



2016 CHAPTER 18

PROSPECTIVE

PART 5

LASTING POWERS OF ATTORNEY

Creation of lasting power of attorney

Lasting powers of attorney

97.—(1) A lasting power of attorney is a power of attorney by which the donor confers on the attorney (or attorneys) authority to make decisions about (or about specified matters concerning) all or any of the following—

- (a) the donor's care, treatment and personal welfare,
- (b) the donor's property and affairs,

and which includes authority to make such decisions in circumstances where the donor no longer has capacity.

(2) A lasting power of attorney is created only if—

- (a) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 4;
- (b) at the time when the donor executes the instrument, the donor is 16 or over and has capacity to execute it; and
- (c) section 101 (requirements as respects attorneys) is complied with.

(3) An instrument which—

- (a) purports to create a lasting power of attorney, but

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- (b) does not comply with this section, section 101 or Schedule 4, confers no authority.
- (4) The authority conferred by a lasting power of attorney is subject to—
- (a) the provisions of this Act and, in particular—
 - (i) sections 98 to 100 (restrictions);
 - (ii) sections 1, 2, 5 and 7 (principles, best interests); and
 - (b) any conditions or restrictions specified in the instrument.
- (5) In the following provisions of this Part, in relation to a lasting power of attorney or an instrument executed with a view to creating such a power—
- (a) any reference to “care, treatment and personal welfare” includes matters concerning care, treatment or personal welfare that are specified in the power or instrument;
 - (b) any reference to “property and affairs” includes matters concerning property or affairs that are specified in the power or instrument.
- (6) Subsections (2) and (3) are subject to—
- (a) section 102(5) (joint and several appointments: breach of requirements as respects some but not all attorneys); and
 - (b) section 103(6) (breach of requirements as respects replacement attorneys).

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.

Appointment of attorneys and replacements

Appointment of attorneys: requirements as respects attorneys

101.—(1) A person appointed as an attorney by an instrument executed with a view to creating a lasting power of attorney (a “relevant instrument”) must be—

- (a) an individual who is 18 or over at the time the instrument is executed; or
- (b) if the instrument relates only to the donor's property and affairs, either such an individual or a trust corporation.

- (2) An individual who is bankrupt may not be appointed by a relevant instrument as an attorney in relation to the donor's property and affairs.

Appointment of two or more attorneys

102.—(1) This section applies in relation to an instrument executed with a view to creating a lasting power of attorney which appoints two or more persons to act as attorneys.

- (2) The instrument may appoint them to act—

- (a) jointly;
- (b) jointly and severally; or
- (c) jointly in respect of some matters and jointly and severally in respect of others.

- (3) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be treated as appointing them to act jointly.

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(4) If they are to act jointly in respect of all matters, a failure, as respects one of the persons, to comply with a requirement of section 101 or Part 1 or 2 of Schedule 4 prevents a lasting power of attorney from being created.

(5) If they are to act jointly and severally in respect of some or all matters, a failure, as respects one of the persons, to comply with a requirement of section 101 or Part 1 or 2 of Schedule 4—

- (a) prevents the appointment from taking effect in that person's case; but
- (b) does not prevent a lasting power of attorney from being created in the case of the other or others (limited, where they are to act jointly and severally only in respect of some matters, to those matters).

Appointment of replacement attorneys

103.—(1) An instrument executed with a view to creating a lasting power of attorney—

- (a) cannot give a person appointed as attorney power to appoint a substitute or successor (whether of that person or any other person appointed as attorney); but
- (b) may itself appoint one or more persons (“replacement attorneys”) to replace any person appointed as attorney on the occurrence of a terminating event which has the effect of terminating that person's appointment.

(2) An instrument that appoints a person as a replacement attorney may not appoint a person to replace a replacement attorney (in the event that a terminating event terminates the appointment of the replacement attorney).

(3) Where an instrument executed with a view to creating a lasting power of attorney—

- (a) appoints two or more persons as attorneys, and
- (b) appoints two or more persons as replacement attorneys,

it may specify the order in which the appointments of the replacement attorneys are to take effect.

(4) Nothing in subsection (3) limits the power under subsection (1)(b) for an instrument to specify a particular person (or persons) as the person who is to replace a particular person appointed as attorney (“A”) on the occurrence of a terminating event that terminates A's appointment.

(5) Section 101 (requirements as respects attorneys) applies in relation to the appointment of a person as a replacement attorney as it applies in relation to the appointment of a person as an attorney.

(6) A failure, in relation to a person appointed as a replacement attorney, to comply with a requirement of section 101 or Part 1 or 2 of Schedule 4 does not prevent a lasting power of attorney from being created.

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- (7) In this section “a terminating event” means—
- (a) an event mentioned in section 107(2)(a) to (f);
 - (b) a termination of an appointment under section 110(4)(b).

Appointment of two or more replacements for a single initial appointee

104.—(1) This section applies to an instrument executed with a view to creating a lasting power of attorney that—

- (a) appoints one person (“A”) as attorney; and
- (b) under section 103(1)(b) appoints two or more persons (“the replacement attorneys”) to replace A.

(2) The instrument may provide that the replacement attorneys, if they replace A, are to act—

- (a) jointly;
- (b) jointly and severally; or
- (c) jointly in respect of some matters and jointly and severally in respect of others.

(3) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be treated as appointing them to act jointly.

(4) Subsections (5) and (6) apply where, in relation to some but not all of the replacement attorneys, there is a failure to comply with a requirement of section 101 or Part 1 or 2 of Schedule 4.

(5) To the extent that the replacement attorneys were appointed to act jointly, the appointment mentioned in subsection (1)(b) is of no effect.

(6) To the extent that they were appointed to act jointly and severally, that appointment is to be treated as being an appointment of such of the replacement attorneys as respects whom there is no failure to comply with a requirement of section 101 or Part 1 or 2 of Schedule 4.

Replacement attorneys: position where two or more initial appointees

105.—(1) This section applies where—

- (a) an instrument executed with a view to creating a lasting power of attorney appoints two or more persons as attorneys (the “initial appointees”);
- (b) an initial appointee is replaced under the instrument by virtue of section 103(1)(b); and
- (c) on that replacement, there are at least two relevant appointees under the instrument.

(2) A person is a “relevant appointee” under the instrument if—

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(a) the person was appointed as an attorney by the instrument (whether or not to act jointly with the initial appointee who has been replaced) and no terminating event has terminated the person's appointment; or

(b) the person has replaced an initial appointee and no terminating event has terminated the person's appointment.

(3) The relevant appointees are—

(a) if the initial appointees were appointed to act jointly, to be treated as appointed to act jointly;

(b) if the initial appointees were appointed to act jointly and severally, to be treated as appointed to act jointly and severally;

(c) if the initial appointees were appointed to act jointly in respect of some matters and jointly and severally in respect of others, to be treated as appointed to act in the same way.

(4) But where a terminating event has terminated a relevant appointee's appointment in relation to the donor's property and affairs (but not in relation to other matters), subsection (3) is subject to that termination.

(5) In this section “terminating event” has the same meaning as in section 103.

Revocation of lasting power etc by donor or on donor's bankruptcy

106.—(1) Where—

(a) an instrument (“a relevant instrument”) is executed with a view to creating a lasting power of attorney, or

(b) a lasting power of attorney is registered,

the donor may, at any time when the donor has capacity to do so, revoke the instrument or the lasting power of attorney.

(2) Where a relevant instrument has been executed (but not registered) and the donor is bankrupt, the bankruptcy revokes the instrument so far as it relates to the donor's property and affairs.

(3) Where the donor of a lasting power of attorney is bankrupt—

(a) if the donor is bankrupt merely because an interim bankruptcy restrictions order has effect, the power is suspended, so far as it relates to the donor's property and affairs, for so long as the order has effect;

(b) otherwise, the bankruptcy revokes the power so far as it relates to the donor's property and affairs.

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Revocation etc: events relating to the attorney

107.—(1) This section applies where an event mentioned in subsection (2) occurs in relation to a person (“A”) appointed as an attorney or replacement attorney by—

- (a) a lasting power of attorney; or
- (b) an instrument executed with a view to creating a lasting power of attorney.

(2) The events referred to in subsection (1) are—

- (a) the disclaimer of the appointment by A in accordance with any prescribed requirements;
- (b) the death of A;
- (c) the bankruptcy of A (but see subsections (5) to (8));
- (d) if A is a trust corporation, its winding-up or dissolution;
- (e) the dissolution, annulment or judicial separation of a marriage or civil partnership between the donor and A (but see subsections (5) and (9));
- (f) the lack of capacity of A.

(3) The event terminates A's appointment.

(4) If A is an attorney under the power or an intended attorney under the instrument, the event revokes the power or instrument unless—

- (a) A was appointed as an attorney by the power or instrument and is replaced under its terms; or
- (b) A is one of two or more persons who were to act jointly and severally in respect of any matter and, after the event, there is at least one remaining attorney or intended attorney (as the case may be).

(5) Subsections (3) and (4) are subject—

- (a) in the case of an event mentioned in subsection (2)(c), to subsections (6) and (7);
- (b) in the case of an event mentioned in subsection (2)(e), to subsection (9).

(6) The bankruptcy of A does not terminate A's appointment, or revoke the instrument or power, in so far as A's authority relates to the donor's care, treatment and personal welfare.

(7) Where A is an attorney under a lasting power of attorney and is bankrupt merely because an interim bankruptcy restrictions order has effect, A's appointment and the power are suspended, so far as they relate to the donor's property and affairs, for so long as the order has effect.

(8) The reference in subsection (7) to the suspension of the power is to be read, where A is one of two or more attorneys who are to act jointly and

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severally in respect of any matter, as a reference to the suspension of the power so far as it relates to A.

(9) The dissolution, annulment or judicial separation of a marriage or civil partnership does not terminate A's appointment, or revoke the instrument or power, if the instrument or power provides that it is not to do so.

(10) In subsection (4) “intended attorney” means a person who, if the instrument were registered and a lasting power of attorney were created, would be an attorney under the lasting power.

(11) In this section references to the “judicial separation” of a marriage or civil partnership include—

- (a) the making of a decree of judicial separation in respect of a marriage, and
- (b) the making of a separation order in respect of a civil partnership.

Protection of attorney and others

Protection of attorney and others if no power created or power revoked

108.—(1) Subsections (2) to (4) apply if—

- (a) an instrument has been registered under Schedule 4 as a lasting power of attorney, but
- (b) a lasting power of attorney was not created,

whether or not the registration has been cancelled at the time of the act or transaction in question.

(2) A person (“X”) who acts (whether alone or with others) in purported exercise of the power does not incur any liability (to the donor or any other person) because of the non-existence of the power unless at the time of acting X—

- (a) knows that a lasting power of attorney was not created; or
- (b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated X's authority to act as an attorney.

(3) Any transaction between—

- (a) one or more persons acting in purported exercise of the power, and
- (b) another person (“Y”),

is, in favour of Y, as valid as if the power had been in existence; but this is subject to subsection (4).

(4) Subsection (3) does not apply if, at the time of the transaction, Y—

- (a) knows that a lasting power of attorney was not created; or

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(b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated the authority of any person within subsection (3)(a) to act as an attorney.

(5) If the interest of a purchaser depends on whether a transaction was valid by virtue of subsection (3), it is to be conclusively presumed in favour of the purchaser that the transaction was valid if—

- (a) the transaction was completed within 12 months of the date on which the instrument was registered; or
- (b) Y makes a statutory declaration, before or within 3 months after the completion of the purchase, that Y had no reason at the time of the transaction to doubt that the person or persons mentioned in subsection (3)(a) had authority to dispose of the property which was the subject of the transaction.

(6) In its application to a lasting power of attorney which relates to matters in addition to the donor's property and affairs, section 4 of the Powers of Attorney Act (Northern Ireland) 1971 (protection where power is revoked) has effect as if references to revocation included the cessation of the power in relation to the donor's property and affairs.

Reliance on authority of attorney in relation to treatment etc

109.—(1) This section applies if—

- (a) an instrument has been registered under Schedule 4 as a lasting power of attorney granted by a person (“P”);
- (b) another person (“D”) does an act in connection with the care, treatment or personal welfare of P;
- (c) D does the act with the consent of a person (“A”) purporting to be an attorney under a lasting power of attorney granted by P; and
- (d) either A is not such an attorney, or it is not within the scope of A's authority to consent in relation to the matter in question.

(2) If—

- (a) before doing the act, D takes reasonable steps to establish whether—
 - (i) A is an attorney under a lasting power of attorney granted by P, and
 - (ii) it is within the scope of A's authority to consent in relation to the matter in question, and
- (b) when doing the act, D reasonably believes that A is such an attorney and has authority to consent in relation to the matter,

D does not incur any liability in relation to the act because A was not such an attorney or, as the case may be, did not have such authority.

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Powers of the court

Powers of court as to lasting powers of attorney

- 110.**—(1) This section applies if—
- (a) a person has executed an instrument with a view to creating a lasting power of attorney (a “relevant instrument”) or purported to execute a relevant instrument; or
 - (b) an instrument has been registered as a lasting power of attorney.
- (2) The court may determine any question relating to—
- (a) whether one or more of the requirements for the creation of a lasting power of attorney have been met;
 - (b) whether the instrument or power has been revoked or has otherwise come to an end.
- (3) Subsection (4) applies if the court is satisfied—
- (a) that fraud or undue pressure was used to induce a person to create a lasting power of attorney or execute a relevant instrument;
 - (b) that an attorney under a lasting power of attorney has behaved, or is behaving, in a way that contravenes the attorney's authority or is not in the donor's best interests; or
 - (c) that a person appointed as attorney or replacement attorney by a lasting power of attorney or relevant instrument proposes to behave as attorney in a way that would contravene the attorney's authority or would not be in the donor's best interests.
- (4) Where this subsection applies, the court may—
- (a) direct that an instrument purporting to create the lasting power of attorney is not to be registered; or
 - (b) if the donor lacks capacity to revoke the instrument or the lasting power of attorney—
 - (i) revoke the instrument or power; or
 - (ii) terminate the appointment of a person appointed as attorney or replacement attorney by the instrument or power.

Powers of court as to operation of lasting powers of attorney

- 111.**—(1) The court may determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one.
- (2) The court may—
- (a) give directions with respect to decisions—

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- (i) which an attorney under a lasting power of attorney has authority to make; and
 - (ii) which the donor lacks capacity to make;
- (b) give any consent or authorisation to act which an attorney under a lasting power of attorney would have to obtain from the donor if the donor had capacity to give it.
- (3) The court may, if the donor of a lasting power of attorney lacks capacity to do so—
- (a) give directions to an attorney with respect to the rendering by the attorney of reports or accounts and the production of records kept by the attorney for that purpose;
 - (b) require an attorney (“A”) to supply information or produce documents or things in A’s possession as attorney;
 - (c) give directions with respect to the remuneration or expenses of an attorney;
 - (d) relieve an attorney wholly or partly from any liability which the attorney has or may have incurred on account of a breach of a duty as attorney.
- (4) The court may authorise the making of gifts, under a lasting power of attorney, which are not within section 100(2) (permitted gifts).

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