

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

30th March, 2022

Proposition No. P.2022/14

COMMITTEE FOR HEALTH & SOCIAL CARE

THE CAPACITY (LASTING POWERS OF ATTORNEY)
(BAILIWICK OF GUERNSEY) ORDINANCE, 2022

AMENDMENT

Proposed by: Her Majesty's Comptroller

Seconded by: Deputy A.H. Brouard

1. In the Capacity (Lasting Powers of Attorney) (Bailiwick of Guernsey) Ordinance, 2022 -

(a) for section 1(8), substitute the following subsection -

“(8) For the avoidance of doubt, a person may make both types of lasting power of attorney set out in section 22(1)(a) and (b) of the Law using the same relevant instrument.”;

(b) after section 2(2), insert the following subsection -

“(3) For the avoidance of doubt -

(a) where a person (“B”) is required to give consent for the purposes of the relevant instrument or to sign any other prescribed document for the purposes of this Ordinance -

(i) B must sign the relevant instrument in the presence of a witness who is not an attorney for the purposes of that lasting power of attorney, and

(ii) the witness must sign the relevant document in B’s presence,

- (b) for the purposes of paragraph (a) “sign” in relation to B includes where a third person (“C”) signs the relevant instrument in B’s presence and at B’s direction,
 - (c) where C signs the relevant instrument in accordance with paragraph (b), B must -
 - (i) acknowledge the signature in the presence of a witness who is not an attorney for the purposes of that lasting power of attorney, and
 - (ii) that witness must sign the relevant instrument in B’s presence, and
 - (d) article 1(d) of the Electronic Transaction (Exemptions) Order, 2001 shall apply in relation to a relevant instrument or other prescribed document as it would apply to a power of attorney.”;
- (c) in section 4(9)(a) immediately after “notify”, insert “P and”;
- (d) in section 4(11), after “this section”, insert “and section 6”;
- (e) in section 17(1), after “this Ordinance)” insert “on a point of law”;
- (f) in section 20, after the definition of “long lease”, insert the following definition -

“**notify**” means, subject to subsection (3)(b), giving notification of the required information in writing,”;
- (g) in section 21(1) -
 - (i) after paragraph (a)(ii), insert the following subparagraph -
 - “(iii) in the definition of “bankrupt”, after paragraph (e), add the following paragraph –
 - “(f) that an event, measure or procedure has occurred outside the Bailiwick in relation to the individual which corresponds as nearly as may be to any event, measure or procedure described in paragraphs (a) to (e),””, and
 - (ii) after paragraph (a), insert the following paragraph –
 - “(b) for section 24(2), substitute the following subsection –

“(2) An individual who is bankrupt may not be appointed as A under a lasting power of attorney in relation to P's property and financial affairs–

(a) where one or more of paragraphs (a) to (e) of the definition of "bankrupt" apply -

(i) the declaration, appointment or order was made, or

(ii) the composition, compromise or arrangement was entered into,

(as may be applicable having regard to the definition of "bankrupt") less than 10 years before the appointment as A is made, and

(b) where paragraph (f) of the definition of "bankrupt" applies, that individual has not been discharged from bankruptcy for the purposes of the law of the other jurisdiction outside the Bailiwick under which that individual was made bankrupt.”,

and re-letter paragraphs (b) and (c) of section 21(1) of the Ordinance as (c) and (d); and

(h) after section 22, insert the following section -

“Extent.

23. This Ordinance shall have effect throughout the Bailiwick of Guernsey.”.

Rule 4(1) Information

- c) The propositions have been submitted to Her Majesty’s Procureur for advice on any legal or constitutional implications.
- d) There are no financial implications to the States of amending the Ordinance in the ways set out.

Explanatory note

As a result of comments raised at training sessions and further discussion since the draft Ordinance was considered by the Legislative Review Panel, it is considered necessary or expedient that these technical amendments are made to the Ordinance before it is enacted. Taking the amendments in turn:

- (a) the original subsection 1(8) was intended to have been deleted after the meeting of the Legislative Review Panel at which the draft Ordinance was reviewed, but it is considered that this substitution is to be preferred for the avoidance of any doubt that both types of lasting powers of attorney described in section 22(1) of the Capacity (Bailiwick of Guernsey) Law, 2020 (the “Capacity Law”) can be used by way of the same instrument;
- (b) similar provision is made in the Capacity Law, and it is considered that it should be included for the purposes of legal certainty and to ensure that electronic form and signatures are not used in relation to a relevant instrument (e.g. the instrument conferring a power of attorney) or other prescribed documents;
- (c) this amendment requires HM Greffier to notify the grantor (the person who has made the lasting power of attorney) when that power of attorney has been activated as a further safeguard (should they still retain capacity);
- (d) for consistency, the same restriction on a prescribed person assessing capacity for the purposes of activation of a lasting power of attorney should apply to a person doing so for the purposes of suspending a lasting power of attorney under section 6 of the draft Ordinance, i.e. that person cannot be an attorney or any of the attorney's immediate family;
- (e) this amendment limits appeals to the Guernsey Court of Appeal from the Royal Court to appeals on points of law only;
- (f) the insertion of this definition is to ensure that simple notifications required under the Ordinance are given in writing (which would include electronic form);
- (g) this widens the definition of bankrupt to include bankruptcy in jurisdictions outside the Bailiwick for the purposes of an individual's eligibility to be appointed, and act, as an attorney under a lasting power of attorney for property and financial matters; and
- (h) clarifies the extent of the Ordinance.