

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

SCHEDULES

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

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

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.