

# The Capacity and Self Determination (Jersey) Law

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The Capacity and Self Determination (Jersey) Law 2016 (the "**CSD Law**") came into effect on 1 October 2018, bringing a much needed change to this area of law in Jersey.

Prior to the introduction of the CSD Law, it was not possible for a Jersey resident to grant a Lasting Power of Attorney ("**LPA**") which had legal effect following a loss of mental capacity, and the law governing curatorships was restrictive and rigid, only providing for the management of the financial aspects of a person's life, with no legal authority to make decisions in respect of care arrangements or other personal issues.

The CSD Law introduces some important core principles:

- a person, must be assumed to have capacity, unless it is shown that the person lacks capacity in relation to the decision
- a person is not to be treated as unable to make a decision unless all practicable steps to enable that person to make the decision have been taken without success
- a person is not to be treated as unable to make a decision merely because the person makes an unwise decision
- an act done, or a decision made, on behalf of a person lacking capacity must be done or made in the person's best interests
- before an act is done, or a decision is made which is restrictive of the person's rights and freedom of action, regard must be had to whether the purpose for the which it is needed can be achieved as effectively in a less restrictive way

The CSD Law enables anyone who is over the age of 18 and who has mental capacity to put in place either or both of two types of LPA. One deals with health and welfare matters and covers issues such as medical treatment and wishes relating to life-sustaining treatment (including the refusal of such treatment). The other covers property and financial affairs and can give power

to pay debts, make provision for the payment of that person's, or their family's maintenance and benefit, or make financial gifts to charities or to people.

You can prepare your own LPA, but given the significance of the decisions that you will be making you may wish to have the comfort of specialist legal advice. The Ogier team can help you prepare and register your LPA, and ensure that you are guided in making the most appropriate decisions for your personal circumstances.

The Royal Court of Jersey can appoint a delegate where a person does not take the opportunity to draw up a LPA but then loses mental capacity.

Whilst the Royal Court will always retain an overall supervisory power, there is an undeniable risk that the powers given to an attorney under an LPA, or to a delegate, in particular in respect of property and financial affairs, could be misunderstood or abused. There are steps that can be taken to minimise this risk, such as the Attorney or delegate obtaining professional advice so that they fully understand what they can and cannot lawfully do; including a clause in the LPA to consult with a third party so that there is some oversight over the actions of the Attorney; limiting powers to make gifts over a certain amount; and requiring a third party to be notified when the LPA is registered. It is recommended that the Attorney or delegate should keep accurate records of the assets and of their dealings with those assets.

Protection is offered by the CSD Law not only to individuals potentially lacking capacity, but also to those entrusted with the decisions of the individual, provided that decisions are made in the best interests of the person and, in the case of an LPA, that the decisions are in line with the authority given in the LPA. A number of judgments made by the European Court of Human Rights and the Supreme Court regarding human rights principles are reflected in the CSD Law in this respect.

Generally, the CSD Law provides consistency and clarity in respect of decisions in relation to capacity, enabling everyone to make decisions in respect of their own future, and ensuring that anything done by an Attorney or delegate is in the best interests of the person who has lost capacity.

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