



Cross-Border Issues in the Court of Protection

Sophy Miles

s.miles@doughtystreet.co.uk

5 November 2019

Overview

Lasting Powers of Attorney- harmonisation?

How does the Court of Protection approach cross-border cases?

Practice Points

LPAs – why do they matter?

- Opportunity to plan ahead for a time when we may lack capacity
- Opportunity for self-determination and a chance to exercise autonomy
- An international issue in view of changing demographics and understanding of human rights AND United Nations Convention on the Rights of Persons with Disabilities
- Encouraged by the Council of Europe Committee of Ministers- Recommendation No R(99)4

Foreign Lasting Powers of Attorney- 1

- Schedule 3 Mental Capacity Act- “International Protection of Adults”
- Para 13 permits a donor who is NOT habitually resident in England and Wales to specify they wish the law of England and Wales to apply to “existence, extent, modification or extinction” of the LPA if:
 - --s/he is a UK national OR
 - --s/he has previously been habitually resident in England and Wales OR
 - --s/he has property here (in which case the law of England and Wales will only apply to that property).

Foreign Lasting Powers of Attorney- 2

- If a LPA purports to apply the Law of England and Wales BUT does not meet the criteria then the Court of Protection can disapply or modify the LPA- Schedule 3, para 14.
- OPG will not register foreign LPAs – so in the event of a refusal by bank or other institution to act upon it, application to the Court of Protection could be made- Section 15(1)(c).
- Unsatisfactory situation- no current plans for change.

Jurisdiction of the Court of Protection- 1

- Most cases will concern those habitually resident in England and Wales
- All other countries – including Scotland and Northern Ireland – count as foreign jurisdictions.
- Common “cross-border” issues:
 - - incapacitated adult “kidnapped” and brought to England and Wales;
 - - incapacitated adult placed in England and Wales by a foreign jurisdiction for care/treatment;
 - - older adult lacking capacity wishing to return to country of their birth (section 21A case).

Jurisdiction of the Court of Protection -2

- Hague Convention on the International Protection of Adults (“Hague 35”)
- Aims: to improve the protection in international situations of adults who by reason of an impairment or insufficiency in their personal faculties are not able to safeguard their own interests.
- Article 2 defines an adult as a person who has reached 18 years.
- Scotland is the only country in the UK which has ratified Hague 35. MCA 2005 gives effect to Hague 35 via Schedule 3 MCA 2005. See also Part 23A, COPRs and PD 23A.

Jurisdiction of the Court of Protection -3

- Schedule 3, paragraph 7 permits the Court to exercise its jurisdiction (“functions”) in relation to:
 - - An adult habitually resident in England and Wales
 - - An adult’s property in England and Wales
 - - An adult who is present in England and Wales or who has property there if the matter is urgent, or
 - - 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/her.

What is an adult?

- “Adult” – defined in Schedule 3, para 4 as a person who
- - as a result of an impairment or insufficiency of his personal faculties cannot protect his interests AND
- -has reached the age of 16 (cf Hague 35- 18+).

NOT the same as lacking capacity though there will be a significant overlap.

Para 4 (2) excludes children to whom the Hague Convention on Parental Responsibility and Protection of Children or Council Regulation (EC) No. 2201/2003 concerning recognition/enforcement of judgments in matrimonial matters.

“Habitual residence”

- Not defined in the MCA.
- “A question of fact to be determined in the individual circumstances of the case’- Re MN [2010] EWHC 1926 (Fam). Change in habitual residence does not require formal court order- Re PO [2013] EWHC 3932 (COP).
- “Broad assessment” to determine whether quality of residence has necessary degree to stability to distinguish from mere presence- SW [2014] EWCOP 43.

Habitual residence – caselaw- 1

- Re MN [2010] EWHC 1926 (Fam)- P was resident in California but was removed to Canada and then the UK, apparently in breach of Advance Health Care Directive. Hedley J noted that wrongful removal of children did not change their habitual residence – wrongful removal of an adult should have the same consequences.
- But if it was a “proper and lawful” exercise of authority considerations would be different. In the circumstances “most probable” that MN has become habitually resident in England and Wales.

Habitual residence – caselaw 2

- An English Local Authority v SW and others [2014] EWCOP 43.
- Moylan J held that the Court of Protection should use the same approach as would be applied in other family law instruments including “Brussels” II a. One of the factors to be considered is the “degree of integration”- A v A [2014] 1 FLR 111.
- SW was born in Scotland, and suffered hypoxic brain injury in 2006; was moved to a placement in England under a CTO; this lapsed and she moved to her own home. Wanted to remain in England but did not like current placement. “Integration” can be “an emotive and loaded word”- key question is whether residence has “necessary degree of stability” to distinguish from temporary residence”- acquired here by duration.

Habitual residence- caselaw 3

- Re EC and DB [2016] EWCOP 30, both with profound LDs and complex behavioural problems. Detained under Scottish Mental Health legislation and transferred in 2010 to placements in England, treated under section 3 MHA (Part VI MHA 1983).
- Section 3 orders were rescinded and both placed under standard authorisations. Both applied under section 21A.
- “Accepted” that Court had jurisdiction to make determinations under section 21A. But what about sections 15/16? Both submitted placements only intended to be temporary. Baker J swayed by the length of time and fact they would have been in residential or hospital settings anyway – both had HR in England and Wales.

More definitions – Protective measures

- Relevant because COP has jurisdiction when adult is NOT HR in England and Wales but when “protective measure” which is temporary is proposed.
- Schedule 3, Para 5- “a measure directed to the protection of the person or property of an adult”: could concern
 - - determination of capacity and institution of a protective regime
 - - placing under guardianship/under protection of an appropriate authority/placing “where protection can be provided;”
 - -administering, conserving or disposing of property.

Part 4 Schedule 3- Recognition and Enforcement

- England and Wales should recognise and enforce a protective measure taken by a foreign country on the basis the adult was habitually resident in that country. Interested person can apply for declarations.
- May disapply if:
 - (procedural): matter was not urgent AND adult not given an opportunity to be heard AND amounted to a breach of natural justice (Para 19 (3))
 - (substantive): recognition manifestly contrary to public policy; or inconsistent with mandatory provision of law of England and Wales or measure subsequently taken or recognised in England and Wales (Para 19(4))

Re PA and others – [2015] EWCOP 38

- PA born in Republic of Ireland moved to St Andrews Hospital by order of Irish Court (when under 18). Detained under the MHA but discharged by Tribunal. Remained at St Andrew's with care and treatment being reviewed regularly by the court in Ireland.
- At one stage secluded and nursed on 3:1
- Court of Protection asked to recognise and enforce the Irish Court's order.
- Key issue = compliance with Articles 5,6 and 8.

PA continued

- MoJ wrote to the Court: Court should only review merits “to the extent that it is necessary to do” for purpose of para 19.
- Baker J concluded PA and others were HR in Ireland
- A “limited review” was needed to satisfy Court that there was no violation of the ECHR and court should strive for “combined and harmonious” application of Schedule.
- No reason not to recognise and enforce the orders.
- Linked case - Re PD EWCOP 48- woman with anorexia- Baker J emphasised need to “work with the grain” of the foreign order.

Schedule 3- Procedural Matters

- Re PA, Re PD- Baker J invited the COPRC to amend the COPRs to provide guidance for Schedule 3 applications. May not need to join the adult as a party; or could appoint ALR for a “quick and focussed analysis”.
- COPRs 2017 now deal with Schedule 3 cases. PD 23 A in packs.
- Start process with COP1; no need for COP3 unless asking to exercise s15/16; COP24 with certificated copy of the foreign order; and provide evidence of compliance with ECHR.
- If judge considers adult should be joined will direct COP3 on capacity to litigate
- Will usually allocate to Senior Judge or a Tier 3 judge.

Practice Points

- Older adults who grew up outside the UK frequently wish to return to country of childhood.
- Issue regularly surfaces in s21A cases.
- Court will need to consider how to gather evidence of options for care and treatment. Expert evidence? High Commission? Red Cross?
- Remember that court can exercise jurisdiction over P's property in the UK- schedule 3, para 7(1)(b).
- Consider appointing a deputy in England and Wales to meet costs of care arrangements abroad.

Questions?

Sophy Miles

s.miles@doughtystreet.co.uk

5 November 2019