

*These notes refer to the Mental Capacity Act (Northern Ireland)
2016 (c.18) which received Royal Assent on 9 May 2016*

Mental Capacity Act (Northern Ireland) 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5 – Lasting Powers of Attorney

Chapter 1 - Lasting Powers of Attorney

A power of attorney is a formal arrangement by which one person (the donor) gives another person (the attorney) authority to make decisions for him or her, or on his or her behalf. At common law, such authority would cease if the donor later lost capacity but the Enduring Powers of Attorney (NI) Order 1987 (“the 1987 Order”) allows attorneys to continue to act after the donor lost capacity, in certain circumstances.

Part 5 of the Act provides for a new form of power of attorney, the lasting power of attorney (“LPA”). This new scheme will operate alongside the existing Enduring Power of Attorney (“EPA”) scheme.

Section 97 – Lasting powers of attorney

This section sets out the key features of LPAs. The LPA gives authority to an attorney to make certain decisions when the donor has lost capacity to do so him or herself. Unlike an EPA which only applies to decisions regarding property and affairs, LPAs can additionally apply to care, treatment and personal welfare decisions. The decision-making authority may relate to those areas generally or to specified matters concerning them, as long as this is specified in the LPA.

The section explains that for a LPA to be created it must first meet the Act’s requirements in respect of who can be an attorney, as set out in section 101, and that the instrument (that is, the formal legal document setting up the LPA) must be made and registered with the Public Guardian in accordance with the formalities laid down in Schedule 4. The registration may be done straight away or it may be left for some time, but the LPA may not be used until it is registered. The donor must be aged 16 or over at the time he or she makes the instrument and must have capacity to do so.

The attorney is subject to the provisions of the Act, in particular the principles of the Act and the best interests test must be followed. Any conditions or restrictions that the donor may wish to include in the LPA instrument must be respected by the attorney.

Section 98 – Restrictions on scope of lasting power of attorney

LPAs covering care, treatment and personal welfare decisions can only be used where the donor lacks capacity or the attorney reasonably believes that the donor lacks capacity.

LPAs are also subject to effective advance decisions made by the donor, to the extent provided for in section 99, noted below. LPAs for care, treatment and personal welfare decisions may include authority to give or refuse consent to health care treatments, subject to any conditions or restrictions in the LPA instrument; however, giving or refusing consent to life-sustaining treatment is only permitted where the LPA instrument expressly says so.

Restraint can only be used by the attorney to prevent harm to the donor who lacks capacity and in that case, the restraint must be proportionate to the seriousness and likelihood of the harm occurring. LPAs do not authorise an attorney to deprive the donor of his or her liberty, nor does the attorney have the right to consent to psychosurgery on behalf of the donor (and regulations may specify other treatments which the attorney cannot authorise).

Section 98 also provides that an LPA executed before the donor has reached the age of 18 has the same effect as an LPA executed by a donor aged 18 or over, except that while the donor is under the age of 18, the attorney will have no greater power to make decisions than the donor him or herself would have had, if he or she had retained capacity.

Section 99 – Relationship between advance decisions and lasting powers of attorney

Any LPA that gives the attorney authority to give or refuse consent to treatment is subject to any effective advance decision made at the same time or after the LPA is made. So if the LPA gives authority to the attorney to consent or refuse treatment and then the donor makes an advance decision refusing consent to such treatment, that later personal choice prevails. If an effective advance decision regarding treatment is already in place, the section provides that the advance decision is withdrawn by the making of a LPA which gives the attorney authority to consent or refuse the relevant treatment.

Section 100 – Scope of lasting powers of attorney: gifts

An attorney acting under a LPA may only make gifts on behalf of the donor to his or her relations or associates, on customary occasions such as birthdays, the birth of a child, a marriage, civil partnership or anniversary, or any other occasion associated with giving presents. Gifts to charities supported by the donor are also permitted. However, the monetary value of any such gift must be reasonable in relation to the circumstances and in particular, to the size of the donor's estate. This power to make gifts is subject to any conditions or restrictions in the LPA instrument.

Section 101 – Appointment of attorneys: requirements as respects attorneys

This section is about the appointment and authority of attorneys. A person appointed as an attorney must be an individual aged 18 or over or, where the power relates only to property and affairs, an individual (aged 18 or over) or a trust corporation. However a person who is bankrupt may not be appointed as an attorney for property and affairs.

Section 102 – Appointment of two or more attorneys

The donor can create a LPA naming two or more persons as attorney. The instrument may appoint them to act jointly: that is they must all act together, as a unit, in making decisions and any failure by one attorney to comply with the appointment and registration processes for attorneys invalidates the LPA instrument. Alternatively, they may be appointed to act jointly and severally, which means that they may all act together or each of them may act separately, independently of the others. Here a failure by one attorney to comply with the appointment and registration processes only invalidates that attorney's ability to act (the other attorneys can continue to act on any matters deemed 'jointly and severally'). As a third possibility, they may be appointed to act jointly in respect of some matters and jointly and severally in respect of other matters. But where this is not specified it is assumed they will act jointly.

Section 103 – Appointment of replacement attorneys

This section enables the donor to provide for replacement attorneys in the LPA instrument. An attorney may not be given the power to appoint a substitute or successor but the donor, in the LPA instrument, may appoint someone to step into the attorney role if a "terminating event" occurs which prevents the original attorney from acting as attorney. Terminating events are defined in section 107 and 110 and include, for example, the death of an attorney.

Where there is provision for a replacement attorney, the LPA instrument may not go further and appoint someone to replace that replacement, should a terminating event occur in respect of the attorney appointed as a replacement.

Where the LPA appoints two or more attorneys, the instrument can provide for two or more replacement attorneys. The instrument can specify the order in which the replacement attorneys are to be appointed; or it can specify which attorney the donor wants to replace a particular attorney who can no longer act due to a terminating event occurring.

The requirements for attorneys, as set out in section 101, also apply to the replacement attorney(s); however, if the replacement attorney does not meet these requirements (or those in Part 1 or 2 of Schedule 4 regarding the making of LPA instruments), the LPA can still be made. So for example, if a replacement attorney has not reached the age of 18 at the time the LPA instrument is made and therefore does not meet the requirements for attorneys in section 101, the LPA can still be created, as long as the acting attorney meets the requirements.

Section 104 – Appointment of two or more replacements for a single initial appointee

An instrument creating a LPA and appointing two or more replacement attorneys may determine how those replacement attorneys are to act, i.e. jointly, jointly and severally or jointly in some areas and jointly and severally in other areas. Where no such provision is made, the default position is that the replacement attorneys must act jointly. Where at least one, but not all, of the replacement attorneys do not meet the requirements for attorneys as set out in section 101 (or Part 1 or 2 of Schedule 4) but the LPA instrument has appointed them to act jointly, the appointment is not valid and the attorneys cannot act. Where the same applies but the replacement attorneys have been appointed to act jointly and severally, only the attorney who meets the requirements can be appointed.

Section 105 – Replacement attorneys: position where two or more initial appointees

This section sets out how replacement attorneys are to act in circumstances where there are two or more “initial” attorneys appointed and one is replaced by a replacement attorney. The section then refers to the acting attorneys as “relevant appointees” who must act as the LPA originally prescribed i.e. jointly, jointly and severally, or jointly in some areas and jointly and severally in other areas, even though one of the initial attorneys has been replaced. However, where a terminating event occurs that prevents one of the relevant attorneys from acting in respect of the donor’s property and affairs, that attorney can continue to act in respect of other matters (care, treatment and personal welfare) along with the other attorney, as prescribed by the LPA instrument i.e. jointly, jointly and severally, or jointly in some areas and jointly and severally in other areas.

Section 106 – Revocation of lasting power etc by donor or on donor’s bankruptcy

This section provides that a donor may revoke a LPA instrument or a registered LPA at any time he or she has capacity to do so.

In addition certain events may automatically terminate a LPA. If the LPA instrument has been made but not registered and the donor is bankrupt, the property and affairs part of the LPA instrument is automatically revoked. However, the LPA instrument will still apply unaffected to any care, treatment and personal welfare issues that it covers.

Where the donor is bankrupt because of an interim bankruptcy restrictions order, the property and affairs LPA is suspended for the duration of the interim restrictions order. Again, the LPA instrument will still continue to apply unaffected to any care, treatment and personal welfare issues that it covers.

Section 107 – Revocation etc: events relating to the attorney

This section details the events that can terminate the appointment of an attorney and revoke the LPA instrument or power. These are called “terminating events”.

However, the LPA instrument or power will not be revoked by a terminating event if the attorney is one of two or more attorneys appointed by the LPA to act jointly and severally (in which case, the other attorney(s) can continue to act) or if the LPA instrument or power provides for replacement attorneys, who will then take over.

The terminating events include a disclaimer of appointment by the attorney. Also, the attorney may die or become bankrupt or, in the case of a trust corporation, be wound up or dissolved. Bankruptcy will not terminate an attorney's appointment in so far as the appointment relates to the donor's care, treatment and personal welfare.

Furthermore, if the bankruptcy is a result of an interim bankruptcy restrictions order, suspension of the attorney's appointment and power to make decisions regarding the donor's property and affairs is only for as long as the interim bankruptcy restrictions order has effect.

Further terminating events are the dissolution, annulment or judicial separation of a marriage or civil partnership between the donor and the attorney, but these do not revoke the instrument or power if the instrument or power states that it should not have that effect.

And finally, the lack of capacity of the attorney terminates the appointment.

Section 108 – Protection of attorney and others if no power created or power revoked

This section sets out the legal consequences when a registered LPA turns out to be invalid for any reason. Both the person acting as attorney and any third party dealing with him or her or dealing subsequent to his or her involvement are given protection from liability if they were unaware that the LPA was defective.

Any transactions between the person acting as an attorney and another person ("Y") are valid unless at the time of the transaction Y knows that the LPA was not created or is aware of circumstances that have terminated the authority of the attorney under the LPA.

If the interest of a purchaser depends on whether a transaction between the person acting as attorney and Y was valid, it is conclusively presumed in favour of the purchaser that the transaction was valid if the transaction was completed within 12 months of the date on which the LPA instrument was registered; or if there is any statutory declaration by Y before or within 3 months of completion of the purchase stating that Y had no reason at the time of the transaction to doubt the authority of the person acting as attorney to dispose of the property which was the subject of the transaction.

Section 4 of the Powers of Attorney Act (NI) 1971 regarding protection where power is revoked, also applies where that power relates to matters in addition to the donor's property and affairs; and references to revocation include the cessation of the power in relation to the donor's property and affairs.

Section 109 – Reliance on authority of attorney in relation to treatment etc

If a person (“D”) does an act in connection with the care, treatment or personal welfare of a person (“P”) based on the consent of an attorney purportedly acting under P’s LPA but it subsequently emerges that either the attorney did not have the authority to provide the consent, or that the person acting as attorney is not actually an attorney under the LPA; as long as D has taken reasonable steps to check that the attorney has been appointed by P’s LPA and that the attorney has authority to consent to the matter in question, D will not incur any liability in relation to the act.

Section 110 – Powers of court as to lasting powers of attorney

This section and the next one delineate the powers of the court in respect of LPAs. The court referred to here is the High Court. These court powers apply where an instrument has been made with a view to creating a LPA, or where a person has purported to do so, or where a LPA instrument has been registered.

The court has jurisdiction to determine any question about whether the requirements for the valid creation of a LPA have been met and whether the power has been revoked or otherwise ended. Where the court is satisfied that there is fraud, or undue pressure placed on a person to create a LPA or execute it; or it may be that the attorney has behaved in a way, or is proposing to behave in a way, that goes contrary to the authority granted by the LPA, or is not in the best interests of the donor, the court has power to direct that the instrument should not be registered by the Public Guardian, or it may revoke the instrument or the LPA if the donor does not have capacity to do so him or herself.

Section 111 – Powers of court as to operation of lasting powers of attorney

This section gives more powers to the court. It sets out that the court may determine any question as to the meaning or effect of a LPA or an instrument purporting to create a LPA. The court may give directions regarding decisions that an attorney under the LPA has authority to make where the donor lacks capacity to make them; and the court may give consent or authorise an act which an attorney would have to obtain from the donor if the donor had capacity to give consent. In addition, the court has a number of powers available. These are powers to give directions to the attorney to render reports, accounts and records, to supply information, or produce documents or other items in his or her possession as attorney. The court may give directions about the attorney’s remuneration or expenses. The court may also relieve the attorney of liability for breach of a duty as attorney. Finally the court may authorise the attorney to make gifts outside the limited scope permitted by section 100.