



# Mental Capacity Act 2005

## 2005 CHAPTER 9

### PART 1

#### PERSONS WHO LACK CAPACITY

##### *Lasting powers of attorney*

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

- (1) A lasting power of attorney is a power of attorney under which the donor (“P”) confers on the donee (or donees) authority to make decisions about all or any of the following—
  - (a) P’s personal welfare or specified matters concerning P’s personal welfare, and
  - (b) P’s property and affairs or specified matters concerning P’s property and affairs,and which includes authority to make such decisions in circumstances where P no longer has capacity.
- (2) A lasting power of attorney is not created unless—
  - (a) section 10 is complied with,
  - (b) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1, and
  - (c) at the time when P executes the instrument, P has reached 18 and has capacity to execute it.
- (3) An instrument which—
  - (a) purports to create a lasting power of attorney, but
  - (b) does not comply with this section, section 10 or Schedule 1,confers no authority.
- (4) The authority conferred by a lasting power of attorney is subject to—
  - (a) the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests), and

- (b) any conditions or restrictions specified in the instrument.

## **10 Appointment of donees**

- (1) A donee of a lasting power of attorney must be—
  - (a) an individual who has reached 18, or
  - (b) if the power relates only to P's property and affairs, either such an individual or a trust corporation.
- (2) An individual who is bankrupt may not be appointed as donee of a lasting power of attorney in relation to P's property and affairs.
- (3) Subsections (4) to (7) apply in relation to an instrument under which two or more persons are to act as donees of a lasting power of attorney.
- (4) The instrument may appoint them to act—
  - (a) jointly,
  - (b) jointly and severally, or
  - (c) jointly in respect of some matters and jointly and severally in respect of others.
- (5) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly.
- (6) If they are to act jointly, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 prevents a lasting power of attorney from being created.
- (7) If they are to act jointly and severally, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1—
  - (a) prevents the appointment taking effect in his case, but
  - (b) does not prevent a lasting power of attorney from being created in the case of the other or others.
- (8) An instrument used to create a lasting power of attorney—
  - (a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor, but
  - (b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 13(6)(a) to (d) which has the effect of terminating the donee's appointment.

## **11 Lasting powers of attorney: restrictions**

- (1) A lasting power of attorney does not authorise the donee (or, if more than one, any of them) to do an act that is intended to restrain P, unless three conditions are satisfied.
- (2) The first condition is that P lacks, or the donee reasonably believes that P lacks, capacity in relation to the matter in question.
- (3) The second is that the donee reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (4) The third is that the act is a proportionate response to—
  - (a) the likelihood of P's suffering harm, and
  - (b) the seriousness of that harm.

- (5) For the purposes of this section, the donee restrains P if he—
  - (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
  - (b) restricts P's liberty of movement, whether or not P resists,or if he authorises another person to do any of those things.
- (6) But the donee does more than merely restrain P if he deprives P of his liberty within the meaning of Article 5(1) of the Human Rights Convention.
- (7) Where a lasting power of attorney authorises the donee (or, if more than one, any of them) to make decisions about P's personal welfare, the authority—
  - (a) does not extend to making such decisions in circumstances other than those where P lacks, or the donee reasonably believes that P lacks, capacity,
  - (b) is subject to sections 24 to 26 (advance decisions to refuse treatment), and
  - (c) extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P.
- (8) But subsection (7)(c)—
  - (a) does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect, and
  - (b) is subject to any conditions or restrictions in the instrument.

## **12 Scope of lasting powers of attorney: gifts**

- (1) Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).
- (2) The donee may make gifts—
  - (a) on customary occasions to persons (including himself) who are related to or connected with the donor, or
  - (b) to any charity to whom the donor made or might have been expected to make gifts,if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.
- (3) "Customary occasion" means—
  - (a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or
  - (b) any other occasion on which presents are customarily given within families or among friends or associates.
- (4) Subsection (2) is subject to any conditions or restrictions in the instrument.

## **13 Revocation of lasting powers of attorney etc.**

- (1) This section applies if—
  - (a) P has executed an instrument with a view to creating a lasting power of attorney, or
  - (b) a lasting power of attorney is registered as having been conferred by P,

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*Status: This is the original version (as it was originally enacted).*

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and in this section references to revoking the power include revoking the instrument.

- (2) P may, at any time when he has capacity to do so, revoke the power.
- (3) P's bankruptcy revokes the power so far as it relates to P's property and affairs.
- (4) But where P is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the power is suspended, so far as it relates to P's property and affairs, for so long as the order has effect.
- (5) The occurrence in relation to a donee of an event mentioned in subsection (6)—
  - (a) terminates his appointment, and
  - (b) except in the cases given in subsection (7), revokes the power.
- (6) The events are—
  - (a) the disclaimer of the appointment by the donee in accordance with such requirements as may be prescribed for the purposes of this section in regulations made by the Lord Chancellor,
  - (b) subject to subsections (8) and (9), the death or bankruptcy of the donee or, if the donee is a trust corporation, its winding-up or dissolution,
  - (c) subject to subsection (11), the dissolution or annulment of a marriage or civil partnership between the donor and the donee,
  - (d) the lack of capacity of the donee.
- (7) The cases are—
  - (a) the donee is replaced under the terms of the instrument,
  - (b) he is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining donee.
- (8) The bankruptcy of a donee does not terminate his appointment, or revoke the power, in so far as his authority relates to P's personal welfare.
- (9) Where the donee is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, his appointment and the power are suspended, so far as they relate to P's property and affairs, for so long as the order has effect.
- (10) Where the donee is one of two or more appointed to act jointly and severally under the power in respect of any matter, the reference in subsection (9) to the suspension of the power is to its suspension in so far as it relates to that donee.
- (11) The dissolution or annulment of a marriage or civil partnership does not terminate the appointment of a donee, or revoke the power, if the instrument provided that it was not to do so.

#### **14 Protection of donee and others if no power created or power revoked**

- (1) Subsections (2) and (3) apply if—
  - (a) an instrument has been registered under Schedule 1 as a lasting power of attorney, but
  - (b) a lasting power of attorney was not created,
 whether or not the registration has been cancelled at the time of the act or transaction in question.

- (2) A donee who acts in purported exercise of the power does not incur any liability (to P or any other person) because of the non-existence of the power unless at the time of acting he—
  - (a) knows that a lasting power of attorney was not created, or
  - (b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated his authority to act as a donee.
- (3) Any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence, unless at the time of the transaction that person has knowledge of a matter referred to in subsection (2).
- (4) If the interest of a purchaser depends on whether a transaction between the donee and the other person was valid by virtue of subsection (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if—
  - (a) the transaction was completed within 12 months of the date on which the instrument was registered, or
  - (b) the other person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.
- (5) In its application to a lasting power of attorney which relates to matters in addition to P's property and affairs, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power is revoked) has effect as if references to revocation included the cessation of the power in relation to P's property and affairs.
- (6) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.