Preparing and executing Lasting Powers of Attorney during COVID-19

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In this article, Claire van Overdijk and Alex Cisneros consider the benefits and challenges of creating a Lasting Power of Attorney ("LPA") during the current coronavirus ("COVID-19") pandemic.

Introduction

To explore the benefits of having an LPA and how they can adapt to meet the challenges of COVID-19, the article explores where LPAs developed from and how the legal conceptualisation of substituted decision has been codified in various statutory materials. We look at two requirements for making an LPA where mistakes are often made, providing a certificate and witnessing signatures, and provide guidance on what can be done during COVID-19 taking examples from other jurisdictions where witnessing LPAs by video link has been permitted through emergency laws. Finally, the article considers 'business LPAs' as a tool for administering business relationships at a time when individuals may not be able to make decisions for themselves.

This article is not intended as, and it is not, legal advice appropriate to the individual situation of any particular person. We suggest that any person requiring support or assistance in drafting an LPA should seek advice from a specialist lawyer.

Legislative requirements for creating an LPA

Section 9(2) of the Mental Capacity Act 2005 ("MCA 2005") provides that:

> *(2) A lasting power of attorney is not created unless -*
>
> *(a) section 10 is complied with,*
>
> *(b) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1, and*
>
> *(c) at the time when P executes the instrument, P has reached 18 and has capacity to execute it.*

Schedule 1 of the MCA 2005 sets out the formalities for making an LPA:

> *An instrument is not made in accordance with this Schedule unless*
>
> *(a) it is in the prescribed form,*
>
> *(b) it complies with paragraph 2, and*
>
> *(c) any prescribed requirements in connection with its execution are satisfied.*

The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 ("the regulations"), set out what the prescribed requirements and prescribed form is for creating a valid LPA.

The consequence of failing to make an instrument in accordance with the any of the prescribed requirements is that:

> *"The court must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney if it - determines under section 22(2)(a) that a requirement for creating the power was not met."*

Since its inception, there have been a string of cases, which together emphasise the empowering intention of the MCA 2005 and the "underlying principle that respect must be given wherever possible to the donor's autonomy" (per Baker LJ in *The Public Guardian v. DA & Others* [2018] EWCOP 26 at paragraph 47)[i]. Judges have aimed to honour a donor's wishes within an LPA wherever possible.

However, Her Honour Judge Hilder made clear in the case of *Office of the Public Guardian v PGO & Ors* [2019] EWCOP 13 that the court's power under Schedule 1 paragraph 3 (2) of MCA 2005 to treat an instrument as if it was in the prescribed form does not mean that the court will forgive a failure to execute an instrument by signing in compliance with the regulations.

Restrictions on certificate providers

The idea of a certificate being part of creating an LPA was suggested by the Law Commission in a 1992 consultation paper. The reason behind the suggestion at this stage was to make sure that the donor had the requisite capacity to be making the power of attorney. The paper suggested that both a doctor and a lawyer should be required to certify that the donor fully understood the instrument that they were signing:

> *"If the existing notification and registration requirements are felt unnecessary or ineffective, we would propose that a certificate at the time of execution (together with a more complicated standard form) would be one way of replacing them. However, although capacity is a legal rather than a strictly medical concept, it appears that most EPAs are drafted by solicitors acting for the donor; we would therefore prefer to combine the requirements for legal and medical certification of capacity. We therefore suggest that there should be certificates from both the solicitor and from a registered medical practitioner, that each has seen the donor recently, and explained the nature and effect of the document, and that he or she appears to understand it."* [ii]

This was a wildly unpopular idea and responses to that consultation argued that having both a doctor and a lawyer attest to a person's capacity would be incredibly costly. The Law Commission, therefore, withdrew the suggestion that a certificate must be obtained from a doctor and a lawyer but suggested that it may still be appropriate in certain circumstances:

> *"Our provisional proposal that the donor's capacity to execute should be certified by a solicitor and a doctor at the time of execution did not commend itself to the majority of our consultees. Numerous respondents said that any such requirement would present practical difficulties and force donors to incur extra costs. Concern focused on the idea that both a doctor and a lawyer need be involved in every case…*
>
> *In appropriate cases good practice already demands that an appropriate medical certificate should be obtained and/or appropriate records kept on file. The provisional proposal for a certification procedure was a corollary to the proposed abolition of any form of registration, which ... we are no longer pursuing. In those circumstances, the draft Bill simply provides that a CPA (like an EPA) must be executed in the prescribed manner by both donor and done."* [iii]

The Law Commission had envisaged that the provision of a certificate would ensure that a donor understood what the instrument was designed to do. During the drafting of the MCA 2005, the requirement to have a certificate checking a donor's understanding was retained. An additional aspect was added to require the certificate to confirm that no fraud or undue pressure was be used to induce the donor to create an LPA.

This additional element to the certificate was not a recommendation from the Law Commission but was added during the drafting of the MCA 2005. It was added, in part, due to Senior Judge Lush's submission to Joint Committee on the Draft Mental Incapacity Bill: "*I support the thrust of the Bill, but I think its weak in terms of protection*" [iv]. He went on to discuss how the Bill at that point did not sufficiently protect donors against financial abuse. This was picked up during the Bill's reading in the House of Lords by Baroness Ashton of Upholland who noted:

> *"So the Bill provides freedom of choice, but it does not lose sight of protection. My noble friend has made it clear that he is worried about the coercion or pressure that could be put on someone to give a decision-making power to a person through a lasting power of attorney. That is why the Bill provides that all applications to register a lasting power of attorney must be accompanied by a certificate from a person of prescribed description that, in his opinion, the donor understands what he is doing and that no fraud or undue pressure is being used to induce the donor to create that lasting power of attorney.*[v]

These two elements (i.e. to confirm the donor's capacity to make an LPA and to protect the donor) are central to the role of a certificate provider. In the original forms for creating an LPA that appear at Schedule 1 to the regulations, the certificate provider was required to confirm that they had discussed the contents of this LPA with the donor when the attorneys were not present.

The new forms, updated in 2015, no longer prescribe the way in which the certificate provider should satisfy themselves that the two elements of their role have been discharged. However, given the importance of the certificate, a court is likely to be unimpressed if an instrument is not prepared in a careful way so as to protect the donor.

This can pose a problem where, because of the rules on self-isolation, certificate providers are not able to speak to the donor prior to signing the certificate. Efforts should be made by whomever is preparing the instrument to allow the certificate provider and the donor to speak without anyone else being present (this can be done over the telephone or using skype for example). Given this added complication in preparing the instrument, it is plainly desirable to be overly cautious and take steps that may not usually be needed to prepare the instrument. Recent guidance from the Office of the Public Guardian ("OPG") provides that the certificate provider must talk to the donor about the LPA to make sure the donor understands it and is not being pressured to make it.[vi] Although this conversation usually happens face-to-face, it can take place over the telephone or video call instead, but the certificate provider should make sure the call is private to limit the risk of undue influence.

Witnessing an LPA

There are two areas of the LPA form that require a witness to attest that the document was signed in front of them: (1) the signature of the donor, and (2) the signature of any attorneys.

Much has been written recently about the difficulty that prospective testators have faced when trying to execute a Will.[vii] Similarly, here it seems unlikely that a donor and/or attorney(s) will be in the same physical place as the witness.

There are two rules within the regulations about witnessing signatures that are required for the power:

- The donor may not witness any signature required for the power;
- Each attorney may witness the signature of another attorney but cannot witness any other signature required for the power.[viii]

Although the government has officially accepted the Law Commission of England and Wales' opinion that electronic signatures on contracts and many deeds are already legally valid without the need for formal primary legislation,[ix] it has cautioned that a wider review of the law of deeds is needed as the Law Commission report noted there are particular issues with allowing e-signatures to be used on some instruments, such as wills, powers of attorney and transfers of land.[x]

It may be possible to source a witness within the same household as the donor and/or attorneys to enable their signature to be witnessed. In the absence of any such person in the same household as the donor and/or attorneys, Senior Judge Lush in the case of *Re Clarke* (19 September 2011) said that an instrument is properly executed so long as the person witnessing the signatures has a line of sight to the person signing. In that case, the donor was in one room and the witnesses in another, separated by a glass door. The judge drew on the early cases of *Shires v Glasscock (1688)* 2 Salk 688, and *Casson v Dade (1781)* 1 Bro CC 99, 28 ER 1010, which determined that the person witnessing the execution of a Will must be in such a position as to see the signing if they had chosen to look.

Guidance from the Office of the Public Guardian on LPAs during COVID-19

Unlike the stance taken by the Office of the Public Guardian in Scotland (as to which see below), the OPG has recommended in its guidance issued on 17 April 2020 [xi] to delay making an LPA until the social distancing rules have relaxed. This guidance highlights that there are other ways for people to allow others to make decisions on their behalf that are quicker to get in place, which may be useful while one is waiting for an LPA to be registered or if the person is self-isolating and needs someone to carry out bank transactions for them. The OPG suggests that a 'third party mandate' allows the authorisation of a third party to carry out bank transactions, or a general power of attorney can be made to authorise someone to manage their financial affairs if they have mental capacity to do so.

On the issue of signing and witnessing an LPA, the OPG provides the following guidance:

- Donors should post the LPA to the people who need to sign it.
- If they live within walking distance, the donor should take the LPA to the people who need to sign. However, social distancing rules of keeping at least two metres away from each other at all times must be followed with a recommendation to wash hands before and after handling the LPA.
- Digital signatures should not be used - the document must be printed out and signed by hand with a black pen.

- Photocopies or scans of the LPA to sign cannot be sent - everyone must sign the same, original document.
- The donor should not ask individuals to send a scan or photocopy of the page they have signed it as an LPA that includes scans or copied pages cannot be registered.
- There needs to be a witness to the donor signing the LPA, the witness must then sign it themselves to say they have witnessed the signature. Each attorney and replacement attorney's signature must also be witnessed.
- A neighbour can witness a signature, for example, on the doorstep or over the garden fence (keep at least 2 metres apart of course). A signature can also be witnessed through a closed window.
- Someone the donor lives with can witness their signature, as long as that person:
  - is aged 18 or over
  - has mental capacity
  - is not an attorney or replacement attorney on the LPA
- Someone an attorney lives with can witness their signature, as long as that person:
  - is aged 18 or over
  - has mental capacity
  - is not the donor on the LPA
- If there is more than one attorney and they live together, they can witness each other's signatures.
- There is express guidance not to witness signatures over video calls, such as Skype or FaceTime. Signatures must be witnessed in person.

Thus, the general message to be taken from the above is that as long as COVID-19 restrictions continue, individuals should avoid making an LPA if possible, but if they decide to do so, certain hurdles need to be overcome to ensure that it is validly executed.

Other jurisdictions

How does this approach compare with other jurisdictions? Below we look at approaches taken in Scotland, Australia, Canada (Ontario) and USA (New York, Florida and federal law).

Scotland

The Law Society of Scotland and the Office of the Public Guardian in Scotland acted promptly to agree a six-stage virtual execution procedure (by way of video conference) for LPAs. This is premised on the basis that it will rarely be appropriate to delay complete fulfilment of an instruction to have a power of attorney granted and registered.[xii]

The six steps are as follows:

- The solicitor is required to provide the donor with the power of attorney document in advance either by post or, where the client has facilities to print it off, by email (preferably a PDF version which cannot be altered).

- The donor should not sign the document in advance of the interview.

- The donor must show the solicitor via video conference that the document is unsigned prior to the interview.

- The interview will take place and all the normal requirements for such an interview should be fulfilled, during the video conferenced interview.

- If, following all normal criteria, the solicitor is satisfied that the document can properly be certified, then, at the solicitor's request, the donor should sign the document and the witness should sign as appropriate. The donor should then show the solicitor the signed copy power of attorney document.

- The client should be instructed promptly to return the hard copy signed copy to the solicitor: a photocopy or scanned copy will not suffice for this purpose, as sections 15(3) and 16(3) of the Adults with Incapacity (Scotland) Act 2000 set out that a continuing and/or welfare power of attorney shall be valid only if it is expressed in a written document which is subscribed by the donor. The solicitor can only register the document once the principal, wet ink copy, is received. The certificate requires to be incorporated into that original document. It should be signed by the certifier on the same date as execution by the donor and attached to the original document once it is received.

The guidance provides that it is a matter of professional judgement for a practitioner asked to certify as to whether these arrangements are appropriate in any individual case; and, if these arrangements are followed, whether the solicitor can thereupon properly certify. This guidance refers only to the practical methodology for signing and certifying at a distance from the donor and that it will mostly only be appropriate where the client is an existing client and the practitioner is satisfied that the client has capacity, there is no undue influence, and there is no other vitiating factor.

The guidance goes on to say that where a new client wishes to give instructions in a power of attorney matter, the same principles apply and practitioners will need to exercise their own judgment as to whether or not it is appropriate to conduct the entire piece of business using video technology. This is not to say that the LPA would not be compliant with the relevant legislation. However, the professional obligations to ascertain relevant capacity, and to ensure that there is no undue influence or other vitiating factor, can prove to be more difficult when no physical meeting takes place and caution should be exercised in proceeding in this way for new clients.[xiii]

Australia (New South Wales)

On 22 April 2020 the state of New South Wales ("NSW") passed temporary regulations permitting the witnessing by video transmission of wills, powers of attorney, a deed or agreement, an enduring guardianship appointment, an affidavit, including an annexure or exhibit to the affidavit, and a statutory declaration.[xiv] The temporary regulation was made pursuant to section 17 of the Electronic Transmissions Act and provides that a person witnessing the signing of a document by audio visual link must:

- observe the person signing the document sign the document in real time, and
- attest or otherwise confirm the signature was witnessed by signing the document or a copy of the document, and

- be reasonably satisfied the document the witness signs is the same document, or a copy of the document signed by the signatory, and
- endorse the document, or the copy of the document, with a statement -
  - specifying the method used to witness the signature of the signatory, and
  - that the document was witnessed in accordance with this Regulation.

Without limiting the ways in which a witness may confirm the signature was witnessed, the witness may:

- sign a counterpart of the document as soon as practicable after witnessing the signing of the document, or

- if the signatory scans and sends a copy of the signed document electronically -countersign the document as soon as practicable after witnessing the signing of the document.

Canada (Ontario)

Another example of early action to address the virtual witnessing of wills and powers of attorney during the COVID-19 pandemic can be seen in Ontario.

Under the *Emergency Management and Civil Protection Act*, on 7 April 2020 Ontario's provincial government temporarily permitted the virtual witnessing of wills and powers of attorney as a result of COVID-19. Ordinarily, both wills and powers of attorney must be signed in the physical presence of two witnesses. Under the province's emergency order, the presence of such witnesses "may be satisfied by means of audio-visual communication technology," meaning any technology through which the three parties can "see, hear and communicate with each other in real time."

Wills and powers of attorney signed in the province do not usually require either witness to be a legal professional: merely they cannot be beneficiaries of the estate or family members of the testator. However, to safeguard against issues of lack of capacity or undue influence, the emergency order requires that, for documents witnessed virtually, at least one of the witnesses must be a licensee under Ontario's Law Society Act.

The emergency order does not permit the documents to be signed in counterparts, so it appears that there will be a need for:

- Transportation and circulation of the documents in order to obtain "wet signatures"; and

- Multiple virtual meetings to ensure that each of the signing by the testator/grantor is made with both witnesses "virtually" present to see him or her signing, followed by each witness signing the documents after receiving the original documents signed by the testator/grantor and doing so in the "virtual" presence of the testator/grantor and the other witness.

Once this is done, a "virtual" commissioning of the affidavit of one of the witnesses must follow to ensure completion of the project, unless the completion of the affidavit can wait until COVID-19 restrictions are lifted and one of the witnesses can attend in person to swear the affidavit. However, practitioners in Ontario have emphasised that "virtual" commissioning has not been approved by the

courts and is not addressed under the Order so practitioners should assume that its use is not without risk.[xv]

USA (New York, Florida and federal law)

Even before COVID-19, some US states had passed laws and issued regulations allowing remote online notarisation ("RON") so that notaries can acknowledge documents without in-person meetings. Early adopters included Florida, Kentucky, Michigan, Minnesota, Montana, Nevada, Ohio, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. Further, in response COVID-19 many other states have fast tracked laws to permit this process.

For example, On 7 April 2020, New York Governor Andrew Cuomo issued Executive Order 202.14, permitting remote witnessing of wills, powers of attorney, health care proxies, deeds and other documents. Together with the recent Executive Order 202.7 permitting video notarisation, this means that New York residents who wish to execute new or updated wills, healthcare proxies or powers of attorney may do so without leaving their home or admitting others to their home, provided all the rules outlined below are followed. [xvi]

Florida is an example of a state that authorised RON before COVID-19 restrictions came into place. on 1 January 2020 HB 409, "Electronic Legal Documents" was signed into law amending Fla.Stat. 115.05 (pertaining to notary publics in Florida).[xvii] This covers most documents, except for those that fall under the category of "electronic wills". This category includes wills, revocable trusts, durable powers of attorney health care surrogate designation and living wills, which will only be included on the list of electronic wills from 1 July 2020. There is a movement amongst the estate planning profession in Florida to push the legislature to pass a law allowing electronic notarisation for electronic wills (and accompanying documents) to be allowed prior to 1 July.

However, progress comes with its boundaries; if an individual is a vulnerable adult as defined by Florida state law, they will not be able to have a document electronically notarised either now or when electronic wills are included. Florida law (Fla.Stat.415.102) defines a "vulnerable adult" as a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.[xviii]

At the federal level, on 18 March 2020, Senate Bill 3533, the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 (the "SECURE Act"),[xix] was introduced as bipartisan legislation to authorise and establish minimum standards for electronic and remote notarisations that occur in or affect interstate commerce.

Currently, 23 states have enacted some form of RON law: Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin. Many of these states include wills and powers of attorney as defined transactions.

The basic components of each state's RON law are to:

- Allow notarial acts to be completed using audio-video communication, including acts where the signer is located outside the state in which the notary is authorised to operate;

- Require that the notary authenticate the person signing; and
- Require recording of the audio-video communication.

If the SECURE Act becomes law in its current form, it would authorise every notary in the USA to perform RON using audio-visual communications and tamper-evident technology in connection with interstate transactions.

Business LPAs

We now turn to the less well-known topic of business LPAs, which deserve special attention in the current COVID-19 economic climate.

Illness, injury, or long-term absence might prevent an individual from making decisions on a temporary or permanent basis and their business could be at risk if they decide how it should be run.

If an individual is unable to make business decisions in the future, and have not made a business LPA, an application to the Court of Protection for the appointment of a deputy to act on their behalf may be necessary. The process can take months during which time the business may be vulnerable and there is no guarantee that the Court of Protection will choose someone the individual would have chosen as deputy.

Some examples of how this can adversely affect the business are as follows:

- There is a risk the business bank account(s) may be frozen, and loans or overdrafts recalled.
- If they lack capacity, the individual may not enter into lawfully enforceable contracts.
- If the business owner loses capacity and a third party is unaware of this, that third party may enforce the contract against them, which may place the business and its assets at risk.

- If an individual lacking capacity continues to act as a director, they may no longer be able to take the actions ordinarily required to run the business and may breach the Companies Act 2006.

- If a co-partner, member or director becomes aware, or reasonably should have been aware that a partner lacks capacity, a duty arises on them to assist and protect them and their financial interests from any potential exploitation. Failure to do so, may result in them potentially becoming liable for the consequences arising from this.

- Loss of capacity may result in intervention by the regulatory body and potential closure of the business.

It is important to check the type of business that the donor is engaged in before determining whether an LPA is capable of enabling attorneys to make business decisions on the donor's behalf.

If the individual is a sole trader, the business is unlikely to have a separate legal entity, which means that appointing an attorney under a business LPA will be an effective way for the sole trader to make provision for the continuity of their business, in the event that they are incapacitated.

In the partnership context, the terms of the partnership agreement will determine if a business LPA is appropriate. Some partnership agreements may already include provision for what would happen should one of the partners become incapacitated. If such a provision exists, it may already adequately provide for the continuity of the business in which case, a business LPA would not be necessary.

As for directors of a company, the company's articles of association will be the first port of call.

[xx] Frequently, articles of association will provide for the termination of a director's appointment in the event that the director loses capacity. This is often done to protect the company's interests. As a sole director of a small private company, the articles of association are not likely to simply terminate the director's appointment, or there would be no one else to continue running the company. In such circumstances, a business LPA would be appropriate.

A deed or memorandum of wishes can be drafted alongside the business LPA expressing the donor's views about how the LPA should be operated. Such a document would be stored with the LPA and be used to provide guidance regarding the business to the attorney(s) in the event the donor loses capacity. This could include the donor's thoughts, beliefs and wishes on items such as whether they wish the business to be sold or developed if they lose capacity, and their wishes for succession.

When preparing a business LPA, it is important to keep it very separate from the donor's private affairs. This is to avoid any conflicts of interest from arising. Paragraph 7.60 of the MCA 2005 Code of Practice says:

> *"A fiduciary duty means attorneys must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. They also must not allow any other influences to affect the way in which they act as an attorney. Decisions should always benefit the donor, and not the attorney. Attorneys must not profit or get any personal benefit from their position, apart from receiving gifts where the Act allows it, whether or not it is at the donor's expense.*"

Senior Judge Lush in the case of *Re JW* [2015] EWCOP 82 looked at how the duty to avoid a conflict of interest may work in practice. The case concluded that, even where there is a conflict of interest, this does not automatically disqualify someone from acting on an incapacitated person's behalf and it would be the job of the Court of Protection in those circumstances to manage the conflict to ensure that any act done or any decision made on behalf of a person who lacks capacity is done or made in their best interests.

Traditionally, donors have been advised to make separate property and affairs LPAs for business decisions and for personal decisions. The form to apply to register an LPA that appears in Schedule 3 to the regulations at page 10 asks the donor or attorneys to confirm whether any other LPAs or enduring powers of attorney have been made by the donor. This implies that the Office of the Public Guardian is aware that some people may choose to make multiple LPAs.

There is nothing inherently wrong with having multiple LPA instruments dealing with different types of decisions, and when an individual has separate business interests it is to be recommended. However, donors need to ensure that any instructions or restrictions that they include in their instruments are clear enough to allow the LPA to operate otherwise those instructions are likely to be severed by the court.

The types of instructions that have been severed by the court include:

- *Re Black* (an order of the Senior Judge made on 11 January 2013) - *"A has been appointed solely to manage ABC Solicitors to enable continuing management of the Practice. B has been appointed to deal with all other financial matters both personal and business related, which do not specifically require a Solicitor of the Supreme Court."* The restriction was severed because it was incompatible with a joint and several appointment.

- *Re Steiner* (an order of the Senior Judge made on 17 October 2011) - "*Should the need arise relating to the management of my financial affairs and my business interests, whoever at the time is acting for me personally as my accountant or solicitor shall adjudicate over my personal financial interests and whoever is acting professionally for me in respect of my business interests either my accountant or solicitor shall adjudicate over my business interests."* The court severed the provision from the LPA on the ground that it could potentially oust the jurisdiction of the court.

- *Re Hamilton* (an order of the Senior Judge made on 25 October 2011) - *"My No 1 Attorney will make all decisions re my everyday expenses and decisions [and] will make joint decisions with the Replacement Attorney in reference to any large decisions re the selling of investments, property and the eventual need of a nursing home etc."* The provision was severed on the ground that, having appointed the attorneys to act successively, the donor could not authorise them to make any decisions concurrently, whether jointly or jointly and severally.

Two separate LPAs allows the donor to limit the authority of each set of attorneys to decisions related to their remit (i.e. private financial affairs or business affairs). The problem with having just one LPA is two-fold:

- Attorneys can only be appointed jointly and/or severable. There is no ability in an LPA instrument to appoint some attorneys to make certain decisions and some to make others.

- In *Re Various Lasting Powers of Attorney* [2019] EWCOP 40, the court made it clear that any mandatory terms within LPA instructions which purport to limit an attorney's power to act in the donor's best interests should be severed. It is better to have two separate LPAs that deal with distinct areas of decision making rather than seek to limit the authority of attorneys within the same instrument. That way, it is clear what type of decisions each set of attorneys can make and the LPA does not have to limit their ability to act in the donor's best interests in making those decisions.

Conclusions

Those looking to execute and use an LPA are likely to be disproportionately affected by the current health crisis. As Mr Justice Hayden, Vice-President of the Court of Protection, recently said in his 'Additional Guidance for Judges and Practitioners arising from Covid-19' "This Court is charged with responsibility for a cohort of people who are in the eye of the storm."

While the prescribed requirements and prescribed form for creating a valid LPA must still be followed, even in these difficult circumstances, it is hoped that an understanding of the context of these requirements will encourage practitioners and donors to continue to create and use LPAs.

There can be little doubt that the difficult and urgent circumstances presented by COVID-19 make it impossible to strictly comply with the requirements of the regulations. However, rather than encouraging donors to hold off from making LPAs, other jurisdictions have highlighted innovative and proactive approaches to enable a more flexible approach to the witnessing of LPAs through audio-visual communication. If the restrictions imposed by COVID-19 are envisaged to last many months, especially for the elderly as some of the most vulnerable members of society, it is not too late for the Government take steps in consultation with stakeholders about options for allowing certain documents to be signed and executed electronically in England & Wales. A proactive stance is needed, however, and it is hoped that some heed will be taken from other jurisdictions that are leading the way.

Contact us

Please do not hesitate to contact us for help and support concerning LPAs such as those discussed in this article, or in relation to litigation concerning mental capacity generally.

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The Private Client team at Outer Temple Chambers

The 14 barristers who form part of our Private Client team have extensive experience in matters related to the Court of Protection, inheritance, including estate planning, wills, probate, the administration of estates, and claims under the Inheritance (Provision for Family and Dependants) Act 1975. Our members' expertise also encompasses matters concerning trusts, be they private, charitable, or related to pensions or personal injury awards.

Claire van Overdijk and Alex Cisneros have appeared in some of the leading cases in the property and affairs jurisdiction of the Court of Protection such as *Various Incapacitated Persons and the Appointment of Trust Corporations as Deputies [2018] EWCOP 3, Matrix Deputies Litigation No 1 [2017] EWCOP 14 and No2 [2018] EWCOP 22, Various Lasting Powers of Attorney, Re [2019] EWCOP 40 and Office of the Public Guardian v PGO & Ors, Re: BGO [2019] EWCOP 13.*

Outer Temple Chambers won the "Chambers of the Year" category at the STEP Private Client Awards 2018/19, presented by the Society of Trust and Estate Practitioners, a global professional association for practitioners who specialise in inheritance and succession planning. Claire van Overdijk was shortlisted as “Advocate of the Year” at the 2019/2020 STEP awards.

Endnotes

[i] *Miles & Beattie v. The Public Guardian* [2015] EWHC 2960, *Wye Valley NHS Trust v. Mr B* [2015] EWHC 60 and *Briggs v. Briggs* [2016] EWCOP 53

[ii] "Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction", Law Commission Consultation Paper No.128 (23 December 1992), at para 7.15

[iii] Mental Incapacity (Law Com No 231, February 1995), at para 7.27

[iv] https://publications.parliament.uk/pa/jt200203/jtselect/jtdmi/189/3101408.htm [last accessed 20 April 2020]

[v] https://hansard.parliament.uk/Lords/2005-03-15/debates/07894cbe-98f8-4bbb-89b0-5dffe5b37d65/MentalCapacityBill [last accessed 20 April 2020]

[vi] "Making and registering an LPA during the coronavirus outbreak" Guidance from the Office of the Public Guardian issued on 17 April 2020 https://www.gov.uk/guidance/making-and-registering-an-lpa-during-the-coronavirus-outbreak [last accessed 20 April 2020]

[vii] *'Will-Making in Difficult Circumstances: How to Comply With Formal Validity Requirements'* David E Grant and Gabor Bognar https://www.outertemple.com/wp-content/uploads/2020/04/Outer-Temple-Chambers_The-Formalities-of-a-Will.pdf [last accessed 20 April 2020]

[viii] Regulation 9(b) of the regulations

[ix] https://www.lawcom.gov.uk/project/electronic-execution-of-documents/ [last accessed 20 April 2020]

[x] The Law Commission report confirmed its view that electronic signatures can lawfully be used to execute documents, including most deeds and other documents where there is a statutory requirement for a signature. The study found that e-signatures are valid if the person signing intends to do so and that any additional formalities required by statue, such as witnessing, are satisfied. In practice, the Commission noted, English and Welsh courts have accepted electronic forms of signatures in many test cases, including a name typed at the bottom of an email, or clicking an 'I accept' tick box on a website'. However, Certain deeds remain excepted, including wills and LPAs.

[xi] *See* EN vi

[xii] https://www.lawscot.org.uk/news-and-events/law-society-news/coronavirus-updates/ [last accessed 20 April2020]

[xiii] https://www.lexisnexis.co.uk/blog/covid-19/insight-into-law-society-s-discussions-with-the-ministry-of-justice-on-urgently-reforming-witnessing-requirements-for-wills-due-to-coronavirus-(covid-19) [last accessed 20 April 2020]

[xiv] https://www.legislation.nsw.gov.au/regulations/2020-169.pdf [last accessed 22 April 2020]

[xv] https://www.step.org/news/canadian-province-permits-virtual-witnessing-documents-during-covid-outbreak [last accessed 20 April 2020]

http://foglers.com/uploads/press/file/773/Client_Bulletin_VIRTUAL_WITNESSING_OF_WILLS_AND_POWERS_OF_ATTORNEY_NOW_TEMPORARILY_PERMITTED_IN_ONTARIO.pdf [last accessed 20 April 2020]

[xvi] https://www.governor.ny.gov/news/no-20214-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency [last accessed 20 April 2020]

[xvii] http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0100-0199/0117/Sections/0117.285.html [last accessed 20 April 2020]

[xviii] http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0400-0499/0415/Sections/0415.102.html [last accessed 20 April 2020]

[xix] https://www.congress.gov/bill/116th-congress/senate-bill/3533 [last accessed 20 April 2020]

[xx] The model Articles of Association on the government's website allows Directors to delegate their powers to any person they see fit: https://www.gov.uk/government/publications/model-articles-for-private-companies-limited-by-guarantee/model-articles-for-private-companies-limited-by-guarantee#delegate [last accessed 20 April 2020]

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