

# MENTAL CAPACITY ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 1: Persons Who Lack Capacity**

##### **Lasting powers of attorney**

##### *Section 10: Appointment of donees*

53. This sets out certain requirements relating to donees and how they should act. A donee must be aged 18 or over. Someone who is bankrupt cannot be appointed as the donee of an LPA relating to property and affairs. If the LPA relates only to property and affairs, the donee can be either an individual or a trust corporation (defined in section 68(1) of the Trustee Act 1925 as the Public Trustee or a corporation appointed by the court in any particular case to be a trustee, or entitled by rules made under section 4(3) of the Public Trustee Act 1906, to act as custodian trustee).
54. *Subsection (4)* provides that where two or more people are appointed as donees, they may be appointed either to act jointly (so that they must all join together in any decision) or to act jointly and severally (which means they can act all together or each of them can act independently). The donor may also appoint two or more persons to act jointly in respect of some matters and jointly and severally in respect of others. To the extent that the donor does not specify in the instrument whether donees are to act jointly or jointly and severally, it will be assumed from the instrument that they are appointed to act jointly (*subsection (5)*).
55. For joint attorneys, any breach of the relevant rules about how lasting powers of attorney are made will prevent a valid LPA being created (*subsection (6)*). For “joint and several” attorneys, a breach only affects the attorney who is in breach; a valid LPA is still created in respect of the other donee(s) (*subsection (7)*).
56. *Subsection (8)* allows a donor to provide for the replacement of the donee(s) on the occurrence of a specified event which would normally terminate a donee’s powers. The specified events are: the donee renouncing his appointment, the donee’s death or insolvency, the dissolution or annulment of a marriage or civil partnership between the donor and the donee or the lack of capacity of the donee. For example, an older donor might wish to appoint his spouse, but nominate a son or daughter as a replacement donee. A donee cannot be given power to choose a successor (*subsection (8)(a)*) as this would be inconsistent with the core principle that the donor is giving authority to a chosen attorney. A civil partnership is a registered relationship between two people of the same sex which ends only on death, dissolution or annulment, as provided for in the Civil Partnership Act 2004.