

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

SCHEDULES

Schedule 1: Lasting powers of attorney: formalities

Part 1: Making instruments

158. This Part sets out the requirements with regard to the form and execution of an LPA. A document which fails to comply with the provisions of this Schedule or regulations made under it will not generally create an LPA and consequently will not give any powers to the donee. An LPA must be in the form prescribed by regulations. The form must also contain statements by both the donor and the donee of the power to the effect that they have read, or have had read to them, such information as may be prescribed. The LPA must include names of any persons whom the donor wishes to be notified of any application to register the LPA (“named persons”) or a statement that there are no such persons.
159. The form must also include a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument he understands the purpose of the instrument and the scope of the authority conferred, that no fraud or undue pressure is being used to induce him to create an LPA, and that there is nothing else that would prevent an LPA from being created by the instrument. The Public Guardian may treat an LPA differing in an immaterial respect from the prescribed form as sufficient to create an LPA. The Court of Protection has the power to make a declaration that an instrument not in the prescribed form is to be treated as if it were, if satisfied that the persons executing the instrument intended to create an LPA.

Part 2: Registration

160. The powers given in an LPA to the donee cannot be exercised until the document has been registered. In order to register an LPA an application must be made by the donor or donee(s) to the Public Guardian. When about to apply to register the LPA, the donor or donee(s) must notify the named persons to inform them of the pending registration. The Public Guardian is required to notify the donor or donee(s) (depending on who makes the application). The court will have the power to dispense with the notification requirement on the application of either the donor or donee.
161. If the instrument received by the Public Guardian is flawed in some way (that is, it is ineffective, or contains a provision that would make it inoperable as an LPA), the Public Guardian must refer it to the Court of Protection and must not register the instrument in the interim. The court can either remove (or “sever”) the offending provision from the instrument or direct the Public Guardian not to register the LPA instrument. If the court severs a provision, the Public Guardian can then register the instrument, but must attach a note to that effect to it.
162. Objections can be made to the registration of the LPA within a prescribed period. An objection by a donor to registration by the donee(s) must be made to the Public Guardian and the court will only direct him to register the LPA if satisfied that the donor lacks

capacity to object. An objection by a donee or named person on the basis that the LPA has been revoked (for example, because of bankruptcy of the donee) must also be made to the Public Guardian who, if satisfied, will not register the LPA. If the person wishing to register the LPA disagrees with the Public Guardian's decision not to register the instrument, he can apply to the court. If the court finds that the grounds for the Public Guardian objecting to registration are not established, the court can direct the Public Guardian to register the LPA. An objection by a donee or named person on such other grounds as may be prescribed must be made to the court. The Public Guardian must not register the instrument, unless told to do so by the court, where it appears to him that there is a deputy appointed for the donor and that the powers of the deputy would conflict with the powers to be conferred on the donee.

Part 3: Cancellation of registration and notification of severance

163. The Public Guardian will cancel an LPA if he is satisfied that the power has been revoked on the basis of:
- the donor's bankruptcy;
 - the donee giving up his/her appointment by exercising a disclaimer;
 - the death of the donee;
 - the insolvency of the donee;
 - the dissolution or annulment of a marriage or civil partnership between donor and donee; and
 - the lack of capacity of the donee.
164. The court must direct the Public Guardian to cancel the registration of an LPA if the court:
- decides that a requirement for creating the LPA was not met;
 - decides that the power has been revoked or otherwise come to an end; or
 - revokes the power on fraud or undue pressure grounds.
165. On cancellation of the registration of an LPA the Public Guardian will notify both the donor and donee to this effect. Where the court has removed a provision from an instrument, *paragraph 19(2)(a)* requires the court to notify the Public Guardian of the severance of that provision. And where the court determines that a provision in an instrument means that instrument cannot operate as a valid LPA, *paragraph 19(2)(b)* requires the court to direct the Public Guardian to cancel the registration of that instrument as an LPA.

Part 4: Records of alterations in registered powers

166. A note of any revocation of an LPA, because of the donor or donee's bankruptcy, which only takes effect in so far as the power relates to the property and affairs of the donor will be attached to the LPA by the Public Guardian. The Public Guardian must also attach a note to an instrument if an event has terminated the appointment of the donee but not revoked the instrument (for example, if there is more than one donee), where a donee's ability to act has been suspended by the making of an interim bankruptcy restrictions order or the appointment of the donee has been replaced under the terms of the LPA. The Public Guardian must give the donor and donee notice of any notes attached to the LPA. Where the court has notified the Public Guardian that it has removed a provision from an instrument, *paragraph 24* requires that the Public Guardian must attach a note to that effect to the instrument.