

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

SCHEDULES

Schedule 1: Lasting powers of attorney: formalities

Part 1: Making instruments

158. This Part sets out the requirements with regard to the form and execution of an LPA. A document which fails to comply with the provisions of this Schedule or regulations made under it will not generally create an LPA and consequently will not give any powers to the donee. An LPA must be in the form prescribed by regulations. The form must also contain statements by both the donor and the donee of the power to the effect that they have read, or have had read to them, such information as may be prescribed. The LPA must include names of any persons whom the donor wishes to be notified of any application to register the LPA (“named persons”) or a statement that there are no such persons.
159. The form must also include a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument he understands the purpose of the instrument and the scope of the authority conferred, that no fraud or undue pressure is being used to induce him to create an LPA, and that there is nothing else that would prevent an LPA from being created by the instrument. The Public Guardian may treat an LPA differing in an immaterial respect from the prescribed form as sufficient to create an LPA. The Court of Protection has the power to make a declaration that an instrument not in the prescribed form is to be treated as if it were, if satisfied that the persons executing the instrument intended to create an LPA.

Part 2: Registration

160. The powers given in an LPA to the donee cannot be exercised until the document has been registered. In order to register an LPA an application must be made by the donor or donee(s) to the Public Guardian. When about to apply to register the LPA, the donor or donee(s) must notify the named persons to inform them of the pending registration. The Public Guardian is required to notify the donor or donee(s) (depending on who makes the application). The court will have the power to dispense with the notification requirement on the application of either the donor or donee.
161. If the instrument received by the Public Guardian is flawed in some way (that is, it is ineffective, or contains a provision that would make it inoperable as an LPA), the Public Guardian must refer it to the Court of Protection and must not register the instrument in the interim. The court can either remove (or “sever”) the offending provision from the instrument or direct the Public Guardian not to register the LPA instrument. If the court severs a provision, the Public Guardian can then register the instrument, but must attach a note to that effect to it.
162. Objections can be made to the registration of the LPA within a prescribed period. An objection by a donor to registration by the donee(s) must be made to the Public Guardian and the court will only direct him to register the LPA if satisfied that the donor lacks

capacity to object. An objection by a donee or named person on the basis that the LPA has been revoked (for example, because of bankruptcy of the donee) must also be made to the Public Guardian who, if satisfied, will not register the LPA. If the person wishing to register the LPA disagrees with the Public Guardian's decision not to register the instrument, he can apply to the court. If the court finds that the grounds for the Public Guardian objecting to registration are not established, the court can direct the Public Guardian to register the LPA. An objection by a donee or named person on such other grounds as may be prescribed must be made to the court. The Public Guardian must not register the instrument, unless told to do so by the court, where it appears to him that there is a deputy appointed for the donor and that the powers of the deputy would conflict with the powers to be conferred on the donee.

Part 3: Cancellation of registration and notification of severance

163. The Public Guardian will cancel an LPA if he is satisfied that the power has been revoked on the basis of:
- the donor's bankruptcy;
 - the donee giving up his/her appointment by exercising a disclaimer;
 - the death of the donee;
 - the insolvency of the donee;
 - the dissolution or annulment of a marriage or civil partnership between donor and donee; and
 - the lack of capacity of the donee.
164. The court must direct the Public Guardian to cancel the registration of an LPA if the court:
- decides that a requirement for creating the LPA was not met;
 - decides that the power has been revoked or otherwise come to an end; or
 - revokes the power on fraud or undue pressure grounds.
165. On cancellation of the registration of an LPA the Public Guardian will notify both the donor and donee to this effect. Where the court has removed a provision from an instrument, *paragraph 19(2)(a)* requires the court to notify the Public Guardian of the severance of that provision. And where the court determines that a provision in an instrument means that instrument cannot operate as a valid LPA, *paragraph 19(2)(b)* requires the court to direct the Public Guardian to cancel the registration of that instrument as an LPA.

Part 4: Records of alterations in registered powers

166. A note of any revocation of an LPA, because of the donor or donee's bankruptcy, which only takes effect in so far as the power relates to the property and affairs of the donor will be attached to the LPA by the Public Guardian. The Public Guardian must also attach a note to an instrument if an event has terminated the appointment of the donee but not revoked the instrument (for example, if there is more than one donee), where a donee's ability to act has been suspended by the making of an interim bankruptcy restrictions order or the appointment of the donee has been replaced under the terms of the LPA. The Public Guardian must give the donor and donee notice of any notes attached to the LPA. Where the court has notified the Public Guardian that it has removed a provision from an instrument, *paragraph 24* requires that the Public Guardian must attach a note to that effect to the instrument.

Schedule 2: Property and affairs: supplementary provisions

167. This contains detailed provisions relating to the court's powers in relation to property and affairs, in particular the making of wills and settlements. *Paragraphs 1 to 4* deal with wills that can be made on behalf of an adult lacking capacity. These are generally known as "statutory wills" when made under the Mental Health Act 1983, Part 7. *Paragraphs 5 and 6* concern settlements, that is putting a person's property into a trust. *Paragraph 7* enables the court to direct the transfer of stocks to a person appointed outside England and Wales.
168. *Paragraph 10* specifies that only a representative appointed by the Court of Protection may exercise the powers which the person concerned has as patron of a benefice. A benefice is a freehold office in the Church of England, such as the vicar or rector of a parish, and the patron of a benefice has the right to present a priest for admission to that benefice. The representative must be an individual capable of appointment by a patron as his representative under section 8(1)(b) of the Patronage (Benefices) Measure 1986. This means he must be a communicant member of the Church of England (or of a Church in communion with it) or a clerk in Holy Orders. The representative will discharge the person's functions as patron of the benefice not only presenting a priest to a vacant benefice, but also performing other functions of the patron such as acting as a consultee when there is a proposal to suspend presentation under section 67 of the Pastoral Measure 1983. In discharging his functions, the representative is subject to the provisions of the 1986 Measure in the same way that a representative appointed by a patron with capacity would be.

Schedule 3: International protection of adults

169. This makes provision as to the private international law of England and Wales in relation to persons who cannot protect their interests. In particular, it gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2000 (Cm. 5881) (the "Hague Convention") (the text of which is available at: <http://www.hcch.net/e/conventions/menu35e.html>).
170. It should be noted that for the purposes of the Hague Convention, England and Wales, Scotland and Northern Ireland are treated separately because they constitute separate jurisdictions. The provisions of *Schedule 3* are intended to be compatible with the provisions of Schedule 3 to the Adults with Incapacity (Scotland) Act 2000 which provided for the private international law of Scotland in this field and implemented the Hague Convention for Scotland. Scotland is as yet the only country to have ratified the Convention, which will enter into force only once it has been ratified by three states. However, *Schedule 3* provides private international law rules to govern jurisdictional issues between Scotland and England/Wales, irrespective of whether the Convention is in force.

Part 1: Preliminary

171. This Part contains relevant definitions and introductory provisions. The definition of "adult" in *paragraph 4* is consistent with the Act but is not the same as the definition provided in the Hague Convention.

Part 2: Jurisdiction of competent authority

172. *Part 2* of the Schedule provides the grounds, based on Articles 5 to 11 of the Hague Convention, on which the Court of Protection will exercise its jurisdiction under the Act when dealing with cases with an international element. *Paragraph 7(1)* provides that the court may exercise its jurisdiction in relation to: an adult habitually resident in England and Wales; an adult's property in England and Wales; an adult present in England or Wales or who has property there, if the matter is urgent; or an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.

173. *Paragraph 7(2)* provides that an adult present in England and Wales is to be treated as habitually resident if his habitual residence cannot be ascertained, he is a refugee or he has been displaced as a result of disturbance in the country of his habitual residence.
174. Once the provisions of the Convention are in force the court will also be able to exercise jurisdiction, in so far as it cannot otherwise do so under the provisions of *paragraph 7*, in relation to a British citizen with a closer connection with England and Wales than with Scotland or Northern Ireland. The jurisdiction may be exercised provided that the court considers that it is in a better position to assess the interests of the adult, that certain requirements as to notification of other Convention countries are complied with and that other Convention countries which may have jurisdiction on certain grounds have not dealt, or are not dealing with the matter (*paragraph 8(2)(c)* and Article 7 of the Hague Convention).

Part 3: Applicable law

175. *Part 3* of the Schedule makes provision as to which law is to apply in various situations. Although the Court of Protection will normally apply the law of England and Wales, and the conditions of implementation of any protective measure taken abroad will be governed by the law of England and Wales if implemented here, the court may apply the law of another country if it thinks that a matter has a substantial connection with that country (*paragraphs 11 and 12*).
176. In addition the donor of a foreign power akin to an LPA may specify that the law applicable to the existence, extent, modification or extinction of the power is to be the law of a country of which he is a national, in which he is habitually resident, or in which he has property. If the power is exercised in England and Wales the law of England and Wales shall, however, apply to the manner of the exercise of the power. Regulations may apply the provisions of *Schedule 1* (lasting powers of attorney: formalities) to such foreign powers (*paragraphs 15*).
177. The court may disapply or modify a lasting power (including a foreign power) where the power is not exercised in a manner sufficient to guarantee the protection of the donor or his property. In these circumstances the court must, so far as possible, have regard to any foreign law applicable by virtue of this (*paragraph 14*).
178. This Part provides protection for a third party who enters into a transaction with a representative on behalf of a person, where that representative was actually not entitled so to act under the law of a country other than England and Wales applicable by virtue of this Part. Protection is provided if the third party neither knew nor ought to have known that such a law was applicable (*paragraph 16*); ensures that mandatory provisions of the law of England and Wales apply regardless of any other system of law that would apply (*paragraph 17*); and provides that nothing in this Part of the Schedule requires or enables the application in England and Wales of a provision of the law of another country that is manifestly contrary to public policy (*paragraph 18*).

Part 4: Recognition and enforcement

179. *Part 4* of the Schedule provides for the recognition and enforcement of protective measures taken in other countries. It provides that a protective measure is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country. It also provides that a protective measure taken in another Convention country is to be recognised provided that it was taken on a ground provided for in the Convention (the same grounds on which the Court of Protection will exercise jurisdiction under Part 2) (*paragraph 19(1) and (2)*).
180. However the court may refuse to recognise a protective measure where it thinks that the case in which the measure was taken was not urgent, the adult was not given an opportunity to be heard, and that omission amounted to a breach of natural justice. The court may also refuse to recognise a protective measure if recognition of the measure

would be manifestly contrary to public policy, the measure would be inconsistent with a mandatory provision of the law of England and Wales, or the measure is inconsistent with one subsequently taken or recognised in relation to the adult (*paragraph 19(3)* and *(4)*).

181. *Paragraph 20* provides for any interested person to apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales.
182. *Paragraph 22* provides for an interested person to apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than England and Wales is enforceable, or to be registered, in England and Wales in accordance with Court of Protection Rules.

Part 5: Co-operation

183. *Part 5* of the Schedule provides for co-operation between authorities in England and Wales and authorities in other Convention countries.

Part 6: General

184. *Part 6* includes powers to make further provision as to private international law by Order in Council and regulations (*paragraphs 31* and *32*). An Order in Council under *paragraph 31* will be subject to the negative resolution procedure in Parliament. Regulations under *paragraph 32(1)(b)* will be subject to the affirmative resolution procedure (see *section 65*).

Schedule 4: Provisions applying to existing enduring powers of attorney

185. This Schedule has effect in relation to any EPAs remaining at the time of the repeal of the Enduring Powers of Attorney Act 1985. It ensures that such instruments will continue to have the same legal effect as they had at the time they were made. They will also continue to be governed by the legal rules and procedures which were in place at the time they were made. The Schedule therefore restates with amendments the relevant provisions of the Enduring Powers of Attorney Act 1985. The amendments relate to the distribution of the functions of the original Court of Protection between the new Court of Protection and the new office of the Public Guardian.

Part 1: Enduring powers of attorney

186. *Part 1* sets out the main elements of EPAs. They are not revoked by any subsequent mental incapacity of the donor of the power, unlike ordinary powers of attorney. Such a power is only created if it is in the prescribed form and complies with the provisions in *paragraph 2* of this Part. This Part also deals with the scope of EPAs. Both general and specific powers may be subject to conditions and restrictions as set out by the donor. A donee may from time to time make gifts from the donor's property to people connected to the donor (including himself) and to any charity the donor may have been expected to make gifts to. This is subject to any conditions or restrictions as mentioned above and also to the reasonableness of such gifts with regard to the size of the donor's estate.

Part 2: Action on actual or impending incapacity of donor

187. This Part outlines the steps which should be taken on the actual or impending incapacity of the donor. Once the attorney believes that the donor is or is becoming mentally incapacitated he or she must immediately make an application to the Public Guardian to register the power. Part 3 deals with the steps which must be taken before the application to the Public Guardian is made. The application for registration must be made in the prescribed form and must contain the appropriate statements (as prescribed by regulations).

Part 3: Notification prior to registration

188. **Part 3** sets out the steps which should be taken by the attorney before making an application to the Public Guardian to register the power. The attorney must give notice of his intention to register the power to all those entitled to receive notice. These people can include the donor's spouse or current partner, the donor's children and the donor's parents. The attorney is also under a duty to give notice of his intention to register to the donor. The attorney may apply to the court to dispense with this requirement to give notice to entitled persons. Notices should be in the prescribed form and must contain specific information, especially with regard to the right of that person to object to registration.

Part 4: Registration

189. Where an application for registration is made in accordance with the provisions of Part 2, the Public Guardian must register the instrument unless a valid notice of objection has been made in accordance with the provisions of this part. A notice of objection is valid if made on one or more of the following grounds:
- that the power was not valid as an EPA;
 - that the power created no longer exists;
 - that the application is premature because the donor is not yet becoming mentally incapable;
 - that fraud or undue pressure was used to induce the donor to create the power;
 - that, having regard to all the circumstances, the donee is unsuitable to be the donor's attorney.
190. It is for the court to decide whether any of those grounds is actually made out and if so it must direct the Public Guardian not to register the instrument. If the court is satisfied that fraud or undue pressure was used or that the donee is unsuitable, then it must also order the revocation of the power created by the instrument.
191. Where it appears that there is no one to whom notice has been given or the Public Guardian has reason to believe that appropriate inquiries might bring to light evidence on which he could be satisfied that one of the valid grounds of objection was established, he must not register the instrument and must undertake such inquiries as he thinks appropriate. If, after those inquiries, he considers one of the grounds of objection to be made out, he must apply to the court for directions and must not register the instrument except in accordance with such directions. The Public Guardian must not register an EPA if a deputy has been appointed and the powers of the attorney would conflict. Again, the court may give directions.

Part 5: Legal position after registration

192. Once an EPA has been registered any revocation of the power must be confirmed by the court. A disclaimer by the attorney is not valid until the attorney has given notice of such to the Public Guardian. Furthermore, the donor cannot alter in any way the scope of the power given in the registered power. This Part also sets out the role of the court with regard to registered powers. The court has a number of functions, not least the power to decide any question about the meaning or effect of an EPA. The court is also under an obligation to direct the Public Guardian to cancel the registration of a power in a number of circumstances (for example, if it is satisfied that the donor is and is likely to remain capable or that undue force or pressure was put on the donor to create the power). The full list of circumstances is given in *paragraph 16(4)*. This Part also lists the circumstances under which the Public Guardian is obliged to cancel the registration of a power, such as on receipt of a disclaimer from the attorney.

Part 6: Protection of attorney and third parties

193. This Part provides protection for those who act under a power which is invalid as long as at the time of acting they did not know that the power was invalid or that, had the EPA been valid, either an event had occurred which would have revoked the power or that the power would have expired. Any transaction between an attorney and another person is valid unless that person is aware of any of those matters.

Part 7: Joint and joint and several attorneys

194. A document which appoints more than one attorney cannot create an EPA unless the attorneys are appointed to act jointly or jointly and severally. Where attorneys are appointed to act jointly and severally, if one of them fails to comply with the necessary requirements for the creation of an EPA, then the document will not create a power in his case. But this will not affect the creation of a power in relation to the other attorneys. If one or more (but not both or all) of the attorneys applies to register the document, they must notify the other attorney(s) of this.

Schedule 5: Transitional provisions and savings

195. *Schedule 5* sets out transitional arrangements arising from the repeal of Part 7 of the Mental Health Act 1983 and repeal of the Enduring Powers of Attorney Act 1985.
196. In particular, Part 1 sets out provisions for enabling receivers appointed under the Mental Health Act 1983 to continue. *Paragraph 1(2)* provides that after implementation the Act shall apply as if any receiver for the person were, in fact, a deputy appointed in relation to that person, but only with the functions he had as a receiver. Part 2 allows for the continuation of procedural matters (e.g. appeals and other legal proceedings) relating to EPAs which remain in place by the time the Enduring Powers of Attorney Act 1985 is repealed.