

KEY POINTS

What is the issue?

Foreigners living in Spain who fall ill, have an accident or lose mental capacity may be faced with unexpected problems when it comes to protecting their assets.

What does it mean for me?

Practitioners may wish to advise their clients living permanently or temporarily in Spain as to the most appropriate actions to safeguard their future wellbeing, such as lasting powers of attorney or the advance election of a guardian, in the event of such circumstances.

What can I take away?

Knowledge of the best course of action to take in the protection of vulnerable adult clients.

Sunset years

MARÍA DEL MAR HERNÁNDEZ CORTÉS DESCRIBES PREVENTIVE MEASURES FOR VULNERABLE ADULTS IMMIGRATING TO SPAIN

Although a majority of elderly people will happily enjoy their golden years, the increase in life expectancy raises the likelihood of succumbing to illness that could affect capacity.

According to a study by Málaga University on geronto-immigration,¹ 28 per cent of EU citizens living in Spain, Iceland and Norway live alone, and around 67 per cent are part of a two-member family. This means that if the individual becomes unable to make decisions about personal, economic and healthcare issues due to an injury or illness, the presence of personal or family support is absolutely crucial if no preventive measures have been taken.

Article 200 of the Spanish *Civil Code* states that persistent physical or mental illness or deficiencies that prevent a person from governing themselves shall be a cause of incapacitation.

For the benefit of a person who potentially loses capacity to make these decisions, as well as for their relatives and those close to them, it is absolutely critical that advisors inform their clients of the

uses of a lasting power of attorney (*poderes preventivos*, LPA) and advance election of a guardian (*autotutela*).

These are the only self-protective measures that any adult of any age and nationality residing in Spain can use to decide who will take care of them and their assets, were they to lose capacity. These measures are also the only way to preserve the dignity of vulnerable adults, giving them the chance to decide in advance how they wish to be looked after.

If an individual partially or completely loses capacity and has not granted an LPA, the alternative option is to begin a procedure of incapacitation or modification of the capacity. In this procedure, the court will appoint a guardian, taking into consideration the individual's particular circumstances. This is a much longer and more expensive option, and the incapacitated person will have no choice as to who is appointed guardian by the judge.

Additionally, there is the option of granting a living will (*testamento vital*) or advance decision (*declaración de voluntades anticipadas*), which may coincide with the health and medical decisions of the LPA.

SUPPORTING LEGAL FRAMEWORKS

Below are some brief references to relevant legal frameworks internationally and in Spain, including inspiring principles and particular references to the LPA:

- In the UN's *Universal Declaration of Human Rights*, the protection of the freedom and dignity of every person is declared, which is the essence and foundation of the LPA.²



María del Mar Hernández Cortés
TEP is a Partner at Balmaseda & Hernández
Abogados in Málaga, Marbella, Estepona



- The UN's *Convention on the Rights of People with Disabilities*, ratified by Spain on 3 December 2007 and an integral part of Spanish law, refers to and promotes the autonomy of the dignity of the person.³
- The EU's *Charter of Fundamental Rights of the European Union*, which lays out the rights to move and reside freely, dignity, freedom, free and informed consent, security and the right of elderly people to have a dignified and independent life, serves as a basis for the LPA.⁴
- *Royal Legislative Decree 1/2008*.
- Preparatory legislative work in the European Council, European Parliament and European Commission, such as the following:
 - *Recommendation CM/Rec(2009)11* on the principles concerning continuing powers of attorney and advanced directives for incapacity (the Recommendation);⁵
 - *Enabling Citizens to Plan for Incapacity*: a report reviewing the follow-up action taken by Council of Europe Member States on the Recommendation;⁶
 - *The European Added Value of EU Legislative Action on the Protection of Vulnerable Adults*;⁷ and
 - *Report of the Legal Affairs Commission of the European Parliament of 3 April 2017*, with recommendations for the protection of vulnerable adults.
- The Spanish *Civil Code*, which states that any foreign adult residing in Spain is entitled to grant an LPA, irrespective of their nationality or permanent residence.⁸
- The EU's *Convention on the Law Applicable to Contractual Obligations Opened for Signature in Rome on 19 June 1980*.⁹

It would be desirable to have an EU regulation (or other international legislation) for the capacity of vulnerable adults, in which a unique model of an LPA and lasting wills could be created, together with a central registry where all LPAs would be registered. This would ensure that any authority or medical professional could have access to it if necessary. Revoked LPAs could also be registered to safeguard the interests of vulnerable adults.

The *Hague Convention of 13 January 2000 on the International Protection of Adults* includes a model of an LPA that could be useful for this purpose, but few European countries have ratified it.

BENEFIT OF AN LPA

The dignity of the vulnerable adult is protected with an LPA as they have decided it in advance. The costs are also much more affordable than a



'It would be desirable to have an EU regulation ... for the capacity of vulnerable adults, in which a unique model of an LPA and lasting wills could be created, together with a central registry'

procedure of incapacitation, and the process is simpler.

The appointed guardian(s) can immediately act for the benefit of the vulnerable adult and the representative can act in the many areas they have been appointed for, without any need for long and costly court permissions.

Further possible procedures of incapacitation are also avoided, which can create uncertainties and be slower and more expensive.

ELEMENTS OF AN LPA

The powers to be included in the LPA are flexible and should be individually adapted to the needs of the grantor, but below is a brief overview.

Validity and effectiveness

The grantor can decide if they want the LPA to be valid and effective on being signed when they are still capable and when incapacitation eventually appears, or if the LPA will only be fully effective if

incapacitation appears. In the latter case, it is common to include a condition where the appointed representative proves the lack of capacity with two medical certificates or in a similar way.

Personal care

It is important to consider who will take care of the grantor if there are several guardians. Will the care be shared jointly or severally? Will the grantor move to a nursing facility or stay at home?

Economic administration

Consideration should be given to the individual who will administer the grantor's assets. Again, will this be jointly or severally? Will there be special instructions for relevant decisions?

Safeguards

Depending on the degree of confidence in the appointed guardian(s), it may be recommended to appoint an association or professional who periodically supervises the personal and/or economic situation of the incapacitated person to avoid misuse of the LPA.

Advance decisions

As mentioned above, aside from the LPA, the grantor can also sign a living will and advance decisions, which must be granted at a government health office and will later be registered in a central registry of living wills. However, it is also possible, and relatively common, to include some powers related to advance decisions in the LPA, granted before a notary.

However, the LPA does not yet have access to the central registry of living wills, meaning that, in a medical emergency, it is important that the appointed representative brings the original LPA to the medical practitioner, who will admit it, as it is a notary power of attorney, with the only inconvenience being that it cannot be registered.

Advance appointment of guardian

Although the LPA may be granted, there are circumstances, such as a misuse of the LPA of the incapacitated person by the appointed person, that can result in a procedure of incapacitation. It is therefore important that, in this case, the grantor includes several people whom they would like to be their guardians in the LPA.

#CROSS-BORDER ESTATES

#LEGISLATION #ESTATE PLANNING

1 [bit.ly/2xCH5Wr](#) 2 In the preamble and arts.1 and 3 arts.3.a) and 12, paras.3–5 being of particular relevance 4 In the preamble, as well as arts.1, 2a), 6, 7, 25, 26, 41.2 and 45.1 5 [bit.ly/2UaHx65](#) 6 [bit.ly/3aZnyxZ](#) 7 [bit.ly/2whatRl](#) 8 arts.9.6 and 10.9 arts.3–4