

# Jersey takes a step closer to modern mental capacity law

By **Donna Withers**, probate and wills manager, Bedell Cristin

**A** NEW law has been approved by the States of Jersey which will radically change the way the Island responds to mental health issues.

Scheduled to come into force in April 2018, the Capacity and Self Determination (Jersey) Law, has been developed to take into account modern standards in clinical practice and legislation and case law in both Jersey and England.

It aims to put the principles of autonomy and best interests of the vulnerable in our society to the fore in decision-making on their behalf. It will enable every Jersey resident to put in place legally-binding arrangements for the future of their finances and welfare should they no longer be able to cope with decision making for themselves.

Similarly to making a will and arrangements for one's death, it is a hard task emotionally envisaging a time when we may be no longer capable of participating in decisions, but it is a worthwhile exercise to ensure your wishes are respected and to ease the burden of responsibility on those caring for you and who you care about. The new law will go a long way to providing peace of mind.

Highlights of the new law are as follows:

## 1. DELEGATES (TO REPLACE CURATORS)

WHEN a Jersey resident loses capacity to deal with their own financial affairs, the Royal Court appoints a curator to act on their behalf. Curatorship, a customary law office, was last refreshed by the legislature 48 years ago when the regime was codified in part by the Mental Health (Jersey) Law 1969. Curators must account to the Judicial Greffe each year for all income and outgoings and must ask permission of the court to spend more than £2,000 per year (or ten per cent of income) on items such as holidays or furniture. This can be particularly onerous and intrusive for spouses of individuals lacking capacity.

The new law will replace the current curatorship regime with the appointment of delegates by the Royal Court. The extent of authority of the delegate can be stipulated by the Royal Court at the time of appointment, allowing for extra flexibility where desirable (such as for spouses) or providing tailor made limitations if necessary, given the particular circumstances of the person and how best to serve their best interests.

## 2. LASTING POWERS OF ATTORNEY

FOR the first time, a Jersey resident will be able to plan for the risk of future mental incapacity by granting lasting powers of attorney (LPA) for health and welfare and also property and financial affairs.

Jersey currently has no powers of attorney which survive the intervening incapacity of the donor. A new regime for lasting powers will empower Jersey residents to plan ahead and afford flexibility to prescribe how they would wish for their affairs to be organised should they one day no longer be able to do so for themselves.

The States Assembly expressed the intention that all Jersey residents would create LPAs and that the Jersey version of the instruments will be much simpler than in the UK to enable them to be created without the expense and assistance of a lawyer. However, whilst simplification is to be welcomed, it must not be at the cost of safeguards against abuses of LPAs. The use of lawyers in the creation of LPAs is an additional safeguard against the risk of abuse.

## 3. OVERARCHING PRINCIPLES

THERE are five principles which underlie the operation of the new law, designed to guide the decision maker



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**David Nicholls**

t: 020 7131 4515

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Donna Withers

Profile

Donna Withers is an English solicitor and full member of STEP with over 12 years of experience advising private clients. As well as inheritance issues, such as preparing wills and assisting families with probate, she is passionate about protecting the wealth and welfare of elderly or otherwise vulnerable clients. She advises on estate planning measures to plan for the risk of future incapacity and also advises on the duties of those caring for incapacitated individuals. She is an expert in this evolving field, having co-authored the Jersey chapter in the Oxford University Press textbook *The International Protection of Adults*.

in practice. They are similar to the principles of the English Mental Capacity Act 2005 and can be summarised as follows:

- i) A person must be assumed to have capacity unless it is established that he lacks capacity;
- ii) A person is not to be treated as unable to make a decision unless all practicable steps to help him make the decision have been taken without success;
- iii) A person is not to be treated as unable to make a decision merely because he makes an unwise decision;
- iv) An act done or decision made, under the new law, or on behalf of a person who lacks capacity, must be done, or made, in his best interests;
- v) Before the act is done, or the decision made, regard must be had to whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of the person's rights and freedoms.

These principles underline the ethos of the new law of self-determination, supporting people as far as possible to live autonomously.

4. A STATUTORY TEST FOR MENTAL CAPACITY AND BEST INTEREST DECISIONS

THE new law recognises that capacity is not an all or nothing matter and can be affected by both timing and current circumstances. In response to this, the legislation contains a helpful capacity checklist whereby a person will be considered unable to make a specific decision if, at the relevant time, he or she is unable:

- i) To understand information relevant to the decision;
- ii) To retain the information;
- iii) To use or weigh that information as part of the decision-making process; or
- iv) To communicate the decision.

If it is established that a particular decision cannot be made by a person for himself, then the person with responsibility for making the decision must have regard to the best interests considerations laid out in the law.

5. STATUTORY WILLS

FOR the first time, statutory wills will be available in Jersey. The court will be empowered to direct that a will may be executed on behalf of a person lacking capacity for all their estate, except immovable estate (such as property) situated outside of the Island. This development is to be welcomed to counter the harsh consequences for families of any failure to execute a will before a loss of capacity or to make for a more equitable distribution of a person's estate than the laws of intestacy (when no will has been made) would otherwise allow.

Given shifting trends away from the traditional nuclear family toward more blended families, coupled with the increasing mobility of people around the globe, such measures are a welcome addition to the Jersey legislation.

The new law, with 73 articles and two schedules, is a substantial raft of legislation and whilst there is much work to be done in the subordinate regulations, its approval by the States Assembly is a positive development and an essential stride forward to empower the vulnerable in the Island's growing population and those who support them.

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