

SCHEDULES

SCHEDULE 4

Section 66(3)

PROVISIONS APPLYING TO EXISTING ENDURING POWERS OF ATTORNEY

PART 1

ENDURING POWERS OF ATTORNEY

Enduring power of attorney to survive mental incapacity of donor

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of Attorney Act 1971 (c. 27) (protection of donee and third persons), so far as applicable, applies as if the power had been revoked by the donor's mental incapacity,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

Characteristics of an enduring power of attorney

- 2 (1) Subject to sub-paragraphs (5) and (6) and paragraph 20, a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power—
- (a) is in the prescribed form,
 - (b) was executed in the prescribed manner by the donor and the attorney, and
 - (c) incorporated at the time of execution by the donor the prescribed explanatory information.

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- (2) In this paragraph, “prescribed” means prescribed by such of the following regulations as applied when the instrument was executed—
 - (a) the Enduring Powers of Attorney (Prescribed Form) Regulations 1986 (S.I. 1986/126),
 - (b) the Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (S.I. 1987/1612),
 - (c) the Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (S.I. 1990/1376),
 - (d) the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2000 (S.I. 2000/289).
- (3) An instrument in the prescribed form purporting to have been executed in the prescribed manner is to be taken, in the absence of evidence to the contrary, to be a document which incorporated at the time of execution by the donor the prescribed explanatory information.
- (4) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form it is to be treated as sufficient in point of form and expression.
- (5) A power of attorney cannot be an enduring power unless, when he executes the instrument creating it, the attorney is—
 - (a) an individual who has reached 18 and is not bankrupt, or
 - (b) a trust corporation.
- (6) A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power.
- (7) An enduring power is revoked by the bankruptcy of the donor or attorney.
- (8) But where the donor or attorney is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the power is suspended for so long as the order has effect.
- (9) An enduring power is revoked if the court—
 - (a) exercises a power under sections 16 to 20 in relation to the donor, and
 - (b) directs that the enduring power is to be revoked.
- (10) No disclaimer of an enduring power, whether by deed or otherwise, is valid unless and until the attorney gives notice of it to the donor or, where paragraph 4(6) or 15(1) applies, to the Public Guardian.

Scope of authority etc. of attorney under enduring power

- 3 (1) If the instrument which creates an enduring power of attorney is expressed to confer general authority on the attorney, the instrument operates to confer, subject to—
 - (a) the restriction imposed by sub-paragraph (3), and
 - (b) any conditions or restrictions contained in the instrument,authority to do on behalf of the donor anything which the donor could lawfully do by an attorney at the time when the donor executed the instrument.
- (2) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any

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consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further—

- (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.

(3) Without prejudice to sub-paragraph (2) but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further—

- (a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth, a marriage or the formation of a civil partnership, 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.

PART 2

ACTION ON ACTUAL OR IMPENDING INCAPACITY OF DONOR

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

- 4 (1) Sub-paragraphs (2) to (6) apply if the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable.
- (2) The attorney must, as soon as practicable, make an application to the Public Guardian for the registration of the instrument creating the power.
- (3) Before making an application for registration the attorney must comply with the provisions as to notice set out in Part 3 of this Schedule.
- (4) An application for registration—
- (a) must be made in the prescribed form, and
 - (b) must contain such statements as may be prescribed.
- (5) The attorney—
- (a) may, before making an application for the registration of the instrument, refer to the court for its determination any question as to the validity of the power, and
 - (b) must comply with any direction given to him by the court on that determination.
- (6) No disclaimer of the power is valid unless and until the attorney gives notice of it to the Public Guardian; and the Public Guardian must notify the donor if he receives a notice under this sub-paragraph.
- (7) A person who, in an application for registration, makes a statement which he knows to be false in a material particular is guilty of an offence and is liable—

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- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.
- (8) In this paragraph, “prescribed” means prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor.

PART 3

NOTIFICATION PRIOR TO REGISTRATION

Duty to give notice to relatives

- 5 Subject to paragraph 7, before making an application for registration the attorney must give notice of his intention to do so to all those persons (if any) who are entitled to receive notice by virtue of paragraph 6.
- 6 (1) Subject to sub-paragraphs (2) to (4), persons of the following classes (“relatives”) are entitled to receive notice under paragraph 5—
- (a) the donor’s spouse or civil partner,
 - (b) the donor’s children,
 - (c) the donor’s parents,
 - (d) the donor’s brothers and sisters, whether of the whole or half blood,
 - (e) the widow, widower or surviving civil partner of a child of the donor,
 - (f) the donor’s grandchildren,
 - (g) the children of the donor’s brothers and sisters of the whole blood,
 - (h) the children of the donor’s brothers and sisters of the half blood,
 - (i) the donor’s uncles and aunts of the whole blood,
 - (j) the children of the donor’s uncles and aunts of the whole blood.
- (2) A person is not entitled to receive notice under paragraph 5 if—
- (a) his name or address is not known to the attorney and cannot be reasonably ascertained by him, or
 - (b) the attorney has reason to believe that he has not reached 18 or is mentally incapable.
- (3) Except where sub-paragraph (4) applies—
- (a) no more than 3 persons are entitled to receive notice under paragraph 5, and
 - (b) in determining the persons who are so entitled, persons falling within the class in sub-paragraph (1)(a) are to be preferred to persons falling within the class in sub-paragraph (1)(b), those falling within the class in sub-paragraph (1)(b) are to be preferred to those falling within the class in sub-paragraph (1)(c), and so on.
- (4) Despite the limit of 3 specified in sub-paragraph (3), where—
- (a) there is more than one person falling within any of classes (a) to (j) of sub-paragraph (1), and
 - (b) at least one of those persons would be entitled to receive notice under paragraph 5,

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then, subject to sub-paragraph (2), all the persons falling within that class are entitled to receive notice under paragraph 5.

- 7 (1) An attorney is not required to give notice under paragraph 5—
- (a) to himself, or
 - (b) to any other attorney under the power who is joining in making the application,
- even though he or, as the case may be, the other attorney is entitled to receive notice by virtue of paragraph 6.
- (2) In the case of any person who is entitled to receive notice by virtue of paragraph 6, the attorney, before applying for registration, may make an application to the court to be dispensed from the requirement to give him notice; and the court must grant the application if it is satisfied—
- (a) that it would be undesirable or impracticable for the attorney to give him notice, or
 - (b) that no useful purpose is likely to be served by giving him notice.

Duty to give notice to donor

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

Contents of notices

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

Duty to give notice to other attorneys

- 11 (1) Subject to sub-paragraph (2), before making an application for registration an attorney under a joint and several power must give notice of his intention to do so to any other attorney under the power who is not joining in making the application; and paragraphs 7(2) and 9 apply in relation to attorneys entitled to receive notice by

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virtue of this paragraph as they apply in relation to persons entitled to receive notice by virtue of paragraph 6.

- (2) An attorney is not entitled to receive notice by virtue of this paragraph if—
- (a) his address is not known to the applying attorney and cannot reasonably be ascertained by him, or
 - (b) the applying attorney has reason to believe that he has not reached 18 or is mentally incapable.

Supplementary

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

PART 4

REGISTRATION

Registration of instrument creating power

- 13 (1) If an application is made in accordance with paragraph 4(3) and (4) the Public Guardian must, subject to the provisions of this paragraph, register the instrument to which the application relates.
- (2) If it appears to the Public Guardian that—
- (a) there is a deputy appointed for the donor of the power created by the instrument, and
 - (b) the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney,
- the Public Guardian must not register the instrument except in accordance with the court's directions.
- (3) The court may, on the application of the attorney, direct the Public Guardian to register an instrument even though notice has not been given as required by paragraph 4(3) and Part 3 of this Schedule to a person entitled to receive it, if the court is satisfied—
- (a) that it was undesirable or impracticable for the attorney to give notice to that person, or
 - (b) that no useful purpose is likely to be served by giving him notice.
- (4) Sub-paragraph (5) applies if, before the end of the period of 5 weeks beginning with the date (or the latest date) on which the attorney gave notice under paragraph 5 of an application for registration, the Public Guardian receives a valid notice of objection to the registration from a person entitled to notice of the application.
- (5) The Public Guardian must not register the instrument except in accordance with the court's directions.
- (6) Sub-paragraph (7) applies if, in the case of an application for registration—
- (a) it appears from the application that there is no one to whom notice has been given under paragraph 5, or

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- (b) the Public Guardian has reason to believe that appropriate inquiries might bring to light evidence on which he could be satisfied that one of the grounds of objection set out in sub-paragraph (9) was established.
- (7) The Public Guardian—
- (a) must not register the instrument, and
 - (b) must undertake such inquiries as he thinks appropriate in all the circumstances.
- (8) If, having complied with sub-paragraph (7)(b), the Public Guardian is satisfied that one of the grounds of objection set out in sub-paragraph (9) is established—
- (a) the attorney may apply to the court for directions, and
 - (b) the Public Guardian must not register the instrument except in accordance with the court's directions.
- (9) A notice of objection under this paragraph is valid if made on one or more of the following grounds—
- (a) that the power purported to have been created by the instrument was not valid as an enduring power of attorney,
 - (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.
- (10) If any of those grounds is established to the satisfaction of the court it must direct the Public Guardian not to register the instrument, but if not so satisfied it must direct its registration.
- (11) If the court directs the Public Guardian not to register an instrument because it is satisfied that the ground in sub-paragraph (9)(d) or (e) is established, it must by order revoke the power created by the instrument.
- (12) If the court directs the Public Guardian not to register an instrument because it is satisfied that any ground in sub-paragraph (9) except that in paragraph (c) is established, the instrument must be delivered up to be cancelled unless the court otherwise directs.

Register of enduring powers

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

PART 5

LEGAL POSITION AFTER REGISTRATION

Effect and proof of registration

- 15 (1) The effect of the registration of an instrument under paragraph 13 is that—

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

Functions of court with regard to registered power

- 16 (1) Where an instrument has been registered under paragraph 13, the court has the following functions with respect to the power and the donor of and the attorney appointed to act under the power.
- (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 supply 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 paragraph 3(2) and (3) (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 must confirm the revocation of the power if satisfied that the donor—

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- (a) has done whatever is necessary in law to effect an express revocation of the power, and
 - (b) was mentally capable of revoking a power of attorney when he did so (whether or not he is so when the court considers the application).
- (4) The court must direct the Public Guardian to cancel the registration of an instrument registered under paragraph 13 in any of the following circumstances—
- (a) on confirming the revocation of the power under sub-paragraph (3),
 - (b) on directing under paragraph 2(9)(b) that the power is to be revoked,
 - (c) on being satisfied that the donor is and is likely to remain mentally capable,
 - (d) on being satisfied that the power has expired or has been revoked by the mental incapacity of the attorney,
 - (e) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected,
 - (f) on being satisfied that fraud or undue pressure was used to induce the donor to create the power,
 - (g) on being satisfied that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.
- (5) If the court directs the Public Guardian to cancel the registration of an instrument on being satisfied of the matters specified in sub-paragraph (4)(f) or (g) it must by order revoke the power created by the instrument.
- (6) If the court directs the cancellation of the registration of an instrument under sub-paragraph (4) except paragraph (c) the instrument must be delivered up to the Public Guardian to be cancelled, unless the court otherwise directs.

Cancellation of registration by Public Guardian

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

PART 6

PROTECTION OF ATTORNEY AND THIRD PARTIES

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

- 18 (1) Sub-paragraphs (2) and (3) apply where an instrument which did not create a valid power of attorney has been registered under paragraph 13 (whether or not the registration has been cancelled at the time of the act or transaction in question).

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

Further protection of attorney and third persons

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

- (4) Paragraph 18(4) applies for the purpose of determining whether a transaction was valid by virtue of sub-paragraph (3) as it applies for the purpose of determining whether a transaction was valid by virtue of paragraph 18(3).

PART 7

JOINT AND JOINT AND SEVERAL ATTORNEYS

Application to joint and joint and several attorneys

- 20 (1) An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act—
- (a) jointly, or
 - (b) jointly and severally.
- (2) This Schedule, in its application to joint attorneys, applies to them collectively as it applies to a single attorney but subject to the modifications specified in paragraph 21.
- (3) This Schedule, in its application to joint and several attorneys, applies with the modifications specified in sub-paragraphs (4) to (7) and in paragraph 22.
- (4) A failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers—
- (a) prevents the instrument from creating such a power in his case, but
 - (b) does not affect its efficacy for that purpose as respects the other or others or its efficacy in his case for the purpose of creating a power of attorney which is not an enduring power.
- (5) If one or more but not both or all the attorneys makes or joins in making an application for registration of the instrument—
- (a) an attorney who is not an applicant as well as one who is may act pending the registration of the instrument as provided in paragraph 1(2),
 - (b) notice of the application must also be given under Part 3 of this Schedule to the other attorney or attorneys, and
 - (c) objection may validly be taken to the registration on a ground relating to an attorney or to the power of an attorney who is not an applicant as well as to one or the power of one who is an applicant.
- (6) The Public Guardian is not precluded by paragraph 13(5) or (8) from registering an instrument and the court must not direct him not to do so under paragraph 13(10) if an enduring power subsists as respects some attorney who is not affected by the ground or grounds of the objection in question; and where the Public Guardian registers an instrument in that case, he must make against the registration an entry in the prescribed form.
- (7) Sub-paragraph (6) does not preclude the court from revoking a power in so far as it confers a power on any other attorney in respect of whom the ground in paragraph 13(9)(d) or (e) is established; and where any ground in paragraph 13(9) affecting any other attorney is established the court must direct the Public Guardian to make against the registration an entry in the prescribed form.

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- (8) In sub-paragraph (4), “the requirements for the creation of enduring powers” means the provisions of—
- (a) paragraph 2 other than sub-paragraphs (8) and (9), and
 - (b) the regulations mentioned in paragraph 2.

Joint attorneys

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

Joint and several attorneys

- 22 (1) In paragraph 2(7), the reference to the bankruptcy of the attorney is to be read as a reference to the bankruptcy of the last remaining attorney under the power; and the bankruptcy of any other attorney under the power causes that person to cease to be an attorney under the power.
- (2) In paragraph 2(8), the reference to the suspension of the power is to be read as a reference to its suspension in so far as it relates to the attorney in respect of whom the interim bankruptcy restrictions order has effect.
- (3) The restriction upon disclaimer imposed by paragraph 4(6) applies only to those attorneys who have reason to believe that the donor is or is becoming mentally incapable.

PART 8

INTERPRETATION

- 23 (1) In this Schedule—
- “enduring power” is to be construed in accordance with paragraph 2,
- “mentally incapable” or “mental incapacity”, except where it refers to revocation at common law, means in relation to any person, that he is incapable by reason of mental disorder (within the meaning of the Mental Health Act) of managing and administering his property and affairs and “mentally capable” and “mental capacity” are to be construed accordingly,
- “notice” means notice in writing, and

“prescribed”, except for the purposes of paragraph 2, means prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor.

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