

The Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2021

THE STATES, in pursuance of their Resolution of the ?th ?, ?^a, and in exercise of the powers conferred on them by sections 23 and 73 of the Capacity (Bailiwick of Guernsey) Law, 2020^b, and all other powers enabling them in that behalf, hereby order:-

Creation.

1. (1) Subject to subsection (2), a lasting power of attorney is created where -
 - (a) the grantor ("P") has executed the relevant instrument,
 - (b) P makes an application to Her Majesty's Greffier for the relevant instrument to be registered, and
 - (c) the relevant instrument has been registered by Her Majesty's Greffier.

- (2) A lasting power of attorney can only be created where, at the time when P applies to register the relevant instrument, P -
 - (i) has attained the age of 18, and

^a Article ? of Billet d'État No. ? of 2021.

^b Order in Council No. II of 2021.

(ii) has capacity to -

(A) execute the relevant instrument, and

(B) register the relevant instrument, and

(b) the provisions of the Law and this Ordinance are complied with.

(3) Where P -

(a) executes the relevant instrument, but

(b) does not apply to register the relevant instrument,

no lasting power of attorney is created.

(4) Where -

(a) any document purports to create a lasting power of attorney, but

(b) that document does not comply with the provisions of the Law (especially section 24) and this Ordinance,

no lasting power of attorney is created.

(5) Subject to subsection (6), the relevant instrument to be executed for the purposes of this section shall be in the prescribed form.

- (6) If –
- (a) a document provides the information and authentication required in accordance with subsection (1)(a),
 - (b) that document is not the prescribed form, but
 - (c) that document differs in an immaterial respect in form or mode of expression from the substantive form,

it is to be treated by Her Majesty's Greffier as sufficient in point of form and expression.

(7) The Court or the Tribunal may declare that a relevant instrument which is not the prescribed form is to be treated as if it were, if it is satisfied that P intended it to provide the information and authentication required to create a lasting power of attorney.

Requirements as to content of relevant instruments.

2. A relevant instrument must include -

- (a) the prescribed information about the purpose of the instrument and the effect of a lasting power of attorney,
- (b) a statement by P to the effect that P -
 - (i) has read the prescribed information or a prescribed part of it (or has had it read to P), and

- (ii) intends the authority conferred under the instrument to include authority to make decisions on P's behalf in circumstances where P no longer has capacity,
- (c) a statement by the attorney ("A") or, if more than one, each A to the effect that A -
 - (i) has read the prescribed information or a prescribed part of it (or has had it read to A), and
 - (ii) understands the duties imposed on an attorney of a lasting power of attorney under sections 3 (the principles) and 6 (best interests) of the Law.

Registration.

3. (1) An application to Her Majesty's Greffier for the registration of the relevant instrument -
- (a) must be made in the prescribed form, and
 - (b) must include any prescribed information.
- (2) An application under subsection (1) must be made by P in person.
- (3) The application must be accompanied by -
- (a) the relevant instrument, and
 - (b) any fee provided for under rules of court.

(4) A person who, in an application for registration, makes a statement which that person knows or believes to be false in a material particular is guilty of an offence and is liable -

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding level 5 on the uniform scale, or both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine, or both.

(5) Before a lasting power of attorney is registered by Her Majesty's Greffier -

(a) Her Majesty's Greffier may request the Committee to investigate -

(i) if P has capacity to -

(A) create a lasting power of attorney, and

(B) register the relevant instrument, and

(ii) the circumstances in which the instrument has been made, and

(b) the Committee may investigate the matters set out in paragraph (a) using the powers set out in section 9.

(6) For the avoidance of doubt, Her Majesty's Greffier may refuse to register the relevant instrument where Her Majesty's Greffier reasonably believes that -

(a) P did not have capacity to -

(i) execute the relevant instrument, or

(ii) apply to register the relevant instrument,

when P applied to do so, or

(b) P has been put under undue pressure to execute the relevant instrument or to apply to register that instrument.

(7) Where Her Majesty's Greffier refuses to register the substantive form as a lasting power of attorney, P or A may appeal to the Royal Court sitting as an Ordinary Court in accordance with rules of court.

(8) Where Her Majesty's Greffier is satisfied that -

(a) P had capacity to -

(i) execute the relevant instrument, and

(ii) apply to register the relevant instrument,

when P applied to do so, and

(b) P has complied with the requirements of this section,

Her Majesty's Greffier may register the relevant instrument as a lasting power of attorney.

Activation.

4. (1) Where a lasting power of attorney in relation to property and financial affairs has been registered by P, A may act in accordance with that lasting power of attorney where P gives A authority to do so at a time when P had capacity to give that authority (including in the relevant instrument).

(2) Where P -

(a) does not give A authority in the relevant instrument to act in accordance with that lasting power of attorney described in subsection (1), but

(b) gives that authority subsequently,

P must notify Her Majesty's Greffier in the prescribed form as soon as reasonably practicable after the authority is given by P.

(3) Where -

(a) a lasting power of attorney in relation to -

(i) health and welfare, or

(ii) property and financial affairs (other than one described in subsection (1)),

has been registered by or on behalf of P, and

- (b) A reasonably believes that P no longer has capacity in relation to health and welfare or property and financial affairs matters (as the case may be),

A must request a prescribed person to complete a prescribed certificate.

(4) Except in the case set out in subsection (1), A may only act in accordance with a power of attorney where -

- (a) A has provided to Her Majesty's Greffier the prescribed certificate completed in accordance with subsection (3) which states that P no longer has capacity, and
- (b) Her Majesty's Greffier has completed the prescribed form.

(5) Before Her Majesty's Greffier completes the prescribed form -

- (a) Her Majesty's Greffier may request the Committee to investigate the circumstances in which the prescribed certificate has been made, and
- (b) the Committee may investigate those circumstances using the powers set out in section 9.

(6) For the avoidance of doubt, Her Majesty's Greffier may refuse to complete the prescribed form where Her Majesty's Greffier reasonably believes that -

- (a) P retains capacity in relation to health and welfare or property and financial affairs matters (as the case may be), or
- (b) P has been placed under undue pressure to activate the lasting power of attorney.

(7) Where Her Majesty's Greffier refuses to complete the prescribed form, P or A may appeal to the Royal Court sitting as an Ordinary Court in accordance with rules of court.

(8) Where Her Majesty's Greffier completes the prescribed form, Her Majesty's Greffier shall -

- (a) notify A of that fact, and
- (b) update the Register accordingly.

(9) For the avoidance of doubt, A may act in accordance with the lasting power of attorney upon notification by Her Majesty's Greffier in accordance with subsection (8)(a).

Amendment.

5. (1) Where P wishes to amend a lasting power of attorney, including by -

- (a) substituting a different A, or
- (b) amending any conditions or restrictions specified in the relevant instrument,

P must -

- (i) complete the prescribed form, and
- (ii) apply to Her Majesty's Greffier in person.

(2) Where P has provided -

- (a) the prescribed form, and
- (b) any fee provided for in rules of court,

to Her Majesty's Greffier -

- (i) Her Majesty's Greffier may request the Committee to investigate -
 - (A) if P had capacity to amend a lasting power of attorney in the way set out in the prescribed form when P applied to do so, and
 - (B) the circumstances in which the instrument has been made, and
- (ii) the Committee may investigate the matters set out in subparagraph (i) using the powers set out in section 9.

(3) For the avoidance of doubt, Her Majesty's Greffier may refuse to register an amendment to an LPA where Her Majesty's Greffier reasonably believes that -

- (a) P did not have capacity to amend a lasting power of attorney in the way set out in the prescribed form when P applied to do so, or
- (b) P has been put undue pressure to amend the lasting power of attorney in the way set out in the prescribed form or at all.

(4) Where Her Majesty's Greffier refuses to register an amendment to a lasting power of attorney, P or A may appeal to the Royal Court sitting as an Ordinary Court in accordance with rules of court.

(5) Where Her Majesty's Greffier registers an amendment to a lasting power of attorney, Her Majesty's Greffier -

- (a) shall notify P, and
- (b) update the Register accordingly.

Suspension.

6. (1) Where A believes, or has reasonable grounds to believe, that P has regained capacity in relation to health and welfare or property and financial affairs matters (as the case may be), A shall request a prescribed person to assess P's capacity and complete the prescribed certificate.

(2) Where a prescribed person has completed the prescribed certificate on the basis that -

- (a) P has regained capacity in relation to health and welfare or property and financial affairs matters (as the case may be), A must,

except where the lasting power of attorney falls within section 4(1)

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(i) immediately notify Her Majesty's Greffier that the lasting power of attorney has been suspended using the prescribed form, and

(ii) must no longer act in accordance with that power of attorney, or

(b) P has not regained capacity in relation to health and welfare or property and financial affairs matters (as the case may be), A may continue to act in accordance with the lasting power of attorney.

(3) Where Her Majesty's Greffier receives notification under subsection (2)(a)(i), Her Majesty's Greffier must update the Register.

(4) Where -

(a) a lasting power of attorney has been suspended under subsection (2)(a), and

(b) A reasonably believes that P no longer has capacity in relation to health and welfare or property and financial affairs matters (as the case may be),

A must act in accordance with section 4(3).

(4) If, other than where the lasting power of attorney falls within section 4(1).

A -

(a) does not -

(i) request a prescribed person to assess P's capacity and complete the prescribed certificate, or

(ii) notify Her Majesty's Greffier,

in circumstances where a reasonable person might reasonably believe that P had regained capacity in relation to health and welfare or property and financial affairs matters (as the case may be), or

(b) continues to act in accordance with the power of attorney where a prescribed person has completed the prescribed certificate on the basis that P has regained capacity in relation to health and welfare or property and financial affairs matters (as the case may be),

A is guilty of an offence.

(5) Where A is guilty of an offence under subsection (4), A is liable -

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding level 5 on the uniform scale, or both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine, or both.

(6) Where –

(a) A has disposed of any of P's property, and

(b) any of the circumstances set out in subsection (4) apply,

P may apply to the Royal Court to make any order which the Court sees fit -

(i) for the purpose of -

(A) preventing any further disposal of the property in question, or

(B) returning that property to P, and

(ii) any purpose ancillary to the purposes set out in subparagraph (i).

(7) For the avoidance of doubt -

(a) the Committee may give guidance as to the meaning of "regain capacity", especially in relation to cases of fluctuating capacity, in any Code of Practice issued under the Law,

(b) any person (including a court) must take any such guidance into account for the purposes of this section.

Revocation, etc.

28. (1) P may, at any time when P has capacity to do so, revoke the power by notifying Her Majesty's Greffier in the prescribed form.

(2) For the avoidance of doubt, A no longer has authority to act in accordance with a lasting power of attorney when P has notified Her Majesty's Greffier.

(3) Where P has -

(a) notified Her Majesty's Greffier, and

(b) provided any fee provided for in rules of court,

Her Majesty's Greffier shall update the Register.

(4) P's bankruptcy revokes the power so far as it relates to P's property and financial affairs.

(5) The occurrence in relation to A of an event mentioned in subsection (6) -

(a) terminates A's appointment, and

(b) except in the cases given in subsection (7), revokes the power.

(6) The events are -

(a) the disclaimer of the appointment by A in accordance with the prescribed requirements,

- (b) subject to subsection (8), the death or bankruptcy of A or, if A is a trust corporation, its winding-up or dissolution,
- (c) subject to subsection (9), the dissolution or annulment of a marriage or civil partnership between P and A, and
- (d) A's lack of capacity.

(7) The cases are -

- (a) A is replaced under the terms of the instrument,
- (b) A is one of two or more persons appointed to act jointly and severally in respect of any matter and, after the event, there is at least one remaining A.

(8) The bankruptcy of A does not terminate A's appointment, or revoke the power, in so far as A's authority relates to P's health and welfare.

(9) The dissolution or annulment of a marriage or civil partnership does not terminate A's appointment, or revoke the power, if the instrument provided that it was not to do so.

(10) For the avoidance of doubt -

- (a) the Court under section 14 of the Law, or
- (b) the Tribunal under section 18 of the Law,

may revoke the power.

Power of Court to suspend.

8. (1) In addition to any power of the Court under the Law, the Court, on application of the Committee, may direct that -

- (a) A may not act in accordance with the lasting power of attorney, or
- (b) A may only exercise that power, or make specified decisions under that power, with the consent of the Committee,

for a specified period to allow the Committee to investigate whether that power is being used in P's best interests.

(2) Where the Committee -

- (a) has completed its investigation under subsection (1), and
- (b) reasonably believes that the power is not being used in P's best interests,

it shall apply to the Court to decide whether to revoke A's appointment.

(3) Any application under subsection (2) shall be made in accordance with rules of court.

Power of Committee to investigate.

9. (1) Without prejudice to any power under an Ordinance made under Part 9 of the Law, where -

- (a) Her Majesty's Greffier has requested the Committee to undertake an investigation in accordance with this Ordinance, or
- (b) the Committee believes that A may -
 - (i) have behaved, or be behaving, in a way that contravenes the A's authority or was not in the best interests of P,
 - (ii) be proposing to behave in a way that would contravene that authority or would not be in P's best interests, or
 - (iii) have failed to comply with the requirements of an order made, or directions given, by the court,

the Committee may exercise the powers set out in subsection (2).

(2) The Committee may require A -

- (a) to provide specified information or information of a specified description, or
- (b) to produce specified documents or documents of a specified description.

(3) The information or documents must be provided or produced -

- (a) before the end of such reasonable period as may be specified, and
- (b) at such place as may be specified.

(4) The Committee may require -

- (a) any information provided to be verified in such manner, or
- (b) any document produced to be authenticated in such manner,

as it may reasonably require.

(5) For the purposes of this section, "**specified**" means specified in a notice in writing given to A by the Committee.

(6) A person who, in purported compliance with a requirement imposed under this section, does any of the following -

- (a) makes a statement which that person knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular,
- (b) dishonestly or otherwise, recklessly makes a statement which is false, deceptive or misleading in a material particular,
- (c) produces or causes or permits to be produced any information or document which that person knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular,
or

- (d) dishonestly or otherwise, recklessly produces or recklessly causes or permits to be produced any information or document which is false, deceptive or misleading in a material particular,

is guilty of an offence.

(7) A person guilty of an offence under subsection (6) is liable, on summary conviction, to imprisonment for a term not exceeding 2 years, to a fine not exceeding level 5 on the uniform scale, or to both.

- (8) Without prejudice to any other power of the Committee to do so, where -
 - (a) A does not provide the information or produce any document in accordance with the notice, or
 - (b) A has provided the information or produced any document in accordance with the notice, but the Committee believes that the attorney's conduct falls within subsection (1),

the Committee may make an application to the Court in accordance with rules of court to make an appropriate order, including but not limited to, an order terminating A's appointment.

Disposal of property.

10. (1) For the purposes of section 27 of the Law, A may only dispose of P's real property where the Court has made an order approving that disposal.

(2) A may make an application to the Court in accordance with rules of court for the purposes of subsection (1).

Further provision.

11. (1) The Committee may by regulation make alternative provision in relation to any requirement in this Ordinance to do any act in person, notwithstanding any provision to the contrary, where the Committee is satisfied that there is a good reason to do so (including, but not limited to, a public health reason).

(2) Any regulations made under subsection (1) may only be in force for a period not exceeding 3 months.

Interpretation.

12. (1) For the purposes of this Ordinance -

"**the Committee**" includes any person appointed or otherwise directed by the Chief Pleas of Sark, or one of its committees, to deal with safeguarding matters.

"**the Court**" means the Royal Court sitting as an Ordinary Court, and

"**prescribed**" means prescribed by regulations of the Committee.

(2) Any term used in this Ordinance shall have the same meaning as found in the Law.

Commencement and citation.

13. This Ordinance -

(a) may be cited as the Capacity (Lasting Powers of Attorney) Ordinance, 2021, and

(b) shall come into force on ?, ? 2021.