COLLAS CRILL

Guardianship vs Power of Attorney in Guernsey

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It can be a stressful time when a loved one or family member becomes unable to manage their own affairs. However, it is important that if that time arises, appropriate steps are taken by family members, trusted friends or advisors to be able to manage the person's affairs on their behalf.

In England, a Lasting Power of Attorney can be created which would allow a person, providing they have the capacity to do so at the time, to provide continuous authority to another to make decisions about their welfare, property and affairs.

In Guernsey, this is not the case although it is a common misconception that a Power of Attorney is sufficient in all circumstances to enable one person to administer another's affairs.

A Power of Attorney has many potential uses. The power granted varies and can enable a person to sign all or specified documents on another's behalf or for example to attend the Conveyancing Court on another's behalf in order to sell a property. In order for the Power of Attorney to be effective it is imperative that the person granting the authority to act on their behalf has the mental capability to fully understand the powers that they are granting.

Under curatelle a guardian, or curateur, is entrusted with the responsibility of administering the patient's estate under the guidance and support of a family council.

Unfortunately, when a person suffers from a mental illness, they may often lack the necessary understanding to be able to execute a valid Power of Attorney. It may be the case if a patient is suffering from a degenerative mental illness that they have the capacity to execute a Power of Attorney in the early stages, but as soon as their condition worsens to an extent where they cannot manage their affairs on their own, the Power of Attorney becomes void. The question of whether the patient has the necessary understanding will be matter for a medical professional, such as the family general practitioner.

Assuming that the medical professional advises that the patient no longer has the necessary understanding to administer their own affairs, it will become necessary to proceed with an application to the Royal Court to place the patient under Guardianship (or curatelle). Under curatelle a guardian, or curateur, is entrusted with the responsibility of administering the patient's estate under the guidance and support of a family council.

The family council will normally comprise of three relatives or close family friends who will attend before the Court to recommend the appointment of the proposed guardian. It is possible for more than one guardian to be appointed and at least one of the proposed guardians must be based in Guernsey. Following a successful application, the guardian will take control of the patient's assets, undertaking to the Court that they will at all

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times act in the patient's best interests "en bon pere de famille" or as a prudent parent would. In most situations the guardian will have a free hand to deal with the patient's assets as they see fit, the main exception being when the guardian wishes to sell Guernsey Real Property belonging to the patient or if the guardian feels it is in the patient's best interests to create a charge against their Guernsey Real Property. In either case, further applications will need to be made to the Royal Court, and the application will need to be supported by the family council.

Powers of Attorney and Guardianships are useful tools in aiding a party to deal with the affairs of another, whether it be paying bills, managing bank accounts or otherwise. However, it is imperative that the correct method is utilised depending on the circumstances and the purpose for which the Guardianship or Power of Attorney is required. If a formal Guardianship is deemed necessary by medical professionals it is important that the necessary guidance is sought from an experienced advocate who can advise and support the proposed guardian and the family council through their application.

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