

A Guide to Making a Lasting Power of Attorney

What is a Lasting Power of Attorney?

A Lasting Power of Attorney (LPA) is a document that allows you (the donor) to appoint one or more people (the donee or Attorney) to act on your behalf if the time comes when you are no longer capable of making decisions yourself, because you lack the mental capacity to do so.

An LPA is a written record of your wishes, clearly set out and recorded in advance, explaining how the person you appoint as your donee is to make decisions on your behalf, and in certain circumstances, what those decisions should be. It also allows you to set up restrictions and guidelines on what your donee can or cannot do on your behalf.

Who can make a Lasting Power of Attorney?

To make an LPA, you have to be over 18 years of age, and you must still have the mental capacity to make the decisions involved in setting up the LPA. You must make it as an individual, and no-one can make it on your behalf.

When should I create an LPA?

For an LPA to be valid, it must be made before you lose mental capacity. If you are diagnosed with an illness or your lifestyle is such that you might possibly suffer an injury that could impair your mental capacity, then you might want to set up an LPA as early as you can.

It is difficult to make the decision to set up an LPA; some people find it hard to acknowledge that they will lose capacity. However, for many others, making an LPA in good time provides a great deal of relief that they do not have to worry about their future, especially about financial matters. The person or persons you appoint to be your donee can only make those decisions

once the LPA is registered and only once you have lost capacity and can no longer make those decisions for yourself.

What are the benefits of making a Lasting Power of Attorney?

There are various ways of stating your preferences to your loved ones so that they can take decisions on your behalf. You can simply write a statement of your wishes but this is not legally binding. If you are under the care of social services teams, you could write a care plan. Or you could make an Advance Decision to refuse treatment.

An Advance Decision is a legally binding document that allows anyone over 16 with mental capacity to specify the types of treatment that they do not want, if at some point in the future they lack the capacity to make a decision on treatment.

Without an LPA in place, if you lose your mental capacity, then your family and friends would have to apply to the Court of Protection to become 'deputies' in order to make decisions on your behalf. In a similar way to LPAs, there are two types of deputy; a deputy for property and financial affairs, and a deputy for personal welfare. The difficulty with this situation is that applying for a deputy status is a long and expensive process.

However, if you are aged 18 and over, an LPA provides a legally binding way of planning ahead for the rest of your life, even if you do lose the capacity to make vital decisions. It saves time and money and provides peace of mind for you and clarity for family and friends, your loved ones, your professional carers, with which to take decisions that they will know you would have wanted to take.

What types of LPAs are there?

There are two types of LPA, both of which have to be registered in the LPA Register at the Supreme Court of Gibraltar in order to be valid:

- **Health and Welfare LPA**

The Health and Welfare LPA allows you to choose the person who will make decisions about your health and personal welfare. You can choose whether to give the donee to make specific decisions, or leave them – if they are especially trusted persons – to make all the decisions on your behalf.

Making this LPA means that you can make decisions in advance about how you are to be looked after:-

- about your daily routine, such as washing, clothing, food choices
- about your medical care and what kind of treatments you are happy to receive
- your living arrangements and whether you want to live in your own home or move into residential care

In order to ensure that you retain control over your own care choices for as long possible, your Health and Welfare LPA can only be used when you no longer have the capacity to make decisions.

- **Property and Financial LPA**

The Property and Financial LPA gives your donee the power to make decisions about any or all of your property and financial affairs and can be used both while you have capacity, if you have given this as a specific instruction, as well as once you have lost capacity.

Your Property and Financial LPA can give the donee the authority to do any of the following:

- manage your bank accounts, including paying bills on your behalf
- buy and sell property
- collect pension or welfare payments on your behalf

Your donee can start their duties under your Property and Financial LPA as soon as it is registered, unless you have directed them otherwise.

How can I make my LPA?

You can make your LPA by using the various templates that are available on HM Government of Gibraltar website. Alternatively, you can instruct a lawyer who is familiar with the Lasting Powers of Attorney and Capacity Act 2018 to assist you in setting up and registering your LPA.

Having an experienced lawyer assist you with setting up an LPA is especially helpful if there are no close friends or family members you wish to appoint as a donee; your lawyer can help you choose a donee or set up a Trust Corporation to become your donee. It is important to remember that the Health and Welfare LPA and the Property And Financial LPA are separate documents and must be prepared and registered separately.

- **Choose your donee and replacement donee**

A donee has an important role. You need to be sure that the person you choose is someone you trust, and who knows you well enough to make decisions on your behalf, and that those decisions are in your best interests.

You also have to be sure that the donee is happy to take on this role. Sometimes close friends or family members feel overwhelmed by what they see as a huge responsibility. You may, in that case, consider appointing your a trusted professional, such as a carer you have known for a long time and whom you trust, or your solicitor, as your donee.

Your donee can be anyone aged 18 or over, such as a family member, a friend, a professional, your partner or a Trust Corporation.

A Trust Corporation is an organization that manages your funds (such as savings, pensions and investments) based on a set of rules and objectives that you have approved.

If you choose your spouse or civil partner as your donee, you must remember that if the relationship is legally ended, then the LPA will become unusable unless you include a condition in your LPA saying they can continue to act as your donee, or you appoint a replacement donee, or they are one of several donees and you have appointed them to act jointly and severally.

It may be the case that at some point your donee cannot make decisions for you, for a variety of reasons. For example, they might lose mental capacity themselves, or they could die. If you appoint at least one Replacement Attorney, then should this happens, your LPA will continue to be usable as the replacement donee will make decisions on your behalf according to the rules that you had already set out in your LPA. For example, if you appoint your spouse as your donee, you could appoint your son or daughter as a replacement donee if your spouse dies.

All donees and replacement donees must be over 18, not bankrupt and you need to be sure they understand their roles and responsibilities and that they agree to being appointed.

- **Who you cannot choose to be your donee**

You cannot choose anyone who:

- is under the age of 18
- lacks mental capacity
- is an undischarged bankrupt – if a donee becomes bankrupt after your LPA has been registered, they will not be able to act as your donee and your LPA may be cancelled

- **How you want your attorneys to make decisions on your behalf**

What instructions you give your donees in your LPA depends on a number of things, starting with how many donees you appoint, and whether you instruct that they should act jointly, or jointly and severally, or jointly for some decisions and severally for others. You can even instruct one donee to take certain decisions and the other donee to take other decisions. It depends on whom you trust most in which areas of your life. It is because sometimes these appointments can be complicated, that the objective, professional advice of a lawyer can be so useful.

Your LPA can be quite broad; for example, you can simply leave all the decisions to a trusted family member because you are confident that they know you so well that they can be trusted to take all the decisions you need in your best interests when the time comes. On the other, hand, you can be very specific about certain issues that are of particular importance to you, such as what type of medical treatment you are prepared to accept and which you would rather refuse.

- **Selecting a Certificate Provider**

Your LPA must include the provision of a certificate by a Certificate Provider who is someone whom you choose who can confirm that you fully understand your LPA and the instructions that you are giving that it sets out, and, importantly, that you have not been put under pressure to make it. The Certificate Provider makes up an important safety aspect of an LPA in that they are confirming that the LPA has not been completed fraudulently.

A Certificate Provider can be someone who has known you for at least 2 years, or who has the relevant skill or knowledge to be able to form a professional judgment about your understanding and capacity. Someone with relevant skill or knowledge could be your registered healthcare professional, a registered social worker, a lawyer or an Independent Mental Capacity Advocate. Very close family members such as a spouse or children or grandchildren cannot be a Certificate Provider.

An Independent Capacity Advocate can represent and support anyone who lacks capacity in relation to certain decisions, for example, in situations where serious medical treatment is proposed. The ICA can provide support to the person lacking capacity so that they can participate as fully as possible in the decision; obtain and evaluate information to support the patient's best interests including further medical opinion and ascertaining what, if the patient had capacity, their wishes for those particular matters might be based on the patient's known beliefs and values.

- **Assessing Capacity**

Capacity is the mental ability to make decisions about a particular matter, at a particular time. People may lack capacity to make a decision for many reasons. For example, this may be because of a stroke, mental illness, dementia, brain damage, physical or medical conditions that cause confusion or loss of consciousness, delirium, concussion following a head injury, or the symptoms of alcohol or drug use.

- **Duties of the Attorney**

The role of the attorney (donee) is important. When you are making your LPA you should discuss the instructions you are leaving with them and make sure that they fully understand their role and duties, and that they agree to take on those responsibilities.

When you agree to become a donee, you are declaring that you understand your role and responsibilities. Once the LPA is registered, it allows you to start to make decisions on the donor's behalf, unless the donor has specified otherwise.

- **Witnesses**

Your witness is someone who signs your LPA to confirm they witnessed you signing and dating it. Your witness can also confirm that they witnessed your donee signing and dating the LPA, or you can have separate witnesses to do this.

Having witnesses is an important part of the safety aspects of your LPA and helps to ensure that the LPA has not been made under coercion or fraudulently.

- **Registering the LPA**

To be valid, your LPA must be sent to the LPA Registrar in the Supreme Court of Gibraltar. There is a registration fee of £100. The Health and Welfare LPA and the Property and Financial LPA must be registered separately, even if you are using the same donee or donees for both. If there are no mistakes in the LPA, the Registry will return the LPA with a certificate and it is ready to use. This paperwork proves that you have a valid LPA and that the donee is legally authorised to act on your behalf.

- **Making amendments**

You can change or revoke your LPA at any time, while you still have capacity.

How does the legislation protect me from possible abuse?

The Lasting Powers of Attorney & Capacity Act 2018 creates safeguards to ensure that you are not open to coercion by others in the making of your LPA. For an LPA to be registered and valid, it needs to be witnessed, the donees sign to confirm they understand their roles and duties, and a certificate must be provided by an independent third party confirming that you have the mental capacity to draw up those important instructions that make up your LPA, and that there has been no fraud or undue pressure.

The Lasting Powers of Attorney & Capacity Act 2018 is an essential tool for planning ahead, reducing stress and strain on your near and dear ones. It can give you peace of mind in knowing that all your financial affairs and personal welfare needs are being met and your wishes respected, with the power of the law behind it. It also provides peace of mind for your family and friends, reassuring them of your wishes and guiding them in caring for you. A Lasting Power of Attorney is part of planning for the end of your life and meeting this with calm and with dignity.

If you would like further help and guidance in preparing a Lasting Power of Attorney, contact TSN's LPA team on 00350 200 79423 and ask for Lesley-Ann Saez or email us:

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