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# Jersey

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## **1. Does your jurisdiction have legislation providing for powers of representation such as ordinary, continuing, enduring or lasting powers of attorney?**

The two main statutes dealing with the provision of powers of attorney in Jersey are the Powers of Attorney (Jersey) Law 1995 (the POA Law) and the Capacity and Self-Determination (Jersey) Law 2016 (the Capacity Law). The POA Law provides the statutory framework for general powers of attorney (GPA) and the Capacity Law provides the statutory framework for lasting powers of attorney (LPA).

In Jersey, GPAs are often used to grant a donee the power to assist the donor with everyday matters such as paying a bill or assisting with the completion of income tax assessments. An LPA differs from a GPA in that it can survive the incapacity of the donor, whereas a GPA cannot. In addition, GPAs cannot be granted in respect of a donor's health/welfare whereas an LPA can. In short, under Jersey law, LPAs have a much wider scope than GPAs.

## **2. When do powers of representation come into effect?**

Article 2(2) of the POA Law details that a GPA takes effect upon it being "duly executed", unless the power of attorney states otherwise. Article 2(3) of the POA Law provides that a GPA is duly executed if it is "signed by the donor, or acknowledged by the donor to have been

signed by the donor in the presence of one witness who is not a party to the power of attorney”.

Article 2(4) of the POA Law details that a power of attorney may be executed without any further attestation by a “body corporate in the manner permitted by its articles of association” and a “limited liability company in the manner permitted by its LLC agreement as defined in Article 1(1) of the Limited Liability (Jersey) Law 2018”.

Article 3 of the POA Law introduces the concept of “registrable powers of attorney” for a power of attorney which is defined under Article 3(a) as a power of attorney that is “intended to be used to effect a transaction which is required to be registered” or “required to be registered by any enactment other than a provision of this law”. An application to register a registrable power of attorney needs to be made to the Royal Court.

Article 13(1)(a) of the Capacity Law details that an LPA is not validly created unless “the instrument purporting to create it complies with the requirements of this Part, and with the requirements as to execution in, and prescribed under, Part 1 of the Schedule” and “it is registered by the Judicial Greffe in accordance with the requirements as to registration in Part 2 of the Schedule”. An LPA will therefore come into effect once it has been validly created and registered with the Judicial Greffe.

### **3. Does your jurisdiction have a legal test for determining mental capacity?**

Articles 4 and 5 of the Capacity Law provide the statutory basis for assessing mental capacity under Jersey law.

Article 4(1) of the Capacity Law provides that a person lacks capacity if “(a) the person is unable to make his or her own decision in relation to the matter” because “(b) he or she suffers from an impairment or a disturbance in the functioning of his or her mind or brain”.

Article 5(1) of the Capacity Law states that for the purposes of Article 4(1), a person is unable to make his or her own decision if he or she cannot “understand information relevant to that decision, retain the information for a period, however short, which is sufficient to make the decision; use or weigh the information in making the decision; or communicate the decision (whether by speech, sign language, or any other means)”.

The test for mental capacity under Jersey law is therefore formed of three parts comprising Articles 4(1)(a), (b) and 5(1)(a) of the Capacity Law.

#### **4. Can the powers of representation deal with property and finances and/or health and welfare?**

A GPA will allow a donee to do, on the donor's behalf, anything he or she can lawfully do by an attorney, save for those functions for which the donor has a trustee or personal representative. This includes matters relating to an individual's finances but excludes those relating to health and welfare. A registrable power of attorney is required for matters relating to property transactions.

Article 11(2)(a) and (b) of the Capacity Law provides the means for two types of LPA in Jersey. The first concerns health and welfare and the second concerns property and affairs. Under a Health and Welfare LPA, the donor is able to appoint an attorney to make decisions in relation to his or her medical health which permits the attorney to deal with a variety of issues such as managing the donor's daily health routine and making decisions in relation to the refusal or continuation of life-sustaining treatment. A Health and Welfare LPA will only be operational in circumstances where the donor is no longer able to make decisions regarding such issues for his or herself.

A Property and Affairs LPA permits the attorney to undertake any action that a donor could lawfully do for his or herself in relation to his or her property and affairs. Article 15(2) of the Capacity Law does, however, put some restrictions on an attorney making gifts and provides that "Subject to any conditions or restrictions in the instrument", an attorney "may make gifts of P's property – (a) on customary occasions to persons (including A) who are related to or connected with P; and (b) to any charity to which P made gifts or might have been expected to make gifts, if the value of each such gift is not unreasonable having regard to all the circumstances and in particular to the size of P's estate". It is also important to note that, unlike a Health and Welfare LPA, under a Property and Affairs LPA, the attorney may also act while the donor still possesses mental capacity.

#### **5. Are there any other protective measures available?**

In circumstances where an individual loses mental capacity and does not have an LPA, an application can be made to the Royal Court under Article 24(2)(a) of the Capacity Law to either "make a decision on P's behalf as to the matter" or Article 24(2)(b) to "appoint a delegate to make a decision on P's behalf as to such matters".

If a delegate is appointed on behalf of an individual, the delegate will be able to make a variety of decisions in relation to that individual's affairs.

Article 35(1) confers a wide range of powers onto a delegate who (subject to any restriction or condition imposed by the court) may "do,

or secure the doing of, anything which appears to the delegate to be necessary or expedient to be done in P's best interests”.

In cases where a delegate is appointed to deal with an individual's property or affairs, the power conferred on a delegate under Article 35 of the Capacity Law includes the “power to do or secure the doing of anything necessary or expedient – (a) for the maintenance or other benefit of P, P's family or dependents [*sic*]; and (b) for the payment of P's debts, whether legally enforceable or not”.

Article 35(4) of the Capacity Law makes it clear that a delegate must act in the best interests of the individual and the delegate's actions are supervised by the Royal Court.

## **6. What are the formalities of establishing a power of representation?**

A GPA will take effect upon it being duly executed (signed by the donor in the presence of one witness who is not a party to the power of attorney). A registrable power of attorney requires the presence of a specific class of witness described in Article 3(2)(a) and (b) of the POA Law alongside an application to the Royal Court.

Notwithstanding the above, it is possible for a GPA and registrable power of attorney to be valid, even in circumstances where it has not been signed by the donor. This is possible if the requirements listed in Article 3A of the POA Law are met. These requirements are: 3A(a) “the donor declared in the presence of a qualified witness that, being physically incapacitated to sign the power of attorney himself or herself, the donor wished the power of attorney to be signed by another person on the donor's behalf”; 3A(b) “the declaration by the donor and the date it was made are recorded on the face of the power of attorney”; 3A(c) “the power of attorney was read aloud to the donor (or, in the case of a deaf donor, the whole contents of the power of attorney were made known to the donor by some other means) in the presence of the person signing the power of attorney on behalf of the donor and the qualified witness”; and 3A(d) “after the power of attorney was read to the donor (or, in the case of a deaf donor, after the whole contents of the power of attorney were made known to him or her by some other means), it was signed by some other person on the donor's behalf in the presence of a qualified witness and that witness put his or her signature to the power of attorney in the presence of the donor and that other person”.

The process for registering an LPA is detailed in Part 1 of Schedule 1 of the Capacity Law. The donor (or his or her lawyer or agent) must complete the requisite online form in preparation of the relevant signatures.

The donor must be accompanied by a professional witness (such as a lawyer or a doctor) who is required to witness the donor's signature and certify that the donor has the mental capacity to make the LPA and that they are not acting under undue influence. The attorneys must also sign the LPA which confirms their acceptance of their duties under it.

A corporate entity or a professional person may be an attorney and an attorney must be over the age of 18 and (in relation to a Property and Affairs LPA) must not be bankrupt. The attorney must have regard to the Code of Practice issued pursuant to the Capacity Law.

Article 12(2) of the Capacity Law permits the appointment of more than one attorney to act alongside one another. The donor must decide whether the attorneys are to be appointed to act jointly in all decisions (requiring them to agree and sign all the relevant documents in order to validate a decision) or whether the attorneys may act severally (so that one may act alone). Under Jersey law, the attorneys can act jointly in relation to some decisions and alone in relation to others. In addition, Article 12(5)(b) of the Capacity Law permits a donor to appoint substitute attorneys in the LPA who can take over from first choice attorneys in circumstances where they are unable to act (because of illness, death or absence).

### **7. Is there a registration process for powers of representation?**

A GPA will take effect upon it being duly executed, however, a registrable power of attorney is not exercisable until it has been duly executed and registered in the Public Registry.

Part 2 of Schedule 1 of the Capacity Law details that an LPA must be registered in the prescribed form available online from the Judicial Greffe. Once all the relevant signatures and certifications have been completed, the signed form must be registered with the Probate and Protection Department of the Judicial Greffe together with a payment of £25 in order to make the LPA legally binding.

### **8. How can a power of representation be revoked or terminated (ie, in the event of marriage, divorce or death)?**

Article 9(1) of the POA Law details that a GPA "may be revoked or abandoned by a document conforming generally to whichever of the forms in Schedule 3 is applicable and executed in the same manner as is required for the creation of a power of attorney under this Law". Article 9(5) of the POA Law details that a GPA is also revoked by the "death, incapacity or bankruptcy of the donor or, if the donor is a body corporate or limited liability company, by its bankruptcy or dissolution".

Article 17 of the Capacity Law details the means by which an LPA can



be revoked. In Jersey, an LPA will be terminated upon the death or revocation by the donor. An LPA may also terminate in circumstances where the attorney becomes bankrupt (in relation to a Property and Affairs LPA only), mentally incapacitated, deceased or divorces or annuls a civil partnership with the donor. The Royal Court may also terminate an LPA if it finds that the attorney has acted inappropriately, and it is in the best interests of the donor to revoke the LPA.

**9. Is the process of making and/or registering a power of representation supervised by a court or government body?**

The Probate and Protection Department of the Judicial Greffe is the body responsible for administering the registration of powers of attorney in Jersey. The Judicial Greffe is a court department which provides judicial, secretarial, administrative and interlocutory support for the courts and tribunals of Jersey.

**10. Is there a governmental or administrative body with oversight of the validity of a power of representation and supervision of its use?**

The Probate and Protection Department of the Judicial Greffe is the body responsible for administering the registration of powers of attorney in Jersey.

The Royal Court has various powers in relation to the validity and operation of an LPA which will be discussed in further detail in the following question.

**11. What role do the courts in your jurisdiction have in relation to powers of representation?**

The Royal Court has various powers in relation to the validity and operation of an LPA which are detailed in Articles 19 and 20 of the Capacity Law.

Article 19(1) of the Capacity Law deals with the powers of the court in relation to the validity of an LPA and it states that the court may determine any question as to whether “(a) one or more of the requirements for the creation of a lasting power of attorney have been met; or (b) a lasting power of attorney has been revoked or otherwise come to an end”.

Article 20(1) of the Capacity Law deals with the operation of an LPA and details that “The Court may determine any question as to the meaning or effect of a lasting power of attorney or of any instrument purporting to confer authority by a lasting power of attorney”.

Article 20(2) provides that the court may give directions with “(a) respect to a decision which is within the authority conferred on A by

a lasting power of attorney, if P lacks capacity to make the decision; and (b) as to – (i) the rendering of reports or accounts by A and the production of records kept by A for the purpose of such reports or accounts, (ii) A's remuneration or expenses”.

Article 20(3) of the Capacity Law enables the court to authorise the making of certain gifts by an attorney who otherwise would have had to obtain permission from the donor to give such a gift (if the donor had capacity).

Article 20(4) of the Capacity Law enables the court to require the attorney to “produce documents or any other things, which are within A's possession as a result of the authority conferred on A by a lasting power of attorney” and Article 20(5) permits the court to relieve an attorney “wholly or partly from any liability which A has or may have incurred as a result of breach of duties imposed on A by a lasting power of attorney”.

## **12. Are foreign powers of representation legally recognised in your jurisdiction? If so, what is the applicable legal framework?**

Royal Court Practice Direction RC22/03 provides that “applications for the registration of LPAs (*or the equivalent thereof*) originally registered outside of the British Islands must be commenced by a Representation”. The Jersey court will therefore recognise a foreign power of attorney (or equivalent) provided that it is registered with the Royal Court. Once registered and confirmed by a formal Act of Court, the attorney appointed under the foreign document will then have the legal authority to deal with the donor's affairs in Jersey.

The application to register a foreign power of attorney is made by a representation which is an application made by a Jersey qualified lawyer who must provide:

- the original (registered) LPA (or equivalent document) or a copy of that document that has been officially sealed and certified by the court in the foreign jurisdiction that registered the original;
- confirmation of the current value of the asset or assets in Jersey (eg, a bank statement or share valuation or similar);
- identification documents from both the donor and the attorney; and
- a £330 registration fee.

In addition, if a foreign power of attorney (or equivalent) is not required to be formally registered in the country of origin in order for it to be officially valid and utilised (and therefore the requirement listed in the first bullet point above cannot be met), then it will also require an affidavit from a lawyer in that jurisdiction which confirms this.

**13. Has your jurisdiction ratified The Hague Convention on the International Protection of Adults 2000? If not, are there any plans for your jurisdiction to do so in the near future?**

Jersey has not ratified The Hague Convention on the International Protection of Adults 2000 and the authors are not aware of any immediate plans which suggest that this is likely to change.

**14. Is there any publicly available guidance on the law and procedure concerning powers of representation in your jurisdiction?**

The Government of Jersey website ([www.gov.je/pages/default.aspx](http://www.gov.je/pages/default.aspx)) contains useful information which details the process of making and registering an LPA. The website provides an overview of the Capacity Law and explains what an LPA is, alongside how one can be made. Similarly, Citizens Advice Jersey (a charitable organisation which offers impartial advice to members of the public) has produced a useful free guide in relation to the setting up of an LPA.

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