Title Research

Entitlement

Winter 2017

Can legal professionals do more to safeguard against abuse of LPAs?

Plus:

- world history case study
- a new look for Title Research

Quarterly insight from the genealogy and asset repatriation specialists

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Welcome to Title Research's quarterly news digest – **Entitlement.**

It has been a few years since we last produced our print newsletter, which long standing clients may recall.

If you haven't used our services before, or perhaps haven't needed to for a while, then do take a fresh look at our new website.

The legal industry has changed dramatically over the last few years. New providers of estate administration services have entered the marketplace and many firms have merged. Fixed fees are gradually permeating the industry as consumers start to shop around more for estate administration services, and their expectations in terms of service, quality and transparency are increasing dramatically. Our practitioner clients tell us time and again that the trend among PRs is to expect value for money when administering estates. This is a concept that fits well with Title Research's charging structure; we undertake genealogical research only when instructed by practitioners who, in turn, are acting for the PR and in the interests of the estate as a whole. Here at Title Research we are constantly striving to deliver exceptional service to our clients, to help them deliver exceptional service to theirs. We know that you and your clients have a choice over who to use for specialist probate support services, and we strive to deliver quality, efficient and reliable services at all times.

We want to be completely transparent with our clients about fees. We guarantee that we will never quote a figure to you purely to win the work – our fees are always representative of the complexities involved based on our experience of over 50 years. If we can't help you with something, we will say so, and try to put you in touch with someone who can.

Wherever possible, we will offer you a fixed price for the work you are asking us to quote for. We believe this is the fairest and most transparent way to provide our services to you and to your clients. We will never base our fees on the estate value; our role is simply to prove entitlement and assist in the distribution of the estate so that you can close your file. We take no interest in the value of the estate other than to assess the viability of undertaking the work required and in instances where there are little or no funds available we will always work with you and your client to find a suitable solution.

Over the last ten years the increase in availability of genealogical records online has, on the face of it, made genealogy 'easier'. However, whilst more records have become available, family make up has become more complex with the advent of civil partnerships, same-sex marriages, more frequent adoption of children and more children being born outside of the traditional family structure. Combine this with increased international mobility, and I am sure you will agree it is vital that you instruct a firm with the resources and experience necessary to ensure that every entitled person is identified, and that entitled people receive all they are entitled to.

The purpose of Entitlement was always to keep you, our clients, up-to-date with what's going on in the industry generally and how Title Research can offer support on some of the more complex or simply problematic cases you may encounter. We aim to continue in this vein with summaries of cases of note we've worked on and also by presenting views from industry leaders. In this first, quarterly edition of Entitlement we are delighted to provide an article by **Caroline Bielanska** on the hot topic of **Lasting Powers of Attorney** and the recent comments made by retired senior Judge, Denzil Lush, which we hope you will find thought provoking.

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Head of Client Services

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

Guest contributor: Caroline Bielanska
Caroline is the former Chief Executive and former Chair of Solicitors for the Elderly, an organisation she helped to found in 1999. She lectures regularly and is well known in her specialist field, advising older and vulnerable adults who have limited physical and/or mental capacity.

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.

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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?

"It is best practice to draft for use, not registration"

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.

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WORLD HISTORY CASE STUDY

Tracing holocaust survivors through overseas records

Key case points:

- Our client asked us to create the family tree for a lady who died intestate.
- The Deceased was born in eastern Poland in 1911. The family were of the Jewish faith.
- Ultimately, research was required in Australia, Austria, France, Guatemala, Israel, Italy, Poland, Spain, UK and USA.
- Seven potential heirs were ultimately located.

Our world history case study demonstrates the impact that events in world history can have on our work.

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On the face of it, this may appear to be straightforward.

The Deceased died intestate in England, and we needed to reconstruct her family tree in order to establish who the rightful heirs to her estate were. She was a widow, without issue, parent or surviving siblings (or their issue). She was born in 1911 and so her grandparents had statistically long since died as well, so we were able to proceed straight to investigating the class of whole blood uncles and aunts (and of course their issue).

Now, she was born in eastern Poland, and this is a jurisdiction we can work in and do so regularly with usually very good results. Research takes longer, and occasionally we encounter problems where records are missing or damaged due to World War Two, or the international border has moved so a town or village that was believed to be in Poland is now in Ukraine or perhaps Belarus. But, with patience and perseverance the full family tree can normally be established.

However, you may have noticed from the key case points that the Deceased's family were of the Jewish faith. Religion is not something that normally comes into things when we are researching a UK based family – records are not organised in accordance with religious beliefs, and unless we are searching way back before civil registration started in 1837, we don't normally need to look at parish records such as baptism or marriage. When we are carrying out this type of research in Europe, where the civil registration system is not as advanced, we need to consult religious records much more frequently. As such, knowing that a family were Catholic or Protestant is very useful indeed. As is knowing they were Jewish.

I am sure we are all aware of the horrors of the World War Two, and the atrocities that were committed against the Jews across Europe. This often presents itself in our research and provides its own unique challenges as it did in this case. Tragically, we found that some lines of the family completely disappeared and we could find no records relating to some of the first cousins once they had been identified – no marriages, or emigration records for example. Occasionally we were able to pick up references to members of the family in some of the ghettos that were set up by the Nazis – Warsaw for example, but nothing further. It was clear that they had just disappeared without trace. On other occasions, we did find records – including that some members of the family had perished at Auschwitz.

Over the last fifty years, the worldwide Jewish community have preserved testimony from the now dwindling number of holocaust survivors and as we are now into the internet age much of this is becoming available to search and whilst at times harrowing to read, it is helping us greatly in our work.

Some lines of this family did escape – and as you can see research was ultimately required around the world. We located only seven potential heirs to this estate, much less than we would expect from a family that was as large as this, and insurance supported our research on those lines where documentary evidence was not available.
The final, and perhaps most interesting point on this case comes from two heirs we found in the United States. They, along with approximately 850 others, avoided transport to Auschwitz Concentration Camp with the help of Oskar Schindler, and I am sure many of you will have seen the film Schindler's List which tells this story.

Same service, **new look**

Explore our new website **www.titleresearch.com**

The Title Research website has been revamped to deliver a more fluid, intuitive and informative experience for our viewers. Our new website embodies the business's purpose while promoting our wide range of services.

Did you know?

- We can reseal a grant in Gibraltar as well as the Isle of Man, Jersey and many other overseas jurisdictions
- We can value and sell UK shareholdings
- We can carry out bankruptcy searches in over 60 jurisdictions for a fixed fee of £49 (plus VAT and disbursements)
- We are one of the few UK companies who hold the Medallion Signature Guarantee Stamp in-house, allowing for fast tracked transactions
- Fixed fee solutions are available for many of our services
- We locate over 4,000 missing beneficiaries each year. Prices start from £299 (plus VAT and disbursements)
- We located beneficiaries in countries as diverse as Guatemala, South Korea and Egypt
- We regularly host free CPD webinars on our website and can deliver these at your office, free of charge

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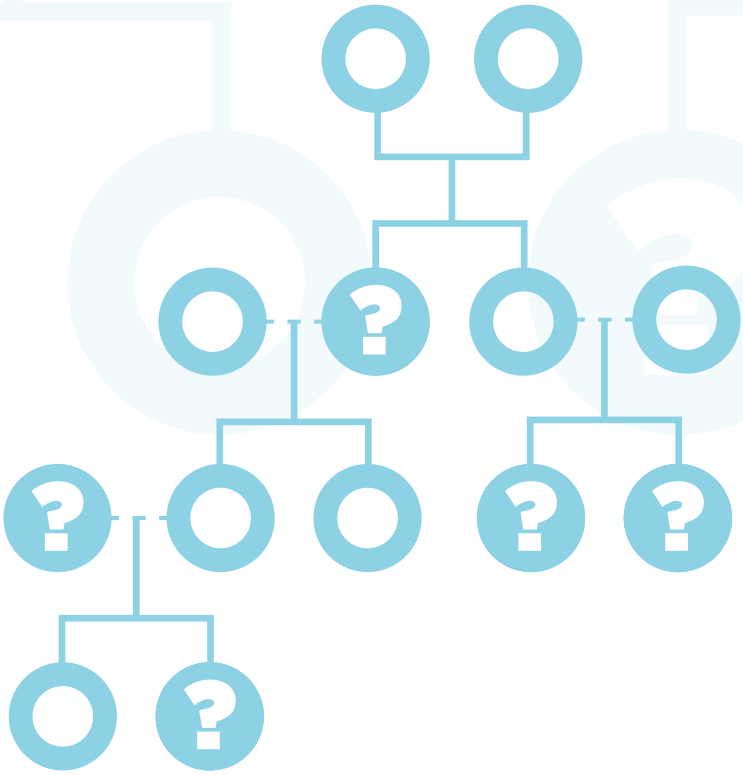

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