

Cross-border matters

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Introduction

27.1 The majority of cases before the Court of Protection concern the property or personal welfare of people who are habitually resident in England and Wales. However, the Mental Capacity Act (MCA) 2005 also includes detailed provisions relating to the powers of the court over people who are habitually resident other than in England but in respect of whom, for whatever reason, declarations or decisions are sought. This might be, for instance, because an incapacitated adult has been kidnapped from their home country and brought to England and Wales. In such a case, an order may well be sought in their home country seeking their return; Schedule 3 to the MCA 2005 contains provisions detailing when and how such an order would be given effect by the Court of Protection. Alternatively, a question might arise as to the proper disposal of property in England belonging to someone habitually resident abroad upon whose behalf decisions are now being taken by a guardian appointed under the laws of that country.

27.2 The private international law rules governing decision-making for incapacitated adults with a foreign connection is a complex topic, a full discussion of which lies outside the scope of this book.¹ The complications are only increased by the fact that MCA 2005 Sch 3 implements – as the law of Wales – many of the provisions of the Hague Convention on the International Protection of Adults 2000, but the UK has not, to date, ratified the convention as regards England and Wales.²

27.3 This chapter limits itself to highlighting those jurisdictional questions that are most likely to arise in the court setting before noting the position in relation to foreign lasting powers of attorney (LPAs) (ie powers made under other legal systems which have a similar effect to LPAs).

What counts as a foreign jurisdiction?

27.4 It is important to realise that, for purposes of proceedings before the Court of Protection, both Scotland and Northern Ireland count

1 Readers are directed, in particular, to Part X of Ashton et al, *Court of Protection Practice 2014*, Jordans; and also, for a fuller discussion, to Frimston et al, *International Protection of Adults* (forthcoming, OUP, 2014).

2 It has done so in respect of Scotland.

as foreign jurisdictions.³ This means, therefore, that a move of an incapacitated adult from England to Scotland would give rise to a cross-border jurisdictional question; as would questions concerning the exercise of a Scottish power of attorney in England.

The basis of jurisdiction of the Court of Protection

- 27.5 The Court of Protection has jurisdiction to make declarations and decisions under MCA 2005 ss15–16 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.⁴
- 27.6 'Habitual residence' is not defined in the MCA 2005, but the phrase has been the subject of judicial consideration. Above all, it is 'a question of fact to be determined in the individual circumstances of the case'.⁵ In the case of an adult who lacks the capacity to decide where to live, habitual residence can in principle be lost and another habitual residence acquired without the need for any court order or other formal process, such as the appointment of an attorney or deputy.⁶ If an adult has been moved across borders, then a central question in deciding whether their habitual residence has changed will be whether there has been any element of wrongfulness in the move.⁷ Habitual residence can in principle be lost and another habitual residence acquired on the same day.⁸
- 27.7 An adult is deemed to be habitually resident in England and Wales if:

3 MCA 2005 Sch 3 para 1.

4 MCA 2005 Sch 3 para 7(1).

5 *Re MN (recognition and enforcement of foreign protective measures)* [2010] EWHC 1926 (Fam), [2010] COPLR Con Vol 893 at para 22 per Hedley J.

6 *Re PO* [2013] EWHC 3932 (COP), [2013] WLR (D) 495, per Sir James Munby P at para 18.

7 *Re MN* (move in apparent breach of instruction in Californian Advance Healthcare Directive); or *Re HM (vulnerable adult: abduction)* [2010] EWHC 870 (Fam), [2010] 2 FLR 1057 (move in breach of a court order).

8 *Re PO* [2013] EWHC 3932 (COP), [2013] WLR (D) 495 at para 17.

- 1) their habitual residence cannot be determined;
- 2) they are a refugee; or
- 3) they have been displaced as a result of disturbance in the country of their habitual residence.⁹

Recognition and enforcement of foreign protective measures

27.8 Perhaps the most important function of the provisions of MCA 2005 Sch 3 is to put in place a mechanism for declarations to be obtained that foreign ‘protective measures’ be recognised and enforced in England and Wales. Such ‘protective measures’ will include any measure directed to the protection of the person or property of an adult, who for these purposes is any person over 16¹⁰ who, as a result of an impairment or insufficiency of his personal faculties, cannot protect their interests.¹¹ The MCA 2005 gives examples of such protective measures;¹² examples that have come before the Court of Protection include:

- an order made by a Californian court requiring the return of an adult to California after her removal from the jurisdiction to England in questionable circumstances;¹³ and
- the placement of an Irish national in an English psychiatric institution by way of an order made in the High Court in the Republic of Ireland.¹⁴

It is important to note that, for these purposes, a protective measure includes not just single court orders but also the appointment of a guardian or equivalent by the relevant authorities in the foreign jurisdiction.

27.9 Where a measure has been taken on the ground that an adult is habitually resident in any foreign jurisdiction (including, for these

9 MCA 2005 Sch 3 para 7(2).

10 Except if they are aged 16 or 17 and subject to the provisions either of the 1996 Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children or Council Regulation (2201/2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

11 MCA 2005 Sch 3 para 4.

12 MCA 2005 Sch 3 para 5.

13 *Re MN*.

14 *Re M* [2012] COPLR 430 (COP).

purposes, Scotland and Northern Ireland¹⁵), any interested person can apply to the Court of Protection for a declaration that it is to be recognised in England and Wales.¹⁶ Such an application will almost invariably be accompanied by an application that the measure be declared enforceable here as well.¹⁷ Although neither the MCA 2005 nor the Court of Protection Rules (COPR) 2007 SI No 1744 set down any formal procedure by which applications for recognition and enforcement are to be made, they should be made by way of a standard COP1 application,¹⁸ and do not require permission.¹⁹ They should be accompanied by full details and – where relevant – a certified translation of the relevant order(s).

- 27.10 A judge of the Court of Protection asked to recognise and/or declare enforceable a foreign protective measure operates within strict limits. Their role is confined, in essence, to scrutinising whether core procedural and substantive rights have been complied with. They cannot, in particular, conduct their own analysis of where the adult's best interests may lie, although they can – and must – consider the adult's best interests in deciding how the measure is to be implemented.²⁰

Foreign lasting powers of attorney

- 27.11 An adult who is habitually resident other than in England and Wales at the point of making an LPA²¹ can specify that they want English law to apply to questions of existence, extent, modification or extinction, if:
- a) they do so in writing; and
 - b) they are:
 - i) a UK national;
 - ii) they have previously been habitually resident in England and Wales; or

15 By virtue of the definition of 'country' given in MCA 2005 Sch 3 para 1.

16 MCA 2005 Sch 3 para 20(1).

17 MCA 2005 Sch 3 para 22(1).

18 As happened in *Re MN*.

19 MCA 2005 Sch 3 para 20(2).

20 *Re MN* at paras 29 and 31; and MCA 2005 Sch 3 para 12.

21 Which will include a power of like effect to an English LPA: MCA 2005 Sch 6 para 6(c).

iii) they have property here (subject to the limitation that they are only entitled to specify that English law applies in relation to the property here).²²

c) If they do not make any such specification, then the law of the country in which they were habitually resident at the point of making the power will apply.

27.12 A foreign LPA – ie made by someone habitually resident other than in England and Wales at the point of making it – is automatically effective in England and Wales if it satisfies the requirements of the law that applies under the test set out in the paragraph immediately above.²³ If, though, the foreign power is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the Court of Protection can – if it has jurisdiction over the person or their property (applying the tests set out in para 27.5 above) disapply or modify the power.²⁴

27.13 It should be noted that – as matters stand – the Office of the Public Guardian does not register foreign LPAs alongside those of English powers. If a bank or other institution is not willing to accept that a foreign LPA is effective, then, assuming that the jurisdictional test set out in para 27.5 above is met, it may be necessary to bring an application to the Court of Protection for a declaration that – for instance – the attorney is acting lawfully in exercising the foreign power in England and Wales. Such an application is not an application for recognition and enforcement;²⁵ it would appear, further, that permission would be required.²⁶

27.14 The situation described immediately above is not satisfactory; in due course, if ratification of the 2000 convention is extended to England and Wales, then the situation will improve – at least between contracting states to the 2000 convention. Under article 38 of the 2000 convention, authorities of a contracting state to the Convention where a measure of protection has been taken or a power of representation confirmed can issue to the person entrusted with the protection of the adult's person or property a certificate indicating

22 MCA 2005 Sch 3 para 12(2)(b).

23 This flows from MCA 2005 Sch 3 para 13(1)–(2).

24 MCA 2005 Sch 3 para 14(1).

25 See Frimston et al, *International protection of adults*, chapter 9. This is by contrast with an application by a guardian appointed by a foreign court for recognition and enforcement of their appointment, which would be such an application.

26 MCA 2005 s51(2); the attorney would not be the donee of an LPA falling within the provisions of the MCA 2005.

the capacity in which the person is entitled to act and the powers conferred. Under a provision of the MCA 2005 which will come into force upon ratification with effect to England and Wales,²⁷ such a certificate would stand – unless the contrary is shown – as proof of the capacity in which the representative acts and the powers conferred upon them by the power of representation.

27 They are not currently in force: *Re PO* at para 9.