

Status: Point in time view as at 18/09/2012.

Changes to legislation: Mental Capacity Act 2005, Part 1 is up to date with all changes known to be in force on or before 10 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

SCHEDULES

SCHEDULE 4

PROVISIONS APPLYING TO EXISTING ENDURING POWERS OF ATTORNEY

PART 1

ENDURING POWERS OF ATTORNEY

Enduring power of attorney to survive mental incapacity of donor

- 1 (1) Where an individual has created a power of attorney which is an enduring power within the meaning of this Schedule—
- (a) the power is not revoked by any subsequent mental incapacity of his,
 - (b) upon such incapacity supervening, the donee of the power may not do anything under the authority of the power except as provided by sub-paragraph (2) unless or until the instrument creating the power is registered under paragraph 13, and
 - (c) if and so long as paragraph (b) operates to suspend the donee's authority to act under the power, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection of donee and third persons), so far as applicable, applies as if the power had been revoked by the donor's mental incapacity,
- and, accordingly, section 1 of this Act does not apply.
- (2) Despite sub-paragraph (1)(b), where the attorney has made an application for registration of the instrument then, until it is registered, the attorney may take action under the power—
- (a) to maintain the donor or prevent loss to his estate, or
 - (b) to maintain himself or other persons in so far as paragraph 3(2) permits him to do so.
- (3) Where the attorney purports to act as provided by sub-paragraph (2) then, in favour of a person who deals with him without knowledge that the attorney is acting otherwise than in accordance with sub-paragraph (2)(a) or (b), the transaction between them is as valid as if the attorney were acting in accordance with sub-paragraph (2)(a) or (b).

Characteristics of an enduring power of attorney

- 2 (1) Subject to sub-paragraphs (5) and (6) and paragraph 20, a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power—
- (a) is in the prescribed form,
 - (b) was executed in the prescribed manner by the donor and the attorney, and
 - (c) incorporated at the time of execution by the donor the prescribed explanatory information.

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- (2) In this paragraph, “prescribed” means prescribed by such of the following regulations as applied when the instrument was executed—
 - (a) the Enduring Powers of Attorney (Prescribed Form) Regulations 1986 (S.I. 1986/126),
 - (b) the Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (S.I. 1987/1612),
 - (c) the Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (S.I. 1990/1376),
 - (d) the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2000 (S.I. 2000/289).
- (3) An instrument in the prescribed form purporting to have been executed in the prescribed manner is to be taken, in the absence of evidence to the contrary, to be a document which incorporated at the time of execution by the donor the prescribed explanatory information.
- (4) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form it is to be treated as sufficient in point of form and expression.
- (5) A power of attorney cannot be an enduring power unless, when he executes the instrument creating it, the attorney is—
 - (a) an individual who has reached 18 and is not bankrupt, or
 - (b) a trust corporation.
- (6) A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power.
- (7) An enduring power is revoked by the bankruptcy of the donor or attorney.
- (8) But where the donor or attorney is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the power is suspended for so long as the order has effect.
- (9) An enduring power is revoked if the court—
 - (a) exercises a power under sections 16 to 20 in relation to the donor, and
 - (b) directs that the enduring power is to be revoked.
- (10) No disclaimer of an enduring power, whether by deed or otherwise, is valid unless and until the attorney gives notice of it to the donor or, where paragraph 4(6) or 15(1) applies, to the Public Guardian.

Scope of authority etc. of attorney under enduring power

- 3 (1) If the instrument which creates an enduring power of attorney is expressed to confer general authority on the attorney, the instrument operates to confer, subject to—
 - (a) the restriction imposed by sub-paragraph (3), and
 - (b) any conditions or restrictions contained in the instrument,
 authority to do on behalf of the donor anything which the donor could lawfully do by an attorney at the time when the donor executed the instrument.
- (2) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any

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consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further—

- (a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively, and
- (b) he may do whatever the donor might be expected to do to meet those needs.

(3) Without prejudice to sub-paragraph (2) but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further—

- (a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth, a marriage or the formation of a civil partnership, to persons (including himself) who are related to or connected with the donor, and
- (b) he may make gifts to any charity to whom the donor made or might be expected to make gifts,

provided that 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.

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