



2016 CHAPTER 18

PART 5

LASTING POWERS OF ATTORNEY

PROSPECTIVE

Scope of lasting power of attorney

Restrictions on scope of lasting power of attorney

98.—(1) Where a lasting power of attorney authorises an attorney to make decisions about the donor's care, treatment and personal welfare (or about any of those matters), the authority—

- (a) does not extend to making such decisions in circumstances other than those where the donor lacks, or the attorney reasonably believes that the donor lacks, capacity; and
- (b) is subject to section 99(2) (effective advance decision to refuse treatment made after execution of instrument).

(2) Where a lasting power of attorney authorises an attorney to make decisions about the donor's treatment (whether or not it also authorises the making of decisions about other matters), the authority extends to giving or refusing consent to the provision of a treatment by a person providing health care for the donor; but this subsection—

- (a) is subject to subsections (1) and (7) and to any conditions or restrictions in the instrument; and

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(b) authorises the giving or refusing of consent to the provision of life-sustaining treatment only if the instrument contains express provision to that effect.

(3) A lasting power of attorney does not authorise an attorney to deprive the donor of his or her liberty or to authorise another person to deprive the donor of his or her liberty.

(4) A lasting power of attorney authorises an attorney to do, or to authorise another person to do, an act restraining the donor only if the conditions in subsection (6) are met.

(5) In subsection (4) an “act restraining the donor” means an act (other than a deprivation of the donor's liberty) which—

- (a) is intended to restrict the donor's liberty of movement, whether or not the donor resists; or
- (b) is a use of force or a threat to use force and is done with the intention of securing the doing of an act which the donor resists.

(6) The conditions referred to in subsection (4) are that the attorney reasonably believes—

- (a) that the donor lacks capacity in relation to the matter in question;
- (b) that there is a risk of harm to the donor if the attorney does not do or (as the case may be) authorise the act restraining the donor; and
- (c) that doing or authorising that act is a proportionate response to—
 - (i) the likelihood of harm to the donor; and
 - (ii) the seriousness of the harm concerned.

(7) A lasting power of attorney does not authorise an attorney to give consent to psychosurgery in respect of the donor.

(8) Where the donor of a lasting power of attorney was under 18 when he or she executed the instrument mentioned in section 97(2)(a)—

- (a) the lasting power of attorney has the same effect as it would have if the donor had been 18 or over when he or she executed the instrument; except that
- (b) at any time when the donor is under 18, the authority conferred by the lasting power does not extend to doing anything that the donor could not do at that time (even if the donor had capacity, within the meaning of Part 1, in relation to the matter in question).

(9) The Department may by regulations amend subsection (7) so as to extend the descriptions of treatment to which an attorney may not give consent.

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Relationship between advance decisions and lasting powers of attorney

99.—(1) This section applies in relation to any authority conferred on an attorney by a lasting power of attorney to give or refuse consent to the carrying out or continuation of a treatment.

(2) The authority is subject to any effective advance decision to refuse the treatment made by the donor after, or at the same time as, the execution of the relevant instrument.

(3) Any relevant decision to refuse the treatment made by the donor before the execution of the relevant instrument is to be treated as having been withdrawn by the execution of the relevant instrument (and accordingly is not an effective advance decision to refuse the treatment).

(4) In this section—

(a) “an effective advance decision to refuse the treatment” means a decision which, under the common law relating to advance decisions, has the same effect as if at the material time the donor—

(i) refused consent to the treatment's being carried out or continued;
and

(ii) had capacity to refuse that consent;

(b) “the material time” means the time when the question arises whether the treatment should be carried out or continued;

(c) “relevant decision to refuse the treatment” means a decision that would (but for the execution of the relevant instrument) have been an effective advance decision to refuse the treatment;

(d) references to the “execution of the relevant instrument” are to the execution by the donor of an instrument with a view to creating the lasting power of attorney.

(5) Subsection (3) does not affect any rule of law under which a decision that would otherwise fall within subsection (4)(a) is to be regarded as having been withdrawn.

Scope of lasting powers of attorney: gifts

100.—(1) Where a lasting power of attorney authorises an attorney to make decisions about the donor's property and affairs, it does not authorise the attorney to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).

(2) The attorney may make gifts—

(a) on customary occasions to persons (including the attorney) who are related to or associated with the donor, or

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- (b) to any charity to which 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) a birthday, the birth of a child, a marriage or anniversary of a marriage, or the formation or anniversary 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.

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