

At last ... the introduction of lasting powers of attorney in Guernsey

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In line with the existence of lasting powers of attorney (also known as **LPAs**) under both English and Jersey law, many will welcome the introduction in Guernsey law of the right to create LPAs.

[1]

An LPA essentially allows a person, known as the grantor, to appoint one or more persons, each known as an attorney, to make certain decisions for the grantor should they lose mental capacity (and in some cases relating to property and financial affairs, even before they do).

These decisions fall into two categories:

- health and welfare; and
- property and financial affairs

and an LPA can deal with one or both of these categories either generally or in relation to specified matters.

Previously any power of attorney granted by a person would automatically cease to be valid if that person lost capacity and such powers of attorney can still be granted notwithstanding the introduction of the LPA.

Very specific requirements must be met by both the grantor and any attorney in order to provide for a valid LPA.

The key requirements for a grantor are:

- they must be over 18 in order to register the LPA
- they must have capacity and not be under any undue influence at the time the LPA is registered
- they are responsible for the provision of accurate information and ensuring the attorney or

attorneys appointed are eligible to act

The key requirements for an attorney are:

- one or more persons can be appointed either jointly or jointly and severally (or a mixture of both)
- in relation to health and welfare, an attorney must be over 18 years of age
- in relation to property and financial affairs, an attorney must also be over 18 or a licensed Guernsey fiduciary
- other eligibility restrictions also apply, particularly in relation to a person who has been bankrupt
- the LPA instrument can provide for the appointment of a substitute or successor attorney in some circumstances
- if a spouse or civil partner of a grantor is appointed as attorney, if they subsequently divorce or lawfully separate, unless the LPA instrument provides otherwise, their appointment will automatically cease

An LPA is subject to certain overriding principles, including, importantly, that acts and decisions must only be made in the grantor's best interests.

It should be noted that an LPA cannot be used to alter a grantor's will. An LPA for health and welfare is also subject to provisions under the Law relating to advance decisions to refuse treatment, and any advance care plans should also be taken into account, as well as any other past wishes.

The LPA instrument must be in a prescribed form available online from the Royal Court (or otherwise meet the requirements of the Law and Ordinance but be immaterially different to the prescribed form), the content must comply with the requirements of the Law and Ordinance and is subject to any conditions or restrictions set out as well as restrictions set out in the Law limiting the authorisation an LPA can provide and the making of gifts by an attorney.

In certain circumstances it is possible to amend or revoke an LPA.

In order for an LPA to be valid, the grantor must:

- execute the LPA instrument in line with execution guidance provided by the Royal Court
- register the same themselves in person with HM Greffier (such that any foreign person would need to visit Guernsey personally) or HM Greffier (or his deputy) will attend at a person's home locally if they are unable to attend the Greffe in person (for a fee)

- pay the necessary fees

Where an LPA is activated when the grantor has lost capacity, there are very specific requirements by which capacity must be considered, how the grantor must be treated and what assessments must be made if it is believed the grantor has lost capacity. This information will be need to be submitted to HM Greffier before an LPA is considered activated.

In circumstances where it is considered necessary to terminate an LPA, the legislation provides appropriate safeguards to ensure the grantor's best interests are provided for.

It is very important that the choice of attorney is fully considered and revisited throughout the capacity of the grantor to ensure that any attorney in place at the time an LPA is activated is appropriate. An attorney should very carefully consider whether they are willing and able to accept such a position and any potential for a conflict of interest to arise should be assessed before the attorney is appointed. In some cases, it will be advisable for grantors or attorneys to seek legal advice.

It is hoped the introduction of the LPA will help in circumstances that can naturally be difficult and upsetting for individuals and families and to see capacity issues being addressed has been positively commented on.

[1] The Capacity (Bailiwick of Guernsey) Law, 2020 (the **Law**) and The Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022 (the **Ordinance**).

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