

Peace of mind

Donna Withers
explores Jersey's
new mental
capacity law

Although Jersey enjoys a highly developed legal system facilitating its offshore finance industry, its laws in relation to mental capacity have been somewhat neglected, having last been refreshed nearly 50 years ago. Given the relatively small population of the island, estimated at just higher than 100,000, case law on the subject is sparse.

However, a new law has been approved that will change the way in which the island responds to mental health issues. Scheduled to come into force in April 2018, the *Capacity and Self-determination (Jersey) Law 2016* (the Capacity Law) has been developed to take into account modern standards in clinical practice, and legislation and case law in both Jersey and England and Wales. Aligned in many respects with the England and Wales *Mental Capacity Act 2005* (MCA 2005), it aims to bring the principles of autonomy and best interests of the vulnerable to the fore when decision-making occurs on their behalf.

Highlights of the new law are set out below.

DELEGATES TO REPLACE CURATORS

When a Jersey resident loses capacity to deal with their own financial affairs, the Royal Court of Jersey appoints a curator to act on their behalf. Curatorship, a customary law office, 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 the Royal Court's permission to spend more than GBP2,000 per year (or 10 per cent of income) on items such as holidays or furniture. This



➤→ KEY POINTS

WHAT IS THE ISSUE?

Legal difficulties arising by reason of the ageing population are now being addressed by the legislature in Jersey.

WHAT DOES IT MEAN FOR ME?

Practitioners should have an awareness of the latest developments affecting private clients with connections to Jersey.

WHAT CAN I TAKE AWAY?

Knowledge of the approach in Jersey to matters relating to vulnerable clients.

can be particularly onerous and intrusive for spouses of individuals lacking capacity.

The Capacity Law will replace the current curatorship regime with the appointment of delegates by the Royal Court. The extent of the delegate's authority 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 optimally to serve their best interests.

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 (LPAs) for health and welfare, and also property and financial affairs. A new regime for LPAs will empower Jersey residents to plan ahead and afford flexibility to prescribe how they would wish their affairs to be organised, should they one day no longer be able to do this themselves.

The Capacity Law expressly provides for the recognition and enforcement of LPAs that have been validly created and registered elsewhere in the UK and Crown Dependencies. The Royal Court has always taken a pragmatic approach to such powers given by non-Jersey residents, and has registered them for use on the island as a matter of comity. We would expect this approach to continue for similar powers and clients from outside the UK and Crown Dependencies.

Jersey's parliament, the States Assembly, expressed the intention that all Jersey residents would create LPAs.

Wishing to learn from the experience of England and Wales, Jersey intends its version of the instruments to be much simpler than those introduced under the MCA 2005. However, while 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.

OVERARCHING PRINCIPLES

There are five principles that underlie the operation of the Capacity Law, designed to guide the decision-maker in practice. They are similar to the principles under the MCA 2005, and can be summarised as follows:

A STATUTORY TEST FOR MENTAL CAPACITY AND BEST-INTERESTS DECISIONS

The Capacity Law recognises that capacity is not an all-or-nothing matter, and can be affected by both timing and current circumstances. In response, the legislation contains a helpful capacity checklist, whereby a person will be considered unable to make a specific decision if, at the relevant time, they are unable to:

- **understand information relevant to the decision;**
- **retain the information;**
- **use or weigh that information as part of the decision-making process; or**
- **communicate the decision.**

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

STATUTORY WILLS

For the first time, statutory wills will be available in Jersey. The Royal Court will be empowered to direct that a will may be executed on behalf of a person lacking testamentary capacity. Jersey has adopted the common-law principles of private international succession law, in that the *lex situs* is applied to questions of immovable property, and the *lex domicilii* in respect of questions concerning movables. Therefore, any such applications to the Royal Court for a statutory will could not include immovable property outside the island.

Statutory wills are to be welcomed as a measure to counter the harsh consequences for families who fail 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 towards more 'blended' families, coupled with the increasing mobility of people around the globe, such measures are a welcome addition to the Jersey legislation. The Capacity Law, with 73 articles and two schedules, is a substantial raft of legislation, and while 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 in empowering the vulnerable among the island's growing population and those who support them.



DONNA WITHERS TEP
IS PROBATE AND WILLS
MANAGER AT BEDELL CRISTIN