

Contents

<i>Table of Statutes</i>	<i>xiii</i>
<i>Table of Statutory Instruments</i>	<i>xix</i>
<i>Table of Cases</i>	<i>xxiii</i>
Chapter 1 Introduction	1
What is a power of attorney?	1
Types of power of attorney	2
Typical uses	3
Operation of lasting and enduring powers of attorney	4
Joint powers and joint and several powers	5
Who should be appointed as attorney?	5
Is a power of attorney necessary?	6
The donee	8
Chapter 2 Mental Capacity Act 2005	10
Introduction	10
Why was it thought necessary to have a Mental Capacity Act?	11
The Public Guardian	15
Disclosure of information on the register: search by the Public Guardian	17
Court of Protection	18
Security	23
Court of Protection Visitors	24
Independent mental capacity advocate service	26
Definition of capacity	28
Best interests	30
The Mental Capacity Act Code	32
What is a lasting power of attorney?	32
What are the differences between a lasting power of attorney and an enduring power?	33
Existing enduring powers of attorney	33
Chapter 3 Lasting Powers of Attorney – Formalities and Registration	34
When should a lasting power be granted?	34
Choice of attorney	36
Formalities	37
What is the position if the instrument differs from the prescribed form?	42
Who can be the attorney or donee?	43
Completion of the forms	45

Contents

Execution of the lasting power of attorney	85
Registration	87
Notification requirements	89
Objections to registration of the lasting power	91
Cases involving objections to registration of powers	94
Notification of registration	97
Evidence of registration	97
Deputy already appointed	98
Records of alterations in registered powers	99
Chapter 4 Lasting Powers of Attorney – Revocation	101
Revocation of lasting powers of attorney and cancellation of registration	101
Powers of court in relation to validity of lasting powers of attorney	136
Powers of court in relation to operation of lasting powers of attorney	137
Power to require information from donees of lasting power of attorney	139
Time	139
Chapter 5 Enduring Powers of Attorney	141
Form	142
Execution	144
Joint powers and joint and several powers	147
Alternative appointments	151
Alterations to the prescribed form	153
Miscellaneous points	154
Compliance with formalities	154
Registration of enduring powers of attorney	155
Notice to relatives	156
Notice to donor	158
Notice to other attorneys	158
Grounds for objection to registration	159
Preliminary hearing as to validity of power	161
The application for registration	161
Effect of application for registration	163
Simultaneous receipt of application for registration and application to appoint a deputy	163
Functions of court on application for registration	164
Dispensing with notice of application at the hearing	169
Effect of registration	169
Functions of court with regard to registered powers	170
Assumption of full mental capacity	171
Effect of failure to register	171

Contents

Cancellation of registration	171
Time	179
Loss or destruction of instrument registered as enduring power of attorney	180
Power to acquire information from attorneys under enduring power of attorney and other powers	180
Chapter 6 Ordinary Powers of Attorney	181
Formalities	181
Individuals	182
Companies	183
Chapter 7 Capacity of Donor and Donee	185
Capacity of donor to grant an ordinary power	186
Capacity of donor to grant a lasting power	200
Capacity of donor to grant an enduring power	206
Void powers of attorney: third-party rights	214
Capacity of donee	215
Chapter 8 Extent of the Authority	218
I. Ordinary powers of attorney	219
II. Lasting powers of attorney	227
Execution of documents	262
Power to appoint new trustees	263
III. Enduring powers of attorney	263
IV. Powers with a foreign element	271
Chapter 9 Duties and Rights of Attorneys and Deputies	273
Duty to act	274
Duties imposed by the Mental Capacity Act 2005	275
Utmost good faith to the donor	275
Duty to keep a separate account for the donor	276
Duty to keep accounts	276
Duty to disclose all relevant facts in certain transactions	277
Duty not to make secret profits	281
Duty not to exceed the authority conferred by the power or order	282
Duty to take care and be skilful	283
Duty to register the power	284
Investment	285
Duty not to delegate	290
Duty of confidentiality	291
Duty to comply with the direction of the court	291
Duty not to disclaim without notifying the court and the donor	292
Rights of donees of ordinary powers	292
Rights of donees of lasting powers	294

Contents

Rights of donees of enduring powers	294
Liens	295
Solicitors and powers of attorney	295
Financial services	296
Chapter 10 Duration and Termination of Powers of Attorney	298
I. Ordinary powers of attorney	299
II. Lasting powers of attorney	312
III. Enduring powers of attorney	317
Chapter 11 Rights and Liabilities of Donor, Donee/Attorney and Third Parties	324
I. Ordinary powers of attorney, lasting powers of attorney and enduring powers of attorney where the donor retains capacity	325
II. Lasting powers of attorney	334
III. Enduring powers of attorney	335
Chapter 12 Protection of Third Parties and Subsequent Purchasers	339
I. Ordinary powers of attorney	340
II. Lasting powers of attorney	343
III. Enduring powers of attorney	345
Third party protection when power is invalid	347
Chapter 13 Execution of Documents, Conveyancing and Grants of Representation	348
I. Execution of documents	348
II. Conveyancing	350
III. Grants of representation to an attorney	354
Chapter 14 Deputies	357
What powers can be conferred on a deputy?	361
Restrictions on deputies	363
Excluded decisions	365
Who can be appointed a deputy?	366
Position of deputy	367
Remuneration and expenses of deputy	367
Security	367
Reports	368
Revocation of appointment	369
Chapter 15 Wills	370
Testamentary capacity of the donor of a power of attorney	370
Statutory wills	372
Ademption of specific gifts	387

Contents

Chapter 16 Capacity and Power to Make Gifts	388
Capacity of donor to grant a lasting power	389
Capacity of donor to grant an enduring power	392
Capacity to make gifts	393
Capacity to make a will	397
Powers of attorney to make gifts	399
Factors to be taken into account when advising about gifts	402
Chapter 17 Procedure in the Court of Protection	403
The overriding objective	403
General case management powers	405
Powers of court officers	406
Computation of time	406
Exercise of powers on court's own initiative	406
Service of documents	407
How to start proceedings	409
Dealing with applications	410
Applications relating to lasting powers of attorney	412
Responding to an application	413
Procedure for disputing the court's jurisdiction	413
Application for joinder as a party	414
Persons to be bound as if parties	415
The parties to the proceedings	415
Court's jurisdiction in certain kinds of case to be exercised by certain judges	415
Reports under section 49 of the Act	415
General rule – hearing to be in private	416
Attendance at hearings	416
Directions as to appointment of a litigation friend	416
Litigation friend without a court order	417
Court's power to prevent a person from acting as litigation friend or to order change	417
Appointment of litigation friend by court order – supplementary	418
Representatives	418
Changing a solicitor	420
Admissions, evidence and depositions	421
Experts	424
Costs	427
Appeals	428
Choice of deputy	428
Removal of deputy	451
Powers of deputies	466
Capacity	468
Capacity to marry	476
Capacity to consent to an abortion	481

Contents

Consent to cohabitation	484
Choice of residence	485
Deprivation of liberty	492
Disclosure of reports	535
DNA test	536
Family life	536
Forced marriages	537
Litigation	539
Medical treatment	540
Removal from UK/return to UK	562
Sexual relations	564
Reporting restrictions	574
Solicitor's retainer	577
Views of person lacking capacity	578
Choice of residence/capacity to consent to sexual relations/ deprivation of liberty	579
Other cases	580
Persons not lacking capacity under the Mental Capacity Act 2005	581
Chapter 18 Points for Practitioners	583
Appendix 1 Lasting Power of Attorney Instruments	585
A1.1 Lasting power of attorney for property and financial affairs (Form LP1F)	587
A1.2 Lasting power of attorney for health and welfare (Form LP1H)	611
A1.3 Continuation sheets (Form LPC)	655
Appendix 2 Other Forms	643
A2.1 Registering your lasting power of attorney (Form LP2)	645
A2.2 Notice of intention to register a lasting power of attorney (Form LP3)	653
A2.3 Disclaimer by a proposed or acting attorney under a lasting power of attorney (Form LPA005)	659
A2.4 Objection by the donor to the registration of a lasting power of attorney (LPA 006)	663
A2.5 Objection to the Office of the Public Guardian of a proposed registration of a lasting power of attorney on factual grounds (LPA 007)	664
A2.6 Notice to the Office of the Public Guardian of an application to object to registration of a lasting power of attorney made to the Court of Protection (LPA 008)	665
Appendix 3 Precedents	667
A3.1 General power of attorney under the Powers of Attorney Act 1971	668

Contents

A3.2 Limited power of attorney authorising sale of a house and the purchase and mortgage of another house	669
A3.3 Limited power of attorney authorising the grant of a lease	670
A3.4 Delegation of trusts by power of attorney under section 25 of the Trustee Act 1925	671
A3.5 Notice under section 25 of the Trustee Act 1925, as substituted by Trustee Delegation Act 1999	672
A3.6 Extension of powers in respect of shareholdings	673
Index	675

Publisher's note

The pronoun 'he' is used throughout the book to refer to a person of unspecified sex.