INTERNATIONAL ASPECTS OF DEPUTYSHIP

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Introduction

The world is getting smaller. The latest government statistics show that in the year to September 2015, 617,000 people came to live in the UK from overseas. 87,000 of these people had UK passports and were returning from living abroad, 257,000 were EU citizens, and 273,000 were from non EU countries. 294,000 people left the UK during this period, 127,000 of them were British.

The problem

There is no one law that governs the international elements of each country's internal laws. Further, as a general rule, one country cannot force another country to recognise an order or decision they have made. This is a serious problem for all aspects of the legal world, and various attempts have been made to try and fix it in all elements of the legal world from pet vaccinations to taxation. International private client law, including the law regarding making wills and mental capacity, is fraught with difficulties. In crass summary, the problem is that each separate country has its own separate legal system to govern how particular elements of living, eg succession, protection of vulnerable adults, taxation, are dealt with in their own country. The problems are beautifully summarised by Richard Frimson in his book ‘The International Protection of Adults’ published last year by the Oxford University Press, when he says ‘Unlike garden fences, the boundaries created by separate countries’ legal systems rarely meet’.

When a person has only lived in the country of their birth, and doesn’t own property outside of that country, then the law of his home country will apply without any issues. However, when a person moves from one country to another at different stages of their lives, and has children and property in different countries, and even continents, then the issue of which country’s legal system should apply to which part of that person’s life comes to the fore.

Where the internal systems in different countries do not match each other, this will often result in conflicting legislation about the same issue. For example, Bruce was born in England, but spent most of his working life in France, where he had 3 children. He moved back to England to retire, but has kept numerous assets including a house and a bank account in France, as he wishes to return to visit and he also wishes his French pension to be paid into his French bank account. Bruce is an English citizen living in England. The assets that he has within England will without doubt be governed by English law. However, the position is far less clear cut regarding his French state and private pension entitlement, French bank account and French house. He will need to make arrangements to deal with all of these assets during his lifetime whilst he retains capacity, during his lifetime in the event he loses capacity, and also on his death. Where a Deputy is appointed, the Deputy will be under a duty to deal with all of the assets that the incapacitated person (P) has, not just his assets in England and Wales. This can lead to serious complications, as is detailed below.

One key distinction that is useful in determining which country’s law is the applicable law is that of the distinction between movable (ie a bank account) and immovable property (ie a house). As a general rule, the law of the country in which the immovable property exists will apply to the immovable item, and the law of the country in

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1 Paragraph 2.01, The International Protection of Adults, Oxford University Press, 2015.
which the owner resides will apply to the movable property. However, this is a very broad brush distinction for the sole purpose of this presentation, and should not be relied on further than that.

**The position in England and Wales**

The law in relation to the international elements of mental capacity law within England and Wales is set out in Schedule 3 Mental Capacity Act 2005 (MCA), and supporting case law. It is important to highlight that MCA only applies in England and Wales. It does not apply in Scotland or Northern Ireland. For current purposes and for the purposes of legislation generally, they are foreign countries.

Schedule 3 MCA 2005 is one of the least understood and underutilised areas of the MCA, and at the time of writing has no practice direction or rules to support it or assist practitioners in how to utilise it, however this is currently under review.

**The Hague Convention on the International Protection of Adults**

The history of Schedule 3 MCA is bound up with what is known as the Hague Convention on the International Protection of Adults, which was signed at the Hague on 13 January 2000 ('the convention'). Due to increased movement of people between countries, in January 2000, the Hague Conference on Private International Law was attended by 77 countries, including the UK. The purpose of the conference was to promote and enable cross border working and cooperation on all elements of private law. The convention came into force on 1 January 2009, when it was ratified by three of the countries that attended the conference. However, in order for it to take effect in each state, that state must not only sign it, but ratify it (ie permit it to have effect in their legislative system). It has now been signed by 14 states (all European), and ratified by 8 states.

For ease, the following table, provided by the Hague Convention², shows which states have signed and/or ratified the convention:

<table>
<thead>
<tr>
<th>State</th>
<th>Date Signed</th>
<th>Date Ratified</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>10-VII-2013</td>
<td>9-X-2013</td>
</tr>
<tr>
<td>Cyprus</td>
<td>1-IV-2009</td>
<td>Not ratified</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>1-IV-2009</td>
<td>18-IV-2012</td>
</tr>
<tr>
<td>Estonia</td>
<td>Not signed</td>
<td>13-XII-2010</td>
</tr>
<tr>
<td>Finland</td>
<td>18-IX-2008</td>
<td>19-XI-2010</td>
</tr>
<tr>
<td>France</td>
<td>13-VII-2001</td>
<td>18-IX-2008</td>
</tr>
<tr>
<td>Germany</td>
<td>22-XII-2003</td>
<td>3-IV-2007</td>
</tr>
<tr>
<td>Greece</td>
<td>18-IX-2008</td>
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<tr>
<td>Ireland</td>
<td>18-IX-2008</td>
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<tr>
<td>Italy</td>
<td>31-X-2008</td>
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<tr>
<td>Luxembourg</td>
<td>18-IX-2008</td>
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<tr>
<td>Monaco</td>
<td>4-III-2016</td>
<td>4-III-2016</td>
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<tr>
<td>Netherlands</td>
<td>13-I-2000</td>
<td></td>
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² [https://www.hcch.net/en/instruments/conventions/status-table/?cid=71](https://www.hcch.net/en/instruments/conventions/status-table/?cid=71)
As you will see, the UK signed the convention on 1 April 2003, but has only ratified it in respect of Scotland. This means that it only directly applies in Scotland, and does not directly apply in England and Wales. The convention therefore has no direct effect in England and Wales.

The main objective of the convention was to put in place a system of mutual recognition and enforcement of protective measures and orders between countries that have signed and ratified the convention. Put simply, in practice such a system would mean that the equivalent of a Deputyship order in one convention country would automatically be recognised and, importantly be able to be used, in another convention country. It would avoid the duplication, or triplication in some cases, of time, money and stress of having to obtain an equivalent 'Deputyship' order in all countries where P has property or currently resides.

### Schedule 3 Mental Capacity Act 2005

To confirm; England and Wales have not ratified the convention. Therefore, the system of mutual recognition of orders and protective measures does not apply in England and Wales. As a result of this, Schedule 3 MCA 2005 was enacted in an attempt to bring the legal position within England and Wales in line with those states that had ratified the convention, including Scotland. Schedule 3 carries out 3 distinct functions:

1. **Gateway to the Court of Protection and Mental Capacity Act 2005**

   According to paragraph 7 (1) Schedule 3 MCA 2005, the Court of Protection has jurisdiction to make declarations and decisions under the Mental Capacity Act 2005 ss.15-16 in relation to:

   - (a) an adult habitually resident in England and Wales,
   - (b) an adult's property in England and Wales,
   - (c) an adult present in England and Wales or who has property there, if the matter is urgent,
   - or
   - (d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him

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For the purposes of the above criteria, an adult is a person aged 16 or over who ‘as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests’. (MCA 2005 Sch 3 para 4 (1)). This is a definition of mental incapacity rather than capacity, and is slightly wider than that used in the main part of MCA 2005. The purpose of this wider definition of mental incapacity is to bring it in line with the definition in the convention, for the purposes of dealing with international elements of a person's affairs. In theory this could lead to a position where a person lacks capacity in relation to their international assets, but not their English assets, but this is not something that should cause too much concern at this point. Of slightly more importance is the slight discrepancy between the convention and the MCA in relation to the age that the provisions take effect. MCA 2005 applies to all persons over 16, but the convention only applies to those over 18. This will need to be addressed as and when England and Wales ratify the convention.

'Habitual residence' has been defined in case law as 'a question of fact to be determined in the individual circumstances of the case' (Re MN)\(^3\). A person's habitual residence is somewhat fluid. It should not be confused with concepts such as domicile, citizenship or residence from a taxation perspective. Therefore, if a person is moved to another country when they lack capacity to consent, provided the move is lawful, it will result in a change in their habitual residence. Where the move is made in their best interests, there may be no need for any formal or Court process. Therefore, as a Deputy, it may be useful to note that where the habitual residence of a person is changed quickly, and possibly even in a situation where there is conflict about where a person should be living, provided that the change was done in good faith and was necessary, it may still be lawful, even if it has not been sanctioned by the Court of Protection. This was confirmed in Re PO, where PO was moved from her home in Worcestershire to Scotland by one child against the wishes of the other three children (Re PO [2013] EWHC 3932 (COP)).

As a Deputy, it is also worth bearing in mind that where the change is lawful, the move will trigger a change in ordinary residence for the point of view of who is responsible for funding P’s care.

Property is defined at s.64(1) MCA as ‘any thing in action and any interest in real or personal property’. As Schedule 3 does not offer its own definition of property, it is assumed therefore that property for the purposes of Schedule 3 extends to both moveable and immovable property. This means that if a person is habitually resident in another country, but has property of any kind in England and Wales, the Court of Protection may be able to exercise its powers over that person.

Outside of the above gateway, the Court of Protection has no power over an individual. For example, Camilla is a British national, having in born and grown up in London. When she was 21 she met Angus whilst on a bird watching tour of Skye, and she has lived there ever since. She owns a house, immovable property, in Scotland. She has had a stroke leaving her unable to make any decisions regarding her care or finances. She has not made any power of attorney provisions. Angus died in 2010. The Court of Protection has no jurisdiction over her or her property, simply by virtue of the fact that she was born in England. If, however, Camilla was visiting her sister, Priscilla, in London when she had her stroke and urgent decisions needed to be made about her care and treatment, which were unable to be agreed, then an application could be made to the Court of Protection to ask them to make a best interests declaration about Camilla, as she was at the time the decision needed to be made, present in England and Wales (MCA 2005, Sch 3, para 7(1)(c)).

If a person falls within the jurisdiction of the Court of Protection, then the full range of powers that are usually available to the Court of Protection under ss.15-16 MCA 2005 are available. Therefore, the Court of Protection can make best interests declarations, appoint a Deputy, make gifting provisions etc. Any decision made for a person using these provisions is made in their best interests.

2. Unilateral recognition of foreign ‘protective measures’

It is possible that an individual bank or association in England or Wales will simply accept a foreign protective measure. There are no rules against them doing this. However, it is more likely that they will not. In the event that they do not, paragraphs 19 to 25 of Schedule 3 set out very clear legislation on when and how a foreign ‘protective measure’ should be recognised in the Court of Protection. A foreign protective measure is purposefully wide phrase, and will include ‘any measure directed to the protection of the person or property of

\(^3\) Re MN (recognition and enforcement of foreign protective measures [2010] EWHC 1926 (fam), [2010] COPLR Con Vol 893 at para 22 per Hedley J.
an adult who for these purposes is any person over 16 who, as a result of an impairment or insufficiency of his personal faculties, cannot protect their interests⁴.

It is very important to realise that where a foreign protective measure, such as a Court Order, is in place, it is not automatically recognised in England and Wales. For it to be recognised in England and Wales, it is necessary for the Court of Protection to 'make a declaration of enforceability' under paragraph 22(1). If this is done, then the measure is as enforceable as if it were an Order originally made by the Court of Protection (paragraph 22(3)).

Any 'interested person' can make an application for a foreign protective measure to be recognised in England and Wales, and no permission is required (paragraph 20). At present, there exists no guidance, rules or practice directions as to how to do this. However, in absence any guidance, it would seem that the standard COP1 procedure, with relevant annexes, should be used. It would seem eminently sensible to also submit a form COP24 to explain the background to the application. This procedure was used in Re MN (above).

In stark contrast to the situation at ‘1’ above, when an application for recognition of a foreign protective measure is made, on receipt of the application, the Court of Protection does not have its full discretion available to it. It must accept any finding of fact made by the original Court and cannot consider the merits of the measure (paragraph 24). Further, there is no element of best interests making attributable to such an application. Instead, the Court must make the declaration of enforceability if it is satisfied that the adult was habitually resident in the country in which the measure was taken at the time it was taken (paragraph 19(1)), unless one of the following limited exceptions applies:

i) the case in which the measure was taken was not urgent, and the adult was not given an opportunity to be heard, and that omission amounted to a breach of natural justice (paragraph 19(3)), or

ii) recognition of the measure would be manifestly contrary to public policy, or

iii) the measure would be inconsistent with a mandatory provision of the law of England and Wales, or

iv) the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult (paragraph 19(4)).

Whilst this may all seem relatively straightforward, the major issue is that it is only relatively straightforward because England and Wales have an advanced legal system that has procedures in place for this type of situation. Other countries do not. Therefore there is absolutely no guarantee about how a Court of Protection Order may be received abroad. This may have particular relevance if P had significant offshore assets, and estate planning was required. The Convention, if signed and ratified by all those countries that agreed to it, would go a long way to avoiding this problem.

It is important to realise that there is no scope for best interests decision making by the Court of Protection in deciding whether to recognise a foreign protective order. This was confirmed in Re MN (above) where P, who was a British citizen and had been born in the UK, had moved to the USA with her American husband following the Second World War. She had appointed her British niece as her health attorney under an American Advance Healthcare Directive, and had subsequently lost capacity to make decisions for herself. After the death of MN's husband, the niece flew MN back to England. The court in California almost immediately made an Order for her return and the equivalent of a Deputy (a 'Conservator') was appointed for her. The Conservator applied to the Court of Protection for recognition of this Order, which was granted. The Court of Protection confirmed that the recognition of an Order is not a decision 'for or on behalf of' P, and therefore the best interests principle is not engaged. The only point at which the Court can exercise such a best interests function is in deciding how P should be treated ongoing, if they are within the jurisdiction of the Court of Protection, which is the case for applications under the first gateway, above.

The above process has also been used to recognise a number of Irish Orders that have Ordered that P be treated in England (most famously Health Service Executive of Ireland v PA, PB and PC [2015] EWCOP 38)],

⁴ Para 27.8, Chapter 27, Court of Protection Handbook, First edition, Legal Action Group
which confirmed that P would remain under the jurisdiction and control of the Irish Courts and mental healthcare system, despite their treatment in England, as no suitable facilities were available in Ireland.

3. Mutual recognition of ‘protective measures’ made by Convention countries

This part of Schedule 3 is only speculative at present as England and Wales are yet to ratify the convention. Therefore there is not much advantage to considering the provisions in great detail at the present time. However, in summary, it is proposed that in all but the most unusual circumstances, where a protective measure has been taken by a fellow Convention country, an interested person will simply be able to apply what is known as an ‘Article 38’ certificate, which will recognise the foreign protective measure as if it had been made in the Court of Protection. The great advantage of this is that the ratification would, one would hope, go hand in hand with a simplified application procedure at the Court of Protection, and would also result in Orders from the Court of Protection being recognised in other Convention countries. Ratification would also lead to various provisions relating to the safeguarding of P and their placement in other Convention countries being able to be put to use.

Brits abroad

A more accurate descriptor of this section would be ‘the English and Welsh’ abroad! Whilst it may seem obvious from the above, it is worth saying that a Court of Protection Order has no automatic authority in other countries. Again, as a Deputy, you may be lucky and find that a particular bank or organisation in another country is happy to accept a Court of Protection Order, but it may not. It is more likely to be accepted in an old Commonwealth country, as they share a legal history with England and Wales, and many Commonwealth counties, such as Canada, New Zealand and Jamaica, still look to England and Wales when they are reviewing and implementing new legislation. If your English Deputyship client has assets in other countries, you may well find yourself needing to work alongside an equivalent Deputy or attorney in said other country.

Powers of Attorney

Whilst not directly related to Deputyship, it may be useful to touch on powers of attorney, as there is overlap. There has been significant academic debate about how powers of attorney and their international equivalents should be treated. They are dealt with to a certain extent under paragraphs 13-16 Schedule 3. The important thing to note is that the legislative framework within which a power of attorney operates is that of the country in which a person is trying to use it (paragraph 13(5)). For example, if a client has a German equivalent power of attorney, perhaps because they have spent the majority of their adult life in Germany, and wishes to use it in England, then the law of England applies to said use.

However, there is an ongoing debate about whether a power of attorney is a measure of protection, or whether it is simply what is known as a ‘private lasting mandate’, i.e. a form of private contract entered into between the donor and the donee. It is important as the distinction affects whether a foreign power of attorney can be formally recognised by the Court of Protection. Current academic thought is that a power of attorney is a private mandate, not a measure of protection and therefore it is not open to an interested person to apply for its recognition and enforcement under paragraph 19 of Schedule 3, as they would if they were dealing with the equivalent of a Deputyship Order (paragraph 9.13 Frimson et al ‘International Protection of Adults’).

Notwithstanding this, it would be open to someone to apply to the Court of Protection for a declaration that an attorney is acting lawfully in line with their powers as attorney in using the foreign power in England and Wales. Permission would be needed as the applicant wouldn’t be an attorney under an LPA or EPA. I have successfully done this for a Colorado Power of Attorney where P lacked capacity to make decisions for himself. I was instructed by his wife, and in the application I paid the £400 application fee, and used forms form COP1 and COP24, together with a letter from a medical professional about capacity. I did not use forms COP1A or 3, and therefore the costs were kept to a minimum.

Statutory wills

A key consideration for any Deputy is the testamentary arrangements of P. Therefore it is important to note the effect, or otherwise, of any statutory will executed for P., Paragraph 4(4), Schedule 2 MCA 2005 confirms that wherever P is domiciled at the date of execution, the statutory will is unable to dispose of immovable property outside of England and Wales. Equally, wherever P is domiciled at the date of execution, the will always
disposes of immovable property (eg houses) situated within England and Wales on his death. Further, if P is domiciled in England and Wales at the time of execution, it will be effective over moveable property wherever situated. Conversely, if P is not domiciled in England and Wales at the time it is executed, it will only cover moveable property wherever situated if as a result of P’s domicile the law of England and Wales would be the appropriate law to determine his testamentary capacity. The law surrounding any will that P made in his lifetime will be subject to the legislative framework in place at the time he executed it. Clearly, as a Deputy you are under a duty to ensure that any will or statutory will does not create a conflict in private international law, which will be costly for P’s estate to administer following his death.

**Best interests decisions**

A further area of interest to professional Deputies is the enforceability, or otherwise, of best interests decisions.

Whether a person who deliberately does not comply with a Best Interest decision is in contempt of court has recently been considered in ‘the Saudi Arabia case’ MASM v MMAM (By her Litigation Friend the Official Solicitor) and Other [2015] EWCOP 3. In this case, the Court decided that it was in the best interests of an elderly lady to remain living in the residential home that she had been residing in for a number of years. In strict defiance of that Order, her son moved her to her native Saudi Arabia. He had been a party to proceedings.

The Court concluded that a Best Interests decision is simply a declaration of the Court’s views about the best course of action for that person at that particular time. It is not a Court Order as such. Therefore, by deliberately not complying with it, you are not acting in contempt of court; you are merely making the second or third best choice for P. However, the non-compliant party was forced to pay the entire costs of the proceedings at every stage, to reflect the court’s depreciation of his conduct.

This is certainly something to bear in mind, particularly if viewed alongside Re PO, above, as family members may decide to take swift action in defiance of a Best Interests decision, which could be fairly definitive if the action involves a move to a foreign country.

**Conclusion**

In conclusion, the law surrounding the international protection of adults is far from clear, and is fast moving. A clear set of practice directions and rules supporting Schedule 3 MCA 2005 would be very useful for Deputies, attorneys and private client practitioners alike. There is also an ongoing campaign by leaders in the international private law sphere for the government to ratify the convention. This would be of even more assistance to Deputies across the country, and would also help those practitioners from other countries who have clients with English and Welsh assets.