

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 The 1985 Act is repealed by section 66(1)(b), but the legal effect of an EPA already made under the current law is preserved and integrated into the scheme of the Act by *section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.

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.

Section 11: Lasting powers of attorney: restrictions

57. *Subsections (1) to (4)* place restrictions on the use of restraint by attorneys, matching those applying in relation to “[section 5 acts](#)” (see [section 6](#)) and deputies (see [section 20](#)). Restraint can only be used to prevent harm, and must be proportionate. *Subsection (6)* makes clear that for [section 11](#) a deprivation of liberty within the ECHR meaning amounts to more than mere restraint.
58. Further restrictions are set out in *subsection (7)*. An attorney cannot act where the donor has capacity, or where the donor has made a qualifying advance decision (see [sections 24 to 26](#)). *Subsection 7(c)* has to be read with *subsection (8)*. Thus, although an attorney may give or refuse consent to the carrying out or continuation of health care, this would not extend to refusing life-sustaining treatment unless the LPA expressly said so, and is subject to any conditions or restrictions in the LPA.

Section 12: Scope of lasting powers of attorney: gifts

59. This is similar to section 3(5) of the Enduring Powers of Attorney Act 1985 and deals with an attorney’s power to make gifts of the donor’s property. The attorney can only do something that is in the donor’s best interests but this section operates as a specific restriction in relation to gifts. It allows modest gifts proportionate to the donor’s assets to people related or connected to the donor (including himself) on “customary occasions”, as defined; and to charities (subject to any conditions or restrictions in the LPA itself). The court has power to authorise more substantial gifts (see [section 23\(4\)](#)) if satisfied this would be in the donor’s best interests. For example, if an older person has substantial assets then tax planning might be a reason for the making of gifts.

Section 13: Revocation of lasting powers of attorney

60. This deals with the ways in which LPAs may cease to be effective, whether before or after registration. A donor may revoke an LPA at any time while he has capacity to do so (*subsection (2)*). Other events will automatically terminate an LPA.

*These notes refer to the Mental Capacity Act 2005
(c.9) which received Royal Assent on 7 April 2005*

61. The bankruptcy of either the donor or the attorney will terminate any financial powers granted. *Section 64(3)* provides that all references to the bankruptcy of an individual include a case where a bankruptcy restrictions order is in force in respect of him. Bankruptcy restrictions orders are provided for in Schedule 4A to the Insolvency Act 1986. Interim bankruptcy restrictions orders do not bring a power of attorney to an end; they just have a suspensive effect (*subsections (4) and (9)*).
62. An LPA also comes to an end if the donee disclaims, dies or loses capacity. The dissolution or annulment of a marriage or civil partnership between the donee and the donor will terminate the donee's powers unless the donor has specified that it should not (*subsection (11)*).
63. *Subsections (7) and (10)* provide for situations where there is a replacement or a "joint and several" attorney (in respect of any matter) who can continue to act.

Section 14: Protection of donee and others if no power created or power revoked

64. This sets out the legal consequences when a registered LPA turns out to be invalid. There is similar provision in relation to EPAs in section 9 of the 1985 Act. Broadly, both attorneys and third parties are given protection from liability if they were unaware that the LPA was invalid or had come to an end.