(b) Exercising authority

3–03 An attorney appointed by an ordinary power cannot validly exercise his authority at a time when the donor lacks capacity. This is not merely a question of whether the donor understands the attorney's role. An attorney can only validly do an act that, at the time he does it, the donor has the capacity to do (*Drew v Nunn* (1879) 4 Q.B.D. 661).

The common law rule is that subsequent mental incapacity terminates the authority granted by a power of attorney. The exact nature of the lack of capacity is not defined; the Powers of Attorney Act 1971 refers to the donor's "incapacity" (s.4(1)(a)(ii)), but adds no further detail. The power is revoked despite the attorney's ignorance of the change in circumstances (*Yonge v Toynbee* [1910] 1 K.B. 215). To this general rule, there are now a number of exceptions. The donor's mental incapacity will not prejudice the authority of an attorney appointed under a lasting power, an enduring power (provided it is registered) or a power coupled with an interest. An attorney acting under a power which, without his knowledge, has been revoked by the donor's loss of capacity has statutory protection (1971 Act s.5(1)). Opposite third parties, an attorney's ostensible authority under a revoked power may continue.

A lasting power of attorney for health and welfare can only be used (provided it is registered) when the donor loses capacity (or the attorney reasonably believes that the donor has lost capacity) (Mental Capacity Act 2005 s.11(7)(a)).

(c) Nature of capacity

3–04 The legal capacity to grant a power of attorney generally coincides with the donor's ability to enter into a binding contract. One must ask, "was he or she capable of understanding the nature of the contract which he or she entered into?" (*Boughton v Knight* (1873) L.R. 3 P. & D. 64 at [72]). The rule is that the donor must, with the assistance of whatever explanation he was given, have the mental capacity to understand the nature and effect of the transaction (*Re K (Enduring Powers of Attorney), Re F* [1988] Ch. 310). This is a common law rule, and none of the statutes dealing with powers of attorney has addressed the point.

For the purposes of lasting powers of attorney, a person lacks mental capacity and therefore the capacity to grant a power of attorney when, by reason of a permanent or temporary impairment of the mind or brain or a disturbance with its functioning, he cannot make a decision for himself in relation to the matter. Inability to make a decision means being unable to understand, retain, use and weigh relevant information, or communicate the decision. The following cannot alone establish a lack of capacity: a person's age, appearance, or a condition or behaviours which may lead others to make unjustified assumptions (2005 Act ss.2(1)–(3), 3(1)).

For an enduring power, Hoffman J accepted this summary of what the donor must understand when granting it (*Re K (Enduring Powers of Attorney), Re F* at [316]):

> "First, if such be the terms of the power, that the attorney will be able to assume complete authority over the donor's affairs; second, if such be the terms of the power, that the attorney will in general be able to do anything with the donor's property which he himself could have done; third, that the authority will continue if the donor should be or become mentally incapable; fourth, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court."

In judging a donor's mental capacity, guidance issued jointly by the British Medical Association and the Law Society (*Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers*, 4th edn, 2015) suggests that questions to test understanding which can be answered "Yes" or "No" may not be adequate. This draws on an analogous decision in *Re Beamy (deceased)* [1978] 1 W.L.R. 770, which concerned the capacity of someone who subsequently died to execute a valid transfer of a house. Mr Martin Nourse QC, sitting as a deputy judge of the Chancery Division, said at [777]:

> "She was physically capable of signing her name and she was capable of understanding simple things, although she quickly forgot them. This enabled her to give the appearance of understanding things which were not so simple, particularly if the questions she was asked could be given a 'Yes' or 'No' answer, being the answer which was obviously wanted."

This capacity to grant a valid power must not be confused with the requirement of mental capacity in the donor at the time when the attorney acts under the power (except in the case of lasting or enduring powers), see below under *Mental Patients*, para.3–08.

2. Partners

3–05 As a normal partnership is unincorporated, a firm which wishes to appoint an attorney to act on its behalf must do so by means of a joint appointment by all the partners. Their capacity to appoint an attorney jointly is the same as their capacity as individuals. One partner has no implied authority to bind the other partner by deed (*Marchant v Morton Down & Co* [1901] 2 K.B. 829), and as a

power of attorney must be given by deed (1971 Act s.1), one partner cannot grant a valid power of attorney on behalf of the firm, although a power of attorney is often incorporated into partnership agreements.

In relation to any real property which the partners own as partnership property, they (or some of them) will necessarily hold the legal estate as trustees (Law of Property Act 1925 s.34). The rules relating to trustees granting powers of attorney therefore apply (Ch.13, p.101).

If one partner grants his co-partner a power of attorney to do something which each partner is already entitled to do individually on behalf of the firm—e.g. in the case of a trading partnership, to draw and indorse bills of exchange—it is construed as authority to do the act in respect of the partner's personal estate (*Attwood v Munnings* (1827) 7 B. & C. 278).

A partner may be able to delegate his functions as such, although that could well depend on the nature of the partnership and whether it should be inferred that personal performance is one of the partnership obligations. Authority to exercise the donor's powers and privileges under a partnership deed does not permit the attorney to dissolve the partnership (*Harper v Godsell* (1870) L.R. 5 Q.B. 422).

3. Corporations

3–06 A body corporate—a company or a limited liability partnership—can create an ordinary power of attorney. No act of a company can be called into question by reason of its lack of capacity, and anyone dealing with a company in good faith may assume that the board of directors are free to bind the company (Companies Act 1985 ss.35, 35A). A limited liability partnership has unlimited capacity (Limited Liability Partnerships Act 2000 s.1(3)). A corporation cannot, however, create a lasting power of attorney (2005 Act s.10(1)) nor, formerly, an enduring power of attorney (Enduring Powers of Attorney Act 1985 s.1(1)).

The directors of a company may appoint an agent to execute any agreement or instrument which is not a deed in relation to any matters within its powers. This appointment can be by resolution or otherwise (Law of Property Act 1925 s.74(2)).

A company has a general power to appoint an attorney to execute deeds on its behalf, generally or in respect of specified matters (Companies Act 2006 s.46). The deeds or documents which the attorney executes on its behalf bind the company as if executed by the company (2006 Act s.47).

4. Minors

3–07 In general, where a minor can lawfully do an act on his own behalf, so as to bind himself, he can appoint an agent to do it on his behalf. However the extent to which a minor (under the age of eighteen: Family Law Reform Act 1969 s.1) can validly grant a power of attorney is still somewhat doubtful. Certainly, it is no longer the case, as Lord Mansfield held, that a power of attorney granted by a minor is void (*Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr. 1794). Lord Denning MR said:

> "The correct proposition is that an infant cannot appoint an agent to make a disposition of his property so as to bind him irrevocably. A disposition by an agent for an infant is voidable just as a disposition by the infant himself would be so long as it is avoided within a reasonable time after attaining full age."
>
> (*G(A) v G(T)* [1970] 2 Q.B. 643 at [652]).

A power of attorney which a mother granted on behalf of her children aged 12 and 10, used to bring foreign litigation which was not in their best interests, was set aside (*Black v Yates* [1992] Q.B. 526). The judge noted that "there was no evidence before me that the children, at the time that the power of attorney was given, were aware of any of the steps being taken on their behalf, let alone able to give them independent consideration or to give any informed consent as to the power of attorney or the authority of their mother to give it on their behalf" at [553] per Potter J.

There is also the question whether a power of attorney granted by a minor is for that reason revocable in circumstances in which it otherwise would not be. The act of appointing an agent, as distinct from the act of entering into the proposed contract, could itself be an imprudence from the consequences of which the law should protect a minor. However, if the power is coupled with an interest in a transaction that fully binds the minor, there seems no ground for suggesting that it can be revoked. In other cases, the power of attorney itself may be revocable within a reasonable time after the minor comes of age, but without prejudice to the acts already performed under its authority.

5. Mental patients

3–08 The fact that a person has been diagnosed with, or is receiving treatment for, some mental illness does not of itself mean that he does not have capacity to grant a power of attorney. What is relevant is the donor's understanding when executing the power. An

otherwise incapable patient may have a lucid interval and be able to grant a power. A person who is unfit to manage his affairs may nevertheless be able to grant a valid power (*Re K (Enduring Powers of Attorney), Re F* [1988] Ch. 310).

This principle has received statutory recognition is relation to lasting powers of attorney. The question whether a person lacks capacity is to be answered in relation to the matter in question and there is a general presumption that a person has capacity unless it is established that he lacks it (2005 Act ss.1(2), 2(1)).

6. Intoxication

3–09 Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind (Mental Health Act 1983 s.1(3)) However, it seems that if a person who is so drunk that he cannot appreciate what he is doing contracts with another who realises his state, the contract is voidable by the drunkard when he is sober again (*Matthews v Baxter* (1873) L.R. 8 Exch.132):

> "There ought to be no distinction between a person so drunk as not to know the nature of the transaction, and a person of unsound mind to the same extent."

(*Hart v O'Connor* [1985] A.C. 1000 (PC) at 1005). Presumably, the rule would be extended to incapacity because of the influence of narcotic drugs. This should apply on the grant of a power on attorney, on the basis that the capacity to grant a power follows the capacity to contract.

It would scarcely be practical for the authority of an attorney to be cancelled, or even suspended, at any time when the donor happened to be drunk. Yet, in principle, the donor should be at full capacity both when the power is granted, and when authority under it is exercised. The point does not seem to have been decided.

7. Enemy aliens

3–10 An enemy alien in time of war cannot validly contract, and therefore is incapable of granting a power of attorney. A power existing when war is declared is automatically revoked when one of the parties becomes an enemy alien (*V/O Sovfracht v NV Gebr Van Udens* [1943] A.C. 203).

An irrevocable power of attorney for the sale of land is an exception (*Tingley v Muller* [1917] 2 Ch. 144). It is suggested that the exception would extend to all powers coupled with an interest, because in such cases the attorney is not really the donor's agent, but acts independently of him.

8. Attorneys

3–11 A person who is appointed to be someone else's attorney normally has no power to grant a further power of attorney, to authorise someone else to carry out his functions under the first power of attorney. The rule *delegatus non potest delegare* makes a subsequent delegation invalid.

Nevertheless, an ordinary power of attorney may authorise the attorney whom it appoints to appoint a substitute. A precedent for a clause for that purpose is given in Appendix 4. However, neither a lasting power of attorney nor an enduring power of attorney can authorise the attorney to appoint a substitute or successor (2005 Act s.10(8)(a), Sch.4 para.2(6)). But a lasting power may appoint a person to replace the attorney whose appointment is automatically terminated on his death, bankruptcy, divorce from or dissolution of a civil partnership with the donor or loss of capacity (2005 Act s.10(8)(b)).

The statutory powers given to trustees as a body to appoint an attorney can include conferring authority to appoint a substitute if, but only if, it is reasonably necessary to do so (2000 Act s.14(2), (3)(a)).

With one exception, the statutory provision authorising individual trustees to delegate their powers for up to twelve months contains no reference to substitutes. It does not seem appropriate for a power of attorney granted thereunder to contain such a clause. It would undermine part of the purpose of the statutory notice of the grant of the power, which has to name the attorney. The exception is to permit the delegation of the power to transfer inscribed stock (Trustee Act 1925 s.25(8)).

9. Personal representatives

3–12 Once a grant of representation has been made, personal representatives have the powers of delegation, both as individuals and collectively, that are enjoyed by trustees generally (1925 Act s.25(1)(a); 2000 Act s.35). See Ch.13, p.101.

The powers of attorneys to obtain grants of representation are dealt with separately in Ch.18, p.145.

10. Tenants for life and statutory owners

3–13 The statutory powers that trustees enjoy to delegate as individuals apply equally to tenants for life and to statutory owners (Ch.13, p.101). There are special provisions about the notice that must be given when granting a power of attorney. In the case of a tenant for life, it goes to the trustees of the settlement and to any other person who, jointly with the donor, constitutes the tenant for life. A statutory

purported enduring power of attorney validated by the provision dealt with in para.12–04, the purchaser can be protected. In favour of a purchaser, the earlier transaction is conclusively presumed to be valid in either of two circumstances. It is presumed valid if the transaction to which the attorney was a party was completed within 12 months of the date on which the purported power was registered. Alternatively, the presumption also applies if, within three months of completing the purchase, the person who dealt with the attorney makes a statutory declaration that at the time of dealing with the attorney he had no reason to doubt the attorney's right to dispose of the property (2005 Act s.14(4); Sch.4 para.18(4)).

If a third party has any doubts regarding the validity of the lasting power, a register is maintained by the Office of the Public Guardian and can be searched to check that the lasting power remains in force. If the terms of a lasting power changed after it is registered, the Office of the Public Guardian should attach a note to the power to advise of the change. An office copy of a lasting power can be relied on as evidence of the contents of the power and the fact that it has been registered (2005 Act Sch.1 para.16).

(c) Delegation to beneficiaries of trusts of land

12–09 There are conclusive presumptions in favour of a purchaser whose interest depends on the validity of an earlier transaction with the attorney, if the person dealing with the attorney makes an appropriate statutory declaration. The presumptions are that the person dealing with the attorney did so in good faith, and did not know that he was a person to whom the trustee functions could not be delegated. The statutory declaration must be to that effect (see Appendix 3 para.A3–13) and must be made within three months after the completion of the purchase (1996 Act s.9(2)).

(d) Trustee beneficiaries

12–10 The validity of an ordinary or enduring power of attorney granted by a trustee of land who has a beneficial interest in that land depends upon his having a beneficial interest when the attorney acts (Trustee Delegation Act 1999 Act s.1(1)). A signed statement by the attorney that the donor had a beneficial interest at the appropriate time is conclusive evidence in favour of the purchaser that he did indeed do so. The statement may be made when the attorney acts, so it can be included in the conveyance, or at any time within the next three months (1999 Act s.2).

(e) Stock exchange transactions

Special statutory protection is conferred in the case of the transfer of a registered security for the purpose of a stock exchange transaction. See para.19–08. **12–11**

3. Scope of attorney's authority

A transaction between an attorney and a third party can only bind the donor of a power of attorney if it is within the attorney's authority. This is something that the third party has to investigate. The donor will not only be bound by an act within the attorney's actual authority, but also by one within his ostensible authority. **12–12**

(a) Actual authority

The scope of the actual authority of an attorney is dealt with in Ch.2, p.11. Normally, it will be defined by the power of attorney. It can be extended by the donor by a direct communication from him to a third party (*Reckitt v Barnett, Pembroke and Slater Ltd* [1929] A.C. 176: the donor wrote to his bank extending the attorney's authority to draw cheques on his account). The attorney's actual authority can also be restricted by a private communication. If it is only the attorney who is notified, his authority is cut down, but third parties who know nothing of the restriction will probably not be prejudiced because the attorney's ostensible authority will be unimpaired. **12–13**

A third party is also deemed to know of a limit on the attorney's power of which he was given the opportunity to learn, even though he did not avail himself of that chance (*Jacobs v Morris* [1902] 1 Ch. 816: the attorney misrepresented his power to borrow; he produced the power of attorney from which the position would have been clear, but the third party did not read it). In the case of bills of exchange, statutory force is given to this rule that a third party is deemed to know the limits of an agent's actual authority if he has notice that the ostensible authority may be circumscribed:

> "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."
>
> (Bills of Exchange Act 1882 s.25).

(b) Ostensible authority

12–14 The ostensible authority of an attorney is the authority with which the donor appears to have invested him. The extent of that authority may be judged from the wording of the power, if the third party does not know that it has been modified by some collateral instruction, from general custom or from a course of dealings between the parties in question.

If

> "an agent is clothed with ostensible authority no private instructions prevent his acts within the scope of the authority from binding his principal"

(*National Bolivian Navigation Co v Wilson* (1880) 5 App. Cas. 176 at [209] per Lord Blackburn).

A third party is entitled to rely upon the attorney's ostensible authority even though he did not know when he contracted with him that the attorney was not acting as a principal (*Watteau v Fenwick* [1893] 1 Q.B. 346).

A principal should be clear as to the extent of the power of the agent. Failure to do so may bind the principal to representations made to third parties which is beyond the scope of the power (*Kelly v Fraser* [2012] UKPC 25).

A restriction on an attorney's authority may be conveyed directly to the third party, or it may be announced publicly to everyone likely to deal with him (*Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 1 W.L.R. 1335): auction conditions declared that the auctioneers had no authority to make or give any representation or warranty about the property). The limit on the donor's authority may stem from the donor's power to effect a particular transaction, and this may be a matter of law that third parties are assumed to know if they are aware of the relevant facts. The limits on the powers of a trustee or mortgagee to lease property are examples: the ostensible authority of an attorney appointed by a trustee or mortgagee would not extend further, if it was clear to the third party in what capacity the donor was acting.

(c) Companies

12–15 Special rules apply to companies registered under the Companies Act 2006 or earlier Acts. The validity of a company's act cannot be called into question on the ground of lack of capacity because of anything in its memorandum of association. In favour of a person dealing with a company in good faith, the powers of the directors to bind the company and to authorise others to do so are deemed to be free of any limit under the company's constitution. Moreover,

a third party is not bound to inquire into the company's capacity or any limitation on the directors' powers (Companies Act 1989 s.108(1); 2006 Act s.40). Accordingly, a third party dealing with a company's attorney appointed by a power executed by the company—which will naturally involve at least one director signing—will not have to investigate any question of capacity unless he has some outside indication of malpractice by any director involved (which might prevent the third party's acting in good faith).

4. Attorney without authority

12–16 A third party may be misled by an attorney into thinking that the attorney has authority. If that causes him loss—because the donor is not bound by the attorney's act—the third party may have an action against the attorney. An attorney who acts under a power that has been revoked without his knowledge does not thereby incur liability (1971 Act s.5(1)).

An attorney may mislead a third party into thinking that the circumstances exist that are necessary to make a conditional power valid. For example, when granted a power to be exercised only while the donor is abroad, the attorney may assure the third party that the donor is abroad when he is not.

The nature and extent of the attorney's liability in such cases varies according to what the attorney knows of the facts.

(a) Deceit

12–17 An attorney who knowingly represents to a third party that he has authority to act when he has not, and thereby causes loss to the third party, is guilty of the tort of deceit (*Polhill v Walter* (1832) 3 B. & Ad. 114).

(b) Warranty of authority

12–18 An attorney who innocently acts without authority may be liable to a third party who suffers loss for breach of warranty of authority. The attorney is not, however, liable for breach of a contract made on the donor's behalf. The donor cannot be sued if the attorney has no authority, either actual or ostensible, but neither is the attorney liable, because he contracts on behalf of a named principal (*Smout v Ilbery* (1842) 10 M. & W. 1). The third party can recover from the attorney, as part of his damages for breach of warrants of authority, any costs thrown away in suing the donor on such a contract (*Godwin v Francis* (1870) L.R. 5 C.P. 29).

that the trustee remains liable for the acts and defaults of his attorney remains (Trustee Act 1925 s.25(7)). There are now two exceptions, although they do not apply if they are excluded when the trust is established:

(i) a general power for all trustees to delegate for a limited period;

(ii) a power for a trustee of land who also has a beneficial interest in the property to delegate functions in relation to the land.

3. Temporary delegation by any trustee

(a) Scope

13–04 Originally, the general statutory power of delegation was for trustees who were going abroad. Now, unless the trust instrument prohibits or restricts delegation (1925 Act s.69(2)), a trustee is entitled to delegate all or any of his functions as trustee for a limited period (1925 Act s.25(1)).

Formerly, a trustee was not entitled to appoint an individual who was his only co-trustee as his attorney. That restriction has been lifted in respect of powers granted after 1 March 2000, when amendments to the 1925 Act came into effect (Trustee Delegation Act 1999 s.5(1) but also see 13–11 to 13–13, inclusive).

The Council of the Law Society expressed the opinion in 1931 that the costs of a power of attorney granted by a trustee who was about to go abroad—to which s.25 of the 1925 Act was then limited—are properly paid from the trust fund (1 *Law Society's Digest* 480).

(b) Period

13–05 A trustee may delegate his functions for up to a year, but the power may specify a shorter time (1925 Act s.25(2)). The period starts on the date the power states, or if it is silent on the date it is executed.

The 12–month limit on delegation is of little effect. There is nothing to prevent a trustee granting an unlimited number of successive powers of attorney, each lasting for a year. The 1999 Act amendments to s.25 of the 1925 Act, allowing the power to state a future date for the start of the 12–month period (1925 Act s.25(2)(a)), offers a further possibility. A number of powers can be granted at the same time, each specifying a different 12–month period, so that those periods run consecutively. The only challenge the trustee seems likely to face is the possibility of removal from office on the grounds that he has been absent from the UK for more than 12 months, or being unfit or incapable (1925 Act s.36(1)).

(c) Notice

13–06 Before or within seven days after the power is created, the donor has to notify his fellow trustees and anyone entitled to appoint new trustees. They must be told:

(i) the date on which the power comes into operation;

(ii) for how long it will last;

(iii) the attorney's name;

(iv) the reason for the delegation; and,

(v) if the delegation is not total, which trusts, powers and discretions are delegated.

However, failure to give this notification does not, so far as someone dealing with the attorney is concerned, invalidate anything he does (1925 Act s.25(4)).

The notice requirements also apply, with modifications, to trustees of particular types. A personal representative who grants a power of attorney must give notice to the other personal representatives, but not to an executor who has renounced; a tenant for life must give notice to the trustees of the settlement, and anyone else who jointly constitutes the tenant for life; a statutory owner must give notice to anyone else jointly constituting the statutory owner, and, in the case of a strict settlement, to the trustees (1925 Act s.25(10)).

(d) Form

13–07 The 1999 Act introduced a new statutory short form of general trustee power of attorney (1925 Act s.25(5)). It can be used by a single trustee to delegate all his powers exercisable under one identified trust to a single attorney. As an alternative a power "to the like effect", expressed to be made under s.25(5) of the 1925 Act can be used (1925 Act s.25(5)). As in the case of the statutory short form of general power, it may not be advisable to use it where the attorney is likely to have to deal with assets abroad. People outside the country may not be familiar with the effect which statute gives to the succinct form.

(e) Administrative acts

13–08 The common law accepted that a trustee could delegate mechanical acts of administration which involved no exercise of judgment (*Attorney General v Scott* (1749) 1 Ves. Sen. 413). Similarly, delegating

trust (1996 Act s.9(1)). Neither a lasting power of attorney nor an enduring power of attorney can be used for this purpose (1996 Act s.9(6)).

The power may specify the period for which the functions are delegated, or it may be indefinite (1996 Act s.9(5)). Any of the trustees may revoke the power, unless it is given by way of security and described as irrevocable. It is automatically revoked if someone else is appointed as a trustee, but not by the death or retirement of one of the trustees who granted it (1996 Act s.9(3)). If a beneficiary ceases to have an interest under the trust which qualifies him for delegation, the power is revoked so far as it relates to him (1996 Act s.9(4)).

Outsiders will not know whether the attorney is someone to whom the trustees are entitled to delegate. This is dealt with by statutory provisions. Someone who in good faith deals with the attorney in relation to the land may rely on a presumption that the attorney is a beneficiary to whom the functions could be delegated, unless at the time of the transaction he knew that he was not. There is a conclusive presumption to protect a later purchaser ("a person who acquires an interest in or charge on property for money or money's worth": Law of Property Act 1925 s.105(1)(xxi); 1996 Act s.23(1)), whose title depends on the validity of that transaction, that the person dealing with the attorney was in good faith and did not know that the attorney was not a qualifying beneficiary. That presumption operates if the person who dealt with the attorney made a statutory declaration before or within three months after completion of the purchase.

The protection is therefore in two stages. The person dealing directly with the attorney can rely on a presumption if he has no contrary information, but as it is only a presumption, it can be defeated by proof to the contrary. A purchaser from him is, however, protected by a conclusive presumption, which would be indefeasible, provided that the person who dealt directly with the attorney makes an appropriate declaration. It is clearly important that someone who acquires property from an attorney in these circumstances should make the declaration immediately, because were he to die before disposing of it, his successors would not be able to make a good title to it without the declaration.

Once the trustees have delegated functions under these provisions, the beneficiaries have trustees' duties and liabilities in that connection, although they are not to be regarded as trustees for other purposes. They cannot, e.g. delegate further, nor act as trustees in receiving capital money. The trustees are responsible for the acts and defaults of the beneficiaries, but only if they did not exercise reasonable care in deciding whether to delegate the functions (1996 Act s.9(7)).

6. Charity trustees

(a) General

Charity trustees have the powers to delegate enjoyed by individual trustees which are explained above. However, delegation may be less important as their decisions may be taken by a majority rather than unanimously. **13–17**

(b) Executing deeds

There is special legislation to take account of the fact that there is no limit on the number of trustees of a charity, which might make it inconvenient to execute deeds and other instruments. This is an authority to delegate, although it does not have to be exercised by power of attorney. Separate provisions apply to unincorporated trustees (Charities Act 1993 s.82) and to incorporated trustees (1993 Act s.60). **13–18**

The power given to unincorporated trustees is subject to any modification in the trust deed. Subject to that, the trustees may give any two or more of their number the power to execute deeds, etc., on behalf of the charity and, where appropriate on behalf of the official custodian.

Trustees may be incorporated by certificate of the Charity Commission (1993 Act s.50). This is the type of incorporated body whose trustees enjoy the right to delegate the power to execute documents; it is to be distinguished from a charity incorporated under the Companies Acts. Where the incorporated body does not have a common seal, or chooses not to use it, a deed must usually be executed by being signed by a majority of the trustees. However, the trustees may confer a general or limited authority on any two or more of their number to execute deeds in the name of the charity.

In the case of both unincorporated and incorporated trustees, these points apply to the authority they can give:

(a) it may be given in writing or by a resolution of the trustees; no deed is required;

(b) it may be restricted to named trustees, any trustees of a minimum number, or in any other way; it is, however, limited to those who are trustees; and

(c) it continues until revoked, notwithstanding any change of trustees; it is, nevertheless, necessarily ended if named trustees who are given the power to execute cease to be trustees.

elsewhere, which is the intention, it may be thought that he is not prejudiced. But there may be some months of uncertainty before it is clear whether or not the tenants will exercise their rights.

Nothing in the Act precludes a landlord persuading his tenants to contract with him not to exercise their rights. There is a statutory procedure excluding the right of first refusal if a sufficient proportion of tenants notify a prospective purchaser that they will not avail themselves of it (1987 Act s.18). This does not appear to be available to the landlord in advance of his finding a buyer, but it is suggested that he can legitimately contract to become attorney for the tenants to waive their rights when a prospective buyer serves notices with a view to obtaining waivers.

Precedent

The Tenant irrevocably[3] appoints the Landlord to be his attorney until [date] to receive and respond to any notice served under section 18 of the Landlord and Tenant Act 1987 relating to the sale of [property] for no less than £[4]

(c) Letting commonhold unit

17–10 One of the fundamental features of a commonhold development is that the owners of the commonhold units, the unitholders, are members of the commonhold association which owns the common parts and is responsible for the provision of services. That is how they participate in the communal management. If a commonhold unit is let, the tenant does not have that right of participation. Where the tenant has paid a premium, so that the letting is on terms which transfers the major economic interest in the premises to the tenant—which is mainly likely to affect commercial properties, as the terms on which residential units can be let are restricted—the landlord can cede his role in the management of the development by granting a power of attorney in the lease.

Precedent

As a member of the Commonhold Association Limited ("Association"), the Landlord irrevocably appoints the Tenant for the time being to be his attorney for the duration of the term of the lease, to act on the Landlord's behalf to receive all notices from

[3] Although expressed to be irrevocable, the power necessarily expresses when the stated period ends.

[4] Even though the power is given as part of a contract for which the Landlord pays a consideration to the Tenant, it must be a deed to make the power of attorney valid.

the Association, to attend and to speak at general meetings of the Association and to vote on resolutions proposed.

5. When the Authority of the Court is required

If an attorney, under a lasting or enduring power of attorney, does not have formal authority to deal with the donor's property, he should make an application to the Court of Protection for an order for sale. 17–11

Even if the attorney has formal authority to deal with the donor's property, he may still need to apply to the Court of Protection for consent to the proposed transaction, to protect himself against a possible challenge in the future. The attorney should make an application to the Court of Protection if the transaction is likely to be controversial or give rise to a conflict of interest e.g. self-dealing or a sale to a family member of the attorney.

The attorney may also want to apply to the Court of Protection for consent if he is unsure whether the transaction would be in the best interests of the donor.

(a) Gifts of Land by Attorney

The 2005 Act provides that an attorney under an enduring or lasting power of attorney can make gifts and confer benefits on behalf of the donor only in limited circumstances (2005 Act s.12(2); Sch.4 para.3(2)–(3)). 17–12

Furthermore, the attorney's fiduciary duty to their principal means that attorney's generally cannot use their power to confer a benefit on themselves, unless the power or the relevant statute expressly allows the attorney to take such a benefit. In such a case, unless there is evidence that the donor has ratified the transaction, the Land Registry would usually serve notice of the disposition on the donor.

An instrument creating a gift of land would not normally fall within the scope the 2005 Act (s.12(2); Sch.4 para.3(2)–(3)).

The Land Registry will usually reject a disposition of land involving a gift, transaction at undervalue or benefit that is executed under an enduring or lasting power of attorney unless either the power is unregistered and the registered proprietor executes the disposition in person (following a requisition to this effect) or the power has been registered and the Court of Protection has authorised the disposition (Sch.4 para.16(2)(e) of the 2005 Act, in the case of an enduring power of attorney; s.23(4) in the case of a lasting power of attorney).

from the insolvent estate if he is specifically directed to do so (1986 Rules r.8.6).

(b) Forms

19–06 A series of proxy forms are prescribed by the 1986 Rules for use in different cases:

Form 8.1: company or individual voluntary arrangements.
Form 8.2: administration.
Form 8.3: administrative receivership.
Form 8.4: winding up by the court or bankruptcy.
Form 8.5: members' or creditors' voluntary winding up.

When notice is given of a meeting to be held in insolvency proceedings, forms of proxy are sent out with it and no one may be named on it. That form, or one in substantially similar form must be used. It must be signed by the principal, or someone authorised by him stating the nature of his authority (1986 Rules r.8.2).

3. Directors

19–07 A director cannot appoint a proxy to act or vote on his behalf as a member of the board. His appointment is personal. The articles of the company may, however, entitle him to appoint an alternate. The articles should make precise provisions as to the appointment, status and tenure of office of an alternate.

Normally, an alternate is appointed by the director for whom he is a substitute, with the consent of the other directors. The period for which an appointment is made is often limited. While the appointment continues, the alternate exercises the powers, and therefore has the responsibilities, of a director in his own right. His appointment can generally be revoked or suspended by the appointor resuming his duties.

4. Stock exchange transfers

19–08 The Powers of Attorney Act 1971 confers special protection on a person taking a transfer of a registered security when the transfer is executed by an attorney for the purposes of a stock exchange transaction. If the attorney makes a statutory declaration on or within three months of the date of the transfer that the power had not been revoked on that date, there is a conclusive presumption in the transferee's favour that it is so (1971 Act, s.6(1)). This protection is in addition to that provided by s.5, so no declaration is needed when the transfer is made within twelve months of the power coming into operation.

"Registered securities" are transferable securities (shares, stock, debentures, debenture stock, loan stock, bonds, unit trust units, or other securities) whose holders are entered in a register wherever it is maintained. A "stock exchange transaction" is a sale and purchase of securities in which each party is a member of a stock exchange acting in the ordinary course of his business as such, or is acting through the agency of such a member (Stock Transfer Act 1963 s.4(1); 1971 Act s.6(2)).

5. Example of use: share pre-emption

19–09 The articles of association of a private company frequently provide that a shareholder who wishes to sell his shares must first offer them to other members of the company. This is a way for a family to retain control of a family business, or to restrict the participation of antipathetic people. To ensure that the pre-emption provisions are promptly complied with, even where the selling shareholder is reluctant, the articles may give the directors power of attorney to execute a transfer of shares.

Directors are required either to register a transfer of shares or debentures or to provide the transferee with reasons for their refusal to register within two months of the transfer being lodged with the company. Where the directors refuse to register the transfer of a share, the transferee is entitled to receive such information as he may reasonably require regarding the reasons for the directors' refusal to register the transfer. Such information does not extend to minutes of meetings of the directors.

Where a company fails to comply, the company and every officer of the company who is in default commits an offence (2006 Act s.771).

It is not lawful to register a transfer of shares unless a proper instrument of transfer is delivered to the company (2006 Act s.770). Granting a power of attorney avoids the impasse that could be created if the selling shareholder will not execute a transfer.

Articles of association are not executed as a deed, and indeed may not even have been signed by any of the current members of the company. It is, however, considered that the appointment of an attorney by the articles would comply with the requirements of s.1 of the 1971 Act that "an instrument creating a power of attorney shall be executed as a deed by . . . the donor". Nevertheless there is a new doubt. Section 33 of the 2006 Act reads:

". . . The provisions of a company's constitution bind the company and its members to the same extent as if they were covenants on

shall operate to delegate to the person identified in the form as the single donee of the power the execution and exercise of all the trusts, powers and discretions vested in the donor as trustee (either alone or jointly with any other person or persons) under the single trust so identified.

(6) The form referred to in subsection (5) of this section is as follows—

THIS GENERAL TRUSTEE POWER OF ATTORNEY is made on [*date*] by [*name of one donor*] of [*address of donor*] as trustee of [*name or details of one trust*].

I appoint [*name of one donee*] of [*address of donee*] to be my attorney [*if desired, the date on which the delegation commences or the period for which it continues (or both)*] in accordance with section 25(5) of the **M2** Trustee Act 1925

[*To be executed as a deed*]*.

(7) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.

(8) For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the transfer of any inscribed stock, himself to delegate to an attorney power to transfer, but not including the power of delegation conferred by this section.

(9) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.

(10) This section applies to a personal representative, tenant for life and statutory owner as it applies to a trustee except that subsection (4) shall apply as if it required the notice there mentioned to be given—

(a) in the case of a personal representative, to each of the other personal representatives, if any, except any executor who has renounced probate;

(b) in the case of a tenant for life, to the trustees of the settlement and to each person, if any, who together with the person giving the notice constitutes the tenant for life; and

(c) in the case of a statutory owner, to each of the persons, if any, who together with the person giving the notice constitute the statutory owner and, in the case of a statutory owner by virtue of section 23(1)(a) of the Settled Land Act 1925, to the trustees of the settlement.][1]

Notes

1. Substituted by Trustee Delegation Act 1999 c.15 s.5(1) (March 1, 2000: has effect in relation to powers of attorney created after the commencement of this Act)

Power of appointing new or additional trustees.

36.—(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees,— **A1–02**

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid.

(2) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of this section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees.

(3) Where a corporation being a trustee is or has been dissolved, either before or after the commencement of this Act, then, for the purposes of this section and of any enactment replaced thereby, the corporation shall be deemed to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation.

(4) The power of appointment given by subsection (1) of this section or any similar previous enactment to the personal representatives of last surviving or continuing trustee shall be and shall be deemed always to have been exercisable by the executors for the time being (whether original or by representation) of such surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of such trustee without the concurrence of any executor who has renounced or has not proved.

(5) But a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce, shall have and shall be deemed always to have had power, at any time before renouncing probate, to exercise the power of appointment given by this section, or by any similar previous enactment, if willing to act for that purpose and without thereby accepting the office of executor.

(6) [Where, in the case of any trust, there are not more than three trustees—][1]

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(b) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being;

may, by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument, if any, creating the trust, or any statutory enactment provides to the contrary, not shall the number of trustees be increased beyond four by virtue of any such appointment.

[(6A) A person who is either—

(a) both a trustee and attorney for the other trustee (if one other), or for both of the other trustees (if two others), under a registered power; or

(b) attorney under a registered power for the trustee (if one) or for both or each of the trustees (if two or three),

may, if subsection (6B) of this section is satisfied in relation to him, make an appointment under subsection (6)(b) of this section on behalf of the trustee or trustees.

(6B) This subsection is satisfied in relation to an attorney under a registered power for one or more trustees if (as attorney under the power)—

(a) he intends to exercise any function of the trustee or trustees by virtue of section 1(1) of the Trustee Delegation Act 1999; or

(b) he intends to exercise any function of the trustee or trustees in relation to any land, capital proceeds of a conveyance of land or income from land by virtue of its delegation to him under section 25 of this Act or the instrument (if any) creating the trust.

(6C) In subsections (6A) and (6B) of this section *"registered power"* means [an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005.][3]

(6D) Subsection (6A) of this section—

(a) applies only if and so far as a contrary intention is not expressed in the instrument creating the power of attorney (or, where more than one, any of them) or the instrument (if any) creating the trust; and

(b) has effect subject to the terms of those instruments.][2]

(7) Every new trustee appointed under this section as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(8) The provisions of this section relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

[(9) Where a trustee [lacks capacity to exercise][5] his functions as trustee and is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his place shall be made by virtue of paragraph (b) of subsection (1) of this section unless leave to make the appointment had been given by [the Court of Protection][6].][4]

Notes

1. Words substituted by Trusts of Land and Appointment of Trustees Act 1996 c.47 Sch.3 para.3(11) (January 1, 1997)
2. Added by Trustee Delegation Act 1999 c.15 s.8(1) (March 1, 2000: has effect only where the power, or (where more than one) each of them, is created after the commencement of this Act)
3. Words substituted by Mental Capacity Act 2005 c.9 Sch.6 para.3(2)(a) (October 1, 2007)
4. Section 36(9) substituted by Mental Health Act 1959 (c.72), Sch. 7 Pt. I; restricted by SI 1984/2035, rule. 15
5. Words substituted by Mental Capacity Act 2005 c.9 Sch.6 para.3(2)(b)(i) (October 1, 2007)
6. Words substituted by Mental Capacity Act 2005 c.9 Sch.6 para.3(2)(b)(ii) (October 1, 2007)

Law of Property Act 1925 c.20

Saving of certain legal estates and statutory powers

A1–03 7.—(1) A fee simple which, by virtue of the Lands Clauses Acts, [. . .][1], or any similar statute, is liable to be divested, is for the purposes of this Act a fee simple absolute, and remains liable to be divested as if this Act had not been passed [and a fee simple subject to a legal or equitable right of entry or re-entry is for the purposes of this Act a fee simple absolute.][2]

(2) A fee simple vested in a corporation which is liable to determine by reason of the dissolution of the corporation is, for the purposes of this Act, a fee simple absolute.

(3) The provisions of—

[. . .][3]

(b) the Friendly Societies Act, 1896, in regard to land to which that Act applies;

(c) any other statutes conferring special facilities or prescribing special modes (whether by way of registered memorial or otherwise) for disposing of or acquiring land, or providing for the vesting (by conveyance or otherwise) of the land in trustees or any person, or the holder for the time being of an office or any corporation sole or aggregate (including the Crown);

shall remain in full force.

[. . .][4]

(4) Where any such power for disposing of or creating a legal estate is exercisable by a person who is not the estate owner, the power shall, when practicable, be exercised in the name and on behalf of the estate owner.

Notes

1. Words repealed by Reverter of Sites Act 1987 (c.15), ss. 6(1), 8(3)(4), Sch.
2. Words added by Law of Property (Amendment) Act 1926 (c.11), Sch.
3. Repealed by Criminal Justice Act 1948 (c.58), Sch. 10 Pt. I
4. Words repealed by Trusts of Land and Appointment of Trustees Act 1996 c.47 Sch.4 para.1 (January 1, 1997)

Conveyances on behalf of persons suffering from mental disorder and as to land held by them [in trust][2]

A1–04 [**22.**—(1) Where a legal estate in land (whether settled or not) is vested [, either solely or jointly with any other person or persons, in a person lacking capacity (within the meaning of the Mental Capacity Act 2005) to convey or create a legal estate, a deputy appointed for him by the Court of Protection or (if no deputy is appointed][3] for him) any person authorised in that behalf shall, under an order of [the Court of Protection],[4] or of the court, or under any statutory power, make or concur in making all requisite dispositions for conveying or creating a legal estate in his name and on his behalf.

(2) If land [subject to a trust of land][5] is vested, either solely or jointly with any other person or persons, in a person who [lacks capacity (within the meaning of that Act) to exercise][6] his functions as trustee, a new trustee shall be appointed in the place of that person, or he shall be otherwise discharged from the trust, before the legal estate is dealt with [by the trustees].[7]

[(3) Subsection (2) of this section does not prevent a legal estate being dealt with without the appointment of a new trustee, or the discharge of the incapable trustee, at a time when the donee of [an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act) is entitled to act for the trustee who lacks capacity in relation to the dealing].[9]][8]][1]

Notes

1. Section 22 substituted by Mental Health Act 1959 (c.72), Sch. 7 Pt. I
2. Words substituted in the sidenote by Trusts of Land and Appointment of Trustees Act 1996 c.47 Sch.3 para.4(6) (January 1, 1997)
3. Words substituted by Mental Capacity Act 2005 c.9 Sch.6 para.4(2)(a)(i) (October 1, 2007)
4. Words substituted by Mental Capacity Act 2005 c.9 Sch.6 para.4(2)(a)(ii) (October 1, 2007)
5. Words substituted by Trusts of Land and Appointment of Trustees Act 1996 c.47 Sch.3 para.4(6)(a) (January 1, 1997)
6. Words substituted by Mental Capacity Act 2005 c.9 Sch.6 para.4(2)(b) (October 1, 2007)
7. Words substituted by Trusts of Land and Appointment of Trustees Act 1996 c.47 Sch.3 para.4(6)(b) (January 1, 1997)
8. Added by Trustee Delegation Act 1999 c.15 s.9(1) (March 1, 2000: has effect whether the enduring power was created before or after the commencement of this Act)
9. Words substituted by Mental Capacity Act 2005 c.9 Sch.6 para.4(2)(c) (October 1, 2007)

Powers of Attorney Act 1971

c.27

An Act to make new provision in relation to powers of attorney and the delegation by trustees of their trusts, powers and discretions. **A1–05**

[12th May 1971]

Execution of powers of attorney

1.—(1) An instrument creating a power of attorney shall be [executed as a deed by][1] the donor of the power.

[. . .][2]

(3) This section is without prejudice to any requirement in, or having effect under, any other Act as to the witnessing of instruments creating powers of attorney and does not affect the rules relating to the execution of instruments by bodies corporate.

Notes

1. Words substituted by Law of Property (Miscellaneous Provisions) Act 1989 (c.34), s.1(8)(9)(11), Sch. 1 para. 6(a)
2. Repealed by Law of Property (Miscellaneous Provisions) Act 1989 (c.34), ss. 1(8)(9)(11), 4, Sch. 1 para. 6(b) Sch. 2

[. . .][1]

Notes

1. Section 2 repealed by Supreme Court Act 1981 (c.54), s. 152(4), Sch. 7

Retention of proxies

A2–04 **8.4**—(1) Subject as follows, proxies used for voting at any meeting shall be retained by the chairman of the meeting.

(2) The chairman shall deliver the proxies, forthwith after the meeting, to the responsible insolvency practitioner (where that is someone other than himself).

Right of inspection

A2–05 **8.5**—(1) The responsible insolvency practitioner shall, so long as proxies lodged with him are in his hands, allow them to be inspected, at all reasonable times on any business day, by—

(a) the creditors, in the case of proxies used at a meeting of creditors, and

(b) a company's members or contributories, in the case of proxies used at a meeting of the company or of its contributories.

(2) The reference in paragraph (1) to creditors is—

(a) in the case of a company in liquidation or of an individual's bankruptcy, those creditors who have proved their debts, and

(b) in any other case, persons who have submitted in writing a claim to be creditors of the company or individual concerned;

but in neither case does it include a person whose proof or claim has been wholly rejected for purposes of voting, dividend or otherwise.

(3) The right of inspection given by this Rule is also exercisable—

(a) in the case of an insolvent company, by its directors, and

(b) in the case of an insolvent individual, by him.

(4) Any person attending a meeting in insolvency proceedings is entitled, immediately before or in the course of the meeting, to inspect the proxies and associated documents [(including proofs) sent or given, in accordance with directions contained in any notice convening the meeting, to the chairman of that meeting or to any other person by a creditor, member or contributory for the purpose of that meeting.]

[*The words in r.8.5(4) were substituted by SI 1987/1919 (Insolvency (Amendment) Rules) Sch.1(1)(9), para.136.*]

Proxy-holder with financial interest

A2–06 **8.6**—(1) A proxy-holder shall not vote in favour of any resolution which would directly or indirectly place him, or any associate of his, in a position to receive any remuneration out of the insolvent estate, unless the proxy specifically directs him to vote in that way.

(1A) Where a proxy-holder has signed the proxy as being authorised to do so by his principal and the proxy specifically directs him to vote in the way mentioned in paragraph (1), he shall nevertheless not vote in that way unless he produces to the chairman of the meeting written authorisation from his principal sufficient to show that the proxy-holder was entitled so to sign the proxy.

(2) This Rule applies also to any person acting as chairman of a meeting and using proxies in that capacity [under Rule 8.3]; and in its application to him, the proxy-holder is deemed an associate of his.

[*The words in r.8.6(2) were inserted by SI 1987/1919 (Insolvency (Amendment) Rules) Sch.1(1)(9), para.137(2).*]

Company representation

A2–07 **8.7**—(1)Where a person is authorised under section 375 of the Companies Act to represent a corporation at a meeting of creditors or of the company or its contributories, he shall produce to the chairman of the meeting a copy of the resolution from which he derives his authority.

(2) The copy resolution must be under the seal of the corporation, or certified by the secretary or a director of the corporation to be a true copy.

[(3) Nothing in this Rule requires the authority of a person to sign a proxy on behalf of a principal which is a corporation to be in the form of a resolution of that corporation.]

[*Rule 8.7(3) were inserted by SI 1987/1919 (Insolvency (Amendment) Rules) Sch.1(1)(9), para.138.*]

Interpretation of creditor

A2–08 [**8.8**—(1) This Rule applies where a member State liquidator has been appointed in relation to a person subject to insolvency proceedings.

(2) For the purposes of rule 8.5(1) (right of inspection of proxies) a member State liquidator appointed in main proceedings is deemed to be a creditor.

(3) Paragraph (2) is without prejudice to the generality of the right to participate referred to in paragraph 3 of Article 32 of the EC Regulation (exercise of creditor's rights).

[*Rule 8.8 added by SI 2002/1307 (Insolvency (Amendment) Rules) r.9(2).*]

(3) Where a grant is required to be made to not less than two administrators, and there is only one person competent and willing to take a grant under the foregoing provisions of this rule, administration may, unless a registrar otherwise directs, be granted to such person jointly with any other person nominated by him.

(4) Notwithstanding the foregoing provisions of this rule, administration for the use and benefit of the [person who lacks capacity with the meaning of Mental Capacity Act 2005] may be granted to such other person as the registrar may by order direct.

(5) [Unless the applicant is the person authorised in paragraph (2)(a) above,] notice of an intended application under this rule shall be given to the Court of Protection.

[*The words in square brackets in r.35(5) inserted by SI 1998/1903 (Non-Contentious Probate (Amendment) Rules), r.9(2).*]

[*The words in square brackets in rr.35(1)–(4) substituted by SI 2007/1898 (Mental Capacity Act 2005 (Transitional and Consequen- tial Provisions) Order Sch.1, para.13.*]

The Land Registration Rules 2003 rr.61–63, Sch.3, forms 1–3

(SI 2003/1417)

PART 6

REGISTERED LAND: APPLICATIONS, DISPOSITIONS AND MISCELLANEOUS ENTRIES

Execution by an attorney

Documents executed by attorney

A2–16 **61.**—(1) If any document executed by an attorney is delivered to the land registry, there must be produced to the registrar—

(a) the instrument creating the power, or

(b) a copy of the power by means of which its contents may be proved under section 3 of the Powers of Attorney Act 1971, or

[(c) a document which under section 4 of the Evidence and Powers of Attorney Act 1940, paragraph 16 of Part 2 of Schedule 1, or paragraph 15(3) of Part 5 of Schedule 4 to the Mental Capacity Act 2005 (c.9) is sufficient evidence of the contents of the power, or"; and]

(d) a certificate by a conveyancer in Form 1.

[(2) If an order or direction under section 22 or 23 of, or paragraph 16 of Part 5 of Schedule 4 to, the Mental Capacity Act 2005 has been made with respect to a power or the donor of the power or the attorney appointed under it, the order or direction must be produced to the registrar.]

(3) In this rule, "power" means the power of attorney.

[*The words in square brackets in rr.61(1)(c) and rr.61(2) substituted by SI 2007/1898 (Mental Capacity Act 2005 (Transitional and Consequential Provisions) Order Sch.1 para.31).*]

Evidence of non-revocation of power more than 12 months old

A2–17 **62.**—(1) If any transaction between a donee of a power of attorney and the person dealing with him is not completed within 12 months of the date on which the power came into operation, the registrar may require the production of evidence to satisfy him that the power had not been revoked at the time of the transaction.

(2) The evidence that the registrar may require under paragraph (1) may consist of or include a statutory declaration by the person who dealt with the attorney or a certificate given by that person's conveyancer in Form 2.

Evidence in support of power delegating trustees' functions to a beneficiary

A2–18 **63.**—(1) If any document executed by an attorney to whom functions have been delegated under section 9 of the Trusts of Land and Appointment of Trustees Act 1996 is delivered to the registrar, the registrar may require the production of evidence to satisfy him that the person who dealt with the attorney—EP

(a) did so in good faith, and

(b) had no knowledge at the time of the completion of the transaction that the attorney was not a person to whom the functions of the trustees in relation to the land to which the application relates could be delegated under that section.

(2) The evidence that the registrar may require under paragraph (1) may consist of or include a statutory declaration by the person who dealt with the attorney or a certificate given by that person's conveyancer either in Form 3 or, where evidence of non-revocation is also required pursuant to rule 62, in Form 2.

Requirement for two LPA certificates where instrument has no named persons

A2–28 **7.** Where an instrument intended to create a 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—

(a) the instrument must include two LPA certificates; and

(b) each certificate must be completed and signed by a different person.

Persons who may provide an LPA certificate

A2–29 **8.**—(1) Subject to paragraph (3), the following persons may give an LPA certificate—

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

(b) a person chosen by the donor 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 paragraph (2)(1)(e) of Schedule 1 to the Act.

(2) The following are examples of persons within paragraph (1)(b)—

(a) a registered health care 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.

(3) A person is disqualified from giving an LPA 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—

(i) any other lasting power of attorney, or

(ii) 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 within sub-paragraph (b);

(e) a director or employee of a trust corporation acting as a donee within sub-paragraph (b);

(f) a business partner or employee of—

(i) the donor, or

(ii) a donee within sub-paragraph (b);

(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).

(4) In this regulation—

"care home" has the meaning given in section 3 of the Care Standards Act 2000;

"registered health care professional" means a person who is a member of a profession regulated by a body mentioned in section 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—

(a) the General Social Care Council;

(b) the Care Council for Wales;

(c) the Scottish Social Services Council; or

(d) the Northern Ireland Social Care Council.

Execution of instrument

A2–30 **9.**—(1) An instrument intended to create a lasting power of attorney must be executed in accordance with this regulation.

(2) The donor must read (or have read to him) all the prescribed information.

(3) As soon as reasonably practicable after the steps required by paragraph (2) have been taken, 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 paragraph (7), sign Part A of the instrument in the presence of a witness.

(4) As soon as reasonably practicable after the steps required by paragraph (3) have been taken—

(a) the person giving an LPA certificate, or

(b) if regulation 7 applies (two LPA certificates required), each of the persons giving a certificate,

must complete the LPA certificate at Part B of the instrument and sign it.

(5) As soon as reasonably practicable after the steps required by paragraph (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.

(6) As soon as reasonably practicable after the steps required by paragraph (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 paragraph (7), must sign Part C of the instrument in the presence of a witness.

(7) 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 done in the presence of two witnesses.