

STATES OF JERSEY



DRAFT SIGNING OF INSTRUMENTS (MISCELLANEOUS PROVISIONS) (JERSEY) LAW 201-

Lodged au Greffe on 23rd January 2018
by the Chief Minister

STATES GREFFE



Jersey

**DRAFT SIGNING OF INSTRUMENTS
(MISCELLANEOUS PROVISIONS) (JERSEY)
LAW 201-**

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Chief Minister has made the following statement –

In the view of the Chief Minister, the provisions of the Draft Signing of Instruments (Miscellaneous Provisions) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator I.J. Gorst**

Chief Minister

Dated: 19th January 2018

REPORT

Introductory

1. This draft Law makes a number of amendments to the law in Jersey governing the execution of wills and powers of attorney. It also amends provisions in the [Capacity and Self-Determination \(Jersey\) Law 2016](#), as well as in the [Affidavits \(Advocates and Solicitors\) \(Jersey\) Law 1992](#).
2. The main purpose of the amendments concerns the execution of instruments by persons with a disability who are unable to sign documents. The amendments also revise provisions in Jersey legislation concerning persons qualified to witness wills disposing of Jersey land.

Persons unable to sign documents – wills

3. In 2015 the Legislation Advisory Panel (“LAP”) considered the implications of a recent decision in a case before the Royal Court¹ where the deceased had been unable to sign his will as a result of paralysis of the hands. It was not disputed that the deceased had had the mental capacity to make a will; and he had directed a family friend to sign the will on his behalf in the presence of his lawyer. The Registrar declined to admit the will to probate and, after the matter was considered by the Royal Court, the result was that the unsigned will could not be admitted to probate.
4. It so happened in the case concerned that the interested parties were content for the estate to be administered as though the will had been admitted to probate, and so the inability to obtain a grant was academic. The result did however mean that the ability, and hence the right, of a disabled person to make a Jersey will was uncertain. If there were any doubt as to that right, this would be liable to place Jersey in breach of the European Convention on Human Rights.
5. The main purpose of this draft Law, as recommended to the Chief Minister by the LAP, is to make clear the means by which and the conditions subject to which a person with a physical disability may execute a valid will if he or she is unable to sign it.
6. Careful consideration was given by the LAP to the necessary safeguards against potential abuse where a testator is unable to sign a will and someone else does so on his or her behalf. Jersey law already makes special provision when anyone executes a will of immovables (Jersey land) by requiring the will to be read aloud to the testator and requiring one of the witnesses to be “qualified”, in other words, to be a Member of the States, a Crown Officer, an advocate or Jersey solicitor. It was considered that safeguards of a similar type were needed where a will – whether of movables or immovable – was being signed on someone else’s behalf.
7. The safeguards provided by the draft Law would be contained in a new *Article 17A* of the [Wills and Successions \(Jersey\) Law 1993](#) and would be as follows –

¹ *In the matter of the Representation of Nicola Maria Le Couilliard (née Perks) as Executrix of the late Anthony Yves Le Couilliard.*

- The testator declares – in whatever way the testator can convey his or her wishes – that he or she wants the will to be signed by another person on his or her behalf. (The person who signs the will on the testator’s behalf must have the capacity to execute a valid will.)
 - This declaration, whatever form it takes, is –
 - made in the presence of 2 witnesses², and
 - recorded on the face of the will, and
 - dated.
 - One of the witnesses must be a “qualified witness” (see further in paragraph 8 *below*).
 - The will is read aloud to the testator (or, if he or she is deaf, the contents are made known to him/her by other means). This is done in the presence of –
 - the person who will sign the will for the testator, and
 - the 2 witnesses.
 - The will is signed by the person for the testator in the presence of the 2 witnesses.
 - The 2 witnesses also sign the will, in each other’s presence and in the presence of the person who signed the will.
8. The reference above to a “qualified witness” means, if the will is made in Jersey, a Jurat, a member of the States, an advocate, a Jersey solicitor or a notary public. If the will is made elsewhere the list extends to judges, justices of the peace, magistrates, lawyers and various other officials, including consular officials and certain officers of the British armed forces. The States are empowered to amend the list of “qualified” witnesses by Regulations.

Persons unable to sign documents – powers of attorney

9. The opportunity is also taken in the draft Law to clarify the position when executing powers of attorney for use in Jersey in cases where the donor of the power is unable to sign.
10. A new *Article 3A* in the [Powers of Attorney \(Jersey\) Law 1995](#) would provide for a donor to make a declaration on similar lines to that made by a testator making a will, and for the power of attorney to be read aloud in the presence of the person signing for the donor; but only one witness, who must be a “qualified” witness, would be required.³

Persons unable to sign documents – lasting powers of attorney

11. The Capacity and Self-Determination (Jersey) Law 2016 – when it is brought into force – will provide for lasting powers of attorney (LPAs) which include giving authority to make certain decisions in circumstances where the person giving the authority may later lack capacity to do so.

² The person who signs the will cannot be a witness as well.

³ Those who rank as competent witnesses for the purposes of the Powers of Attorney (Jersey) Law 1995 are set out in Article 3(2)(a) of, and Schedule 1 to, that Law depending on whether or not the power is executed in Jersey.

12. The Schedule to the 2016 Law provides for the form and execution of LPAs. The draft Law amends that Schedule to provide for executing an LPA in circumstances where the person giving the authority is physically unable to do so. The mode of execution is similar to that for ordinary powers of attorney.

Persons unable to sign documents – affidavits

13. Article 1 of the Affidavits (Advocates and Solicitors) (Jersey) Law 1992 empowers an advocate or solicitor of the Royal Court to take an affidavit for the purposes of a proceeding in a court or before a statutory body in Jersey. Article 1 requires an affidavit so taken, among other things, to be signed by the person making the affidavit.
14. The draft Law would qualify this requirement by providing that, if the deponent is unable to sign the affidavit by reason of being physically incapacitated, the advocate or solicitor taking the affidavit must endorse it with a statement that it has not been signed by the deponent by reason of the deponent's physical incapacity.

Witnesses to wills of Jersey land generally

15. As has already been noted – paragraph 6 above – Jersey law makes it a requirement for executing a will of Jersey land that one of the witnesses is a Member of the States, a Crown Officer, an advocate or Jersey solicitor (or a notary public if the will is executed outside Jersey).
16. This requirement is contained in the *Loi (1851) sur les testaments d'immeubles*. In 1851 a Jurat would have been a Member of the States, but the *Loi* seemingly was not amended consequentially by the Assembly of the States (Jersey) Law 1948 when Jurats ceased to be Members of the States.
17. In any event there need be no difference between the categories of qualified witnesses for the purposes of witnessing a will of Jersey land, and those for the purpose of witnessing a will executed by a person with a disability. The draft Law therefore applies the categories of qualified witnesses under the new *Article 17A* of the Wills and Successions (Jersey) Law 1993 – see paragraph 8 above – to the execution of wills of Jersey land generally.

Conclusion

18. By providing a clear framework within which persons under a physical disability are able to execute instruments, the draft Law will remove all possibility of there being discrimination against such persons by reason of doubt about the status of instruments signed by another person on their behalf. In doing this, care has also been taken to provide safeguards against abuse in situations of potential vulnerability.

Collective responsibility under Standing Order 21(3A)

The Council of Ministers has a single policy position on this proposition, and as such, all Ministers, and the Assistant Ministers to the Chief Minister, are bound by the principle of collective responsibility to support the proposition, as outlined in the Code of Conduct and Practice for Ministers and Assistant Ministers ([R.11/2015](#) refers).

Financial and manpower implications

There are no financial or manpower implications for the States arising from the adoption of this draft Law.

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT

Human Rights Notes on the Draft Signing of Instruments (Miscellaneous Provisions) (Jersey) Law 201-

These Notes have been prepared in respect of the Draft Signing of Instruments (Miscellaneous Provisions) (Jersey) Law 201- (the “**draft Law**”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (“**ECHR**”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The draft Law, as its long title indicates, will provide for the making of affidavits, wills and powers of attorney by persons unable to sign by reason of physical incapacity and make further provision for the witnessing of wills.

The present uncertainty of Jersey law as to the efficacy of a signature put to a will on behalf of testator raises potential human rights issues under Article 8 ECHR and Article 1 of Protocol 1, and those provisions when read with Article 14⁴. The uncertainty is borne out of a decision of the Royal Court *In re the matter of the Representation of Nicola Maria Le Couilliard (née Perks) as Executrix of the late Anthony Yves Le Couilliard* (unreported). There was not a fully reasoned judgment in this case, but an agreed order based on an apparent conclusion by the court that a will not signed by a person who was physically unable to sign it – but otherwise possessed of sound mental faculties – was not admissible to probate because it had been signed by someone else on the testator’s behalf.

Under Article 8 ECHR: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Article 1 of Protocol 1 gives protection to property rights whilst Article 14 prohibits discrimination in securing the enjoyment of the rights protected by the ECHR.

The extent to which Article 8, Article 1 of Protocol 1 and Article 14 apply to matters of succession and the interplay between the three provisions has been explored in a number of cases. The term ‘family life’ in Article 8 is given a broad meaning, covers interests of a material kind, and encompasses matters of succession between near relatives;⁴ and *Marckx v Belgium* makes clear, among other things, that making a will is a constituent feature of family life.

It is unnecessary to examine the existing position in Jersey in detail, as the purpose of the draft Law is not to perpetuate but to clarify and reform the position. It suffices to observe that, following the decision of the Royal Court in *Le Couilliard*, the position at worst might be that disabled persons are deprived altogether of the ability – and hence the right – to make a will, a right that is afforded to all able-bodied members of society. A failure to enable those with a disability to make a will would be a potential

⁴ See, *inter alia*, *Marckx v Belgium* [1979] ECHR 6833/74, *Camp and Bourimi v The Netherlands* [2000] ECHR 28369/95, *Haas v The Netherlands* [2004] ECHR 36983/97, and *Brauer v Germany* [2009] ECHR 3545/04.

infringement of their Article 8 rights and A1P1 right in itself, and would also raise discrimination issues in respect to the exercise of the rights concerned.

The purpose of the draft Law is to address this potential deprivation of right, and to provide a mechanism whereby a testator who is physically incapable of signing his or her will, can nevertheless make one if he or she wishes; and thus make clear the precise mode by which the freedom of such a person to make a will is exercisable.

The mechanism provided by the draft Law contains safeguards which do not apply in the case of execution of instruments by an able-bodied person. The safeguards – and notably that of a “qualified” witness as one of the two witnesses – are not dissimilar in their overall effect to the notarial act by which a will (or other instrument) may be executed in civil law jurisdictions. At all events the purpose of these provisions is to guard against possible fraud in cases where an instrument is signed by another person on behalf of a potentially vulnerable testator (or donor or deponent). These safeguards are rational and proportionate.

In conclusion, the draft Law is framed in such a way that Jersey law will be able to be applied in the above respects in an ECHR compatible manner.

Explanatory Note

This Law makes provision for the execution of wills, powers of attorney, lasting powers of attorney and affidavits by persons who are unable to sign such instruments by reason of physical incapacity. It also re-defines who may be an official witness (or “*témoin qualifié*”) in relation to wills, whether they are made in or outside Jersey.

Article 1 amends the Loi (1851) sur les testaments d’immeubles to re-define who must witness a will of immovable property. One of the witnesses must be a “*temoin qualifié*” (“qualified witness”) within the meaning of Article 17A of the Wills and Successions (Jersey) Law 1993.

Article 2 amends the Affidavits (Advocates and Solicitors) (Jersey) Law 1992 which requires an affidavit to be signed by the deponent. The amendment provides that if the deponent is unable to sign the affidavit by reason of being physically incapacitated, the solicitor or advocate taking the affidavit must endorse it with a statement that it has not been signed by the deponent by reason of the deponent’s physical incapacity.

Article 3 amends the Wills and Successions (Jersey) Law 1993 by inserting new Article 17A.

New Article 17A provides that a will of movable or immovable estate is valid if it has been signed by a person other than testator, where the testator is unable to sign for himself or herself, if certain conditions are met. In order for a will that is not signed by the testator to be valid the testator must have declared in the presence of 2 witnesses (one of whom was a qualified witness) present together that, being physically incapacitated to sign the will himself or herself, the testator wished the will to be signed by another person on the testator’s behalf. The declaration must be recorded on the face of the will; the will must have been read aloud to the testator in the presence of the person signing the will on behalf of the testator and the two witnesses present together; and thereafter it must have been signed by some other person on the testator’s behalf, in the presence of the 2 witnesses present together and the 2 witnesses must have put their signatures to the will in the presence of each other and of that other person. New Article 17A also defines “qualified witness”, and solicitor” and “advocate”, both being persons falling within the definition of “qualified witness”.

Article 4 amends the Powers of Attorney (Jersey) Law 1995 so that a power of attorney is valid when it has not been signed by the donor if it is signed in accordance with the provisions of new Article 3A. The donor must have declared in the presence of a qualified witness that, being physically incapacitated to sign the power of attorney himself or herself, the donor wished the power of attorney to be signed by another person on the donor’s behalf; the declaration by the donor and the date it was made must be recorded on the face of the power of attorney; the power of attorney must have been read aloud to the donor in the presence of the person signing and the qualified witness; and the power of attorney must be signed by the person signing on the donor’s behalf in the presence of the qualified witness and the qualified witnesses must have put his or her signature to the power of attorney in the presence of the person signing on the donor’s behalf.

Article 4 also amends the Powers of Attorney (Jersey) Law 1995 to provide that a power of attorney may be revoked or abandoned by a document conforming generally with the applicable form that is set out in Schedule 3 to that Law and executed in the same manner as is required for the creation of a power of attorney under that Law.

Article 5 amends the Capacity and Self-Determination (Jersey) Law 2016 (which is not yet in force) so that a lasting power of attorney (“LPA”, as defined in that Law) is valid when it has not been signed by the person (“P”) conferring the powers if it is signed in accordance with the new provisions contained in paragraph 1(4) of the Schedule to that Law. P must have declared in the presence of a witness of a prescribed description that, being physically incapacitated to sign the LPA himself or herself, P wished the LPA to be signed by another person on P’s behalf; the declaration by P and the date it was made must be recorded on the face of the LPA; the LPA must have been read aloud to P in the presence of the person signing the LPA on behalf of P and the witness and then signed by some other person on P’s behalf, in the presence of the witness and the witness must have put his or her signature to the LPA in the presence of that other person.

Article 6 gives the title of this Law and provides for Article 5 to come into force on the later of the days that the Capacity and Self-Determination (Jersey) Law 2016 comes into force and the day that is 7 days after this Law is registered, and for the remainder of this Law to come into force 7 days after this Law is registered.



Jersey

**DRAFT SIGNING OF INSTRUMENTS
(MISCELLANEOUS PROVISIONS) (JERSEY)
LAW 201-**

Arrangement

Article

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Jersey

**DRAFT SIGNING OF INSTRUMENTS
(MISCELLANEOUS PROVISIONS) (JERSEY)
LAW 201-**

A LAW to make provision for the making of affidavits, wills and powers of attorney by persons unable to sign by reason of physical incapacity and make further provision for the witnessing of wills.

<i>Adopted by the States</i>	<i>[date to be inserted]</i>
<i>Sanctioned by Order of Her Majesty in Council</i>	<i>[date to be inserted]</i>
<i>Registered by the Royal Court</i>	<i>[date to be inserted]</i>

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Loi (1851) sur les testaments d’immeubles amended

In the Loi (1851) sur les testaments d’immeubles¹ –

- (a) in Article 8, for the 4th paragraph there shall be substituted the following paragraph –
“Un des témoins devra être un témoin qualifié (‘qualified witness’) dans le sens de l’Article 17A de la loi dite Wills and Successions (Jersey) Law 1993².”;
- (b) in Article 11, for the words “pays; dans ces Testaments le témoin officiel devra être un Notaire.” there shall be substituted the word “pays.”.

2 Affidavits (Advocates and Solicitors) (Jersey) Law 1992 amended

After Article 1(2) of the Affidavits (Advocates and Solicitors) (Jersey) Law 1992³ there shall be inserted the following paragraph –

“(2A) If the deponent is unable to sign the affidavit by reason of being physically incapacitated, the solicitor or advocate taking the affidavit shall endorse upon the affidavit that it has not been signed by the deponent by reason of the deponent’s physical incapacity.”.

3 Wills and Successions (Jersey) Law 1993 amended

In the Wills and Successions (Jersey) Law 1993⁴, after Article 17 there shall be added the following Article –

“17A Will signed by person other than testator

- (1) Despite Articles 8 and 30 of the Loi (1851) sur les testaments d'immeubles⁵ or any rule of customary law, a will of movable or immovable estate shall be valid when it has not been signed by the testator if –
 - (a) the testator declared in the presence of 2 witnesses (one of whom was a qualified witness) present together that, being physically incapacitated to sign the will himself or herself, the testator wished the will to be signed by another person on the testator's behalf;
 - (b) the declaration by the testator and the date it was made are recorded on the face of the will;
 - (c) the will was read aloud to the testator (or, in the case of a deaf testator, the whole contents of the will were made known to the testator by some other means) in the presence of the person signing the will on behalf of the testator and the two witnesses; and
 - (d) after the will was read to the testator (or, in the case of a deaf testator, after the whole contents of the will were made known to him or her by some other means), the will was signed by some other person on the testator's behalf in the presence of the 2 witnesses present together and the 2 witnesses put their signatures to the will, in the presence of each other and of that other person.
- (2) A person shall not be competent to sign a will on behalf of a testator unless that person has the capacity to execute a valid will of his or her own.
- (3) In this Article, 'qualified witness' means –
 - (a) if the will is executed in Jersey, a Jurat of the Royal Court, a member of the States, an advocate, a solicitor or a notary public; or
 - (b) if the will is executed outside Jersey –
 - (i) one of the persons mentioned in sub-paragraph (a), or
 - (ii) a judge, justice of the peace, magistrate, mayor, chief officer of any city or municipal corporation, a barrister, solicitor, a lawyer qualified under the legal system of the place of execution, a person authorized to take oaths or affidavits or the equivalent thereof by the law of Jersey or the law of the place of execution, a British consular official (or a person for the time being discharging the duties of such an official), or, if the testator is a member of the British armed forces, an officer of those forces authorized to take affidavits.

- (4) In paragraph (3)(b)(ii) –
- ‘barrister’ means a person who is qualified as a barrister in England and Wales or Northern Ireland or as an advocate in Scotland; and
- ‘solicitor’ means a solicitor of the Supreme Court of England and Wales, a solicitor of the Supreme Court of Judicature of Northern Ireland or a solicitor in Scotland.
- (5) The States may by Regulations amend paragraph (3) or (4).”.

4 Powers of Attorney (Jersey) Law 1995 amended

In the Powers of Attorney (Jersey) Law 1995⁶ –

- (a) after Article 3 there shall be inserted the following Article –

“3A Power of Attorney signed by person other than donor

- (1) Despite Articles 2(3) and 3(2), a power of attorney (including a registerable power of attorney) shall be valid when it has not been signed by the donor if –
- (a) the donor declared in the presence of a qualified witness that, being physically incapacitated to sign the power of attorney himself or herself, the donor wished the power of attorney to be signed by another person on the donor’s behalf;
- (b) the declaration by the donor and the date it was made are recorded on the face of the power of attorney;
- (c) the power of attorney was read aloud to the donor (or, in the case of a deaf donor, the whole contents of the power of attorney were made known to the donor by some other means) in the presence of the person signing the power of attorney on behalf of the donor and the qualified witness; and
- (d) after the power of attorney was read to the donor (or, in the case of a deaf donor, after the whole contents of the power of attorney were made known to him or her by some other means), it was signed by some other person on the donor’s behalf in the presence of a qualified witness and that witness put his or her signature to the power of attorney in the presence of the donor and that other person.
- (2) A person shall not be competent to sign a power of attorney on behalf of a donor unless that person has the capacity to execute a valid will of his or her own.
- (3) In this Article, ‘qualified witness’ means –
- (a) if the power of attorney is executed in Jersey, a person referred to in Article 3(2)(a); or

- (b) if the power of attorney is executed outside Jersey, a person referred to in Article 3(2)(a) or a person specified in Schedule 1.”;
- (b) in Article 9(1), for the words “ as was required for the due execution of the instrument creating that power” there shall be substituted the words “as is required for the creation of a power of attorney under this Law”.

5 Capacity and Self-Determination (Jersey) Law 2016 amended

In the Schedule to the Capacity and Self-Determination (Jersey) Law 2016⁷, after paragraph 1(3), there shall be added the following sub-paragraph –

- “(4) Despite sub-paragraph (1), a LPA shall be valid when it has not been signed by P if –
 - (a) P declared in the presence of a witness of a prescribed description that, being physically incapacitated to sign the LPA himself or herself, P wished the LPA to be signed by another person on P’s behalf;
 - (b) the declaration by P and the date it was made are recorded on the face of the LPA;
 - (c) the LPA was read aloud to P (or, in the case where P is deaf, the whole contents of the LPA were made known to P by some other means) in the presence of the person signing the LPA on behalf of P and the witness; and
 - (d) after the LPA was read to P (or in the case where P is deaf, after the whole contents of the LPA were made known to him or her by some other means), it was signed by some other person on P’s behalf, in the presence of the witness and the witness put his or her signature to the LPA in the presence of P and that other person.”.

6 Citation and commencement

This Law may be cited as the Signing of Instruments (Miscellaneous Provisions) (Jersey) Law 201- and –

- (a) Article 5 shall come into force on the later of the day upon which the Schedule to the Capacity and Self-Determination (Jersey) Law 2016⁸ comes into force and the day that is 7 days after this Law is registered; and
- (b) the remainder shall come into force 7 days after this Law is registered.

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- 1 *chapter 18.800*
 - 2 *chapter 04.960*
 - 3 *chapter 07.105*
 - 4 *chapter 04.960*
 - 5 *chapter 18.800*
 - 6 *chapter 04.680*
 - 7 *L.30/2016*
 - 8 *L.30/2016*