The Law Commission

(LAW COM. No. 122)

THE INCAPACITATED PRINCIPAL

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*) OF THE LAW COMMISSIONS ACT 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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To the Right Honourable The Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain.

PART I

INTRODUCTION

1.1 One of the very first topics considered by the Law Commission was the law and practice relating to powers of attorney. In the ordinary course of that work we drew attention to the fact that the supervening mental incapacity of the donor of a power of attorney revokes the attorney's authority and we suggested[1] that it might be convenient if it were possible for a person to be able to grant a power of attorney which would continue in force notwithstanding his subsequent incapacity. While the convenience would be by no means confined to cases where the mental incapacity arises through senility, such cases provide perhaps the most obvious examples. We can, indeed, go further and say that the convenience is likely to be most marked in cases of senility: firstly, because of the special difficulty in reaching a decision as to whether a person's mental faculties have deteriorated simply through age to such an extent that he has become incapable in law of acting for himself: and secondly, because the problem in such cases is often expected to be relatively short-term and the family may rightly doubt whether the making of more formal arrangements would be worthwhile.

1.2 As we stated in our Report on Powers of Attorney,[2] the suggestion attracted a great deal of interest but, after discussions with The Law Society, the Holborn Law Society and the then Master of the Court of Protection, we decided not to make any recommendation about it at that time because the subject involved considerations outside the projected scope of that Report. The Powers of Attorney Act 1971, which implemented the recommendations which we did make, clarified the law in this field and provided a short standard form of power (which we understand has proved very popular) but it did not concern itself directly with the effect on a power of attorney of the subsequent mental incapacity of the donor.[3]

Our terms of reference

1.3 The suggestion was, however, not lost sight of and on 16 March 1973 you asked us:

> " To consider the law and practice governing powers of attorney and other forms of agency in relation to the mental incapacity of the principal, and to make recommendations."

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1 Powers of Attorney (1967), Working Paper No. 11, para. 21.
2 Law Com. No. 30, paras. 25–27.
3 It did, however, in s. 5 give protection to attorneys and third parties acting on the strength of a revoked power in ignorance of the revocation: see para. 2.20 below.

The Working Paper and consultation

1.4 We published a Working Paper[4] on the subject in 1976, expressing the provisional view that the law should be altered to enable a person of sound mind to grant a power of attorney which would continue in force if he became mentally incapable at a later date, subject to certain conditions and safeguards. We are grateful to those who sent us their comments on the paper ;[5] and in this connection we wish to record our particular indebtedness to Mr. J. A. Armstrong, C.B. (until recently the Master of the Court of Protection) with whom we have had lengthy discussions and to Mr. D. L. Taylor, of Messrs. Lewis W. Taylor & Co., for the very extensive help which he has given us.

1.5 As we shall see,[6] consultees were virtually unanimous in expressing the view that a person of sound mind should indeed be permitted by the law to grant a power of attorney which would survive his subsequent mental incapacity. We refer to such a power henceforth as an enduring power of attorney or " EPA ". (We refer to any power which is not an EPA as an ordinary power.) However, there was considerable divergence of views as to the conditions and safeguards which ought to be imposed. As the later parts of this Report will explain, we have decided to adhere to our original proposal that a donor of a power of attorney should be allowed to create a special type of power which would not be revoked by subsequent mental incapacity, but to propose conditions and safeguards which are substantially different from those suggested in the Working Paper.

The arrangement of this Report

1.6 In Part II, we summarise the law and practice as it stands at present, so far as relevant to our subject, together with a section on the Court of Protection. In Part III we set out and discuss the broad principles of our recommendations ; and Part IV is devoted to the proposed scheme in detail. Part V contains a summary of recommendations ; a draft Bill to implement them is to be found in Appendix A.

PART II

THE PRESENT LAW AND PRACTICE

Sources of the law

2.1 A power of attorney is a type of agency. It follows that the law relating to powers of attorney forms part of the general law of agency. Much of it, especially the general principles, lies in the common law. There has been some statutory intervention (especially the Powers of Attorney Act 1971)[7] but this has been concerned primarily with the form and effect of powers of attorney rather than with the general agency principles upon which they are based. Fundamental amongst these is the principle that an act done

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4 Working Paper No. 69.
5 The names of those who commented are given in Appendix B to this Report.
6 See para. 3.8 below.
7 Another example of statutory intervention is s. 25 of the Trustee Act 1925 (as amended by s. 9 of the Powers of Attorney Act 1971).

by a person's agent is in general to be treated as one done by the person himself.[8]

Definition of a power of attorney

2.2 A power of attorney is a formal arrangement whereby one person (the donor)[9] gives another person (the attorney or donee)[10] authority to act on his behalf and in his name.

2.3 *Formal.* An instrument creating a power of attorney must be executed under seal by the donor.[11] It is normally created by deed poll and the attorney produces it to third parties to show the extent of his authority.

2.4 *Capacity to be donor/attorney.* In general anyone who is capable of entering into a valid contract can be a donor under a power. This includes companies, trustees and bankrupts although there are limitations to the extent to which some of these may validly create a power in particular circumstances.[12] With a few exceptions, anyone may be appointed as attorney.

2.5 *Authority.* A power of attorney is not in itself a contract between donor and attorney. Accordingly, there is nothing about a power of attorney in the absence of any express provision or arrangement to the contrary that obliges the attorney to take any action under it. It just authorises him to do so if he wishes. He will, however, assume certain duties (including a duty of care) once he does start acting under the power.[13]

Mental capacity needed to create a power of attorney

2.6 The law of agency provides that capacity to act as a principal is determined by the rules governing contractual capacity generally. Indeed, most of the rules relating to the capacity required to create a power of attorney coincide with those of the law of contract.[14] The general test of contractual capacity is that the person concerned was capable of understanding the nature and effect of the contract in question at the time he made it.[15] As we say below,[16] we feel that the mental capacity required for the creation of an EPA should be similar to that required for the creation of ordinary powers.

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[8] For a detailed exposition of the principles of agency law generally, see *Bowstead on Agency* 14th ed., (1976).

[9] When referring to powers of attorney we use the term " donor " rather than the general agency term " principal ".

[10] We hereafter use the term " attorney " rather than " donee ".

[11] Sect. 1(1) of the Powers of Attorney Act 1971.

[12] For example, a company's capacity to create a power will depend upon the terms of its constitution. Minors may create powers to secure the performance of any act which they could validly perform themselves.

[13] See para. 2.13 *et seq.*, below.

[14] See G. H. Treitel, *The Law of Contract* 5th ed., (1979), p. 534; *Bowstead on Agency* 14th ed., (1976), p. 18; T. M. Aldridge, *Powers of Attorney* 5th ed., (1981), p. 15.

[15] *Boughton* v. *Knight* (1873) L.R. 3 P.D. 64, 72. Although the mental capacity required for the creation of an agency is in general similar to that required for the creation of a contract there are few authorities on the point relating specifically to powers: see *Elliot* v. *Ince* (1859) 7 De G.M. & G. 475, 489; *Daily Telegraph Co. Ltd.* v. *McLaughlin* [1904] A.C. 776, 779 (P.C.).

[16] See para. 4.4 below. We also feel that EPA attorneys should have this capacity: see para. 4.7 below.

Effect of mental incapacity to create a power of attorney

2.7 If a donor lacks the mental capacity to create a power of attorney, the purported grant is invalid. Anything done on the strength of it is void. Thus if deeds are executed under such invalid power they are void for all purposes.[17] The fact that neither the attorney nor any third party was aware of the donor's mental incapacity is immaterial. Indeed, the attorney may be liable to a third party for breach of the implied warranty of authority.[18]

The scope of the attorney's authority

2.8 The extent of the attorney's authority turns primarily upon the wording of the power itself. The donor may if he wishes, give his attorney extremely wide powers, thus enabling the attorney to do on behalf of the donor almost anything that the donor himself could do. An example of this is the general power of attorney introduced by the Powers of Attorney Act 1971.[19] On the other hand, the donor may wish to limit the authority so that the attorney can only effect particular transactions or carry out business in a particular way. In deciding whether to give his attorney a general or a limited power, the donor has to bear in mind that if the authority is too wide he may be empowering unnecessarily a dishonest or incompetent person. If, however, the authority is too restrictive the attorney will be unable to perform his functions properly.

2.9 Nevertheless, there are limitations to the attorney's authority under even a general power. For example there are some functions, such as the execution of a will, that cannot be delegated to him.[20] And even if delegation is legally possible, the attorney's authority must be construed in the context of agency law as a whole. Thus the fiduciary relationship normally existing between principal and agent[21] may restrict the authority of an attorney under even a general power. So the attorney should not use his power otherwise than for the benefit of the donor without the latter's specific authority.

2.10 As between the donor and the attorney, the attorney can only bind the donor to a transaction with a third party if it is within the scope of his *actual* authority. The actual authority is usually that specified in the power itself but it may be extended or restricted by the donor without such variation appearing on the face of the instrument.

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17 *Elliot* v. *Ince* (supra); *Daily Telegraph Co. Ltd.* v. *McLaughlin* (supra). The result is different in the law of contract. The fact that a person may have lacked the mental capacity to enter into a binding contract (or having entered into it then loses capacity) will not of itself render the contract void. Provided that the other party was unaware of the incapacity the contract will bind the incapable party. Even if the other party was aware of the incapacity (so that the contract was voidable at the option of the incapable party) the incapable party would still be liable in respect of any necessary goods or services supplied to him either pursuant to the contract or by a third party who bought them on his behalf. It is not clear whether these contractual rules apply to contracts of simple agency. A discussion of the contractual liability of a mentally-incapable person and his agent is set out in the Working Paper at paras. 16 to 26.

18 See para. 2.12 below.

19 Sect. 10 and Sched. 1. This general power is in fact commonly used in situations where the attorney's functions are intended to be limited. For example, we believe that a general power is often granted merely to allow the attorney to sign a contract while the donor is away on holiday.

20 See para. 2.15 below as to delegation by the attorney.

21 See para. 2.16 below.

2.11 However, a donor will also be bound, as between himself and a third party, by any transaction concluded between the attorney and the third party which is within the scope of the former's *ostensible* authority. The ostensible authority is that which the donor appears to have vested in the attorney. For example, if the donor subsequently restricts the attorney's actual authority (as appearing on the face of the instrument), the attorney will have ostensible authority to continue acting as before so far as any third party unaware of the restriction is concerned.

2.12 *Absence of authority.* As a general principle of agency law, an agent who purports to act on behalf of a principal impliedly warrants that he has authority to act. If an agent, albeit innocently, misleads a third party into believing that he has authority, that third party if he thereby suffers loss will have a cause of action against the agent for breach of the implied warranty of authority. [22] As we shall see,[23] however, any person (including an attorney) who acts pursuant to a power of attorney at a time when it has been revoked may be protected against the absence of authority provided that he was unaware of the revocation.

Duties of attorney

2.13 Whilst a power of attorney does not, in itself, normally impose any duties on the attorney but merely authorises him to act if he wishes,[24] the attorney will assume several duties once he starts acting under the power.[25] The primary duty is to act only within the scope of the actual authority conferred by the power. If the attorney fails in this duty, and the donor thereby suffers loss,[26] the attorney will usually be liable to compensate him. Similarly, the attorney will generally be liable to the donor if he purports to act at a time when the power has been revoked, unless he was unaware of the revocation.[27]

2.14 The attorney owes his donor a duty of care in the carrying out of his functions under the power. The requisite standard of care is generally considered to be dependent upon whether the attorney is receiving payment for his services. If he is not being paid he must use such care and skill as he would do in the management of his own affairs. He must, however, use such skill as he does in fact have or has held himself out as possessing. If he is being paid for his services he must apply such care and skill in the performancse of his undertaking as is reasonably necessary for the proper performance of the duties undertaken by him. Where the paid attorney undertakes these duties in the course of his profession he must display normal professional competence.[28]

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22 *Yonge* v. *Toynbee* [1910] 1 K.B. 215.

23 Para. 2.20 below.

24 There may, however, be circumstances whereby an attorney would be bound to inform his principal if he decided not to act. See *Bowstead on Agency* 14th ed., (1976), p. 123.

25 It is open to the parties to make their own arrangements as to the extent of the attorney's duties. For example they may decide that the attorney should be under a duty to take a particular course of action. Or they may decide to exclude duties which the law would otherwise imply.

26 This might arise, for example, where a third party was entitled to rely on the attorney's ostensible authority. If it is the third party that suffers loss he may be able to sue the attorney for breach of the implied warranty of authority.

27 See para. 2.20 below.

28 *Hart & Hodge* v. *Frame, Son & Co.* (1839) 6 C. & F. 193.

2.15 The general agency principle that an agent may not delegate his authority[29] may be expressed as a duty on the part of the attorney to perform *personally* his functions under the power. This duty is imposed because of the discretion and trust reposed in the attorney by the donor. The attorney does, however, have an implied power to delegate acts of a purely ministerial nature provided that these acts are not such that the donor would have expected the attorney to attend to them personally.[30] If the attorney is to have a general power to delegate, that must be provided for expressly in the deed.

2.16 The attorney, in carrying out his functions under the power, owes his donor duties of a fiduciary nature. He must avoid conflicts between his responsibilities to the donor and his own personal interests. Thus he must refrain from entering into transactions in which such a conflict might arise[31] unless the donor, with full knowledge of all the material circumstances, gives his consent. Nor must the attorney without such consent use his position as attorney to acquire any benefit for himself whether or not this would be at the donor's expense.[32] The attorney is also bound to keep proper accounts of transactions involving the donor's money and must keep such money separate from his own.[33]

Remuneration and expenses

2.17 The instrument may provide for the attorney to be remunerated for his services. It is not entirely clear how far he is entitled to claim remuneration in the absence of express provision but it seems that he may be entitled to claim on a quantum meruit basis if there was an understanding that he would be remunerated.[34] Whether or not the instrument so provides, the attorney is entitled to be indemnified by the donor in respect of all costs and expenses properly incurred by him in the due execution of his functions under the power.[35]

Termination of powers

2.18 There are four main situations in which a power of attorney will be terminated. *First,* by effluxion of time. A power granted for a fixed period or a specific purpose will end automatically at the expiration of that period or once the purpose has been achieved. *Secondly,* by revocation of the power on the part of the donor. This may be express or implied.[36] *Thirdly,* by renunciation or disclaimer on the part of the attorney. *Fourthly,* by operation of law as, for example, where the donor dies or (as we shall now see) loses his mental capacity.

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29 *De Bussche* v. *Alt* (1878) 8 Ch. D. 286.
30 *Speight* v. *Gaunt* (1883) 9 App. Cas. 1.
31 *Rothschild* v. *Brookman* (1831) 2 Dow & Cl. 188.
32 *Parker* v. *McKenna* (1874) L.R. 10 Ch. App. 96.
33 *Gray* v. *Haig* (1855) 20 Beav. 219. It is, of course, open to the parties to agree other arrangements. Thus they might be husband and wife keeping their money in a joint banking account.
34 *Way* v. *Latilla* [1937] 3 All E.R. 759.
35 *Curtis* v. *Barclay* (1826) 5 B. & C. 141. See n. 193 below.
36 Implied revocation would include an act by the donor that is inconsistent or incompatible with the continuation of the power.

2.19 *Loss of mental capacity.* The donor's loss of mental capacity has, as a general rule,[37] the effect of automatically revoking the power, so that the attorney no longer has actual authority. This follows from the basic proposition that an act done by a person's agent is to be treated as one done by the person himself, so that an agent does not have authority to do what his principal cannot himself do.[38] The consequences of this rule are, however, mitigated in two ways.

2.20 *First,* an attorney who acts under a power that has been revoked without knowing of the revocation does not thereby incur liability to either the donor or anyone else.[39] *Secondly,* where an attorney acts under a revoked power, anyone with whom he deals who is himself unaware of the revocation may rely on the attorney's ostensible authority and the transaction will be binding on the donor.[40]

2.21 The protection mentioned in the last paragraph is, in principle, not confined to cases where the donor has formally revoked the power or where he has lost mental capacity. The protection does not, however, extend to cases where a power never existed as, for example, where the donor lacked sufficient mental capacity to create it in the first place. And the attorney must always bear in mind that the power is no longer valid once the donor has lost mental capacity. Once the attorney becomes aware of the incapacity he should consider applying to the Court of Protection under the Mental Health Act 1983 for the appointment of a receiver or for some other order. It is to this aspect that we now turn.

The Court of Protection: receivership

2.22 The Court of Protection is the office of the Supreme Court charged with administering the affairs of persons who are incapable, by reason of mental disorder, of managing them for themselves. Its functions are now defined in Part VII of the Mental Health Act 1983.[41] The functions of the Court are divided between the Judicial Division which deals with all judicial matters; the Protection Division which deals with non-judicial matters relating to the administration of incapable persons' estates by external receivers; and the Management Division which as from 1 January 1983 took over most of the receivership work previously undertaken by the Official Solicitor. The judicial functions of the Court are performed by a judge of the Chancery Division appointed by the Lord Chancellor, many of the judge's functions being delegated to the Master. The Court is assisted by Panels of Medical, Legal and General Visitors appointed by the Lord Chancellor[42] who are

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37 The donor's loss of mental capacity (or even his loss of life) will not terminate a power given to the attorney to secure a proprietary interest of the attorney or the performance of an obligation owed to him. Such powers are often given by mortgagors to mortgagees to facilitate the power of sale by the latter should this prove necessary. Such powers are irrevocable. Since our concern in this Report is with powers that are revoked by the donor's incapacity, none of our proposals affect irrevocable powers. See generally s. 4 of the Powers of Attorney Act 1971.

38 *Drew* v. *Nunn* (1878) 4 Q.B.D. 661.

39 Powers of Attorney Act 1971, s. 5(1). This has the effect, so far as powers of attorney are concerned, of reversing the decision in *Yonge* v. *Toynbee* [1910] 1 K.B. 215.

40 Powers of Attorney Act 1971, s. 5(2). Sect. 5(4) provides means whereby it may (for the benefit of a subsequent purchaser) be conclusively presumed that the person with whom the attorney dealt was not aware of the revocation of the power.

41 See also the Court of Protection Rules 1982 (S.I. 1982/322 (L.8)).

42 The 1983 Act, s. 102.

available to visit patients[43] and to report to the Court on their circumstances and their mental or physical condition.

2.23 The powers of the Court in relation to the property and affairs of a patient may fairly be described as exhaustive:[44] they even include power to make a will for him.[45] Cases generally come to the notice of the Court by means of an originating application. This may be made by anyone but will normally be made by a near relative of the patient. Exceptionally, the Court may act of its own motion and, after instituting enquiries, direct one of its own officers or the Official Solicitor to apply.[46] Sometimes in the interests of an individual, action needs to be taken urgently without receivership proceedings being started and without the Court having received medical evidence as to the individual's mental health. The Court has power to take action in such a case if it considers it necessary.[47]

2.24 The object of an originating application to the Court is usually to secure the appointment of a receiver to manage the patient's property and affairs under the Court's direction.[48] In most cases a relative or close friend will be named. If the patient had hitherto had an attorney, he might well be the most appropriate person for appointment because regard will, as far as possible, be had to the wishes of the patient himself.[49] If no other suitable person is available or willing to act, the Court's Management Division will undertake the receivership functions itself.

2.25 Although the patient may still have some mental capacity (at least, as regards certain acts) the making of a general receivership order brings to an end any authority, such as a power of attorney, that may hitherto have been vested in anyone else to manage the patient's property. While the order remains in force the patient is incapacitated from dealing with it himself.[50] If the patient makes a full recovery the order may be discharged upon the production of medical evidence, but there is no question of its being in suspense during lucid intervals.

2.26 A receiver appointed by the Court is not an independent agent. His authority is derived from the Court and he operates throughout under its supervision. He is appointed under a general order which gives him reasonably wide powers to manage the patient's affairs on a day to day basis. A specific order is, however, necessary to cover transactions such as the sale of the patient's investments or his dwelling-house. The degree of supervision may vary from case to case but its existence is, we believe, one of the factors which has led those whom we have consulted to say that there are many

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[43] A " patient " is defined, for the purposes of Part VII of the 1983 Act, as a person whom the Court is satisfied is " incapable, by reason of mental disorder, of managing and administering his property and affairs ": s. 94(2).

[44] These are set out in s. 96 of the 1983 Act.

[45] The 1983 Act, s. 96(1)(*e*). See also *Re D(J)* [1982] Ch. 237. The Court may require the production of any will previously executed by the patient (Court of Protection Rules 1982, r. 75).

[46] Court of Protection Rules 1982, rr. 13 and 72.

[47] The 1983 Act, s. 98.

[48] In cases where the Court thinks it appropriate (for example, where the property of the patient does not exceed £5,000 in value) it will not appoint a receiver but will instead use its " short procedure " pursuant to the Court of Protection Rules 1982, r. 6. This involves the Court (whether or not an originating application has been issued) making an order directing an officer of the Court or some other fit and proper person to deal with the patient's property and affairs in the manner specified in the order.

[49] *Re Leacock* (1838) Lloyd & G. 498.

[50] *Re Walker* [1905] 1 Ch. 160; *Re Marshall* [1920] 1 Ch. 284.

cases for which the law should be prepared to countenance less formal arrangements.

2.27 The underlying complaint is not that the Court of Protection is unapproachable or unnecessarily slow or inflexible. It is none of those things. Inevitably, however, it has procedures, and procedures always involve time and expense.[51] For example, before making a receivership order the Court always requires production of *medical evidence* because it has to be satisfied that the proposed patient is indeed a " patient ". The originating application must usually be accompanied by a substantial *affidavit*[52] to enable the Court to judge the suitability of the proposed receiver and (looking to the future) to assist the Court to give directions on questions relating to the administration of the patient's estate. Furthermore, the receiver may as a condition of his appointment be required to provide *security*. He will also usually be required to render annual *accounts* to the Court and he may have to attend Court to have these passed.[53] Finally, in order to finance the Court's activities, *fees* are payable by the patient's estate. At the outset each originating application bears a commencement fee of £50.[54] Additionally, there are fairly substantial fees charged annually on the patient's clear annual income as well as " transaction " fees for some individual dealings with the patient's estate (including the making of a statutory will).[55]

PART III

OUR RECOMMENDATIONS—THE BROAD PRINCIPLES

The problem

3.1 As we have shown in our summary of the existing law, a power of attorney will be revoked by the donor's supervening incapacity. The protection afforded to an attorney or third party acting pursuant to a revoked power is available only if that attorney or third party is unaware of the revocation.[56] The attorney who continues to act despite being aware of the revocation may be liable to the donor or to a third party for any loss caused by his unauthorised actions; the third party who deals with the attorney after learning of the revocation may find that the transaction will not bind the donor and so may be set aside.

3.2 Thus, at a time when the assistance of the attorney has become for the donor not merely desirable but essential, the attorney has no authority to act. But clearly the need for the donor's affairs to be managed properly

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51 See L. Gostin, *The Court of Protection* (1983) for a critical analysis of the practice and procedures of the Court. This book is published by the National Association for Mental Health (MIND).

52 Known as the affidavit of family and property: in some cases a *certificate* of family and property is used instead. Court of Protection Rules 1982, r. 38.

53 Court of Protection Rules 1982, r. 66.

54 Except where it appears that the patient's clear annual income is less than £1,000.

55 Court of Protection Rules 1982, rr. 83–86. The *income fee* is based on a sliding scale. There is no fee if the income is £1,000 p.a. or less. For income exceeding £1,000 but not exceeding £2,000 the fee is £75 increasing to £850 for income between £10,000 and £20,000. Where income exceeds £20,000 the excess is charged at 5%. The *transaction fee* is £50 (or, in some cases, ¼% of the consideration of the transaction if that would produce a higher figure).

56 Para. 2.20 above.

continues although the attorney's authority does not. We were told on consultation that this situation occurs commonly. An elderly person, feeling that he is becoming increasingly less able to run his affairs efficiently, creates a power in favour of his spouse or children in the expectation that they will use it to run his affairs for him. But a subsequent steady decline in his mental faculties is likely to have the eventual[57] effect of terminating the power and frustrating his expectations. With the number of elderly people in our society continuing to increase, the problem is unlikely to diminish in the future.

3.3 A particular difficulty in this area is the identification of incapacity.[58] A donor's failure to manage his affairs properly may be as easily attributable to lack of inclination as to positive lack of mental capacity. He may have " good " as well as " bad " days. Applying any definition of " incapacity " inevitably involves taking a subjective rather than an objective view. The donor's doctor may consider that he is incapable while his wife may attribute his behaviour to eccentricity. Our recommendations reflect the uncertainties prevalent in this area.

Solutions to the problem

3.4 Having identified the problem we have tried to find the most satisfactory solution. We accept that it may be argued that the problem lies not in the existing law and practice but in people's ignorance of it ; that, instead of the law needing to be changed, all that is required is education as to the law. Thus attorneys would be urged to keep the mental condition of their donors under constant review and, once satisfied that their powers had been revoked by the donor's incapacity, to consider applying to the Court of Protection[59] under the Mental Health Act 1983 for a receivership or similar order. There would thus be no change in the law since this is a course of action already open to attorneys.

3.5 This would not be a solution that we could recommend. Whilst it might foster greater public awareness of the law and practice in this area (which is something to be welcomed) it would do nothing to meet the valid objections that clearly exist in relation to that law and practice. Whilst a receivership application to the Court is a course of action already open to attorneys, it is one which comparatively few attorneys seem to adopt. We have already mentioned some of the problems associated with the Court.[60] The views expressed during the consultation do not encourage us to believe that attorneys are ever likely to approach the Court in significantly increased numbers under the existing law. Furthermore, such a solution would do nothing to implement the wish clearly expressed by the consultation that the law should be amended to permit certain powers to survive the donor's

[57] Because of the difficulties involved in identifying incapacity, it will in practice often be impossible to determine the precise time at which the power was revoked.

[58] Our references in the remainder of this Report to a person's " incapacity " are references to his being incapable by reason of mental disorder of managing and administering his property and affairs: that is, a person who could be a patient under Part VII of the Mental Health Act 1983. Where, however, we refer to a power being revoked by a person's " incapacity " we mean such incapacity as is sufficient to revoke that power. These two definitions of " incapacity " do not necessarily cover the same ground.

[59] Our references in the remainder of this Report to " the Court " are references to the Court of Protection.

[60] See para. 2.27 above.

loss of capacity ; that the donor should be allowed to choose someone to continue looking after his affairs during his incapacity as well as before—and doing so not as a receiver deriving his authority from the Court, but as the donor's trusted attorney enjoying the relationship normally associated with powers of attorney. We accordingly feel that leaving the law as it is now would not provide a satisfactory solution to the problem. We now examine solutions that would involve a change in the law.

3.6 One such solution would be simply to abolish the rule that a donor's mental incapacity, if sufficiently advanced, terminates the power. There seems little doubt that in many cases the effect of this would be to legalise current practice. It is our belief that ordinary powers are very commonly acted on, in disregard of the law, after being revoked by the donor's incapacity. Such disregard may in some cases be deliberate. Far more often it will be through ignorance of the law. In many cases it will not be easy to decide whether the donor's mental incapacity is sufficiently pronounced to have the effect of revoking the power. In the result we have no doubt that attorneys frequently exercise their powers (and third parties, such as bank managers, accept their exercise of them) beyond the point at which the powers have in law been revoked. In most cases no question of bad faith or fraud arises. The attorney runs certain risks in theory. He will, however, often be a member of the donor's family and, where the rest of the family are entirely happy to allow him to continue looking after the donor, the risks are probably very small in practice. This status quo is especially likely to be maintained where, as in the case of an elderly donor, the " irregularity " may be expected to subsist for no great length of time. So far as the third party is concerned the risks he runs are likely to be even smaller. He may have little or no contact with the donor and may well prefer to continue dealing with the attorney rather than make enquiries about the donor.

3.7 This solution clearly has attractions. It would be simple and would accord with the legal position which many people consider already prevails. It would also remove the necessity for deciding the very difficult question as to whether the donor's incapacity is such as to revoke the power. It is, indeed, the solution which we would gladly recommend if we thought it would produce a satisfactory result. Unfortunately we do not think it would. For it would have the " blanket " effect of enabling any power granted to any attorney to continue beyond the donor's incapacity despite the fact that the type of power created might be wholly unsuitable for such continuation and that the donor had never intended the attorney to operate the power unsupervised. Even more important, there would be no safeguards for the donor once he had become incapable.[61] The need to provide such safeguards was very much in mind at the time we wrote the Working Paper and has been endorsed by the consultation. We are therefore unable to recommend a solution that confined itself to abolishing the rule that a donor's incapacity terminates the power.

3.8 A second solution is to make no change to the existing law as it affects ordinary powers but to devise a scheme permitting the creation of a new sort of power—the EPA[62]—which subject to conditions and safeguards would continue in force despite the donor's subsequent incapacity. This was the solution aired in our Working Paper and it received overwhelming support

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[61] See para. 3.11 below.
[62] Enduring power of attorney: see para. 1.5 above.

from consultees. Almost unanimously, it was felt that the introduction of a scheme which, whilst containing safeguards for the donor, nevertheless permitted the continuance of a power after his loss of capacity would represent a most beneficial change in the law. We endorse this feeling and recommend that the law be so changed.

Safeguards—a delicate balance

3.9 Although the consultation provided overwhelming support for the concept of the EPA, it was by no means unanimous as to the provisions which a desirable EPA scheme should contain. In particular, there was no general consensus as to the safeguards needed to protect the donor from possible exploitation. In making our detailed recommendations we have been conscious throughout of the necessity to balance two conflicting needs. First, the need to provide a simple, effective and inexpensive method of allowing powers to continue despite the donor's incapacity. Secondly the need to protect the donor's interests against exploitation. Both needs are perfectly valid. Unfortunately they are not easily reconciled. In trying, however, to balance these conflicting needs we have had to bear in mind a number of considerations.

3.10 The *first* consideration is that a capable donor should be entitled to direct his affairs as he wishes without requiring the consent of others. Upon this basis he should be able to arrange how, in the event of his becoming incapable, his property and affairs should then be managed. If he trusts someone well enough to act in his best interests after he has become incapable, then he should in principle be able to arrange for this in advance. The argument against this, however, is that many donors might execute EPAs at a time when they were already becoming incapable so that they were not in the best position to make objective future plans anyway.

3.11 The *second* consideration is the need to protect the interests of the donor when he has become incapable. Once that event has happened, the attorney would, in the absence of special safeguards, be able to use his power without any supervision by anybody. The donor's incapacity involves a material change of circumstances and deprives him of the control that a capable donor can exercise over his attorney to prevent misuse of the power, accidental or otherwise. While we do not think that deliberate fraud would be likely to be commonplace, we suspect that many relatives of donors might be tempted to use their EPAs in ways which were not strictly for the donor's benefit. This would not necessarily be done dishonestly. Attorneys might persuade themselves that, if their donor had been capable, he would have wanted them to benefit from his property out of gratitude for their help. Or they might wish to reduce the incidence of taxation that would arise on the donor's death by giving away much of his estate in advance.

3.12 The *third* consideration is that the introduction of EPAs would be unlikely to increase substantially the risk of donors being exploited. Clearly the determined criminal would always be able to find easier methods of exploitation than the securing of his appointment as an EPA attorney. He might, for example, be able to persuade the would-be donor to sign away his property or make gifts in his favour or to members of his family. He might forge the would-be donor's signature to cheques and pass books. But even the less unscrupulous person would find that the EPA offered little scope for exploitation that did not exist at present with an ordinary power.

We have already said that we have no doubt that attorneys frequently exercise ordinary powers beyond the point at which the powers have been revoked by the donor's incapacity. The opportunity for exploitation thus exists already but there is no evidence that it is often taken.

3.13 The *fourth* consideration is that an EPA scheme would only be acceptable if it were simple, effective and inexpensive. Otherwise no one would want to use it but would be tempted instead to contine using revoked ordinary powers regardless of the legal niceties. There is no doubt that, if our proposals for the EPA scheme involved the formalities, restrictions, delays and general inconvenience necessarily associated with the procedures of the Court, the EPA would not be acceptable. This was made quite clear to us by those who responded to the Working Paper and has satisfied us that these factors act as a powerful deterrent to any prolonged involvement with the Court. In this sense the security of the Court is somewhat illusory since it benefits relatively few people.[63] The implication is that most people who could benefit from the protection and experience of the Court muddle along without it. We do not doubt the benefits of safeguards. It is just that they have to be balanced against the benefits of simplicity. And even if the EPA scheme were to be hedged about with restrictions, this would not guarantee total security for the donor against determined rogues. Such persons are not deterred by restrictions. But honest attorneys would be. Few people other than perhaps the most devoted relatives would take on the office of EPA attorney if their powers were so limited and their duties so onerous that the operation of the EPA became an obstacle course. No one has to take on the attorneyship and the success of our proposals when implemented would be dependent on people being willing to do so.

Safeguards—the experience of foreign jurisdictions

3.14 We decided to examine the EPA schemes operating in other common law jurisdictions with a view to seeing how other countries have resolved the balance between simplicity and protection. We were also interested in finding out how other EPA schemes have operated in practice. Such schemes exist in the Northern Territory of Australia,[64] Victoria,[65] British Columbia,[66] Ontario,[67] Manitoba;[68] and about three quarters of the states in the U.S.A. have adopted the EPA in one form or another—many of their EPA schemes being based on one or other of the two sets of recommendations made in this field by the National Conference of Commissioners on Uniform State Laws.[69] We examined many of these schemes and are most grateful to those who gave us their assistance.

3.15 Two points of special relevance emerged from our examination of foreign EPA schemes. The first of these was their general popularity. Even though most of the schemes had been running for only a few years they were

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63 As at 31 December 1981, there were 23,283 patients under the jurisdiction of the Court. *Hansard* (H.C.) 24 February 1982, Vol. 18, Written Answers col. *409*.

64 Powers of Attorney Act 1980.

65 Instruments (Enduring Powers of Attorney) Act 1981.

66 Power of Attorney Act 1979.

67 The Powers of Attorney Act 1979.

68 The Powers of Attorney Act 1980.

69 The Model "Special Powers of Attorney for Small Property Interests Act" proposed in 1964; and provisions in Part 5 of the Uniform Probate Code (1969, as revised in 1979)—see sections 5-501 to 5-505.

already being seen as fulfilling a previously unmet need.[70] In particular they were seen as an inexpensive and useful alternative to receivership proceedings.

3.16 The other point which emerged from our examination of foreign EPA schemes was that there was no such thing as an internationally accepted form of EPA scheme. Each country had its own model. Thus there was no internationally agreed balance between the conflicting needs for simplicity on the one hand and protection of the donor on the other.

3.17 Most schemes that we examined, however, contained at least three basic provisions designed to protect the donor's interests. These provisions were:—

(*a*) a requirement that the EPA instrument contain a statement by the donor showing his intention that the power should be able to survive his mental incapacity ;[71]

(*b*) a requirement that the donor's signature be witnessed by someone other than the attorney ;

(*c*) machinery whereby the EPA could be terminated (or at least controlled) by the intervention of the court or some other official body.

We shall refer to this sort of scheme as *the basic scheme.* And it was this basic scheme that was recommended by the Uniform Law Conference of Canada in 1978[72] and (with the exception of the witnessing requirement) by the National Conference of Commissioners on Uniform State Laws in 1969[73] and adopted recently by Victoria.[74]

3.18 There were, however, many variations on, and additions to, the basic scheme. Thus, in North Carolina the EPA has to be acknowledged by the donor before an authorised person and there are provisions for registration of the EPA and for filing of annual accounts.[75] In California the EPA must carry written warnings for the donor's benefit if the power is contained in a printed form and granted without legal advice ; and there are provisions enabling the donor or his family both to compel the attorney to submit accounts and to obtain a declaration that the power has terminated because of the attorney's unfitness or because this would be in the donor's best interests.[76] And some schemes have built extensive protective structures onto the basic scheme. Thus, in the Northern Territory of Australia the EPA must not only show the donor's intention that the power should be able to continue despite his incapacity and be executed in the presence of an independent witness, but must also contain a statement by the attorney accepting the power and be registered ; furthermore, the attorney is not

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[70] In the typical case the donor would be elderly and the attorney would be a close relative. Not infrequently, however, the donor and attorney would be business partners with the EPA being given to facilitate the running of the business whilst one partner was away from the office for a while.

[71] One exception was the American state of Georgia where a written power would continue regardless of the donor's incapacity unless the instrument provided otherwise.

[72] The Conference produced its draft Uniform Powers of Attorney Act which was subsequently adopted to a greater or lesser extent by British Columbia, Ontario and Manitoba.

[73] See Part 5 of the Uniform Probate Code.

[74] Instruments (Enduring Powers of Attorney) Act 1981.

[75] N.C. Gen. Stat. Section 47–115.1.

[76] Uniform Durable Power of Attorney Act (1981).

able to retire without leave of the court, and the Public Trustee (and anyone else with an interest) can require the production of accounts and the power can be terminated by the making of a protection order.[77]

Safeguards—our conclusions

3.19 It will be apparent from the foregoing that whilst our review of the existing EPA schemes confirmed the general acceptance and approval of EPAs, it produced no general consensus as to the proper balance between simplicity and protection. Such consensus as there was was limited to a recognition that EPA schemes needed safeguards. And the minimum safeguards that were generally considered acceptable were those contained in the basic scheme. It will be seen below[78] that we would wish to have these minimum safeguards in our own sehemc. But would they be sufficient on their own?

3.20 We have little doubt that a basic EPA scheme could be operated in this country. It is apparent from our researches that there is little complaint about the functioning of the basic scheme in the jurisdictions in which it operates.[79] Admittedly the experience of most of those jurisdictions is limited to a very few years so it is perhaps unlikely that our researches would indicate otherwise. Nevertheless there is no reason to suppose that a basic scheme could not be used with advantage in this country. Indeed we have no hesitation in saying that the adoption of a basic scheme would be preferable to there being no EPA scheme at all. For we have already said that we feel that certain powers of attorney should be capable of surviving the donor's incapacity. And we would prefer a scheme that incorporates safeguards which we in some respects consider inadequate to the absence of a scheme altogether.

3.21 We do not, however, recommend the adoption of a basic scheme, without more, for this country. Although we appreciate the attraction of the basic scheme's simplicity we do not consider that it offers sufficient protection for the donor. The consultation that we received in response to our Working Paper made it clear to us that there were misgivings about the risk of exploitation. It was felt that the EPA scheme needed to incorporate safeguards sufficient to counter this risk. The basic scheme would assist capable donors by informing them that the EPA was liable to continue despite their subsequent incapacity. And it would provide some further assistance in that independent witnessing of their signatures would be necessary and in that the court could control the attorney if it happened to learn of misconduct or mismanagement on his part. We are, however, concerned about the limitations of such assistance.

3.22 In particular, we have in mind the donor who is no longer fully capable when he grants the EPA, even though he still has sufficient capacity to create the power.[80] This is likely to be a very common case in practice where (as will be most usual) the donor is elderly. Many people will not consider the creation of an EPA until their mental state is beginning to

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77 Powers of Attorney Act 1980.
78 See paras. 4.16, 4.18 and 4.78 below.
79 But see para. 3.23 below.
80 See para. 2.6 above.

deteriorate. There is a likelihood that such a donor will be highly suggestible and liable to do whatever the prospective attorney says is best for him without appreciating the effect of the grant either in terms of the "enduring" element or in terms of the scope of the authority being granted. We also have in mind the donor who, though capable when he grants the EPA, makes an error of judgment in his choice of attorney or in the scope of the authority granted. Once he becomes incapable, he will be unable to correct his mistake. We believe that an EPA scheme should be able to protect the interests of donors in both these types of case. We do not believe that the basic scheme would.[81] The requirement that the EPA contain a statement by the donor showing his intention that the power should be able to survive his mental incapacity might provide little protection in either case. A witness to his signature might well not be able to express any view as to the desirability of appointing the particular attorney. And the power of the Court to intervene would only give protection where the Court was asked to do so: it would be unlikely to help where the donor had nobody to look after him apart from the attorney. This too is likely to be common in the case of elderly people.

3.23 We are not alone in considering the protection offered by the basic scheme to be insufficient. We heard during our researches from several people who had first hand knowledge of the operation of basic schemes in the USA and Canada and who expressed fears that donors would suffer loss as a result of mismanagement of their affairs by attorneys who were either dishonest or who were themselves incapable. Instances of such loss were cited to us. Furthermore we were impressed by the number of jurisdictions that saw fit to build onto the basic scheme additional safeguards. Thus in one scheme there was a requirement that certain EPAs must carry warnings explaining to the donor the effect of the EPA.[82] And several schemes allowed persons interested in the donor's estate to go to court for an order either requiring the attorney to produce accounts or controlling him in some other way.[83]

3.24 Our proposals, whilst not on the one hand supporting the basic scheme, are not on the other an attempt at building a legal framework offering total security to the donor. This is not a realistic option open to us. We have tried to strike the right balance between simplicity and protection. And we have been conscious throughout of the need to produce a system that both the donor and the attorney will want to use. We discuss our recommendations in detail in Part IV of this Report. It may, however, be helpful to pause at this point and discuss in general terms the main safeguards that we do recommend.

The main safeguards

3.25 *Donor's mental capacity.* In the Working Paper[84] we laid some emphasis on the proposition that, in order to be valid, an enduring power

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81 There are other areas where we feel donors should be protected but which are not covered by the basic scheme. An example of this is the extent to which the attorney should be able to use his authority under the EPA to benefit persons other than the donor himself. This includes the question not only of making gifts but also of maintaining dependants. See para. 4.23 *et seq.*, below.

82 California (Uniform Durable Power of Attorney Act 1981).

83 These include Ontario (Powers of Attorney Act 1979) and the Northern Territory (Powers of Attorney Act 1980).

84 Para. 56.

of attorney would have to be granted by someone who satisfied the general legal test of mental capacity i.e. someone who was able to understand the nature and effect of an EPA. We also expressed the provisional view[85] that there should be no mandatory requirement of professional evidence of the donor's capacity at the time of the grant. Our opinions on both these points were strongly supported on consultation, and we have decided to adhere to them. It is still an important feature of our proposals that an enduring power granted by a person who had no capacity to create it will be invalid.[86] However, we do not now put so much reliance on this safeguard as we did at the time of the Working Paper. We have two main reasons for this. The first reason is that the protection afforded by this proposal may be eroded by the fact that the donor, although not yet so incapable that he has no capacity to create the EPA, may already be beginning to lose his capacity through senility or other causes.[87] This may happen frequently and the judgment of a donor in this position may well be impaired. Secondly, it may well be difficult to ascertain whether the donor had the necessary capacity to execute an EPA on the appropriate day, and to prove it perhaps several years after the event. Accordingly, on any view the requirement that the donor must have capacity at the time he executes the EPA must be supplemented by other safeguards.

3.26 *Form and contents of the EPA.* We consider it essential that the donor and attorney should so far as possible appreciate the nature and effect of the EPA at the time of execution. This is especially important for the donor since an EPA would involve a greater potential risk for him once he became incapable than if his affairs were under the supervision of the Court. But we also consider it important that the attorney should appreciate at the outset the nature of the role he is to play. We therefore recommend that all EPAs should incorporate certain explanatory information (preferably in the form of notes) explaining to the donor and the attorney the general effect of creating or accepting an EPA.[88] Furthermore we feel that all EPAs should contain certain statements by the parties. The donor would state that he intended the EPA to continue in spite of any supervening mental incapacity on his part.[89] He would also state that he had read the explanatory information. The attorney would make statements to the effect that he understood both about his duty to register the EPA and about his limited power to use the donor's property to benefit persons other than the donor himself.[90] To avoid any possibility that these statements or the explanatory information might be omitted from the instrument we recommend that the Lord Chancellor prescribe the form of the instrument so that only instruments in that form could create EPAs.[91]

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85 Para. 63.

86 Although, where such a power has been registered, the attorney and third parties acting on it in ignorance of the invalidity would be protected: see para. 4.86 *et seq.*, below.

87 See para. 3.22 above.

88 Cf. EPAs created in California which if contained in a printed form and given without legal advice must carry written warnings: see para. 3.18 above.

89 This is, of course, one of the provisions of the basic scheme. We do not suggest that this statement would necessarily protect a donor who was already becoming incapable: it is merely intended to alert the capable donor to the fact that the power could continue in force at a time when he would have little or no control over the attorney. He would therefore have to choose his attorney carefully and consider the authority that the attorney should exercise.

90 See para. 4.16 below.

91 The Lord Chancellor would also prescribe the manner in which the instrument was executed, including the witnessing of the donor's signature: see paras. 4.10 and 4.18 below.

3.27 *Minimum of two attorneys?* In the Working Paper we suggested that an EPA should have a minimum of two attorneys and these would have to act jointly. We thought this might be a useful safeguard for the donor in that there would be increased consultation about his affairs and reduced scope for exploitation. In other words, one attorney could not act on his own. The consultation, however, revealed that there were misgivings about this suggestion. We accept that there is much force to some of these misgivings. For example, one of the main justifications for devising a scheme permitting the creation of EPAs is that the donor should be allowed to leave the management of his affairs to the person whom he trusts. Accordingly, if a donor is completely satisfied that a particular individual is entirely suitable to carry out the attorney's duties alone, it is hard to see why the law should insist on there being at least two joint attorneys, especially if the donor knows one suitable candidate only. Moreover, a requirement that there should always be not fewer than two would plainly make the scheme less flexible and increase the risk of the attorneyship collapsing.

3.28 It also emerged on consultation that some misgivings existed as to whether it would really be safe to allow authority under an EPA to become vested, without further enquiry, in any two persons (even if they had to act jointly). The selection of examples is invidious but there is little doubt that in this field some measure of concern attaches in the public mind to hospitals, residential nursing homes and other institutions where the opportunity to exert undue influence clearly exists. Should an EPA granted to, say, the owner of a nursing home and his or her spouse be acceptable without further enquiry on the basis that there are two attorneys acting jointly? A provision, however, disqualifying certain classes of persons or combinations of persons from appointment under an EPA would not provide a solution since unsatisfactory attorneys cannot readily be identified by class description. Such a provision could, at best, be only partially successful at weeding out undesirable attorneys whilst it would arbitrarily disqualify many who might otherwise make execellent attorneys.

3.29 In the result, we have come to the conclusion that our suggested safeguard that there should be a minimum of two attorneys acting jointly would be unsatisfactory not only in terms of efficiency and convenience but also in terms of security. Since this was one of the primary safeguards suggested in our Working Paper we have had to consider what other safeguards should be provided in its place; preferably one that would help "weed out" unsuitable attorneys.

3.30 *Notification of relatives.* We have already said that we feel that the basic scheme offers insufficient protection for the donor.[92] Such protection as it can give operates chiefly at the time of execution. It enables the capable donor to be aware of the enduring quality of the EPA; and the independent witnessing requirement reduces the risk of forgery. But it offers no other protection apart from the "long stop" of intervention by the Court in the event of it learning of misconduct or mismanagement by the attorney. In short, the protection of the basic scheme is essentially *passive*: provided that the formalities at execution are complied with, there is little further serious attempt at safeguarding donors' interests. Thus, there is no real protection if the donor at the time of execution is no longer fully capable or has become

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[92] See para. 3.21 above.

" suggestible ". And even if the donor is fully capable at the time he executes he still needs (but under the basic scheme is unlikely to get) protection in respect of matters which come to light after he has lost capacity. He may have made a mistake in his choice of attorney or in the scope of the authority given to him. Unfortunately he will not be in a position to correct that mistake if the truth surfaces only once he is incapable. We accordingly recommend a *positive* safeguard. We propose that the attorney should be required to notify the donor's closest relatives to give them an opportunity to vet the attorneyship and object, if they think fit, to the attorney's continued operation of the EPA.

3.31 Our notification proposal would operate as follows. The attorney's duty to notify would arise once he had reason to believe that the donor was becoming, or had become, incapable. Relatives could raise objection on a variety of grounds—these could relate to the validity of the power or to the attorney's suitability. If the objection were upheld by the Court the attorney would normally be prevented from acting further.

3.32 Since this proposal would involve notifying the donor's closest relatives—usually those who would know him best—any doubts about the attorney or the EPA could be aired before the attorney began acting unsupervised. And the absence of objections from relatives, following the opportunity to express any they might have, would indicate a degree of satisfaction on their part with the arrangements made by the donor.

3.33 There are two further matters to which we would like to refer in this connection. First, we think that there will be certain classes of attorney who can safely be excused from the notification requirement.[93] Secondly, it is necessary to make other arrangements to protect the donor in cases where there are no relatives who can be notified.[94]

3.34 *Registration.* Having accepted that this sort of notification procedure would provide a useful safeguard (and one that did not involve the disadvantages of the " two attorney " proposal) it became clear to us that some sort of registration of the EPA would be necessary to back up the notification.[95] Our reasoning runs as follows. The main proposal contained in this Report is that an EPA should not be revoked by the donor's subsequent incapacity. On the other hand we consider it important that so far as possible the attorney should not, once the donor has become incapable, continue acting until he has cleared the notification procedure. But how can the attorney be encouraged to notify? Clearly some sort of incentive is needed. We therefore propose that once the donor's mental incapacity is such that if the EPA had been an ordinary power it would have been revoked, then the attorney should not in general be able to operate the EPA until he had cleared the notification procedure.[96] Since the attorney's authority under

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93 See para. 4.43 below.

94 See para. 4.48 below.

95 One possible safeguard for the donor mentioned in the Working Paper was that there might be a requirement that the EPA should be registered or filed with an independent body. We said, however, that such a requirement would be meaningless unless that independent body had powers of supervision over the attorney's exercise of his authority; and we were anxious not to impose requirements which would have the effect of making the attorney's position under an EPA indistinguishable in practice from that of a receiver under the Court of Protection. Our initial rejection of such a registration or filing requirement met with general approval.

96 Such an attorney would, however, have a limited authority under the power once he had applied for registration: see para. 4.53 below.

the EPA would, once the donor had become incapable, effectively depend on clearing the notification procedure it follows that there must be some means whereby a third party could know that this has happened. Registration of the EPA by a central body is an obvious means. Registration would operate to confirm that the EPA was valid and that the notification procedure had been cleared without any sustainable objection from the persons to whom the notification had been sent. Thus the registering body would register the EPA in the absence of any good reason for not doing so. The fact of registration would be noted on the face of the EPA and would both enable the attorney to continue operating the power and allow a third party to deal securely with him.[97]

3.35 It is clear that there would not be registration without a registering authority. There would have to be someone to whom relatives could send objections, someone to judge whether the objections were sustainable and someone to complete the registration. In our view, that someone should be the Court of Protection. The Court has an experience and expertise in the administration of the affairs of the mentally ill which is unrivalled by any other body. Furthermore, if an application for registration were refused for any reason it would generally be the case[98] that the Court would be able to make a receivership or similar order in respect of the donor's property and affairs. Thus if the Court were not satisfied with an application for registration it could institute its own proceedings without delay.[99]

3.36 We feel that a registration system along the lines that we have indicated would form an integral part of an effective system for safeguarding the donor's interests. We accordingly recommend its creation.[100]

3.37 *Gifts.* We have already pointed out that attorneys may be tempted to help themselves to the donor's property, albeit with the best of intentions.[101] We accordingly recommend that the authority of the EPA attorney to make gifts of the donor's property should be limited. At a more general level, we also recommend restrictions on his authority to use his position to benefit persons other than the donor.

3.38 *The Court of Protection.* We must emphasise that at no stage in our consideration of this subject has it ever been suggested that anything now done by way of modifying the law about powers of attorney should diminish the *existing* jurisdiction of the Court either by preventing applications to it by interested persons or by inhibiting the exercise of the Court's inherent right to intervene in proper cases. The introduction into the law of the EPA might reduce somewhat the need to call upon the Court to exercise

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97 We see no purpose in permitting public inspection of the register otherwise than with the leave of the Court. Even those closely connected with the attorney would normally have no need to inspect it: it would be undesirable to permit those who were merely curious to do so. In any event a general right to inspect might in some cases imply a duty to inspect so that people would feel bound to inspect the register rather than, as we would wish, inspect the instrument itself.

98 Assuming that the donor was already mentally incapable.

99 Because our proposals vest the judicial functions for EPAs solely in the Court of Protection it follows that the EPA scheme will be based in London. We accept that there may be a case for jurisdiction in some respects being vested more locally—for example in the County Court. This is not, however, a matter that is within the scope of this Report.

100 Several foreign jurisdictions that we examined provide for registration of the EPA. These include North Carolina and the Northern Territory.

101 See para. 3.11 above.

its jurisdiction; but the jurisdiction itself would not thereby be prejudiced.[102] Throughout, the existence of the Court would be and would remain the ultimate safeguard. Once the donor had become incapable the Court would be able to deal with any cases of abuse by terminating the EPA. This it could do by, for example, appointing a receiver.

Summary

3.39 In this introduction to our proposals we have tried to show the problems that arise under the existing law once donors of powers lose capacity. We consider that the position of both donor and attorney in these cases is often far from satisfactory. We feel that these problems could be solved by a change in the law so as to permit certain powers to survive the donor's mental capacity and we so recommend. We accept, however, that some safeguards are necessary to protect the donor's interests. We propose a system of notification and registration to help implement this protection and to facilitate the operation of the EPA once the donor is incapable. We now discuss our recommendations in greater detail.

PART IV

OUR RECOMMENDATIONS—IN DETAIL

(a) A type of power

4.1 We wish to emphasise at the outset that the EPA would be a power of attorney albeit a special type of power. It would therefore follow the general conceptual pattern of any other power. The Powers of Attorney Act 1971 would in principle apply to EPAs as it does to ordinary powers. Nevertheless, the EPA, as a particular type of power, would be designed to cope with a particular situation. Therefore, particular rules would apply to it. The situation to be dealt with by the EPA would be that the power would be given by a single individual who, wishing it to continue after his loss of capacity, had found someone whom he trusted sufficiently to act for him at that time as well as before.

(b) Types of power excluded

4.2 It follows from our comments in the previous paragraph that the EPA scheme would be inappropriate for some types of power. We have identified three types of power that we feel should not be drawn up in a form appropriate to EPAs. The *first* comprises powers created otherwise than by single individuals: only individuals suffer mental incapacity. Thus, for example, corporations could not be donors. *Secondly,* we would exclude powers granted by trustees pursuant to section 25 of the Trustee Act 1925. Under that section a trustee may delegate the exercise of his functions for a period of up to twelve months. Clearly little practical value could attach to setting up an EPA with such a short life (only part of which could represent a period during which the donor trustee would be incapable); in any event, the Trustee Act 1925 itself contains provisions for the replace-

[102] Indeed the Court's jurisdiction would be extended under our proposals: see para. 4.78 *et seq.*, below.

ment of incapable trustees.[103] *Thirdly*, we think that irrevocable powers given as security[104] should not be covered by our EPA recommendations. Such powers are not affected by the incapacity of the donor.

(c) Creation of an EPA

4.3 Since the EPA would be a type of power of attorney the formalities surrounding its creation would only differ from those applicable to ordinary powers where particular aspects of our scheme necessitated variation.

(i) Donor

4.4 It would clearly be of the greatest importance that the EPA donor had sufficient mental capacity to create the power. We have already said[105] that in general anyone who is capable of entering into a valid contract can be a donor under an ordinary power. We feel that the test of contractual capacity would be as satisfactory for EPAs as for ordinary powers and we therefore recommend no special provisions for EPAs in this respect. Thus the EPA donor would have to be capable of understanding the nature and effect of the particular EPA at the time he executed it.[106]

4.5 As we have already implied,[107] the EPA donor should be a single individual ; accordingly, not every person capable of being a donor under an ordinary power would be able to qualify as a donor under an EPA.[108] Provided however that a prospective donor were a single individual, we would recommend that he be as free to create an EPA as he already is to create an ordinary power. Thus minors and undischarged bankrupts would be able to create EPAs.[109]

(ii) Attorney

4.6 In general anyone can be appointed an attorney under an ordinary power.[110] This reflects the usual characteristic of ordinary powers that they merely authorise the attorney to act rather than require him to. Whilst this is equally true of EPAs the latter would, in many cases, involve the attorney in functions of considerable responsibility: functions which might extend to managing the whole of the donor's affairs in addition to his own. We therefore recommend that some restrictions be imposed on the appointment of persons as EPA attorneys.

4.7 The EPA attorney must plainly be *mentally capable* for a valid EPA to be created. It is not entirely clear how relevant the attorney's capacity

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103 Sect. 36. Where, however, the incapable trustee owns a beneficial interest in the trust property such a replacement may require the leave of the Court of Protection (s. 36(9)).

104 See n. 37 above.

105 See paras. 2.4 and 3.25 above.

106 Para. 2.6 above. We do not consider that a requirement of medical evidence as to the donor's capacity would be either practicable or desirable: see para. 4.19 below.

107 Para. 4.2 above.

108 Thus corporations could not be EPA donors nor could groups of individuals such as trustees and partnerships.

109 We would envisage that instances of minors or undischarged bankrupts creating EPAs would be rare. The existing law does, however, permit the creation of ordinary powers by a minor to secure the performance of any act which he could validly perform himself. An undischarged bankrupt is also permitted to create an ordinary power although, since his assets are vested in his trustee in bankruptcy, the scope of his attorney's authority is necessarily limited.

110 There are a few exceptions. For example a corporation may only act as attorney if authorised to do so under its constitution.

is in the context of ordinary powers.[111] For EPAs, however, we recommend that the test of capacity for the attorney should be the same as for the donor. Thus he must be capable of understanding the nature and effect of the particular EPA at the time he executed it.

4.8 We do not feel that the EPA attorney should ordinarily be other than an *individual* or individuals.[112] We have considered whether perhaps companies might qualify. The nature of the duties of the EPA attorney suggests to us that few companies would be suited to, or wish to assume, an EPA attorneyship. It does seem to us, however, that there is a case for allowing trust corporations[113] to act in this capacity. They have acquired considerable experience in managing the property and affairs of others through their executor and trusteeship functions. We accordingly recommend that trust corporations, but not other companies, be permitted as EPA attorneys.

4.9 We recommend that EPA attorneyship should not be open to *minors* or *undischarged bankrupts.* So far as minors are concerned, we feel it would be unrealistic to expect them to undertake the responsibilities of managing the donor's property and affairs. Admittedly, the disability of minority might have been removed by the time the donor became incapable. On the other hand, many donors would be likely to grant EPAs at a time when, although capable, they were already starting to feel the need for assistance straightaway —not in a few years time. In any event, however, we do not feel that the appointment of a minor attorney reflects reality. We would envisage that a donor appointing a family attorney would normally appoint a spouse or adult offspring. But it would still be possible for a donor to appoint as attorney a minor under an ordinary power. As regards bankruptcy, there are a number of objections to appointing an attorney who is an undischarged bankrupt. Clearly it would often be difficult to justify allowing a person whose own affairs had foundered to be put in charge of someone else's especially when that someone else might soon be incapable and unable to supervise the attorney. There might also be the suspicion that the bankrupt attorney might find irresistible the opportunity presented by his attorneyship to use the donor's assets to improve his own position. As with minority it might be the case that the disability would be cured by the time the donor lost capacity. Again as with minority, however, many donors would be relying heavily on the attorney from the moment the EPA was executed. We further recommend that the bankruptcy of an EPA attorney should automatically revoke his power.[114]

(iii) Form and Content

4.10 We regard the form and content of the EPA as being matters of the greatest importance. As we have already said,[115] it is essential that both the

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111 The attorney is not, after all, normally a party to an ordinary power. Since the EPA attorney would be executing a deed it would be necessary for him to be mentally capable.

112 The donor may wish to appoint more than one attorney: we discuss this at para. 4.91 *et seq.*, below.

113 By which we mean the Public Trustee and corporations either appointed as trustee by the court in any particular case or else entitled by rules made under s. 4(3) of the Public Trustee Act 1906 to act as custodian trustee.

114 The bankruptcy of an attorney under an ordinary power will revoke that power if the insolvency is inconsistent with the continuation of the attorney's duties thereunder. Much will depend on the circumstances of the agency: see *McCall* v. *The Australian Meat Co. Ltd.* (1870) 19 W.R. 188.

115 See para. 3.26 above.

donor and the attorney appreciate the nature and effect of the EPA at the time of execution. Indeed, so important do we consider the form and content to be that we recommend that no power should be an EPA unless it were in a particular form, contained particular information and were executed in a particular manner.[116] We have included in Appendix C to this Report a specimen of how the EPA might look and our discussion of the form and content in the next few paragraphs focusses on this specimen. We recommend, however, that the details of the form, contents and execution be left to the Lord Chancellor who would be responsible for prescribing them by regulations.

4.11 *The instrument.* It will be seen from the specimen EPA in Appendix C to this Report that we intend the prescribed form of EPA to be an "all purpose" instrument. The specimen allows for a single attorney or for a number of attorneys acting jointly or jointly and severally. The donor can give general authority for the attorney to act in relation to all his affairs (or just some) or a limited authority for him to act in relation to all his affairs (or just some). The inapplicable alternatives would be deleted. The donor can limit the attorney's authority by adding such restrictions and conditions as he wishes and provide for any additional matters such as the attorney's remuneration. Finally the form contains obligatory material—that is, statements by the donor and attorney and explanatory notes.

4.12 We recommend that the EPA be *mandatory* as to form because we believe it to be important that it contains the obligatory material. In particular, it will be seen that the document creating the EPA incorporates the notes attached to our specimen EPA. Thus the instrument and the notes are inseparable and so the form must be mandatory. We recommend that the form be *prescribed* by the Lord Chancellor rather than be set out in a statute because this will facilitate amendments to the form in the light of experience. This is especially necessary in view of the detailed nature of the notes.

4.13 *Explanatory notes.* We recommend that no power should be an EPA unless the document creating it incorporated the prescribed explanatory information or notes at the time of execution by the donor. These notes would be intended to inform the donor and the attorney of some of the more important features of the EPA. The sort of notes that we have in mind are those attached to our specimen EPA. In particular, we would want the notes to explain to the donor the effect of the authority that he was giving the attorney under the power. Thus, if the attorney is given general authority he will be able to use the power to do anything that can be done by an attorney. This would include selling any of the donor's property (including his house). Accordingly, if the donor does not want the attorney to have so extensive an authority he must make this clear on the face of the instrument. This he could do either by giving the attorney general authority but limiting it by inserting restrictions or conditions—for instance, excluding the attorney's authority to deal with the house—or by giving him authority to do specified things only. The notes should also explain when the attorney's duty to register the instrument arises and inform him that there are requirements as to notification of the donor and the donor's relatives which

[116] We recommend, however, that immaterial differences in the form or content of the instrument should not affect its validity. We would not, on the other hand, envisage the Court being empowered to validate instruments that were invalid as EPAs.

must be complied with before registration.[117] In addition the notes should explain that the attorney has authority, albeit limited, to use the donor's property to benefit persons other than the donor.[118] Thus, for example, the attorney can make some gifts to himself. If the donor wishes to restrict or prevent this he must make this clear on the face of the instrument.

4.14 We would envisage that law stationers will print these explanatory notes in close physical proximity to the prescribed form. Ideally the notes should be securely attached to the prescribed form so that the donor can read them before executing the EPA and the attorney will be able to refer to them from time to time for guidance. Whilst, however, a power cannot be an EPA unless the document creating it incorporated the notes at the time the donor executed, we accept that, if the notes become detached from the instrument after execution, there may subsequently be doubt as to whether the notes actually were there at execution and therefore as to whether an EPA was created. In such a case we recommend that there should be a presumption (in the absence of evidence to the contrary) that an instrument in the prescribed form and executed in the prescribed manner did in fact incorporate the notes at the time of execution by the donor.

4.15 The explanatory notes are intended primarily as a mandatory minimum form of protection for the capable donor in order to explain to him the effect of an EPA and the attorney's authority under it. There are, however, other notes which could sensibly be included on an optional basis by law stationers and these might

(*a*) explain the qualifications necessary to be an EPA donor or attorney, stressing that only a person capable of understanding the nature and effect of an EPA could be a donor ;

(*b*) inform the attorney of his duty to keep sufficient records to enable him to produce accounts ;

(*c*) warn third parties that if they know that the donor is incapable and that the deed is not yet registered they should check that the attorney has authority to effect the transaction in question.[119]

4.16 *Obligatory statements.* We have already said[120] that we recommend that the EPA should contain statements to help ensure that the donor and attorney are aware of the nature and effect of the power being given. There would be four of these statements. The *first* statement would be by the donor to the effect that he intends the power to continue in spite of any supervening mental incapacity on his part.[121] The *second* statement would also be by the donor and would be to the effect that he had read the explanatory information incorporated into the power. The *third* and *fourth* statements would be by the attorney and would be to the effect that he under-

[117] We feel that it would be very helpful if a booklet, written in simple terms, were provided for the assistance of Citizens' Advice Bureaux and similar organisations which are likely in practice to assist persons who wish to create EPAs. This booklet would, among other things, explain the notification and registration requirements.

[118] See para. 4.23 *et seq.*, below.

[119] See paras. 3.34 above and 4.53 below.

[120] See para. 3.26 above.

[121] This is, of course, one of the provisions of the basic scheme: see para. 3.17 above.

stood about his duty to register the power[122] and about his limited power to use the donor's property to benefit persons other than the donor himself.[123]

4.17 *Execution by the attorney.* We propose that the EPA be executed by the attorney as well as by the donor. This is unlike the position with an ordinary power which is a deed poll and does not need to be executed by the attorney. On the other hand a deed poll is not in itself capable of imposing duties on others. Since our proposals would involve imposing a duty on the attorney once the donor had lost capacity[124] it would clearly be desirable, both from the point of view of the donor and the attorney, that the attorney know the nature of his responsibilities at the outset. We consider that the best way of achieving this would be for the attorney to be a party to the instrument and to execute it accordingly. The formality associated with execution, in contrast with mere signature or counter-signature, would be an indication to the attorney of the importance of the operation. Failure by the attorney to execute would mean that only an ordinary power could be created.

4.18 *Witnesses.* We propose a requirement that the signatures of both donor and attorney be witnessed. We suggest that a single witness would suffice in both cases. It is true that ordinary powers do not generally[125] require attestation even though in practice they are attested. It would however be in the nature of an EPA that it would be operable at a time when the donor was incapable and thus in no position to settle any doubts as to his due execution of the instrument. We accordingly recommend that his signature be witnessed. This need for attestation has less relevance in relation to the attorney's signature. We suggest, however, that the same requirements apply since this would accord with the general practice that signatures in deeds are witnessed and would maintain consistency within the deed. We also recommend that neither party should be the witness to the other's signature.[126] Failure to observe these attestation requirements would mean that only an ordinary power could be created.

4.19 We would mention at this point that we have given careful consideration to the question whether the witness should be a " special " witness—a solicitor or doctor, for example—for the purpose of assessing the donor's capacity to create the EPA. Some of our consultees would have favoured such a rule but we have come down, on balance, against it. It is true that if the donor's solicitor or doctor knew the donor sufficiently well to be able to judge whether he had sufficient capacity to create the EPA, his attestation (which might incorporate some form of certificate) would go a long way towards proving that the EPA was not void at the time of creation on the ground of incapacity.[127] But the attestation of a solicitor or doctor who was not familiar with the donor should not, we think, carry any such additional weight; and problems would certainly arise if the witness were required to

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122 See para. 4.34 *et seq.*, below.

123 See para. 4.23 *et seq.*, below.

124 This is the duty to apply for registration of the power. The duty would in fact arise once the attorney had reason to believe that the donor was becoming, or had become, incapable: see para. 4.35 below.

125 See also ss. 1(1) and (2) of the Powers of Attorney Act 1971 as regards a power executed on the donor's behalf by a third party.

126 This is, of course, in line with one of the provisions of the basic scheme: see para. 3.17 above.

127 Though the opinion of a special witness would turn on subjective considerations. Thus one special witness might consider the donor to be capable whilst another might disagree.

furnish any form of certificate, because a person's degree of understanding is notoriously difficult to judge on a short acquaintance.[128] By contrast, the persons who would be far more likely to be able to make that judgment would be the relatives who would be notified under the proposed notification procedure and we think that this aspect of the matter would be better left to them. Indeed, it could be argued that the existence of a special witness would tend to eclipse the views of the relatives on this point and we think that this would be undesirable. An additional objection to a requirement of a special witness is that donors might be reluctant to approach the necessary solicitor or doctor.

(iv) Attorney's Authority

4.20 The extent of the attorney's authority would, as with ordinary powers, turn primarily upon the wording of the instrument. And the fact that the EPA would have to be in the prescribed form would not alter this. The donor could give *general* authority for the attorney to act in the whole or part of his affairs or just a *limited* authority. The donor could limit the authority by adding such restrictions and conditions as he wished. Where general authority was given we propose this should authorise the attorney—subject to any such restrictions and conditions—to do under the power anything which can lawfully be done by an attorney.[129] Thus the attorney would be authorised to sell any of the donor's property, run his business and so on. If, however, the attorney's authority were limited so that, for example, the sale of the donor's house or other specified property were forbidden, the attorney would be powerless to carry out such a transaction. We consider that the authority given to the attorney and the measure of control over the donor's affairs which he would accordingly exercise should, in principle, be a matter to be decided upon by the donor in consultation with the attorney.

4.21 We do, however, recommend that our EPA scheme contain some regulation of the attorney's authority. Whilst any donor should in general be at liberty to give his attorney such authority as he wishes, the donor of an EPA (unlike other donors) would not be able to retract the authority or otherwise supervise the attorney once he had lost capacity. We accordingly feel that some control over EPA attorney's authority is justified in order to protect the donor's interests.

4.22 *Delegation and substitution.* As in the case of ordinary powers[130] the EPA attorney would have implied power to delegate any of his functions which were not such that the donor would have expected the attorney to attend to them personally. Any wider power to delegate would have to be provided for expressly in the instrument. We would not wish, however, the attorney to be enabled to appoint a substitute or successor to himself.[131] This would be contrary to the special relationship of trust subsisting between the EPA donor and attorney and would undermine some of the safeguards which we recommend in this Report. We accordingly propose that no power

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128 It would seem likely that the suggestion that the donor's mental capacity was being assessed would often cause embarrassment for donor and witness alike and so perhaps deter the donor from creating the EPA. There is also some evidence that, in the area of wills at least, doctors are not always willing to act as witnesses.

129 As in the case of a general power created in accordance with s. 10 of the Powers of Attorney Act 1971.

130 See para. 2.15 above.

131 I.e. thereby irrevocably parting with his authority under the power (as opposed to mere delegation).

that enabled the attorney to appoint a substitute or successor should be capable of being an EPA.

4.23 *Benefiting others.* We propose that there be restrictions on the attorney's authority to use his EPA to benefit persons other than the donor himself, whether by way of gift or otherwise. We have already said[132] that even under a general ordinary power the attorney's authority may be restricted by virtue of the fiduciary relationship normally existing between principal and agent. The agent must not, for example, use his position to acquire any benefit for himself unless he has his principal's informed consent.[133] Thus the attorney who wishes to be able to use his power to benefit himself (or perhaps others) should ensure that he has such consent to the arrangement. The extent of these restrictions will depend on all the circumstances including the relationship between the donor and the attorney but the prudent attorney should always satisfy himself that he has the donor's consent before using the power to benefit anyone other than the donor.

4.24 The difficulty that arises with EPAs in this area is that it will not be possible for the attorney to obtain the donor's effective consent once the latter has become incapable. Accordingly, the attorney's authority under the EPA to, say, maintain the donor's dependants or make gifts may be doubtful unless the EPA specifically authorises this. One solution to this might be to encourage the donor to frame his EPA so as to authorise specifically the making of gifts and other similar transactions. We doubt whether such a policy would operate in the donor's best interests. An unlimited authority to make gifts might tempt the attorney to abuse his position especially if he himself fell on hard times and persuaded himself that the donor, if capable, would have wanted him to benefit in this way. And the unscrupulous attorney might persuade a semi-capable donor that such an authority was standard practice and perfectly safe. Another solution would be to prohibit totally the use of EPAs for benefiting persons other than the donor. Thus the attorney who wanted to benefit others would either have to use an ordinary power or, if the donor was incapable, apply to the Court for permission.

4.25 The consultation in response to our Working Paper reflected conflicting views so far as gifts were concerned. At one end of the spectrum some people thought that no special provisions were needed to restrict the attorney's authority: by contrast others felt that the attorney should never be permitted to make any disposition other than for full consideration.

4.26 Our recommendations fall between these two extremes. We feel that to deny the attorney any authority to use his EPA to benefit persons other than the donor would deprive the EPA of much of its practical utility. Indeed we feel that it would be sensible for attorneys to have a limited authority in this area. On the other hand we feel it would be undesirable to allow attorneys unrestricted authority.

4.27 We accordingly recommend that all attorneys should have statutory authority to use their EPA to provide for the *needs* of anyone (including themselves) for whom the donor might have been expected to provide

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132 See paras. 2.9 and 2.16 above.
133 *Parker* v. *McKenna* (1874) L.R. 10 Ch. App. 96.

had he then been capable. This authority would be limited to doing whatever the donor might have been expected to do to meet those needs had he then been capable. We also recommend that all attorneys should have statutory authority to use their EPAs to make *gifts* of the donor's property provided that such gifts were either

(a) gifts of a seasonal nature or on the occasion (or anniversary) of a birth or marriage made to persons (including the attorney) who are related to or connected with the donor, or

(*b*) gifts to any charity to whom the donor had made donations (or might have been expected to make had he then been capable)

provided (in either case) that the value of each such gift was not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.

4.28 We recommend that attorneys should have both the authority to provide for needs and the authority to make gifts without the need for any enabling provision in the EPA itself and both authorities would be exercisable whether or not the donor was incapable and without the need for the attorney to obtain anyone's consent.[134] Both authorities would, however, be subject to any provision in the EPA that had the effect of restricting or excluding them. Thus if the donor provided in the EPA that the attorney was not to use the power for anyone's benefit apart from the donor's, the statutory authorities which we recommend would be excluded. And the same result would arise if the authority specified in the EPA were so limited as to exclude any possibility that other persons were to be benefited. Thus if, for example, the authority were merely to collect income and pay debts the attorney would not be authorised to maintain the donor's relatives or make any gifts.

4.29 We accept that these limitations on the attorney's authority may be considered by some people either unnecessary or arbitrary. Not for the first time in this project, however, we have had to balance considerations of simplicity and freedom of action against the need to protect donors against exploitation. On balance we feel that limitations are necessary. As for the limitations being arbitrary we have endeavoured to give such authority as we think most attorneys would be ever likely to need.[135]

4.30 *Restrictions by reference to value or time.* We considered whether the use of EPAs should be limited by considerations of value or time. We recommend, however, that it should be permissible to create an EPA in respect of an estate of any value and for any period of time. As regards *value,* the extent of the donor's property might be a factor in deciding whether an EPA was appropriate and who should be the attorney. There would, however, be no automatic correlation between the extent of the property and the difficulty of managing it. Furthermore the imposition of an arbitrary limit could involve costly and time-consuming valuations and would logically[136] involve the termination of the power if the limit were exceeded

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134 Any provision in an EPA purporting to give the attorney a greater authority to benefit persons other than the donor would be ineffective. But see para. 4.83(vii) below.

135 If greater authority were needed it might be possible to obtain this with leave of the Court: see para. 4.83(vii) below. Whilst the donor is still capable he can of course use an ordinary power to authorise the attorney to benefit others without limitation.

136 As the model " Special Power of Attorney for Small Property Interests Act " adopted in several States in the U.S.A. recognises.

at some later date. So far as *time limits* are concerned these would seem positively disadvantageous in the context of EPAs. It would not be possible to forecast for how long an individual EPA would be needed except that it would usually be needed for as long as the donor's incapacity lasted. A time limit, whether it ran from the creation of the EPA or perhaps its registration, would be liable to result in its termination at a time when the donor would be incapable of creating a replacement.[137]

(v) Gaps in Attorney's Authority

4.31 We would like to sound a note of caution about the drafting of the attorney's authority under the EPA. Subject to the exceptions mentioned above, the donor would in general be able to insert in the prescribed form of EPA whatever provisions he thought fit whether they related to the subject-matter of the power or to the authority conferred under it. And he could grant as many EPAs in favour of as many attorneys as he liked. This would merely reflect the general principle that people should be able to make such arrangements for the management of their affairs as they please. It will be important, however, for the donor to ensure that the authority bestowed under his EPA (or EPAs if several are granted)[138] effectively covers the whole of his property and affairs.[139] If he leaves a "gap" so that part of his property and affairs is not covered by an EPA, it may be necessary for the Court to intervene and appoint a receiver. And whilst we would not wish to prevent the donor giving his attorney such limited authority as he thought fit, the fact remains that the less authority that is given to the attorney, the greater is the risk that he would be unable to act for the donor at a later date. If by that time the donor were incapable so that he could not create a new power, the Court might have to take over.

(d) The operation of an EPA whilst the donor is capable

4.32 We envisage that whilst the donor was capable the EPA should be operable like an ordinary power. Thus, once created, the EPA would be treated by both donor and attorney as an ordinary power with the attorney acting under it in accordance with the authority given him by it as and when required. The extent of the attorney's authority would, as with ordinary powers,[140] turn primarily upon the wording of the instrument. And his duties would be those of an attorney under an ordinary power.[141] In the absence of any contractual obligations the attorney would owe no duty to operate the power and indeed the instrument might well have been executed with the intention that its authority should not be exercised at all whilst the donor retained his faculties. Either party could terminate the EPA, as in the case of an ordinary power.[142] We recommend, however, that any disclaimer by the attorney should be invalid unless and until he had notified the donor of

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137 The donor would, however, be free to limit the EPA by reference to value or time if he so wished. Although we would consider such limitations to be unusual we would not recommend that they be capable of extension by the Court.

138 See para. 4.91 *et seq.*, below.

139 Subject to any property which he excludes from the attorney's authority for whatever reason e.g. to prevent its ademption (see para. 4.65 below).

140 As to which see para. 2.8 *et seq.*, above.

141 As to which see para. 2.13 *et seq.*, above.

142 As to which see para. 2.18 *et seq.*, above. An unregistered EPA would in general terminate in the same circumstances as an ordinary power (except of course upon the mental incapacity of the donor).

this in writing.[143] This would alert the capable donor to the fact that he could no longer rely on the attorney to act for him: the donor would thereby be able to consider making alternative arrangements.[144]

4.33 Nevertheless, although an EPA would be operable as an ordinary power whilst the donor was capable, we must stress that the EPA would not be an ordinary power. It would be a special type of power and by no means interchangeable with other powers. The EPA would involve a degree of trust on the part of the donor and of responsibility on the part of the attorney rarely found in other powers. Thus the donor would be unwise to create, and the attorney to accept, an EPA in cases where all that was required was an ordinary power.

(e) Duty to apply for registration

4.34 We have already expressed the view that a system of registration of EPAs would be beneficial in protecting the donor's interests.[145] In particular, registration would facilitate the operation of our proposed notification procedure. But it would also enable the attorney to operate the power, and the third party to deal with the attorney, on the basis that both the power and the attorney's authority under it were valid and subsisting.[146] This would be partly because instruments would only be registrable by the Court if they satisfied the formalities required of an EPA and if the notification procedure were cleared. It would also be because registration would remove any doubt as to the attorney's right to exercise his authority under the power.[147] It would accordingly be in the interests of all parties to ensure that an application for registration were made at the appropriate time.

4.35 *When to apply for registration.* We recommend that the attorney should be under a statutory duty to apply to the Court for the registration of his EPA once he had reason to believe that the donor was becoming, or had become, mentally incapable.[148] The attorney's attention would of course have been drawn to this duty at the time he executed the EPA. The duty would operate only when the attorney had " reason to believe ". The reason for this is the difficulty in deciding when a person has lost capacity: such decisions can be very much a matter of opinion. It would perhaps have been possible to require that the attorney should obtain an expert medical opinion ; but medical evidence (which is required in receivership proceedings) is liable to cause embarrassment both to the donor and attorney and might detract from the acceptability of the proposed EPA scheme as a whole.[149] In any event, our recommendation is intended to cover not only the incapable donor but also the donor who is *merely becoming* incapable. We feel that our choice of words would help prevent the risk that the conscientious attorney might

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143 It is doubtful whether a written notice of disclaimer is necessary in the case of ordinary powers.

144 Once, however, the attorney had reason to believe that the donor was becoming or had become incapable he would have to notify not the donor but the Court: see para. 4.54 *et seq.*, below.

145 See para. 3.36 above.

146 Provided that the attorney and the third party were acting in good faith: see para. 4.86 *et seq.*, below.

147 For the restrictions on the attorney's authority once the donor has become incapable but before registration, see para. 3.34 above and 4.53 below.

148 The duty could only arise, however, if his power were a valid subsisting EPA at that time. Thus if, for example, the donor had previously revoked the EPA no duty would arise.

149 Furthermore the opinion of one medical expert might well differ from that of another.

delay his application until (perhaps years later) he was absolutely certain that the donor was incapable. Our proposal would also in many cases enable the attorney to register his EPA before his authority became inoperable by the donor's actual incapacity.[150]

(f) The registration procedure

4.36 The registration procedure which we shall now discuss constitutes the keystone of the protective part of our scheme. Under our scheme the initial responsibility for the selection of the attorney rests with the donor. Since, however, for a variety of reasons the attorney may not be suitable to act on the donor's behalf without supervision, our scheme would ensure that the donor's relatives would have an opportunity to consider whether it would be safe to allow the attorney to continue acting once the donor's capacity was in doubt. The registration procedure would fall into two parts. First the notification to the relatives and then the actual application to the Court.

4.37 *Notification to relatives.* We propose that once the attorney had reason to believe that the donor was becoming, or had become, incapable he should notify the donor's relatives of his intention to apply for registration and inform them of their right to object if they wished.[151] For this purpose we have drawn up the following classes of relative:

(*a*) the donor's spouse
(*b*) the donor's children
(*c*) the donor's parents
(*d*) the donor's brothers and sisters (whether of the whole or half blood)
(*e*) the widow(er) of a child of the donor
(*f*) the donor's grandchildren
(*g*) the donor's nephews and nieces (of the whole blood)
(*h*) the donor's nephews and nieces (of the half blood)
(*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).

to comply with the notification procedure the attorney would, in principle, have to notify three relatives. Those three should come from the earliest classes available in the list: and if any relatives in a particular class had to be notified (in order to satisfy the minimum requirement of three) every member of that class should be notified even if that involved notifying half a dozen or more. Thus the attorney would not be allowed to choose which relatives in a particular class to notify (perhaps with the object of avoiding the notification of a particular relative who would be likely to object). If, for example, the donor's nearest relative were his two children and his five brothers the attorney must notify all seven. The attorney himself would not be excluded from the count just because he was the attorney though he would not of course have to notify himself. And it would not be necessary to notify relatives if their names and addresses were not known to the attorney (and

150 See paras. 3.34 above and 4.53 below.
151 There is nothing new about the idea of notifying relatives. It is a standard procedure for the purposes of the Court appointing a receiver under the Mental Health Act 1983.

could not be reasonably ascertained by him) or if he had reason to believe that they were minors or were mentally incapable.

4.38 We recommend some flexibility in the operation of the notification procedure. Clearly the attorney would not be expected to notify three relatives if there were fewer than that number within these classes. He would only need to notify such (if any) as there were.[152] He would not have to notify any relative if the Court agreed to dispense with the need to notify that relative on the ground that such notification would be undesirable, impracticable or unlikely to serve any useful purpose.[153]

4.39 These classes of relatives have been drawn up to reflect (in descending order) those relatives who would be most likely to know the donor best (and, perhaps, the attorney also) and have an interest in his well-being. As these relatives would also probably be the persons most nearly concerned in the donor's estate after his death, non-objection by them would be the best available guarantee that the attorneyship would not be fraught with difficulties caused by friction within the family.[154]

4.40 *The form of notice.* We recommend that the notice should explain that the attorney proposed to apply to the Court for registration of the EPA and that the recipient could object to the proposed registration by notifying the Court within one month.[155] It should also set out the grounds upon which a valid objection could be made.[156]

4.41 To assist the attorney we propose that the notice should be in a prescribed form. This would set out the possible grounds of objection and so would reduce the number of inadmissible objections received by the Court.

4.42 *Notification to donor.* We recommend that the attorney should also notify the donor of his intention to apply for registration. Whilst we appreciate that there might be cases where the sight of a formal letter of notification might cause the donor worry or distress it seems to us on balance more undesirable that the donor should be unaware of the proposed registration or learn of the proposed registration at second hand, perhaps from a notified relative. The donor's notice would merely inform him of the attorney's intention to apply for registration and of the fact that the donor, once the power was registered, would not be able to revoke the power effectively without the revocation being confirmed by the Court.[157] It would no doubt be a sensible practice for the attorney to discuss the matter with the donor before notifying him formally. The attorney would be able, however, to apply to the Court to dispense with the need to notify the donor if such notification would be undesirable, impracticable or would be unlikely to serve any useful purpose.

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152 See para. 4.48 below for cases where there is no relative to notify.

153 In such a case, however, we contemplate that the Court would be able to conduct further enquiries: see n. 163 below.

154 We appreciate that these classes of relative are not exhaustive and that, in some cases, there may be other people such as stepchildren or close friends of the donor who could usefully be notified. In the interests of certainty and simplicity, however, we have found it necessary to draw the classes to cater not for the less usual situations but to involve those people who are most likely, in the generality of cases, to have an interest in the donor's well-being.

155 A longer time limit would be undesirable: it is important that the attorney's authority should be perfected by registration as soon as possible. Objections could in fact also be made once the registration had taken place: see n. 199 below.

156 These grounds would be limited to those entitling the Court to refuse registration: see para. 4.49 below.

157 See para. 4.72 *et seq.*, below.

4.43 *Exemption from notification of relatives.* Whilst it will be clear that we regard the notification of relatives as a useful safeguard for the donor we recognise that it is possible to justify exemptions from the notification requirements on the basis that the donor's interests are adequately safeguarded by other means. In particular we feel that such exemption could be justified by reference to the type of attorney appointed. If the attorney were a member of a class or group of persons which satisfied certain criteria it might be that this would provide the donor with sufficient protection to render the notification procedure unnecessary. Such criteria might include experience at managing the property and affairs of others (especially the elderly), integrity, professional requirements (such as accounting regulations) and protection afforded by the attorney's professional organisation or his compulsory indemnity arrangements in the event of loss arising through his shortcomings. We do not think it possible to set out an exhaustive set of criteria by which possible candidates for exemption should be judged any more than it would be possible for us to provide an exhaustive list of the candidates themselves. And although some obvious candidates come to mind—trust corporations, solicitors and chartered accountants, for example—we do not necessarily suggest that other exemptions might not also be suitable. Furthermore, even the obvious candidates raise a number of questions. For instance should an exemption for solicitors extend only to those holding current practising certificates (and solicitors employed by them)? And what about other types of accountant? We feel that considerations such as these go beyond the scope of this Report. We accordingly recommend that the Lord Chancellor be empowered to exempt attorneys from the requirement to notify relatives and that the exemptions should relate to attorneys of such descriptions as he thinks fit. Exempt attorneys would nevertheless still have to notify the *donors* of their intention to apply to the Court for registration of the instrument, unless the Court dispensed with this obligation in a particular case.

4.44 *Application for registration.* As soon as practicable after notifying the relatives and the donor, the attorney would be required to make the actual application to the Court for registration of the EPA. As with the notice to relatives, we propose that the application should be in a prescribed form to save both the time of the attorney and that of the Court itself. The application form[158] would contain a series of statements as to matters within the attorney's own knowledge which would have a direct bearing on the registrability of the EPA.[159] The statements by the attorney should in our view be statements:—

(*a*) that he believed that the donor had sufficient capacity to create the power at the time of execution ;

(*b*) that the attorney at the time of the execution by him was neither a minor nor an undischarged bankrupt (nor had been the latter since) *or* that the attorney is a trust corporation ;

(*c*) that he believed that the EPA was valid and subsisting and that, if the donor had purported to revoke it, such purported revocation was ineffective (giving reasons) ;

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[158] Which the attorney would send to the Court accompanied by the EPA instrument itself.

[159] We propose criminal sanctions for attorneys who knowingly make false statements: see para. 4.101 below.

(*d*) that he had reason to believe that, by reason of mental disorder, the donor was losing or had lost the capacity to manage his property and affairs ;[160]

(*e*) of the names and addresses of the notified relatives (showing their relationship to the donor) ;

(*f*) as to whether he had reason to believe that there was any relative who had not yet been notified either :

(i) because he did not know (and could not reasonably ascertain) that relative's name and address,[161] or

(ii) because he had reason to believe that relative was mentally incapable, or

(iii) because of some other reason even though that relative was entitled to be notified (giving that relative's name and address and the reason why he was not notified) ;

(*g*) the latest date upon which he gave notice to a relative.

4.45 The attorney would not be required to file an affidavit of family and property (as would be required by the Court in receivership proceedings) or any like document. It is of the essence of our proposed scheme that the Court would not be concerned with the donor's affairs or the attorney's administration of them until it had grounds for intervention, or it became necessary for it to be informed in order to assist an attorney seeking directions. Thus the giving of notice by the attorney and the subsequent registration of the EPA by the Court would in routine cases be a simple and straightforward procedure.

4.46 *The Court's action on the application.* We regard it as an important feature of the proposed scheme that the registration by the Court should normally be a simple administrative operation. We would envisage that, in the great majority of cases, applications for registration would involve the Court in doing no more than checking that the relevant documents were in order and no objections had been made. It would seem to us to be essential to the success of the EPA scheme, both in terms of Court resources and of public acceptability, that the Court should be bound to grant the application and register the EPA in the absence of a valid objection or any other reason for not doing so. Whilst we accept that the Court should have a discretion in appropriate cases to make further enquiries and investigations, we would not expect this discretion to be exercised unless the Court " smelled a rat ". In other words it should have no duty to make independent enquiries unless there were suspicious circumstances. Thus the Court would not normally be expected to check that those relatives whose names and addresses appeared in the registration application had actually been notified.

4.47 It is clear, however, that some applications would be less straightforward. These would not necessarily be the cases where, say, the instrument was in some way invalid : such applications could be refused outright. The difficult cases would probably be those where the notification procedure

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[160] We consider this statement to be of particular importance in reducing the risk of applications being made in respect of capable donors.

[161] It would probably be sensible for the form to require the applicant to explain the steps he had taken to ascertain this information and, if none, the reason why.

had not been carried out in full or where there had been objections from such relatives as had been notified.

4.48 If it appeared from the application form that no relative had been notified, we recommend that the Court should not register or refuse to register without first considering the possibility of making inquiries.[162] If, on the other hand, it appeared from the application that a relative who could and should have been notified by the attorney had not been, we would recommend that the Court should not register the instrument unless it were satisfied that notification of that relative would have been undesirable, impracticable or unlikely to serve any useful purpose.[163]

4.49 *Valid grounds of objection.* These would be the grounds printed in the notice sent by the attorney to the relatives[164]:—

(*a*) that the instrument did not create a valid EPA;

(*b*) that the power no longer subsisted;

(*c*) that the application was premature;

(*d*) that fraud or undue pressure was used to induce the donor to create the power;

(*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.

Our comments on these grounds are as follows:—

(*a*) This would include the fact that the instrument was formally defective as an EPA (e.g. omission of obligatory statements, not executed by the parties, not properly witnessed, not under seal), that it was not capable of being an EPA (e.g. it was a trustee power), that the donor or the attorney was incapable, a corporation[165] or (in the case of the attorney) that he was an undischarged bankrupt or a minor.

(*b*) This would include the donor's valid revocation, bankruptcy[166] or death, the attorney's disclaimer, mental incapacity, bankruptcy or death and the ending of the EPA by effluxion of time or fulfilment of purpose.

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162 If the attorney had notified at least one relative and there were no other notifiable relatives (or at least none whose names and addresses could be reasonably ascertained by the attorney) then we would recommend that the registration should proceed in the absence of suspicious circumstances.

163 It is possible that, in a case where the Court agreed to dispense with notification of a particular relative, it would wish to have another relative notified in his place. Where the Court agreed to dispense with notification of all the relatives who would otherwise be entitled to be informed or where it "smelled a rat", it would be able to achieve this in substance by using the power to make further enquiries discussed in paras. 4.46 and 4.48 above. We contemplate, however, that rules made under cl. 10 of the Bill in Appendix A to this Report would permit the Court to make its own enquiries and contact persons (whether or not relatives of the donor) whom it considered might usefully comment on the proposed registration. We would, however, envisage that the Court should exercise this power in exceptional circumstances only.

164 Although we envisage that any objections would normally come from the recipients of the attorney's notification, it would be open to anyone to object to the proposed registration whether or not he was a recipient.

165 Except (in the case of the attorney) a trust corporation.

166 This follows the existing law. Thus whilst a donor who is an undischarged bankrupt can create a valid ordinary power (see paras. 2.4 and 4.5 above) such a power is automatically revoked by a donor's subsequent bankruptcy.

(*c*) This would cover the case where the donor was not yet becoming incapable.

(*d*) This is self-explanatory.

(*e*) This needs some explanation. It would amount in effect to a criticism of the donor's choice of attorney. But we would not wish this ground to be sustained merely because the attorney was not the sort of person that a particular relative would have chosen. It is our wish that the donor's choice of attorney should carry considerable weight. Thus, for example, a mother might be content to appoint her son as her EPA attorney despite being aware of a conviction for theft. We would not want her choice of attorney to be upset simply because a particular relative would not want the son to be his attorney. The question should be whether the particular attorney is suitable to act as attorney for the particular donor. In short, the Court should examine carefully all the circumstances—particularly the relationship between donor and attorney.

4.50 We have said that we recommend that the Court should register the EPA in the absence of any special circumstances and that it should have no general duty to make independent enquiries. We would not, for example, expect the Court to investigate whether the attorney was a suitable person if no relative had suggested that he was not, unless the Court had a particular reason for doing so. In cases, however, where the Court either received a valid objection to the proposed registration or had reason to believe that appropriate enquiries might produce evidence upon which a valid objection could be sustained, we recommend that the Court should not register or refuse to register without considering the possibility of making enquiries.[167]

4.51 Where the Court, whether or not following enquiries, sustained an objection it would refuse the application for registration. Grounds (*a*) or (*b*) would mean that no valid EPA subsisted anyway and grounds (*c*) (*d*) or (*e*) would mean that registration would be inappropriate. A refusal to register made on grounds (*d*) or (*e*) would result in the EPA being revoked by the Court.[168] In all cases where registration was refused (except where the refusal was on the prematurity ground) the Court would normally retain the instrument to avoid any possible confusion or misuse in the future. Where the Court refused to register the power, we would expect it to consider whether a receivership or similar order should be made in respect of the donor. Such an order would, of course, only be appropriate if the donor were already actually incapable.

4.52 Where the Court granted the application and registered the EPA it would seal the original to signify that the power had become a registered one. It would also provide office copies as required by the attorney.[169]

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167 Where the Court deemed it necessary to make an independent investigation we recommend that it should be able to direct relevant enquiries to be made by the Official Solicitor or by Visitors (see para. 2.22 above).

168 If the donor were still at least partially capable at that time, we suggest that the Court should explain to him that the power has been revoked.

169 An office copy of a registered EPA would be evidence of the fact of registration and of the contents of the instrument. Cf. s. 3 of the Powers of Attorney Act 1971 whereby the contents of powers may be proved by means of a certified copy. Sect. 3 will apply equally to EPAs whether or not registered.

4.53 *Action pending registration.* We have already said that we propose that the attorney's authority be suspended once the donor's incapacity is such that the EPA, if it had been an ordinary power, would have been revoked.[170] The purpose behind this is to ensure that, so far as possible, an attorney does not act for an incapable donor without clearing the registration procedure including the notification proposals. This policy could, however, create difficulties in cases where the donor actually becomes incapable before registration. We envisage that there would be a period of at least six weeks between the date upon which the attorney's duty to apply for registration arose and the date of actual registration. Clearly it would be no less important that the donor's affairs be attended to during that period than at any other time. There might be bills to pay (nursing home fees, for example) or investments to sell. We accordingly recommend that once the attorney had made his registration application he should be given a limited authority to act under his power. This authority would enable the attorney to maintain the donor, prevent loss to his estate and provide for the needs of himself and others to the extent that he could have done but for the power being suspended. Once registration had been completed his normal authority would be restored.

4.54 *Attorney wishes to disclaim.* We have already proposed that in cases where the donor is capable and the attorney wishes to disclaim the EPA his disclaimer should only be valid if he gave the donor written notice of the disclaimer.[171] The purpose of this was to enable the donor to make alternative arrangements such as to execute another EPA. Clearly, however, the donor will not be in a position to do this once he is no longer capable. Yet simple disclaimer by the attorney would leave him without anyone to manage his affairs.

4.55 We accept that it would not be practicable to compel an unwilling attorney to continue acting under his EPA once the donor was no longer capable. An unwilling attorney is likely to be an unsatisfactory one. Nevertheless, we do feel that the donor should not be abandoned, once he is no longer capable, without alternative arrangements for his welfare being made. We accordingly recommend that once the attorney has reason to believe that the donor is becoming or has become incapable he should not be able to disclaim his power validly until he has given written notice of the disclaimer to the Court. This restriction on disclaimers would operate whether or not the EPA had yet been registered. In either case the Court's attention would be drawn to the probability that the donor no longer had anyone managing his affairs and it would be for the Court to decide whether a receivership or other order should be made for the donor.[172]

4.56 Although this proposal would not prevent an attorney disclaiming his EPA once the donor were no longer capable, we nevertheless believe that few attorneys would disclaim lightly. This is especially so since they would often be close relatives and feel a strong moral obligation to continue. Clearly it is important that people do not agree to become EPA attorneys in the first place without understanding the responsibilities that they are taking on. This is the primary reason for our recommendation that the EPA

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[170] See para. 3.34 above.
[171] See para. 4.32 above.
[172] If the donor were still at least partially capable we suggest that the Court should explain to him that the power has been revoked.

contain a statement by the attorney to the effect that he understands his duty to register the power. Circumstances do, however, change. Years might have passed since the EPA was granted. The attorney might have moved to a different area. Indeed, he might himself now be elderly and would find the prospect of managing someone else's affairs distinctly burdensome. We accordingly accept that the attorney must be able to disclaim. We hope however that such cases will in practice be few.

4.57 *Functions of the Court.* We propose that the attorney should be able, before making an application to register his EPA, to refer to the Court for determination any question as to the validity of the power created by the instrument. Since his duty to apply for registration would be dependent upon the existence of a valid EPA a determination by the Court at this point would assist the attorney with doubts as to the validity both from the point of view of needless notification of relatives and from the point of view of his statement (in his registration application) that he believed the EPA to be valid and subsisting. The attorney would be bound to comply with any direction given to him by the Court upon that determination.

4.58 There are other functions which we recommend that the Court should have prior to registration. Since some of these are similar to the functions that we recommend the Court should have after registration, we shall discuss them at that point.[173]

(g) Position after registration

4.59 We envisage that registration would in many cases make little difference to the position of the donor or the attorney. It would serve to confirm the attorney's position as attorney and the instrument's status as a valid EPA. But the attorney's authority and duties would be largely unaffected by registration.

4.60 *The attorney's authority.* The extent of the attorney's authority would be unaltered: thus the fact of registration would give him no additional authority. Third parties dealing with him should still inspect the instrument to check that he had the requisite authority; and he would be no more able after registration to carry out transactions forbidden by the instrument than he would have been before.

4.61 *The attorney's duties.* The attorney under a registered power would have the same duties as any other attorney; that is to say those (if any) specified in the instrument and those imposed by the general law.[174] In the context of the latter, two are perhaps worth mentioning here.

4.62 *Duty to keep accounts.* Although it is of the essence of our proposed scheme that an attorney under a registered EPA should be permitted to proceed without supervision to the maximum extent possible, the EPA attorney (like any other attorney) must keep the donor's money separate from his own and must keep full and correct accounts of transactions involving the donor's money.[175] Such accounts could be called for by the donor's personal representatives or, indeed, by the donor himself. We propose, how-

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173 See para. 4.83 below.
174 As to which, see para. 2.13 *et seq.*, above.
175 See para. 2.16 above.

ever, that the Court should also have power to require the production of accounts. We say more about this below.[176]

4.63 *Duty of good faith.* The EPA attorney, as any other, must act bona fide in the exercise of his authority. There is one aspect of this duty which is particularly relevant to the registered EPA. Any disposal by the attorney of any of the donor's assets would be liable to have an effect on the entitlement of the persons interested in the donor's estate after his death. If the attorney were to sell assets which were specifically bequeathed by the donor's will the interests of the persons entitled to the residue of the estate would be preserved at the expense of the specific legatees; and vice versa. It might very often be necessary for the registered attorney to sell the donor's assets in order to provide for the donor's maintenance. And it would be possible for the attorney to arrange the sales so that the interests of particular beneficiaries (including himself perhaps) were preserved at the expense of others.

4.64. Having identified the problem, we do not feel that there is anything that we could usefully recommend to prevent it happening. The attorney's duty of good faith would forbid the carrying out of any transaction with an improper motive. Bad faith in this area would normally be very difficult to identify and could only be prevented by imposing controls on the attorney's management powers. This would, it seems to us, be counter-productive. In our view it is absolutely clear that an attorney should be entitled to decide which assets were to be sold and that his judgment in the matter should not in principle be open to question. The donor would be able to exclude from the scope of the attorney's authority any assets which he wished retained;[177] subject to that, he must be presumed to have left the decision as to which assets were to be sold to his attorney. Accordingly, we would not regard it as necessarily objectionable if the effect of an attorney's decision to sell a particular asset of the donor was to preserve his own expectations under the donor's will or intestacy at the expense of the interests of other beneficiaries. Clearly, however, if bad faith were established we have no doubt that the Court would consider terminating the EPA by making a receivership or similar order.[178]

4.65 *Ademption.* It will be apparent from our remarks in the previous paragraph that we do not propose any special rules to cover the possibility of ademption: that is to say, to cover the possibility that a gift specified in the donor's will would fail as a result of the attorney having disposed of the subject matter of that gift before the donor's death. Admittedly the Mental Health Act 1983[179] does contain provisions to protect the patient's beneficiaries against dispositions made by the *receiver.* The position of the EPA attorney would, however, be very different in this respect from that of the receiver. As we have just pointed out, the donor would be able to prevent ademption by stating in the EPA that the attorney was not to dispose of particular assets. This a patient cannot do. In addition, the attorney (unlike the receiver) would have been chosen by the donor to act for him at a time when he might no longer be capable and should, subject to the terms of the EPA, be able to have an unfettered discretion as to which

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176 See para. 4.83(iii) below.
177 See para. 4.13 above.
178 See para. 4.78 *et seq.*, below.
179 Sect. 101.

assets to sell and when. Furthermore the attorney (unlike, in some cases, the receiver) would not necessarily have any means of discovering the contents of the donor's will so as to avoid ademption: he might therefore adeem gifts without realising it.

4.66 *A duty to act?* We have already said that a power of attorney does not in itself oblige the attorney to take any action under it.[180] We have accordingly considered whether our proposals should include a statutory duty on the EPA attorney to use the power to manage the donor's affairs.

4.67 The provisional view which we expressed in the Working Paper[181] was that the attorney should be under a 'duty of prudent management' once he became aware that the donor was incapable. Thus he would be bound to do for the donor everything which he should reasonably be expected to do having regard to the donor's incapacity. The precise nature and extent of the duty would depend on all the circumstances including the skills and qualifications of the attorney. The consultation generally supported the imposition of such a duty.[182]

4.68 Having reconsidered this matter, however, we have decided against including any duty to act as part of our recommendations.[183] Whilst a duty to act has strong theoretical attractions, we soon discovered that it would bring with it a number of problems which were soluble only at the expense of considerable additional complexity to our proposed EPA scheme. One problem was deciding the nature and extent of the duty. It would, we thought, have to cover attending not only to the donor's property and affairs but also to his needs and those of his dependants. The attorney would be expected to bear in mind the manner in which the donor would have managed his affairs had he then been capable. The duty had to be fairly comprehensive if it was worth having at all. But this gave rise to the next problem. The duty would be onerous and compliance would at times be difficult. This would be particularly the case where several attorneys had been appointed each of whom might have different ideas as to the manner in which the donor would have run his affairs.[184] There seemed to be a clear risk that the prospect of such a duty to act would either deter people from becoming an attorney under an EPA or, if they were already an attorney, encourage them to disclaim. A related further problem was that of sanctions where the attorney was in breach of his duty to manage the donor's affairs. Difficult questions began to arise about measure of damages and remoteness. Could, for example, the donor's dependants sue the attorney and, if so, what could they claim? We then asked ourselves whether such a duty would often be realistic or necessary. It seemed to us that the duty would be unrealistic in the cases where the attorney was a close relative of the donor—an elderly spouse perhaps. And it would often be unnecessary in cases where the attorney was a professional person who will be paid for his services and who accepts a contractual obligation to act once the donor was no longer capable.

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180 See para. 2.5 above.
181 Para. 132.
182 Some consultees did, however, express doubts as to the practicability of such a duty.
183 Apart, that is, from the attorney's duties in connection with registration: see para. 4.34 *et seq.*, above.
184 The attorneys might be the donor's spouse and his solicitor.

4.69 Accordingly we do not recommend that the attorney be subject to a statutory duty to act. The problems that such a duty would solve would, we feel, be heavily outweighed by those it would create. And we are well aware of the risks of discouraging the acceptance of EPA attorneyships. In our view, the prospects of a donor's affairs being well run after his incapacity are dependent not so much upon duties and sanctions but rather upon his choice of attorney at the outset. And we hope that our recommendations as to notification and registration (which were not included in the Working Paper) will go some way towards ensuring that the donor's affairs are in capable hands once he is no longer capable himself.

4.70 *The attorney in charge.* It is no part of our proposals that the mere fact of registration should prevent the donor being able to run his own affairs to the extent that he is actually able to run them. For example, if the donor after registration has sufficient capacity to do his shopping or run his bank account he should be able to do so independently of the attorney; and people with whom the donor deals should not be prevented from relying on his instructions just because they know that an EPA granted by him has been registered.[185]

4.71 Nevertheless, registration of an EPA carries the implication that the donor is either incapable or becoming incapable. In certain situations it is necessary for our EPA scheme to reflect this implication and show that, to the extent of his authority under the power, the attorney is, after registration, unequivocally authorised to run the donor's affairs. In particular we have in mind situations where the donor attempts to revoke or vary the attorney's authority under the registered EPA.

4.72 *Revocation.* We recommend that the donor of a registered EPA should not be able to make an effective revocation of the power without applying to the Court for its confirmation of the revocation. The significance of this recommendation lies in the importance we attach to the ability of the attorney and third parties to rely on the fact of registration as verifying the validity of the instrument. Much of this reliance would be jeopardised if the donor were permitted to make informal revocations of his registered power. The attorney and third parties would often be uncertain whether the revocations were effective; that is, whether the donor retained sufficient capacity to revoke. We suspect that in many cases third parties would play safe and refuse to deal with the attorney further. This might not be in the donor's interests especially since the third parties might be wary of dealing directly with him as well. We therefore feel that, in these cases, the attorney and third parties should be entitled to act on the strength of the registered power until such time as the donor's purported revocation had been confirmed by the Court. At that point the Court would cancel the registration.

4.73 A recommendation of this nature does, of course, involve a balance of interests: the donor's right to resume control of his affairs against the desirability of reliance upon registration. We have to accept that the fact of registration would not always mean, as a matter of law, that the donor was no longer capable of revoking. We suspect, however, that the instances of donors under registered powers possessing such capacity would be rela-

185 It would of course be different if they were aware that he lacked the mental capacity to give the instruction in question. Cf. n. 17 above.

tively few and that the balance of interests should tip in favour of preserving the " sanctity " of registration. The attorney would, after all, have been selected by the donor as someone whom he would be happy to have representing him when incapable. A desire to revoke after registration might be perfectly legitimate but would, perhaps, be more likely to be attributable to a measure of mental incapacity rendering the continuation of the power more beneficial to the donor than its revocation.

4.74 We suggest that the mechanics of the confirmation should be as follows. The application to the Court could be made by either the donor[186] or someone on his behalf. The Court's confirmation would be automatic if it were satisfied that the donor did in fact have capacity to revoke at the date of the purported revocation and that, but for the registration, the revocation would have been effective. The revocation would take effect as from the confirmation. The Court would cancel the registration at the same time. The attorney would, pending the result of the application, be entitled to continue operating the power. If, however, the Court decided that this would for some reason be undesirable, it would be able to intervene immediately and take such action as appeared necessary. It might perhaps limit the attorney's management powers pending the decision.[187]

4.75 *Varying the attorney's authority.* Any attorney will generally do his best to accommodate his donor's wishes as expressed from time to time. In so far as he acts at all he must, in principle, act in accordance with them. The position would, however, differ somewhat in the case of registered EPAs. Registration of the EPA would take place on the basis that there was at least some doubt as to the donor's mental capacity. Thus, although the donor might still be sufficiently capable to vary the attorney's authority or give sensible detailed instructions as to how the attorney should manage his affairs, it would no longer be safe to allow such variation or instructions to have legal effect. We accordingly recommend that once the EPA has been registered the donor should not be able to vary the scope of the attorney's authority under the power. Furthermore, any instructions or consents that the donor might give should have no legal effect. The attorney and third parties should therefore ignore them.

4.76 How should the third party (such as the bank manager or the stockbroker) react when he received conflicting instructions from the donor and the attorney? With which should he comply? The answer would depend on whether the EPA had been registered. If it had not, the third party should comply with the donor's wishes.[188] If it had, the third party should obey the attorney and ignore the donor. We recommend this even though the donor might still be capable since, once again, we regard the ability of attorneys and third parties to rely on the fact of registration as being of the greatest importance. Moreover we would consider this approach to be safer from the donor's point of view as well.

4.77 *Duration of the consequences of registration.* The consequences of registration that we have mentioned would continue while the power was

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186 The Court would have to ensure that the attorney was aware of such applications.

187 See para. 4.83(ii) below.

188 On the basis that the attorney's authority stemmed from the donor and had effectively been suspended or revoked *pro tanto* by the donor authorising something different. It would not, however, be safe for the third party to act on the donor's instructions if he were aware that the donor was incapable.

registered, whether or not the donor was capable. Accordingly, they would cease in the event of the registration being cancelled.

(h) The EPA and the Court of Protection

4.78 *Generally.* We would envisage that the primary function of the Court under our proposed EPA scheme would be to provide support and assistance to the attorney where necessary. Apart from the registration procedure, we would regard Court involvement in the running of any given EPA as very much more the exception than the rule. This would underline the essential distinction to be drawn between the Court's functions under Part VII of the Mental Health Act 1983 on the one hand and those under the EPA scheme on the other. Under the former, the Court has a continuing responsibility to supervise the receiver: under the latter the responsibility would be firmly vested in the attorney and the Court would only be involved if a problem arose. Nevertheless, the Court would have corrective functions. It would be able to investigate the conduct of an attorneyship and, if necessary, bring it to an end.

4.79 The support and assistance which the Court would afford the EPA attorney would in principle be available whether the power was registered or not. Nevertheless we feel that the Court's role while the power was unregistered should be a limited one, confined to cases where there was reason to believe that the donor was becoming or had become incapable. It would be no part of the Court's functions to involve itself in the running of any unregistered power where the donor was clearly capable. If, therefore, difficulties arose between the capable donor and attorney as to the operation of their EPA, they would have to deal with them themselves.[189] The Court would not intervene. The Court's involvement would start only once the donor's mental capacity was in doubt.

4.80 We recommend that the Court be given powers designed specifically to enable it to carry out its functions under our proposed EPA scheme. It is true that the Court already has its powers under Part VII of the 1983 Act and very extensive they are too. They could, for example, be used in appropriate cases to terminate an EPA attorneyship in favour of a receivership. Nevertheless, the Court would need special powers for EPAs. This is partly because of the detailed provisions of our EPA recommendations and partly because the Part VII powers are in general exercisable for the benefit of incapable persons only. Our EPA recommendations however would mean that the Court's jurisdiction would on occasions be exercisable for the benefit of persons who are only becoming incapable.[190] Whilst we do not in principle wish the Court to involve itself with the affairs of those not yet incapable we accept that this will, from time to time, be inevitable.

4.81 *Functions before registration.* There are several situations where the Court's help could be needed before registration. For example, the attorney might be in some doubt as to the validity of the EPA.[191] There

189 Although they could of course refer disputes to any court having jurisdiction to determine issues arising from the use of powers of attorney.

190 The main reason for this is that the attorney's duty to apply for registration is linked not to the donor's actual incapacity but to the attorney's *having reason to believe* that the donor *was becoming* or had become incapable: see para. 4.35 above.

191 If the power were not a valid subsisting EPA the attorney would have no duty to apply for registration.

would also, of course, be the registration procedure itself with the Court processing the attorney's application and dealing with any objections from relatives.

4.82 We discuss below the functions which we recommend the Court should have once the EPA has been registered. It seems to us, however, that it may occasionally be useful for the Court to be able to exercise some of these functions before registration.[192] We have in mind cases where the Court's assistance is needed urgently and where it would be unsatisfactory to wait until the registration procedure had been completed. For example, the attorney might need to sell a particular investment quickly but be in doubt whether the instrument gave him authority. In such a case we feel that the Court should be able to determine questions as to the meaning or effect of the instrument. There might also be cases where a relative of the donor thought that the donor had become incapable yet the attorney showed no inclination to apply for registration. The Court should, we feel, be able to give the attorney directions as to the running of the donor's affairs with a view perhaps to persuading him to apply for registration. We therefore recommend that these functions should be exercisable whether or not an application for registration had already been made and upon the Court having reason to believe that the donor might be, or might be becoming, incapable. It is our view, however, that the exercise of these functions in advance of registration would be unusual since few matters would be so urgent that they could not await registration. Indeed, we recommend that the Court should not use this jurisdiction before registration unless it is of the opinion that this is in fact necessary.

4.83 *Functions once EPA is registered.* We now turn to specific functions that we recommend the Court should have in respect of the registered EPA. We recommend that the Court should have these functions because we can envisage cases where they would individually be useful; they include powers of investigation into the running of the attorneyship and scrutiny of the attorney's management of the donor's affairs. We should like to stress, however, that the Court would *not* be under any duty to investigate an attorneyship unless it had reason to do so. Accordingly we would not envisage that the Court should exercise these powers as a matter of routine or on a spot-check basis. We recommend that the Court should have jurisdiction as to:—

(i) *Effect of the EPA*

to determine any question as to the meaning or effect of the EPA instrument;

(ii) *Management of the donor's affairs*

to give the attorney directions as to his management or disposal of the donor's property and affairs;

(iii) *Accounts*

to require the attorney to render accounts. Every attorney has a duty to keep accounts of transactions involving the donor's money. However, the regular preparation of accounts in a special form would not only be a burden to the attorney but also an expensive

192 The functions that we have in mind are those set out at para. 4.83(i) to (viii) below.

charge on the donor's estate. We accordingly would not expect the Court to call for accounts unless it had reason for believing that there was something wrong with the attorneyship. We certainly would not recommend that the attorney be required to file annual accounts as a matter of routine ;

(iv) *Remuneration*

to give direction as to the attorney's remuneration and payment of his expenses as attorney. We propose that an EPA should be able to contain whatever terms as to remuneration and expenses the parties wished. Indeed we would regard it as desirable that the EPA should state whether or not the attorney was to be remunerated and, if so, on what basis.[193] Even if the EPA did make specific provision, however, it is clear that problems could still arise. For example, the awarding of a fixed annual fee might prove unsatisfactory in the event of inflation or, indeed, if it assumed a large volume of work which never materialised. But even providing for 'reasonable remuneration' would leave open the question of what was reasonable in any given case. We therefore recommend that the Court should be able to give directions generally as to the attorney's remuneration and expenses (whether or not the EPA made specific provision) to cover matters such as the repayment by him of excessive remuneration and the payment to him of additional remuneration. Thus the attorney would have to apply to the Court for directions if he wanted to claim remuneration in excess of that (if any) to which he was entitled under the power. This might happen as a result of a substantial and unforeseen increase in his duties.[194] We would expect the Court to be circumspect in considering such requests. One relevant factor would be the likelihood and relative desirability of the attorney disclaiming the power (in favour, perhaps, of receivership) if his request were rejected ;

(v) *Production of information, etc.*

to require the attorney to furnish the Court with information, papers, etc. relating to his attorneyship or produce anything in his possession as attorney ;

(vi) *Giving consent*

to consent to or authorise any matter which requires the donor's consent ;[195]

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193 We do not feel, however, that the absence of such statements should automatically disentitle the attorney from a claim to remuneration or payment of expenses. It seems, for example, that an attorney under an ordinary power (containing no such statement) may be entitled to remuneration on an implied contract or a *quantum meruit* basis. That is to say he may charge a reasonable fee for work done by him if there is an understanding that he would be remunerated; and an attorney (like a trustee) would always be entitled to reimbursement of costs and expenses reasonably incurred by him in the execution of his office.

194 See *Re Duke of Norfolk's Settlement Trusts* [1982] Ch. 61 where it was decided that since the court had inherent power to authorise remuneration for a *trustee* where none was provided for in the trust instrument, the court had power to increase or otherwise vary existing remuneration provisions of an instrument.

195 This would resolve conflicts of interest arising under the power. An example of such a conflict would be the attorney buying the donor's property, albeit at full value, for himself or for a member of his family. As a matter of general agency law, the consent of the principal would be required in such cases but an incapable donor could not give a valid consent.

(vii) *Authorising benefits to others*

we have already recommended restrictions on the attorney's authority to use his EPA to benefit persons other than the donor himself.[196] Such restriction would operate even if the EPA purported to give the attorney a greater authority in this respect. These restrictions were designed to protect the donor's interests but we see no reason why the Court should not be able to relax them and give the attorney greater authority to benefit others (including himself) provided that such greater authority was not prohibited by the instrument ;

(viii) *Relief from liability*

to relieve the attorney in appropriate cases from liability in respect of any breach of his duties as attorney ;[197]

(ix) *Revocation applications*

to hear applications for confirmation of the donor's purported revocation ;[198]

(x) *Cancellation of registrations*

to cancel the registration of the EPA in any of the following circumstances :—

(*a*) upon being satisfied that there was no valid EPA subsisting at the time of registration ;[199]

(*b*) upon being satisfied that the EPA has since terminated. (This would include the death or bankruptcy of the donor or attorney, the mental incapacity of the attorney and the expiration of any time limit specified in the EPA) ;

(*c*) upon being satisfied that the donor is capable and is likely to remain so. This would involve a complete recovery rather than a return to, say, the ' becoming incapable ' level ;[200]

(*d*) upon being satisfied that fraud or undue pressure was used to induce the donor to create the power ;

(*e*) upon 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 ;

(*f*) upon confirming a revocation or receiving a notice of disclaimer ;

(*g*) upon the Court giving a direction revoking the power.[201]

The attorney would be expected to inform the Court of any event requiring the registration to be cancelled. The most usual event would, no doubt,

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196 See para. 4.23 *et seq.*, above.

197 This would compare with a trustee obtaining relief under s. 61 of the Trustee Act 1925. (We would wish the Court to have an unfettered discretion in awarding relief to the attorney.)

198 See para. 4.72 *et seq.*, above.

199 This might result from information received from a relative of the donor (whether or not that relative had been notified of the attorney's intention of applying for registration).

200 The effect of cancellation under this head would be that the EPA would revert to being an ordinary unregistered EPA.

201 Such a direction would be pursuant to the Court's powers under Part VII of the Mental Health Act 1983—for example upon the Court appointing a receiver under s. 99.

be the death of the donor. The Court would be entitled to cancel the registration whenever it learned (from whatever source) of such an event.

4.84 *Forbidden transactions.* The donor might provide in the instrument that the attorney must not carry out particular transactions. Thus, he might forbid the sale of his house or of some other possession that he particularly treasured. At some future time, however, the interests of the incapable donor might require that the forbidden transaction be effected. We do not feel that the Court should be able to authorise the attorney to disobey his instructions as expressly stated in the instrument. That would do too much violence to the donor-attorney relationship. In such cases we would recommend that the Court should use its existing jurisdiction under the Mental Health Act 1983. Thus it could appoint the attorney as an ad hoc *receiver* for the purpose of carrying out the transaction.[202]

4.85 The powers that we recommend the Court should have in dealing with EPAs would, of course, supplement the Court's existing powers under Part VII of the 1983 Act. Thus its power to appoint a receiver under section 99 of that Act could be used in an appropriate case to terminate an EPA if this proved desirable for any reason. We would anticipate that rule-making powers would be needed for the purpose of detailed implementation of the Court's proposed EPA functions and we propose that the Lord Chancellor should be given such powers.[203]

(i) Protection of attorney and third parties

4.86 We have already explained[204] that an attorney acting under an ordinary power and the third parties dealing with him have statutory protection in cases where, unknown to them, the power has been revoked. Accordingly, such revocation would not involve the " innocent " attorney in liability for acting under a revoked power nor would it prevent the " innocent " third party entering into a valid transaction. We also pointed out[205] that this protection did not apply in cases where the power never existed—as, for example, where the donor lacked capacity to create a valid power.

4.87 What should the protection be in the case of EPAs? In accordance with our policy that the EPA should, where possible, be treated like any other power, we recommend that all attorneys and third parties acting pursuant to an EPA (whether or not registered) should in principle have the same protection as for ordinary powers.[206] We propose, however, that

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202 The 1983 Act, s. 99. In such cases (and in conflict of interests cases) the Court might wish to have the desirability of the proposed transaction considered independently by the Official Solicitor.

203 To cover matters such as who should be entitled to invoke the Court's proposed power to call on the attorney for information.

204 See para. 2.20 above.

205 See para. 2.21 above.

206 The protection needs a slight amendment in the case of the unregistered power where the donor's incapacity is such that the power, had it been an ordinary power, would have terminated. Our general policy is that, at that point, the attorney's authority should be limited pending registration (see para. 4.53 above). The " innocent " attorney who nevertheless continued to act (and the " innocent " third party who continued to deal with him) outside those limitations should be protected. However, the statutory protection for ordinary powers extends only to revoked powers and mental incapacity would not revoke the EPA. It is therefore necessary to provide specifically for this case. This matter is covered in cl. 1(1)(*c*) of the draft Bill attached to this Report.

additional protection be given in the case of the EPA once registered. Whereas the present law gives no protection if the power never existed, we recommend that protection be given once the EPA had been registered.

4.88 The basis of this special treatment for registered EPAs is the importance we attach to the *bona fide* attorney and (more particularly) the third party being able to rely on the fact of registration as having verified the validity of the instrument as an EPA. They should in principle be able to assume that the EPA was validly created and was still subsisting. We would consider it undesirable if third parties felt it necessary to " go behind the registration " by, for example, querying the donor's capacity at the time he created the power. The registration procedure that we recommend is designed to elicit any doubts that there might be on such issues and the fact of registration ought in our view to confer protection against any irregularities that there may actually have been. Thus, if the instrument executed by the donor failed to create a power but had nevertheless been registered as an EPA, the attorney and any third party should be entitled to assume that a valid EPA was created and was still subsisting unless either they knew that the instrument did not create a valid EPA or they knew of a reason why (if a valid EPA had been created) it would have terminated. It should also be possible for a purchaser from the third party to protect himself against any risk arising from the third party's knowledge in this respect.[207]

(j) Termination of the EPA

4.89 The EPA would terminate in very much the same circumstances as the ordinary power.[208] The nature of our proposed scheme, however, involving as it does the need to safeguard the donor's interests once he is no longer capable does mean that some special provisions for termination are necessary. We recommend that the EPA (whether or not registered) should terminate upon the happening of any of the following events:—

(i) the effluxion of any time limit or the satisfaction of any other terminating condition specified in the EPA ;

(ii) the revocation of the power by the donor (this would not be effective, in the case of a registered EPA, until confirmed by the Court) ;[209]

(iii) the disclaimer by the attorney ;[210]

(iv) the death or bankruptcy of the donor ;

(v) the death, mental incapacity or bankruptcy of the attorney (or its winding-up or dissolution in the case of a trust corporation) ;

(vi) the Court's refusal to register (or, having registered, its revocation of) the EPA because of the attorney's unsuitability or because fraud or undue pressure was used to induce the donor to create the power ;

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207 Cf. s. 5(4) of the Powers of Attorney Act 1971. We would also recommend protection to cover the case where an instrument which was intended to create an EPA failed to do so, but succeeded in creating an ordinary power. This might arise out of a drafting error. We would recommend that the attorney and any third party should be entitled to assume that an ordinary power created in the form of an EPA was a validly created and subsisting EPA unless they knew both that it was merely an ordinary power and of the donor's mental incapacity.

208 As to which see para. 2.18 above.

209 See para. 4.72 *et seq.*, above.

210 See para. 4.54 *et seq.*, above.

(vii) the Court gives a direction revoking the power.

It will be apparent that, where two or more attorneys were appointed to act jointly for the donor, a terminating event affecting any of them would terminate the power for all. The termination of an EPA would, of course, end the power in its entirety. There could be no question of its continuing as an ordinary power.

(k) Miscellaneous matters

4.90 We come finally to a number of miscellaneous matters which, belonging under no heading of their own, can conveniently be bracketed together at the end.

(i) Appointing more than on attorney

4.91 In discussing the EPA attorney so far in this Report we have referred to him on the basis that he has been appointed as sole attorney by the donor. We have done this, however, purely as a matter of convenience and we are well aware that donors of ordinary powers commonly appoint two or more attorneys to act either as joint or as joint and several attorneys. Sometimes successive attorneys are appointed also.[211] It is our wish that the EPA donor should be free to appoint more than one attorney if he so chooses. Indeed in our Working Paper we suggested that a requirement of at least two attorneys acting jointly would be desirable.[212]

4.92 Thus, the EPA donor might prefer to appoint not just, say, his spouse as attorney but his children as well. He might create a joint power so that all the attorneys would have to act together[213] or a joint and several power which would be operated by any or all of them.[214]

4.93 *Effect of appointing more than one attorney.* We recommend that where joint EPA attorneys are appointed they should in principle have to act together in all matters just as if they were attorneys under an ordinary power. Likewise, where joint and several attorneys are appointed they should be able to act either jointly or individually as they would under an ordinary power. The fact that more than one attorney has been appointed, however, does have implications for some of the detailed provisions of our

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211 There is a fourth type of appointment, the alternative attorney, who can only act if the donor's first choice is unable to take up the attorneyship. This type does, however, appear to be used but rarely under the existing law and we would not envisage its use under our proposed EPA scheme.

212 This was intended primarily as a safeguard for the donor although this was not on the whole supported by the consultation: see para. 3.27 *et seq.*, above.

213 Whilst ensuring that all the attorneys are in agreement before the power is operated, joint powers do have the disadvantage of becoming inoperable if any one attorney is unable to act for whatever reason. Indeed, the death or other permanent incapacity of any one joint attorney would terminate the authority for all.

214 We do not recommend that an instrument should be able to provide for successive EPAs; that is, one or more attorneys who would replace the original attorney or attorneys should he or they cease to act. Our main reason for this is that the benefit to be gained by including successive EPAs in our proposals would be out of all proportion to the complexity that such powers would create in relation to some of the more detailed areas of our scheme. In any event, successive EPAs are rendered largely unnecessary because a joint and several EPA would permit the continuation of the EPA in the event of one of the attorneys ceasing to act. It would, however, be possible to create the effect of successiveness by a donor granting EPAs in separate instruments so that the authority of an attorney under one power could commence only upon the termination of the authority of an attorney under another power.

recommendations and raises questions which do not arise where only one attorney is appointed.

4.94 These questions arise in part from the essential difference between joint powers on the one hand and joint and several powers on the other. Any matter affecting the capacity of an attorney under a joint power to operate his power affects all his co-attorneys also since they cannot act without him. Where, however, the power is joint and several the incapacity of one will not generally prejudice the capacity of the other attorneys. This difference creates a measure of complexity for some aspects of our proposed EPA scheme since the validity of the power and the attorney's authority under it may differ according to whether the power is joint or joint and several. Furthermore, the very fact that more than one attorney has been appointed raises questions which cannot necessarily be answered by applying to such cases our recommendations as they apply to sole attorneys.

4.95 We have therefore found it necessary to make special provisions to deal with the matters which arise when more than one attorney is appointed. This we have done in clause 11 and Schedule 3 of the Bill attached to this Report. It may be helpful, however, to mention briefly two of the areas where special provision is required.

4.96 The first of these two areas is the creation of the EPA. We recommend that a failure to comply with the requirements for creating a valid EPA in respect of any attorney under a *joint* power should result in the creation of an EPA for none of the attorneys. This is because of the joint nature of the joint power. Thus, if any attorney under a joint power were a minor, the instrument could create merely an ordinary power. By contrast, we recommend that such a failure in respect of any attorney under a *joint and several* power should merely be fatal to the creation of an EPA for that attorney.

4.97 The second area where special provision is required is the registration procedure. Whilst we propose that all attorneys under a *joint* power should have to join in the application to register we feel that it should be open to attorneys under a *joint and several* power to make either a joint application together or else leave it to one or more to make the application (though we envisage that in practice they would usually apply together jointly). Whichever choice is made by the joint and several attorneys, a successful application will have the effect of registration of the instrument for all of them. We therefore consider it important that all the attorneys are made aware of the proposed registration. Some of them might, for example, be aware of circumstances rendering it desirable that the application should be refused or not made at all. Accordingly, we recommend that any attorney under a joint and several power who is not applying for registration should be notified of the proposed registration by the attorney(s) who is applying. The notification would be similar to that sent to relatives. As with the notification to relatives, however, the applying attorney would not be expected to notify his non-applying co-attorneys in certain circumstances.[215]

4.98 Following notification, relatives would be able to object to the proposed registration in the usual way. And, since we propose that the notifica-

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215 See paras. 4.37 and 4.38 above. Nor need a non-applying co-attorney be notified if he is already being notified as a relative. And no applying attorney need be notified either as a relative or as an attorney.

tion should disclose the names of all the attorneys, relatives could make objections in respect of any attorney whether or not he was the applying attorney. If an objection were upheld by the Court in respect of any attorney under a joint power, registration of that instrument would be refused. If, however, the objection upheld related to an attorney under a joint and several power, that would not of itself prejudice the position of the other attorneys.[216] In such a case the instrument could be registered with the registration qualified.[217]

(ii) **Sanctions**

4.99 It will be clear that our recommendations for the EPA scheme would involve the attorney exercising considerable authority over the property and affairs of another with the minimum of external control and supervision. His power and discretion would normally far exceed that of a trustee. We therefore considered whether special sanctions were needed for the EPA attorney who failed in his duties.

4.100 In our view, the existing law would in general be sufficient to deal with the attorney who failed in his duties. Thus, the EPA attorney who acted outside his authority would in principle be personally liable to the donor[218] or to a third party for any loss suffered by either as a result. The same would apply to cases where the attorney's authority had terminated or was inoperable pending registration: the attorney would enjoy no statutory protection against personal liability for knowingly acting without authority.[219] The attorney who was in breach of any of his duties as attorney would be personally liable to the donor for any loss thereby sustained by the estate. It is perhaps less clear whether there would be a remedy against the attorney whose failure to comply with his statutory duty to apply to the Court for registration resulted in loss to the estate. It would often be difficult to attribute the cause of the loss to the attorney's failure to comply with this duty, especially since the duty would be dependent upon his appreciation of the donor's mental condition. Be that as it may, we find that there are sound reasons for not going out of our way to create new sanctions for EPA attorneys.[220] The principal reason is that we wish to encourage people to accept EPA attorneyships: this purpose would be frustrated if honest prospective EPA attorneys were deterred by talk of penalties, especially when —in the case of the duty to apply for registration—there might often be genuine doubt as to whether the duty had yet arisen.

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216 If the objection upheld related to the validity of the instrument creating the joint and several power, then that would, of course, affect all the attorneys. For example none of the attorneys would have a valid power if it transpired that the donor had lacked capacity to create the power in the first place.

217 We propose that the detailed procedure in such cases should be covered by rules which could, for example, state the effects of such qualification. Similar points arise where, after registration, one joint and several attorney is no longer able to act (for instance, through his death or bankruptcy). Provided that there was still at least one joint and several attorney able to continue acting, we would expect the Court to be able to qualify the registration in an appropriate manner.

218 Or, as the case might be, the donor's personal representatives.

219 Sect. 5 of the Powers of Attorney Act 1971 would not apply in such a case.

220 One effective sanction against incompetent or inactive attorneys would be the Court's power to appoint a receiver for an incapable donor and thereby terminate the EPA. And the failure of an attorney to comply with an order of the Court could result in liability for contempt.

4.101 So far as criminal sanctions are concerned, clearly the existing law would cover acts of dishonesty committed by the attorney. We consider, however, that criminal sanctions should attach to dishonest attempts by an unregistered attorney to undermine the registration procedure. Accordingly we recommend that anyone who makes a statement in his registration application that he knows to be false in a material particular should be guilty of an offence.

(iii) Other forms of agency

4.102 In our terms of reference[221] we were asked to consider the mental incapacity of principals not only relating to powers of attorney but also as regards " other forms of agency ". We have accordingly considered whether the proposals that we have made in relation to powers should apply also to other forms of agency.[222]

4.103 One form of agency to which our proposals might apply is the gratuitous agency granted under hand, of which a common example is the mandate signed by one person authorising another to operate his bank account. Another form is the commercial agency, including that of professional advisers like solicitors, accountants and estate agents. Should all these agencies be permitted to survive the principal's mental incapacity?[223]

4.104 In our view, other forms of agency such as these would rarely provide a suitable basis for an EPA and accordingly their extension beyond the donor's capacity should not be encouraged. Admittedly, the formalities that we recommend as a safeguard to donors would result in an EPA being a complex vehicle for many agency relationships. We would therefore not expect to see, for example, bank mandates drawn up in the form of EPAs. Nevertheless, it will be apparent that the EPA as envisaged in this Report is sufficiently flexible to embrace many forms of agency, including commercial agencies. We would not wish to encourage such agencies to be drawn up in the form of EPAs since they would tend to be unsuitable as EPAs because of their likely narrow scope. A principal who has become incapable needs more than the limited *ad hoc* assistance available to him by virtue of, say, having retained the services of a professional person. What he needs is complete management of his affairs: this can only be achieved by a person who has general authority to deal with them. The EPA is specifically designed for the grant of such authority. As, however, it would be possible[224] to create an EPA giving the attorney merely a limited authority, it would not be practicable to devise a formula prohibiting certain categories of agency from the EPA scheme on the basis that they were of limited scope. And other agency-excluding formulae would involve our proposals in a measure of additional complexity that we would consider unacceptable. Accordingly, whilst the only form of agency that we would wish to survive the mental incapacity of the principal would be the sort of EPA created under the scheme discussed in this Report, we accept that an EPA might incorporate other agencies for which the scheme had not been specific-

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221 See para. 1.3 above.

222 The consultation to our Working Paper produced little support for extending an EPA-type regime to agencies other than powers.

223 One particular type of commercial agency already does survive the donor's mental incapacity: see n. 37 above. Our recommendations will not affect this type of agency.

224 See para. 4.11 above.

ally intended. We consider however that the proposed safeguards (especially that of notification of relatives) would help counter any possible abuses.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 In this Part of the Report we summarise the recommendations for reform contained in Parts III and IV. Where appropriate, we identify the relevant clauses in the draft Enduring Powers of Attorney Bill (contained in Appendix A to this Report) intended to give effect to particular recommendations.

5.2 Our recommendations are as follows:—

(1) *Our principal recommendation.* The law should be changed to permit the creation of a special type of power of attorney—the enduring power of attorney or "EPA"—which would not be revoked by the mental incapacity of its donor. Safeguards should, however, be introduced to protect the donor's interests.

(Paragraphs 3.8, 3.39 and clause 1 (1) (*a*)).

(2) The donor of an EPA should be an individual. Thus, corporations would not qualify. And powers of attorney granted by trustees under the Trustee Act 1925 and irrevocable powers should not be drawn up as EPAs.

(Paragraph 4.2 and clauses 1 (1) and 2 (8)).

(3) The attorney under an EPA should either be an individual who is neither a minor nor bankrupt or a trust corporation.

(Paragraphs 4.8, 4.9 and clause 2 (7)).

(4) Instruments creating EPAs should be in a form prescribed by the Lord Chancellor. They should also incorporate explanatory information or notes which should similarly be prescribed by the Lord Chancellor.

(Paragraphs 4.10 to 4.13 and clauses 2 (1) and 2 (2)).

(5) All EPAs should contain four obligatory statements. The first two would be made by the donor to show that he intended the power to continue despite any supervening mental incapacity and to indicate that he had read the explanatory information. The third and fourth would be made by the attorney to the effect that he understood about his duty to register the power and about his limited power to use the donor's property to benefit persons other than the donor himself.

(Paragraph 4.16 and clause 2 (2) (*b*)).

(6) The attorney as well as the donor should execute the EPA. Both signatures should be witnessed by persons other than the donor and attorney.

(Paragraphs 4.17 and 4.18).

(7) The attorney's authority under an EPA should turn primarily upon the wording of the instrument. If he is given *general* authority he should in principle be able to do anything which can lawfully be done by an attorney.

(Paragraph 4.20 and clause 3(2)).

(8) The attorney should not be able to appoint a substitute or successor to himself. And his authority to use the EPA to benefit persons other than the donor (whether or not by way of gift) should be limited.

(Paragraphs 4.22 to 4.29 and clauses 2(9), 3(3) and 3(4)).

(9) No disclaimer by the attorney of his EPA should be valid without his giving written notice of disclaimer. This notice should either be given to the donor or, if the EPA is registered or if the attorney has reason to believe that the donor is becoming or has become incapable, to the Court.

(Paragraphs 4.32, 4.54 to 4.56 and clauses 2(12), 4(6) and 7(1)).

(10) The attorney should have a duty to apply to the Court to register the EPA once he has reason to believe that the donor is becoming or has become incapable.

(Paragraph 4.35 and clauses 4(1) and 4(2)).

(11) Before making his application to register, the attorney should notify the donor and the donor's relatives of his intention to apply for registration. The relatives should be given an opportunity to object to the proposed registration.

(Paragraphs 4.37 to 4.42 and clause 4(3)).

(12) The Lord Chancellor should be empowered to exempt attorneys from the requirement to notify the donor's relatives.
(Paragraph 4.43 and clause 12).

(13) Where an application for registration has been duly made, the Court should be bound to register unless a ground of objection to the registration is established.

(Paragraphs 4.46 to 4.50 and clause 6).

(14) The Court should be able to issue office copies of registered EPAs.

(Paragraph 4.52 and clause 7(3)).

(15) The attorney's authority under an unregistered EPA should be suspended once the donor's mental incapacity is such that the EPA, had it been an ordinary power, would have been revoked. The suspension would, however, be partially lifted once the attorney had made his application to register.

(Paragraphs 3.34 and 4.53 and clause 1).

(16) Once the EPA was registered, the donor should be able to revoke the power only by obtaining the Court's confirmation and any pur-

ported variations by the donor of the attorney's authority should have no legal effect.

(Paragraphs 4.70 to 4.76 and clause 7(1)).

(17) The Court should, in addition to its powers under the Mental Health Act 1983, have special powers in relation to EPAs in general and their operation by attorneys in particular. These would be available once the donor was becoming incapable.

(Paragraphs 4.57, 4.78 to 4.85 and clauses 4(5), 5 and 8).

(18) There should be protection for attorneys and third parties in particular circumstances where the instrument created either no power at all or merely an ordinary power. Such protection would be in addition to that conferred by section 5 of the Powers of Attorney Act 1971.

(Paragraphs 4.86 to 4.88 and clause 9).

(19) It should be possible for joint and joint and several attorneys to act under EPAs.

(Paragraphs 4.91 to 4.98 and clause 11).

(20) A criminal sanction should be created in relation to false statements by an attorney in his registration application. No other special sanctions would be necessary.

(Paragraphs 4.99 to 4.101 and clause 4(7)).

(*Signed*) RALPH GIBSON, *Chairman*

STEPHEN M. CRETNEY
BRIAN DAVENPORT
STEPHEN EDELL
PETER NORTH

J. G. H. GASSON, *Secretary.*

23 June 1983.

APPENDIX A

Draft
Enduring Powers of Attorney Bill

ARRANGEMENT OF CLAUSES

Enduring powers of attorney

DRAFT

OF A

BILL

TO

Enable powers of attorney to be created which will survive any subsequent mental incapacity of the donor and to make provision in connection with such powers.

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:—

Enduring powers of attorney

Enduring power of attorney to survive mental incapacity of donor.

1.—(1) Where an individual creates a power of attorney which is an enduring power within the meaning of this Act then—

(*a*) the power shall not be revoked by any subsequent mental incapacity of his ; but

(*b*) upon such incapacity supervening the donee of the power may not do anything under the authority of the power except as provided by subsection (2) below or as directed or authorised by the court under section 5 unless or, as the case may be, until the instrument creating the power is registered by the court under section 6 ; and

1971 c. 27.

(*c*) section 5 of the Powers of Attorney Act 1971 (protection of donee and third persons) so far as applicable shall apply while paragraph (*b*) above applies as if the power had been revoked by the donor's mental incapacity.

(2) Notwithstanding subsection (1)(*b*) above, where the attorney has made an application for registration of the instrument then, until the application has been initially determined, 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 section 3(3) permits him to do so.

EXPLANATORY NOTES

Clause 1

1. Paragraph (*a*) of subsection (1) implements the principal recommendation in the Report (paragraph 3.8) that a power of attorney that is an enduring power (within the meaning of the Bill) shall not be revoked by the donor's subsequent mental incapacity. At common law ordinary powers of attorney are revoked by the donor's subsequent mental incapacity.

2. Paragraph (*b*) of subsection (1) gives effect to the recommendations in paragraphs 3.34 and 4.53 that once the donor has become incapable and until the instrument creating the power has been registered the attorney may not act under the power except in accordance with subsection (2) or as authorised by the Court under clause 5.

3. Paragraph (*c*) of subsection (1) extends the protection given to attorneys and third parties under section 5 of the Powers of Attorney Act 1971 to the situation where an attorney under an enduring power is, by virtue of paragraph (*b*), unable to act under the power (see footnote 206 to the Report).

4. Subsection (2) provides that an attorney who has applied to register the instrument may, pending the initial determination of that application, take certain action under the power notwithstanding that paragraph (*b*) of subsection (1) would otherwise prevent this. This gives effect to the recommendation in paragraph 4.53 of the Report.

Characteristics of an enduring power.

2.—(1) Subject to subsections (7) to (9) below and section 11, a power of attorney is an enduring power within the meaning of this Act if the instrument which creates the power—

(*a*) is in the prescribed form ; and

(*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.

(2) The Lord Chancellor shall make regulations as to the form and execution of instruments creating enduring powers and the regulations shall contain such provisions as appear to him to be appropriate for securing—

(*a*) that no document is used to create an enduring power which does not incorporate such information explaining the general effect of creating or accepting the power as may be prescribed ; and

(*b*) that such instruments include statements to the following effect—

(i) by the donor, that he intends the power to continue in spite of any supervening mental incapacity of his ;

(ii) by the donor, that he read or had read to him the information explaining the effect of creating the power ;

(iii) by the attorney, that he understands the duty of registration imposed by this Act.

(3) Regulations under subsection (2) above—

(*a*) may include different provision for cases where more than one attorney is to be appointed by the instrument than for cases where only one attorney is to be appointed ; and

(*b*) may, if they amend or revoke any regulations previously made under that subsection, include saving and transitional provisions.

(4) Regulations under subsection (2) above shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) An instrument in the prescribed form purporting to have been executed in the prescribed manner shall 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.

(6) Where an instrument differs in an immaterial respect in form or mode of expression from the prescribed form the instrument shall be treated as sufficient in point of form and expression.

EXPLANATORY NOTES

Clause 2

1. The purpose of clause 2 is to set out the characteristics of an enduring power of attorney. Subsection (1) provides that a power of attorney is an enduring power if the instrument creating it is in the prescribed form, executed in the prescribed manner by the donor and the attorney and incorporated, at the time the donor executed it, the prescribed explanatory information. This implements the recommendations in paragraph 4.10 of the Report.

2. Subsection (2) imposes on the Lord Chancellor a duty to make regulations as to the form and execution of instruments creating enduring powers and requires that the regulations shall contain such provisions as appear to him appropriate for securing that all instruments creating enduring powers shall incorporate certain explanatory information and certain statements by the donor and attorney. This implements the recommendations in paragraphs 4.10, 4.13 and 4.16 of the Report.

3. Subsection (3) allows for saving and transitional provisions and subsection (4) deals with the making of the regulations.

4. Subsection (5) provides a rebuttable presumption that an instrument which is in the prescribed form and which purports to have been executed in the prescribed manner is a document which incorporated the prescribed information at the time the donor executed. This point is explained in paragraph 4.14 of the Report.

5. Subsection (6) provides that an instrument shall be treated as if it were in the prescribed form if it merely differs in form or mode of expression in an immaterial respect. This point is referred to in footnote 116 to the Report.

(7) 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 attained eighteen years and is not bankrupt; or

(*b*) a trust corporation.

1925 c. 19.

(8) A power of attorney under section 25 of the Trustee Act 1925 (power to delegate trusts etc. by power of attorney) cannot be an enduring power.

(9) A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power.

(10) An enduring power shall be revoked by the bankruptcy of the attorney whatever the circumstances of the bankruptcy.

1983 c. 20.

(11) An enduring power shall be revoked on the exercise by the court of any of its powers under Part VII of the Mental Health Act 1983 if, but only if, the court so directs.

(12) No disclaimer of an enduring power, whether by deed or otherwise, shall be valid unless and until the attorney gives notice of it to the donor or, where section 4(6) or 7(1) applies, to the court.

(13) In this section "prescribed" means prescribed under subsection (2) above.

Clause 2 (continued)

6. Subsections (7) to (9) provide that in certain circumstances a power of attorney cannot be an enduring power. This implements the recommendations in paragraphs 4.2, 4.8, 4.9 and 4.22 of the Report.

7. Subsections (10) and (11) provide for the revocation of an enduring power in certain circumstances. This implements the recommendations in paragraphs 4.9 and 4.83 of the Report.

8. Subsection (12) provides that the attorney's disclaimer of an enduring power shall not be valid until notice of it is given to the donor or (in some circumstances) to the court. This implements the recommendation in paragraphs 4.32 and 4.54 to 4.56 of the Report.

9. Subsection (13) defines " prescribed " for the purposes of the clause.

Scope of authority etc. of attorney under enduring power.

3.—(1) An enduring power may confer on the attorney general authority (as defined in subsection (2) below) to act on the donor's behalf in relation to all or a specified part of the property and affairs of the donor or may confer on him authority to do specified things on the donor's behalf and the authority may, in either case, be conferred subject to conditions and restrictions.

(2) Where an instrument is expressed to confer general authority on the attorney it operates to confer, subject to the restriction imposed by subsection (4) below and to any conditions or restrictions contained in the instrument, authority to do on behalf of the donor anything which the donor can lawfully do by an attorney.

(3) 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, that is to say—

(*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

(*b*) he may do whatever the donor might be expected to do to meet those needs.

(4) Without prejudice to subsection (3) above 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, that is to say—

(*a*) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including himself) who are related to or connected with the donor; and

(*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.

Clause 3

1. This clause contains provisions as to the scope of the attorney's authority under an enduring power.

2. Subsection (1) provides that an enduring power may confer on the attorney general authority to act for the donor or merely authority to do specific things. Subsection (2) explains the effect of conferring general authority. These matters are referred to in paragraph 4.20 of the Report.

3. Subsections (3) and (4) enable the attorney under an enduring power to use the power to benefit persons other than the donor without the need to obtain the donor's consent. An attorney under an ordinary power would usually need the donor's consent in such matters. This point is explained in paragraph 4.23. The attorney under an enduring power will accordingly, subject to any conditions or restrictions in the instrument, have a limited authority both to provide for the needs of persons other than the donor (subsection (3)) and to make gifts of the donor's property (subsection (4)). This implements paragraphs 4.27 to 4.29 of the Report.

Action on actual or impending incapacity of donor

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

4.—(1) If the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable subsections (2) to (6) below shall apply.

(2) The attorney shall, as soon as practicable, make an application to the court for the registration of the instrument creating the power.

(3) Before making an application for registration the attorney shall comply with the provisions as to notice set out in Schedule 1.

(4) An application for registration shall be made in the prescribed form and shall contain such statements as may be prescribed.

(5) The attorney 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 he shall comply with any direction given to him by the court on that determination.

(6) No disclaimer of the power shall be valid unless and until the attorney gives notice of it to the court.

(7) Any person who, in an application for registration, makes a statement which he knows to be false in a material particular shall be liable—

(*a*) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or both; and

(*b*) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or both.

(8) In this section and Schedule 1 "prescribed" means prescribed by rules of the court.

EXPLANATORY NOTES

Clause 4

1. This clause has effect once the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable (subsection (1)). Subsection (2) imposes a duty on the attorney to apply to the court to register his instrument. Subsection (3) requires him, before making his application, to comply with the requirements of Schedule 1 as to notifying the donor and his relatives. Subsection (4) provides that the registration application shall be in the prescribed form and shall contain certain statements. These provisions implement the recommendations in paragraphs 4.35 to 4.42 and 4.44 of the Report.

2. Subsection (5) enables the attorney, before applying to register, to seek guidance from the court as to the validity of the power. He must comply with any direction given by the court. This point is explained in paragraph 4.57 of the Report.

3. Subsection (6) imposes a requirement for a valid disclaimer of his power by the attorney. This implements the recommendation in paragraph 4.55 of the Report.

4. Subsection (7) makes it an offence to make statements in the registration application knowing them to be false in a material particular. This point is referred to in paragraph 4.101 of the Report.

5. Subsection (8) defines " prescribed " for the purpose of this clause and Schedule 1.

Functions of court prior to registration.

5.—(1) Where the court has reason to believe that the donor of an enduring power may be, or may be becoming, mentally incapable and the court is of the opinion that it is necessary to exercise any power conferred by this section before the instrument creating the power is registered the court may exercise that power.

(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;

(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 furnish information or produce documents or things in his possession as attorney;

(*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 section 3(3) and (4) (but subject to any conditions or restrictions contained in the instrument);

(*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) The powers conferred by this section may be exercised whether the attorney has or has not made an application to the court for the registration of the instrument appointing him.

Clause 5

1. This clause gives the court certain powers which it may exercise before the instrument is registered. Subsection (1) provides for the exercise of these powers in cases where the court both has reason to believe that the donor of an enduring power may be, or may be becoming, mentally incapable and is of the opinion that it is necessary to exercise the powers before the instrument is registered. This implements paragraph 4.82 of the Report.

2. Subsection (2) sets out the powers which the court is to be able to exercise under this clause. These include power to determine any question as to the meaning or effect of the instrument, power to give directions as to the attorney's management of the donor's property and affairs and power to require the production of information or other matters in the attorney's possession (cf. subsection (2) of clause 8).

3. Subsection (3) provides that these powers are exercisable whether or not the attorney has applied for registration.

Functions of court on application for registration.

6.—(1) In any case where—

(*a*) an application for registration is made in accordance with section 4(3) and (4); and

(*b*) subsection (3) below does not apply,

the court shall register the instrument to which the application relates.

(2) Where it appears from an application for registration that notice of it has not been given under Schedule 1 to some person entitled to receive it (other than a person in respect of whom the attorney has been dispensed or is otherwise exempt from the requirement to give notice) the court shall direct that the application be treated for the purposes of this Act as having been made in accordance with section 4(3), if the court is satisfied that, as regards each such person—

(*a*) it was undesirable or impracticable for the attorney to give him notice; or

(*b*) no useful purpose is likely to be served by giving him notice.

(3) If, in the case of an application for registration—

(*a*) a valid notice of objection to the registration is received by the court before the expiry of the period of five weeks beginning with the date or, as the case may be, the latest date on which the attorney gave notice to any person under Schedule 1; or

(*b*) it appears from the application that there is no one to whom notice has been given under paragraph 1 of that Schedule; or

(*c*) the court has reason to believe that appropriate inquiries might bring to light evidence on which the court could be satisfied that one of the grounds of objection set out in subsection (4) below was established,

the court shall neither register the instrument nor refuse the application until it has made or caused to be made such inquiries (if any) as it thinks appropriate in the circumstances of the case.

(4) For the purposes of this Act a notice of objection to the registration of an instrument is valid if the objection is made on one or more of the following grounds, namely—

(a) that the power purported to have been created by the instrument was not valid as an enduring power of attorney;

(*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;

(*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.

EXPLANATORY NOTES

Clause 6

1. This clause sets out the court's functions once an application to register the instrument has been made.

2. Subsection (1) requires the court to register the instrument provided that the registration application is in order and that none of the circumstances in subsection (3) apply. This implements the recommendation in paragraph 4.46 of the Report.

3. Subsection (2) provides that an application should be treated as complying with the provisions as to notifying the donor and his relatives even if the attorney had not notified a person who was entitled to be notified, provided that the court is satisfied that such notification would have been undesirable, impracticable or unlikely to serve any useful purpose. This implements paragraph 4.48 of the Report.

4. Subsection (3) provides for circumstances in which the court should neither register nor refuse the application without considering making inquiries. These circumstances include the receipt by the court of a valid objection to the registration and the court's having reason to believe that inquiries might produce evidence that could establish a valid objection. These points are explained in paragraphs 4.46 to 4.48 of the Report.

5. Subsection (4) sets out the five grounds of a valid objection. Grounds (*a*) and (*b*) relate to the validity of the power whilst grounds (*c*) to (*e*) relate to the undesirability of registration of an enduring power albeit valid. This implements paragraph 4.49 of the Report.

(5) If, in a case where subsection (3) above applies, any of the grounds of objection in subsection (4) above is established to the satisfaction of the court, the court shall refuse the application but if, in such a case, it is not so satisfied, the court shall register the instrument to which the application relates.

(6) Where the court refuses an application for registration on ground (*d*) or (*e*) in subsection (4) above it shall by order revoke the enduring power in question.

(7) Where the court refuses an application for registration on any ground other than that specified in subsection (4)(*c*) above the instrument shall be delivered up to be cancelled, unless the court otherwise directs.

Clause 6 (continued)

6. Subsection (5) provides that where an objection is upheld the court shall refuse the application. Conversely, where the objection is not upheld the instrument will be registered. Subsections (6) and (7) explain the consequences of an application being refused. These provisions implement the recommendations in paragraph 4.51 of the Report.

Legal position after registration

Effect and proof of registration, etc.

7.—(1) The effect of the registration of an instrument under section 6 is that—

(*a*) no revocation of the power by the donor shall be valid unless and until the court confirms the revocation under section 8(3);

(*b*) no disclaimer of the power shall be valid unless and until the attorney gives notice of it to the court;

(*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 shall, in the case of a consent, confer any right and, in the case of an instruction, impose or confer any obligation or right on or create any liability of the attorney or other persons having notice of the instruction or consent.

(2) Subsection (1) above applies for so long as the instrument is registered under section 6 whether or not the donor is for the time being mentally incapable.

(3) A document purporting to be an office copy of an instrument registered under this Act shall, in any part of the United Kingdom, be evidence of the contents of the instrument and of the fact that it has been so registered.

EXPLANATORY NOTES

Clause 7

1. This clause explains certain consequences of the instrument being registered. These are that the donor's ability to revoke the power and the attorney's ability to disclaim are subject to restrictions (paragraphs (*a*) and (*b*) of subsection (1)). Furthermore, the donor will be unable to vary the attorney's authority under the power and no instruction or consent given by the donor in relation to the power will have any legal effect (paragraph (*c*) of subsection (1)). These consequences apply whilst the registration stands (subsection (2)). These provisions implement the recommendations in paragraphs 4.55 and 4.70 to 4.77 of the Report.

2. Subsection (3) explains the effects of an office copy of a registered instrument. This point is explained in footnote 169 to the Report.

Functions of court with respect to registered power.

8.—(1) Where an instrument has been registered under section 6, the court shall have the following functions with respect to the power and the donor of and the attorney appointed to act under the power.

(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;

(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 furnish information or produce documents or things in his possession as attorney;

(*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 section 3(3) and (4) (but subject to any conditions or restrictions contained in the instrument);

(*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 shall confirm the revocation of the power if satisfied that the donor has done whatever is necessary in law to effect an express revocation of the power and 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).

EXPLANATORY NOTES

Clause 8

1. This clause explains the court's functions in relation to an enduring power once the instrument has been registered. It implements recommendations in paragraph 4.83 of the Report.

2. Subsection (2) enables the court to determine any question as to the meaning or effect of the instrument and enables it to give directions as to the attorney's management of the donor's property and affairs, the rendering of accounts by the attorney and the attorney's remuneration or expenses. The court will also be able to consent to or authorise transactions which, though authorised by the power, the attorney would otherwise be unable to carry out either because they need the donor's informed consent or because they exceed the limited power given the attorney in subsections (3) and (4) of clause 3 to benefit persons other than the donor.

3. Subsection (3) enables the court to confirm purported revocations of the power by the donor. This matter is discussed in paragraphs 4.72 to 4.74 of the Report.

(4) The court shall cancel the registration of an instrument registered under section 6 in any of the following circumstances, that is to say—

(*a*) on confirming the revocation of the power under subsection (3) above or receiving notice of disclaimer under section 7(1)(*b*);

(*b*) on giving a direction revoking the power on exercising any of its powers under Part VII of the Mental Health Act 1983; 1983 c. 20.

(*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 death or bankruptcy of the donor or the death, mental incapacity or bankruptcy of the attorney or, if the attorney is a body corporate, its winding up or dissolution;

(*e*) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected;

(*f*) on being satisfied that fraud or undue pressure was used to induce the donor to create the power; or

(*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.

(5) Where the court cancels the registration of an instrument on being satisfied of the matters specified in paragraph (*f*) or (*g*) of subsection (4) above it shall by order revoke the enduring power in question.

(6) On the cancellation of the registration of an instrument under subsection (4) above except paragraph (*c*) the instrument shall be delivered up to be cancelled, unless the court otherwise directs.

Clause 8 (continued)

4. Subsections (4) to (6) provide for cancellation of the registration and for the consequences of cancellation.

Protection of attorney and third parties

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

9.—(1) Subsections (2) and (3) below apply where an instrument which did not create a valid power of attorney has been registered under section 6 (whether or not the registration has been cancelled at the time of the act or transaction in question).

(2) An attorney who acts in pursuance of the power shall not incur any liability (either to the donor or to any other person) by reason of the non-existence of the power unless at the time of acting he knows—

(*a*) that the instrument did not create a valid enduring power; or

(*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

(*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 shall, in favour of that person, be 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 subsection (2) above.

(4) Where the interest of a purchaser depends on whether a transaction between the attorney and another person was valid by virtue of subsection (3) above, it shall be conclusively presumed in favour of the purchaser that the transaction was valid if—

(*a*) the transaction between that person and the attorney was completed within twelve months of the date on which the power came into operation; or

(*b*) that person makes a statutory declaration, before or within three 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.

(5) Schedule 2 shall have effect to confer protection in cases where the instrument failed to create a valid enduring power and the power has been revoked by the donor's mental incapacity.

(6) In this section " purchaser " and " purchase " have the meanings specified in section 205(1) of the Law of Property Act 1925.

1925 c. 20.

EXPLANATORY NOTES

Clause 9

1. This clause confers protection upon attorneys and third parties in particular circumstances where the instrument either did not create any power of attorney or created merely an ordinary power. Such protection is additional to that given by section 5 of the Powers of Attorney Act 1971 and implements the recommendations in paragraphs 4.86 to 4.88 of the Report.

2. Subsections (2) and (3) confer protection in cases where the instrument, although registered, created no power at all. An example of this would be where the donor lacked the mental capacity to create the power at the outset.

3. Subsection (4) confers a measure of protection upon a person who purchases from the third party who dealt with the attorney. (This is referred to in the final sentence of paragraph 4.88 of the Report.)

4. Subsection (5) provides that Schedule 2 will confer protection in cases where the instrument created merely an ordinary power.

5. Subsection (6) defines " purchaser " and " purchase " for the purposes of this clause.

Supplementary

Application of Mental Health Act provisions relating to the court.
1983 c. 20.

10.—(1) The provisions of Part VII of the Mental Health Act 1983 (relating to the Court of Protection) specified below shall apply to persons within and proceedings under this Act in accordance with the following paragraphs of this subsection and subsection (2) below, that is to say—

(*a*) section 103 (functions of Visitors) shall apply to persons within this Act as it applies to the persons mentioned in that section;

(*b*) section 104 (powers of judge) shall apply to proceedings under this Act with respect to persons within this Act as it applies to the proceedings mentioned in subsection (1) of that section;

(*c*) section 105(1) (appeals to nominated judge) shall apply to any decision of the Master of the Court of Protection or any nominated officer in proceedings under this Act as it applies to any decision to which that subsection applies and an appeal shall lie to the Court of Appeal from any decision of a nominated judge whether given in the exercise of his original jurisdiction or on the hearing of an appeal under section 105(1) as extended by this paragraph;

(*d*) section 106 except subsection (4) (rules of procedure) shall apply to proceedings under this Act and persons within this Act as it applies to the proceedngs and persons mentioned in that section.

(2) Any functions conferred or imposed by the provisions of the said Part VII applied by subsection (1) above shall be exercisable also for the purposes of this Act and the persons who are "within this Act" are the donors of and attorneys under enduring powers of attorney whether or not they would be patients for the purposes of the said Part VII.

(3) In this section "nominated judge" and "nominated officer" have the same meanings as in Part VII of the Mental Health Act 1983.

Clause 10

This clause applies certain provisions of the Mental Health Act 1983 to persons " within ", and proceedings under, the Bill. These provisions relate to the functions of Visitors, the powers of the judge, appeals and rules of procedure.

Application to joint and joint and several attorneys.

11.—(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 jointly or jointly and severally.

(2) This Act, in its application to joint attorneys, applies to them collectively as it applies to a single attorney but subject to the modifications specified in Part I of Schedule 3.

(3) This Act, in its application to joint and several attorneys, applies with the modifications specified in subsections (4) to (6) below and in Part II of Schedule 3.

(4) A failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers, shall prevent the instrument from creating such a power in his case without however affecting 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) Where one or more but not both or all the attorneys makes or joins in making an application for registration of the instrument then—

(*a*) an attorney who is not an applicant as well as one who is may act pending the initial determination of the application as provided in section 1(2) (or under section 5);

(*b*) notice of the application shall also be given under Schedule 1 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.

(6) The court shall not refuse under section 6(5) to register an instrument because a ground of objection to an attorney or power is established if an enduring power subsists as respects some attorney who is not affected thereby but shall give effect to it by the prescribed qualification of the registration.

(7) The court shall not cancel the registration of an instrument under section 8(4) for any of the causes vitiating registration specified in that subsection if an enduring power subsists as respects some attorney who is not affected thereby but shall give effect to it by the prescribed qualification of the registration.

(8) In this section—

" prescribed " means prescribed by rules of the court; and

" the requirements for the creation of enduring powers " means the provisions of section 2 other than subsections (10) to (12) and of regulations under subsection (2) of that section.

Clause 11

This clause applies the provisions of the Bill to cases where the instrument provides for the appointment of either joint or joint and several attorneys. This implements paragraphs 4.91 to 4.98 of the Report.

Powers of Lord Chancellor to modify pre-registration requirements in certain cases.

12.—(1) The Lord Chancellor may by order exempt attorneys of such descriptions as he thinks fit from the requirements of this Act to give notice to relatives prior to registration.

(2) Subject to subsection (3) below, where an order is made under this section with respect to attorneys of a specified description then, during the currency of the order, this Act shall have effect in relation to any attorney of that description with the omission of so much of section 4(3) and Schedule 1 as requires notice of an application for registration to be given to relatives.

(3) Notwithstanding that an attorney under a joint or joint and several power is of a description specified in a current order under this section, subsection (2) above shall not apply in relation to him if any of the other attorneys under the power is not of a description specified in that or another current order under this section.

(4) The power to make an order under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Clause 12

This clause enables the Lord Chancellor to exempt certain attorneys from the need to notify relatives prior to registration. This implements the recommendation in paragraph 4.43 of the Report.

Interpretation, short title, commencement and extent.

13.—(1) In this Act—

"the court", in relation to any functions under this Act, means the authority having jurisdiction under Part II of the Mental Health Act 1983;

1983 c. 20.

"enduring power" is to be construed in accordance with section 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 of managing and administering his property and affairs and "mentally capable" and "mental capacity" shall be construed accordingly;

"mental disorder" has the same meaning as it has in the Mental Health Act 1983;

"notice" means notice in writing;

"rules of the court" means rules under Part VII of the Mental Health Act 1983 as applied by section 10;

1982 c. 48.

"statutory maximum" has the meaning given by section 74(1) of the Criminal Justice Act 1982;

1906 c. 55.

"trust corporation" means the Public Trustee or a corporation either appointed by the High Court or a county court (according to their respective jurisdictions) in any particular case to be a trustee or entitled by rules under section 4(3) of the Public Trustee Act 1906 to act as custodian trustee.

(2) Any question arising under or for the purposes of this Act as to what the donor of the power might at any time be expected to do shall be determined by assuming that he had full mental capacity at the time but otherwise by reference to the circumstances existing at that time.

(3) This Act may be cited as the Enduring Powers of Attorney Act 1983.

(4) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(5) This Act extends to England and Wales only except that section 7(3) and section 10(1)(*b*) so far as it applies section 104(4) of the Mental Health Act 1983 extend also to Scotland and Northern Ireland.

EXPLANATORY NOTES

Clause 13

1. This clause provides for the interpretation of various expressions used in the Bill. It also provides for the short title, commencement and extent.

2. In subsection (1) the definition of the expression " mentally incapable " makes reference to revocation at common law. This point is mentioned at footnote 58 to the Report.

SCHEDULES

Section 4.

SCHEDULE 1

NOTIFICATION PRIOR TO REGISTRATION

PART I

DUTY TO GIVE NOTICE TO RELATIVES AND DONOR

Duty to give notice to relatives

1. Subject to paragraph 3 below, before making an application for registration the attorney shall give notice of his intention to do so to all those persons (if any) who are entitled to receive notice by virtue of paragraph 2 below.

2.—(1) Subject to the limitations contained in sub-paragraphs (2) to (4) below, persons of the following classes (referred to in this Act as " relatives ") are entitled to receive notice under paragraph 1 above—

(*a*) the donor's husband or wife ;

(*b*) the donor's children ;

(*c*) the donor's parents ;

(*d*) the donor's brothers and sisters, whether of the whole or half blood ;

(*e*) the widow or widower 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 ;

(*i*) the donor's uncles and aunts of the whole blood ; and

(*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 1 above if—

(*a*) his name and address is not known to the attorney and cannot be reasonably ascertained by him ; or

(*b*) the attorney has reason to believe that he has not attained eighteen years or is mentally incapable.

(3) Except where sub-paragraph (4) below applies, no more than three persons are entitled to receive notice under paragraph 1 above and, in determining the persons who are so entitled, persons falling within class (*a*) of sub-paragraph (1) above are to be preferred to persons falling within class (*b*) of that sub-paragraph, persons falling within class (*b*) are to be preferred to persons falling within class (*c*) of that sub-paragraph ; and so on.

EXPLANATORY NOTES

Schedule 1

1. This Schedule contains the provisions as to notifying the donor and his relatives with which the attorney must comply before applying for registration (clause 4(3)). These provisions implement paragraphs 4.37 to 4.42 and 4.97 of the Report.

2. Paragraphs 1 to 3 deal with the notice to the relatives.

(4) Notwithstanding the limit of three specified in sub-paragraph (3) above, where—

(*a*) there is more than one person falling within any of classes (*a*) to (j) of sub-paragraph (1) above; and

(*b*) at least one of those persons would be entitled to receive notice under paragraph 1 above;

then, subject to sub-paragraph (2) above, all the persons falling within that class are entitled to receive notice under paragraph 1 above.

3.—(1) An attorney shall not be required to give notice under paragraph 1 above to himself or to any other attorney under the power who is joining in making the application, notwithstanding that he or, as the case may be, the other attorney is entitled to receive notice by virtue of paragraph 2 above.

(2) In the case of any person who is entitled to receive notice under paragraph 1 above, 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 shall 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.

Duty to give notice to donor

4.—(1) Subject to sub-paragraph (2) below, before making an application for registration the attorney shall give notice of his intention to do so to the donor.

(2) Paragraph 3(2) above shall apply in relation to the donor as it applies in relation to a person who is entitled to receive notice under paragraph 1 above.

Schedule 1 (continued)

3. Paragraph 4 deals with the notice to the donor.

PART II

CONTENTS OF NOTICES

5. A notice to relatives under this Schedule—

(*a*) shall be in the prescribed form ;

(*b*) shall state that the attorney proposes to make an application to the Court of Protection for the registration of the instrument creating the enduring power in question ;

(*c*) shall inform the person to whom it is given that he may object to the proposed registration by notice in writing to the Court of Protection before the expiry of the period of one month beginning with the day on which the notice under this Schedule was given to him ;

(*d*) shall specify, as the grounds on which an objection to registration may be made, the grounds set out in section 6(4).

6. A notice to the donor under this Schedule—

(*a*) shall be in the prescribed form ;

(*b*) shall contain the statement mentioned in paragraph 5(*b*) above ; and

(*c*) shall inform the donor that, whilst the instrument remains registered, any revocation of the power by him will be ineffective unless and until the revocation is confirmed by the Court of Protection.

Schedule 1 (continued)

4. Paragraphs 5 and 6 relate to the contents of the notices to relatives and the donor.

PART III

DUTY TO GIVE NOTICE TO OTHER ATTORNEYS

7.—(1) Subject to sub-paragraph (2) below, before making an application for registration an attorney under a joint and several power shall 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 3(2) and 5 above shall 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 2 above.

(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 attained eighteen years or is mentally incapable.

PART IV

SUPPLEMENTARY

8.—(1) For the purposes of this Schedule an illegitimate child shall be treated as if he were the legitimate child of his mother and father.

1978 c. 30.

(2) Notwithstanding anything in section 7 of the Interpretation Act 1978 (construction of references to service by post), for the purposes of this Schedule a notice given by post shall be regarded as given on the date on which it was posted.

Schedule 1 (continued)

5. Paragraph 7 relates to the notification of joint and several attorneys who are not themselves applying for registration.

6. Paragraph 8(1) uses the terms " legitimate " and " illegitimate ". In our Report on Illegitimacy (Law Com. No. 118) we recommended (paragraph 4.51) that these terms should cease to be used as terms of art and that the terms " marital " and " non-marital " should be used in their stead. Accordingly we would hope that, in the event of the draft legislation attached to that Report being enacted before this present Bill, the terms " marital " and " non-marital " would be used in preference to the terms " legitimate " and " illegitimate ".

Section 9.

SCHEDULE 2

FURTHER PROTECTION OF ATTORNEY AND THIRD PERSONS

1. Where—

(*a*) an instrument framed in a form prescribed under section 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,

paragraphs 2 and 3 below shall apply, whether or not the instrument has been registered.

2. An attorney who acts in pursuance of the power shall 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

(*b*) that the donor has become mentally incapable.

3. Any transaction between the attorney and another person shall, in favour of that person, be 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 ordinary power; and

(*b*) that the donor has become mentally incapable.

4. Section 9(4) shall apply for the purposes of determining whether a transaction was valid by virtue of paragraph 3 above as it applies for the purposes of determining whether a transaction was valid by virtue of section 9(3).

Schedule 2

See note 4 under clause 9.

Section 11.

SCHEDULE 3

JOINT AND JOINT AND SEVERAL ATTORNEYS

PART I

JOINT ATTORNEYS

1. In section 2(7), the reference to the time when the attorney executes the instrument shall be read as a reference to the time when the second or last attorney executes the instrument.

2. In section 2(9) and (10), the reference to the attorney shall be read as a reference to any attorney under the power.

3. In section 5(2), references to the attorney shall be read as including references to any attorney under the power.

4. Section 6 shall have effect as if the ground of objection to the registration of the instrument specified in subsection (4)(*e*) applied to any attorney under the power.

5. In section 8(2), references to the attorney shall be read as including references to any attorney under the power.

6. In section 8(4), references to the attorney shall be read as including references to any attorney under the power.

PART II

JOINT AND SEVERAL ATTORNEYS

7. In section 2(10), the reference to the bankruptcy of the attorney shall be construed as a reference to the bankruptcy of the last remaining attorney under the power; and the bankruptcy of any other attorney under the power shall cause that person to cease to be attorney, whatever the circumstances of the bankruptcy.

8. The restriction upon disclaimer imposed by section 4(6) applies only to those attorneys who have reason to believe that the donor is or is becoming mentally incapable.

Schedule 3

This Schedule provides (in cases where the instrument makes provision for the appointment of either joint or joint and several attorneys) for modifications to the general application by clause 11 of the provisions of the Bill.

APPENDIX B

List of those who commented on Working Paper No. 69

The Association of Police Officers in England, Wales and Northern Ireland
Messrs. Brignall, White & Orchard
The Building Societies Association
The Court of Protection
The Department of Health and Social Security
Mr. G. A. Dunn
Sir Leslie Farrer
Mr. G. E. Garrett
The Hon. Mr. Justice Goulding
The Holborn Law Society
The Inland Revenue
The Institute of Chartered Secretaries and Administrators
The Justices' Clerks' Society
The Law Society
The Law Society of Scotland
Mr. W. A. Leitch
Mr. D. J. Little
The Lord Chancellor's Visitors Office
Macfarlanes
Dr. E. A. Marshall
The National Association for Mental Health
The Official Solicitor
Mr. A. A. Preece
The Public Trustee
Mr. P. H. Race
The Royal College of Psychiatrists
The Scottish Law Commission
The Senate of the Inns of Court and the Bar
Mr. D. W. Shorey
Mr. M. Sladen
Mr. D. L. Taylor

APPENDIX C

SPECIMEN FORM OF ENDURING POWER OF ATTORNEY

THIS ENDURING POWER OF ATTORNEY is made this.....day of 19..... by AB of

I appoint CD of
or [CD of
and EF of jointly *or* (jointly and severally)]
to be my attorney(s) for the purposes of the Enduring Powers of Attorney Act 1983 [with general authority to act on my behalf] (*a*) *or* [with authority to do the following on my behalf] (*b*)

in relation to [all my property and affairs] or [the following property and affairs]

(subject to the following restrictions and conditions)
(*Here add any further provisions*) (*c*)

I intend that this power shall continue even if I become mentally incapable.

I have read the notes which accompanied and explained this document.

IN WITNESS etc., (Execution by donor)

I/We, the attorney(s) named in this power understand that under the Enduring Powers of Attorney Act 1983 I/we have a duty to register the instrument (*d*) and have a limited power (subject to any restrictions or conditions specified in this instrument) to make gifts of property (*e*) or otherwise to benefit myself/ourselves and other persons (*f*)

IN WITNESS etc., (Execution by attorney(s))

Notes

(*a*) If general authority is given, section 3 of the Enduring Powers of Attorney Act 1983 (the Act) will have the effect, subject to any restrictions or conditions specified in the instrument, of enabling the attorney to do anything the donor can do by an attorney including, for example, selling any house or other property belonging to the donor. He will be able to make gifts and use the donor's property to benefit himself or others, but only to the extent described in notes (*e*) and (*f*) below.

(*b*) If this alternative of giving only limited authority is adopted, the attorney will be able to do only the things specified. However, he will be able to make gifts and use the donor's property to benefit himself or others, but only to the extent described in notes (*e*) and (*f*) below.

(*c*) These further provisions can include, for example, a provision for paying the attorney for his services as attorney.

(*d*) The duty to register the instrument arises under section 4 of the Act as soon as the attorney has reason to believe the donor is becoming or has become mentally incapable of managing his affairs and is a duty to register (or join with the other joint attorneys in registering) the instrument with the Court of Protection. The Act contains requirements for the notification of the donor and his relatives by the attorney before the instrument can be registered. Details of these requirements are available from the Court of Protection.

(*e*) The donor's property can only be given away within the limits set out in section 3(4) of the Act but it includes power (within those limits) for the attorney to benefit himself by gifts. The donor can attach conditions to these powers or restrict them further than those limits by inserting the conditions or restrictions in the instrument at the place indicated for any restrictions or conditions.

(*f*) The donor's property can be used to benefit other persons, including the attorney, within the limits set out in section 3(3) of the Act. See also note (*e*) above as to further restrictions or conditions.

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