

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

Lasting powers of attorney

Section 9: Lasting powers of attorney

48. *Sections 9 to 14* create a new statutory form of power of attorney, the “lasting power of attorney” (or LPA). This replaces the “enduring power of attorney” (or EPA) provided for by the Enduring Powers of Attorney Act 1985. The 1985 Act is repealed by section 66(1)(b), but the legal effect of an EPA already made under the current law is preserved and integrated into the scheme of the Act by *section 66(3)* and *Schedule 4*.
49. *Section 9* sets out the key aspects of an LPA. Unlike an EPA, it can extend to personal welfare matters (*subsection (1)(a)*) as well as to property and affairs. By making an LPA, an individual (the donor) confers on another individual or individuals (donee/s) authority to make decisions about the donor’s personal welfare and/or property and affairs or specified matters concerning those areas. Power to make decisions includes, by virtue of *section 64(2)*, acting on decisions made where appropriate.
50. *Subsection (1)* also makes clear that to be valid an LPA must include authority to make decisions when the donor no longer has capacity to make those decisions himself. An LPA can, in certain circumstances, operate as an ‘ordinary’ power of attorney when the donor has full mental capacity but it will also continue to operate after the donor has lost capacity.
51. *Subsection (2)* deals with the creation of an LPA. The donor must be aged 18 or over and have capacity to execute an LPA. The rules in section 10 about who can be a donee must be complied with. Detailed provisions about the making and registration of the instrument, as set out in *Schedule 1*, must be complied with. If the rules are not complied with the document created will not be a valid LPA and cannot be lawfully used to make decisions on behalf of the donor (*subsection (3)*).
52. *Subsection (4)* reiterates that any donee must apply the principles set out in *section 1* and act in the donor’s best interests. A donee’s authority is also subject to any conditions or restrictions that the donor may choose to put in the LPA document itself.