of the LPA, for example, arguing they have merely advanced their eventual inheritance, the donor would have wanted them to have the money, or they have sacrificed their life by acting as attorney and deserve larger gifts to be made.

Being a good decision maker, requires the attorney to understand their limits, know when to seek and act upon appropriate advice, support the donor to make decisions for himself, and if unable to- consult the donor, any co- attorney and others to make best interest decisions?

***Draft the power for use***

It is best practice to draft for use, not registration. Severance of clauses by the Court occurs when the power contains a provision which is prohibited by legislation. As the devil is in the detail, professionals should use precedents, such as those contained in the OPG’s guidance, ‘LP12’ or’ Cretney & Lush on Lasting and Enduring Powers of Attorney’, and ‘Elderly Clients: A Precedent Manual’, published by Lexis Nexis.

***Supervision***

The attorney has a limited power to make gifts under s12 MCA to charities or people associated with the donor, so long as the gift is reasonable both in the circumstances, and in relation to the size of the gift. There is nothing in the 2015 prescribed form which would alert an attorney to this. Professional advisers should give clear guidance and explain the potential consequence of breaching this limit, such as the risk of removal and publicity in the media.

This should be dovetailed with some form of supervision condition. It could be as simple as requiring the attorney to provide copies of all financial statements to a non-attorney or more complex, such as providing for audited accounts to be produced to a third party. This provides some accountability as any transaction which exceeds the attorney’s authority would be noticed.

Many professionals recommend a joint and several appointment, as in practice it allows a main attorney and a less active one, who can step in if the main attorney is unable to act. But it is not the same as a sole attorney and replacement attorney, and there is a danger in treating them as such. In the case of **Re MM** [2016] 13 September 2016, (unreported) (DJ Batten), the Court was highly critical of a professional attorney appointed jointly and severally with the donor’s son in law. The professional had taken a less active role and been unaware that her co- attorney had made gift of £325,000 to his wife, which not only exceeded s12 MCA but also interfered with the devolution of MM’s estate under her will. The professional only started to obtain copy bank statements when the OPG commenced an investigation.

It is clear from this case that information should have been provided to the attorney about the limits on the power, and the need for attorneys to work in partnership. This is good practice whenever a joint and several appointment is made. A supervisory clause can be extended to expressly state that financial statements are to be shared with all attorneys.

***Include names of people to be consulted in decision making***

Although the MCA requires the attorney to support the donor make decisions for himself, consult with the donor when he lacks capacity, and take into account his views, feelings, values and beliefs when making decisions, it is hard to imagine a lay attorney reading the MCA or underpinning Code. By including a provision requiring the attorney to consult with the donor, co-attorneys and other named individuals, such as the replacement attorneys or friends- everyone is on notice as to how they should act.

***Notify potential whistle- blowers after registration***

Notifying people before registration of the LPA does not operate as an effective safeguard. It is extremely difficult to produce robust evidence for an application to the Court within 3 weeks of being notified. It is far more effective to notify named people after the registration, who are prepared to take an interest in the donor’s life, providing them with details of the limits on the power and how to raise any concern they might have with the OPG, including contact details, at any time during the attorneyship.

The OPG discourage advice or inclusion of conditions and encouraged people to make the LPA on line- eventually it will be fully digital. Can donors really afford to take the risk and do it themselves? Professional advice and specialised drafting can be a key safeguard which justifies professional charges.