

26 April 2022

Briefing Note

At Last: The new Lasting Powers of Attorney regime in Guernsey

Introduction

After wide consultation, a regime for Lasting (or Enduring) Powers of Attorney (LPAs) in Guernsey has at last come into force on 1 April 2022 under the Capacity (Bailiwick of Guernsey) Law, 2020. The Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022, was passed after debate on 30 March 2022.

This brings a welcome relief to families with a family member who has lost capacity, who were previously obliged to make an application for guardianship which is expensive and time-consuming at an already stressful time, and leaves a gap between the time when a family member loses capacity and the obtaining of a guardianship order. It also means an individual can plan effectively, by granting powers of attorney before any difficulties arise.

What does this mean for someone wishing to register an LPA?

Guernsey now allows for two types of Lasting Powers of Attorney (LPAs) to be executed, in person, at the Greffe, by the person giving the power (known as the Grantor), namely Health and Welfare (HW) and Property and Financial Affairs LPA (PFA). These will allow the Grantor respectively to delegate authority to their attorney-in-fact ("Attorney"), to deal with either their health and welfare, their property and financial affairs, or both of these things together, and the fee for registration will be £80 if registered individually, or £100 if registered on the combined form.

Who can be the Attorney?

An Attorney does not need to be a lawyer, but can be anyone who is of age, and has not been declared insolvent in the preceding ten years.

A professional fiduciary can also be appointed as Attorney for PFA LPAs, which may be an interesting proposition for business in the future bearing similarities to a trust arrangement.

Either one or multiple Attorneys can be appointed, and it can be specified that certain decisions must be taken jointly. Replacement Attorneys can be listed, this is important as your original Attorney can renounce appointment if they are no longer able to fulfil the role due to insolvency, divorce from the Grantor, or his or her own loss of capacity, amongst other factors.

Importantly, where there are multiple Attorneys, and it is not specified as to whether decisions are to be taken individually or jointly, there is a presumption that the decisions must be taken jointly. If there is only one Attorney at that time, the authority to act under the LPA will be revoked for that joint decision, as it cannot be taken in the manner specified by the Grantor.

Activation, Suspension and Revocation

A PFA LPA can be activated immediately and used while the Grantor has capacity, in the manner directed by and with the permission of the Grantor. If this is not done, the activation of a PFA LPA, like a HW LPA, will be triggered by the Grantor's loss of capacity. The Attorney will take steps to activate the LPAs by the submission of the activation form enclosing a medical report by one of a designated list of health and care

professionals such as a doctor, nurse or consultant. The Greffe, on receipt and if satisfied, will issue an activation certificate. An LPA can only be used in conjunction with this certificate.

The power of Attorney forms will require that the grantor has the capacity to sign them, and any concerns over this capacity will be investigated by the Committee for Health and Social Care either on registration, or activation, or at any time alerted by a third party. The LPAs can be suspended while investigation takes place, and revoked if the Grantor is found to have capacity or if activation was triggered by a loss of capacity which was temporary.

What can be delegated? Limitations on the LPA

The main difference between the forms for HW and for PFA LPAs is that, for the PFA LPAs it is necessary to specify whether or not they take effect while the Grantor has capacity, and this must be explicitly indicated. If they are to take immediate effect, an additional form to indicate this must accompany the registration form, in order that an activation certificate is given.

In a HW LPA, it is necessary to specify explicitly whether or not the Attorney or Attorneys can make decisions about life-sustaining treatment. Thought should be given to this, and in particular whether the Grantor would like certain treatments to be decided on by a single Attorney, such as urgent life-sustaining treatment where there would not be time to call a family council or seek the advice of a particular practitioner, if those were the requirements laid out for the making of such decisions.

Within the forms themselves, it will be for the Grantor to specify the manner in which they would like their wishes to be acted upon, and to give guidance to their Attorney, in the same way as a letter of wishes guides a trustee or executor in the administration of a late estate or a will. The Grantor may also specify the way

in which decisions should be taken, including values to be considered, or consultation with specific persons or types of persons may be required.

A HW LPA may also attach an advance care plan made by a medical professional determined and approved while you have capacity. This gives a measure of control to the Grantor, which promotes their dignity when the time comes to administer care.

There are certain decisions that are not allowed to be taken by the Attorney. One of these is – importantly – the sale of property or property interests. A court order will be needed in order to do this. Various other acts relating to the Grantor may not be consented to, such as marriage, certain parenting decisions, or treatments for mental disorders that are regulated by Part VIII of the Mental Health Law. Advice should be sought if you are executing an LPA and anticipate any such care being necessary.

Conclusion

LPAs are a welcome development in Guernsey as they are a convenient tool for local people to take control of their future affairs, and for their loved ones to provide the care that they need swiftly upon the loss of capacity, and in the manner that they desire. LPAs also signal a new mechanism for fiduciaries to add value to private clients who may not be based in Guernsey.

While LPAs can be registered directly at the Greffe by members of the public, please do get in touch with a member of our team if any assistance is required.

Subscribe to receive the latest news, briefing notes and legal updates from us.

[Subscribe](#)

Authors



Kim Manley

K.Manley@babbelegal.com



Marco Nel

M.Nel@babbelegal.com

This note is for information purposes only and is not intended to be legal advice