

The New Capacity Law in Guernsey and Lasting Powers of Attorney

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The Capacity (Bailiwick of Guernsey) Law 2020 will come into force later this year. The Guernsey law has been influenced by the provisions of the English Mental Capacity Act of 2005.

Among other things the new law will introduce the concept of Lasting Powers of Attorney - which already exist in Jersey and in England and Wales.

The person making the Lasting Power of Attorney will be known as the Grantor. The Grantor appoints an Attorney, who may be authorised to make decisions about the Grantor's health and welfare and / or the Grantor's property and financial affairs.

Powers of Attorney are nothing new, but an Attorney under a 'normal' Power of Attorney is not able to act when the person appointing them loses the ability to make decisions, for themselves e.g. through a lack of mental capacity. A Lasting Power of Attorney, which will come to be known as a LPA, will remain in force after the Grantor has lost the capacity to make decision for him or herself. The Grantor will appoint one or more individuals, and in respect of powers to deal with property and financial affairs, the individual, or individuals, could be regulated entities - such as trust companies. Where there is more than one Attorney they will be able to act jointly or severally (together or individually), or a combination of the two according to the task to be undertaken.

The heading of 'health and welfare' covers wishes in respect of medical treatment, care and life-sustaining treatment, including the refusal of such treatment. It can only be used once a Grantor is unable to make those decisions for themselves.

An LPA which deals with property and financial affairs gives the Attorney the power to deal with the Grantor's assets within the limits set out by the Grantor in the LPA.

It is possible for the Attorney to act under the LPA whilst the Grantor still has mental capacity if that power has been included in the LPA.

The Attorney, if an individual, does not have to be an Advocate; a spouse, partner or friend may be chosen. The choice of Attorney is important, however, because they will need to make important decisions about the Grantor's financial affairs, health and welfare if there is a loss of mental capacity.

At the point when a Grantor becomes incapable of making decisions for themselves the LPA will need to go through some form of registration. Under our current law the Royal Court needs to be persuaded that the appointment of a guardian is in the best interests of the patient. When the new Law comes into force this process is likely to be simpler. The 2020 Law does not provide details of how this will be achieved; this detail will follow in an Ordinance. During the consultation phase for the new law the States became aware that there were differing views about the extent to which a formal registration process was necessary, and whether the process should be the same for health and care matters as for financial and property affairs. By dealing with the registration process in an Ordinance the States can monitor the making and use of LPAs and amend the process relatively quickly, if necessary.

It seems likely that the Courts will remain involved in matters concerning disposal of real property (i.e. houses and land).

Once the LPA comes into force, however that is to be achieved, an Attorney would do well to take legal advice to ensure they fully understand the extent of their powers as well as any restrictions imposed on the decisions they make. An Attorney must take decisions which are in the best interests of the Grantor and only within the powers granted to them in the LPA. That said, any Attorney will be pleased to know the new Law provides them with some protection where they act in good faith.

Lasting Powers of Attorney will terminate upon the death of the Grantor or following its revocation by the Grantor before he or she loses capacity). It is also possible for the Court to terminate the LPA if it is in the best interests of the Grantor or because an Attorney has acted inappropriately. The Court will also be able to give guidance to the Attorney where direction is required.

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Meet the Author



[Martyn Baudains](#)

Partner

[Guernsey](#)

E: martyn.baudains@ogier.com

T: [+44 1481 752217](tel:+441481752217)

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