



Leaping forward

DONNA WITHERS EXPLAINS HOW JERSEY'S NEW MENTAL CAPACITY LAW FURTHER PROTECTS VULNERABLE CLIENTS

2018 BROUGHT MUCH excitement in terms of Jersey's legal framework for vulnerable clients: the *Capacity and Self-Determination (Jersey) Law 2016* (the Capacity Law) and the *Signing of Instruments (Miscellaneous Provisions) (Jersey) Law 2018* (the Signing Law) both came into force.

The Signing Law came into effect on 8 June 2018 and puts beyond doubt that clients should not be denied the right to put in place wills, powers of attorney (whether registrable, ordinary or lasting) or any other affidavit by reason of physical incapacity to sign. Such instruments can be signed on behalf of the client, providing certain formalities are observed.

The Capacity Law came into effect on 1 October 2018 and includes the following highlights:

- Clients can now put in place lasting powers of attorney to enable decisions to be made by an attorney of their choosing, should they one day be unable to make decisions for themselves.
- The antiquated and rigid customary office of curator (a court-appointed representative for the financial affairs of incapacitated clients) has been replaced in its entirety by a new delegation regime, with bespoke and flexible powers.
- There is now a statutory test for capacity, together with a best-interests checklist, five overarching principles and a code of practice to guide professionals dealing with vulnerable clients.
- Advance decisions to refuse treatment are now on a statutory footing.¹
- The newly created role of independent capacity advocate is now in place to support vulnerable clients in the decision-making process and ensure that their wishes and feelings are upheld where there is no next of kin or in cases of dispute.

RECENT CASES

The Royal Court of Jersey (the Court) has recently been called on to consider issues of

capacity. In April 2018, the Court had to consider whether or not the attorneys of a registered English and Welsh enduring power of attorney (the EPA) were able to use it to transact on Jersey-*situs* immovable property.²

Mrs Matthews, a resident of England, was mentally incapacitated and owned Jersey-*situs* immovable property. Her attorneys wished to enter a transaction on the property on her behalf under the EPA. Under Jersey law, powers of attorney used to effect property transactions require additional formality, which was absent in the EPA. The Court was requested to exercise its inherent jurisdiction and enable the transaction to proceed by reason of comity, and examples were cited of the Court proceeding as such in recognising the validity of foreign appointments not known in Jersey, in relation to bankruptcy proceedings.

Without intending to provide a mechanism for the use of EPAs generally in relation to Jersey-*situs* assets, the Court decided that:

- the attorneys of the EPA were able to act in a manner analogous with a curator, due to the combination of the EPA together with its registration with the Office of the Public Guardian in England and Wales;
- there is reciprocity, as the English and Welsh courts would recognise a curator; and
- with the urgency of the proposed transaction, a curatorship appointment in Jersey was not appropriate, as it imposed continuing duties to the Court and so was a cumbersome mechanism for dealing with a single transaction where there would be no ongoing interest in the Jersey-*situs* property.

The Court was satisfied that it was able to exercise its inherent jurisdiction and enable the EPA to be used to transact on Matthews' Jersey property.

In the second case, heard in December 2018,³ shortly after the introduction of the Capacity Law, the Court was requested to

consider the powers of a delegate appointed under the Capacity Law. The delegate sought the Court's blessing of her proposed acceptance of a personal injury compensation offer on behalf of an incapacitated client. Under the prior curatorship regime, approval of the Court for the acceptance of such an offer had been mandatory, whereas the delegation regime under the Capacity Law provides for no such mandatory approval. Subject to certain parameters not relevant in this case, a delegate has the power to do anything it considers necessary or expedient in the client's best interests.

The Court considered that its function in such an application was analogous to its role when a trustee seeks the Court's blessing. Following the approach set out previously,⁴ the Court was satisfied that the delegate was acting in good faith, she had formed a reasonable opinion in accordance with the Law and it was not vitiated by a potential conflict of interest, so the Court sanctioned her decision to accept the offer.

As the scope for mental capacity cases increases in line with an ageing population and the rise in mental health conditions, together with the growth in both Jersey's population and its international finance business, so our statutory framework has now made a welcome leap forward to keep pace with change.

¹ Living wills, advance directives and healthcare proxies have been recognised in Jersey and given the force of law since 2004. *Attorney General v X* [2004] JLR 1 ² *In the Matter of the Representation relating to Violet Betty Matthews and the Matter of Felcroft* [2018] JRC 075 ³ *In the Matter of the Representation of A as Delegate (formerly Curator) for B and in the Matter of an application pursuant to article 24 of the Capacity and Self-Determination (Jersey) Law 2016* [2018] JRC 225 ⁴ *In Re S Settlement* [2001] JLR Note 37



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