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Document Reference: 30
March 2019

INFORMATION SHEET No 30

Power of Attorney

The UK rules concerning Powers of Attorney dealing with incapacity changed at the end of 2007. Since October 2007, when the Mental Capacity Act 2005 came into force, it has no longer been possible to create an Enduring Power of Attorney ('EPA'). Instead, EPAs have been replaced by two types of Lasting Power of Attorney ('LPA'), one to cover property and financial affairs and the other to cover personal welfare.

The new LPA regime differs significantly from the EPA regime in several key respects. In particular, it is possible for an attorney of an LPA not only to make decisions about the donor's property and financial affairs but also about his or her personal welfare, for example issues concerning the donor's accommodation, healthcare and even whether life sustaining treatment is to be refused. Furthermore, all LPAs have to be registered with the PGO before use and a certificate confirming that the donor is mentally capable and not under any undue influence should be obtained.

There is no direct equivalent of an LPA in Spain although a Power of Attorney (POA) can be signed to deal with the issue of incapacity. First of all let's begin by dispelling a couple of myths. It is important to be clear that a POA ceases to have effect upon death, both in Spain and the UK. This comes as a shock to many people who mistakenly believe that the POA can be used by surviving relatives to access bank accounts of the deceased etc. When a person dies the POA dies with them and the question then arises whether the deceased had a Will, or whether they died intestate.

Another common misunderstanding is the effect of mental incapacity upon a POA. Most ordinary POA's are automatically revoked in the event of the donor losing capacity. The person appointed on the POA may continue to use it and pretend to be unaware of the incapacity although this is not correct and they risk a great deal by doing so.

We encourage everyone, of any age, to review their affairs so that appropriate documentation can be prepared in a calm and non pressured environment. A Spanish POA can be drafted so that it only commences to have effect in the event of incapacity or, alternatively, an ordinary POA can be drafted so that it is not revoked by any subsequent incapacity. Ideally everyone should sign such a POA as it is relatively quick to prepare, inexpensive, and can then be confined to the bottom drawer in the hope it will never be needed.

The information provided on this article is not intended to be legal advice, but merely conveys general information related to legal issues.