Chapter 3

Lasting Powers of Attorney – Formalities, Registration, Revocation

Readers are referred to the guidance which can be downloaded from the website of the Office of the Public Guardian, www.publicguardian.gov.uk.

WHEN SHOULD A LASTING POWER BE GRANTED?

3.1 (This question is considered in **Chapter 1**.)

It could be argued that, as soon as a person attains 70, or even 60, he should grant a lasting power to any children. On the other hand, many people retain their faculties well into their seventies or eighties or nineties or even beyond, and they may not be very happy about entrusting the management of their affairs to their children. It is clearly an issue which may need tactful handling, although many people will readily grant such a power.

Of course, the donor can continue to manage his own affairs despite the grant of a lasting power, and so it may be a good idea for a person to grant a lasting power on the understanding that it will not be exercised whilst the donor retains his faculties. Indeed, it is possible for the power to expressly state that it will not come into effect until some event occurs, for example the donor becoming mentally incapable.

Some donors may be prepared to grant a lasting power of attorney, but may not want to give it to one child because he or she does not trust them. In these circumstances, a joint power could be granted to two or more children; the effect of this would be that all the attorneys would have to agree to any action.

It is also clear that a lasting power can still be granted even though the donor is showing signs of mental incapacity. Thus, it is possible to wait, but at the first signs of mental incapacity, a lasting power can be granted. Most people do not suddenly become incapable; it is usually a gradual process. On some days, they will be fully capable; on other days, they will not.

It is highly unlikely that both spouses or civil partners or cohabitees will become mentally incapable at the same time, and so the advice to them may be to wait

until one begins to show signs of lacking capacity. It will probably not be too late for the party showing signs of lacking capacity to grant a lasting power. Similarly, a parent can wait until they are showing signs of lacking capacity before granting a lasting power of attorney in favour of a child. However, the disadvantage of waiting until a person shows signs of lacking capacity is that he or she may suddenly be rendered incapable.

Should younger people grant a lasting power of attorney? Young people are often not concerned about becoming mentally incapable. However, younger clients may wish to do so as they may be concerned that, if they are rendered incapable in an accident, their spouses or partners would not be able to operate the bank and building society accounts without an application to the Court of Protection. The risk of a young person being rendered mentally incapable in an accident is fairly remote, but it does happen, and so perhaps there is some force in the argument that young people should grant a lasting power of attorney.

There is no definite answer to the question at what age clients should grant a lasting power of attorney. It is really up to the client.

CHOICE OF ATTORNEY

3.2 (This question is also considered in **Chapter 1**.)

The donor can appoint relatives, friends, a solicitor or an accountant. It is obviously essential that whoever is appointed is trustworthy.

Another decision is whether there should be a sole attorney, or two or more attorneys. If more than one attorney is to be appointed, then there is a choice between a joint power and a joint and several power.

A joint power will terminate if one attorney dies, becomes mentally incapable or bankrupt, unless it is a lasting power, and a replacement attorney has been appointed. A joint and several power will continue even if one of the attorneys dies or becomes bankrupt or mentally incapable. However, the disadvantage of a joint and several power is that one attorney alone can deal with the assets of the donor. The original prescribed form for a lasting power of attorney (contained in SI 2007/1253) gives the donor of the power a choice of the attorneys acting together, which is a joint power, or together and independently, which is a joint and several power. In addition, there can be a joint authority with regard to some matters, and a joint and several authority with regard to other matters. The new prescribed form (see SI 2009/1884) has reverted to the use of joint or joint and several.

Can an attorney acting under a lasting power be given power to appoint another attorney for the donor? This is prohibited by s 10(8)(a) of the Mental Capacity

Act 2005. However, it is possible for the donor to appoint a person to replace an attorney on the occurrence of any event mentioned in section 13(6)(a)–(d) which have the effect of terminating the attorney's appointment. The events listed in s 13(6)(a)–(d) are:

(*a*) the disclaimer of the appointment by the attorney in accordance with such requirements as may be prescribed for the purposes of this section in regulations made by the Lord Chancellor;

(*b*) the death or bankruptcy of the attorney, or if the attorney is a trust corporation, its winding up or dissolution; note that the bankruptcy of an attorney does not does not terminate his appointment, or revoke the power, insofar as his authority relates to the donor's personal welfare, and in that situation there is no power to appoint a substitute to deal with the personal matters. However, it can be done in relation to the property and affairs of the deceased. In addition, the authority of the attorney does not terminate but is suspended if the attorney is bankrupt because an interim bankruptcy restrictions order has effect in respect of him (s 13(9)).

(*c*) the dissolution or annulment of a marriage or civil partnership between the donor and the attorney. However, the dissolution or annulment of a marriage or civil partnership does not terminate the appointment of an attorney, or revoke the power if the instrument provided that it was not to do so.

(*d*) the lack of capacity of the attorney.

FORMALITIES

3.3 The Mental Capacity Act 2005 lays down various rules with regard to lasting powers of attorney.

Part 1 of Sch 1 contains rules dealing with the execution of instruments, and the contents of instruments. It also contains provisions authorising the Lord Chancellor to make regulations about these matters. The regulations have been made, and are contained in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007/1253, as amended by SI 2009/1884) ('the Regulations')).

Paragraph 1 of Sch 1 to the Mental Capacity Act 2005 provides that an instrument is not executed in accordance with the Schedule unless it is in the prescribed form, complies with the paragraph, and fulfils any other requirements prescribed in regulations made by the Lord Chancellor. Paragraph 1(2) provides that regulations may make different provisions according to whether:

(*a*) the instrument relates to personal welfare, property and affairs or both;

(*b*) only one or more than one attorney is to be appointed (and, if so, whether jointly or severally).

The Regulations provide for separate lasting powers, one dealing with the property and financial affairs of the donor, and the other dealing with the health and personal welfare of the donor; these are reproduced in **Appendix 1**.

It is possible to appoint more than one attorney. The prescribed form covers the appointment of one attorney or several attorneys. If more than one attorney is appointed, then it can be a joint appointment or a joint and several appointment. For a discussion of the difference between joint powers and joint and several powers, see para **3.2**.

As with enduring powers of attorney, a lasting power of attorney must contain the prescribed information with regard to the purpose of the instrument and the effect of the lasting power. Again, as with enduring powers of attorney, the lasting power of attorney must contain a statement to the effect that the donor has read the prescribed information or has had it read to him or her (Mental Capacity Act 2005, Sch 1, para 2(1)(a), (b)).

It must also contain a statement that the donor intends the authority conferred under the instrument to include authority to make decisions on his behalf in circumstances where he no longer has capacity (Mental Capacity Act 2005, Sch 1, para 2(1)(b)). All that is very similar to the formal requirements for enduring powers of attorney.

If it was necessary to register an enduring power of attorney, then it was necessary to give notice to the donor's relatives. The Enduring Powers of Attorney Act 1985 laid down a list of persons to whom notice had to be given. In theory, this was fine as it gave the relatives a chance to object to the registration of the power. However, it could be a nonsense. A donor might not have any close relatives, but in theory notice had to be given to distant relatives who had had nothing to do with the donor for years.

With lasting powers of attorney, there is still a requirement to give notice, but the donor can specify in the power to whom notice is to be given (Mental Capacity Act 2005, Sch 1, para 2(1)(c)).

How does this operate in practice? If parents appoint all three children as their attorneys, there seems little point in giving notice to more distant relatives. On the other hand, if only one child is appointed, then it might be desirable to provide that notice is given to the other children, so that they can object if they wish to do so. Usually, donors who do not have children can find a relative or friend or neighbour who is prepared to be the named person.

Regulation 6 of the Regulations provides that the maximum number of persons who can be named as being entitled to be notified of the registration is five. However, the attorney cannot be named as a person to whom notice must be given (Mental Capacity Act 2005, Sch 1, para 2(3)), and neither can a person who is named as substitute attorney.

The attorney must also sign a statement to the effect that he has read the prescribed information and understands that he must observe the principles laid down in s 1 and act in the best interests of the donor as laid down in s 4 (Mental Capacity Act 2005, Sch 1, para 2(1)(d)).

There is a requirement for a certificate by a prescribed person. This certificate must state that, in the opinion of the person giving the certificate:

(i) the donor understands the purpose of the instrument and the scope of the authority conferred under it,

(ii) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney, and

(iii) there is nothing else which would prevent a lasting power of attorney from being created by the instrument (Mental Capacity Act 2005, Sch 1, para 2(1)(e)).

The certificate cannot be given by the attorney (Mental Capacity Act 2005, Sch 1, para 2(6)). Obviously, if it could be given by the attorney, this would rather nullify the safeguard of the certificate.

Regulation 8(1) provides that the following persons may give the certificate:

(*a*) a person chosen by the donor or as being someone who has known him personally for the period of at least two years which ends immediately before that date on which that person signs the certificate; or

(*b*) a person chosen by the donor or who, on account of his professional skills and expertise, reasonably considers that he is competent to make the judgments necessary to certify the matters set out in para 2(1)(e) of Schedule 1 to the Act (this paragraph is set out above).

Regulation 8(2) gives examples of the persons within reg 8(1)(b). They are:

(*a*) a registered healthcare professional;

(*b*) a barrister, solicitor or advocate called or admitted in any part of the United Kingdom;

(*c*) a registered social worker; or

(*d*) an independent mental capacity advocate (these are discussed in para **2.11**).

Regulation 8(3) provides that a person is disqualified from giving a certificate in respect of any instrument intended to create a lasting power of attorney if that person is:

(*a*) a family member of the donor;

(*b*) a donee of that power;

(*c*) a donee of any other lasting power of attorney, or an enduring power of attorney which has been executed by the donor (whether or not it has been revoked);

(*d*) a family member of a donee of the power;

(*e*) a director or employee of a trust corporation acting as a donee of the power;

(*f*) a business partner or employee of the donor or the donee of that power;

(*g*) an owner, director, manager or employee of any care home in which the donor is living when the instrument is executed; or

(*h*) a family member of a person within sub-paragraph (g).

For a non-exhaustive list of 'family memers', see para **3.6** (Page 9: Part B).

Regulation 8(4) provides that a 'care home' has the meaning given in s 3 of the Care Standards Act 2000; a 'registered healthcare professional' means a person who is a member of a profession regulated by a body mentioned in s 25(3) of the National Health Service Reform and Health Care Professions Act 2002; and 'registered social worker' means a person registered as a social worker in a register maintained by the General Social Care Council, the Care Council for Wales, the Scottish Social Services Council or the Northern Ireland Social Care Council.

The list of persons who cannot give the certificate is in most respects unexceptional, and is designed to ensure that anyone who might have influence over the donor cannot give the certificate. However, the regulation may cause some problems for professionals who agree to act as an attorney under a lasting power. It is clearly correct that the attorney or donee should not give the certificate, but in addition the business partners or employees of the donee cannot give a certificate. Many solicitors' firms do not permit the appointment of employees as attorneys, but if they do, it seems that a partner could give the certificate. However, if a partner is appointed as the attorney or donee, then the donor will have to choose another person to give the certificate. In addition, it would seem that there is considerable scope for abuse, as adult children may persuade parents to execute lasting powers of attorney and friends to give the certificate.

If the donor states that there are no persons whom he wishes to be notified of any application for registration, two persons of the prescribed description must each

give a certificate (Mental Capacity Act 2005, Sch 1, para 2(2)(b)). This is reinforced by reg 7, which provides that, where the lasting power of attorney includes a statement by the donor that there are no persons whom he wishes to be notified of any application for the registration of the instrument, the instrument must include two certificates, and each certificate must be completed and signed by a different person.

WHAT IS THE POSITION IF THE INSTRUMENT DIFFERS FROM THE PRESCRIBED FORM?

3.4 What is the position if the donor executes a lasting power, but there is non-compliance with the formal requirements? Section 9(3) of the Mental Capacity Act 2005 makes it clear that such a power does not confer any authority on the attorney. It provides that an instrument which:

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

(*b*) does not comply with this section, section 10 or Schedule 1,

confers no authority.

However, if the difference is immaterial, then it may still be valid. What is an immaterial difference? Regulation 3 of the Regulations offers some guidance as to what is an immaterial difference. Regulation 3(1)(a) provides that any reference to a form, in the case of a form set out in Schedules 1 to 7 to the Regulations, is to be considered as including a Welsh version of that form. In the case of a form set out in Schedules 2 to 7 to the Regulations, any reference to a form is to be regarded as also including:

(i) a form to the same effect but which differs in an immaterial respect in form of mode or expression;

(ii) a form to the same effect but with such variations as the circumstances may require or the court or the Public Guardian may approve; or

(iii) a Welsh version of a form within (i) or (ii).

The forms are set out in **Appendices 1** and **2**. Schedule 1 prescribes the two forms of lasting power of attorney, and it appears that the only difference that is permissible is a Welsh version. However, with other forms, it seems that there may be a more lenient attitude, but the form must still be to the same effect, although it can differ in an immaterial respect in form of mode of expression.

It seems clear that a defective lasting power cannot operate as an ordinary power, and anyone who acts under it will be liable for breach of warranty of authority (for a discussion of the liability of attorneys, readers are referred to **Chapter 10**).

WHO CAN BE THE ATTORNEY OR DONEE?

3.5 Any person over 18 may be appointed as an attorney under a lasting power of attorney. A trust corporation can be appointed in relation to the donor's property and affairs, but not with regard to the donor's personal welfare.

However, an attorney who is bankrupt cannot be appointed as attorney in relation to the donor's property and affairs, but can be in relation to the personal welfare of the donor. Presumably, someone who has been made bankrupt, but discharged, can be appointed as a attorney in relation to both the property and affairs of the donor as well as the personal welfare of the donor (Mental Capacity Act 2005, s 10(1), (2)).

If more than one attorney is appointed, then they can be appointed jointly or jointly and severally (Mental Capacity Act 2005, s 10(3), (4)). It is also possible to have a joint appointment in respect of some matters and a joint and several appointment with regard to other matters. If it is a joint appointment, then it means that all the attorneys must agree on any action with regard to the property and affairs or personal welfare of the donor. If it is a joint and several appointment, then it means that one attorney can make decisions about the property and affairs or personal welfare of the deceased without reference to the other. (The original prescribed forms for lasting powers of attorney gave the donor the right to choose whether two or more attorneys should act together, which is a joint appointment, or together and independently, which is a joint and several appointment: see para **3.2** above).

A person with convictions for offences of dishonesty can be appointed as attorney, although it may not be desirable.

If more than one person was appointed as attorney, and the power is silent as to whether it is a joint or joint and several appointment, then it is to be assumed that it is a joint appointment (s 10(5)); this means that the attorneys must act together.

What happens if two or more persons are appointed as attorneys, and one or more fails to comply with the requirements for registration in Parts 1 and 2 of Sch 1 to the Mental Capacity Act 2005, or is not qualified to act under s 10(1) and (2) of the Mental Capacity Act 2005 because they are under 18 or bankrupt? Section 10(6) provides that, if it is a joint appointment, then the failure to comply with these requirements by any of the attorneys means that the lasting power is ineffective. It is clear from s 9 that the power confers no authority.

Section 10(7) provides that, if the attorneys are to act jointly and severally, and one fails to comply with the requirements, then the power of appointment does not take effect as far as that attorney is concerned. However, if the other

attorneys comply with the requirements, then the power will be effective as far as the others are concerned.

Can an attorney acting under a lasting power be given power to appoint another attorney for the donor? This is prohibited by s 10(8)(a) of the Mental Capacity Act 2005. However, it is possible for the donor to appoint a person to replace an attorney on the occurrence of any event given in any of paragraphs (a)–(d) of s 13(6) which has the effect of terminating the attorney's appointment. The events listed in s 13(6)(a)–(d) are set out in para **3.2** above.

COMPLETION OF THE FORMS

3.6 Readers are referred to the 'Lasting power of attorney – property and financial affairs' form set out in **Appendix 1**. Many of the comments are also relevant to the health and personal welfare lasting power as well.

Page 1

The form will not be rejected if the checklist is not completed, although it is obviously sensible to complete this.

Page 4: Section 3 – Replacement attorneys

The Mental Capacity Act 2005 prescribes the circumstances when a replacement attorney can take over. It is not permissible to specify when the appointment of the replacement attorney will be effective.

In *Re Bates* (*an order of the Senior Judge made on 3 December 2008*) the donor appointed a replacement attorney, and stated that she could act at any time at the election of the two attorneys she had appointed. These words were severed, on the basis that a replacement attorney could only act in the circumstances prescribed in s 13(6)(a)–(d).

In *Re Baldwin* (*an order of the Senior Judge on 14 May 2009*) the donor appointed X as original attorney, Y as replacement for X, and Z as replacement for Y. The appointment of Z was severed, as this is not permitted by the Mental Capacity Act 2005.

Note that a person who is appointed a replacement attorney cannot be a named person.

Page 5: Section 4 – How you want your attorneys to make decisions

Donors may wish to confer a joint and several authority on attorneys with regard to all their assets apart from the home of the donor, where the authority may be

joint. However, if the donor has more than one account with a bank or building society, it is not perhaps sensible to confer a joint authority over some accounts, and joint and several over other accounts.

In *Re P* (*an order of the Senior Judge made on 9 June 2009*) the donor appointed three attorneys to act jointly and severally, and imposed the following restriction: 'I require that two attorneys must act at any one time so that no attorney may act alone'. On the application of the Public Guardian, the restriction was severed.

In *Re Bratt* (*an order made by the Senior Judge on 14 September 2009*) the donor appointed two attorneys, A and B, to act jointly and severally, and directed that 'B is only to act as attorney in the event of A being physically or mentally incapable of acting in this capacity'. The Public Guardian applied for severance of this provision, and severance was ordered. It was inconsistent with a joint and several appointment. The Senior Judge stated that the donor should instead have appointed B to be a replacement attorney.

In *Re Reading* (*an order of the Senior Judge made on 25 June 2009*) the donor appointed her husband and two of her children as original attorneys and a third child as replacement attorney. If her husband should predecease her, then she stated that any decisions 'must be agreed by all four of my children'. She had a fourth child who had not been appointed as attorney or replacement attorney. The restriction was severed as being ineffective as part of an LPA. A donor could not require that a person who was not an attorney should join in the making of decisions by the attorneys.

Page 6: Section 5 – About restrictions and conditions

It was common for an enduring power of attorney to provide that it only became effective if the donor lacked mental capacity, as certified by the donor's doctor, and sometimes if they lacked physical capacity. Whilst the author fully understands the reasons for imposing such a condition, as an enduring power was effective as soon as it was executed, a condition like this could cause problems. A donor may not be prepared to deal with his or her affairs, but may still have capacity. In that situation, the power cannot be used.

The notes at the side make it clear that conditions must be workable. The cases set out below are examples of conditions which were considered objectionable.

In *Begum* (*Probate Magazine, January 2009, Denzil Lush*) the donor, who was born in 1963, executed a lasting power of attorney in which she appointed a friend called Keith to be her sole attorney.

The lasting power contained the following restrictions:

> 'all decisions about the use or disposal of my property and financial resources must be driven by what my Personal Welfare Lasting Power of Attorney(s) believe will support my long term interests;
>
> any decisions affecting assets (individually or together) worth more than £5000 at any one time must be discussed and agreed with [JM]; and
>
> In the event of there being a disagreement between my Personal Welfare Lasting Power of Attorney(s) and or [JM] this should be resolved by these parties appointing an independent advocate to adjudicate.'

The Public Guardian applied to the Court of Protection to sever these provisions.

With regard to the first, the Public Guardian was of the view that it was not open to the donor to provide that the attorney must defer to the attorneys of the personal welfare lasting power of attorney in all decisions.

With regard to the second condition, the Public Guardian accepted that the donor may require the attorney to obtain the consent of a third party to some transactions, but this was an excessive fetter on the discretion of the attorney.

With regard to the third condition, the Public Guardian was of the view that, if there was any dispute between the attorneys acting under a property and affairs attorney and the attorneys acting under a personal welfare attorney, it would be for the court to resolve the matter.

The court made an order severing these provisions.

In *Hann* (*Probate Magazine, January 2009, Denzil Lush*) the donor executed a lasting power of attorney for property and affairs. In the box at paragraph 4 she wrote:

> 'either of my attorneys may do my banking, deal with property and my affairs and deal with the decisions regarding my health and welfare.'

In paragraph 7, she wrote:

> 'I wish my attorneys to follow the following guidance: that they will involve me in decisions when possible with my best interests and care at heart. This will include dealing with my finance and property and health and welfare.'

The court ordered severance of these provisions.

In *Re Jenkins* (*an order of the Senior Judge made on 2 September 2008*) the donor had granted a property and affairs lasting power. She appointed attorneys

to act 'together and independently'. She then directed that they must act together in relation to any bills, payments or costs exceeding £2,000 in any one calendar month, and in relation to any single payment greater than £1,000 in any calendar month. The donor had also appointed a replacement attorney, and directed that she should act if the original attorneys were 'not available through travel or living abroad or any other circumstances that may prevent or restrict their capacity to act on my behalf as attorneys'.

The Public Guardian applied to sever these provisions, on the grounds that the directions in the first clause were incompatible with an appointment to act 'together and independently'. The directions in the second clause were invalid because a replacement attorney may only act on the occurrence of an event mentioned in s 13(6)(a)–(d) of the Mental Capacity Act 2005.

Severance was ordered.

In *Re Patel* (*an order of the Senior Judge made on 1 December 2008*) the donor appointed a replacement attorney to act if the original attorney should be 'mentally or physically incapable' or if the original attorney 'is not in England at any time that my personal or financial affairs require attention'. The Public Guardian applied for severance of these words on the ground that a replacement attorney may only act on the occurrence of an event mentioned in s 13(6)(a)–(d) of the Mental Capacity Act 2005.

Severance was ordered.

In *Re Clarke* (*an order of the Senior Judge made on 18 November 2009*) the donor appointed three attorneys, A (his wife), B, and C, to be his attorneys. They were appointed to act jointly in some matters, and jointly and severally in others. He then stated that the attorneys were to act independently for transactions not exceeding £5,000 'but together in respect of all other decisions subject to my wife A's opinion prevailing in the event that my attorneys are not unanimous in any decision involving property or expenditure exceeding £5,000'. The words 'subject to my wife A's opinion' onwards were severed.

Page 6: Section 6 – About guidance to your attorneys

This is in effect a letter of wishes frequently encountered in discretionary trusts. It is possibly better if this section is not completed, and the wishes of the donor conveyed in a separate note to the attorneys. There does seem to be a risk that anything written in this section could be construed as a condition.

Page 6: Section 7 – About paying your attorneys

If the donor is appointing a family member as an attorney, presumably the family member will not expect any payment.

If the donor is appointing a friend as attorney, whilst there is an implied right to an indemnity and reimbursement of expenses, there is no right to remuneration. The donor can, of course, provide that the friend is to be entitled to a sum of money for acting as attorney. It is probably best if this sum is specified at the outset.

If the donor is appointing a solicitor or accountant as an attorney, then there is probably an implied right to remuneration. However, it is desirable to include the standard charging clause usually found in wills and settlements where professional persons are appointed as executors and trustees.

Page 7: Section 8 – About people to be told when the application to register this lasting power of attorney is made

Lasting powers of attorney can be abused. The donor may be persuaded to appoint a person as attorney who might abuse his or her position, and the persons named as being entitled to be told when an application to register the power is made might be accomplices.

In view of this, there are some situations where it may be desirable for a professional drafting a lasting power to suggest to the donor whom they should name as being entitled to the notice of application to register the lasting power, although of course it is for the donor to make the final decision. The situation the author has in mind where this might be appropriate is where the client wishes to appoint his or her spouse as attorney, and has children from previous marriages. It may be that those children should be the named persons. Another situation is where the donor is appointing his or her carer as attorney. Again, it may be appropriate to suggest to the donor that a relative should be the named person.

Note that an attorney or replacement attorney cannot be the named person.

Page 9: Part B – Declaration by certificate provider

A family member cannot be a certificate provider. There is no definition of what is meant by a 'family member' in the Act or the Regulations, but the Office of the Public Guardian have produced some evidence of who they consider to be a family member. The list is:

- Spouse or civil partner
- Person who is not a spouse or civil partner but who has been living with the donor/attorney as if they were the spouse or civil partner
- Parent
- Child

- Brother or Sister
- Grandparent
- Grandchild
- Niece or Nephew
- Uncle or Aunt
- Brother or Sister of the half blood (usually called a half-brother or half-sister)
- Step-child
- Step-parent
- Niece or Nephew of the half blood (this means the child of a half-brother or half-sister)
- Uncle or Aunt of the half blood (this means the parent's half-brother or half-sister)
- Widow, widower or surviving civil partner of a child of the Donor or of the Attorney
- Relationship by marriage, eg son-in-law, daughter-in-law, mother-in-law etc, ie the equivalent relationships by marriage of the relevant listed relationships.

In *Re Kittle* (*a judgment of the Senior Judge given on 1 December 2009*), it was held that a first cousin was not a family member and could give the certificate.

Some solicitors have taken the view that they are not prepared to give the certificate as, if it transpires that the lasting power is invalid, then they could be liable to anyone who has suffered loss as a result.

The author does not take this view. If a professional is instructed to draft a lasting power of attorney for a client, then the first question the professional needs to be satisfied about is the capacity of the donor to grant the lasting power. If the professional is satisfied that the donor has capacity, then there is no problem with the professional giving a certificate. If the professional is not satisfied that the donor had capacity, then the professional should not go ahead with the lasting power of attorney.

If there is later a problem with a lasting power, and a professional has given the certificate, there is a presumption under the Mental Capacity Act 2005 that everyone has capacity. The professional would be able to rely upon this, backed up by attendance notes about what had happened when the professional took instructions and when the lasting power was signed.

The comments above also apply to the health and welfare lasting power of attorney. However, the following case is only of relevance to health and welfare powers.

Page 7: Section 6 – About restrictions and conditions

In *Re Azancot* (*an order of the Senior Judge made on 27 May 2009*) the issue was whether a restriction in a personal welfare lasting power should be severed. Section 11(7) of the Mental Capacity Act 2005 provides that a personal welfare attorney may not make a decision unless the donor lacks mental capacity. The donor inserted a restriction that her replacement attorneys 'may only act under this power in the event that the donor is physically or mentally incapacitated and there is written medical evidence to that effect'. The Public Guardian applied for severance of the words 'physically or' on the grounds that they were inconsistent with s 11(7).

Severance was ordered.

EXECUTION OF THE LASTING POWER OF ATTORNEY

3.7 Regulation 9 of the Regulations contains provisions dealing with the execution of a lasting power by the donor, the attorney and the person giving the certificate.

Regulation 9(2) provides that the donor must read (or have read to him) all the prescribed information. As soon as reasonably practicable after the donor has read or had read to him the prescribed information, the donor must:

(*a*) complete the provisions of Part A of the instrument that apply to him (or direct another person to do so); and

(*b*) subject to reg 9(7) (see below), sign Part A of the instrument in the presence of a witness. Part A is the donor's statement (reg 9(3)).

Regulation 9(4) provides that, as soon as reasonably practicable after the steps required by reg 9(3) have been taken:

(*a*) the person giving the certificate, or

(*b*) if two certificates are required, each of the persons giving a certificate, must complete the certificate at Part B of the instrument and sign it.

Regulation 9(5) provides that, as soon as reasonably practicable after the steps required by reg 9(4) have been taken:

(*a*) the donee, or

(*b*) if more than one, each of the donees, must read (or have read to him) all the prescribed information.

Regulation 9(6) provides that, as soon as reasonably practicable after the steps required by reg 9(5) have been taken, the donee or, if more than one, each of them:

(*a*) must complete the provisions of Part C of the instrument that apply to him (or direct another person to do so); and

(*b*) subject to reg 9(7), must sign Part C of the instrument in the presence of a witness.

If the instrument is to be signed by any person at the direction of the donor, or at the direction of any donee, the signature must be made in the presence of two witnesses (reg 9(7)).

Regulation 9(8) provides that the donor must not witness any signature required for the power. A donee must not witness any signature required for the power apart from that of another donee.

A person witnessing a signature must sign the instrument and give his full name and address (reg 9(9)).

It is unusual to come across a person who cannot sign his signature. However, if this is the case, reg 9(10) provides that a person can sign a document by making a mark on the instrument at the appropriate place.

It is therefore clear that the order of events is:

1. The donor must read or have read to him all the prescribed information.
2. The donor must complete Part A and then sign it in the presence of a witness.
3. The person or persons giving the certificate about the validity of the power must then complete Part B and then sign the instrument.
4. The donee or donees must then read or have read to them all the prescribed information.
5. The donee or donees must then complete the provisions of Part C of the instrument and then sign it in the presence of a witness.

REGISTRATION

3.8 Before a lasting power of attorney can be used, it must be registered. This is a radical change from the regime which applied to enduring powers of

attorney. An enduring power of attorney was effective the moment it was executed by the donor. It only had to be registered if the donor became mentally incapable or was becoming mentally incapable.

Part 2 of Sch 1 to the Mental Capacity Act 2005 contains provisions dealing with the registration of lasting powers of attorney.

Paragraph 4(1) provides that an application to the Public Guardian for the registration of an instrument intended to create a lasting power of attorney must be made in the prescribed form and must include any prescribed information.

Who can make the application? Paragraph 4(2) provides that the application can be made:

(*a*) by the donor,

(*b*) by the attorney or donees, or

(*c*) if the instrument appoints two or more donees to act jointly and severally, by any of the donees.

If more than one attorney has been appointed, and it is a joint appointment, then all must apply for registration of the power. If they do not, the power will be held to be ineffective. If more than one attorney has been appointed, it is a joint and several appointment, and not all the attorneys apply for registration, the power will be registered.

The application must be accompanied by:

(*a*) the instrument, and

(*b*) any fee provided for under s 58(4)(b) (currently £120).

Normally, the Public Guardian will register the lasting power of attorney, but this is subject to paragraphs 11 to 14 (see below).

The form which must be used for making the application is LPA002; this is set out in **Appendix 2** and is available on the Office of the Public Guardian's website, www.publicguardian.gov.uk/forms/Making-an-LPA.htm.

Regulation 11(2) of the Regulations provides that, if the original instrument intended to create the power, or a certified copy, is not submitted with the application for registration, then the Public Guardian must not register the instrument unless the court directs him to do so. Regulation 11(3) provides that a 'certified copy' means a photographic or other facsimile copy which is certified as an accurate copy by the donor or a solicitor or notary.

Regulation 12 provides that the period at the end of which the Public Guardian must register a lasting power of attorney is the period of six weeks beginning with:

(*a*) the date on which the Public Guardian gave the notice or notices under para 7 or 8 of Schedule 1 to the Act of receipt of an application for registration; or

(*b*) if notices were given on more than one date, the latest of those dates. The notification requirements are discussed in para **3.9**.

When should a property and affairs lasting power be registered? Many lasting powers will never be used – the donor will retain capacity up to the moment of death. In addition, donors may change their minds as to who they want to appoint as an attorney; a change may be forced on them, as a donor originally appointed may die. So, it could be argued that lasting powers should not be registered until the donor shows signs of lacking capacity. However, many donors want them registered as soon as they are granted. This also has the advantage that, if there is any problem with the form, it can be resolved when the donor still has capacity, whereas if registration is delayed until the donor shows signs of lacking capacity, it may be too late to rectify any problem.

Whilst a personal welfare lasting power cannot be used if the donor still has capacity, these should be registered as soon as they are granted, as the donor may be taken ill suddenly or have an accident – it is difficult to predict when it will be needed.

NOTIFICATION REQUIREMENTS

3.9 There is a requirement to give notice to the donor, the persons named in the lasting power of attorney and the attorneys. This is clearly correct. Who has to give the notice depends on who is applying for registration.

Paragraph 6(1) of Sch 1 of the Mental Capacity Act 2005 applies if the donor is applying for registration, and requires the donor to notify any named persons that he is about to do so. On receipt of the application for registration, the Public Guardian must notify the attorney or donees that the application has been received (para 7).

Paragraph 6(2) applies where the attorney or donees apply for registration, and then the attorney or donees must notify any named persons that they are about to do so. If that is the case, the Public Guardian must notify the donor that an application has been received as soon as practicable after receiving an application by the attorney or donees (para 8(1)). If more than one attorney is appointed, but not all apply for registration, the Public Guardian must notify:

(*a*) the donor, and

(*b*) the attorney or donees who did not join in making the application that the application has been received (para 8(2)).

To summarise:

(*a*) Donor applies

- Donor must give notice to named persons.
- Public Guardian must give notice to attorneys.

Or

(*b*) Attorney applies

- Attorney must notify named persons.
- Public Guardian must give notice to donor.

Thus, where the instrument appoints two or more donees to act jointly and severally, and the application is by an attorney, the Public Guardian must notify the donor, the attorney or donees who have not joined in making the application and any named persons that the application has been received.

Note that if it is a joint appointment, then all the donees must apply for registration. If all joint attorneys do not apply, then the power is ineffective.

The notice under para 6 must be made in the prescribed form, and the notice under para 6, 7 or 8 must include such information, if any, as may be prescribed (para 9).

The form of notice which must be given by a donor or donee has been prescribed; it is LPA003. The Public Guardian must use form LPA003A to give notice to the donee or donees when the Public Guardian receives an application to register a lasting power of attorney. Form LPA003B must be used by the Public Guardian to give notice to the donor. These forms are set out in **Appendix 2**.

Regulation 13(3) provides that, where it appears to the Public Guardian that there is good reason to do so, the Public Guardian must also provide (or arrange for the provision of) an explanation to the donor of the notice served on the donor, its effect and why it is being brought to his attention. Such information must be provided to the donor personally, and in a way that is appropriate to the donor's circumstances (for example, using simple language, visual aids or other appropriate means).

The court can dispense with the requirement to notify if it is satisfied that no useful purpose would be served by giving notice (Mental Capacity Act 2005, Sch 1, para 10). The Act is silent as to the circumstances in which the court would find that no useful purpose would be served by giving notice; in the past, there has been a reluctance with enduring powers of attorney to dispense with the requirement to give notice to the donor of the power, although in many cases the donor would not have been able to understand what is happening. Presum-

ably, if the power created a joint and several power, and the whereabouts of a attorney could not be established without undue expense, then the court would dispense with service on that attorney. If the named person was alive when the lasting power was executed, but dies before registration, the Public Guardian will register the power.

OBJECTIONS TO REGISTRATION OF THE LASTING POWER

3.10 Paragraph 13 of Sch 1 to the Mental Capacity Act 2005 gives the attorney or named person or donor the right to object to the registration of a lasting power. Note that, if anyone other than a named person objects to registration of a lasting power, a fee of £400 is payable.

The attorney or named person must give notice to the Public Guardian of an objection to the registration within the prescribed period (see reg 14(2)).

The grounds for objecting to the registration are that an event mentioned in s 13(3) (the donor's bankruptcy so far as it relates to the donor's property and affairs) or 13(6)(a)–(d) (see para **3.2** above) has occurred which has revoked the instrument.

Note that, under s 13(7), the power is not revoked, even though one of the events listed above has occurred, if the donee is replaced under the terms of the instrument, or he is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining donee.

Paragraph 13(2) provides that the Public Guardian must not register the instrument if he is satisfied that the ground for making the objection is established, unless the court on the application of the person applying for the registration:

(*a*) is satisfied that the ground is not established, and

(*b*) directs the Public Guardian to register the instrument.

Regulation 14(2) (as amended by SI 2007/2161) provides that the donee or a named person must serve a notice of objection before the end of the period of five weeks beginning with the date on which notice is given. Regulation 14(3) provides that a notice of objection must be given in writing, setting out:

(*a*) the name and address of the objector;

(*b*) the name and address of the donor of the power;

(*c*) if known, the name and address of the donee or donees; and

(*d*) the ground for making the objection.

The Public Guardian must notify the objector as to whether he is satisfied that the ground of the objection is established (reg 14(4)). Regulation 14(5) provides that the Public Guardian may require the objector to provide such further information, or produce such documents, as the Public Guardian reasonably considers necessary to enable him to determine whether the ground for making the objection is established.

Regulation 14(6) provides that, where the Public Guardian is satisfied that the ground of the objection is established, but the instrument is not revoked because of s 13(7) (see above), the notice under reg 14(4) must contain a statement to that effect.

Regulation 14(7) provides that an objector can make a further objection, before the end of the period of five weeks beginning with the date on which the notice is given, if the Public Guardian has served notice that he is not satisfied that the particular ground of objection to which the notice relates is established.

Regulation 14A (added by SI 2007/2161) deals with objections to the registration of the power by the donor. It provides that, where the donor of the power is entitled to receive notice under para 8 of Sch 1 to the Act of an application for the registration of the instrument, and wishes to object to the registration, he must do so before the end of the period of five weeks beginning with the date on which the notice is given:

> 'The donor of the power must give notice of his objection in writing to the Public Guardian, setting out–
>
> (*a*) the name and address of the donor of the power;
>
> (*b*) if known, the name and address of the donee (or donees); and
>
> (*c*) the ground for making the objection.'

Paragraphs 13(3) and (4) of Schedule 1 to the Act provide that the Public Guardian must not register the instrument unless the court directs him to do so if an attorney or named person receives notice of an application for the registration of an instrument and, before the end of the prescribed period, makes an application to the court objecting to the registration on a prescribed ground, and notifies the Public Guardian of the application.

Regulation 15(2) provides that the grounds for making an application to the court are:

(*a*) that one or more of the requirements of the creation of a lasting power of attorney had not been met;

(*b*) that the power has been revoked, or has otherwise come to an end, on a ground other than the grounds set out in para 13(1) of Sch 1 to the Act (see above); or

(*c*) any of the grounds set out in sub-paragraph (a) or (b) of section 22(3) of the Act (see below).

The donor, donee or named person who wishes to object under reg 15(2) must make an application to the court before the end of the period of five weeks beginning with the date on which notice is given to them of the application for registration of the power (reg 15(3)). Regulation 15(4) provides that the notice of an application to the court, which a person making an objection to the court is required to give to the Public Guardian under para 13(3)(b)(ii) of Sch 1 to the Act, must be in writing.

Paragraph 14 gives the donor the right to object to the registration of the power. It applies if the donor receives notice of an application for the registration of a power and, before the end of the prescribed period, gives notice to the Public Guardian of an objection to the registration. The Public Guardian must not register the instrument unless the court, on the application of the attorney or donees, is satisfied that the donor lacks capacity to object to the registration, and directs the Public Guardian to register the instrument. This is clearly correct, as the donors of powers of attorney have always had the right to revoke a power unless it was expressed to be irrevocable and given by way of security.

Regulation 16 provides that, if the Public Guardian is prevented from registering an instrument as a lasting power of attorney because the instrument is not made in accordance with Schedule 1, or there is a deputy already appointed, or an objection has been made by the donee or named person on grounds of bankruptcy, disclaimer, death etc, or there has been an objection by the donor, or the application for registration is not accompanied by the original instrument or a certified copy, the Public Guardian must notify the person or persons who applied for registration.

Section 22(3) of the Act provides that, if the court is satisfied:

(*a*) that fraud or undue pressure was used to induce P:

  (i) to execute an instrument for the purpose of creating a lasting power of attorney, or

  (ii) to create a lasting power of attorney, or

(*b*) that the donee (or, if more than one, any of them) of a lasting power of attorney:

  (i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or

  (ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.

then the court may:

(*a*) direct that an instrument purporting to create the lasting power of attorney is not to be registered, or

(*b*) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.

CASES INVOLVING OBJECTIONS TO REGISTRATION OF POWERS

3.11 The following case is concerned with an application to register an enduring power, but presumably a similar attitude will be adopted to similar objections to the registration of a lasting power.

In *Re W* [2000] 1 All ER 175, W appointed her daughter X as her attorney under an enduring power. There were two other children, Y and Z, and as a consequence of a dispute over a property, there was considerable hostility between X, Y and Z. It was held that this by itself did not mean that X was unsuitable within s 6(5)(e). Jules Sher QC, sitting as a Deputy Judge of the High Court, said at page 182:

> 'It seems to me that it is not right to say that (irrespective of the background) hostility of the kind we have seen in this case between the children renders any of them unsuitable to be Mrs. W's attorney. In this case the hostility will not impact adversely on the administration. It would, in my judgment, be quite wrong to frustrate Mrs. W's choice of attorney in this way. Whether it is or is not a good idea for a parent in Mrs. W's position, when such hostility exists, to appoint one child alone as attorney is another question.'

In *Baines* (*Probate Magazine, January 2009, Denzil Lush*) the donor was born in 1946, and had four children, and a wife from whom he had been separated for some time. He granted a lasting power of attorney in favour of a nephew, and another nephew and niece were the named persons.

The wife of the donor challenged the application to register the lasting power of attorney on various grounds – undue pressure, the attorney would misbehave or would not act in the best interests of the donor, that the attorney might be able to sell the house in which the wife and her elderly mother were then residing.

The donor produced a medical report which confirmed that he was fully competent. He also stated that he had granted the lasting power of attorney because he made frequent trips to India.

The court dismissed the objection.

In *Cumings* (*Probate Magazine, January 2009, Denzil Lush*) the donor appointed his current girlfriend as attorney, and two of the partners in a firm of solicitors as replacement attorneys. His two sons were the named persons.

The sons objected to the registration of a lasting power of attorney on the grounds that the attorney proposed to behave in such a way that would contravene her authority or would not be in the best interests of the donor.

The court made an order setting out a timetable for the filing of evidence and responses, but the two sons did not respond. Accordingly, the Public Guardian was directed to register the lasting power of attorney.

The sons did not know that the lasting power of attorney contained a clause stating that the donor had agreed to pay his girlfriend £1,000 per week for acting as attorney.

In *Re Sykes* (*an order of the Senior Judge made on 9 July 2009*) the donor of a property and affairs lasting power of attorney imposed a restriction stating that no gifts of any of her assets should be made other than 'annual or monthly gifts already being made by me at the date of my signing this LPA by regular bank standing orders or direct debits'. This could have permitted the attorney to make gifts beyond those permitted by the Mental Capacity Act 2005, and was severed.

In *Glover* (*Probate Magazine, January 2009, Denzil Lush*) the donor appointed his son as his sole attorney under an enduring power of attorney. He then granted a lasting power under which he appointed his former cleaner and her husband as joint and several attorneys. There were no named persons, and the two certificate providers were the donor's doctor and a legal executive.

The son objected to the registration of the lasting power on the ground that neither he nor his sister had had notice of the application to register the lasting power, and that he was suspicious of the apparent secrecy of the application.

The court gave directions for the filing of objections, and the son withdrew his objection.

In *Hardiman* (*Probate Magazine, January 2009, Denzil Lush*) the donor had appointed her son as her attorney under an enduring power. After a family disagreement, she executed a lasting power under which she appointed her daughter and son-in-law to be her attorneys jointly and severally. The named persons were the daughter and the two daughters of the son-in-law.

The son objected to the registration of the lasting power on the grounds that fraud or undue pressure had been used to induce the donor to make the power, and that the attorneys proposed to behave in such a way that would contravene

their authority or would not be in the best interests of the donor. The son also said that he believed that he should have been notified of the application to register the lasting power of attorney, because he was the attorney under an enduring power of attorney.

Denzil Lush expressed the view that he had some sympathy with the son on this point.

It is the view of the author that it might be desirable to introduce the system which applies to enduring powers to lasting powers so that, instead of the donor being able to nominate who is to be given notice of the application to register the lasting power or to specify that no-one is to be given notice, there is a list of specified relatives who have to be given notice. Otherwise, there is scope for abuse. A donor might be persuaded to grant a lasting power of attorney in favour of a fraudster, with accomplices of the fraudster as the named persons, or no-one to be notified of the application to register the lasting power. Close family members may never know about the lasting power until it is too late – the fraudster has disappeared with all the donor's assets.

NOTIFICATION OF REGISTRATION

3.12 If a power of attorney is registered, the Public Guardian must give notice of the registration in the prescribed form to:

(*a*) the donor, and

(*b*) the attorney or donees (Mental Capacity Act 2005, Sch 1, para 15).

Regulation 17(2) provides that the Public Guardian must give notice to the donor and donee (or donees) of the registration of a lasting power of attorney using LPA004; this form is set out in **Appendix 2**.

Regulation 17(3) provides that, where it appears to the Public Guardian that there is good reason to do so, the Public Guardian must also provide (or arrange for the provision of) an explanation to the donor of the notice and what the effect of it is, and why it is being brought to his attention. Such information must be provided to the donor personally, and in a way that is appropriate to the donor's circumstances (for example, using simple language, visual aids or other appropriate means) (reg 17(3), (4)).

If the Public Guardian does register an instrument as a lasting power, he must retain a copy of the instrument, and return to the person or persons who applied for registration the original instrument, or the certified copy of it, which accompanied the application for registration (reg 17(1)).

EVIDENCE OF REGISTRATION

3.13 An office copy of an instrument registered under Schedule 1 to the Act is evidence in any part of the United Kingdom of the contents of the instrument, and the fact that it has been registered.

However, a copy certified in accordance with s 3 of the Powers of Attorney Act 1971 is also permissible (Mental Capacity Act 2005, Sch 1, para 16).

DEPUTY ALREADY APPOINTED

3.14 If a deputy has already been appointed, the Public Guardian must not register the instrument if the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney unless the court orders him to do so (Mental Capacity Act 2005, Sch 1, para 12).

What is the position if a lasting power has been granted, and been registered, and there is then an application for the appointment of a deputy? It is clear from the Mental Capacity Act Code that a deputy will only be appointed if absolutely necessary.

RECORDS OF ALTERATIONS IN REGISTERED POWERS

3.15 It is possible for a lasting power of attorney to be revoked or suspended in relation to the donor's property and affairs, but not in relation to the personal welfare of the donor. If that is the case, then the Public Guardian must attach a note to the instrument to that effect (Mental Capacity Act 2005, Sch 1, para 21).

Paragraph 22 provides that, if it appears to the Public Guardian that an event has occurred:

(*a*) which has terminated the appointment of the attorney, but

(*b*) which has not revoked the instrument,

the Public Guardian must attach to the instrument a note to that effect.

Paragraph 23 provides that if an instrument has been registered, and it appears to the Public Guardian that the attorney has been replaced under the terms of the instrument the Public Guardian must attach to the instrument a note to that effect.

Paragraph 24 provides that, if, in the case of a registered instrument, the court notifies the Public Guardian under para 19(2)(a) that it has severed a provision of the instrument, the Public Guardian must attach to it a note to that effect.

Paragraph 25 provides that, if the Public Guardian attaches a note to an instrument under paragraph 21, 22, 23 or 24, he must give notice of the note to the donee or donees of the power (or, as the case may be, to the other donee or donees of the power).

Regulation 18 deals with changes to an instrument registered as a lasting power of attorney where the Mental Capacity Act requires the Public Guardian to attach a note to the instrument registered as a lasting power of attorney. Regulation 18(2) provides that the Public Guardian must give a notice to the donor and the donee (or, if more than one, each of them) requiring him to deliver to the Public Guardian the original instrument which was sent to the Public Guardian for registration, and any office or certified copy of that registered instrument. The Public Guardian must then attach the required note to the original instrument and copies, and return the document to the person from whom it was obtained (reg 18(3)).

What is the position if a lasting power or copies have been lost or destroyed? This is dealt with by reg 19 which provides that, in those circumstances, the person required to deliver up the document must provide to the Public Guardian in writing:

(*a*) if known, the date of the loss or destruction and the circumstances in which it occurred;

(*b*) otherwise, a statement of when he last had the document in his possession.

REVOCATION OF LASTING POWERS OF ATTORNEY AND CANCELLATION OF REGISTRATION

3.16 There are some events which will cause a lasting power of attorney to be revoked. Other events will cause the appointment of an attorney to lapse, but the power remains valid as far as another attorney is concerned.

A lasting power of attorney can be revoked in the following circumstances (Mental Capacity Act 2005, s 13):

- The donor may revoke a power at any time as long as he or she has capacity.

- The bankruptcy of the donor revokes the power so far as it relates to the property and affairs of the donor. However, where the donor is bankrupt because of an interim bankruptcy restrictions order, the power is suspended, so far as it relates to the donor's property, for so long as the order has effect.
- The disclaimer of the appointment by the attorney in accordance with the prescribed requirements: see reg 20 discussed below.
- The death or bankruptcy of the attorney, or, if the attorney is a trust corporation, its winding-up or dissolution. However, the bankruptcy of the attorney does not terminate the appointment, or revoke the power insofar as his authority relates to the donor's personal welfare. If the attorney is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the 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.
- The dissolution or annulment of a marriage or civil partnership between the donor and the attorney, but this will not apply if the instrument provides that the dissolution or annulment of a marriage or civil partnership is not to terminate the appointment of the attorney or revoke the power.
- The lack of capacity of the attorney.

The appointment of the attorney does not terminate if:

(*a*) the attorney is replaced under the terms of the instrument, or

(*b*) he is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining attorney (Mental Capacity Act 2005, s 13(7)).

So, if the power appoints A as attorney, with B as substitute, and A becomes bankrupt, then the appointment of A terminates, but the power remains valid as far as B is concerned.

In addition, if more than one attorney is appointed, and it is a joint and several appointment, then if one attorney becomes bankrupt, the appointment terminates as far as that attorney is concerned, but not as far as the other attorneys are concerned.

Paragraph 17 of Sch 1 to the Mental Capacity Act 2005 requires the Public Guardian to cancel the registration of an instrument as a lasting power of attorney on being satisfied that the power has been revoked:

(*a*) as a result of the donor's bankruptcy, or

(*b*) on the occurrence of an event mentioned in s 13(6)(a)–(d) (see para **3.2** above).

If the Public Guardian cancels the registration of an instrument, he must notify:

(*a*) the donor, and

(*b*) the attorney or donees.

The court must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney if it (Mental Capacity Act 2005, Sch 1, para 18):

(*a*) determines under s 22(2)(a) that a requirement for creating the power was not met,

(*b*) determines under s 22(2)(b) that the power has been revoked or has otherwise come to an end, or

(*c*) revokes the power under s 22(4)(b) (fraud etc).

One situation where the court might order the Public Guardian to cancel the registration is where the attorney is abusing his or her position. So, if the court concludes that the attorney proposes to behave in a way that would contravene his authority or would not be in the donor's best interests, the court can order the Public Guardian to cancel the registration. However, this can only be done if the donor is not capable. If the donor is capable, then of course he can revoke the power himself if he is not happy with what the attorney is doing.

Paragraph 19 applies where the court determines, under s 23(1), that a lasting power of attorney contains a provision which:

(*a*) is ineffective as part of a lasting power of attorney, or

(*b*) prevents the instrument from operating as a valid lasting power of attorney.

In that situation, the court must:

(*a*) notify the Public Guardian that it has severed the provision, or

(*b*) direct him to cancel the registration of the instrument as a lasting power of attorney.

Paragraph 20 provides that, on the cancellation of the registration of an instrument, the instrument and any office copies must be delivered up to the Public Guardian for cancellation.

Regulation 20(1) of the Regulations provides that the donee of an instrument must use form LPA005 to disclaim his appointment as donee. Regulation 20(2) provides that the donee must send the completed form to the donor, and a copy

of it to the Public Guardian and any other donee who, for the time being, is appointed under the power. Form LPA005 is reproduced in **Appendix 2**.

Regulation 21 deals with revocation by a donor of a lasting power of attorney. Regulation 21(1) provides that a donor who revokes the lasting power of attorney must notify the Public Guardian that he has done so, and notify the donee, or if more than one, each of them, of the revocation. On receipt of such notice, the Public Guardian must cancel the registration of the instrument creating the power if he is satisfied that the donor has taken such steps as are necessary in law to revoke it (reg 21(2)). Regulation 21(3) provides that the Public Guardian may require the donor to provide such further information, or produce such documents, as the Public Guardian reasonably considers necessary to enable him to determine whether the steps necessary for revocation have been taken. If the Public Guardian does cancel the registration of a lasting power of attorney, he must notify the donor and the donee or, if more than one, each of them (reg 21(4)).

Regulation 22(1) provides that the Public Guardian must cancel the registration of an instrument as a lasting power of attorney if he is satisfied that the power has been revoked as a result of the donor's death. If the Public Guardian does so cancel the registration of an instrument, he must notify the donee or, if more than one, each of the donees of the cancellation.

POWERS OF COURT IN RELATION TO VALIDITY OF LASTING POWERS OF ATTORNEY

3.17 The court has powers to make a wide range of orders in proceedings about a lasting power of attorney.

Sections 22 and 23 of the Mental Capacity Act 2005 apply if:

(*a*) a person ('P') has executed or purported to execute an instrument with a view to creating a lasting power of attorney, or

(*b*) an instrument has been registered as a lasting power of attorney conferred by P.

Section 22(2) provides that 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 power has been revoked or has otherwise come to an end.

Section 22(3) provides that, if the court is satisfied:

(*a*) that fraud or undue pressure was used to induce P:

(i) to execute an instrument for the purpose of creating a lasting power of attorney, or

(ii) to create a lasting power of attorney, or

(*b*) that the donee (or, if more than one, any of them) of a lasting power of attorney:

(i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or

(ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests,

the court may:

(*a*) direct that an instrument purporting to create the lasting power of attorney is not to be registered, or

(*b*) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.

If there is more than one donee, and one lacks capacity, then the court may revoke the instrument or the lasting power of attorney so far as it relates to any of them (s 22(5)).

POWERS OF COURT IN RELATION TO OPERATION OF LASTING POWERS OF ATTORNEY

3.18 Section 23(1) provides that 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.

Section 23(2) provides that the court may:

(*a*) give directions with respect to decisions:

(i) which the attorney of a lasting power of attorney has authority to make, and

(ii) which P lacks capacity to make;

(*b*) give any consent or authorisation to act which the attorney would have to obtain from P if P had capacity to give it.

Section 23(3) provides that the court may, if P lacks capacity to do so:

(*a*) give directions to the attorney with respect to the rendering by him of reports or accounts and the production of records kept by him for that purpose;

(*b*) require the attorney to supply information or produce documents or things in his possession as attorney;

(*c*) give directions with respect to the remuneration or expenses of the attorney;

(*d*) relieve the attorney wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as attorney.

The court may authorise the making of gifts which are not within s 12(2) (permitted gifts) (s 23(4)). However, it has no power to order the attorney to make gifts. In *Re R* [1990] 2 WLR 1219 (which is concerned with enduring powers of attorney, but it is considered that the same ruling would apply to lasting powers), the applicant was employed by R as a cook and housekeeper and lived in R's flat. R gave her nephew an enduring power of attorney, and shortly afterwards she moved to a nursing home. The enduring power of attorney was registered, and the nephew terminated the employment of the applicant, and required her to give up possession of the flat. The applicant alleged that R had promised to provide for her for the rest of her life, and that she had worked for less than the market rate for her services. She applied for provision from R's estate. The application was unsuccessful. Vinelott J said at pages 1222 and 1223:

> 'It is quite plain, and it is not in dispute, that the only authority that the Court of Protection could have to give directions to the attorney, requiring him to make provision for the applicant, would have to be found, if at all, in s 8(2)(b)(i) [now paragraph 16(2)(b)(i) of schedule 4 to the Mental Capacity Act 2005]. The case put by the applicant's counsel is that that subparagraph does give the court unrestricted power to direct an attorney to dispose of any part of the property of the donor by way of gift or in recognition of some moral obligation, unaccompanied by any legal obligation.
>
> I find that an impossible view. Of course the word 'disposal' is, in some contexts, capable of being given a very wide meaning, and could include a disposition by way of gift. But it seems to me that in the context of section 8 it cannot have been intended that it should bear that wide meaning. It comes in a paragraph, (b), which is plainly concerned with administrative matters: the management of the donor's property; the rendering of accounts and the determination of the remuneration of the attorney. These are all part of the jurisdiction which the court is given to supervise the conduct of the attorney and to see that he is exercising his powers of management and administration properly. It would be remarkable, in a paragraph directed to matters of that sort, to find an unrestricted power given to the court to dispose of the whole of the donor's property by way of gift …'

If an attorney wishes to make a gift, which would be outside those permitted by the Mental Capacity Act 2005, then the attorney will have to apply to the Court

of Protection. The procedure is described in Practice Direction F. If the application is to make gifts not exceeding £15,000 per year, then application should be made to the Office of the Public Guardian by letter, provided the gifts can be satisfied from capital or income which is surplus to requirements.

If it is desired to make a larger gift, or to create a settlement, then a formal application must be made to the Court of Protection.

POWER TO REQUIRE INFORMATION FROM DONEES OF LASTING POWER OF ATTORNEY

3.19 Regulation 46 of the Regulations applies where it appears to the Public Guardian that there are circumstances suggesting that the donee of a lasting power of attorney may have behaved, or may be behaving, in a way that contravenes his authority or is not in the best interests of the donor, or is proposing to behave in a way that would contravene that authority or would not be in the donor's best interests, or has failed to comply with the requirements of an order made, or directions given, by the court. In those circumstances, the Public Guardian may require the donee to provide specified information or information of a specified description, or to produce specified documents or documents of a specified description. Regulation 46(3) provides that the information and documents must be provided or produced before the end of such reasonable period as may be specified, and at such place as may be specified. Regulation 46(4) provides that the Public Guardian may require any information provided to be verified in such manner or any document produced to be authenticated in such manner as he may reasonably require. 'Specified' means specified in a notice in writing given to the attorney by the Public Guardian.

TIME

3.20 Regulation 4 of the Regulations deals with the computation of time, and shows how to calculate any period of time which is specified in the Regulations. The rules are:

- A period of time expressed as a number of days must be computed as clear days.
- Where the specified period is 7 days or less, and would include a day which is not a business day, that day does not count.
- When the specified period for doing any act at the office of the Public Guardian ends on the day on which the office is closed, that act will be done in time if done on the next day on which the office is open.

- 'Business day' means any day other than a Saturday, Sunday, Christmas Day, Good Friday, and a bank holiday under the Banking and Financial Dealings Act 1971 in England and Wales.
- 'Clear days' means that, in computing the number of days, (a) the day on which the period begins, and (b) if the end of the period is defined by reference to an event, the day on which that event occurs, are not included.

SUMMARY

3.21

- Lasting powers of attorney may confer authority on the attorney to deal with the personal welfare of the donor, or the property and affairs of the donor, or both.
- The donor can specify who must be given notice of the registration of the power.
- The power must be registered before it is effective.
- The attorney can be anyone over the age of 18 who is not bankrupt.
- A trust corporation can be appointed as an attorney with regard to the property and affairs of the donor.
- Various events will cause the power to terminate, but not the mental incapacity of the donor.