COLLAS CRILL

Powers of attorney: Jersey vs UK

OCTOBER 2015

What exactly is a power of attorney

A power of attorney is a legal document under which a person ("the donor") gives another person or persons ("the donee/s") the "...authority to do on behalf of the donor anything the donor can lawfully do by an attorney..." (The Power of Attorney (Jersey) Law 1995). Powers of attorney are used everyday in law firms, be it for property transactions or Probate applications. Many people now consider granting general powers of attorney in favour of a family member or close friend so as to assist them with their day to day affairs, however in Jersey powers of attorney have certain limitations which individuals and professionals need to be aware of.

Jersey

Would Lasting Powers of Attorney work in Jersey?

In light of the changes to the UK system, is it now time that Jersey had a review of it's own legal system in respect of Powers of Attorney, Curatorships and issues surrounding capacity? There is no denying that the LPA system is a useful tool against the possibility of a donor losing his capacity which would, under current Jersey law, cause the revocation of the power of attorney, and it is possible that Jersey will adopt a similar procedure however we will have to wait and see what the final outcome of ongoing discussions on the matter will bring forth.

In Jersey, if a person loses their capacity a curatorship will be set up by the Royal Court. The curator for the Interdict (previously referred to as the donor) is answerable to the Court in all aspects of the administration of the Interdict's financial affairs only and they have no say in the personal or medical welfare of the Interdict. However, what happens in cases where an Interdict has no family on the Island and the medical staff turn to the curator to make a medical decision, at the end of the day he has no remit in this area so who will make this medical decision? Whilst curatorships have proved themselves to be an effective procedure, many feel that the role of the curator needs to be stretched to deal with issues surrounding the health and well-being of the Interdict.

In Jersey it is fair to say that there is a void in the law with respect to capacity issues and the Curator's right to make decisions in his client's best interests with regards to their personal welfare. A review is currently underway however, how long this will takeand what the outcome will be we cannot say. There is no doubt that a change is due and, from what we understand, this is precisely what the final outcome of the current review is hoping to achieve.

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Powers of Attorney in the UK can be quite different from those in Jersey insofar as concerns the issue of the donor's mental capacity. Since the 1st of October 2007, a person can make what is called a Lasting Power of Attorney ("LPA"). LPA's are similar to general power's of attorney in Jersey insofar as you appoint someone to assist you in managing your affairs. The main difference between a general Jersey power of attorney and a UK LPA is that under the LPA system, a person can make provisions for their attorney to look after their legal, financial and health affairs should they lose or lack the requisite capacity to do so. Under a personal welfare LPA you can also include the power for your attorney to give or refuse consent to medical treatment on your behalf.

A LPA can not be used until it has been registered with the Office of the Public Guardian regardless of whether you still have capacity and under the LPA system an attorney must have regard to the Mental Capacity Act 2005 and the Code of Practice relating to LPA's. Should the donor have assets outside of the UK, the LPA must be ratified by the Court of that jurisdiction so as to enable the attorney to deal with those assets.

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Under Jersey law, general powers of attorney can be granted to a donee so as to assist the donor with everyday matters. In many cases powers of attorney are granted by elderly people to either their children, or in some cases grandchildren, to assist them in dealing with their affairs, whether it be dealing with their bank or completing Income Tax assessments. For a general power of attorney such as this, the document takes effect upon it being duly executed and the requirements for this is that the power is signed by the donor in the presence of one witness who is not a party to the power of attorney. The witness to a power of attorney such as this is not required to have any particular qualification. If, however, it is intended that the power of attorney be used to also assist with property matters, be it the buying or selling of real property or any transaction associated with real property ("a registrable power of attorney"), there are certain rules which must be adhered to for it to be duly executed. If the power is being executed in Jersey, then a Jurat, member of the States, an Advocate or Solicitor of the Royal Court or a Notary Public must witness the document. If it is being executed outside the Island then the power must be witnessed in accordance with the Powers of Attorney (Jersey) Law 1965. A registrable power of attorney is not exercisable until it has been duly executed and registered in the Public Registry.

In the majority of cases, the granting of a general power of attorney in favour of a family member, or in some cases a close friend, will not give rise to any issues or problems however, the person acting as attorney must be mindful that if the donor loses their mental capacity the power of attorney will no longer be legally valid.

Under the Power of Attorney (Jersey) Law 1995, a power of attorney is revoked by the incapacity of the donor, upon the revocation of the power by the donor or the death of the donor. With regards to incapacity what this means is that if a donor develops senile dementia or another such degenerative mental illness which causes

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them to be incapable of managing their own affairs, the power of attorney falls away and the donee can no longer lawfully act as attorney. Of course there are cases where a person may be in the early stages of dementia and will still be able to give direct instructions to their attorney regarding their affairs however, once the condition worsens to the extent whereby they are unable to give sound instructions then the power of attorney is void. In such circumstances the law in Jersey requires that a Curator is appointed to manage the affairs of the donor. The question of whether or not a person has the necessary mental capacity and understanding will be an issue for a medical professional.

UK

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