CROSS-BORDER ISSUES: DEPUTYSHIPS AND LPAS[1]

Rhys Hadden, Guildhall Chambers, 1st February 2018

"The wide world is all about you: you can fence yourselves in, but you cannot forever fence it out."
J.R.R. Tolkien

Introduction

1. In a world with an aging population, increased movement of people between countries and geographically dispersed assets, issues concerning incapacitated individuals and managing their personal affairs now frequently extend beyond local borders. The once rarefied domain of international private client law has become much more commonplace. Indeed, the Society of Trust and Estate Practitioners ("STEP") has gone so far to describe incapacity in a cross-border context as "the ticking timebomb"[2].

2. The law in this area is complex and evolving. The aim of this article is to provide an outline of the relevant legal framework concerning foreign powers of attorney and Deputyship equivalents being used in England and Wales and vice versa.

3. I will first look at the Hague Convention on the International Protection of Adults ("Hague 35") and its domestic counterpart, Schedule 3 of the Mental Capacity Act 2005 ("MCA 2005"). I will then consider the recognition and use of foreign "protective measures" and powers of attorney in England and Wales, including consideration of the long-awaited rules (Part 23 of the CoPR 2017) and accompanying practice direction (PD23A) that came into force on 1 December 2017. Finally, I will look at the enforceability of Lasting Powers of Attorney ("LPAs")[3] and orders of the Court of Protection (including Deputyships) abroad.

4. It is worth remembering that in this context both Scotland and Northern Ireland count as foreign jurisdictions. For example, a move of an incapacitated adult from Wales to Scotland would give rise to a cross-border jurisdictional issue. Similar issues would arise concerning the exercise of a Northern Irish enduring power of attorney in England.

(1) The Hague Convention on the International Protection of Adults

5. Hague 35 was concluded on 13 January 2000[4]. It represents an attempt by States to create a single framework to enable the cross-border protection of adults and their property when they are not in a position to protect their interests.

6. Hague 35 came into force on 1 January 2009. It has now been signed by 18 states (all European) and ratified by 10[5]. The states who have ratified Hague 35 to date are: Austria, Czech Republic, Estonia, Finland, France, Germany, Latvia, Monaco, Switzerland and the UK (in relation to Scotland only).

7. The central provisions of Hague 35 address two matters that are conceptually distinct:

   (i) Protective measures: the resolution of questions relating to the taking of "protective measures" by State authorities (both judicial and administrative), including the

[1] While every effort is made to ensure the accuracy of the information given in these notes, they are not intended to be relied upon as legal advice and no liability will be accepted in relation to such reliance.
[2] https://www.step.org/sites/default/files/2507-mental-capacity-and-CBEG.pdf
[3] Unless otherwise stated any reference to an LPA for property and financial affairs registered with the OPG in England and Wales will also include registered Enduring Powers of Attorney (EPAs).
[4] The full text of Hague 35 can be found here: https://www.hcch.net/en/instruments/conventions/full-text/?cid=71
[5] The current status table of signatories to Hague 35 can be found here: https://www.hcch.net/en/instruments/conventions/status-table/?cid=71

identification of which authorities have jurisdiction to take such measures and the establishment of a framework for the effective recognition and enforcement of such measures in other Contracting States; and

(ii) Powers of representation: the resolution of questions relating to "powers of representation" (or "private mandates") granted in advance by adults prior to the onset of incapacity and designed either to survive such incapacity or to take effect upon their incapacity;

8. Within the context of English law, a "protective measure" would be the equivalent of an order of the Court of Protection, such as appointing a deputy for property and affairs. By contrast, it is broadly accepted that an LPA would be regarded as a "power of representation".

9. The key aim of Hague 35 was to implement a system of mutual recognition and enforcement of protective measures and powers of representation between countries that have signed and ratified the convention. For example, in practice this would mean that equivalent of a Deputyship order in one convention country would be automatically recognised and able to be used in another.

10. It is worth noting that Hague 35 deploys a "status" based definition of capacity. It is concerned with the protection of adults, *"who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests"*[6]. This was deliberate, despite a number of jurisdictions, including England and Wales, now moving beyond this definition to a more issue or decision-specific assessment of capacity.

11. Furthermore, Hague 35 only applies to those who have reached the age of 18, albeit that it can also apply in respect of measures taken in anticipation of a person's majority where the person in question was not 18 at the point they were taken[7].

(2) Schedule 3 of the Mental Capacity Act 2005

12. The UK has only ratified Hague 35 in relation to Scotland. It is yet to ratify it in respect of England and Wales. Instead, Parliament has given effect to a "proto-Hague 35" by taking the unusual step of enacting s.63 and Sch.3 MCA 2005, which incorporates almost all of the same provisions of Hague 35, including the obligation to interpret Sch.3 MCA 2005 consistently with Hague 35[8].

13. Sch.3 MCA 2005 was enacted with a minimum of legislative consideration and remains one of the least understood and employed areas of the MCA 2005. It serves four purposes:

(i) Jurisdiction: it sets out the criteria by which the Court of Protection can exercise its "full original jurisdiction"[9] under the MCA 2005 in relation to adults and/or their property in England and Wales;

(ii) Recognition and enforcement of protective measures: it provides a framework for recognition and enforcement by the Court of Protection of foreign protective measures taken in the place of the person's habitual residence;

(iii) Applicable law for lasting powers: it establishes a set of principles to resolve conflicts of laws arising in respect of powers of representation – referred to in Sch.3 as "lasting powers";

[6] Art.1(1), Hague 35
[7] Art.2(1), Hague 35
[8] Para 2(4), Sch.3 MCA 2005
[9] The phrase "full original jurisdiction" was used by Hedley J in ***Re MN*** **[2010] EWHC 1926 (Fam)** by Hedley J to contrast with the limited jurisdiction of the Court of Protection when it comes to the recognition and enforcement of protective measures.

(iv) Implementation of Hague 35: it sets out a speculative framework for bringing the provisions of Hague 35 into English and Welsh law (yet to be appointed)

14. An unusual feature of Sch.3 MCA 2005 is that (save in certain limited circumstances) all of its obligations are imposed irrespective of whether the country in question is also a signatory to Hague 35. As a result, Sch.3 MCA 2005 will apply whenever a cross-border incapacity issue arises.

15. Furthermore, Sch.3 MCA 2005 does not apply in all circumstances. The exclusions contained in Art.4 Hague 35 are specifically referred to in para 33, Sch.3 MCA 2005.

Jurisdiction

16. With any legal issue arising under Sch.3 MCA 2005, the first question to consider should always be whether the courts of England and Wales have jurisdiction. By para 7(1), Sch.3 MCA 2005 the Court of Protection has jurisdiction to make declarations and decisions under ss.15-16 MCA 2005 in relation to:

(i) an adult habitually resident in England and Wales[10];

(ii) an adult's property in England and Wales;

(iii) an adult present in England and Wales or who has property there, if the matter is urgent; or

(iv) 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.

17. In contrast to Hague 35, an "adult" for the purposes of Sch.3 MCA 2005 is a person who has reached the age of 16[11]. However, the definition of capacity remains the same, namely: "a person … who, as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests".

18. Furthermore, by para 7(2) MCA 2005, the Court may be deemed to have jurisdiction in relation to adult and his worldwide property present in England and Wales whose habitual residence cannot be determined, is a refugee or has been displaced as a result of disturbance in the country of their habitual residence.

19. If an individual (or their property) does not meet any of the criteria set out in Sch.3 MCA 2005 then the Court of Protection will have no jurisdiction to make any declarations or orders under s.15-16 MCA 2005[12].

Habitual residence

20. 'Habitual residence' is not defined in the MCA 2005 or in Hague 35. The meaning is similar to that used in family statutes and instruments. It remains *"a question of fact to be determined in the individual circumstances of the case"*[13]. The phrase has been the subject of judicial consideration within the Court of Protection. There is now a small but helpful body of case law

[10] This would include the adult and his worldwide property;

[11] Para 4(1)(b), Sch.3 MCA 2005. Where the person is under 18, they must also not be subject either to the 1996 Hague Convention or Council Regulation (EC) No. 2201/2003 ("Brussels II").

[12] The inherent jurisdiction of the High Court is not as restricted as the Court of Protection in establishing its jurisdiction to protect vulnerable adults. In two recent cases the High Court has extended the reach of the "great safety net" to protect vulnerable or incapacitated British nationals overseas: see ***Al-Jeffery v Al-Jeffery (Vulnerable Adult; British Citizen)*** **[2016] EWHC 2151 (Fam)** and ***Re Clarke*** **[2016] EWCOP 46**.

[13] Per Hedley J at [22] in ***Re MN (Recognition and Enforcement of Foreign Protective Measures)*** **[2010] EWHC 1926 (Fam**)

on the correct approach to be taken when determining the habitual residence of an adult who lacks capacity:

- ***Re MN (Recognition and Enforcement of Foreign Protective Measures)* [2010] EWHC 1926 (Fam):** what criteria should the Court of Protection apply to recognise and enforce an order of a court of competent jurisdiction in California requiring the return of an elderly lady with dementia to that State;

- ***Re PO* [2013] EWCOP 3932:** whether the Court of Protection had jurisdiction to exercise its functions in relation to PO who had been removed from Worcestershire to Scotland by her son;

- ***An English Local Authority v SW* [2014] EWCOP 43**: determination of habitual residence of Scottish woman placed by Scottish statutory authorities in a rehabilitation placement in England;

- ***Re DB; Re EC* [2016] EWCOP 30:** whether two Scottish men had acquired habitual residence in England after receiving treatment in the same specialist hospital in England for several years;

21. Despite their factual dissimilarities, some conclusions may be drawn from these authorities:

    (i) Habitual residence can in principle be lost and another habitual residence acquired on the same day[14]

    (ii) In the case of an adult who lacks 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[15]

    (iii) Habitual residence will not change if the removal has been wrongful, e.g. in breach of a court order, where there is bad faith or where what is done is unreasonable or not in the best interests of the person[16]

    (iv) Habitual residence must as a general rule have a certain duration which reflects an adequate degree of permanence and stability, though there is no minimum duration[17]

22. The leading practitioner's text on this issue, *The International Protection of Adults,* suggests the following principles can be distilled from the current framework and analogous case law to assist with the individual factual assessment of habitual residence in each case[18]:

    (i) An adult can only have (at most) one habitual residence for the purposes of Hague 35 and may in some circumstances have none;

    (ii) In the case of an adult who <u>had</u>, but has subsequently lost, the capacity to decide where to live, their habitual residence will remain that of the country in which they are habitually resident as at the point at which they lost capacity. It is possible for this to change if they are moved to another country in circumstances which do not give rise to any inference of wrongdoing on the part of a third party (whether formally or informally) for their care and wellbeing;

[14] *Re PO*, para [17]
[15] *Re PO*, para [18]
[16] *Re MN,* para [22]; *Re PO,* para [20]
[17] Re *DB; Re EC* and *A Local Authority v SW*, para [72]
[18] Para 8.64, *The International Protection of Adults* by Frimston et al (OUP, 2015)

(iii) If a change of habitual residence is asserted, the Court should scrutinise both the circumstances of the move itself and the circumstances under which the adult in question is now residing with a view to examining whether it is a permanent arrangement. It may, depending on the circumstances, be appropriate to take into account the degree to which the adult appears to be settled and views that they may be expressing (even if such views do not amount to a capacitous decision as to residence);

(iv) Where an adult is wrongfully removed from their 'home' jurisdiction their habitual residence could change if there is a subsequent endorsement of that move by the responsible administrative or judicial authorities of the country of habitual residence and/or all those family members and carers properly interested in the adult's care;

(v) The passage of a sufficiently long period of time could, in and of itself, effect a change of habitual residence even if the original removal was wrongful[19]. One year might be an appropriate rule of thumb;

(vi) In the case of an adult who has never had capacity to decide where to live, then their habitual residence at the point of majority will be that they had immediately prior to turning eighteen;

(vii) The assessment of habitual residence will always be by reference to the facts as they exist as at the time of assessment by the Court. In an application before the court the relevant date is the date of the hearing, not the date when the application was made;

(viii) The burden will always lie upon the person asserting the change of habitual residence;

(3) Recognition and enforcement of foreign "protective measures"

23. Following the enactment of Sch.3 MCA 2005 England and Wales will now recognise a "protective measure" taken in another state provided that the relevant adult is habitually resident in that other state[20].

24. The meaning of protective measure is broadly defined[21] and will include any measure directed to the protection of the person or property of an adult. A protective measure can include not just single court orders but also the appointment of a guardian or equivalent by the relevant authorities in the foreign jurisdiction.

25. There are no rules to prevent a statutory body, financial institution or other relevant organisation in England and Wales from accepting a valid foreign protective measure as sufficient authority to act on behalf of a client who is habitually resident elsewhere. However, in practice a certified copy of this measure is unlikely to be enough in many cases.

26. If the UK fully ratified Hague 35 then this issue would be resolved, at least when dealing with protective measures or powers of representation from other contracting states. Art.38 of Hague 35 provides for certificates to be issued where an LPA has been registered or a Deputyship order been made. An attorney / deputy would be able to obtain a certificate indicating the capacity in which they are entitled to act and the powers conferred on them. This system would be extremely useful and simplify many practical and legal issues created by the current position. Despite consistent pressure, the Government has not given any indication of when this could happen.

27. At present, if a foreign protective measure is not automatically recognised by an organisation in England and Wales, any interested person can apply to the Court of Protection for a declaration

[19] *Re MN*, para [21]
[20] Part 4, Sch.3 MCA 2005
[21] Para 5, Sch. 3 MCA 2005

that it is to be recognised in England and Wales[22]. Such an application would be accompanied by an application that the measure be declared enforceable here as well[23].

28. By paras 19(3) and (4), Sch.3 MCA 2005 the Court of Protection may exercise a discretion to refuse to recognise a protective measure on the following limited grounds[24]:

    (i) the case in which the measure was taken was not urgent, the adult was not given an opportunity to be heard, and that omission amounted to a breach of natural justice; 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 a protective measure in England and Wales in relation to the adult; or

    (v) Article 33 of Hague 35 has not been complied with in relation to cross-border placement;

29. A Judge of the Court of Protection being 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. In particular, they cannot 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 protective measure is to be implemented[25].

30. The most recent case on this issue is ***The Health Service Executive of Ireland v PA & Ors* [2015] EWCOP 38** where Baker J provides a detailed analysis of the parameters of the Court's jurisdiction to recognise and enforce foreign protective measures under Sch.3 MCA 2005. This case concerned three vulnerable individuals habitually resident in Ireland but detained in England because no suitable psychiatric facilities were available for them in Ireland. Although they could be detained in England under the MHA 1983, the Irish High Court wished to retain jurisdiction over them so that future decisions about their care could be made in Ireland.

31. Baker J held that in cross-border cases involving recognition and enforcement of protective measures taken in relation to adults with impairments, the Anglo-Welsh courts operate within a different framework to purely domestic cases. The court does not apply its "full original jurisdiction". Instead, the Court may only exercise its discretion to refuse recognition on limited grounds – breach of procedural safeguards or public policy. It is not enough to show that another provision of the MCA 2005 appears to be in conflict. In particular:

    (a) Save for the question of whether an adult has litigation capacity, the Court will not apply the test of capacity set out at s.2(1) MCA 2005.

    (b) The Court's has a "status-based" jurisdiction in relation to *"those who as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests"*

[22] Para 20(1), Sch.3 MCA 2005

[23] Para 22(1), Sch.3 MCA 2005

[24] In ***Re M* [2011] EWHC 3590 (COP)**, Mostyn J held that an order of the Irish High Court should be recognised under para 19, Sch. 3 MCA 2005, notwithstanding the fact that it involved the deprivation of liberty, and that if M had been habitually resident in England and Wales, could not have been made in a welfare order under s.16 MCA 2005. The court considered that the ability to disapply under para 19(4) were not relevant on the particular facts but could be in other circumstances.

[25] *Re MN* at paras [29] and [31]; and para 12, Sch.3 MCA 2005

(c) The Court cannot decline to recognise and enforce a protective measure even if – measured by s.2(1) MCA 2005 – the adult would have the material decision-making capacity and is objecting;

(d) The Court of Protection is effectively bound by the decisions of the foreign court as to the habitual residence of the individual;

(e) The Court will not apply the best interests test in s.1(5) and s.4 MCA 2005, except in relation to implementation of the protective measure

32. There are now formal rules and a specific practice direction within the Court of Protection that address how an application to recognise and / or enforce a foreign protective measure can be made. These are considered more fully below.

Appointment of deputy not resident in England and Wales

33. The Court will appoint a property and affairs deputy who is not habitually resident in England and Wales. In *Re DGP* [2015] EWCOP 58, P's brother and niece objected to the appointment of P's daughter, who had emigrated to the USA decades previously. Senior Judge Lush held that *"the fact someone lives outside the jurisdiction should not be an impediment to their appointment as a deputy if, in all other respects, they are the most suitable candidate to be appointed and their appointment is in P's best interests.*

34. This case is worth contrasting with *Long v Rodman* [2012] EWHC 347 (Ch), which concerned an application by a foreign professional office-holder to remove a professional deputy in England. The court refused the application. It serves as a helpful illustration of how <u>not</u> to go about making this type of application, given the aggressive, highly litigious approach taken on behalf of the proposed deputy.

(4) Using foreign lasting powers in England and Wales

35. Many other jurisdictions have forms of powers of attorney that have a like effect to a LPA. These are often called, Enduring, Continuing or Durable powers. In some states, such as Germany, subsequent incapacity does not automatically revoke a general power of attorney. Also, in many jurisdictions, marriage or divorce can automatically revoke a power of attorney.

36. Foreign lasting powers can be effective within England and Wales. In theory, an attorney acting under a foreign lasting power should simply be able to point to the provisions of Sch.3 MCA 2005 when dealing with a financial institution or other organisation. A foreign power 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 these requirements. However, in practice it is not always that simple.

37. A thorough, pre-planned approach on behalf of a capacitous foreign client would be to take steps to register an LPA in England and Wales. Although, they may only specify that the law of England and Wales is to apply to <u>all</u> aspects of the LPA if they have a connection with England and Wales as defined in Sch.3 MCA 2005. This option is not always available.

38. If a bank or other institution is unwilling to accept that a foreign LPA is effective and that person is not able to execute an English LPA, then, assuming that the jurisdictional test is met, an application to the Court of Protection may be brought for a declaration that the attorney is acting lawfully in exercising the foreign power in England and Wales[26].

[26] For the purposes of Sch.3 MCA 2005 (and Hague 35) foreign lasting powers are not "protective measures". As such, they are not capable of being made the subject of an application for a declaration of recognition and enforcement.

39. Any question of the validity and exercise of a foreign lasting power in England and Wales falls for consideration by reference to Part 3, Sch.3 MCA 2005. This provides a framework for resolving conflicts of laws questions.

40. The starting point is the principle that the law applicable to the existence, extent, modification or extinction of the lasting power will be that of the country of the habitual residence of the donor as at the point of granting the power.

41. To try and ensure that adults have autonomy to make choices, it is recognised that a donor should have a limited ability to nominate in writing that a law of a different country should apply to these matters. For example, a person who is habitually resident in France and intends to retire in Cornwall may create a *mandat de protection future* which stipulates that the applicable law is that of England and Wales.

42. To help determine which system of law applies when considering a foreign lasting power, paras 13(1)-(2), Sch.3 MCA 2005 provides that the law applicable to existence, extent, modification or extinction of the power is:

    (1) If the donor is habitually resident in England and Wales at the time of granting the power: (a) the law of England and Wales; or (b) such other law as specified in writing by the donor;

    (2) If the donor is habitually resident in another country at the time of granting the power, but England and Wales are a "connected country"[27], then the applicable law is: (a) the law of the other country; or (b) if the donor specifies in writing the law of England and Wales for that purpose, that law;

43. The applicable law in relation to the manner of the exercise of the lasting power is the law of the country where it is exercised (or where it is proposed it will be exercised)[28]. For example, an attempt to use a Scottish continuing power of attorney to purchase property in Wales would remain subject to the law of England and Wales.

44. There is no requirement to specify which law applies within the lasting power itself or that the specification must be made at the same time as the making of the lasting power. As such, the specification can presumably be made by a separate statement in writing, made at a later time.

45. The Court retains some oversight in relation to foreign lasting powers. If the foreign power is not exercised in a manner *"sufficient to guarantee the protection of the person or property of the donor",* then the Court of Protection can – if it has jurisdiction over the person or their property – disapply or modify the power[29].

46. The Court is also required in exercise of its jurisdiction in this regard to take into account mandatory provisions of the law of England and Wales[30]. Furthermore, the Court cannot be required to apply the law of a country other than England and Wales if its application would be "manifestly contrary" to the law of England and Wales[31].

(5) Part 23 of the Court of Protection Rules 2017

47. Until very recently the Court of Protection had no formal procedure by which an application for recognition and enforcement were to be made. There was considerable uncertainty as to what forms and supporting evidence were required. From 1 December 2017, Part 23 of the new Court

[27] A country is "connected" in relation to the donor, if it is a country of which he is a national, in which he was habitually resident or in which he has property – Para 13(3), Sch.3 MCA 2005.
[28] Para 13(5), Sch.3 MCA 2005
[29] Para 14(1), Sch.3 MCA 2005
[30] Para 17, Sch.3 MCA 2005
[31] Para 18, Sch.3 MCA 2005

of Protection Rules ("CoPR 2017"), now makes provision for applications under Sch.3 MCA 2005. This is accompanied by a practice direction, "PD23A – International Protection of Adults".

48. Part 23 and PD23A make express provision for applications for: (i) the recognition and enforcement of protective measures[32]; (ii) the disapplication or modification of lasting powers[33]; (iii) a declaration as to the authority of the donee of lasting power[34]; (iv) issues of habitual residence[35].

Procedure for making an application

49. PD23A makes detailed provision for the procedure and type of evidence required to support an application. In particular, an application under Sch.3 should:

    (i) Be made by filing a COP1[36];

    (ii) Identify whether any person other than the adult has an interest in the application such that they should be named as a respondent[37];

    (iii) For applications for recognition and enforcement be accompanied by a COP24 witness statement and evidence which includes[38]:

        (a) Evidence to demonstrate the basis upon which it is said that the person to whom the application relates is an "adult" for the purposes of Sch.3 MCA 2005;

        (b) An officially authenticated copy (and, if necessary, certified translation) of the relevant court order or other document embodying the protective measure in respect of which recognition and/or enforcement is sought;

        (c) Confirmation that the protective measure was taken on the basis that the adult was habitually resident in the other jurisdiction;

        (d) Evidence that: (i) the case in which the measure was taken was urgent; alternatively (ii) the adult to whom the protective measure related was given an opportunity to be heard by the foreign court or other body that took the protective measure;

        (e) Evidence that the steps leading to the protective measure being made complied with any relevant provisions of the ECHR;

        (f) Details of any previous measures relating to the adult which have been the subject of a previous Sch.3 application;

        (g) Where enforcement is sought of a protective measure that has already been recognised by the Court, a copy of the order giving effect to that recognition;

    (iv) For applications in relation to lasting powers, a certified copy of the lasting power (and, if necessary, a certified translation)[39]

[32] r.23.4, CoPR 2017
[33] r.23.5, CoPR 2017
[34] r.23.6, CoPR 2017
[35] Paras 18-20, PD23A
[36] Para 8, PD23A
[37] Para 10, PD23A
[38] Para 12, PD23A
[39] Para 12(2), PD23A

50. A COP3 assessment of capacity is not required, unless the applicant is also asking the court to make additional declarations and /or orders under ss.15-16 MCA 2005[40].

Procedure after issue

51. A Sch.3 application is an "excepted application" and will not be automatically allocated to one of the three case management pathways. This decision will be left to the judge tasked with giving directions.

52. If the judge considers that the adult should be joined as a party, a direction will be given for the filing of an assessment of the adult's capacity to conduct the proceedings (by reference to ss.2-3 MCA 2005)[41].

53. PD23A states that applications under r.23.4 CoPR 2017 for recognition and / or enforcement of a protective measure should be dealt with "rapidly" and, on reviewing the papers, whether the order sought can be made without a hearing[42].

54. If the protective measure purports to: (i) authorise a deprivation of liberty (other than a temporary or transient deprivation associated with the transfer of an adult to or from a specified place); or (ii) authorise medical treatment, the application will usually be determined after holding a hearing and be allocated to the Senior Judge or a "Tier 3" Judge[43].

Applications involving issues of habitual residence

55. It is not a Sch.3 application if the Court is being asked to make a declaration that a person is habitually resident in England and Wales for the purposes seeking a declaration or order under ss.15-16 MCA 2005 unless an order under rr23.4 to 23.6 CoPR 2017 is also being sought.

(6) Exercise of LPAs and Deputyships abroad

56. Where a deputy / attorney is appointed, they will be under a duty to deal with all of the assets that incapacitated person has, not just those assets in England and Wales. However, an order from Court of Protection or LPA registered in England Wales does not have automatic authority abroad.

57. A deputy / attorney may be fortunate enough to find a bank or organisation in another country that is willing to accept an order of the Court of Protection / LPA without further scrutiny, but this may not happen.

58. For complete peace of mind, an Anglo-Welsh client with substantial assets or who spends substantial amounts of time abroad would be well-advised to execute an appropriate instrument in respect of the individual country or countries where the property or money is situated. It is much simpler to be able to deal with assets abroad using an equivalent power of attorney in that other jurisdiction.

59. If no foreign power of attorney can be put in place, then in some circumstances it may be acceptable to be used in the foreign jurisdiction if an Anglo-Welsh LPA is registered with the relevant authorities. There may be a better chance of success in dealing with institutions from Commonwealth countries or places where a significant number of expats may be living.

60. In determining the extent to which an LPA is recognised abroad, the first issue to consider is whether LPA is governed by the laws of England and Wales or the laws of another country. Once it has been established which system of law applies, the attorney should take advice from a

[40] Para 9, PD23A
[41] Para 15, PD23A
[42] Para 16, PD23A
[43] Para 17, PD23A

suitably qualified lawyer or notary to confirm the scope of the LPA, whether it can be operated in the applicable jurisdiction and any local requirements that will have to be met before it is used.

61. Similarly, if a deputyship client lives or has assets in other countries, it may well be necessary to work alongside an equivalent deputy in that country.

62. In some countries, the LPA may have to be translated into the local language in order for it to be used and some jurisdictions will require an 'apostille' to be affixed to it by the Foreign Commonwealth office so that it can be used. This is a certificate attached to the document that confirms that the signature, seal or stamp on the document is genuine.

63. The test for mental capacity differs throughout various foreign jurisdictions. They each have their own approach in the way that they define mental capacity as well as the various forms of representation that can be used like an LPA. Sometimes these are referred to as continuing or durable powers of attorney in other jurisdictions. The differing powers can be revoked by incapacity, marriage or divorce, so specialist advice will always need to be taken in respect of the jurisdiction in which the relevant power is to be used.

64. STEP produce very helpful jurisdictional reference guides for a number of countries: https://www.step.org/mental-capacity-benefits. These can provide a good starting point when considering what steps to take in relation to protecting a client's person or property abroad.

Conclusion

65. It is clear that there is no simple solution to the issues that may generated by incapacitated adults who may reside or own property in a number of different jurisdictions. The position would be made more straightforward if England and Wales were to ratify Hague 35. There is no sign of this on the horizon, particularly as Parliament does not appear to have sufficient bandwidth alongside Brexit to consider any other international instrument. Irrespective of this, it is certain that cross-border issues of the nature described in this article will continue to take on increasing prominence in the years ahead.