

Lasting Power of Attorney

Making a plan in case you lose the
ability to manage your own affairs



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Introduction

Lasting Power of Attorney

Making a plan in case you lose the ability to manage your own affairs:

- What is a Lasting Power of Attorney?
- Why should you make a Lasting Power of Attorney?
- How do you make a Lasting Power of Attorney?
- How much does it cost?

If you have a serious accident or stroke, or you develop dementia, you may not be able to manage your finances or make decisions about your care. A Lasting Power of Attorney (LPA) gives someone **you trust** the ability to act on your behalf, should you be unable to act yourself.

There are two types of Lasting Power of Attorney – **one for your property and affairs** and the other for **health and welfare decisions**. Both types must be registered before they are valid.

This guide explains why everyone aged 18 or older should have both types of Lasting Power of Attorney, and how you can go about making them.

If you have any questions or would like to book a free appointment for advice without obligation, just call us on **01534 875 875**, email **info@benestsyvret.com** or call into our offices at **16 Hill Street, St Helier, Jersey**.



Why do I need a Lasting Power of Attorney?

"Mental capacity"

We associate losing "mental capacity" with old age but in fact, this can affect **anybody** at **any point** during their life. For example, did you know:

- According to the Jersey Stroke Association a stroke is suffered by someone every five minutes in the UK. It can happen to anyone, of any age, at any time.
- Accidents can affect anybody at any time, rendering them unable to manage their own affairs.
- One in 14 people over 65 will develop dementia and the condition affects one in six people over 80 (NHS).

Organise now

There are many health conditions that can result in loss of "mental capacity". By the time that happens it is too late to make a Lasting Power of Attorney. It therefore makes sense to organise this document while you are in good health.

It is wrong to assume that if you lose "mental capacity", your partner or "next of kin" will automatically be able to take over handling your finances and make decisions for you. Sometimes the bank will even freeze joint accounts **and refuse to allow access to funds** when one account holder becomes incapacitated – even if the funds are needed to pay for their care.

Everyone aged 18 or over should have both types of Lasting Power of Attorney in place. Rather than leave the choice of who will be making decisions for you to chance, you can make a Lasting Power of Attorney now and decide for yourself who you'd like to be in charge of your affairs.



What does it mean to have "mental capacity"?

The term "mental capacity"

You'll hear the term "mental capacity" when discussing Lasting Power of Attorney. Most of us make decisions daily about every aspect of our lives.

Being able to make these decisions is called "mental capacity".

Many different conditions prevent us from making decisions, or mean that we cannot make all decisions ourselves. For example, learning disabilities, brain injuries, dementia or a stroke can all impact our ability to make decisions.

However, some people get confused with the term "mental capacity", thinking it refers to mental illness. Having a mental health condition does not necessarily mean that a person lacks capacity. Just because they are suffering from depressions, schizophrenia or bipolar, for example, does not prevent them from making decisions for themselves.

The law

The law actually defines under what circumstances someone lacks "mental capacity". The Capacity and Self Determination (Jersey) Law 2016 says:

"A person lacks capacity in relation to a matter if, at the material time:-

- i) the person is unable to make his or her own decision in relation to the matter; because*
- ii) he or she suffers from an impairment of, or a disturbance in the functioning of his or her mind or brain".*

The Law further explains that a person is unable to make decisions for themselves if they cannot:-

- Understand the information relevant to the decision.
- Retain that information for a period, however short, which is sufficient to make the decision.
- Use or weigh that information in making the decision; or
- Communicate their decision (whether by speech, using sign language or other means).

When you make a Lasting Power of Attorney, you must have "mental capacity". If you have not made a Lasting Power of Attorney the Royal Court will have to appoint a Delegate to make decisions for you. The process is relatively lengthy, complex, expensive and easily avoided by making a Lasting Power of Attorney now.

What happens if I don't have a Lasting Power of Attorney?

Losing "mental capacity"

If you do lose "mental capacity" and you don't have a Lasting Power of Attorney, someone will have to apply to the Royal Court to be appointed as your Delegate under Part 4 of the Capacity and Self Determination (Jersey) Law 2016. The person who applies may not be the person you would have chosen yourself. The application process is relatively lengthy and expensive. Once an order is granted, the appointed Delegate can make decisions for you, which might include:

- Paying bills and expenses on your behalf.
- Deciding if your home will be sold.

The Delegate must always act in your best interests and his or her actions are supervised by the Royal Court. Abuse has however been known to happen – including theft, fraud, misuse of property, possessions or benefits, undue pressure and neglect. Instead making a Lasting Power of Attorney means you can nominate someone you trust to manage your affairs.

Advice

The best advice is, don't let matters get to a stage where the Court has to appoint a Delegate with the cost and delay that may arise in that process. Making a Lasting Power of Attorney is a much simpler, cheaper and quicker way to elect somebody you trust to manage your affairs should you be unable to do so yourself.

Can my executors make decisions for me if I lose "mental capacity"?

A Will or A Power of Attorney

People often assume that because they have made a Will, their executors will be able to make decisions for them if they lose "mental capacity". This assumption is not correct. A Will is concerned only with what happens after you die. A Lasting Power of Attorney is concerned only with what happens while you are alive. The two documents are not connected at all.

You can of course appoint the same people you have chosen to be your executors as your attorneys but you do need to make a Lasting Power of Attorney to do this.

But I'm not ill!

Set up a Lasting Power of Attorney before you lose "mental capacity"

Younger people often assume that Lasting Power of Attorney are for the ill or elderly, but this is a common mistake. It's crucial to understand that you can't set up a Lasting Power of Attorney once you lose "mental capacity". If you were in an accident tomorrow and lost "mental capacity", nobody would be able to manage your affairs – not even your partner or grown up children. A Delegate, chosen by the Court, would have to be appointed.

Once completed, Lasting Power of Attorney can take a substantial amount of time to register – 8 weeks is presently the timescale. Until they are registered, they cannot be used. If there are any mistakes or queries regarding your application and you lose "mental capacity" before these have been resolved, in many cases the document will then be of no use. So, it's wise to start the process as soon as possible.

I've been diagnosed with dementia – can I still make a Lasting Power of Attorney?

Making a Lasting Powers of Attorney

You can make a Lasting Power of Attorney provided that you have **"mental capacity"**. A diagnosis of dementia does not automatically mean you have lost "mental capacity".

To make a Lasting Power of Attorney, you don't need to be able to understand every decision that is presented to you. You might be, for example, struggling to manage your finances or to remember to pay bills. That doesn't prevent you from making a Lasting Power of Attorney – as long as you understand what you are signing when it comes to making the Lasting Power of Attorney, and the implications.

Unfortunately, with dementia, you won't know how quickly or slowly you will lose "mental capacity". It's best to make the Lasting Power of Attorney as soon as possible after having the diagnosis. You should also ensure your Will is completely up to date at the same time.

What exactly is a Lasting Power of Attorney?

Property and Affairs

There are **two types** of Lasting Power of Attorney and it is advisable to have both.

The Property and Affairs Lasting Power of Attorney can be used for decisions such as:

- Paying household, care and other bills.
- Claiming, receiving and using pensions and allowances such as the Long-Term Care Allowance or incapacity benefits.
- Making, selling or managing your investments.
- Buying or selling your home or other real estate.

This type of Lasting Power of Attorney is a useful document that can be used, once registered, if:

- You lose "mental capacity" because of illness or injury.
- You are away from home and want someone to deal with a matter for you.
- You are in hospital and want someone else to manage your affairs for the time being.

In fact, this document can be used any time after it has been registered, with your permission (even though you have not lost "mental capacity").

Health and Welfare

The Health and Welfare Lasting Power of Attorney can be used for decisions such as:

- The type of medical care you receive.
- Whether you stay in your home or move into residential care.
- What you eat from day to day.
- Your daily routine – dressing, going out etc.

The Health and Welfare Lasting Power of Attorney can only be used (once registered) if you have lost "mental capacity" and are unlikely to make a recovery within a reasonable time.

For many of us, the choice of attorney will be obvious – a partner or a grown up child who we trust. But without a Lasting Power of Attorney, this person will have no power to make those decisions for us from day to day. Of course, they could apply to be appointed as your Delegate, but they may be unable to take on this responsibility and someone else may be given the power instead. All of this can be avoided by making a Lasting Power of Attorney.

Who should I choose to be my attorney?

Almost anyone aged 18 or over can be your attorney including your partner, your grown up children, other family members, close friends or a lawyer. There are a few restrictions on who you can choose, which we can discuss with you.

You can have as many attorneys as you choose but if you appoint them to make joint decision the more people you have, the more difficult it may be for them to reach an agreement.

What exactly is a Lasting Power of Attorney? (cont.)

Who should I choose to be my attorney?

You can decide whether your attorneys will have to make decisions together (jointly) whether they can make decisions individually (jointly and severally). Assuming you are choosing people you trust, allowing them to making decisions individually should not be a problem. If they have to make every decision collectively this can cause considerable difficulties.

It's also wise to name replacement attorneys in case your choice of attorneys are unable to act. If you appoint two or more attorneys and specify that they must make decisions jointly, then fail to nominate a replacement attorney, the Lasting Power of Attorney will no longer be valid if one of them becomes unable or unwilling to act.

This is a good example of why it is important to instruct Benest & Syvret to prepare your Lasting Power of Attorney. There are many potential pitfalls that are not obvious from simply reading the form on the States of Jersey website. Whilst those pitfalls do not always prevent the document from being registered, they can render the document invalid in the future at a time when you no longer have the capacity to rectify the problem.

How do I make a Lasting Power of Attorney?

Both types of Lasting Power of Attorney can be made online using the relevant portal on the one.gov.je website but it is strongly recommended that you instruct a lawyer to prepare the application for you to avoid the numerous potential pitfalls.

The process involves **three** main steps:

- First meeting with Benest & Syvret to provide your instructions.
- Second meeting with Benest & Syvret to review the Lasting Power of Attorney application and sign them.
- We will then register the document with the Judicial Greffier.

The Act of the Royal Court confirming registration of the Lasting Power of Attorney will be returned directly to Benest & Syvret who will make a copy and send one to you. Benest & Syvret will store the original Act of Court for you free of charge.

Do I have to use a Lawyer?

Lasting Power of Attorney forms

At first glance, the Lasting Power of Attorney forms can appear quite simple. However, a few sections contain potential pitfalls. The main sections where things tend to go wrong include those on how your attorneys should act for you, replacement attorneys, instructions and preferences. If you fill the form in incorrectly, one of three things may happen:

- Your application may be entirely rejected by the Judicial Greffier so that you have to resubmit the documents and further payment.
- The Judicial Greffe may need to contact you for more details, delaying the process of registration; or
- Your application may be accepted but because of how you have set up your Lasting Power of Attorney it may become invalid in certain circumstances, after you have lost "mental capacity".

The final scenario can be the most serious – if your Lasting Power of Attorney is invalid, your relatives or close friends will have to apply to the Royal Court to appoint a Delegate to be able to help you. Aside from being expensive, this is a lengthy process and nobody can act until the Royal Court Order has been made.

However, in scenarios 1 and 2 – where there is a mistake on your form that results in it being rejected or information needs clarifying – if you lose "mental capacity" before the issues have been resolved, the document will again be invalid. The appointment of a Delegate will then be the only option for your relatives/friends. Making a Lasting Power of Attorney yourself without the help of a lawyer is rather like drawing up your own Will without taking legal advice. It is an unwise decision that can have unwelcome and expensive consequences.

Set up an LPA form with a lawyer

A Lasting Power of Attorney is a powerful legal document so it makes sense to use an experienced lawyer to set it up. Using a lawyer to help you prepare your Lasting Power of Attorney gives you peace of mind. Your lawyer will make sure that you fully understand the choices you are making and that everything is prepared correctly.

The Lasting Power of Attorney team at Benest & Syvret are experienced in preparing and submitting Lasting Power of Attorney. Our offices are conveniently located at **16 Hill Street, St Helier, Jersey** or we can call out to you, our fees are very competitive. Call us on **01534 875875** or email **info@benestsyvret.com** to arrange a free appointment without obligation.

How much does it cost to make a Lasting Power of Attorney?

Judicial Greffe fees

The Judicial Greffe charges £25 to register each Lasting Power of Attorney (or £10 if you are in receipt of Long-Term Care Support, Invalidity Allowance or Income Support). This fee applies to both types of Lasting Power of Attorney, so if you have both a Property and Affairs and a Health and Welfare Lasting Power of Attorney, the total application fees will be £50.

In addition to the application fees, you will need to pay for the cost of any legal advice that you receive. Fees can vary a great deal between lawyers.

Benest & Syvret fees

Many people choose to make Wills or review their existing Wills at the same time as making Lasting Powers of Attorney. The options in terms of services we provide relating to Lasting Powers of Attorney and Wills are set out in the table below. Please telephone 01534 875875 for a fees estimate.

You will find Benest & Syvret's fees highly competitive.

	1 x LPA (Property & Affairs or Health & Welfare)	2 x LPA (Property & Affairs and Health & Welfare)	Will of Personal Estate	Wills of Personal & Real Estate	2 x LPA and Wills of Personal & Real Estate
Initial Appointment or home visit discussing your needs	✓	✓	✓	✓	✓
All necessary follow up appointments e.g. for signing	✓	✓	✓	✓	✓
All work reviewed and approved by a lawyer	✓	✓	✓	✓	✓
Forms registered with the Royal Court for you by a lawyer	✓	✓	N/A	N/A	✓
Document storage	✓	✓	✓	✓	✓

Please contact us on **01534 875875** or by email **info@benestsyvret.com** and we will provide you with a personal quote.



I have an Ordinary Power of Attorney – do I need a Lasting Power of Attorney?

Ordinary or General Power of Attorney

An Ordinary or General Power of Attorney is a document that gives permission for someone to undertake actions for you – such as selling your house. You must have "mental capacity" to make a General Power of Attorney. If you lose "mental capacity", the document will no longer be valid as the attorney appointed can only act on your instructions and cannot make decisions on your behalf.

At this stage, you won't be able to make a Lasting Power of Attorney either and your relatives/friends will have to apply to the Royal Court for a Delegate to be appointed which, as noted, is a relatively expensive and lengthy process.

My bank says I should just set up a third-party mandate...

Early health symptoms

If you have early symptoms that could be dementia, sometimes banks or organisations will recommend you simply make a third-party mandate. This is a formal instruction from you to your bank which tells them that you'd like another party to carry out everyday banking transactions on your behalf. They won't be able to open and close the account. The problem with this mandate is that it can only be used while you have "mental capacity".

Once you lose "mental capacity", it is no longer valid – and you won't be able to make a Lasting Power of Attorney at that stage either. It therefore makes more sense to make a Lasting Power of Attorney for financial decisions while you have "mental capacity" – this can be used both while you have "mental capacity" (with your permission) and after you lose "mental capacity".

How is an Advance Directive related to a Lasting Power of Attorney?

Decisions in advance

An Advanced Directive is a document that allows you to set out whether or not you want to refuse specific medical treatment, should you become ill. It allows you to make decisions about your care in advance, so that the doctors know how to act even if you are unable to communicate your wishes in the future.

Usually such a document is quite specific and refers to particular treatments or medical circumstances. If a situation arises that you have not covered, the document will not apply.

The Advanced Directive comes into effect once signed and witnessed properly.

Your Health and Welfare Lasting Power of Attorney is able to cover all medical possibilities – not just those you might mention on the form – but it is your attorney that will make the decisions rather than you. However by executing an Advance Directive you can give instructions as to future care and medical treatment when making your Lasting Power of Attorney which your attorneys must follow. You can also indicate preferences which are guidelines to help your attorneys make the right decision.

If you make both a Health and Welfare Lasting Power of Attorney and an Advance Directive document, and one contradicts the other this can cause difficulties. It is useful therefore to have both prepared at the same time. However, keep in mind that your attorneys should always act in your best interests.

Lasting Power of Attorney: Who's who?

Judicial Greffe The Judicial Greffe is the office of the Judicial Greffier who is effectively the Administrator of the Royal Court. He is the person designated under the Capacity and Self Determination (Jersey) Law 2016 to supervise registration of Lasting Power of Attorney.

The Donor The Donor is the person making the Lasting Power of Attorney. Anyone aged 18 or older with "mental capacity" can be a donor.

The Attorney The Attorney is the person you have chosen to make decisions on your behalf, should you lose "mental capacity". This could be your spouse, your adult children, a close friend or (in the case of a Property and Affairs Lasting Power of Attorney) a professional such as an accountant or lawyer. You can choose as many attorneys as you like, and you can choose different attorneys for each type of Lasting Power of Attorney if you want to. There are a few rules about who can be an attorney which your lawyer will discuss with you.

Witnesses These people witness yours , or your attorney(s) signature when signing and dating the Lasting Power of Attorney forms and dating the Lasting Power of Attorney forms.

Royal Court The Court which ultimately adjudicates on the validity of Lasting Power of Attorney's and the powers which Attorney's hold under the terms of those documents. The Court also supervises the conduct of Attorney(s), any failure to act in your best interests or a dispute as to the operation of an Lasting Power of Attorney will be referred to the Royal Court.

Make an Appointment

Contact Benest & Syvret

At Benest & Syvret we have a team of lawyers experienced in drafting and submitting Lasting Power of Attorney. Our offices at **16 Hill Street, St Helier, Jersey** are conveniently located and have easy access.

We would be happy to see you at our office or visit you in your home if this is more convenient – just give us a call on **01534 875875** or email info@benestsyvret.com.

Legal Disclaimer

The information in this guide:-

- Does not constitute legal advice.
- Does not create a contractual relationship.
- Does not form part of any other advice, whether paid or free.



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