Avoiding invalid provisions in your LPA

Every month the Public Guardian makes a large number of applications (usually over a hundred) to the Court of Protection to 'sever' invalid provisions from lasting powers of attorney (LPAs) which have been sent in for registration. These applications create a large workload for the court and for the Office of the Public Guardian (OPG), which would be reduced if people making LPAs (the 'donors') and their professional advisers were more aware of the problem. This paper aims to explain how to avoid the need for severance, which delays registration and can cause annoyance and frustration to donors and attorneys.

What is 'severance'?

Severance is the term used to describe the court's power to strike out an invalid provision in an LPA so that it can be registered. If OPG considers that a clause in an LPA is invalid, it must apply to court for the offending provision to be severed. The OPG has to do this because it is a requirement of the Mental Capacity Act 2005 (MCA). This can be found in paragraph 11 of Schedule 1 of the MCA. The court has no power to insert a different provision in place of the invalid one. The word "provision" covers restrictions, conditions, guidance and, in some situations, appointments of attorneys.

The most common invalid restrictions and conditions

The vast majority of applications to court for severance involve clauses under the next two headings. The most common invalid clause of all is a provision that is incompatible with a joint and several appointment.

Restrictions which are incompatible with the type of appointment

- If you have appointed your attorneys to act **jointly and severally**, this means that they can choose to act together or individually and they must all be free to act at any time. So if you have appointed your attorneys in this way, you cannot then contradict it by saying that they must act together for particular transactions. In the case of **Jenkins**, a restriction saying that the attorneys must act together for transactions over £2,000 was invalid. A joint and several appointment is also contradicted if you say that a minimum number of attorneys must act at any one time. So in the case of **P**, a restriction saying that two out of the three attorneys had to act together and no attorney could act alone was invalid. Nor can you say that one (or some) of them can only act if the other can no longer act. In the case of **Bratt**, a restriction saying that attorney B could only act if attorney A could no longer act was invalid. The judge added that the donor should instead have appointed B as replacement attorney for A. Your restriction will also be invalid if you say that the majority view is to prevail in a dispute (**Crook**) or that one attorney must defer to the other (**Davies**) or that the decision of one attorney will be final (**Williams**). If you carry on a business and you want one attorney to manage the business and the other to deal with your general affairs, you should make two LPAs, one for your business affairs and one for your general affairs. If you appoint your attorneys in one LPA you cannot include a provision allocating the business to one only. In the case of **Black**, the donor appointed two attorneys jointly and

severally and stated that one was appointed solely to manage a solicitors' practice, but this was invalid.

- If you have appointed your attorneys to act **jointly**, this means that they must all act together for all decisions. If one dies or can no longer act for some other reason, the others have to stop acting as well. So, in the case of **Moore**, a restriction saying that at least two of the three attorneys should act in any transaction was invalid. Nor can you say that they can act by majority in the case of a dispute (**Pugh)** or that the survivor may act alone if the other joint attorney drops out (**Warner**), because these directions are contrary to the nature of a joint appointment.

Provisions authorising gifts outside the statutory power

Section 12 of the MCA says that attorneys may make gifts on "customary occasions" or to charity. There are other conditions to satisfy, and the donor can restrict or exclude gifts in the LPA. ' Customary occasions' means gifts made on occasions such as birthdays, weddings or civil partnerships, Christmas or other religious occasions. If the donor includes a provision which potentially authorises the attorneys to make gifts which are not allowed by section 12, it will be invalid. Attorneys need to apply to the Court of Protection to be authorised to make other kinds of gifts, but it seems that a lot of donors and professional advisers are not aware of this. These examples of invalid provisions about gifts illustrate the point:

- Gifts to reduce liability to inheritance tax (**Jass**, **Baker**, **Knight**).
- Continuation of regular gifts being made by the donor at the time the LPA was made (**Sykes**).
- Trust funds for grandchildren (**Wheatley**).
- Payment of school fees for grandchildren (**Forrest**).
- Payment of student loan (**Burdock**).
- Helping the donor's son financially as and when he requires (**Walker).**
- Interest free loans to family (**Temple**).

What about maintaining a family member or providing for their needs? The Law Commission thought that an LPA attorney could do this even though it was not mentioned in the MCA. However, the approach of the Court of Protection is that an attorney can only provide for the needs of a family member if the donor has a legal obligation to maintain them. So an attorney can provide for the needs of the husband or wife (**Bloom**, **Strange)**, civil partner or child under 18. But provisions in LPAs on providing for the needs of other family members have been severed as invalid, for example:

- Contribute to father's care costs (**Drew**).
- Provide for handicapped (adult) son (**O'Brien**).
- Provide for grandchildren in cases of extreme need (**Gee**).
- In the case of **Bloom**, the attorneys were asked to make provision for the "maintenance and benefit" of the donor's wife. The words "and benefit" were

severed by the court because, although the attorneys could maintain the wife, "benefit" went beyond maintenance.

Pitfalls to avoid if you appoint attorneys to act jointly for some decisions and jointly and severally for others

This option can prove troublesome. You must indicate the decisions your attorneys must make jointly and the decisions they may make jointly and severally. If you don't do this correctly, your LPA may be invalid, but it is sometimes possible to rescue it by a severance application. One common error is to say that certain decisions can only be made by a particular attorney. That is wrong because all decisions must be made either jointly or jointly and severally; no decision can be allocated to one attorney alone. In the case of **Freeman**, the donor wrote: "Major capital expenses jointly. Day to day expenses attorney X." That was invalid because there were no decisions to be made jointly and severally but the court severed the words "Day to day expenses attorney X," so that the attorneys would deal with major capital expenses jointly and (by implication) all other decisions jointly and severally.

Invalid provisions about when a replacement attorney is to start acting

If you appoint replacement attorneys, they can only start acting when one of the 'trigger events' in section 13 of the MCA has ended the appointment of an original attorney. The events are: if the attorney disclaims, dies, is made bankrupt or subject to a debt relief order, loses mental capacity, or if the attorney is your spouse or civil partner and the marriage or civil partnership ends and there is nothing in your LPA to say that the attorney can still act.

If you say that the replacement attorney can start acting in some other situation, the provision will be invalid and will need to be severed, as in these examples:

- In **Jenkins**, the donor said that the replacement should act if any attorney was 'not available through travel or living abroad' but this is not a 'trigger event' and so it was invalid.
- In **Bates**, the donor appointed two original attorneys and one replacement, and then said: "She may act at any time at the election of either attorney." This was invalid for the same reason.
- In **Tucker**, the donor listed the events on which the replacement could start to act, and included revocation of the original attorney's appointment by the donor. While it is possible for donors to revoke the appointment of a particular attorney, this is not a trigger event and so these words had to be severed.
- In **Evans**, the donor appointed A (his wife) and B to act jointly and severally, with C as replacement. He stated that C was to replace both attorneys and act alone if his wife could no longer act. This was invalid because, if A became unable to act, this would be a trigger event for replacing A but not for also replacing B.
- In **Hamilton**, the donor said that the original attorney was to make certain decisions jointly with the replacement attorney. This was invalid because a replacement cannot act unless the original attorney's appointment has ended.

Other invalid provisions about replacement attorneys

In the case of **Hartup**, the donor appointed two attorneys, including his wife, to act jointly and severally and two replacements. He said that, if his wife could no longer act, the replacements would act with the other attorney but some decisions were to be made by all three jointly. This was invalid because, if you appoint your attorneys to act jointly and severally, you cannot then say that the survivor has to act in a different way when replacement attorneys step in.

There is another very tricky area with replacement attorneys: when do they start acting if the original attorneys have been appointed to act jointly, or to act jointly for some decisions and jointly and severally for other decisions? These examples illustrate the problems:

- We saw above that if you appoint attorneys to act jointly and one can no longer act, the others cannot act either. Section 10 of the MCA allows the donor to appoint replacement attorneys, but how does this work if the original attorneys were appointed jointly? In the case of **Druce**, the donor appointed A and B jointly, with C and D as replacements, and said: 'Both C and D should jointly replace the first attorney who needs replacing so that on the first replacement there will be 3 acting attorneys.' This was invalid and had to be severed. If one became unable to act, the other attorney would have to stop acting also, as this is the nature of a joint appointment. So if A became unable to act, C and D would step in and they alone would be able to act, leaving B on the sidelines, even though this was not what the donor intended to happen.
- This has a knock-on effect if you appoint your attorneys A and B to act jointly for some matters and jointly and severally for others, as in the case of **Krajicek.** The donor appointed A and B as original attorneys and C and D as replacements. She then wrote: "If either of the original attorneys is unable to act then C should step in. D is to step in if the second attorney is unable to act." This was invalid because the donor envisaged that C would make all decisions with the survivor of the original attorneys but the effect of **Druce** was that the survivor would not be able to make any of the joint decisions and could only act in decisions to be made jointly and severally. So the donor's provision would not work. The result of severance was that, if A stopped acting, C and D would step in and make the joint decisions together, while B could continue to act only for the joint and several decisions. The moral of this tale is that it is much easier to appoint your original attorneys to act jointly and severally.

Provisions you cannot include in a property and financial affairs LPA

If you try to give your attorneys power to make decisions about your health and welfare they will have to be severed because attorneys of property and financial affairs LPAs can only make decisions about your property and finances. If you want to give them wider powers you will need to make a separate health and welfare LPA. Another thing you cannot do is to say that your attorneys can change your will. Only you can change your will – or the Court of Protection if you lose capacity to make or change a will. So in the case of **Cranston**, where the donor said that the attorneys could make joint decisions about "changing my will", this was invalid.

Provisions you cannot include in a health and welfare LPA

The first point made in the last section applies here too: if you try to give your

attorneys power to make decisions about your property and financial affairs they will have to be severed because attorneys of health and welfare LPAs can only make decisions about your health and welfare. If you want to give them powers over your property you will need to make a separate property and financial affairs LPA. In the case of **McGregor**, the court severed provisions about selling the donor's house and dealing with bank accounts because the attorneys could only make decisions about health and welfare. Other things to avoid if you make a health and welfare LPA include the following:

- Telling your attorneys to do something which could be illegal, such as taking you to you to a euthanasia clinic. If the attorneys did this they could be committing the criminal offence of assisting suicide (**Gardner**).
- Telling your attorneys that they can act if you become 'physically incapable'. The MCA says that a health and welfare LPA cannot be used until you lose mental capacity, so in the case of **Azancot**, where the donor said that the attorneys could act if she was "physically or mentally incapacitated", the court severed the words "physically or".
- Giving directions as to how your attorneys should make decisions about life-sustaining treatment if you have not given them power to make any such decisions. If you have signed Option B on the LPA form, your attorneys cannot give or refuse consent to life-sustaining treatment. In the case of **Hodgkiss** the donor chose Option B and then said that: "Attorneys must consent to any life-sustaining treatment if I am in a persistent vegetative state." This was invalid because it was incompatible with his selection of Option B. The court said that the donor should have chosen Option A.

Invalid provisions about getting the consent of third parties

There is no problem if you say that your attorneys are to consult family members or other third parties, but you cannot go further and say that they must get the consent of someone else because that would be an unreasonable interference with their powers. In the case of **Reading**, the donor appointed her husband and two of her children as attorneys but then said that, if her husband were to stop acting, all decisions "must be agreed by all four of my children". As the other two children were not attorneys, this was invalid and was severed.

Your attorneys act for you, not for someone else

You appoint your attorneys to make decisions about your property and financial affairs or your health and welfare, not the property and financial affairs or health and welfare of a third party. In the case of **Sheppard**, the donor of a health and welfare LPA said: "My attorneys are to maintain the health and welfare needs of X." This was invalid, just as in the case of **Darlison**, where the donor of a property and financial affairs LPA said that the attorneys should "Oversee X's financial welfare. X is my daughter." A variation on this theme is the case of **Norris**, where the donor stated that the attorneys were to act as follows: "At all times to make decisions in the best interests of my wife during her lifetime." This was invalid because section 1(5) of the MCA says that any act or decision must be in the donor's best interests.

Invalid provisions about attorneys delegating their powers to third parties

There are two things to avoid here: you can allow your attorneys to delegate some

things but not everything and you cannot allow your attorneys to appoint someone else to take over from them.

- In the case of **Putt**, the donor wrote: "My attorneys (or any of them) may delegate in writing any of his, her or their functions to any person and shall not be responsible for the default of that person (even if the delegation was not strictly necessary or expedient) provided that he, she or they took reasonable care in his, her or their selection and supervision." The court ruled that this provision was invalid because it was "not simply contrary but almost repugnant to the special relationship of personal obligation and faith that one might reasonably expect to exist between a donor and the attorney of an LPA."
- Section 10(8)(a) of the MCA says that an LPA cannot give the attorney power to appoint a substitute or successor. In the case of **Clare**, the donor said "My attorney may at any time appoint a substitute to act as my attorney and may revoke any appointment without giving a reason. Each appointment is to be in writing signed by my attorney. Every substitute has full powers as my attorney as if appointed by this deed, except the power to appoint a substitute." This provision was made invalid by section 10(8)(a) and so was severed by the court. In the case of **Williams** the donor said that, if either of her attorneys died in her lifetime, their personal representative should take over as attorney. That was invalid for the same reason.

Other invalid provisions

While most severance applications involve invalid restrictions and conditions, there are some other common examples of invalid provisions in LPAs which can be severed.

- Where the attorney or replacement attorney is the sole 'named person'. The MCA (in paragraph 2(3) of Schedule 1) says that an attorney cannot be a named person (a person to be notified of an application to register). The court in the Howarth case ruled that paragraph 2(3) also applied to a replacement attorney. In most cases it is possible to ask the court to sever the appointment of the attorney (as in the case of McAdam) or replacement attorney in question, so that he or she may be the named person. If there are two attorneys (or two replacements) and both are the named persons, you can usually choose which appointment is to be severed. But if the attorneys have been appointed to act jointly, severance will not rescue the situation as, if one attorney's appointment is severed, the other cannot act either. Of course you can easily avoid the problem by choosing someone else as the named person in the first place.
- **Replacement for a replacement attorney.** The court decided in the **Baldwin** case that it is not possible to appoint a replacement attorney for a replacement attorney. Depending on the circumstances, you can choose to ask the court to sever the appointment of the replacement for the replacement attorney, or just to sever the wording which says that replacement attorney B is to take over from replacement attorney A, so that A and B will step in at the same time.

What about guidance?

As a general rule these problems do not arise with guidance, because guidance is just a statement of your wishes. It can often be better to make use of guidance instead of restrictions, because a provision which would be invalid if framed as a restriction may

often be acceptable if framed as guidance, and in practice the attorneys are likely to follow your wishes even though they are not legally binding. We saw above (in the **Jenkins** case) that a restriction saying that attorneys who have been appointed to act jointly and severally must act together in transactions above £2,000 is invalid because it is incompatible with the joint and several appointment. If the donor had instead put in guidance saying that, although the attorneys were appointed jointly and severally, the donor would prefer them so far as possible to act together in transactions above £2,000, there would have been no need for a severance application.

However, even though guidance does not generally need to be severed, there are some exceptions you should be aware of:

- If you have completed the guidance section but have used mandatory language ('must' or 'shall' as opposed to 'I wish', 'I would prefer', 'I hope', or 'I would like'), it will be treated as being in reality a restriction and may be invalid. So, going back to the **Jenkins** case, if the donor had appointed the attorneys to act jointly and severally and had then said in the guidance section that "They **must** act together for transactions over £2,000", OPG would have made a severance application.
- Even if the guidance is clearly just a wish, it will be invalid if it would be unlawful for the attorneys to comply with it. So, for example, if guidance in your Health and Welfare LPA says that you wish your attorneys to take you to a euthanasia clinic, your guidance would be unlawful because the attorneys could be committing a criminal offence by following it (see the **Gardner** case, above). If your guidance says that you wish your attorneys to make gifts in circumstances which are not allowed by section 12 of the MCA, it would be unlawful for your attorneys to comply with your wishes because they would be acting outside their powers. In fact many (if not most) of the cases on the website about gifts have involved guidance. If you have appointed your attorneys to act jointly, and you then give guidance saying: "I wish them to act by majority", that would be invalid because the attorneys could not lawfully comply with it, as they have to act to act together at all times (see the **Moore** case).

Why does OPG ask for the donor's consent to severance?
Where OPG finds a provision in an LPA which it thinks is invalid, it will tell the applicant that the donor may either consent to a severance application or, if preferred, make a new LPA (if you still have capacity to do so) that would not include the invalid provision but would achieve your aims so far as possible in an acceptable way. Not many donors want to do this because a new registration fee will be payable.

The reason OPG asks for your consent (or the attorney's if you have lost capacity) is to speed up the application. If you consent, the court has agreed that the Public Guardian's application does not have to go through all the usual formalities; this means that the consent order is obtained without too long a wait.

What if you do not consent?
In this situation, the Public Guardian would still have to make the application but you and/or your attorneys would have to be made parties and the application would be contentious. It would take longer to obtain the order and have the LPA registered.

What does it cost?
A severance application made by the Public Guardian with your consent does not involve any cost as there is no court fee for this kind of application and the Public Guardian does not charge you for making it.

What if my LPA has already been registered?
Sometimes an LPA is registered and is later found to contain an invalid clause. This may come to light because third parties (such as banks) say that the LPA is invalid when the attorneys try to use it. If OPG should have spotted the invalid clause before registration (as would usually be the case), it will make the severance application.

The digital LPA
OPG has an online service for making LPAs. If you take advantage of this process you will be alerted at various stages to potential pitfalls so that you can avoid them before signing the LPA. For example, if you attempt to specify an attorney as a 'person to notify' (sometimes known as a 'named person' or 'person to be told'), it will not be accepted and you will be prompted to choose someone else. This will be more effective than just providing guidance which some donors may not understand or do not even read. In this way, the digital service plays its part in reducing the need for court applications to sever invalid provisions in LPAs.

You can make an LPA online at:
www.gov.uk/power-of-attorney/make-lasting-power

Jill Martin (legal adviser to the Public Guardian), January 2013
[Amended by OPG in June 2015 to remove reference to web pages that no longer exist and to update digital LPA section]