

“What do I care about law? Ain’t I got the power.”

[Buying and Selling Property using an LPA or Deputy]

- 2024 -

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Scenario

“You are instructed in the sale. Registered freehold title to 65 Wanderers Avenue, Bridgeton, in the names of Roy and Valerie Greaves. No restrictions or mortgages registered. Roy died in 2019. Val now lives in a rest home. She entered an LPA in 2021 appointing her grandson, Ryan Green, to be her attorney. Ryan has agreed to sell 65 Wanderers Avenue for £500,000 to James Wolfe to cover his grandmother’s rest home fees.”

- (a) Discuss steps to be taken where Ryan is the Attorney.
- (b) What if Ryan is a Deputy with a Form A restriction on the title?
- (c) Drafting considerations?

Kid gloves!

1. *“My fake sister tried to steal my home”.*
2. ss 14(3) and 14(4) of the Mental Capacity Act 2005
3. Rule 17 – Land Registration Rules 2003
4. SRA Guidance on accepting instructions from vulnerable clients or third parties acting on their behalf.

First steps...

1. Know your client
2. Authority to sell?
3. Protocol – yes, or no?
4. Check, correct, and deduce/investigate title
5. 'Right first time' on the paperwork

Deducing/Investigating Title

1. Examine the LPA - is it valid? Are there any conditions or restrictions in it?
2. If more than one Attorney, are they to act 'jointly' or 'jointly & severally'?
3. Does the Donor have capacity?
4. Full or Limited title guarantee?

Checking capacity

1. Under the Mental Capacity Act 2005, the following factors must be considered when assessing if someone has capacity to make decisions:
 - whether they can understand the information
 - whether they can retain the information related to the decision to be made
 - whether they can use or weigh that information as part of the process of making the decision
 - whether they can communicate that decision – by any means, including blinking an eye or squeezing a hand
2. Please remember that capacity is both time and decision specific.
3. The Attorney, when deciding for a Donor should:
 - consider if this is something the Donor would want?
 - determine if the Donor can be helped to make all or part of the decision
 - ensure that every decision is made in the Donor's best interests

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Progressing an LPA sale

- Where the Donor has capacity
- Where the Donor lacks capacity
- Is medical evidence needed?
- The contract
- The TR1
- Part 5, HMLR Practice Guide 9 - Joint Owners
- Part 9.5, HMLR Practice Guide 8 - Execution

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Enduring Power of Attorney

- Was it made before 1st October 2007?
- Where the Donor has capacity
- Where the Donor lacks capacity
- Does the EPA need to be registered?

Powers of Attorney Act 2023

The following changes are subject to secondary legislation on how they will be implemented and will come into force on a future date. Until then it is 'business as usual':

- Allow for digital LPAs
- ID checks on those applying for an LPA
- Only the Donor will be able to register the LPA
- Expand the group of people who can object
- Simplify the objection process
- Enable electronic record of LPAs for acceptance by financial institutions

NB – from 18.11.2023 Chartered Legal Executives can certify copies of LPAs.

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Sale by a Deputy

The Deputy must consider the following:

- Check there is authority to sell. If there is uncertainty or family conflict seek a determination by the Court of Protection.
- Obtain at least 2 valuations
- Negotiate the estate agency fee
- Obtain quotes for conveyancing fees from at least 3 firms
- Decide where P will live after the sale
- Clearing the property / removing valuable items / insurance
- Determine what to do with the sale proceeds, and
- Ensure the sale is in the **best interests** of P

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Purchase by a Deputy

- The Deputy must consider the following:
- Check there is authority to purchase. If there is uncertainty or family conflict seek a determination by the Court of Protection.
- What if P is a minor?
- Is the Property suitable for P's needs?
- Does P have sufficient funds to purchase the property, and will P be able to afford it going forward?
- Seek professional advice on any necessary adaptations to the property and on insurance
- Obtain quotes for conveyancing fees from at least 3 firms
- Arrange a full structural survey, and
- Ensure the purchase is in the **best interests** of P

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First steps again...

1. Know your client
2. Authority to sell?
3. Protocol – yes, or no?
4. Check, correct, and deduce/investigate title
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Authority to buy or sell

Attorney

- by virtue of the LPA or EPA

Deputy

HHJ Lush – general authority – older orders

HHJ Hilder – specific authority needed – newer orders

NB – HMLR will query ‘general authority’ orders

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Drafting - LPA

Attorney sale:

1. In the contract the Seller should be described as: *Valerie Greaves acting by her attorney, Ryan Green.*
2. The same wording should be used in box 4 of the TR1 to describe the Transferor.
3. In box 9 of the TR1 place an 'X' against whichever title guarantee the Donor is able to provide.
4. In box 12 - execution - the attestation clause should read: *Signed as a Deed by Valerie Greaves, acting by her attorney Ryan Green in the presence of:*

Drafting - Deputy - Sale

Deputy sale:

1. As to the Contract the Seller should be shown as *“Valerie Greaves by her Deputy, Ryan Green”*.

2. The following Special Condition should also be added:

“The Seller is selling with limited title guarantee by her Deputy pursuant to an Order of the Court of Protection dated Copies of the said Order and of the Order appointing the Seller as Deputy have been supplied to the Buyer’s conveyancers and shall be deemed to be conclusive evidence of the Seller’s authority to sell. The Buyer and his conveyancers shall not be entitled to raise any requisition or objection relating thereto”.

3. As to the TR1:

Box 4 should read: *“Valerie Greaves acting by her Deputy Ryan Green pursuant to an Order of the Court of Protection dated”*

Attestation clause should read: *Signed as a Deed by Valerie Greaves by the said Ryan Green acting as aforesaid in the presence of:”*

The Title Guarantee will be the level that P is able to provide.

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Drafting - Deputy - Purchase

Deputy purchase:

Contract:

Buyer: Valerie Greaves acting by Jackson Lees Trust Corporation Limited whose registered office address is 3rd Floor, Walker House, Exchange Flags, Liverpool, L2 3YL

TR1:

Box 5 - *Valerie Greaves acting by Jackson Lees Trust Corporation Limited. [Add - JLTC Limited company number in appropriate space]*

Box 6 - *care of Jackson Lees Trust Corporation Limited whose registered office is situated at 3rd Floor, Walker House, Exchange Flags, Liverpool, L2 3YL*

Box 12 - NO need for JLTC Limited to sign (as there is no indemnity covenant being given)

NB – No reference must be made to P's capacity
(or lack of capacity)

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Sale and Co-owner lack capacity

1. ATTORNEY (LPA or EPA)

They acquire trustee functions in respect of trusts of land under the Trustee Delegation Act 1999.

2. DEPUTY

- s20(3)(c) Mental Capacity Act – restricts Deputies from exercising trustee functions.
- s36(9) Trustee Act 1925 – application by a continuing trustee for an order to appoint a new trustee in place of the incapable person.
- S54 Trustee Act 1925 – application for an order appointing 2 trustees in place of the surviving incapable person.

3. MINORS

- 2 trustees must be appointed by order on a purchase where the minor is incapable. There must be a Deed of Trust.
- Deed of Trust must be supplied to the Court upon completion.

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SDLT/LTT issues

Adult Sole Buyer

- the Return should detail the 'adult' as the purchaser
- it should state the 'adult's' National Insurance number
- the duty payable (if any) will be based on the consideration and on the 'adult' (e.g., if first time buyer)
- the Deputy / Attorney can sign the Return

Minor or buying as Co-owner

- the Return will show the Trustees as per the DoT as the purchasers
- it should show one of the Trustee's National Insurance number or if a Trust Corporation its UTRN
- duty (if any) based on a bare trust and consideration
- the Trustees will sign the Return

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Fees

Attorney

- Charge your usual sale or purchase rates
- Add extra fees ((if applicable) for checking capacity, home visit, dealing with a second trustee and creating a Deed of Trust

Deputy

- Subject to CoP Practice Direction 19B (from 1ST April 2024)
- Obtain 3 quotes (including one from your firm) as per *Re ACC [2020] EWCOP*
- Accepted quote must be in the best interests of P
- The decision must be included in the Deputy's report to the OPG
but does not need prior approval unless Deputy plans to
use own firm and the quote exceeds £2,000 + vat.

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What about our scenario?

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Useful Guides

HMLR

Practice Guide 6: devolution on the death of a registered proprietor

Practice Guide 8: execution of deeds

Practice Guide 9: powers of attorney and registered land

Practice Guide 24: private trusts of land

OPG/CoP

PN7 - giving gifts

Practice Direction 9F - applications to appoint or discharge a trustee

Guidance on the Sale of Jointly Owned Property

Practice Direction 19B - Fixed Costs and Deputy Remuneration in the Court of Protection

SRA

Accepting instructions from vulnerable clients or third parties acting on their behalf.

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Many thanks for attending

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