

Mental Capacity Bill

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Department for Constitutional Affairs, are published separately as EN – 120.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Mr David Lammy has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Mental Capacity Bill are compatible with the Convention rights.

Mental Capacity Bill

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TO

Make new provision relating to persons who lack capacity; to establish a superior court of record called the Court of Protection in place of the office of the Supreme Court called by that name; to make provision in connection with the Convention on the International Protection of Adults signed at the Hague on 13th January 2000; and for connected purposes.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

PERSONS WHO LACK CAPACITY

The principles

1 The principles

- (1) The following principles apply for the purposes of this Act. 5
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision. 10
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action. 15

*Preliminary***2 People who lack capacity**

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. 5
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities. 10
- (4) No power which a person (“D”) may exercise under this Act –
 (a) in relation to a person who lacks capacity, or
 (b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16. 15
- (5) Subsection (4) is subject to section 18(3).

3 Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable –
 (a) to understand the information relevant to the decision, 20
 (b) to retain that information,
 (c) to use or weigh that information as part of the process of making the decision, or
 (d) to communicate his decision (whether by talking, using sign language or any other means). 25
- (2) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (3) The information relevant to a decision includes information about the reasonably foreseeable consequences of –
 (a) deciding one way or another, or 30
 (b) failing to make the decision.

4 Best interests

- (1) In determining for the purposes of this Act what is in a person’s best interests, the person making the determination must consider all the circumstances appearing to him to be relevant. 35
- (2) In particular, he must take the following steps.
- (3) He must consider –
 (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and 40
 (b) if it appears likely that he will, when that is likely to be.

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- (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
- (5) He must consider, so far as is reasonably ascertainable –
- (a) the person’s past and present wishes and feelings, 5
 - (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
 - (c) the other factors that he would be likely to consider if he were able to do so.
- (6) He must take into account, if it is practicable and appropriate to consult them, the views of – 10
- (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
 - (b) anyone engaged in caring for the person or interested in his welfare,
 - (c) any donee of a lasting power of attorney granted by the person, and 15
 - (d) any deputy appointed for the person by the court,
- as to what would be in the person’s best interests and, in particular, as to the matters mentioned in subsection (5).
- (7) The duties imposed by subsections (1) to (6) also apply in relation to the exercise of any powers which – 20
- (a) are exercisable under a lasting power of attorney, or
 - (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.
- (8) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (6)) he reasonably believes that what he does or decides is in the best interests of the person concerned. 25

5 Acts in connection with care or treatment

- (1) If a person (“D”) does an act in connection with the care or treatment of another person (“P”), the act is one to which this section applies if – 30
- (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
 - (b) when doing the act, D reasonably believes – 35
 - (i) that P lacks capacity in relation to the matter, and
 - (ii) that it will be in P’s best interests for the act to be done.
- (2) D does not incur any liability in relation to the act that he would not have incurred if P –
- (a) had had capacity to consent in relation to the matter, and
 - (b) had consented to D’s doing the act.
- (3) Nothing in this section excludes a person’s civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act. 40
- (4) Nothing in this section affects the operation of sections 24 to 26 (advance decisions to refuse treatment).

6 Section 5 acts: limitations

- (1) If D does an act that is intended to restrain P, it is not an act to which section 5 applies unless two further conditions are satisfied.
- (2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P. 5
- (3) The second is that the act is a proportionate response to—
(a) the likelihood of P’s suffering harm, and
(b) the seriousness of that harm.
- (4) For the purposes of this section D restrains P if he—
(a) uses, or threatens to use, force to secure the doing of an act which P resists, or 10
(b) restricts P’s liberty of movement, whether or not P resists.
- (5) Section 5 does not authorise a person to do an act which conflicts with a decision made, within the scope of his authority and in accordance with this Part, by— 15
(a) a donee of a lasting power of attorney granted by P, or
(b) a deputy appointed for P by the court.
- (6) But nothing in subsection (5) stops a person—
(a) providing life-sustaining treatment, or
(b) doing any act which he reasonably believes to be necessary to prevent 20
a serious deterioration in P’s condition,
while a decision as respects any relevant issue is sought from the court.
- (7) “Life-sustaining treatment” means treatment which in the view of a person providing health care for P is necessary to sustain life.

7 Payment for necessary goods and services 25

- (1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.
- (2) “Necessary” means suitable to a person’s condition in life and to his actual requirements at the time when the goods or services are supplied.

8 Expenditure 30

- (1) If an act to which section 5 applies involves expenditure, it is lawful for D—
(a) to pledge P’s credit for the purpose of the expenditure, and
(b) to apply money in P’s possession for meeting the expenditure.
- (2) If the expenditure is borne for P by D, it is lawful for D—
(a) to reimburse himself out of money in P’s possession, or 35
(b) to be otherwise indemnified by P.
- (3) Subsections (1) and (2) do not affect any power under which (apart from those subsections) a person—
(a) has lawful control of P’s money or other property, and
(b) has power to spend money for P’s benefit. 40

Lasting powers of attorney

9 Lasting powers of attorney

- (1) A lasting power of attorney is a power of attorney under which the donor (“P”) confers on the donee (or donees) authority to make decisions about all or any of the following – 5
- (a) P’s personal welfare or specified matters concerning P’s personal welfare, and
 - (b) P’s property and affairs or specified matters concerning P’s property and affairs,
- and which includes authority to make such decisions in circumstances where P no longer has capacity. 10
- (2) A lasting power of attorney is not created unless –
- (a) section 10 is complied with,
 - (b) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1, and 15
 - (c) at the time when P executes the instrument, P has reached 18 and has capacity to execute it.
- (3) 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, 20
- confers no authority.
- (4) The authority conferred by a lasting power of attorney is subject to –
- (a) the provisions of this Act and, in particular, section 4 (best interests), and
 - (b) any conditions or restrictions specified in the instrument. 25

10 Appointment of donees

- (1) A donee of a lasting power of attorney must be –
- (a) an individual who has reached 18, or
 - (b) if the power relates only to P’s property and affairs, either such an individual or a trust corporation. 30
- (2) An individual who is bankrupt may not be appointed as donee of a lasting power of attorney in relation to P’s property and affairs.
- (3) Subsections (4) to (7) apply in relation to an instrument under which two or more persons are to act as donees of a lasting power of attorney.
- (4) The instrument may appoint them to act – 35
- (a) jointly, or
 - (b) jointly and severally.
- (5) If it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly.
- (6) If they are to act jointly, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 prevents a lasting power of attorney from being created. 40

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- (7) If they are to act jointly and severally, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 –
- (a) prevents the appointment taking effect in his case, but
 - (b) does not prevent a lasting power of attorney from being created in the case of the other or others. 5
- (8) An instrument used to create a lasting power of attorney –
- (a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor, but
 - (b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 13(6)(a) to (d) which has the effect of terminating the donee's appointment. 10
- 11 Lasting powers of attorney: restrictions**
- (1) A lasting power of attorney does not authorise the donee (or, if more than one, any of them) to do an act that is intended to restrain P, unless three conditions are satisfied. 15
- (2) The first condition is that P lacks, or the donee reasonably believes that P lacks, capacity in relation to the matter in question.
- (3) The second is that the donee reasonably believes that it is necessary to do the act in order to prevent harm to P. 20
- (4) The third is that the act is a proportionate response to –
- (a) the likelihood of P's suffering harm, and
 - (b) the seriousness of that harm.
- (5) For the purposes of this section, the donee restrains P if he – 25
- (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
 - (b) restricts P's liberty of movement, whether or not P resists, or if he authorises another person to do any of those things.
- (6) Where a lasting power of attorney authorises the donee (or, if more than one, any of them) to make decisions about P's personal welfare, the authority – 30
- (a) does not extend to making such decisions in circumstances other than those where P lacks, or the donee reasonably believes that P lacks, capacity,
 - (b) is subject to sections 24 to 26 (advance decisions to refuse treatment), and 35
 - (c) extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P.
- (7) But subsection (6)(c) – 40
- (a) does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect, and
 - (b) is subject to any conditions or restrictions in the instrument.

12 Scope of lasting powers of attorney: gifts

- (1) Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2). 5
- (2) The donee may make gifts –
 - (a) on customary occasions to persons (including himself) who are related to or connected with the donor, or
 - (b) to any charity to whom the donor made or might have been expected to make gifts, 10if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.
- (3) "Customary occasion" means –
 - (a) the occasion or anniversary of a birth, marriage or the formation of a civil partnership, or 15
 - (b) any other occasion on which presents are customarily given within families or among friends or associates.
- (4) Subsection (2) is subject to any conditions or restrictions in the instrument.

13 Revocation of lasting powers of attorney etc.

- (1) This section applies if – 20
 - (a) P has executed an instrument with a view to creating a lasting power of attorney, or
 - (b) a lasting power of attorney is registered as having been conferred by P, and in this section references to revoking the power include revoking the instrument. 25
- (2) P may, at any time when he has capacity to do so, revoke the power.
- (3) P's bankruptcy revokes the power so far as it relates to P's property and affairs.
- (4) But where P is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the power is suspended, so far as it relates to P's property and affairs, for so long as the order has effect. 30
- (5) The occurrence in relation to a donee of an event mentioned in subsection (6) –
 - (a) terminates his appointment, and
 - (b) except in the cases given in subsection (7), revokes the power.
- (6) The events are –
 - (a) the disclaimer of the appointment by the donee in accordance with such requirements as may be prescribed for the purposes of this section in regulations made by the Lord Chancellor; 35
 - (b) subject to subsections (8) and (9), the death or bankruptcy of the donee or, if the donee is a trust corporation, its winding-up or dissolution;
 - (c) subject to subsection (11), the dissolution or annulment of a marriage, or civil partnership, between the donor and the donee; 40
 - (d) the lack of capacity of the donee.
- (7) The cases are –
 - (a) the donee is replaced under the terms of the instrument,

- (b) he is one of two or more persons appointed to act as donees jointly and severally and, after the event, there is at least one remaining donee.
- (8) The bankruptcy of a donee does not terminate his appointment, or revoke the power, in so far as his authority relates to P's personal welfare.
- (9) Where the donee is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, his appointment and the power are suspended, so far as they relate to P's property and affairs, for so long as the order has effect. 5
- (10) Where the donee is one of two or more appointed to act jointly and severally under the power, the reference in subsection (9) to the suspension of the power is to its suspension in so far as it relates to that donee. 10
- (11) The dissolution or annulment of a marriage, or civil partnership, does not terminate the appointment of a donee, or revoke the power, if the instrument provided that it was not to do so.
- 14 Protection of donee and others if no power created or power revoked 15**
- (1) Subsections (2) and (3) apply if—
- (a) an instrument has been registered under Schedule 1 as a lasting power of attorney, but
- (b) a lasting power of attorney was not created,
- whether or not the registration has been cancelled at the time of the act or transaction in question. 20
- (2) A donee who acts in purported exercise of the power does not incur any liability (to P or any other person) because of the non-existence of the power unless at the time of acting he—
- (a) knows that a lasting power of attorney was not created, or 25
- (b) is aware of events, facts or circumstances which, if a lasting power of attorney had been created, would have terminated his authority to act as a donee.
- (3) Any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence, unless at the time of the transaction that person has knowledge of a matter referred to in subsection (2). 30
- (4) If the interest of a purchaser depends on whether a transaction between the donee and the other person was valid by virtue of subsection (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if— 35
- (a) the transaction was completed within 12 months of the date on which the instrument was registered, or
- (b) the other person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction. 40
- (5) In its application to a lasting power of attorney which relates to matters in addition to P's property and affairs, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power is revoked) has effect as if references to revocation included the cessation of the power in relation to P's property and affairs. 45

- (6) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

General powers of the court and appointment of deputies

15 Power to make declarations

- (1) The court may make declarations as to – 5
- (a) whether a person has or lacks capacity to make a decision specified in the declaration;
 - (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
 - (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person. 10
- (2) “Act” includes an omission and a course of conduct.

16 Powers to make decisions and appoint deputies: general

- (1) This section applies if a person (“P”) lacks capacity in relation to a matter or matters concerning – 15
- (a) P’s personal welfare, or
 - (b) P’s property and affairs.
- (2) The court may –
- (a) by making an order, make the decision or decisions on P’s behalf in relation to the matter or matters, or 20
 - (b) appoint a person (a “deputy”) to make decisions on P’s behalf in relation to the matter or matters.
- (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to section 4 (best interests).
- (4) When deciding whether it is in P’s best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that – 25
- (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
 - (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances. 30
- (5) The court may make such further orders or give such directions, and confer on a deputy such powers, as it thinks necessary or expedient for giving effect to an order or appointment made by it under subsection (2).
- (6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P’s best interests, even though no application is before the court for an order, directions or an appointment on those terms. 35
- (7) An order of the court may be varied or discharged by a subsequent order.
- (8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy – 40

- (a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests, or
- (b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.

17 Section 16 powers: personal welfare 5

- (1) The powers under section 16 as respects P's personal welfare extend in particular to—
 - (a) deciding where P is to live;
 - (b) deciding what contact, if any, P is to have with any specified persons;
 - (c) making an order prohibiting a named person from having contact with P; 10
 - (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P;
 - (e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility. 15
- (2) Subsection (1) is subject to section 20 (restrictions on deputies).

18 Section 16 powers: property and affairs

- (1) The powers under section 16 as respects P's property and affairs extend in particular to—
 - (a) the control and management of P's property; 20
 - (b) the sale, exchange, charging, gift or other disposition of P's property;
 - (c) the acquisition of property in P's name or on P's behalf;
 - (d) the carrying on, on P's behalf, of any profession, trade or business;
 - (e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member; 25
 - (f) the carrying out of any contract entered into by P;
 - (g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;
 - (h) the settlement of any of P's property, whether for P's benefit or for the benefit of others; 30
 - (i) the execution for P of a will;
 - (j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;
 - (k) the conduct of legal proceedings in P's name or on P's behalf.
- (2) No will may be made under subsection (1)(i) at a time when P has not reached 18. 35
- (3) The powers under section 16 as respects any other matter relating to P's property and affairs may be exercised even though P has not reached 16, if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when he reaches 18. 40
- (4) Schedule 2 supplements the provisions of this section.
- (5) Section 16(7) (variation and discharge of court orders) is subject to paragraph 6 of Schedule 2.
- (6) Subsection (1) is subject to section 20 (restrictions on deputies).

19 Appointment of deputies

- (1) A deputy appointed by the court must be –
 - (a) an individual who has reached 18, or
 - (b) as respects powers in relation to property and affairs, an individual who has reached 18 or a trust corporation. 5
- (2) The court may appoint an individual by appointing the holder for the time being of a specified office or position.
- (3) A person may not be appointed as a deputy without his consent.
- (4) The court may appoint two or more deputies to act –
 - (a) jointly, or 10
 - (b) jointly and severally.
- (5) When appointing a deputy or deputies, the court may at the same time appoint one or more other persons to succeed the existing deputy or those deputies –
 - (a) in such circumstances, or on the happening of such events, as may be specified by the court; 15
 - (b) for such period as may be so specified.
- (6) A deputy is to be treated as P’s agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part.
- (7) The deputy is entitled –
 - (a) to be reimbursed out of P’s property for his reasonable expenses in discharging his functions, and 20
 - (b) if the court so directs when appointing him, to remuneration out of P’s property for discharging them.
- (8) The court may confer on a deputy powers to –
 - (a) take possession or control of all or any specified part of P’s property; 25
 - (b) exercise all or any specified powers in respect of it, including such powers of investment as the court may determine.
- (9) The court may require a deputy –
 - (a) to give to the Public Guardian such security as the court thinks fit for the due discharge of his functions, and 30
 - (b) to submit to the Public Guardian such reports at such times or at such intervals as the court may direct.

20 Restrictions on deputies

- (1) A deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to the matter. 35
- (2) Nothing in section 16(5) or 17 permits a deputy to be given power –
 - (a) to prohibit a named person from having contact with P;
 - (b) to direct a person responsible for P’s health care to allow a different person to take over that responsibility. 40
- (3) A deputy may not be given powers with respect to –
 - (a) the settlement of any of P’s property, whether for P’s benefit or for the benefit of others,

- (b) the execution for P of a will, or
(c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.
- (4) A deputy may not be given power to make a decision on behalf of P which is inconsistent with a decision made, within the scope of his authority and in accordance with this Act, by the donee of a lasting power of attorney granted by P (or, if there is more than one donee, by any of them). 5
- (5) A deputy may not refuse consent to the carrying out or continuation of life-sustaining treatment in relation to P, unless the court has conferred on the deputy express authority to that effect. 10
- (6) The court may exercise its power under subsection (5) only if it is satisfied that the circumstances are exceptional.
- (7) The authority conferred on a deputy is subject to the provisions of this Act and, in particular, section 4 (best interests).
- (8) A deputy may not do an act that is intended to restrain P unless four conditions are satisfied. 15
- (9) The first condition is that, in doing the act, the deputy is acting within the scope of an authority expressly conferred on him by the court.
- (10) The second is that P lacks, or the deputy reasonably believes that P lacks, capacity in relation to the matter in question. 20
- (11) The third is that the deputy reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (12) The fourth is that the act is a proportionate response to –
(a) the likelihood of P’s suffering harm, or
(b) the seriousness of that harm. 25
- (13) For the purposes of this section, a deputy restrains P if he –
(a) uses, or threatens to use, force to secure the doing of an act which P resists, or
(b) restricts P’s liberty of movement, whether or not P resists, or if he authorises another person to do any of those things. 30

21 Transfer of proceedings relating to people under 18

The Lord Chancellor may by order make provision as to the transfer of proceedings relating to a person under 18, in such circumstances as are specified in the order –

- (a) from the Court of Protection to a court having jurisdiction under the Children Act 1989 (c. 41), or 35
(b) from a court having jurisdiction under that Act to the Court of Protection.

Powers of the court in relation to lasting powers of attorney

22 Powers of court in relation to validity of lasting powers of attorney 40

- (1) This section and section 23 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.
 - (2) The court may determine any question relating to – 5
 - (a) whether 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.
 - (3) Subsection (4) applies if the court is satisfied – 10
 - (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 – 15
 - (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.
 - (4) The court may – 20
 - (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.
 - (5) If there is more than one donee, the court may under subsection (4)(b) revoke the instrument or the lasting power of attorney so far as it relates to any of them. 25
 - (6) “Donee” includes an intended donee.
- 23 Powers of court in relation to operation of lasting powers of attorney**
- (1) The court may determine any question as to the meaning or effect of a lasting power of attorney. 30
 - (2) The court may –
 - (a) give directions with respect to decisions –
 - (i) which the donee 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 donee would have to obtain from P if P had capacity to give it. 35
 - (3) The court may, if P lacks capacity to do so – 40
 - (a) give directions to the donee 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 donee to supply information or produce documents or things in his possession as donee;

- (c) give directions with respect to the remuneration or expenses of the donee;
 - (d) relieve the donee wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as donee.
- (4) The court may authorise the making of gifts which are not within section 12(2) (permitted gifts). 5
- (5) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

Advance decisions to refuse treatment

24 Advance decisions to refuse treatment: general 10

- (1) In this section and sections 25 and 26 “advance decision” means a decision made by a person (“P”), after he has reached 18 and when he has capacity to do so, that if—
- (a) at a later time and in such circumstances as he may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for him, and 15
 - (b) at that time he lacks capacity to consent to the carrying out or continuation of the treatment,
- the specified treatment is not to be carried out or continued.
- (2) For the purposes of subsection (1)(a), a decision may be regarded as specifying a treatment or circumstances even though expressed in layman’s terms. 20
- (3) P may withdraw or alter an advance decision at any time when he has capacity to do so.

25 Validity and applicability of advance decisions

- (1) An advance decision does not affect the liability which a person may incur for carrying out or continuing a treatment in relation to P unless the decision is at the material time— 25
- (a) valid, and
 - (b) applicable to the treatment.
- (2) An advance decision is not valid if P— 30
- (a) has withdrawn the decision at a time when he had capacity to do so,
 - (b) has, under a lasting power of attorney created after the advance decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates, or 35
 - (c) has done anything else clearly inconsistent with the advance decision remaining his fixed decision.
- (3) An advance decision is not applicable to the treatment in question if at the material time P has capacity to give or refuse consent to it.
- (4) An advance decision is not applicable to the treatment in question if— 40
- (a) that treatment is not the treatment specified in the advance decision,
 - (b) any circumstances specified in the advance decision are absent, or

- (c) there are reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them.
- (5) An advance decision is not applicable to life-sustaining treatment unless P specified in the decision that it was to apply to such treatment. 5
- (6) The existence of any lasting power of attorney other than one of a description mentioned in subsection (2)(b) does not prevent the advance decision from being regarded as valid and applicable.

26 Effect of advance decisions

- (1) If P has made an advance decision which is – 10
 - (a) valid, and
 - (b) applicable to a treatment,the decision has effect as if he had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued. 15
- (2) A person does not incur liability for carrying out or continuing the treatment unless, at the time, he is satisfied that an advance decision exists which is valid and applicable to the treatment.
- (3) A person does not incur liability for the consequences of withholding or withdrawing a treatment from P if, at the time, he reasonably believes that an advance decision exists which is valid and applicable to the treatment. 20
- (4) The court may make a declaration as to whether an advance decision –
 - (a) exists;
 - (b) is valid;
 - (c) is applicable to a treatment. 25
- (5) Nothing in an apparent advance decision stops a person –
 - (a) providing life-sustaining treatment, or
 - (b) doing any act he reasonably believes to be necessary to prevent a serious deterioration in P’s condition,while a decision as respects any relevant issue is sought from the court. 30

Excluded decisions

27 Family relationships etc.

- (1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person –
 - (a) consenting to marriage or a civil partnership, 35
 - (b) consenting to have sexual relations,
 - (c) consenting to a decree of divorce being granted on the basis of two years’ separation,
 - (d) consenting to a dissolution order being made in relation to a civil partnership on the basis of two years’ separation, 40
 - (e) consenting to a child’s being placed for adoption by an adoption agency,
 - (f) consenting to the making of an adoption order,

-
- (g) discharging parental responsibilities in matters not relating to a child’s property,
- (h) giving a consent under the Human Fertilisation and Embryology Act 1990 (c. 37).
- (2) “Adoption order” means – 5
- (a) an adoption order within the meaning of the Adoption and Children Act 2002 (c. 38) (including a future adoption order), and
- (b) an order under section 84 of that Act (parental responsibility prior to adoption abroad).
- 28 Mental Health Act matters** 10
- (1) Nothing in this Act authorises anyone –
- (a) to give a patient medical treatment for mental disorder, or
- (b) to consent to a patient’s being given medical treatment for mental disorder,
- if, at the time when it is proposed to treat the patient, his treatment is regulated by Part 4 of the Mental Health Act. 15
- (2) “Medical treatment”, “mental disorder” and “patient” have the same meaning as in that Act.
- 29 Voting rights**
- (1) Nothing in this Act permits a decision on voting at an election for any public office, or at a referendum, to be made on behalf of a person. 20
- (2) “Referendum” has the same meaning as in section 101 of the Political Parties, Elections and Referendums Act 2000 (c. 41).
- .
- Research* 25
- 30 Research**
- (1) Intrusive research carried out on, or in relation to, a person who lacks capacity to consent to it is unlawful unless it is carried out –
- (a) as part of a research project which is for the time being approved by the appropriate body for the purposes of this Act in accordance with section 31, and 30
- (b) in accordance with sections 32 and 33.
- (2) Research is intrusive if it is of a kind that would be unlawful if it was carried out –
- (a) on or in relation to a person who had capacity to consent to it, but 35
- (b) without his consent.
- (3) A clinical trial which is subject to the provisions of clinical trials regulations is not to be treated as research for the purposes of this section.
- (4) “Appropriate body”, in relation to a research project, means the person, committee or other body specified in regulations made by the Secretary of State as the appropriate body in relation to a project of the kind in question. 40

- (5) “Clinical trials regulations” means –
- (a) the Medicines for Human Use (Clinical Trials) Regulations 2004 (S.I. 2004/1031) and any other regulations replacing those regulations or amending them, and
 - (b) any other regulations relating to clinical trials and designated by the Secretary of State as clinical trials regulations for the purposes of this section. 5

31 Requirements for approval

- (1) The appropriate body may not approve a research project for the purposes of this Act unless satisfied that the following requirements will be met in relation to research carried out as part of the project on, or in relation to, a person who lacks capacity to consent to taking part in the project (“P”). 10
- (2) The research must be connected with a condition which –
- (a) affects P, and
 - (b) is attributable to the impairment of, or disturbance in the functioning of, the mind or brain. 15
- (3) There must be reasonable grounds for believing that the research would not be as effective if carried out only on, or only in relation to, persons who have capacity to consent to taking part in the project.
- (4) The research must – 20
- (a) have the potential to benefit P without imposing on P a burden that is disproportionate to the potential benefit to P, or
 - (b) be intended to provide knowledge of the causes or treatment of, or of the care of persons affected by, the same or a similar condition.
- (5) If the research falls within paragraph (b) of subsection (4) but not within paragraph (a), there must be reasonable grounds for believing – 25
- (a) that the risk to P from taking part in the project is likely to be negligible, and
 - (b) that anything done to, or in relation to, P will not – 30
 - (i) interfere with P’s freedom of action or privacy in a significant way, or
 - (ii) be unduly invasive or restrictive.
- (6) There must be reasonable arrangements in place for ensuring that the requirements of sections 32 and 33 will be met.

32 Consulting carers etc

- (1) This section applies if a person (“R”) – 35
- (a) is conducting an approved research project, and
 - (b) wishes to carry out research, as part of the project, on or in relation to a person (“P”) who lacks capacity to consent to taking part in the project.
- (2) R must take reasonable steps to identify a person who – 40
- (a) otherwise than in a professional capacity or for remuneration, is engaged in caring for P or is interested in P’s welfare, and
 - (b) is prepared to be consulted by R under this section.

-
- (3) If R is unable to identify such a person he must, in accordance with guidance issued by the Secretary of State, nominate a person who –
- (a) is prepared to be consulted by R under this section, but
 - (b) has no connection with the project.
- (4) R must provide the person identified under subsection (2), or nominated under subsection (3), with information about the project and ask him –
- (a) for advice as to whether P should take part in the project, and
 - (b) what, in his opinion, P’s wishes and feelings about taking part in the project would be likely to be if P had capacity in relation to the matter.
- (5) If, at any time, the person consulted advises R that in his opinion P’s wishes and feelings would be likely to lead him to decline to take part in the project (or to wish to withdraw from it) if he had capacity in relation to the matter, R must ensure –
- (a) if P is not already taking part in the project, that he does not take part in it;
 - (b) if P is taking part in the project and no application is made under subsection (7), that P is withdrawn from the project.
- (6) The fact that a person is the donee of a lasting power of attorney given by P, or is P’s deputy, does not prevent him from being the person consulted under this section.
- (7) If R is satisfied that the research has the potential to benefit P he may, if given advice of the kind mentioned in subsection (5), apply to the court.
- (8) If the court is satisfied that the research has the potential to benefit P without imposing on P a burden that is disproportionate to the potential benefit to P, it may make such declaration or order as it considers appropriate.
- (9) Subsection (10) applies if R considers that, having regard to the nature of the research and of the particular circumstances of the case –
- (a) it is necessary to take action for the purposes of the research as a matter of urgency, but
 - (b) it is not reasonably practicable to consult under the previous provisions of this section.
- (10) R may take the action if –
- (a) he has the agreement of a registered medical practitioner who is not concerned in P’s treatment or care, or
 - (b) where it is not reasonably practicable in the time available to obtain that agreement, he acts in accordance with a procedure approved by the appropriate body at the time when the research project was approved under section 31.
- (11) But R may not continue to act in reliance on subsection (10) if he has reasonable grounds for believing that it is no longer necessary to take the action as a matter of urgency.

33 Additional safeguards

- (1) This section applies in relation to a person who is taking part in an approved research project even though he lacks capacity to consent to taking part.
- (2) Nothing may be done to, or in relation to, him in the course of the research –

- (a) to which he objects (whether by showing signs of resistance or otherwise); or
 - (b) which would be contrary to an advance decision of his which has effect.
- (3) If he indicates (in any way) that he wishes to be withdrawn from the project he must be withdrawn without delay. 5
- (4) P must be withdrawn from the project, without delay, if at any time the person conducting the research has reasonable grounds for believing that one or more of the requirements set out in section 31(2) to (6) is no longer met in relation to research being carried out on, or in relation to, P.

Independent consultee service 10

34 Appointment of independent consultees

- (1) The appropriate authority must make such arrangements as it considers reasonable to enable persons (“independent consultees”) to be available to give advice for the purposes of sections 35, 36 and 37.
- (2) The appropriate authority may make regulations – 15
- (a) as to the appointment of independent consultees;
 - (b) as to the functions of independent consultees in relation to sections 35, 36 and 37.
- (3) The regulations may, in particular, provide – 20
- (a) that a person may act as an independent consultee only in such circumstances, or only subject to such conditions, as may be prescribed;
 - (b) for the appointment of a person as an independent consultee to be subject to approval in accordance with the regulations.
- (4) In making arrangements under subsection (1), the appropriate authority must have regard to the principle that advice in relation to a proposed act or decision should, so far as practicable, be given by a person who is independent of any person who will be responsible for the act or decision. 25
- (5) *The arrangements may include provision for payments to be made to, or in relation to, persons carrying out functions in accordance with the arrangements.*
- (6) For the purpose of enabling him to carry out his functions, an independent consultee – 30
- (a) may interview in private the person in relation to whom he has been asked for advice, and
 - (b) may examine any record of a prescribed kind which the person holding the record considers may be relevant to the independent consultee’s investigation. 35
- (7) In this section and section 35, “the appropriate authority” means – 40
- (a) in relation to the provision of the services of independent consultees in England, the Secretary of State, and
 - (b) in relation to the provision of the services of independent consultees in Wales, the National Assembly for Wales.
- (8) “Prescribed” means prescribed by the regulations.

35 Duty to seek advice in connection with serious medical treatment

- (1) This section applies if an NHS body –
 - (a) is proposing to provide serious medical treatment for a person (“P”) who lacks capacity to consent to the treatment, and
 - (b) is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult about P’s best interests. 5
- (2) Before the treatment is provided, the NHS body must seek advice from an independent consultee as to P’s best interests.
- (3) If the treatment needs to be provided as a matter of urgency, it may be provided even though the NHS body has not been able to comply with subsection (2). 10
- (4) If the independent consultee gives the NHS body advice about P’s best interests it must take it into account in treating P.
- (5) “Serious medical treatment” means treatment which involves providing, withholding or withdrawing treatment of a kind prescribed by regulations made by the appropriate authority. 15
- (6) “NHS body” has such meaning as may be prescribed by regulations made for the purposes of this section by –
 - (a) the Secretary of State, in relation to bodies in England, or 20
 - (b) the National Assembly for Wales, in relation to bodies in Wales.

36 Duty of NHS body to seek advice before providing accommodation

- (1) This section applies if an NHS body proposes to make arrangements –
 - (a) for the provision of accommodation in a hospital or care home for a person (“P”) who lacks capacity to agree to the arrangements, or 25
 - (b) for a change in P’s accommodation to another hospital or care home, and is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate for it to consult about P’s best interests.
- (2) Before making the arrangements, the NHS body must seek advice from an independent consultee as to P’s best interests unless it is satisfied that –
 - (a) the accommodation is likely to be provided for a continuous period of less than 28 days, or
 - (b) the arrangements need to be made as a matter of urgency. 30
- (3) If the independent consultee gives the NHS body advice about P’s best interests, the NHS body must take that advice into account in deciding what arrangements to make for P. 35
- (4) “Care home” has the meaning given in section 3 of the Care Standards Act 2000 (c.14).
- (5) “Hospital” means –
 - (a) a health service hospital as defined by section 128 of the National Health Service Act 1977 (c. 49), or
 - (b) an independent hospital as defined by section 2 of the Care Standards Act 2000 (c. 14). 40

- (6) “NHS body” has such meaning as may be prescribed by regulations made for the purposes of this section by –
- (a) the Secretary of State, in relation to bodies in England, or
 - (b) the National Assembly for Wales, in relation to bodies in Wales.

37 Duty of local authority to seek advice before providing accommodation 5

- (1) This section applies if a local authority propose to make arrangements –
- (a) for the provision of residential accommodation for a person (“P”) who lacks capacity to agree to the arrangements, or
 - (b) for a change in P’s residential accommodation,
- and are satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate for them to consult about P’s best interests. 10
- (2) But this section applies only if the accommodation is to be provided in accordance with section 21 of the National Assistance Act 1948 (c. 29) as the result of a decision taken by the local authority under section 47 of the National Health Service and Community Care Act 1990 (c. 19). 15
- (3) Before making the arrangements, the local authority must seek advice from an independent consultee as to P’s best interests unless they are satisfied that –
- (a) the accommodation is likely to be provided for a continuous period of less than 8 weeks, or 20
 - (b) the arrangements need to be made as a matter of urgency.
- (4) If the independent consultee gives the local authority advice about P’s best interests, they must take that advice into account in deciding what arrangements to make for P.

38 Exceptions 25

- Sections 35(2), 36(2) and 37(3) do not apply if there is –
- (a) a person nominated by P (in whatever manner) as a person to be consulted in matters affecting his interests,
 - (b) a donee of a lasting power of attorney created by P,
 - (c) a deputy appointed by the court for P, 30
 - (d) a donee of an enduring power of attorney (within the meaning of Schedule 4) created by P.

39 Power to adjust role of independent consultee service

- (1) The appropriate authority may make regulations –
- (a) expanding the role of independent consultees in relation to persons who lack capacity, and 35
 - (b) adjusting the obligation to make arrangements imposed by section 34.
- (2) The regulations may, in particular –
- (a) prescribe circumstances (different to those set out in sections 35, 36 and 37) in which advice must be sought from an independent consultee, in respect of a person who lacks capacity, by a person of a prescribed description, and 40
 - (b) include provision similar to any made by section 35, 36, 37 or 38.

- (3) “Appropriate authority” has the same meaning as in section 34.

Miscellaneous and supplementary

40 Codes of practice

- (1) The Lord Chancellor must prepare and issue one or more codes of practice—
- (a) for the guidance of persons assessing whether a person has capacity in relation to any matter, 5
 - (b) for the guidance of persons acting in connection with the care or treatment of another person (see section 5),
 - (c) for the guidance of donees of lasting powers of attorney,
 - (d) for the guidance of deputies appointed by the court, 10
 - (e) with respect to the provisions of sections 24 to 26 (advance decisions and apparent advance decisions), and
 - (f) with respect to such other matters concerned with this Act as he thinks fit.
- (2) The Lord Chancellor may from time to time revise a code. 15
- (3) The Lord Chancellor may delegate the preparation or revision of the whole or any part of a code so far as he considers expedient.
- (4) It is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity and is doing so in one or more of the following ways— 20
- (a) as the donee of a lasting power of attorney,
 - (b) as a deputy appointed by the court,
 - (c) in a professional capacity,
 - (d) for remuneration.
- (5) If it appears to a court or tribunal conducting any criminal or civil proceedings that— 25
- (a) a provision of a code, or
 - (b) a failure to comply with a code,
- is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question. 30
- (6) A code under subsection (1)(d) may contain separate guidance for deputies appointed by virtue of paragraph 1(2) of Schedule 5 (functions of deputy conferred on receiver appointed under the Mental Health Act).
- (7) In this section and in section 41 “code” means a code prepared or revised under this section. 35

41 Codes of practice: procedure

- (1) Before preparing or revising a code, the Lord Chancellor must consult—
- (a) the National Assembly for Wales, and
 - (b) such other persons as he considers appropriate.
- (2) The Lord Chancellor may not issue a code unless— 40
- (a) a draft of the code has been laid by him before both Houses of Parliament, and

-
- (b) the 40 day period has elapsed without either House resolving not to approve the draft.
- (3) The Lord Chancellor must arrange for any code that he has issued to be published in such a way as he considers appropriate for bringing it to the attention of persons likely to be concerned with its provisions. 5
- (4) “40 day period”, in relation to the draft of a proposed code, means –
- (a) if the draft is laid before one House on a day later than the day on which it is laid before the other House, the period of 40 days beginning with the later of the two days;
- (b) in any other case, the period of 40 days beginning with the day on which it is laid before each House. 10
- (5) In calculating the period of 40 days, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days.
- 42 Ill-treatment or neglect** 15
- (1) A person is guilty of an offence if he –
- (a) has the care of a person who lacks or whom he reasonably believes to lack capacity, or is the donee of a lasting power of attorney or a deputy appointed for a person by the court, and
- (b) ill-treats or wilfully neglects the person concerned. 20
- (2) A person guilty of an offence under this section is liable –
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both. 25

PART 2

THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN

The Court of Protection

- 43 The Court of Protection**
- (1) There is to be a superior court of record known as the Court of Protection. 30
- (2) The court may sit at any place in England and Wales, on any day and at any time.
- (3) The court is to have a central office and registry at a place appointed by the Lord Chancellor.
- (4) The Lord Chancellor may designate as additional registries of the court any district registry of the High Court and any county court office. 35
- (5) The office of the Supreme Court called the Court of Protection ceases to exist.

44 The judges of the Court of Protection

- (1) Subject to Court of Protection Rules under section 49(2)(d), the jurisdiction of the court is exercisable by a judge nominated for that purpose by –
- (a) the Lord Chancellor, or
 - (b) a person acting on the Lord Chancellor’s behalf. 5
- (2) To be nominated, a judge must be –
- (a) the President of the Family Division,
 - (b) the Vice-Chancellor,
 - (c) a puisne judge of the High Court,
 - (d) a circuit judge, or 10
 - (e) a district judge.
- (3) The Lord Chancellor must –
- (a) appoint one of the judges nominated by virtue of subsection (2)(a) to (c) to be President of the Court of Protection, and
 - (b) appoint another of those judges to be Vice-President of the Court of Protection. 15
- (4) The Lord Chancellor must appoint one of the judges nominated by virtue of subsection (2)(d) or (e) to be Senior Judge of the Court of Protection, having such administrative functions in relation to the court as the Lord Chancellor may direct. 20

*Supplementary powers***45 General powers and effect of orders etc.**

- (1) The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.
- (2) Section 204 of the Law of Property Act 1925 (c. 20) (orders of High Court conclusive in favour of purchasers) applies in relation to orders and directions of the court as it applies to orders of the High Court. 25
- (3) Office copies of orders made, directions given or other instruments issued by the court and sealed with its official seal are admissible in all legal proceedings as evidence of the originals without any further proof. 30

46 Interim orders and directions

The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if –

- (a) there is reason to believe that P lacks capacity in relation to the matter,
- (b) the matter is one to which its powers under this Act extend, and 35
- (c) it is in P’s best interests to make the order, or give the directions, without delay.

47 Power to call for reports

- (1) This section applies where, in proceedings brought in respect of a person (“P”) under Part 1, the court is considering a question relating to P. 40

- (2) The court may require a report to be made to it by the Public Guardian or by a Court of Protection Visitor.
- (3) The court may require a local authority, or an NHS body, to arrange for a report to be made –
 - (a) by one of its officers or employees, or 5
 - (b) by such other person (other than the Public Guardian or a Court of Protection Visitor) as the authority, or the NHS body, considers appropriate.
- (4) The report must deal with such matters relating to P as the court may direct.
- (5) Court of Protection Rules may specify matters which, unless the court directs otherwise, must also be dealt with in the report. 10
- (6) The report may be made in writing or orally, as the court may direct.
- (7) In complying with a requirement, the Public Guardian or a Court of Protection Visitor may, at all reasonable times, examine and take copies of –
 - (a) any health record, and 15
 - (b) any record of, or held by, a local authority and compiled in connection with a social services function, so far as the record relates to P.
- (8) If the Public Guardian or a Court of Protection Visitor is making a visit in the course of complying with a requirement, he may interview P in private. 20
- (9) If a Court of Protection Visitor who is a Special Visitor is making a visit in the course of complying with a requirement, he may if the court so directs carry out in private a medical, psychiatric or psychological examination of P’s capacity and condition.
- (10) “NHS body” has the meaning given in section 148 of the Health and Social Care (Community Health and Standards) Act 2003 (c. 43). 25
- (11) “Requirement” means a requirement imposed under subsection (2) or (3).

Practice and procedure

48 Applications to the Court of Protection

- (1) No permission is required for an application to the court for the exercise of any of its powers under this Act –
 - (a) by a person who lacks, or is alleged to lack, capacity, 30
 - (b) if such a person has not reached 18, by anyone with parental responsibility for him,
 - (c) by the donor or a donee of a lasting power of attorney to which the application relates, 35
 - (d) by a deputy appointed by the court for a person to whom the application relates, or
 - (e) by a person named in an existing order of the court, if the application relates to the order. 40
- (2) But, subject to Court of Protection Rules and to paragraph 21(2) of Schedule 3 (declarations relating to private international law), permission is required for any other application to the court.

- (3) In deciding whether to grant permission the court must, in particular, have regard to –
- (a) the applicant’s connection with the person to whom the application relates,
 - (b) the reasons for the application, 5
 - (c) the benefit to the person to whom the application relates of a proposed order or directions, and
 - (d) whether the benefit can be achieved in any other way.
- (4) “Parental responsibility” has the same meaning as in the Children Act 1989 (c. 41). 10

49 Court of Protection Rules

- (1) The Lord Chancellor may make rules of court (to be called “Court of Protection Rules”) with respect to the practice and procedure of the court.
- (2) Court of Protection Rules may, in particular, make provision –
- (a) as to the manner and form in which proceedings are to be commenced; 15
 - (b) as to the persons entitled to be notified of, and be made parties to, the proceedings;
 - (c) for the allocation, in such circumstances as may be specified, of any specified description of proceedings to a specified judge or to specified descriptions of judges; 20
 - (d) for the exercise of the jurisdiction of the court, in such circumstances as may be specified, by its officers or other staff;
 - (e) for enabling the court to appoint a suitable person (who may, with his consent, be the Official Solicitor) to act in the name of, or on behalf of, or to represent the person to whom the proceedings relate; 25
 - (f) for enabling an application to the court to be disposed of without a hearing;
 - (g) for enabling the court to proceed with, or with any part of, a hearing in the absence of the person to whom the proceedings relate;
 - (h) for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public; 30
 - (i) as to what may be received as evidence (whether or not admissible apart from the rules) and the manner in which it is to be presented; 35
 - (j) for the enforcement of orders made and directions given in the proceedings.
- (3) Court of Protection Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions.
- (4) Court of Protection Rules may make different provision for different areas. 40

50 Practice directions

- (1) The President of the Court of Protection may, with the concurrence of the Lord Chancellor, give directions as to the practice and procedure of the court.

- (2) Directions as to the practice and procedure of the court may not be given by anyone other than the President of the Court of Protection without the approval of the President of the Court of Protection and the Lord Chancellor.
- (3) Nothing in this section prevents the President of the Court of Protection, without the concurrence of the Lord Chancellor, giving directions which contain guidance as to law or making judicial decisions. 5

51 Rights of appeal

- (1) Subject to the provisions of this section, an appeal lies to the Court of Appeal from any decision of the court.
- (2) Court of Protection Rules may provide that where a decision of the court is made by – 10
 - (a) a person exercising the jurisdiction of the court by virtue of rules made under section 49(2)(d),
 - (b) a district judge, or
 - (c) a circuit judge, 15an appeal from that decision lies to a prescribed higher judge of the court and not to the Court of Appeal.
- (3) For the purposes of this section the higher judges of the court are –
 - (a) in relation to a person mentioned in subsection (2)(a), a circuit judge or a district judge; 20
 - (b) in relation to a person mentioned in subsection (2)(b), a circuit judge;
 - (c) in relation to any person mentioned in subsection (2), one of the judges nominated by virtue of section 44(2)(a) to (c).
- (4) Court of Protection Rules may make provision –
 - (a) that, in such cases as may be specified, an appeal from a decision of the court may not be made without permission; 25
 - (b) as to the person or persons entitled to grant permission to appeal;
 - (c) as to any requirements to be satisfied before permission is granted;
 - (d) that where a higher judge of the court makes a decision on an appeal, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that – 30
 - (i) the appeal would raise an important point of principle or practice, or
 - (ii) there is some other compelling reason for the Court of Appeal to hear it; 35
 - (e) as to any considerations to be taken into account in relation to granting or refusing permission to appeal.

Fees and costs

52 Fees

- (1) The Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by the court. 40
- (2) An order under this section may in particular contain provision as to –
 - (a) scales or rates of fees;

- (b) exemptions from and reductions in fees;
 - (c) remission of fees in whole or in part.
- (3) Before making an order under this section, the Lord Chancellor must consult –
- (a) the President of the Court of Protection,
 - (b) the Vice-President of the Court of Protection, and 5
 - (c) the Senior Judge of the Court of Protection.
- (4) The Lord Chancellor must take such steps as are reasonably practicable to bring information about fees to the attention of persons likely to have to pay them.
- (5) Fees payable under this section are recoverable summarily as a civil debt. 10

53 Costs

- (1) Subject to Court of Protection Rules, the costs of and incidental to all proceedings in the court are in its discretion.
- (2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives. 15
- (3) The court has full power to determine by whom and to what extent the costs are to be paid.
- (4) The court may, in any proceedings –
- (a) disallow, or
 - (b) order the legal or other representatives concerned to meet,
- the whole of any wasted costs or such part of them as may be determined in accordance with the rules. 20
- (5) “Legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf. 25
- (6) “Wasted costs” means any costs incurred by a party –
- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or 30
 - (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

54 Fees and costs: supplementary

- (1) Court of Protection Rules may make provision – 35
- (a) as to the way in which, and funds from which, fees and costs are to be paid;
 - (b) for charging fees and costs upon the estate of the person to whom the proceedings relate;
 - (c) for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings. 40

- (2) A charge on the estate of a person created by virtue of subsection (1)(b) does not cause any interest of the person in any property to fail or determine or to be prevented from recommencing.

The Public Guardian

55 The Public Guardian 5

- (1) For the purposes of this Act, there is to be an officer, to be known as the Public Guardian.
- (2) The Public Guardian is to be appointed by the Lord Chancellor.
- (3) *There is to be paid to the Public Guardian out of money provided by Parliament such salary as the Lord Chancellor may determine.* 10
- (4) *The Lord Chancellor may, after consulting the Public Guardian, provide him with such officers and staff as the Lord Chancellor thinks necessary for the proper discharge of his functions.*
- (5) Any functions of the Public Guardian may, to the extent authorised by him, be performed by any of his officers. 15

56 Functions of the Public Guardian

- (1) The Public Guardian has the following functions –
- (a) establishing and maintaining a register of lasting powers of attorney,
 - (b) establishing and maintaining a register of orders appointing deputies,
 - (c) supervising deputies appointed by the court, 20
 - (d) directing a Court of Protection Visitor to visit –
 - (i) a donee of a lasting power of attorney,
 - (ii) a deputy appointed by the court, or
 - (iii) the person granting the power of attorney or for whom the deputy is appointed (“P”), 25and to make a report to the Public Guardian on such matters as he may direct,
 - (e) receiving security which the court requires a person to give for the discharge of his functions,
 - (f) receiving reports from donees of lasting powers of attorney and deputies appointed by the court, 30
 - (g) reporting to the court on such matters relating to proceedings under this Act as the court requires,
 - (h) dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney or a deputy appointed by the court is exercising his powers. 35
- (2) The functions conferred by subsection (1)(c) and (h) may be discharged in co-operation with any other person who has functions in relation to the care or treatment of P.
- (3) The Lord Chancellor may by regulations make provision – 40
- (a) conferring on the Public Guardian other functions in connection with this Act;

- (b) in connection with the discharge by the Public Guardian of his functions.
- (4) Regulations made under subsection (3)(b) may in particular make provision—
- (a) as to the giving of security by deputies appointed by the court and as to the enforcement and discharge of security so given; 5
 - (b) as to the fees which may be charged by the Public Guardian;
 - (c) as to the way in which, and funds from which, such fees are to be paid;
 - (d) as to the making of reports to the Public Guardian by deputies appointed by the court and others who are directed by the court to carry out any transaction for a person who lacks capacity. 10
- (5) For the purpose of enabling him to carry out his functions, the Public Guardian may, at all reasonable times, examine and take copies of—
- (a) any health record, and
 - (b) any record of, or held by, a local authority and compiled in connection with a social services function, 15
- so far as the record relates to P.
- (6) The Public Guardian may also for that purpose interview P in private.

Court of Protection Visitors

57 Court of Protection Visitors

- (1) A Court of Protection Visitor is a person who is appointed by the Lord Chancellor to— 20
- (a) a panel of Special Visitors, or
 - (b) a panel of General Visitors.
- (2) A person is not qualified to be a Special Visitor unless he—
- (a) is a registered medical practitioner or appears to the Lord Chancellor to have other suitable qualifications or training, and 25
 - (b) appears to the Lord Chancellor to have special knowledge of and experience in cases of impairment of or disturbance in the functioning of the mind or brain.
- (3) A General Visitor need not have a medical qualification. 30
- (4) A *Court of Protection Visitor* –
- (a) *may be appointed for such term and subject to such conditions, and*
 - (b) *may be paid such remuneration and allowances,*
- as the Lord Chancellor may determine.*
- (5) For the purpose of carrying out his functions under this Act in relation to a person who lacks capacity (“P”), a Court of Protection Visitor may, at all reasonable times, examine and take copies of— 35
- (a) any health record, and
 - (b) any record of, or held by, a local authority and compiled in connection with a social services function, 40
- so far as the record relates to P.
- (6) A Court of Protection Visitor may also for that purpose interview P in private.

PART 3

MISCELLANEOUS AND GENERAL

Declaratory provision

58 Scope of the Act

For the avoidance of doubt, it is hereby declared that nothing in this Act is to be taken to affect the law relating to murder or manslaughter or the operation of section 2 of the Suicide Act 1961 (c. 60) (assisting suicide). 5

Private international law

59 International protection of adults

Schedule 3— 10
(a) gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2000 (Cm. 5881) (in so far as this Act does not otherwise do so), and
(b) makes related provision as to the private international law of England and Wales. 15

General

60 Interpretation

- (1) In this Act—
- “the 1985 Act” means the Enduring Powers of Attorney Act 1985 (c. 29),
 - “advance decision” has the meaning given in section 24(1), 20
 - “the court” means the Court of Protection established by section 43,
 - “Court of Protection Rules” has the meaning given in section 49(1),
 - “Court of Protection Visitor” has the meaning given in section 57,
 - “deputy” has the meaning given in section 16(2)(b),
 - “enactment” includes a provision of subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30)), 25
 - “health record” has the meaning given in section 68 of the Data Protection Act 1998 (c. 29) (as read with section 69 of that Act),
 - “independent consultee” has the meaning given in section 34(1),
 - “lasting power of attorney” has the meaning given in section 9, 30
 - “life-sustaining treatment” has the meaning given in section 6(7),
 - “local authority” means—
 - (a) the council of a county in England in which there are no district councils,
 - (b) the council of a district in England, 35
 - (c) the council of a county or county borough in Wales,
 - (d) the council of a London borough,
 - (e) the Common Council of the City of London, or
 - (f) the Council of the Isles of Scilly,
 - “Mental Health Act” means the Mental Health Act 1983 (c. 20), 40

| | |
|---|--|
| <p>“property” includes any thing in action and any interest in real or personal property, “Public Guardian” has the meaning given in section 55, “purchaser” and “purchase” have the meaning given in section 205(1) of the Law of Property Act 1925 (c. 20), “social services function” has the meaning given in section 1A of the Local Authority Social Services Act 1970 (c. 42), “treatment” includes a diagnostic or other procedure, “trust corporation” has the meaning given in section 68(1) of the Trustee Act 1925 (c. 19), and “will” includes codicil.</p> <p>(2) In this Act references to making decisions, in relation to a donee of a lasting power of attorney or a deputy appointed by the court, include, where appropriate, acting on decisions made.</p> <p>(3) In this Act references to the bankruptcy of an individual include a case where a bankruptcy restrictions order under the Insolvency Act 1986 (c. 45) has effect in respect of him.</p> <p>(4) “Bankruptcy restrictions order” includes an interim bankruptcy restrictions order.</p> | <p>5</p> <p>10</p> <p>15</p> <p>20</p> |
| 61 Rules, regulations and orders | 20 |
| <p>(1) Any power to make rules, regulations or orders under this Act –</p> <p style="padding-left: 20px;">(a) is exercisable by statutory instrument;</p> <p style="padding-left: 20px;">(b) includes power to make supplementary, incidental, consequential, transitional or saving provision;</p> <p style="padding-left: 20px;">(c) includes power to make different provision for different cases.</p> <p>(2) Any statutory instrument containing rules, regulations or orders made by the Lord Chancellor or the Secretary of State under this Act, other than an order under section 64 or of the kind mentioned in section 63(6), is subject to annulment in pursuance of a resolution of either House of Parliament.</p> | <p>25</p> <p>30</p> |
| 62 Existing receivers and enduring powers of attorney etc. | 30 |
| <p>(1) The following provisions cease to have effect –</p> <p style="padding-left: 20px;">(a) Part 7 of the Mental Health Act,</p> <p style="padding-left: 20px;">(b) the Enduring Powers of Attorney Act 1985 (c. 29).</p> <p>(2) No enduring power of attorney within the meaning of the 1985 Act is to be created after the commencement of this Act.</p> <p>(3) Schedule 4 has effect in place of the 1985 Act in relation to any enduring power of attorney created before the commencement of this Act.</p> <p>(4) Schedule 5 contains transitional provisions and savings in relation to Part 7 of the Mental Health Act and the 1985 Act.</p> | <p>35</p> <p>40</p> |
| 63 Minor and consequential amendments and repeals | 40 |
| <p>(1) Schedule 6 contains minor and consequential amendments.</p> | |

-
- (2) Schedule 7 contains repeals.
- (3) The Lord Chancellor may by order make supplementary, incidental, consequential, transitional or saving provision for the purposes of, in consequence of, or for giving full effect to a provision of this Act.
- (4) An order under subsection (3) may, in particular – 5
- (a) provide for a provision of this Act which comes into force before another provision of this Act has come into force to have effect, until the other provision has come into force, with specified modifications;
 - (b) amend, repeal or revoke an enactment, other than one contained in an Act passed in a Session after the one in which this Act is passed. 10
- (5) The power conferred by subsection (3) is not restricted by any other provision of this Act.
- (6) An order under subsection (3) which amends or repeals a provision of an Act may not be made unless a draft has been laid before and approved by resolution of each House of Parliament. 15
- 64 Commencement and extent**
- (1) This Act comes into force in accordance with provision made by order by the Lord Chancellor.
- (2) An order under this section may appoint different days for different provisions and different purposes. 20
- (3) Subject to subsections (4) and (5), this Act extends to England and Wales only.
- (4) The following provisions extend to the United Kingdom –
- (a) paragraph 15(1) of Schedule 1 (evidence of instruments and of registration of lasting powers of attorney),
 - (b) paragraph 15(3) of Schedule 4 (evidence of instruments and of registration of enduring powers of attorney). 25
- (5) Subject to any provision made in Schedule 6, the amendments and repeals made by Schedules 6 and 7 have the same extent as the enactments to which they relate.
- 65 Short title** 30
- This Act may be cited as the Mental Capacity Act 2004.

SCHEDULES

SCHEDULE 1

Section 9

LASTING POWERS OF ATTORNEY: FORMALITIES

PART 1

MAKING INSTRUMENTS

5

General requirements as to making instruments

- 1 (1) An instrument is not made in accordance with this Schedule unless –
 - (a) it is in the prescribed form,
 - (b) it complies with paragraph 2, and
 - (c) any prescribed requirements in connection with its execution are satisfied. 10
- (2) Regulations may make different provision according to whether –
 - (a) the instrument relates to personal welfare or to property and affairs (or to both);
 - (b) only one or more than one donee is to be appointed (and if more than one, whether jointly or jointly and severally). 15
- (3) In this Schedule –
 - (a) “prescribed” means prescribed by regulations, and
 - (b) “regulations” means regulations made for the purposes of this Schedule by the Lord Chancellor. 20

Requirements as to content of instruments

- 2 (1) The instrument must include –
 - (a) the prescribed information about the purpose of the instrument and the effect of a lasting power of attorney,
 - (b) a statement by the donor to the effect that he – 25
 - (i) has read the prescribed information or a prescribed part of it (or has had it read to him), and
 - (ii) intends the authority conferred under the instrument to include authority to make decisions on his behalf in circumstances where he no longer has capacity, 30
 - (c) a statement by the donor –
 - (i) naming a person or persons whom the donor wishes to be notified of any application for the registration of the instrument, or
 - (ii) stating that there are no persons whom he wishes to be notified of any such application, 35

- (d) a statement by the donee (or, if more than one, each of them) to the effect that he –
 - (i) has read the prescribed information or a prescribed part of it, and
 - (ii) understands the duty imposed on a donee of a lasting power of attorney under section 4 (best interests), and5
- (e) a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument –
 - (i) the donor understands the purpose of the instrument and the scope of the authority conferred under it, 10
 - (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.
- (2) Regulations may – 15
 - (a) prescribe a maximum number of named persons;
 - (b) provide that, where the instrument includes a statement under sub-paragraph (1)(c)(ii), two persons of a prescribed description must each give a certificate under sub-paragraph (1)(e).
- (3) The persons who may be named persons do not include a person who is appointed as donee under the instrument. 20
- (4) In this Schedule “named person” means a person named under sub-paragraph (1)(c).
- (5) A certificate under sub-paragraph (1)(e) – 25
 - (a) must be made in the prescribed form, and
 - (b) must include any prescribed information.
- (6) The certificate may not be given by a person appointed as donee under the instrument.

Failure to comply with prescribed form

- 3 (1) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form, it is to be treated by the Public Guardian as sufficient in point of form and expression. 30
- (2) The court may declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney. 35

PART 2

REGISTRATION

Applications and procedure for registration

- 4 (1) An application to the Public Guardian for the registration of an instrument intended to create a lasting power of attorney – 40
 - (a) must be made in the prescribed form, and
 - (b) must include any prescribed information.
- (2) The application may be made –
 - (a) by the donor,

-
- (b) by the donee or donees, or
 - (c) if the instrument appoints two or more donees to act jointly and severally, by any of the donees.
- (3) The application must be accompanied by –
- (a) the instrument, and 5
 - (b) any fee provided for under section 56(4)(b).
- (4) A person who, in an application for registration, makes a statement which he knows to be false in a material particular is guilty of an offence and is liable –
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both; 10
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine, or both.
- 5 Subject to paragraphs 11 to 13, the Public Guardian must register the instrument as a lasting power of attorney at the end of the prescribed period. 15

Notification requirements

- 6 (1) A donor about to make an application under paragraph 4(2)(a) must notify any named persons that he is about to do so.
- (2) The donee (or donees) about to make an application under paragraph 4(2)(b) or (c) must notify any named persons that he is (or they are) about to do so. 20
- 7 As soon as is practicable after receiving an application by the donor under paragraph 4(2)(a), the Public Guardian must notify the donee (or donees) that the application has been received.
- 8 (1) As soon as is practicable after receiving an application by a donee (or donees) under paragraph 4(2)(b), the Public Guardian must notify the donor that the application has been received. 25
- (2) As soon as is practicable after receiving an application by a donee under paragraph 4(2)(c), the Public Guardian must notify –
- (a) the donor, and
 - (b) the donee or donees who did not join in making the application, 30
- that the application has been received.
- 9 (1) A notice under paragraph 6 must be made in the prescribed form.
- (2) A notice under paragraph 6, 7 or 8 must include such information, if any, as may be prescribed.

Power to dispense with notification requirements 35

- 10 The court may –
- (a) on the application of the donor, dispense with the requirement to notify under paragraph 6(1), or
 - (b) on the application of the donee or donees concerned, dispense with the requirement to notify under paragraph 6(2), 40
- if satisfied that no useful purpose would be served by giving the notice.

Deputy already appointed

- 11 (1) Sub-paragraph (2) applies if it appears to the Public Guardian that –

- (a) there is a deputy appointed by the court for the donor, and
 - (b) the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney.
- (2) The Public Guardian must not register the instrument unless the court directs him to do so. 5

Objection by donee or named person

- 12 (1) Sub-paragraph (2) applies if a donee or a named person –
- (a) receives a notice under paragraph 6, 7 or 8 of an application for the registration of an instrument, and 10
 - (b) before the end of the prescribed period, gives notice to the Public Guardian of an objection to the registration on the ground that an event mentioned in section 13(3) or (6)(a) to (d) has occurred which has revoked the instrument.
- (2) The Public Guardian must not register the instrument if he is satisfied that the ground for making the objection is established. 15
- (3) Sub-paragraph (4) applies if a donee or a named person –
- (a) receives a notice under paragraph 6, 7 or 8 of an application for the registration of an instrument, and
 - (b) before the end of the prescribed period – 20
 - (i) makes an application to the court objecting to the registration on a prescribed ground, and
 - (ii) notifies the Public Guardian of the application.
- (4) The Public Guardian must not register the instrument unless the court directs him to do so. 25

Objection by donor

- 13 (1) This paragraph applies if the donor –
- (a) receives a notice under paragraph 8 of an application for the registration of an instrument, and
 - (b) before the end of the prescribed period, gives notice to the Public Guardian of an objection to the registration. 30
- (2) The Public Guardian must not register the instrument unless the court, on the application of the donee or, if more than one, any of them –
- (a) is satisfied that the donor lacks capacity to object to the registration, and 35
 - (b) directs the Public Guardian to register the instrument.

Notification of registration

- 14 Where an instrument is registered under this Schedule, the Public Guardian must give notice of the fact in the prescribed form to –
- (a) the donor, and 40
 - (b) the donee or, if more than one, each of them.

Evidence of registration

- 15 (1) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of –
- (a) the contents of the instrument, and
 - (b) the fact that it has been registered. 5
- (2) Sub-paragraph (1) is without prejudice to –
- (a) section 3 of the Powers of Attorney Act 1971 (c. 27) (proof by certified copy), and
 - (b) any other method of proof authorised by law.

PART 3 10

CANCELLATION OF REGISTRATION

- 16 (1) The Public Guardian must 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 15
 - (b) on the occurrence of an event mentioned in section 13(6)(a) to (d).
- (2) If the Public Guardian cancels the registration of an instrument he must notify –
- (a) the donor, and
 - (b) the donee or, if more than one, each of them. 20
- 17 The court must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney if it –
- (a) determines under section 22(2)(a) that a requirement for creating the power was not met,
 - (b) determines under section 22(2)(b) that the power has been revoked or has otherwise come to an end, or 25
 - (c) revokes the power under section 22(4)(b) (fraud etc.).
- 18 On the cancellation of the registration of an instrument, the instrument and any office copies of it must be delivered up to the Public Guardian to be cancelled. 30

PART 4

RECORDS OF ALTERATIONS IN REGISTERED POWERS

Partial revocation or suspension of power as a result of bankruptcy

- 19 If in the case of a registered instrument it appears to the Public Guardian that under section 13 a lasting power of attorney is revoked, or suspended, in relation to the donor’s property and affairs (but not in relation to other matters), the Public Guardian must attach to the instrument a note to that effect. 35

Termination of appointment of donee which does not revoke power

- 20 If in the case of a registered instrument it appears to the Public Guardian that an event has occurred – 40

- (a) which has terminated the appointment of the donee, but
 - (b) which has not revoked the instrument,
- the Public Guardian must attach to the instrument a note to that effect.

Replacement of donee

- 21 If in the case of a registered instrument it appears to the Public Guardian that the donee has been replaced under the terms of the instrument the Public Guardian must attach to the instrument a note to that effect. 5

Notification of alterations

- 22 If the Public Guardian attaches a note to an instrument under paragraph 19, 20 or 21 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). 10

SCHEDULE 2

Section 18(4)

PROPERTY AND AFFAIRS: SUPPLEMENTARY PROVISIONS

Wills: general

- 1 Paragraphs 2 to 4 apply in relation to the execution of a will, by virtue of section 18, on behalf of P. 15

Provision that may be made in will

- 2 The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it. 20

Wills: requirements relating to execution

- 3 (1) Sub-paragraph (2) applies if under section 16 the court makes an order or gives directions requiring or authorising a person (“the authorised person”) to execute a will on behalf of P.
- (2) Any will executed in pursuance of the order or direction— 25
- (a) must state that it is signed by P acting by the authorised person,
 - (b) must be signed by the authorised person with the name of P and his own name, in the presence of two or more witnesses present at the same time, and
 - (c) must be attested and subscribed by those witnesses in the presence of the authorised person. 30

Wills: effect of execution

- 4 (1) This paragraph applies where a will is executed in accordance with paragraph 3.
- (2) The Wills Act 1837 (c. 26) has effect in relation to the will as if it were signed by P by his own hand, except that— 35

-
- (a) section 9 of the 1837 Act (requirements as to signing and attestation) does not apply, and
- (b) in the subsequent provisions of the 1837 Act any reference to execution in the manner required by the previous provisions is to be read as a reference to execution in accordance with paragraph 3. 5
- (3) The will has the same effect for all purposes as if –
- (a) P had had the capacity to make a valid will, and
- (b) the will had been executed by him in the manner required by the 1837 Act.
- (4) But sub-paragraph (3) does not have effect in relation to the will – 10
- (a) in so far as it disposes of immovable property outside England and Wales, or
- (b) in so far as it relates to any other property or matter if, when the will is executed –
- (i) P is domiciled outside England and Wales, and 15
- (ii) the condition in sub-paragraph (5) is met.
- (5) The condition is that, under the law of P’s domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales.
- Vesting orders ancillary to settlement etc.* 20
- 5 (1) If provision is made by virtue of section 18 for –
- (a) the settlement of any property of P, or
- (b) the exercise of a power vested in him of appointing trustees or retiring from a trust,
- the court may also make as respects the property settled or the trust property such consequential vesting or other orders as the case may require. 25
- (2) The power under sub-paragraph (1) includes, in the case of the exercise of such a power, any order which could have been made in such a case under Part 4 of the Trustee Act 1925 (c. 19).
- Variation of settlements* 30
- 6 (1) If a settlement has been made by virtue of section 18, the court may by order vary or revoke the settlement if –
- (a) the settlement makes provision for its variation or revocation,
- (b) the court is satisfied that a material fact was not disclosed when the settlement was made, or 35
- (c) the court is satisfied that there has been a substantial change of circumstances.
- (2) Any such order may give such consequential directions as the court thinks fit.
- Vesting of stock in curator appointed outside England and Wales* 40
- 7 (1) Sub-paragraph (2) applies if the court is satisfied –
- (a) that under the law prevailing in a place outside England and Wales a person (“M”) has been appointed to exercise powers in respect of the property or affairs of P on the ground (however formulated) that

- P lacks capacity to make decisions with respect to the management and administration of his property and affairs, and
- (b) that, having regard to the nature of the appointment and to the circumstances of the case, it is expedient that the court should exercise its powers under this paragraph. 5
- (2) The court may direct –
- (a) any stocks standing in the name of P, or
 - (b) the right to receive dividends from the stocks,
- to be transferred into M’s name or otherwise dealt with as required by M, and may give such directions as the court thinks fit for dealing with accrued dividends from the stocks. 10
- (3) “Stocks” includes –
- (a) shares, and
 - (b) any funds, annuity or security transferable in the books kept by any body corporate or unincorporated company or society or by an instrument of transfer either alone or accompanied by other formalities, 15
- and “dividends” is to be construed accordingly.

Preservation of interests in property disposed of on behalf of person lacking capacity

- 8 (1) Sub-paragraphs (2) and (3) apply if – 20
- (a) P’s property has been disposed of by virtue of section 18,
 - (b) under P’s will or intestacy, or by a gift perfected or nomination taking effect on his death, any other person would have taken an interest in the property but for the disposal, and
 - (c) on P’s death, any property belonging to P’s estate represents the property disposed of. 25
- (2) The person takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of.
- (3) If the property disposed of was real property, any property representing it is to be treated, so long as it remains part of P’s estate, as if it were real property. 30
- (4) The court may direct that, on a disposal of P’s property –
- (a) which is made by virtue of section 18, and
 - (b) which would apart from this paragraph result in the conversion of personal property into real property, 35
- property representing the property disposed of is to be treated, so long as it remains P’s property or forms part of P’s estate, as if it were personal property.
- (5) References in sub-paragraphs (1) to (4) to the disposal of property are to –
- (a) the sale, exchange, charging of or other dealing (otherwise than by will) with property other than money; 40
 - (b) the removal of property from one place to another;
 - (c) the application of money in acquiring property;
 - (d) the transfer of money from one account to another; 45
- and references to property representing property disposed of are to be construed accordingly and as including the result of successive disposals.

- (6) The court may give such directions as appear to it necessary or expedient for the purpose of facilitating the operation of sub-paragraphs (1) to (3), including the carrying of money to a separate account and the transfer of property other than money.
- 9 (1) Sub-paragraph (2) applies if the court has ordered or directed the expenditure of money – 5
- (a) for carrying out permanent improvements on any of P’s property, or
- (b) otherwise for the permanent benefit of any of P’s property.
- (2) The court may order that – 10
- (a) the whole of the money expended or to be expended, or
- (b) any part of it,
- is to be a charge on the property either without interest or with interest at a specified rate.
- (3) An order under sub-paragraph (2) may provide for excluding or restricting the operation of paragraph 8(1) to (3). 15
- (4) A charge under sub-paragraph (2) may be made in favour of such person as may be just and, in particular, where the money charged is paid out of P’s general estate, may be made in favour of a person as trustee for P.
- (5) No charge under sub-paragraph (2) may confer any right of sale or foreclosure during P’s lifetime. 20

Powers as patron of benefice

- 10 Only the Lord Chancellor has power to exercise, on behalf of P, P’s powers as patron of a benefice.

SCHEDULE 3

Section 59

INTERNATIONAL PROTECTION OF ADULTS 25

PART 1

PRELIMINARY

Introduction

- 1 This Part applies for the purposes of this Schedule.

The Convention 30

- 2 (1) “Convention” means the Convention referred to in section 59.
- (2) “Convention country” means a country in which the Convention is in force.
- (3) A reference to an Article or Chapter is to an Article or Chapter of the Convention.
- (4) An expression which appears in this Schedule and in the Convention is to be construed in accordance with the Convention. 35

Countries, territories and nationals

- 3 (1) “Country” includes a territory which has its own system of law.
- (2) Where a country has more than one territory with its own system of law, a reference to the country, in relation to one of its nationals, is to the territory with which the national has the closer, or the closest, connection. 5

Adults with incapacity

- 4 “Adult” means a person who –
- (a) as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests, and
- (b) has reached 16. 10

Protective measures

- 5 (1) “Protective measure” means a measure directed to the protection of the person or property of an adult; and it may deal in particular with any of the following –
- (a) the determination of incapacity and the institution of a protective regime, 15
- (b) placing the adult under the protection of an appropriate authority,
- (c) guardianship, curatorship or any corresponding system,
- (d) the designation and functions of a person having charge of the adult’s person or property, or representing or otherwise helping him, 20
- (e) placing the adult in a place where protection can be provided,
- (f) administering, conserving or disposing of the adult’s property,
- (g) authorising a specific intervention for the protection of the person or property of the adult. 25
- (2) Where a measure of like effect to a protective measure has been taken in relation to a person before he reaches 16, this Schedule applies to the measure in so far as it has effect in relation to him once he has reached 16.

Central Authority

- 6 (1) Any function under the Convention of a Central Authority is exercisable in England and Wales by the Lord Chancellor. 30
- (2) A communication may be sent to the Central Authority in relation to England and Wales by sending it to the Lord Chancellor.

Public authority

- 7 “Public authority” has the same meaning as in section 6 of the Human Rights Act 1998 (c. 42). 35

PART 3

APPLICABLE LAW

Applicable law

12 In exercising jurisdiction under this Schedule, the court may, if it thinks that the matter has a substantial connection with a country other than England and Wales, apply the law of that other country. 5

13 Where a protective measure is taken in one country but implemented in another, the conditions of implementation are governed by the law of the other country.

Lasting powers of attorney, etc. 10

14 (1) This paragraph applies where –
(a) the donor of a lasting power designates in writing the law of a connected country as the law applicable to the existence, extent, modification or extinction of the power, and
(b) but for this paragraph, the applicable law in that respect would be the law of England and Wales. 15

(2) The law designated by the donor is the applicable law in that respect.

(3) A country is connected, in relation to the donor, if it is a country –
(a) of which he is a national,
(b) in which he was habitually resident, or
(c) in which he has property. 20

(4) Where this paragraph applies as a result of sub-paragraph (3)(c), it applies only in relation to the property which the donor has in the connected country.

(5) The law applicable to the manner of the exercise of a lasting power is the law of the country where it is exercised. 25

(6) In this Part of this Schedule, “lasting power” means –
(a) a lasting power of attorney (see section 9),
(b) an enduring power of attorney within the meaning of Schedule 4, or
(c) any other power of like effect. 30

15 (1) Where a lasting power is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the court, in exercising jurisdiction under this Schedule, may disapply or modify the power.

(2) Where, in accordance with this Part of this Schedule, the law applicable to the power is, in one or more respects, that of a country other than England and Wales, the court must, so far as possible, have regard to the law of the other country in that respect (or those respects). 35

16 Regulations may provide for Schedule 1 (lasting powers of attorney: formalities) to apply with modifications in relation to a lasting power which comes within paragraph 14(6)(c) above. 40

Protection of third parties

- 17 (1) This paragraph applies where a person (a “representative”) in purported exercise of an authority to act on behalf of an adult enters into a transaction with a third party, at a time when the representative and the third party are in England and Wales. 5
- (2) The validity of the transaction may not be questioned in proceedings, nor may the third party be held liable, merely because –
- (a) the law applicable to the authority in one or more respects is, in accordance with this Part of this Schedule, the law of a country other than England and Wales, and 10
- (b) the representative is not entitled to exercise the authority in that respect (or those respects) under the law of that other country.
- (3) This paragraph does not apply if the third party knew or ought to have known that the applicable law was the law of that other country.

Mandatory rules 15

- 18 Where the court is entitled to exercise jurisdiction under this Schedule, the mandatory provisions of the law of England and Wales apply, regardless of any system of law which would otherwise apply in relation to the matter.

Public policy

- 19 Nothing in this Part of this Schedule requires or enables the application in England and Wales of a provision of the law of another country if its application would be manifestly contrary to public policy. 20

PART 4

RECOGNITION AND ENFORCEMENT

Recognition 25

- 20 (1) A protective measure taken in relation to an adult under the law of a country other than England and Wales is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country.
- (2) A protective measure taken in relation to an adult under the law of a Convention country other than England and Wales is to be recognised in England and Wales if it was taken on a ground mentioned in Chapter 2 (jurisdiction). 30
- (3) But the court may disapply this paragraph in relation to a measure if it thinks that – 35
- (a) the case in which the measure was taken was not urgent,
- (b) the adult was not given an opportunity to be heard, and
- (c) that omission amounted to a breach of natural justice.
- (4) It may also disapply this paragraph in relation to a measure if it thinks that – 40
- (a) recognition of the measure would be manifestly contrary to public policy,
- (b) the measure would be inconsistent with a mandatory provision of the law of England and Wales, or

- (c) the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult.
- (5) And the court may disapply this paragraph in relation to a measure taken under the law of a Convention country in a matter to which Article 33 applies, if the court thinks that that Article has not been complied with in connection with that matter. 5
- 21 (1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales.
- (2) No permission is required for an application to the court under this paragraph. 10
- 22 For the purposes of paragraphs 20 and 21, any finding of fact relied on when the measure was taken is conclusive.

Enforcement

- 23 (1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than England and Wales is enforceable, or to be registered, in England and Wales in accordance with Court of Protection Rules. 15
- (2) The court must make the declaration if –
- (a) the measure comes within sub-paragraph (1) or (2) of paragraph 20, and
- (b) the paragraph is not disapplied in relation to it as a result of sub-paragraph (3), (4) or (5). 20
- (3) A measure to which a declaration under this paragraph relates is enforceable in England and Wales as if it were a measure of like effect taken by the court. 25

Measures taken in relation to those aged under 16

- 24 (1) This paragraph applies where –
- (a) provision giving effect to, or otherwise deriving from, the Convention in a country other than England and Wales applies in relation to a person who has not reached 16, and
- (b) a measure is taken in relation to that person in reliance on that provision. 30
- (2) This Part of this Schedule applies in relation to that measure as it applies in relation to a protective measure taken in relation to an adult under the law of a Convention country other than England and Wales. 35

Supplementary

- 25 The court may not review the merits of a measure taken outside England and Wales except to establish whether the measure complies with this Schedule in so far as it is, as a result of this Schedule, required to do so.
- 26 Court of Protection Rules may make provision about an application under paragraph 21 or 23. 40

PART 5

CO-OPERATION

Proposal for cross-border placement

- 27 (1) This paragraph applies where a public authority proposes to place an adult in an establishment in a Convention country other than England and Wales. 5
- (2) The public authority must consult an appropriate authority in that other country about the proposed placement and, for that purpose, must send it—
- (a) a report on the adult, and
- (b) a statement of its reasons for the proposed placement.
- (3) If the appropriate authority in the other country opposes the proposed placement within a reasonable time, the public authority may not proceed with it. 10
- 28 A proposal received by a public authority under Article 33 in relation to an adult is to proceed unless the authority opposes it within a reasonable time.

Adult in danger etc. 15

- 29 (1) This paragraph applies if a public authority is told that an adult—
- (a) who is in serious danger, and
- (b) in relation to whom the public authority has taken, or is considering taking, protective measures,
- is, or has become resident, in a Convention country other than England and Wales. 20
- (2) The public authority must tell an appropriate authority in that other country about—
- (a) the danger, and
- (b) the measures taken or under consideration. 25
- 30 A public authority may not request from, or send to, an appropriate authority in a Convention country information in accordance with Chapter 5 (co-operation) in relation to an adult if it thinks that doing so—
- (a) would be likely to endanger the adult or his property, or
- (b) would amount to a serious threat to the liberty or life of a member of the adult's family. 30

PART 6

GENERAL

Certificates

- 31 A certificate given under Article 38 by an authority in a Convention country other than England and Wales is, unless the contrary is shown, proof of the matters contained in it. 35

Powers to make further provision as to private international law

- 32 Her Majesty may by Order in Council confer on the Lord Chancellor, the court or another public authority functions for enabling the Convention to be given effect in England and Wales.
- 33 (1) Regulations may make provision – 5
- (a) giving further effect to the Convention, or
 - (b) otherwise about the private international law of England and Wales in relation to the protection of adults.
- (2) The regulations may – 10
- (a) confer functions on the court or another public authority;
 - (b) amend this Schedule;
 - (c) provide for this Schedule to apply with specified modifications;
 - (d) make provision about countries other than Convention countries.

Exceptions

- 34 Nothing in this Schedule applies, and no provision made under paragraph 33 is to apply, to any matter to which the Convention, as a result of Article 4, does not apply. 15

Regulations and orders

- 35 A reference in this Schedule to regulations or an order (other than an Order in Council) is to regulations or an order made for the purposes of this Schedule by the Lord Chancellor. 20

Commencement

- 36 The following provisions of this Schedule have effect only if the Convention is in force in accordance with Article 57 – 25
- (a) paragraph 9,
 - (b) paragraph 10,
 - (c) paragraph 20(2) and (5),
 - (d) Part 5,
 - (e) paragraph 31.

SCHEDULE 4

Section 62(3) 30

PROVISIONS APPLYING TO EXISTING ENDURING POWERS OF ATTORNEY

PART 1

ENDURING POWERS OF ATTORNEY

Enduring power of attorney to survive mental incapacity of donor

- 1 (1) Where an individual has created a power of attorney which is an enduring power within the meaning of this Schedule – 35
- (a) the power is not revoked by any subsequent mental incapacity of his,

-
- (b) upon such incapacity supervening, the donee of the power may not do anything under the authority of the power except as provided by sub-paragraph (2) unless or until the instrument creating the power is registered under paragraph 13, and
- (c) if and so long as paragraph (b) operates to suspend the donee’s authority to act under the power, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection of donee and third persons), so far as applicable, applies as if the power had been revoked by the donor’s mental incapacity, 5
- and, accordingly, section 1 of this Act does not apply. 10
- (2) Despite sub-paragraph (1)(b), where the attorney has made an application for registration of the instrument then, until it is registered, the attorney may take action under the power –
- (a) to maintain the donor or prevent loss to his estate, or
- (b) to maintain himself or other persons in so far as paragraph 3(2) permits him to do so. 15
- (3) Where the attorney purports to act as provided by sub-paragraph (2) then, in favour of a person who deals with him without knowledge that the attorney is acting otherwise than in accordance with sub-paragraph (2)(a) or (b), the transaction between them is as valid as if the attorney were acting in accordance with sub-paragraph (2)(a) or (b). 20

Characteristics of an enduring power of attorney

- 2 (1) Subject to sub-paragraphs (5) and (6) and paragraph 20, a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power – 25
- (a) is in the prescribed form,
- (b) was executed in the prescribed manner by the donor and the attorney, and
- (c) incorporated at the time of execution by the donor the prescribed explanatory information. 30
- (2) In this paragraph “prescribed” means prescribed by such of the following regulations as applied when the instrument was executed –
- (a) the Enduring Powers of Attorney (Prescribed Form) Regulations 1986 (S.I. 1986/126),
- (b) the Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (S.I. 1987/1612), 35
- (c) the Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (S.I. 1990/1376),
- (d) the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2000 (S.I. 2000/289). 40
- (3) An instrument in the prescribed form purporting to have been executed in the prescribed manner is to be taken, in the absence of evidence to the contrary, to be a document which incorporated at the time of execution by the donor the prescribed explanatory information.
- (4) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form it is to be treated as sufficient in point of form and expression. 45
- (5) A power of attorney cannot be an enduring power unless, when he executes the instrument creating it, the attorney is –

- (a) an individual who has reached 18 and is not bankrupt, or
 - (b) a trust corporation.
- (6) A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power. 5
- (7) An enduring power is revoked by the bankruptcy of the donor or attorney. 5
- (8) But where the donor or attorney is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the power is suspended for so long as the order has effect.
- (9) An enduring power is revoked if the court – 10
- (a) exercises a power under sections 16 to 20 in relation to the donor, and
 - (b) directs that the enduring power is to be revoked.
- (10) No disclaimer of an enduring power, whether by deed or otherwise, is valid unless and until the attorney gives notice of it to the donor or, where paragraph 4(6) or 15(1) applies, to the Public Guardian.

Scope of authority etc. of attorney under enduring power 15

- 3 (1) If the instrument which creates an enduring power of attorney is expressed to confer general authority on the attorney, the instrument operates to confer, subject to – 20
- (a) the restriction imposed by sub-paragraph (3), and
 - (b) any conditions or restrictions contained in the instrument,
- authority to do on behalf of the donor anything which the donor could lawfully do by an attorney at the time when the donor executed the instrument.
- (2) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further – 25
- (a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person’s needs respectively, and 30
 - (b) he may do whatever the donor might be expected to do to meet those needs.
- (3) Without prejudice to sub-paragraph (2) but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further – 35
- (a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth, marriage or the formation of a civil partnership, to persons (including himself) who are related to or connected with the donor, and 40
 - (b) he may make gifts to any charity to whom the donor made or might be expected to make gifts,
- provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor’s estate. 45

PART 2

ACTION ON ACTUAL OR IMPENDING INCAPACITY OF DONOR

Duties of attorney in event of actual or impending incapacity of donor

- 4 (1) Sub-paragraphs (2) to (6) apply if the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable. 5
- (2) The attorney must, as soon as practicable, make an application to the Public Guardian for the registration of the instrument creating the power.
- (3) Before making an application for registration the attorney must comply with the provisions as to notice set out in Part 3 of this Schedule.
- (4) An application for registration – 10
- (a) must be made in the prescribed form, and
- (b) must contain such statements as may be prescribed.
- (5) The attorney –
- (a) may, before making an application for the registration of the instrument, refer to the court for its determination any question as to the validity of the power, and 15
- (b) must comply with any direction given to him by the court on that determination.
- (6) No disclaimer of the power is valid unless and until the attorney gives notice of it to the Public Guardian; and the Public Guardian must notify the donor if he receives a notice under this sub-paragraph. 20
- (7) A person who, in an application for registration, makes a statement which he knows to be false in a material particular is guilty of an offence and is liable –
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both; 25
- (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine, or both.
- (8) In this paragraph “prescribed” means prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor. 30

PART 3

NOTIFICATION PRIOR TO REGISTRATION

Duty to give notice to relatives

- 5 Subject to paragraph 7, before making an application for registration the attorney must give notice of his intention to do so to all those persons (if any) who are entitled to receive notice by virtue of paragraph 6. 35
- 6 (1) Subject to sub-paragraphs (2) to (4), persons of the following classes (“relatives”) are entitled to receive notice under paragraph 5 –
- (a) the donor’s spouse or civil partner,
- (b) the donor’s children, 40
- (c) the donor’s parents,
- (d) the donor’s brothers and sisters, whether of the whole or half blood,

-
- (e) the widow, widower or surviving civil partner of a child of the donor,
 - (f) the donor’s grandchildren,
 - (g) the children of the donor’s brothers and sisters of the whole blood,
 - (h) the children of the donor’s brothers and sisters of the half blood, 5
 - (i) the donor’s uncles and aunts of the whole blood,
 - (j) the children of the donor’s uncles and aunts of the whole blood.
- (2) A person is not entitled to receive notice under paragraph 5 if –
- (a) his name or address is not known to the attorney and cannot be reasonably ascertained by him, or 10
 - (b) the attorney has reason to believe that he has not reached 18 or is mentally incapable.
- (3) Except where sub-paragraph (4) applies –
- (a) no more than 3 persons are entitled to receive notice under paragraph 5, and 15
 - (b) in determining the persons who are so entitled, persons falling within the class in sub-paragraph (1)(a) are to be preferred to persons falling within the class in sub-paragraph (1)(b), those falling within the class in sub-paragraph (1)(b) are to be preferred to those falling within the class in sub-paragraph (1)(c), and so on. 20
- (4) Despite the limit of 3 specified in sub-paragraph (3), where –
- (a) there is more than one person falling within any of classes (a) to (j) of sub-paragraph (1), and
 - (b) at least one of those persons would be entitled to receive notice under paragraph 5, 25
- then, subject to sub-paragraph (2), all the persons falling within that class are entitled to receive notice under paragraph 5.
- 7 (1) An attorney is not required to give notice under paragraph 5 –
- (a) to himself, or
 - (b) to any other attorney under the power who is joining in making the application, 30
- even though he or, as the case may be, the other attorney is entitled to receive notice by virtue of paragraph 6.
- (2) In the case of any person who is entitled to receive notice by virtue of paragraph 6, the attorney, before applying for registration, may make an application to the court to be dispensed from the requirement to give him notice; and the court must grant the application if it is satisfied –
- (a) that it would be undesirable or impracticable for the attorney to give him notice, or
 - (b) that no useful purpose is likely to be served by giving him notice. 40

Duty to give notice to donor

- 8 (1) Subject to sub-paragraph (2), before making an application for registration the attorney must give notice of his intention to do so to the donor.
- (2) Paragraph 7(2) applies in relation to the donor as it applies in relation to a person who is entitled to receive notice under paragraph 5. 45

Contents of notices

- 9 A notice to relatives under this Part of this Schedule must –
- (a) be in the prescribed form;
 - (b) state that the attorney proposes to make an application to the Public Guardian for the registration of the instrument creating the enduring power in question; 5
 - (c) inform the person to whom it is given of his right to object to the registration under paragraph 13(4);
 - (d) specify, as the grounds on which an objection to registration may be made, the grounds set out in paragraph 13(9). 10
- 10 A notice to the donor under this Part of this Schedule –
- (a) must be in the prescribed form;
 - (b) must contain the statement mentioned in paragraph 9(b), and
 - (c) must inform the donor that, while the instrument remains registered, any revocation of the power by him will be ineffective unless and until the revocation is confirmed by the court. 15

Duty to give notice to other attorneys

- 11 (1) Subject to sub-paragraph (2), before making an application for registration an attorney under a joint and several power must give notice of his intention to do so to any other attorney under the power who is not joining in making the application; and paragraphs 7(2) and 9 apply in relation to attorneys entitled to receive notice by virtue of this paragraph as they apply in relation to persons entitled to receive notice by virtue of paragraph 6. 20
- (2) An attorney is not entitled to receive notice by virtue of this paragraph if –
- (a) his address is not known to the applying attorney and cannot reasonably be ascertained by him, or
 - (b) the applying attorney has reason to believe that he has not reached 18 or is mentally incapable. 25

Supplementary

- 12 Despite section 7 of the Interpretation Act 1978 (c. 30) (construction of references to service by post), for the purposes of this Part of this Schedule a notice given by post is to be regarded as given on the date on which it was posted. 30

PART 4

REGISTRATION 35

Registration of instrument creating power

- 13 (1) If an application is made in accordance with paragraph 4(3) and (4) the Public Guardian must, subject to the provisions of this paragraph, register the instrument to which the application relates.
- (2) If it appears to the Public Guardian that – 40
- (a) there is a deputy appointed for the donor of the power created by the instrument, and

-
- (b) the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney,
the Public Guardian must not register the instrument except in accordance with the court's directions. 5
- (3) The court may, on the application of the attorney, direct the Public Guardian to register an instrument even though notice has not been given as required by paragraph 4(3) and Part 3 of this Schedule to a person entitled to receive it, if the court is satisfied –
- (a) that it was undesirable or impracticable for the attorney to give notice to that person, or 10
- (b) that no useful purpose is likely to be served by giving him notice.
- (4) Sub-paragraph (5) applies if, before the end of the period of 5 weeks beginning with the date (or the latest date) on which the attorney gave notice under paragraph 5 of an application for registration, the Public Guardian receives a valid notice of objection to the registration from a person entitled to notice of the application. 15
- (5) The Public Guardian must not register the instrument except in accordance with the court's directions.
- (6) Sub-paragraph (7) applies if, in the case of an application for registration – 20
- (a) it appears from the application that there is no one to whom notice has been given under paragraph 5, or
- (b) the Public Guardian has reason to believe that appropriate inquiries might bring to light evidence on which he could be satisfied that one of the grounds of objection set out in sub-paragraph (9) was established. 25
- (7) The Public Guardian –
- (a) must not register the instrument, and
- (b) must undertake such inquiries as he thinks appropriate in all the circumstances. 30
- (8) If, having complied with sub-paragraph (7)(b), the Public Guardian is satisfied that one of the grounds of objection set out in sub-paragraph (9) is established –
- (a) the attorney may apply to the court for directions, and
- (b) the Public Guardian must not register the instrument except in accordance with the court's directions. 35
- (9) A notice of objection under this paragraph is valid if made on one or more of the following grounds –
- (a) that the power purported to have been created by the instrument was not valid as an enduring power of attorney, 40
- (b) that the power created by the instrument no longer subsists,
- (c) that the application is premature because the donor is not yet becoming mentally incapable,
- (d) that fraud or undue pressure was used to induce the donor to create the power, 45
- (e) that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.

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- (10) If any of those grounds is established to the satisfaction of the court it must direct the Public Guardian not to register the instrument, but if not so satisfied it must direct its registration.
- (11) If the court directs the Public Guardian not to register an instrument because it is satisfied that the ground in sub-paragraph (9)(d) or (e) is established, it must by order revoke the power created by the instrument. 5
- (12) If the court directs the Public Guardian not to register an instrument because it is satisfied that any ground in sub-paragraph (9) except that in sub-paragraph (9)(c) is established, the instrument must be delivered up to be cancelled unless the court otherwise directs. 10

Register of enduring powers

- 14 The Public Guardian has the function of establishing and maintaining a register of enduring powers for the purposes of this Schedule.

PART 5

LEGAL POSITION AFTER REGISTRATION 15

Effect and proof of registration

- 15 (1) The effect of the registration of an instrument under paragraph 13 is that –
- (a) no revocation of the power by the donor is valid unless and until the court confirms the revocation under paragraph 16(3);
 - (b) no disclaimer of the power is valid unless and until the attorney gives notice of it to the Public Guardian; 20
 - (c) the donor may not extend or restrict the scope of the authority conferred by the instrument and no instruction or consent given by him after registration, in the case of a consent, confers any right and, in the case of an instruction, imposes or confers any obligation or right on or creates any liability of the attorney or other persons having notice of the instruction or consent. 25
- (2) Sub-paragraph (1) applies for so long as the instrument is registered under paragraph 13 whether or not the donor is for the time being mentally incapable. 30
- (3) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of –
- (a) the contents of the instrument, and
 - (b) the fact that it has been so registered.
- (4) Sub-paragraph (3) is without prejudice to section 3 of the Powers of Attorney Act 1971 (c. 27) (proof by certified copies) and to any other method of proof authorised by law. 35

Functions of court with regard to registered power

- 16 (1) Where an instrument has been registered under paragraph 13, the court has the following functions with respect to the power and the donor of and the attorney appointed to act under the power. 40
- (2) The court may –
- (a) determine any question as to the meaning or effect of the instrument;

- (b) give directions with respect to –
 - (i) the management or disposal by the attorney of the property and affairs of the donor;
 - (ii) the rendering of accounts by the attorney and the production of the records kept by him for the purpose; 5
 - (iii) the remuneration or expenses of the attorney whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive or the payment of additional remuneration;
- (c) require the attorney to supply information or produce documents or things in his possession as attorney; 10
- (d) give any consent or authorisation to act which the attorney would have to obtain from a mentally capable donor;
- (e) authorise the attorney to act so as to benefit himself or other persons than the donor otherwise than in accordance with paragraph 3(2) and (3) (but subject to any conditions or restrictions contained in the instrument); 15
- (f) 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.
- (3) On application made for the purpose by or on behalf of the donor, the court must confirm the revocation of the power if satisfied that the donor – 20
 - (a) has done whatever is necessary in law to effect an express revocation of the power, and
 - (b) was mentally capable of revoking a power of attorney when he did so (whether or not he is so when the court considers the application). 25
- (4) The court must direct the Public Guardian to cancel the registration of an instrument registered under paragraph 13 in any of the following circumstances –
 - (a) on confirming the revocation of the power under sub-paragraph (3),
 - (b) on directing under paragraph 2(9)(b) that the power is to be revoked, 30
 - (c) on being satisfied that the donor is and is likely to remain mentally capable,
 - (d) on being satisfied that the power has expired or has been revoked by the mental incapacity of the attorney,
 - (e) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected, 35
 - (f) on being satisfied that fraud or undue pressure was used to induce the donor to create the power,
 - (g) on being satisfied that, having regard to all the circumstances and in particular the attorney’s relationship to or connection with the donor, the attorney is unsuitable to be the donor’s attorney. 40
- (5) If the court directs the Public Guardian to cancel the registration of an instrument on being satisfied of the matters specified in sub-paragraph (4)(f) or (g) it must by order revoke the power created by the instrument.
- (6) If the court directs the cancellation of the registration of an instrument under sub-paragraph (4) except paragraph (c) the instrument must be delivered up to the Public Guardian to be cancelled, unless the court otherwise directs. 45

Cancellation of registration by Public Guardian

- 17 The Public Guardian must cancel the registration of an instrument creating an enduring power of attorney –
- (a) on receipt of a disclaimer signed by the attorney;
 - (b) if satisfied that the power has been revoked by the death or bankruptcy of the donor or attorney or, if the attorney is a body corporate, by its winding up or dissolution; 5
 - (c) on receipt of notification from the court that the court has revoked the power;
 - (d) on confirmation from the court that the donor has revoked the power. 10

PART 6

PROTECTION OF ATTORNEY AND THIRD PARTIES

Protection of attorney and third persons where power is invalid or revoked

- 18 (1) Sub-paragraphs (2) and (3) apply where an instrument which did not create a valid power of attorney has been registered under paragraph 13 (whether or not the registration has been cancelled at the time of the act or transaction in question). 15
- (2) An attorney who acts in pursuance of the power does not incur any liability (either to the donor or to any other person) because of the non-existence of the power unless at the time of acting he knows – 20
- (a) that the instrument did not create a valid enduring power,
 - (b) that an event has occurred which, if the instrument had created a valid enduring power, would have had the effect of revoking the power, or 25
 - (c) that, if the instrument had created a valid enduring power, the power would have expired before that time.
- (3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person has knowledge of any of the matters mentioned in sub-paragraph (2). 30
- (4) If the interest of a purchaser depends on whether a transaction between the attorney and another person was valid by virtue of sub-paragraph (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if – 35
- (a) the transaction between that person and the attorney was completed within 12 months of the date on which the instrument was registered, or
 - (b) that person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the attorney had authority to dispose of the property which was the subject of the transaction. 40
- (5) For the purposes of section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power is revoked) in its application to an enduring power the revocation of which by the donor is by virtue of paragraph 15 invalid unless and until confirmed by the court under paragraph 16 – 45

- (a) knowledge of the confirmation of the revocation is knowledge of the revocation of the power, but
- (b) knowledge of the unconfirmed revocation is not.

Further protection of attorney and third persons

- 19 (1) If— 5
- (a) an instrument framed in a form prescribed as mentioned in paragraph 2(2) creates a power which is not a valid enduring power, and
 - (b) the power is revoked by the mental incapacity of the donor, sub-paragraphs (2) and (3) apply, whether or not the instrument has been registered. 10
- (2) An attorney who acts in pursuance of the power does not, by reason of the revocation, incur any liability (either to the donor or to any other person) unless at the time of acting he knows—
- (a) that the instrument did not create a valid enduring power, and 15
 - (b) that the donor has become mentally incapable.
- (3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person knows—
- (a) that the instrument did not create a valid enduring power, and 20
 - (b) that the donor has become mentally incapable.
- (4) Paragraph 18(4) applies for the purpose of determining whether a transaction was valid by virtue of sub-paragraph (3) as it applies for the purpose or determining whether a transaction was valid by virtue of paragraph 18(3). 25

PART 7

JOINT AND JOINT AND SEVERAL ATTORNEYS

Application to joint and joint and several attorneys

- 20 (1) An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act— 30
- (a) jointly, or
 - (b) jointly and severally.
- (2) This Schedule, in its application to joint attorneys, applies to them collectively as it applies to a single attorney but subject to the modifications specified in paragraph 21. 35
- (3) This Schedule, in its application to joint and several attorneys, applies with the modifications specified in sub-paragraphs (4) to (7) and in paragraph 22.
- (4) A failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers—
- (a) prevents the instrument from creating such a power in his case, but 40
 - (b) does not affect its efficacy for that purpose as respects the other or others or its efficacy in his case for the purpose of creating a power of attorney which is not an enduring power.

-
- (5) If one or more but not both or all the attorneys makes or joins in making an application for registration of the instrument –
- (a) an attorney who is not an applicant as well as one who is may act pending the registration of the instrument as provided in paragraph 1(2), 5
 - (b) notice of the application must also be given under Part 3 of this Schedule to the other attorney or attorneys, and
 - (c) objection may validly be taken to the registration on a ground relating to an attorney or to the power of an attorney who is not an applicant as well as to one or the power of one who is an applicant. 10
- (6) The Public Guardian is not precluded by paragraph 13(5) or (8) from registering an instrument and the court must not direct him not to do so under paragraph 13(10) if an enduring power subsists as respects some attorney who is not affected by the ground or grounds of the objection in question; and where the Public Guardian registers an instrument in that case, he must make against the registration an entry in the prescribed form. 15
- (7) Sub-paragraph (6) does not preclude the court from revoking a power in so far as it confers a power on any other attorney in respect of whom the ground in paragraph 13(9)(d) or (e) is established; and where any ground in paragraph 13(9) affecting any other attorney is established the court must direct the Public Guardian to make against the registration an entry in the prescribed form. 20
- (8) In sub-paragraph (4) “the requirements for the creation of enduring powers” means the provisions of –
- (a) paragraph 2 other than sub-paragraphs (8) and (9), and 25
 - (b) the regulations mentioned in paragraph 2.

Joint attorneys

- 21 (1) In paragraph 2(5), the reference to the time when the attorney executes the instrument is to be read as a reference to the time when the second or last attorney executes the instrument. 30
- (2) In paragraph 2(6) to (8), the reference to the attorney is to be read as a reference to any attorney under the power.
- (3) Paragraph 13 has effect as if the ground of objection to the registration of the instrument specified in sub-paragraph (9)(e) applied to any attorney under the power. 35
- (4) In paragraph 16(2), references to the attorney are to be read as including references to any attorney under the power.
- (5) In paragraph 16(4), references to the attorney are to be read as including references to any attorney under the power.
- (6) In paragraph 17, references to the attorney are to be read as including references to any attorney under the power. 40

Joint and several attorneys

- 22 (1) In paragraph 2(7), the reference to the bankruptcy of the attorney is to be read as a reference to the bankruptcy of the last remaining attorney under the power; and the bankruptcy of any other attorney under the power causes that person to cease to be an attorney under the power. 45

- (2) In paragraph 2(8), the reference to the suspension of the power is to be read as a reference to its suspension in so far as it relates to the attorney in respect of whom the interim bankruptcy restrictions order has effect.
- (3) The restriction upon disclaimer imposed by paragraph 4(6) applies only to those attorneys who have reason to believe that the donor is or is becoming mentally incapable. 5

PART 8

INTERPRETATION

- 23 (1) In this Schedule –
- “enduring power” is to be construed in accordance with paragraph 2, “mentally incapable” or “mental incapacity”, except where it refers to revocation at common law, means in relation to any person, that he is incapable by reason of mental disorder (within the meaning of the Mental Health Act) of managing and administering his property and affairs and “mentally capable” and “mental capacity” are to be construed accordingly, 10
- “notice” means notice in writing, and 15
- “prescribed”, except for the purposes of paragraph 2, means prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor. 20
- (2) Any question arising under or for the purposes of this Schedule as to what the donor of the power might at any time be expected to do is to be determined by assuming that he had full mental capacity at the time but otherwise by reference to the circumstances existing at that time.

SCHEDULE 5

Section 62(4) 25

TRANSITIONAL PROVISIONS AND SAVINGS

PART 1

REPEAL OF PART 7 OF THE MENTAL HEALTH ACT 1983

Existing receivers

- 1 (1) This paragraph applies where, immediately before the commencement day, there is a receiver (“R”) for a person (“P”) appointed under section 99 of the Mental Health Act. 30
- (2) On and after that day –
- (a) this Act applies as if R were a deputy appointed for P by the court, but with the functions that R had as receiver immediately before that day, and 35
- (b) a reference in any other enactment to a deputy appointed by the court includes a person appointed as a deputy as a result of paragraph (a).
- (3) On any application to it by R, the court may end R’s appointment as P’s deputy. 40

-
- (4) Where, as a result of section 20(1), R may not make a decision on behalf of P in relation to a relevant matter, R must apply to the court.
- (5) If, on the application, the court is satisfied that P is capable of managing his property and affairs in relation to the relevant matter –
- (a) it must make an order ending R’s appointment as P’s deputy in relation to that matter, but 5
 - (b) it may, in relation to any other matter, exercise in relation to P any of the powers which it has under sections 15 to 19.
- (6) If it is not satisfied, the court may exercise in relation to P any of the powers which it has under sections 15 to 19. 10
- (7) R’s appointment as P’s deputy ceases to have effect if P dies.
- (8) “Relevant matter” means a matter in relation to which, immediately before the commencement day, R was authorised to act as P’s receiver.
- (9) In sub-paragraph (1), the reference to a receiver appointed under section 99 of the Mental Health Act includes a reference to a person who by virtue of Schedule 5 to that Act was deemed to be a receiver appointed under that section. 15

Orders, appointments etc.

- 2 (1) Any order or appointment made, direction or authority given or other thing done which has, or by virtue of Schedule 5 to the Mental Health Act was deemed to have, effect under Part 7 of the Act immediately before the commencement day is to continue to have effect despite the repeal of Part 7. 20
- (2) In so far as any such order, appointment, direction, authority or thing could have been made, given or done under sections 15 to 20 if those sections had then been in force – 25
- (a) it is to be treated as made, given or done under those sections, and
 - (b) the powers of variation and discharge conferred by section 16(7) apply accordingly.
- (3) Sub-paragraph (1) – 30
- (a) does not apply to nominations under section 93(1) or (4) of the Mental Health Act, and
 - (b) as respects receivers, has effect subject to paragraph 1.
- (4) This Act does not affect the operation of section 109 of the Mental Health Act (effect and proof of orders etc.) in relation to orders made and directions given under Part 7 of that Act. 35
- (5) This paragraph is without prejudice to section 16 of the Interpretation Act 1978 (c. 30) (general savings on repeal).

Pending proceedings

- 3 (1) Any application for the exercise of a power under Part 7 of the Mental Health Act which is pending immediately before the commencement day is to be treated, in so far as a corresponding power is exercisable under sections 16 to 20, as an application for the exercise of that power. 40
- (2) For the purposes of sub-paragraph (1) an application for the appointment of a receiver is to be treated as an application for the appointment of a deputy.

Appeals

- 4 (1) Part 7 of the Mental Health Act and the rules made under it are to continue to apply to any appeal brought by virtue of section 105 of that Act which has not been determined before the commencement day.
- (2) If in the case of an appeal brought by virtue of section 105(1) (appeal to nominated judge) the judge nominated under section 93 of the Mental Health Act has begun to hear the appeal, he is to continue to do so but otherwise it is to be heard by a puisne judge of the High Court nominated under section 44. 5

Fees 10

- 5 All fees and other payments which, having become due, have not been paid to the former Court of Protection before the commencement day, are to be paid to the new Court of Protection.

Court records

- 6 (1) The records of the former Court of Protection are to be treated, on and after the commencement day, as records of the new Court of Protection and are to be dealt with accordingly under the Public Records Act 1958 (c. 51). 15
- (2) On and after the commencement day, the Public Guardian is, for the purpose of exercising any of his functions, to be given such access as he may require to such of the records mentioned in sub-paragraph (1) as relate to the appointment of receivers under section 99 of the Mental Health Act. 20

Existing charges

- 7 This Act does not affect the operation in relation to a charge created before the commencement day of –
- (a) so much of section 101(6) of the Mental Health Act as precludes a charge created under section 101(5) from conferring a right of sale or foreclosure during the lifetime of the patient; or 25
- (b) section 106(6) of the Mental Health Act (charge created by virtue of section 106(5) not to cause interest to fail etc.).

Preservation of interests on disposal of property 30

- 8 Paragraph 8(1) of Schedule 2 applies in relation to any disposal of property (within the meaning of that provision) by a person living on 1st November 1960, being a disposal effected under the Lunacy Act 1890 (c. 5) as it applies in relation to the disposal of property effected under sections 16 to 20.

Accounts 35

- 9 Court of Protection Rules may provide that, in a case where paragraph 1 applies, R is to have a duty to render accounts –
- (a) while he is receiver;
- (b) after he is discharged.

Interpretation 40

- 10 In this Part of this Schedule –

-
- (a) “the commencement day” means the day on which section 62(1)(a) (repeal of Part 7 of the Mental Health Act) comes into force,
- (b) “the former Court of Protection” means the office abolished by section 43, and
- (c) “the new Court of Protection” means the court established by section 43. 5

PART 2

REPEAL OF THE ENDURING POWERS OF ATTORNEY ACT 1985

Orders, determinations, etc.

- 11 (1) Any order or determination made or other thing done under the 1985 Act which has effect immediately before the commencement day continues to have effect despite the repeal of that Act. 10
- (2) In so far as any such order, determination or thing could have been made or done under Schedule 4 if it had then been in force –
- (a) it is to be treated as made or done under that Schedule, and 15
- (b) the powers of variation and discharge exercisable by the court apply accordingly.
- (3) Any instrument registered under the 1985 Act is to be treated as having been registered by the Public Guardian under Schedule 4.
- (4) This paragraph is without prejudice to section 16 of the Interpretation Act 1978 (c. 30) (general savings on repeal). 20

Pending proceedings

- 12 (1) An application for the exercise of a power under the 1985 Act which is pending immediately before the commencement day is to be treated, in so far as a corresponding power is exercisable under Schedule 4, as an application for the exercise of that power. 25
- (2) For the purposes of sub-paragraph (1) –
- (a) a pending application under section 4(2) of the 1985 Act for the registration of an instrument is to be treated as an application to the Public Guardian under paragraph 4 of Schedule 4 and any notice given in connection with that application under Schedule 1 to the 1985 Act is to be treated as given under Part 3 of Schedule 4; 30
- (b) a notice of objection to the registration of an instrument is to be treated as a notice of objection under paragraph 13 of Schedule 4;
- (c) pending proceedings under section 5 of the 1985 Act are to be treated as proceedings on an application for the exercise by the court of a power which would become exercisable in relation to an instrument under paragraph 16(2) of Schedule 4 on its registration. 35

Appeals

- 13 (1) The 1985 Act, and, so far as relevant, the provisions of Part 7 of the Mental Health Act and the rules made under it as applied by section 10 of the 1985 Act, are to continue to have effect in relation to any appeal brought by virtue of section 10(1)(c) of the 1985 Act which has not been determined before the commencement day. 40

- (2) If in the case of an appeal brought by virtue of section 105(1) of the Mental Health Act as applied by section 10(1)(c) of the 1985 Act (appeal to nominated judge) the judge nominated under section 93 of the Mental Health Act has begun to hear the appeal, he is to continue to do so but otherwise the appeal is to be heard by a puisne judge of the High Court nominated under section 44. 5

Exercise of powers of donor as trustee

- 14 (1) Section 2(8) of the 1985 Act (which prevents a power of attorney under section 25 of the Trustee Act 1925 (c. 19) as enacted from being an enduring power) is to continue to apply to any enduring power – 10
- (a) created before 1st March 2000, and
 - (b) having effect immediately before the commencement day.
- (2) Section 3(3) of the 1985 Act (which entitles the donee of an enduring power to exercise the donor’s powers as trustee) is to continue to apply to any enduring power to which, as a result of the provision mentioned in sub-paragraph (3), it applies immediately before the commencement day. 15
- (3) The provision is section 4(3)(a) of the Trustee Delegation Act 1999 (c. 15) (which provides for section 3(3) of the 1985 Act to cease to apply to an enduring power when its registration is cancelled, if it was registered in response to an application made before 1st March 2001). 20
- (4) Even though section 4 of the 1999 Act is repealed by this Act, that section is to continue to apply in relation to an enduring power –
- (a) to which section 3(3) of the 1985 Act applies as a result of sub-paragraph (2), or
 - (b) to which, immediately before the repeal of section 4 of the 1999 Act, section 1 of that Act applies as a result of section 4 of it. 25
- (5) The reference in section 1(9) of the 1999 Act to section 4(6) of that Act is to be read with sub-paragraphs (2) to (4).

Interpretation

- 15 In this Part of this Schedule “the commencement day” means the day on which section 62(1)(b) (repeal of the 1985 Act) comes into force. 30

SCHEDULE 6

Section 63(1)

MINOR AND CONSEQUENTIAL AMENDMENTS

Fines and Recoveries Act 1833 (c. 74)

- 1 (1) The Fines and Recoveries Act 1833 (c. 74) is amended as follows. 35
- (2) In section 33 (case where protector of settlement lacks capacity to act), for the words from “shall be incapable” to “is incapable as aforesaid” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2004) to manage his property and affairs, the Court of Protection is to take his place as protector of the settlement while he lacks capacity”. 40

- (3) In sections 48 and 49 (mental health jurisdiction), for each reference to the judge having jurisdiction under Part 7 of the Mental Health Act substitute a reference to the Court of Protection.

Improvement of Land Act 1864 (c. 114)

- 2 In section 68 of the Improvement of Land Act 1864 (c. 114) (apportionment of rentcharges) – 5
- (a) for “, curator, or receiver of” substitute “or curator of, or a deputy with powers in relation to property and affairs appointed by the Court of Protection for,”, and
- (b) for “or patient within the meaning of Part VII of the Mental Health Act 1983” substitute “person who lacks capacity (within the meaning of the Mental Capacity Act 2004) to receive the notice”. 10

Trustee Act 1925 (c. 19)

- 3 (1) The Trustee Act 1925 (c. 19) is amended as follows.
- (2) In section 36 (appointment of new trustee) – 15
- (a) in subsection (6C), for the words from “a power of attorney” to the end, substitute “an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2004”, and
- (b) in subsection (9) – 20
- (i) for the words from “is incapable” to “exercising” substitute “lacks capacity to exercise”, and
- (ii) for the words from “the authority” to the end substitute “the Court of Protection”.
- (3) In section 41(1) (power of court to appoint new trustee) for the words from “is incapable” to “exercising” substitute “lacks capacity to exercise”. 25
- (4) In section 54 (mental health jurisdiction) –
- (a) for subsection (1) substitute –
- “(1) Subject to subsection (2), the Court of Protection may not make an order, or give a direction or authority, in relation to a person who lacks capacity to exercise his functions as trustee, if the High Court may make an order to that effect under this Act.”, 30
- (b) in subsection (2) –
- (i) for the words from the beginning to “of a receiver” substitute “Where a person lacks capacity to exercise his functions as a trustee and a deputy is appointed for him by the Court of Protection or an application for the appointment of a deputy”, 35
- (ii) for “the said authority”, in each place, substitute “the Court of Protection”, and 40
- (iii) for “the patient”, in each place, substitute “the person concerned”, and
- (c) omit subsection (3).
- (5) In section 55 (order made on particular allegation to be conclusive evidence of it) – 45

- (a) for the words from “Part VII” to “Northern Ireland” substitute “sections 15 to 20 of the Mental Capacity Act 2004 or any corresponding provisions having effect in Northern Ireland”, and
 - (b) for paragraph (a) substitute –
 - “(a) that a trustee or mortgagee lacks capacity in relation to the matter in question;”.
- (6) In section 68 (definitions), at the end add –
- “(3) Any reference in this Act to a person who lacks capacity in relation to a matter is to a person –
 - (a) who lacks capacity within the meaning of the Mental Capacity Act 2004 in relation to that matter, or
 - (b) in respect of whom the powers conferred by section 46 of that Act are exercisable and have been exercised in relation to that matter.”.
- Law of Property Act 1925 (c. 20)*
- 4 (1) The Law of Property Act 1925 (c. 20) is amended as follows.
- (2) In section 22 (conveyances on behalf of persons who lack capacity) –
- (a) in subsection (1) –
 - (i) for the words from “in a person suffering” to “is acting” substitute “, either solely or jointly with any other person or persons, in a person lacking capacity (within the meaning of the Mental Capacity Act 2004) to convey or create a legal estate, a deputy appointed for him by the Court of Protection or (if no deputy is appointed”, and
 - (ii) for “the authority having jurisdiction under Part VII of the Mental Health Act 1983” substitute “the Court of Protection”,
 - (b) in subsection (2), for “is incapable, by reason of mental disorder, of exercising” substitute “lacks capacity (within the meaning of that Act) to exercise”, and
 - (c) in subsection (3), for the words from “an enduring power” to the end substitute “an enduring power of attorney or lasting power of attorney (within the meaning of the 2004 Act) is entitled to act for the trustee who lacks capacity in relation to the dealing.”.
- (3) In section 205 (interpretation), omit paragraph (xiii).
- Administration of Estates Act 1925 (c. 23)*
- 5 (1) The Administration of Estates Act 1925 (c. 23) is amended as follows.
- (2) In section 41(1) (powers of personal representatives to appropriate), in the proviso –
- (a) in paragraph (ii) –
 - (i) for the words from “is incapable” to “the consent” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2004) to give the consent, it”, and
 - (ii) for “or receiver” substitute “or a person appointed as deputy for him by the Court of Protection”, and
 - (b) in paragraph (iv), for “no receiver is acting for a person suffering from mental disorder” substitute “no deputy is appointed for a person who lacks capacity to consent”.

- (3) Omit section 55(1)(viii) (definitions of “person of unsound mind” and “defective”).

National Assistance Act 1948 (c. 29)

- 6 In section 49 of the National Assistance Act 1948 (c. 29) (expenses of council officers acting for persons who lack capacity) – 5
- (a) for the words from “applies” to “affairs of a patient” substitute “applies for appointment by the Court of Protection as a deputy”, and
- (b) for “such functions” substitute “his functions as deputy”.

U.S.A. Veterans’ Pensions (Administration) Act 1949 (c. 45) 10

- 7 In section 1 of the U.S.A. Veterans’ Pensions (Administration) Act 1949 (c. 45) (administration of pensions) –
- (a) in subsection (4), omit the words from “or for whom” to “1983”, and
- (b) after subsection (4), insert –
- “(4A) An agreement under subsection (1) is not to be made in relation to a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) for the purposes of this Act if – 15
- (a) there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2004 Act), or a deputy appointed for the person by the Court of Protection, and 20
- (b) the donee or deputy has power in relation to the person for the purposes of this Act.
- (4B) The proviso at the end of subsection (4) also applies in relation to subsection (4A).” 25

Intestates’ Estates Act 1952 (c. 64)

- 8 In Schedule 2 to the Intestates’ Estates Act 1952 (c. 64) (rights of surviving spouse or civil partner in relation to home), for paragraph 6(1) substitute –
- “(1) Where the surviving spouse or civil partner lacks capacity (within the meaning of the Mental Capacity Act 2004) to make a requirement or give a consent under this Schedule, the requirement or consent may be made or given by a deputy appointed by the Court of Protection with power in that respect or, if no deputy has that power, by that court.”. 30 35

Variation of Trusts Act 1958 (c. 53)

- 9 In section 1 of the Variation of Trusts Act 1958 (c. 53) (jurisdiction of courts to vary trusts) –
- (a) in subsection (3), for the words from “shall be determined” to the end substitute “who lacks capacity (within the meaning of the Mental Capacity Act 2004) to give his assent is to be determined by the Court of Protection”, and 40
- (b) in subsection (6), for the words from “the authority” to the end substitute “the Court of Protection”.

Administration of Justice Act 1960 (c. 65)

- 10 In section 12(1)(b) of the Administration of Justice Act 1960 (c. 65) (contempt of court to publish information about proceedings in private relating to persons with incapacity) for the words from “under Part VIII” to “that Act” substitute “under the Mental Capacity Act 2004, or under any provision of the Mental Health Act 1983”. 5

Industrial and Provident Societies Act 1965 (c. 12)

- 11 In section 26 of the Industrial and Provident Societies Act 1965 (c. 12) (payments for mentally incapable people), for subsection (2) substitute – 10
- “(2) Subsection (1) does not apply where the member or person concerned lacks capacity (within the meaning of the Mental Capacity Act 2004) for the purposes of this Act and –
- (a) there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2004 Act), or a deputy appointed for the member or person by the Court of Protection, and 15
- (b) the donee or deputy has power in relation to the member or person for the purposes of this Act.”.

Compulsory Purchase Act 1965 (c. 56)

- 12 In Schedule 1 to the Compulsory Purchase Act 1965 (c. 56) (persons without power to sell their interests), for paragraph 1(2)(b) substitute – 20
- “(b) do not have effect in relation to a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) for the purposes of this Act if –
- (i) there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2004 Act), or a deputy appointed for the person by the Court of Protection, and 25
- (ii) the donee or deputy has power in relation to the person for the purposes of this Act.”. 30

Leasehold Reform Act 1967 (c. 88)

- 13 (1) For section 26(2) of the Leasehold Reform Act 1967 (c. 88) (landlord lacking capacity) substitute –
- “(2) Where a landlord lacks capacity (within the meaning of the Mental Capacity Act 2004) to exercise his functions as a landlord, those functions are to be exercised – 35
- (a) by a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2004 Act), or a deputy appointed for him by the Court of Protection, with power to exercise those functions, or 40
- (b) if no donee or deputy has that power, by a person authorised in that respect by that court.”.
- (2) That amendment does not affect any proceedings pending at the commencement of this paragraph in which a receiver or a person authorised under Part 7 of the Mental Health Act is acting on behalf of the landlord. 45

Medicines Act 1968 (c. 67)

- 14 In section 72 of the Medicines Act 1968 (c. 67) (pharmacist lacking capacity) –
- (a) in subsection (1)(c), for the words from “a receiver” to “1959” substitute “he becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) to carry on the business and there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act) or a deputy is appointed for him by the Court of Protection”, 5
 - (b) in subsection (3)(d) – 10
 - (i) for “receiver” substitute “deputy”, and
 - (ii) after “guardian” insert “or from the date of registration of the instrument appointing the donee”, and
 - (c) in subsection (4)(c), for “receiver” substitute “donee, deputy”.

Family Law Reform Act 1969 (c. 46) 15

- 15 For section 21(4) of the Family Law Reform Act 1969 (c. 46) (consent required for taking of bodily sample from person lacking capacity), substitute –
- “(4) A bodily sample may be taken from a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) to give his consent, if consent is given by the court giving the direction under section 20 or by – 20
- (a) a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act), or
 - (b) a deputy appointed, or any other person authorised, by the Court of Protection, 25
- with power in that respect.”.

Local Authority Social Services Act 1970 (c. 42)

- 16 In Schedule 1 to the Local Authority Social Services Act 1970 (c. 42) (enactments conferring functions assigned to social services committee), at the end, insert – 30

| | | |
|---------------------------|---|----|
| “Mental Capacity Act 2004 | | |
| Section 37 | Seeking advice from independent consultee before providing accommodation for person lacking capacity. | 35 |
| Section 47 | Reports in proceedings.”. | |

Courts Act 1971 (c. 23)

- 17 In Part 1A of Schedule 1 to the Courts Act 1971 (c. 23) (office-holders eligible for appointment as circuit judges), omit the reference to a Master of the Court of Protection. 40

Matrimonial Causes Act 1973 (c. 18)

- 18 In section 40 of the Matrimonial Causes Act 1973 (c. 18) (payments to person who lacks capacity) (which becomes subsection (1)) –
- (a) for the words from “is incapable” to “affairs” substitute “(“P”) lacks capacity (within the meaning of the Mental Capacity Act 2004) in relation to the provisions of the order”, 5
 - (b) for “that person under Part VIII of that Act” substitute “P under that Act”,
 - (c) for the words from “such persons” to the end substitute “such person (“D”) as it may direct”, and 10
 - (d) at the end insert –
 - “(2) In carrying out any functions of his in relation to an order made under subsection (1), D must act in P’s best interests (within the meaning of that Act).”.

Juries Act 1974 (c. 24) 15

- 19 In Schedule 1 to the Juries Act 1974 (c. 23) (disqualification for jury service), for paragraph 3 substitute –
- “3 A person who lacks capacity, within the meaning of the Mental Capacity Act 2004, to serve as a juror.”.

Consumer Credit Act 1974 (c. 39) 20

- 20 For section 37(1)(c) of the Consumer Credit Act 1974 (c. 39) (termination of consumer credit licence if holder lacks capacity) substitute –
- “(c) becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) to carry on the activities covered by the licence.”. 25

Solicitors Act 1974 (c. 47)

- 21 (1) The Solicitors Act 1974 (c. 47) is amended as follows.
- (2) For section 12(1)(j) (application for practising certificate by solicitor lacking capacity) substitute –
- “(j) while he lacks capacity (within the meaning of the Mental Capacity Act 2004) to act as a solicitor and powers under sections 15 to 20 or section 46 of that Act are exercisable in relation to him;”. 30
- (3) In section 62(4) (contentious business agreements made by clients) for paragraphs (c) and (d) substitute – 35
- “(c) as a deputy for him appointed by the Court of Protection with powers in relation to his property and affairs, or
- (d) as another person authorised under that Act to act on his behalf.”.
- (4) In paragraph 1(1) of Schedule 1 (circumstances in which Law Society may intervene in solicitor’s practice), for paragraph (f) substitute – 40
- “(f) a solicitor lacks capacity (within the meaning of the Mental Capacity Act 2004) to act as a solicitor and powers under

sections 15 to 20 or section 46 of that Act are exercisable in relation to him;”.

Limitation Act 1980 (c. 58)

- 22 In section 38 of the Limitation Act 1980 (c. 58) (interpretation) substitute –
- (a) in subsection (2) for “of unsound mind” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2004) to conduct legal proceedings”, and
- (b) omit subsections (3) and (4). 5

Public Passenger Vehicles Act 1981 (c. 14)

- 23 In section 57(2)(c) of the Public Passenger Vehicles Act 1981 (c. 14) (termination of public service vehicle licence if holder lacks capacity) for the words from “becomes a patient” to “or” substitute “becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) to use a vehicle under the licence, or”. 10

Judicial Pensions Act 1981 (c. 20) 15

- 24 In Schedule 1 to the Judicial Pensions Act 1981 (c. 20) (pensions of Supreme Court officers, etc.), in paragraph 1, omit the reference to a Master of the Court of Protection except in the case of a person holding that office immediately before the commencement of this paragraph or who had previously retired from that office or died. 20

Supreme Court Act 1981 (c. 54)

- 25 In Schedule 2 to the Supreme Court Act 1981 (c. 54) (qualifications for appointment to office in Supreme Court), omit paragraph 11 (Master of the Court of Protection).

Mental Health Act 1983 (c. 20) 25

- 26 (1) The Mental Health Act is amended as follows.
- (2) In section 134(3) (cases where correspondence of detained patients may not be withheld) for paragraph (b) substitute –
- “(b) any judge or officer of the Court of Protection, any of the Court of Protection Visitors or any person asked by that Court for a report under section 47 of the Mental Capacity Act 2004 concerning the patient;”. 30
- (3) In section 139 (protection for acts done in pursuance of 1983 Act), in subsection (1), omit from “or in, or in pursuance” to “Part VII of this Act,”.
- (4) In section 145(1) (interpretation), in the definition of “patient”, omit “(except in Part VII of this Act)”. 35
- (5) In section 146 (provisions having effect in Scotland), omit from “104(4)” to “section),”.
- (6) In section 147 (provisions having effect in Northern Ireland), omit from “104(4)” to “section),”. 40

Administration of Justice Act 1985 (c. 61)

- 27 In section 18(3) of the Administration of Justice Act 1985 (c. 61) (licensed conveyancer who lacks capacity), for the words from “that person” to the end substitute “he becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) to practise as a licensed conveyancer.”. 5

Insolvency Act 1986 (c. 45)

- 28 (1) The Insolvency Act 1986 (c. 45) is amended as follows.
- (2) In section 389A (people not authorised to act as nominee or supervisor in voluntary arrangement), in subsection (3) –
- (a) omit the “or” immediately after paragraph (b), 10
 - (b) in paragraph (c), omit “Part VII of the Mental Health Act 1983 or”, and
 - (c) after that paragraph, insert “, or
 - (d) he lacks capacity (within the meaning of the Mental Capacity Act 2004) to act as nominee or supervisor”. 15
- (3) In section 390 (people not qualified to be insolvency practitioners), in subsection (4) –
- (a) omit the “or” immediately after paragraph (b),
 - (b) in paragraph (c), omit “Part VII of the Mental Health Act 1983 or”, and 20
 - (c) after that paragraph, insert “, or
 - (d) he lacks capacity (within the meaning of the Mental Capacity Act 2004) to act as an insolvency practitioner.”.

Building Societies Act 1986 (c. 53) 25

- 29 In section 102D(9) of the Building Societies Act 1986 (c. 53) (references to a person holding an account on trust for another) –
- (a) in paragraph (a), for “Part VII of the Mental Health Act 1983” substitute “the Mental Capacity Act 2004”, and
 - (b) for paragraph (b), substitute – 30
 - “(b) to an attorney holding an account for another person under –
 - (i) an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2004, or 35
 - (ii) an enduring power registered under the Enduring Powers of Attorney (Northern Ireland) Order 1987;”.

Public Trustee and Administration of Funds Act 1986 (c. 57)

- 30 In section 3 of the Public Trustee and Administration of Funds Act 1986 (c. 57) (functions of the Public Trustee) – 40
- (a) for subsections (1) to (5) substitute –
 - “(1) The Public Trustee may exercise the functions of a deputy appointed by the Court of Protection.”,

- (b) in subsection (6), for “the 1906 Act” substitute “the Public Trustee Act 1906”, and
- (c) omit subsection (7).

Courts and Legal Services Act 1990 (c. 41)

- 31 In Schedule 11 to the Courts and Legal Services Act 1990 (c. 41) (judges etc. barred from legal practice), for the reference to a Master of the Court of Protection substitute a reference to each of the following – 5
- (a) Senior Judge of the Court of Protection,
 - (b) President of the Court of Protection,
 - (c) Vice-President of the Court of Protection. 10

Child Support Act 1991 (c. 48)

- 32 In section 50 of the Child Support Act 1991 (c. 48) (unauthorised disclosure of information) –
- (a) in subsection (8) –
 - (i) immediately after paragraph (a), insert “or”, 15
 - (ii) omit paragraphs (b) and (d) and the “or” immediately after paragraph (c), and
 - (iii) for “, receiver, custodian or appointee” substitute “or custodian”, and
 - (b) after that subsection, insert – 20
 - “(9) Where the person to whom the information relates lacks capacity (within the meaning of the Mental Capacity Act 2004) to consent to its disclosure, the appropriate person is –
 - (a) a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act), or 25
 - (b) a deputy appointed for him, or any other person authorised, by the Court of Protection, with power in that respect.”.

Social Security Administration Act 1992 (c. 5)

- 33 In section 123 of the Social Security Administration Act 1992 (c. 5) (unauthorised disclosure of information) – 30
- (a) in subsection (10), omit –
 - (i) in paragraph (b), “a receiver appointed under section 99 of the Mental Health Act 1983 or”,
 - (ii) in paragraph (d)(i), “sub-paragraph (a) of rule 41(1) of the Court of Protection Rules 1984 or”, 35
 - (iii) in paragraph (d)(ii), “a receiver ad interim appointed under sub-paragraph (b) of the said rule 41(1) or”, and
 - (iv) “receiver,”, and
 - (b) after that subsection, insert – 40
 - “(11) Where the person to whom the information relates lacks capacity (within the meaning of the Mental Capacity Act 2004) to consent to its disclosure, the appropriate person is –
 - (a) a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act), or 45

- (b) a deputy appointed for him, or any other person authorised, by the Court of Protection, with power in that respect.”.

Judicial Pensions and Retirement Act 1993 (c. 8)

- 34 (1) The Judicial Pensions and Retirement Act 1993 (c. 8) is amended as follows. 5
- (2) In Schedule 1 (qualifying judicial offices), in Part 2, under the cross-heading “Court officers”, omit the reference to a Master of the Court of Protection except in the case of a person holding that office immediately before the commencement of this sub-paragraph or who had previously retired from that office or died. 10
- (3) In Schedule 5 (retirement: the relevant offices), omit the entries relating to the Master and Deputy or temporary Master of the Court of Protection, except in the case of a person holding any of those offices immediately before the commencement of this sub-paragraph.
- (4) In Schedule 7 (retirement: transitional provisions), omit paragraph 5(5)(i)(g) except in the case of a person holding office as a deputy or temporary Master of the Court of Protection immediately before the commencement of this sub-paragraph. 15

Leasehold Reform, Housing and Urban Development Act 1993 (c. 28)

- 35 (1) For paragraph 4 of Schedule 2 to the Leasehold Reform, Housing and Urban Development Act 1993 (c. 28) (landlord under a disability), substitute – 20
- “4 (1) This paragraph applies where a Chapter I or Chapter II landlord lacks capacity (within the meaning of the Mental Capacity Act 2004) to exercise his functions as a landlord.
- (2) For the purposes of the Chapter concerned, the landlord’s place is to be taken – 25
- (a) by a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2004 Act), or a deputy appointed for him by the Court of Protection, with power to exercise those functions, or 30
- (b) if no deputy or donee has that power, by a person authorised in that respect by that court.”.
- (2) That amendment does not affect any proceedings pending at the commencement of this paragraph in which a receiver or a person authorised under Part 7 of the Mental Health Act 1983 (c. 20) is acting on behalf of the landlord. 35

Goods Vehicles (Licensing of Operators) Act 1995 (c. 23)

- 36 (1) The Goods Vehicles (Licensing of Operators) Act 1995 (c. 23) is amended as follows.
- (2) In section 16(5) (termination of licence), for “he becomes a patient within the meaning of Part VII of the Mental Health Act 1983” substitute “he becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) to use a vehicle under the licence” 40
- (3) In section 48 (licence not to be transferable, etc.) –
- (a) in subsection (2) – 45

- (i) for “or become a patient within the meaning of Part VII of the Mental Health Act 1983” substitute “, or become a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) to use a vehicle under the licence,”, and
- (ii) in paragraph (a), for “became a patient” substitute “became a person who lacked capacity in that respect”, and
- (b) in subsection (5), for “a patient within the meaning of Part VII of the Mental Health Act 1983” substitute “a person lacking capacity”.

Disability Discrimination Act 1995 (c. 50)

- 37 In section 20(7) of the Disability Discrimination Act 1995 (c. 50) (regulations to disapply provisions about incapacity), in paragraph (b), for “Part VII of the Mental Health Act 1983” substitute “the Mental Capacity Act 2004”.

Trusts of Land and Appointment of Trustees Act 1996 (c. 47)

- 38 (1) The Trusts of Land and Appointment of Trustees Act 1996 (c. 47) is amended as follows.
- (2) In section 9 (delegation by trustees), in subsection (6), for the words from “an enduring power” to the end substitute “an enduring power of attorney or lasting power of attorney within the meaning of the Mental Capacity Act 2004”.
- (3) In section 20 (the title to which becomes “Appointment of substitute for trustee who lacks capacity”) –
- (a) in subsection (1)(a), for “is incapable by reason of mental disorder of exercising” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2004) to exercise”, and
 - (b) in subsection (2) –
 - (i) for paragraph (a) substitute –
 - “(a) a deputy appointed for the trustee by the Court of Protection,”,
 - (ii) in paragraph (b), for the words from “a power of attorney” to the end substitute “an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2004”, and
 - (iii) in paragraph (c), for the words from “the authority” to the end substitute “the Court of Protection”.

Human Rights Act 1998 (c. 42)

- 39 In section 4(5) of the Human Rights Act 1998 (c. 42) (courts which may make declarations of incompatibility), after paragraph (e) insert –
- “(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.”

Access to Justice Act 1999 (c. 22)

- 40 In paragraph 1 of Schedule 2 to the Access to Justice Act 1999 (c. 22) (services excluded from the Community Legal Service), after paragraph (e) insert –
- “(ea) the creation of lasting powers of attorney under the Mental Capacity Act 2004,

(eb) the making of advance decisions under that Act.”.

Adoption and Children Act 2002 (c. 38)

- 41 In section 52(1)(a) of the Adoption and Children Act 2002 (c. 38) (parental consent to adoption), for “is incapable of giving consent” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2004) to give consent”. 5

Licensing Act 2003 (c. 17)

- 42 (1) The Licensing Act 2003 (c.17) is amended as follows.
- (2) In section 27(1) of the Licensing Act 2003 (c. 17) (lapse of premises licence), for paragraph (b) substitute – 10
- “(b) becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2004) to hold the licence,”.
- (3) In section 47 (interim authority notice in relation to premises licence) –
- (a) in subsection (5), for paragraph (b) substitute – 15
- “(b) the former holder lacks capacity (within the meaning of the Mental Capacity Act 2004) to hold the licence and that person acts for him under an enduring power of attorney or lasting power of attorney registered under that Act,”, and
- (b) in subsection (10), omit the definition of “mentally incapable”. 20

Courts Act 2003 (c. 39)

- 43 (1) The Courts Act 2003 (c. 39) is amended as follows.
- (2) In section 1(1) (the courts in relation to which the Lord Chancellor must discharge his general duty), after paragraph (a) insert – 25
- “(aa) the Court of Protection,”.
- (3) In section 64(2) (judicial titles which the Lord Chancellor may by order alter) –
- (a) omit the reference to a Master of the Court of Protection, and
- (b) at the appropriate place insert a reference to each of the following – 30
- (i) Senior Judge of the Court of Protection,
- (ii) President of the Court of Protection,
- (iii) Vice-president of the Court of Protection.

SCHEDULE 7

Section 63(2)

REPEALS

| <i>Short title and chapter</i> | <i>Extent of repeal</i> | 35 |
|--|-------------------------|----|
| Trustee Act 1925 (c. 19) | Section 54(3). | |
| Law of Property Act 1925 (c. 20) | Section 205(1)(xiii). | |
| Administration of Estates Act 1925 (c. 23) | Section 55(1)(viii) | |

| <i>Short title and chapter</i> | <i>Extent of repeal</i> | |
|---|---|----|
| National Assistance Act 1948 (c. 29) | Section 48(1)(c). | |
| U.S.A. Veterans' Pensions (Administration) Act 1949 (c. 45) | In section 1(4), the words from "or for whom" to "1983". | 5 |
| Mental Health Act 1959 (c. 72) | In Schedule 7, in Part I, the entries relating to— section 33 of the Fines and Recoveries Act 1833, and section 205(1) of the Law of Property Act 1925. | 10 |
| Courts Act 1971 (c. 23) | In Schedule 2, in Part 1A, the words "Master of the Court of Protection". | |
| Sale of Goods Act 1979 (c. 54) | In section 3(2) the words "mental incapacity or". | |
| Limitation Act 1980 (c. 58) | Section 38(3) and (4). | 15 |
| Supreme Court Act 1981 (c. 54) | In Schedule 2, in Part 2, paragraph 11. | |
| Mental Health Act 1983 (c. 20) | Part 7. In section 139(1) the words from "or in, or in pursuance" to "Part VII of this Act,". In section 145(1), in the definition of "patient" the words "(except in Part VII)". In sections 146 and 147 the words from "104(4)" to "section),". | 20 |
| | Schedule 3. In Schedule 4, paragraphs 1, 2, 4, 5, 7, 9, 14, 20, 22, 25, 37, 38, 55 and 56. In Schedule 5, paragraphs 26, 43, 44 and 45. | 25 |
| Enduring Powers of Attorney Act 1985 (c. 29) | The whole Act. | |
| Insolvency Act 1986 (c. 45) | In section 389A(3)— the "or" immediately after paragraph (b), and in paragraph (c), the words "Part VII of the Mental Health Act 1983 or". In section 390(4)— the "or" immediately after paragraph (b), and in paragraph (c), the words "Part VII of the Mental Health Act 1983 or". | 30 |
| | | 35 |
| Public Trustee and Administration of Funds Act 1986 (c. 57) | Section 2. Section 3(7). | 40 |
| Child Support Act 1991 (c. 48) | In section 50(8)— paragraphs (b) and (d), and the "or" immediately after paragraph (c). | |

Mental Capacity Bill

A

B I L L

To make new provision relating to persons who lack capacity; to establish a superior court of record called the Court of Protection in place of the office of the Supreme Court called by that name; to make provision in connection with the Convention on the International Protection of Adults signed at the Hague on 13th January 2000; and for connected purposes.

*Presented by Mr David Lammy
supported by
The Prime Minister, Mr Secretary Prescott,
Mr Chancellor of the Exchequer,
Mr Secretary Blunkett, Mr Secretary Reid,
Ms Rosie Winterton and Mr Christopher Leslie.*

*Ordered, by The House of Commons,
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