

# Common mistakes to avoid when drafting instructions in Lasting Powers of Attorney

A poorly drafted Lasting Power of Attorney (LPA) can lead to unnecessary stress and expense for the Donor or the draftsman, or in the worst cases leave a vulnerable person without any LPA in place at all. This month's CPD will consider the common errors that even the professional draftsman can make when drafting instructions for LPAs of any type.

## WHAT'S THE ISSUE?

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LPAs are complex legal documents and care must be taken when drafting them to ensure they are completed correctly. The Office of the Public Guardian (OPG) will reject any forms that are completed incorrectly or that don't meet their standards. According to the OPG around 15% of LPA forms submitted to them have errors.

Getting it wrong can be expensive if the mistake isn't recognised until registration. The registration fee for LPAs is £82 per document. If they are rejected, they must be corrected and re-registered and this costs £41 per document if sent back within 3 months. If the corrected forms are sent back outside of this time limit you will need to pay the full fee again.

If the registration doesn't take place until after the Donor has lost capacity, then they may be left with no LPA in place at all if a mistake is found. At this point it will be too late to correct the form and resubmit it. This is why it is so important that the forms are completed correctly, and appropriate advice taken if you are unsure about any aspect of the form or how you can put the Donor's wishes into practice.

## PROBLEMATIC INSTRUCTIONS

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This paper will focus on problems caused by instructions. The most common errors with instructions that cause issues for LPAs are:

- Lack of clarity
- Making contradictory statements
- Attempting to ask an Attorney to act beyond their powers
- Legally invalid instructions
- Incorrectly handling how replacement Attorneys will start acting

Often a Donor will have very specific wishes in mind for how their Attorneys should act and what kinds of decisions that can make and how they should make them. Unfortunately, what the Donor wants isn't always legally possible so it's essential to explain the limitations of Attorneys powers and manage a client's expectations when it comes to drafting instructions.

## CONTRADICTIONARY STATEMENTS

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Instructions are legally binding on the Attorneys and they must be followed. It's therefore incredibly important that any instructions are clearly written and legally valid. If the instructions aren't valid then the OPG may refuse to register the LPA or may need to apply to the Court of Protection (COP) to have the offending instruction severed.

Instructions can be invalid because they are too vague and cause uncertainty in what the Attorney is actually allowed to do. When drafting instructions make sure that there is no room for misinterpretation and that what is expected of the Attorney is sufficiently clear.

Instructions that contradict other sections in the LPA will cause the LPA to fail at registration. The most common invalid instructions are those that are incompatible with the way the Attorneys are appointed in section 3 of the form. Where the Donor has appointed multiple Attorneys to act, they must decide on how they will make decisions. There are three available options here:

### 1. Jointly and severally

If Attorneys are appointed to act jointly and severally, they may act either together or independently. This allows more flexibility as any one of the Attorneys may act alone. Especially useful where a decision needs to be made urgently.

Problems arise where a Donor then includes instructions that impose further restrictions that contradict this appointment. Common examples include stating that the Attorneys must act together in certain circumstances, or that one Attorney has a deciding vote. These types of instruction are contrary to what the Donor has selected in section 3 of the form and would have to be severed.

For a recent case example of this see JF (Case No 12925291). In this case the Donor had appointed three Attorneys and, in the instructions, had stated "My two daughters (if surviving) must always agree on any decision jointly before any actions regarding my estate can be implemented. OM may act as an attorney independently of my daughters." The OPG would not register the LPA as the instruction contradicted the nature of the Attorney's appointment, so they applied to the COP to seek a severance of the instruction.

The COP recognised that severing the instruction would lead to an LPA that didn't match the Donor's wishes, and also recognised that the Donor could achieve what she wanted only by executing two separate LPAs. The Donor consented to the severance, so it was directed that the instruction was severed, and the LPA registered without it.

In the same run of severance applications to the COP (they tend to be reviewed in bulk) the COP also heard the case of SH (Case No 1291136T). In this one they directed for an instruction to be severed as the instruction "While my attorneys are authorised to act jointly and severally I specifically direct that all decisions must be made by at least two of my attorneys and that no attorney has the power to make decisions individually." was incompatible with the joint and several appointment they had made.

### 2. Jointly

If Attorneys are appointed to act jointly then they must act unanimously. If one Attorney becomes unable to act the remaining joint Attorneys also become unable to act. As such, any instruction stating that the Attorneys must act by majority.

Up until recently it was also impossible to re-appoint surviving joint Attorneys as replacement attorneys, with the effect that if one joint Attorney stopped acting the survivors continued. It was assumed that if the donor appointed A, B and C as joint Attorneys that they wanted them to act all together or not at all, so naming them all as replacements so they could be 'reappointed' if one died contradicted this. Donors have previously been told to avoid such appointments as they would fail. This position has changed with the case of *Miles v The Public Guardian and Others* [2015] EWHC 2960 (Ch).

In Miles the donor had appointed her attorneys A and B to act jointly in certain transactions, and jointly and severally in regard to everything else. She only wanted her replacement attorney C to act if both A and B could no longer act. The wording used was as follows:

"My attorneys may act jointly and severally save with regard to:

1. any sale of my property at [and it set out her address] (or any property which may subsequently replace it); and
2. any transaction in excess of £10,000

when all surviving attorneys who are capable of acting (whether originally appointed or who have been appointed by and are acting in substitution) shall act jointly in so far as there may be more than one of them able to do so but in the event that there is only one of them capable of acting I expressly re-appoint that attorney to act alone."

It was held that this provision was valid as there was nothing in the MCA 2005 that expressly prohibited it. In his judgement Lord Justice Nugee did admit to finding part of the drafting confusing, specifically the wording in the second set of brackets. This highlights the need to be especially clear when drafting such complex instructions. To that end the following wording was suggested in *Miles* as a means of appointing joint attorneys with provision for the survivor of them to act alone:

"I wish my attorneys A and B to act as follows:

- (1) So long as both attorneys are able and willing to act, I wish them to make the following decisions jointly: sale of the house; transactions over £10,000 [or the like] but all other decisions to be made jointly and severally;
- (2) In the event that one of my original attorneys A and B is unable or unwilling to act, I then appoint the remaining of my original attorneys A or B, as the case may be, as replacement attorney to act solely;
- (3) In the event of both my original attorneys being unable or unwilling to act, I appoint C as a replacement attorney to act solely [with whatever variations the case requires]."

Note that the OPG have not yet updated their official guidance (LP12) since this case, so the OPG may still query such an instruction at registration.

3. Jointly for some decisions, jointly and severally for all other decisions.

This option is the hybrid power, so its benefits and drawbacks mirror those of joint and several/joint appointments.

Instructions must apply equally to all Attorneys named on the form. It isn't possible to appoint A, B, and C and state that A and B can only make decisions about the Donor's personal finances and C can only make decisions about the Donor's business. At least not within a single form. To achieve something like this the Donor would need to make and register two separate LPAs.

## INSTRUCTIONS THAT GO BEYOND AN ATTORNEY'S POWERS

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The powers that Attorneys have under both Health & Welfare and Property & Financial Affairs LPAs are quite wide and cover nearly all aspects of dealing with an incapacitated person's daily affairs. They are subject to some statutory restrictions, however. By way of example, Attorney's cannot change the donor's Will, consent to a marriage or divorce, or vote on their behalf.

Attorneys must also act solely in the best interests of the Donor and are excluded from making decisions that are in the best interests of anyone else, even if connected to the Donor. An instruction directing Attorneys to make provision for someone else would therefore be invalid unless the Donor had a legal obligation to maintain that person. In the case of *Re Strange* (an order of the Senior Court Judge made on 21 May 2012) the court was asked to consider whether guidance in an LPA asking the attorneys to maintain the donor's husband was valid or whether it needed to be severed as contravening the attorneys limited powers to make gifts. The wording of the guidance was as follows: "I wish my attorneys to provide for the financial needs of my husband in the same manner that I might have been expected to do if I had capacity to do so". It was held that the guidance in the LPA was valid as any spouse would have a statutory duty to maintain the other spouse. That said, legal advice ought to be sought before including such an instruction.

Instructions directing the Attorneys to maintain anyone who is not a spouse or civil partner, or dependent child of the Donor would be invalid and would have to be severed. In their practice note "Giving gifts: a guide to the legal background for deputies and attorneys" the OPG themselves suggest that a Donor may normally rely on being able to direct their Attorneys to maintain a person only if they have provided for those needs in the past, or it is reasonable to conclude that the person would have provided for those needs.

Even where the maintenance provision is allowed you must be incredibly careful in how this is drafted. In the case of *Re Bloom* (an order of the Senior Judge made on 16 March 2012). Here the instruction referred to making provision for the Donor's wife for her 'maintenance and benefit'. The words 'and benefit' were severed by the COP as this was too wide and went beyond just maintenance.

A further example of common instructions that go beyond an Attorney's power relates to gifting. Attorney's only have limited powers to make gifts of the Donor's property. Under section 12 of the MCA 2005 an attorney may dispose of the Donor's property by making gifts in the following circumstances:

(2) the Donee may make gifts –

(a) on customary occasions to persons (including the attorney) who are related to or connected with the donor; or

(b) to any charity to which the donor made or might have been expected to make gifts.

The value of the gift must not be unreasonable in all of the circumstances, and many factors will be taken into account to determine what is reasonable, amongst them the size of the donor's estate.

Section 12(3) defines 'customary occasions' as:

- (a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership; or
- (b) any other occasion when presents are customarily given within families, or among friends and associates.

Under section 23(4) the Court of Protection may also authorise the making of gifts that are not covered by section 12(2), such as larger gifts or gifts made for inheritance tax planning purposes

Any instruction in an LPA that attempts to extend an Attorney's power to make gifts will be invalid and will have to be severed before the LPA can be registered. The following types of instruction would be invalid:

- directions to set up trust funds for the donor's grandchildren
- gifts at non-customary occasions
- regular maintenance payments to people the donor is not legally obliged to maintain
- loans
- lump sum payments to the donor's adult children upon a certain event such as marriage or purchase of a house.

## LEGALLY INVALID INSTRUCTIONS

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Instructions that ask the Attorneys to do anything illegal are obviously invalid, so any instructions attempting to induce the Attorney into committing a crime are impossible.

This crops up in LPA forms more often than you would think. Each year the OPG deals with around 120 cases where an instruction has been included in an LPA that is asking the Attorney to assist the donor's suicide in some way. Under section 2 of the Suicide Act 1961 it is illegal to assist a person's suicide. This includes helping them to attend a euthanasia clinic in a country where this is perfectly legal. Therefore, any instruction in an LPA directing the Attorney's to assist the Donor in ending their life is invalid and would have to be severed by the COP before the LPA could be registered.

Instructions made in the wrong type of form are also legally invalid. An instruction in a Health & Welfare LPA regarding dealing with the Donor's finances or vice versa would be legally invalid as the Attorney has no authority over this.

## PROBLEMS WITH REPLACEMENT ATTORNEYS

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Replacement Attorneys may only step in if an original Attorney dies, loses mental capacity, disclaims their appointment, divorces/dissolves their marriage/civil partnership to the Donor, or in the case of Property

& Financial Affairs LPAs becomes bankrupt. These 'trigger events' are covered in section 13 of the MCA 2005.

You must avoid including any instructions in an LPA that direct for a replacement Attorney to step in and start acting upon any event other than those trigger events listed above as this would be invalid.

The following types of instruction would be invalid and would need to be severed:

- A direction for a replacement would step in temporarily to cover an original Attorney who has gone on holiday
- A direction for a replacement to step in when requested by the original Attorneys
- Where original Attorneys were appointed jointly and severally, a direction for the replacement to step in and totally replace both original Attorney's when only one had become unable to act.

It is something that is commonly requested, but it is impossible to state that a replacement Attorney will replace a replacement Attorney. If a Donor wishes to name Attorneys, followed by replacements, and then also name a third level of replacements they would need to make and register two separate LPA forms. One form should appoint the original Attorneys and their replacements, and the second form should name the third level of replacements as the main Attorneys but also include an instruction to state that it will only come into force if the original LPA fails.

## HOW INVALID INSTRUCTIONS ARE DEALT WITH

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If a provision in an LPA is invalid the OPG can apply to the COP to have the instruction severed so the LPA can be registered. The COP deal with around 100 severance applications a month, taking up a lot of court and OPG time as well as causing long delays to registration and stress to Donors. Under Schedule 1, Paragraph 11 of the Mental Capacity Act 2005 the OPG has a duty to apply for severance where an LPA contains an invalid provision and they cannot register a defective LPA until the COP makes a ruling on the case and directs them to register.

Before going to these lengths, the OPG will contact the Donor if they still have capacity and present them a choice. They may choose to go ahead with the severance application, or they can draft a new LPA that removes the invalid instruction and giving them a chance to change the instruction to achieve their aims in a way that the OPG don't find issue with. This would involve paying a new registration fee though.

If the Donor lacks capacity at the time the registration is made then this option of redrafting the LPA is lost, and the OPG may only apply to have the offending instruction severed. They will contact the Attorney's for their consent to the severance, as they would the Donor if they had capacity. The unfortunate consequence of this is that this may lead to an LPA being registered that no longer meets the aims of the Donor.

## CONCLUSION

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When it comes to drafting instructions for LPA's we can't stress enough how important it is that the instructions are clear, concise, and legally valid. If you are ever unsure of how likely an instruction is to be

accepted then we recommend first turning to the OPGs own guidance on LPAs (Form LP12), contacting the Society's Technical Team, or for particularly complex instructions even seeking specialist advice.

**Important Reminder:**

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