

## Electronic Execution of Documents

### Consultation Response: Wedlake Bell LLP

Wedlake Bell LLP is a central London law firm over 200 years old. It has 66 partners and is one of the top 100 firms in the UK on turnover<sup>1</sup>.

The firm welcomes the opportunity to respond to the Law Commission's Electronic Execution of Documents Consultation Paper dated 21 August 2018 ("**the Consultation Paper**").

Wedlake Bell's response has been prepared by its Private Client team and is limited to the section of the Consultation affecting older or vulnerable individuals.

Wedlake Bell's Private Client team has extensive experience of acting for individuals who may lack mental capacity to manage their affairs and make decisions for themselves or who wish to prepare for this. Our advice includes the preparation of Lasting Powers of Attorney ("**LPAs**"), advising attorneys and/or family members on existing LPAs, making Deputyship applications to the Court of Protection and advising on and acting in Court of Protection applications on behalf of vulnerable individuals. Due to the team's wide-ranging experience in this area and the importance of the Consultation Paper to this category of clients, we have chosen to limit our response to this specific area.

Wedlake Bell's Private Client team is ranked in the Legal 500 2018 (tier 3) and was shortlisted in the Society for Trust and Estate Practitioners ("**STEP**") Private Client Awards 2018/19 for "Private Client Legal Team of the Year (midsize firm)". Partner and specialist in the area of mental capacity work, Ann Stanyer, is a professional attorney for many clients and an advocate for action in respect of the financial abuse of vulnerable people. She is author of "*Financial Abuse of Older Clients: Law, Practice and Prevention*" (Bloomsbury, 2017), a member of Solicitors for the Elderly and has had regular press coverage<sup>2</sup> writing on and raising awareness of this important issue.

#### Consultation Question 4

*We believe that where specific provision is necessary in relation to certain types of documents (for example, to protect vulnerable parties, particularly for lasting powers of attorney), that is a matter for specific legislation or regulation, and not for the general law of execution of documents. Do consultees agree?*

We do agree. As rightly stated at 6.34 of the Consultation Paper, the ability to execute an LPA electronically raises questions about whether it creates additional opportunities for fraud and financial abuse. The proposal that documents should be capable under general law of being executed electronically should not be extended to documents such as LPAs which are commonly executed by elderly and vulnerable individuals. As noted at 6.37 and 6.40 of the Consultation Paper, this is a matter for the Office of the Public Guardian ("**OPG**") who should consider what is sufficiently secure and reliable for individuals before introducing any specific system on electronic signatures for LPAs and similar documents.

As noted at 6.37 of the Consultation Paper, at the moment it is possible to create an LPA online but the document must be printed off and wet signatures (which are properly witnessed) should be obtained from all the parties for it to be valid. The responses to the OPG's paper "Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default" (August 2014) ("**the OPG Paper**") emphasised that the removal of wet signatures would reduce protection for consumers. A wet signature

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<sup>1</sup> The Lawyer's top 200 UK law firms 2018 by revenue (ranking: 83).

<sup>2</sup> Recent press coverage includes The Financial Times, The Telegraph, The Times, the STEP Journal and The Law Society Gazette.

is probably the only conclusive way of evidencing the donor's identity and true intention to execute an LPA. Additionally, wet signatures are more easily challenged where there are concerns, as the handwriting can be analysed; whereas, this is just not possible with digital signatures.

The OPG Paper and the Consultation Paper both recognise the problem of "digital poverty" as the elderly have much more limited access to the internet, quite often relying on assistance from family and friends to use it. In particular, having to remember online passwords does not lend itself to easy internet access as clients get older. It is also very often those close family members assisting elderly relatives in accessing the internet who may be the persons responsible for financial abuse.

An electronic LPA will offer a speedier and more practical means of execution and it is easy to see that family members could persuade their elderly relative to execute in that way, particularly if it avoids the relative needing to travel to a solicitor's office or similar to have the document witnessed. However, as the Consultation Paper notes, an LPA can have "devastating consequences" if executed under duress or fraudulently. We have seen all too often at first hand the damage that can be done where attorneys abuse their position of trust, usually involving an attorney taking substantial sums of money and/ or assets from the donor for their own benefit, as we have been involved in a number of Court of Protection cases for redress for the donor in these circumstances. In our opinion, if electronic signatures are introduced for LPAs, this type of financial abuse will only increase.

We understand that in the interests of modernisation, practicality, economy and keeping pace with a society that increasingly works and operates digitally, consideration should continue to be given to full digitisation of LPA production. However, it is not clear in our view how full digitisation and removal of wet signatures can ever provide the safeguards required for the elderly and vulnerable consumer. Until sufficient technology exists to provide those safeguards, wet signatures, independent witnessing and the use of certificate providers (of which, a requirement for this to be a professional would help, as is the case in Scotland) should remain so that consumers, and their families, can be assured that their LPA has been properly executed and the risk of future financial abuse minimised.

To the extent that this technology is developed in future, we agree that this is a matter for specific legislation that can target the particular risks.

**Wedlake Bell LLP**

23 November 2018

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