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This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of their families must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Neutral Citation Number: [2019] EWCOP52

Case Nos.: **13257265, 1236379T, 13303939, 13285001 & 13286102**

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTERS OF GED, BMA, TCM, AB and AJC

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 8th November 2019

Before :

Her Honour Judge Hilder

IN THE MATTER OF

Various applications concerning foreign representative powers

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Hearing: 7th June 2019

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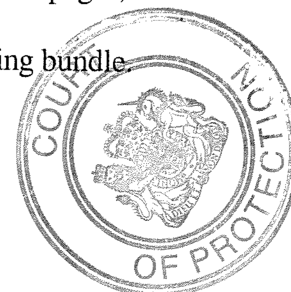
Mr. David Rees QC (instructed by the Official Solicitor), acting as Advocate to the Court
Three attorneys/family members of protected persons attended in person

The hearing was conducted in public subject to transparency orders made on 22nd January 2019.
The judgment was handed down by e-mail on 8th November 2019. It consists of 32 pages, and has been signed and dated by the judge.
The numbers in square brackets and bold typeface refer to pages of the hearing bundle.



A. INTRODUCTION

1. This judgment relates to five separate applications before the Court. They are unrelated except that each asks the Court to make orders to give effect in England and Wales to representative powers originating in a foreign jurisdiction:

   1.1. BMA 1236379T: relates to the appointment of the Public Guardian and Trustee of British Columbia, Canada as Committee of the Estate of BMA pursuant to a Certificate of Incapability;

   1.2. AB 13285001: relates to an Enduring Power of Attorney executed in New Zealand;

   1.3. GED 13257265 relates to a Continuing Power of Attorney executed in Ontario, Canada;

   1.4. AJC 13286102 relates to a Power of Attorney executed in Spain;

   1.5. TCM 13303939 relates to a Lasting Power of Attorney registered with the Office of the Public Guardian of Singapore.

2. By an order made on 30th May 2018 in the matter of GED, I noted "a need for clarification in respect of the Court's approach to foreign powers of attorney, and for the Court to hear full argument to determine this important and difficult point of law" and invited the Official Solicitor to act as Advocate to the Court. By an order made on 22nd January 2019 that invitation was extended to the other four cases.

3. The role of Advocate to the Court is a circumscribed one, as the Vice-President recently restated[1]:

   > "**The Attorney-General's memorandum, 19th December 2001, [2002] Fam Law 229** notes:
   >
   > *"It is important to bear in mind that an advocate to the court represents no one. His or her function is to give the court such assistance as he or she is able on the relevant law and its application to the facts of the case."*

4. The Official Solicitor has taken up the invitation, and I would like to record my thanks to her Office and to Mr. Rees QC for the invaluable assistance they have given to the Court.

B. ISSUES FOR DETERMINATION

5. For the Court to determine these five applications, three broad issues have been identified:

   5.1. Is a foreign power of attorney capable of constituting a 'protective measure'?
   5.2. Is there a capacity threshold to the Court's jurisdiction?
   5.3. Where there is a valid and operable foreign power of attorney in place, is the jurisdiction of the Court of Protection under section 16 of the Mental Capacity Act 2005 limited?

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[1] *Re Lawson, Mottram & Hopton* [2019] EWCOP 22 at paragraph 4

C. THE FIVE CASES

6. BMA 1236379T:

6.1 BMA is 91 years old and lives in residential care in British Colombia, Canada. By COP1 application dated 12th April 2018 [**14**] Christopher Brettell of Services to Adults Public Guardian and Trustee, Vancouver has – with the assistance of London solicitors – applied for an order that "The Public Guardian and Trustee of British Colombia is approved to act as Committee of the Estate of [BMA] pursuant to the laws of the Province of British Colombia, Canada by a certificate of Incapability dated 8th November 2016."

6.2 The issue of Certificates of Incompatibility is described in *The International Protection of Adults*[2] at paragraph 30.14 as follows:

> "... a certificate of incapability is issued by designated officials within the health authorities (ie outside the court process). If a certificate is issued, usually at the request of the Public Guardian and Trustee ('PGT'), the PGT becomes committee of estate. Certificates are not issued for personal and healthcare decisions."

6.3 COP20A and B Certificates have been filed. Three relatives of BMA (two sisters and a nephew), who all live in England, have been notified of the application but have filed no response. A COP3 Assessment of Capacity form has been filed [**25**], completed by a Canadian physician who gives a diagnosis of dementia and his opinion that BMA lacks capacity to "make a decision in her financial and personal affairs."

6.4 A COP24 statement by Mr. Brettell [**37**] has also been filed. Exhibited to the statement is a "Form 2: Certificate of Incapability" in respect of BMA dated 2016/11/08 [**41**]. In the statement Mr. Brettell explains that "Pursuant to the British Colombia law (Patients Property Act RSBC 1996 Chapter 349) the certificate is conclusive proof that a person is incapable of managing his/her own legal and financial affairs and that the PGT has conduct of that person's legal and financial affairs."

6.5 In his statement Mr. Brettell informs the court that BMA has no immoveable property in the United Kingdom but does have a bank account with National Westminster Bank, with a balance of approximately £17 350: "The PGT has applied to National Westminster Bank to gain access to the funds in the bank account. The bank will not, however, allow PGT access to the funds in the account without authority from the Court in England and Wales."

7. AB 13285001:

7.1 AB is 86 and lives in residential care in New Zealand. By COP1 application dated 30th June 2018 [**100**] GB has applied for 'recognition of New Zealand's "Enduring Power of Attorney in relation to property" for [AB].'

7.2 GB is the daughter of AB, one of the appointed attorneys and describes herself as a General Practitioner. She has explained in form COP1F [**109**] that the application is

[2] Frimston et al OUP (2015)

"for the HMRC, so that [AB's] UK pension (widow's pension from Rank Xerox) does not get taxed both in the UK and then again in New Zealand."

7.3 GB has filed a statement [**112**] in which she explains that AB moved to New Zealand as a permanent resident in November 2004. She describes AB's memory as "greatly impaired, and she no longer recognises me" [**113**]. She informs the Court that the cost of AB's residential care is met from her own funds. In April 2018 AB received a cheque from HMRC "as repayment for the tax paid in the UK for the previous 3 years" but the following month GB received a letter from HMRC advising her that "they had accepted my proof of Enduring P of A for AB BY MISTAKE, as apparently it is not a valid document in the UK."

7.4 A certified copy of AB's Enduring Power of Attorney [**116**] has been provided. The substantive part of the document consists of two paragraphs. Paragraph 1 appoints attorneys "with general authority to act on my behalf in relation to the whole of my property; and paragraph 2 states that "I intend that the authority in paragraph 1 of this instrument will not be revoked if I become mentally incapable." It is ostensibly signed by AB and the attorneys, each in the presence of the same witness. The document makes no reference to AB's capacity at the time of signing, and bears no seal or other official mark. There are four paragraphs of "Notes" at the end of the form which provide some explanation of the effect of the document and matters which the donor "should" consider or do.

7.5 GB has also provided various documents from HMRC and a letter from the administrator of AB's care facility [**121**] which sets out that type of care provided is "Dementia level" and the level of care is "Very high."

8. GED 13257265:

8.1 GED is 76 and lives in Ontario, Canada with her husband ED. By COP1 application dated 4th May 2018 [**A1**] ED applied for orders "to enable [GED] to move her account with NatWest to her account with Your Credit Union in Ottawa, Canada." In a statement [**8**] filed with the application, ED refers to "Making valid Canada Power of Attorney in the United Kingdom."

8.2 A copy of the Continuing Power of Attorney has been filed [**12**]. It is a two page document which states that GED appoints ED and two other named individuals "to be my attorney(s) for property…jointly and severally." Paragraph 4 provides that

> "I AUTHORIZE my attorney(s) for property to do on my behalf anything in respect of property that I could do if capable of managing property, except make a will, subject to the law and to any conditions or restrictions contained in this document. I confirm that he/she may do so even if I am mentally incapable."

8.3 The document is ostensibly signed by GED and two witnesses. It makes no reference to GED's capacity or understanding at the time of signing. It bears no seal or other official mark.

9. AJC 13286102:

9.1 AJC is 89 and lives in a rented, assisted living apartment in Spain. By COP1 application dated 28th June 2018 [**134**] his daughter and son applied for an order "to recognise a Spanish power of attorney." His daughter, DC, has filed a COP24 statement [**141**] which explains that "Barclays Bank will not accept the Spanish P.O.A. and have advised me to go through the Court of Protection."

9.2 DC has also provided a copy of the eleven page power of attorney [**144**] and a certified translation [**160**]. The translation includes a statement that "The parties have, in my opinion, sufficient legal capacity to enter the hereby deed of POWER OF ATTORNEY" but there is nothing in the translation which indicates an intention that the power should endure if/when AJC loses capacity to make decisions for himself. No evidence of AJC's present capacity has been filed.

9.3 COP20A and B Certificates have been filed.

9.4 DC attended the hearing. She informed the court that she was herself unclear about the extent of AJC's continuing capacity to make decisions for himself, describing a marked deterioration in recent months.

10. TCM 13303939:

10.1 TCM is 82 years old. He lives with his wife, daughter and the daughter's partner in London. He is a Dutch citizen (not British or Singaporean). He is described as having "had a long, stellar career in architecture and building."

10.2 By COP1 application dated 31st July 2018 [**54**] TCM's wife and daughter applied for orders "to validate the Singapore L.P.A. for [TCM], who has dementia." The applicants have filed in support of the application several documents including COP20A and B Certificates; form COP1F, in which it is confirmed that TCM "now resides in the UK on a permanent basis"[**63**]; and a medical report by Dr. Lee Kim En, Neurologist & Physician, dated 5th December 2016 [**66**], which gives a diagnosis of dementia and previous stroke but does not specifically address functional capacity.

10.3 TCM's daughter/attorney has filed a COP24 statement [**70**] in which she explains that "we would like the Court of Protection to validify the existing Singapore LPA (which has been authenticated and certified by the Singapore Academy of Law and the Notary Public in Singapore) for use in the UK."

10.4 A certified copy of TCM's Lasting Power of Attorney has been filed. It is on "Form 1(2014)". It bears a stamp of the Office of the Public Guardian of Singapore, with a registration number and date of registration (5th August 2015, ie approximately four months after the granting of the power and before any suggestion of supervening incapacity.) It begins with a page of prescribed information, which

a. explains the purpose of the document: "A lasting power of attorney is a legal document that gives authority to the person you appoint (called your 'donee') to make decisions and act for you when you lack mental capacity. You may authorise your donee(s) to make decisions about your personal welfare (which may include health care) and/or property and affairs (including financial matters)";

b. explains that the document must be registered with the Office of the Public Guardian;
c. explains when the donee of the power can act: "only after it has been registered and only where you lack mental capacity or your donee reasonably believes you lack such capacity."

10.5 At page 6 of the document [**81**] the donor has ticked the box giving authority to make welfare decisions, including "giving or refusing consent to the carrying out or continuation of treatment"; and also the box giving authority to make property and affairs decisions, including unrestricted cash gifts. In both cases the donor has ticked the box to indicate that the attorneys must act jointly.

10.6 At page 8 of the document [**83**] an "advocate and solicitor of the Supreme Court" has certified her opinion that, at the time of signing:

a. TCM understood the purpose of the instrument and the scope of authority conferred by it;
b. No fraud or undue pressure was being used to induce TCM to create a lasting power of attorney; and
c. "there is nothing else that will prevent a lasting power of attorney from being created by this instrument."

10.7 TCM's daughters both attended the hearing. They brought with them additional documentation, including letters from Singapore lawyers confirming that the creation of the power complied with necessary formalities and it remains valid; and confirmation from the Singapore Public Guardian that the power remains registered. They informed the Court that TCM's property in Singapore was sold and the proceeds divided between his children, in accordance with the terms of the power; and that TCM does not have any assets in England and Wales but he receives two pensions from the Netherlands, where the Lasting Power has been 'accepted.'

10.8 TCM's daughters explained that the whole family is "based in Europe" now, and TCM became formally domiciled in the UK with effect from 17th April 2017. Their chief focus in making the application was to make clear to persons and bodies concerned with TCM's care their authority under the power to make welfare decisions on his behalf.

D. <u>THE LEGAL FRAMEWORK</u>

The Hague Convention and Mental Capacity Act 2005 Schedule 3

11. On 13th January 2000 the Convention on the International Protection of Adults ("the Convention") was formally concluded at the Hague. The Convention makes provision for two conceptually different matters: the mutual recognition of protective measures by Contracting States, and the resolution of questions relating to private mandates.

Article 1

(1) This Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.

(2) Its objects are –

a. To determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult;
b. To determine which law is to be applied by such authorities in exercising their jurisdiction;
c. To determine the law applicable to representation of the adult;
d. To provide for the recognition and enforcement of such measures of protection in all Contracting States;
e. To establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention."

12. The Convention was accompanied by an explanatory report by Professor Paul Lagarde ("the Lagarde report"), which was reissued with amendments in 2017.

13. The United Kingdom has signed the Convention but has ratified it only in relation to Scotland, not yet in relation to England and Wales[3]. For some time there was uncertainty about this but the definitive position was spelled out by Sir James Munby P in *Re O (Court of Protection: Jurisdiction)* [2014] Fam 197 at 9.

14. The primary source of domestic law is Schedule 3 of the Mental Capacity Act 2005 ("the Act"), which makes provision for the same two concepts as are addressed in the Convention and is given effect by section 63 of the Act:

63 International protection of adults

Schedule 3 –

(a) gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2000 (Cm. 5881) (in so far as this Act does not otherwise do so), and

(b) makes related provision as to the private international law of England and Wales.

15. Paragraph 2(4) of Schedule 3 provides that "an expression which appears in this Schedule and in the Convention is to be construed in accordance with the Convention."

[3] HCCH Status Table at https://www.hcch.net/en/instruments/conventions/status-table/?cid=71

16. Schedule 3 is headed "International Protection of Adults." In broad terms, it contains two parallel sets of provisions:

a. One set of provisions will incorporate the Convention into English domestic law. However, paragraph 35 of Schedule 3 provides that those provisions have effect only once the Convention has been brought into force, which is not yet the case in relation to England and Wales:

> ***Commencement***
>
> 35. The following provisions of this Schedule have effect only if the Convention is in force in accordance with Article 57 –
> (a) paragraph 8,
> (b) paragraph 9,
> (c) paragraph 19(2) and (5),
> (d) Part 5,
> (e) paragraph 30.

b. The other set of provisions is currently in force, based on but independent of the Convention. Effectively these provisions provide a set of rules for the recognition and enforcement in England and Wales of foreign protective measures and for the applicable law in respect of lasting powers of attorney, without any requirement for the foreign state to have assumed reciprocal obligations to the jurisdiction of England and Wales. They apply generally, in respect of States which have signed the Convention and States which have not.

17. Both the Convention and those parts of Schedule 3 which are currently effective apply to "protective measures" in respect of an "adult" but the meaning given to each term is not identical:

17.1 "Adult" in the Convention means a person who has attained the age of 18[4] whereas the definition set out in paragraph 4 of Schedule 3 includes in some circumstances people between the ages of 16 and 18:

> ***Adults with incapacity***
>
> 4 (1) 'Adult' means (subject to sub-paragraph (2)) a person who –
> (a) as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests, and
> (b) has reached 16.
>
> (2) But 'adult' does not include a child to whom either of the following applies –
> (a) the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children that was signed at The Hague on 19th October 1996;

[4] Albeit that the Convention 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 the measure was taken – Article 2(2)

(b)Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.[5]

In other respects, the definition in Schedule 3 follows the terms of the Convention. Notably, it does not refer to a person who lacks capacity within the meaning of the Act but to a person who "as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests." There is room for debate as to whether this phraseology is intended to be wider than mental incapacity[6] but the Lagarde Report offered the following observation[7] at paragraphs 9 – 10:

> "Paragraph 1 [of Article 1 of the 2000 Convention] defines the adults to which the Convention applies. These are naturally those who need protection but, to make this quite clear, the Commission purposefully avoided in this paragraph using juridical terms, such as 'incapable party', which have different meanings depending on the law being considered. It was therefore judged preferable to keep to a factual description of the adult in need to protection. The text contains two factual elements. The first is that of 'impairment or insufficiency of [the] personal faculties' of the adult… The [second is that the] insufficiency or impairment of the personal faculties of the adult must be such that he or she is not 'in a position to protect [his or her] interests.' The second element in the definition must be understood broadly."

17.2 "Protective measure" definitions are more closely aligned. In so far as there are differences of phraseology, they are not material to present considerations. Paragraph 5 of Schedule 3 sets out the domestic definition as follows:

Protective measures

5 (1) 'Protective measure' means a measure directed to the protection of the person or property of an adult; and it may deal in particular with any of the following –

(a) the determination of incapacity and the institution of a protective regime,
(b) placing the adult under the protection of an appropriate authority,
(c) guardianship, curatorship or any corresponding system,
(d) the designation and functions of a person having charge of the adult's person or property, or representing or otherwise helping him,
(e) placing the adult in a place where protection can be provided,
(f) administering, conserving or disposing of the adult's property,

[5] 2(b) is prospectively repealed by the Jurisdiction and Judgments (Family)(Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/519 Sch 1(1) para26) in the event that the UK leaves the EU without a Transition Period being in place.

[6] See "The 2000 Hague Convention on the International Protection of Adults Five years On", Alexander Ruck Keene, February 2014 at paragraph 13(1) and footnote 18. In oral submissions Mr. Rees suggested that the definition at paragraph 4 may be wide enough, for example, to encompass vulnerable persons whose inability to protect their interests lies outside section 2 of the Act but within the protective powers of the inherent jurisdiction of the High Court.

[7] See the decision of Baker J in *HSE v. PA & Others* [2015] EWCOP 38 at paragraph 42.

(g) authorising a specific intervention for the protection of the person or property of the adult.

(2) Where a measure of like effect to a protective measure has been taken in relation to a person before he reaches 16, this Schedule applies to the measure in so far as it has effect in relation to him once he has reached 16.

18. Key to the exercise of jurisdiction under both the Convention and Schedule 3 is the concept of "habitual residence". Neither the Convention nor the Act defines the concept. It is however reasonably settled that the meaning of "habitual residence" under the Act should be the same as is applied in other (family law) instruments such as the 1996 Hague Convention on the International Protection of Children, and EU Council Regulation 2201/2013 ("Brussels IIa").[8] "Habitual residence" is therefore a question of fact, to be determined by reference to the conditions and reasons for the person's stay in a particular jurisdiction, its duration, and any other factors which make clear that the person's presence is not in any way temporary or intermittent.

19. The effect of those provisions of Schedule 3 which are in force can best be understood by considering the Court of Protection's jurisdiction in three separate parts:

  a. 'full, original jurisdiction';
  b. in respect of recognition and enforcement of 'protective measures'; and
  c. in respect of private mandates.

20. Full, original jurisdiction

20.1 The "full, original jurisdiction"[9] of the Court of Protection is its (by now familiar) powers to make declarations and orders under sections 15 and 16 of the Act.

20.2 Paragraph 7(1) of Schedule 3 identifies the persons in respect of whom this full, original jurisdiction of the Court of Protection is exercisable:

Scope of jurisdiction
7 (1) The court may exercise its functions under this Act (in so far as it cannot otherwise do so) 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.

[8] See the decision of Moylan J in *An English Local Authority v. SW* [2014] EWCOP 43.

[9] *Re MN* [2010] EWHC 1926 (Fam) per Hedley J at [20]

20.3 It follows that two different States may have concurrent jurisdiction over aspects of a person's life. Mr. Rees gives the example of a person habitually resident in Scotland but having property in England: both the Scottish and the English courts may be able to exercise jurisdiction over that property. (For clarity, 'property' here is given a wide definition under section 64 of the Act and includes assets such as bank accounts and possessions as well as land.)

20.4 Where there is concurrent jurisdiction, whether the Court of Protection should exercise its jurisdiction or choose not to falls to be determined according to the doctrine of *forum non conveniens* and the principles laid down in *Spiliada Maritime Corporation v. Cansulex Ltd; The Spiliada* [1987] AC 460. An example of this can be seen in the decision of Sir James Munby P in *Re O (Court of Protection: Jurisdiction)* [2014] Fam 197.)

20.5 Nonetheless, the possibility of conflict arises. If the Convention applied, Article 9 would supply an answer: it provides that a State exercising jurisdiction because the person in question has property there can only do so "to the extent that such measures are compatible with those taken by the State of habitual residence." Schedule 3 paragraph 7 contains no equivalent provision.

21. Recognition/Enforcement of foreign protective measures

21.1 Part 4 of Schedule 3 sets out additional powers to recognise and enforce foreign protective measures that relate to adults, irrespective of any reciprocal arrangement.

21.2 The basic provisions are in mandatory terms:

Recognition
19 (1) A protective measure taken in relation to an adult under the law of a country other than England and Wales is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country. (2) *(Not currently in force)*

Enforcement
22(1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than England and Wales is enforceable, or to be registered, in England and Wales in accordance with Court of Protection Rules. (2) The court must make the declaration if – (a) the measure comes within sub-paragraph (1) or (2) of paragraph 19, and (b) the paragraph is not disapplied in relation to it as a result of sub-paragraph (3), (4) or (5).

> (3)A measure to which a declaration under this paragraph relates is enforceable in England and Wales as if it were a measure of like effect taken by the court.

21.3 In the matter of *Re MN* [2010] EWHC 1926 (Fam) Hedley J considered the approach of the court in circumstances where an application was made for recognition of an order made by a Californian court. He described Part 4 of Schedule 3 as of "summary and mandatory nature" (paragraph 28) and then explained (at paragraph 31):

> "In the end, I have concluded that a decision to recognise under para 19(1) or to enforce under para 22(2) is not a decision governed by the best interests of MN .... My reasons are really threefold. First, I do not think that a decision to recognise or enforce can be properly described as a decision 'for and on behalf of MN'. She is clearly affected by the decision but it is a decision in respect of an order and not a person. Secondly, this rather technical reason is justified as reflecting the policy of the Schedule and of Part 4 namely ensuring that persons who lack capacity have their best interests and their affairs dealt with in the country of habitual residence; to decide otherwise would be to defeat that purpose. Thirdly, best interests in the implementation of an order clearly are relevant and are dealt with by para 12 which would otherwise not really be necessary."

21.4 Paragraph 19 of Schedule 3 goes on to provide for circumstances in which the Court of Protection may disapply the mandatory provisions, but those circumstances are limited:

> 19(3) But the court may disapply this paragraph in relation to a measure if it thinks that
>
> (a) the case in which the measure was taken was not urgent,
> (b) the adult was not given an opportunity to be heard, and
> (c) that omission amounted to a breach of natural justice.
>
> (4) It may also disapply this paragraph in relation to a measure if it thinks that –
> (a) recognition of the measure would be manifestly contrary to public policy,
> (b) the measure would be inconsistent with a mandatory provision of the law of England and Wales, or
> (c) the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult.
>
> (5) And the court may disapply this paragraph in relation to a measure taken under the law of a Convention country in a matter to which Article 33 applies, if the court thinks that that Article has not been complied with in connection with that matter.

21.5 Disapplication of the recognition provisions was considered in *Health & Safety Executive of Ireland v. PA & Ors* [2015] EWCOP 38, where an order had been made by the High Court of Ireland to move an incapacitous person from hospital in Ireland to a specialist placement in England where the care arrangements would amount to a deprivation of liberty. Baker J (as he then was) said at paragraphs 36 - 37:

"36. This is an area where the principles of comity and co-operation between courts of different countries are of particular importance in the interests of the individual concerned. The court asked to recognise a foreign order should work with the grain of that order, rather than raise procedural hurdles which may delay or impede the implementation of the order in a way that may cause harm to the interests of the individual. If the court to which the application for recognition is made has concerns as to whether the adult was properly heard before the court of origin, it should as a first step raise those concerns promptly with the court of origin, rather than simply refuse recognition.

37. The purpose of Sch 3 is to facilitate the recognition and enforcement of protective measures for the benefit of vulnerable adults. The court to which such an application is made must ensure that the limited review required by Sch 3 goes no further than the terms of the Schedule require and, in particular, does not trespass into the reconsideration of the merits of the order which are entirely a matter for the court of origin…."

He further noted, at paragraph 94, that:

" …there is likely to be a wide variety in the decisions made under foreign laws that are put forward for recognition under Schedule 3. As the Ministry of Justice has observed, inevitably there may be concerns about some of the foreign jurisdictions from which orders might come. But as the Ministry also observes, taking account of such concerns is surely the purpose of the public policy review. Although no wide-ranging review as to the merits of the foreign measure is either necessary or appropriate, a limited review will always be required as indicated by the European court in *Pellegrini*. That will be sufficient to identify any cases where the content and the form of the foreign measure, and the process by which it was taken, are objectionable. It also seems to me that the circumstances in which Sch 3 is likely to be invoked, and the number of countries whose orders are presented for recognition, are likely to be limited. In oral submissions, Mr Rees pointed out that, in theory, the court could be faced with applications to recognise and enforce orders from any country in the world, including, for example, North Korea or Iran. That may be right in theory, but common sense suggests it is, to say the least, unlikely in practice, at least in the foreseeable future. And if such orders were to be presented for recognition, the public policy review would surely lead swiftly to identifying grounds on which recognition would be refused. It is much more likely that the orders presented for recognition will be those of foreign countries whose legal systems, laws and procedures are closely aligned to our own. Concerns of this nature can be addressed by admitting evidence of the process by which the foreign protective measures were made and general evidence relating to the legal system of the state that made the order."

21.6 Mr. Rees draws from this authority the proposition that "the Court of Protection will need to conduct a limited review to satisfy itself that the foreign proceedings fulfilled the rights guaranteed by Articles 5, 6 and 8 of the European Convention on Human Rights."

22. <u>Private mandates</u>

22.1 The Convention contains specific provisions relating to what it calls "powers of representation" granted by an adult "to be exercised when such adult is not in a position to protect his or her interests." Article 15 specifies the applicable law according to the nature of the question under consideration, there being two options:

a. questions about "the existence, extent, modification and extinction" of such powers (where the starting point is the law of the country of habitual residence at the time of granting the power); and

b. questions about "the manner of exercise" of such powers (where the applicable law is always that of the State where the power is being exercised.)

22.2 Paragraphs 13 – 15 of Schedule 3 bring into effect similar provisions applicable presently as a matter of English domestic law:

Lasting powers of attorney, etc

13 (1) If the donor of a lasting power is habitually resident in England and Wales at the time of granting the power, the law applicable to the existence, extent, modification or extinction of the power is –
(a) the law of England and Wales, or
(b) if he specifies in writing the law of a connected country for the purpose, that law.

(2) If he is habitually resident in another country at that time, but England and Wales is a connected country, the law applicable in that respect is –
(a) the law of the other country, or
(b) if he specifies in writing the law of England and Wales for the purpose, that law.

(3) A country is connected, in relation to the donor, if it is a country –
(a) of which he is a national,
(b) in which he was habitually resident, or
(c) in which he has property.

(4) Where this paragraph applies as a result of sub-paragraph (3)©, it applies only in relation to the property which the donor has in the connected country.

(5) The law applicable to the manner of the exercise of a lasting power is the law of the country where it is exercised.

(6) In this Part of this Schedule, 'lasting power' means –

(a) a lasting power of attorney (see section 9)
(b) an enduring power of attorney within the meaning of Schedule 4, or
(c) any other power of like effect.

22.3 The definition of 'lasting power' at paragraph 13(6) is constructed by reference to domestic provision[10] and then the addition of "any other power of like effect." To date there has not been any judicial consideration of the meaning of this phrase. However, the comparative mechanism and the provisions of Article 15 clearly indicate an intention to encompass powers of representation which are capable of exercise after the donor has ceased to have mental capacity to take decisions authorised by the power.

22.4 In respect of the *existence, extent, modification or extinction* of such a lasting power, the key determinant of the law applicable is the donor's place of habitual residence at the time the power is granted:

a. if at that time the donor was habitually resident in England and Wales, it is the law of England and Wales which applies unless the donor specified the law of a connected country - paragraph 13(1);

b. if at that time the donor was habitually resident in another country, but England and Wales is a connected country, it is the law of the other country which applies unless the donor specified the law of England and Wales – paragraph 13(2).

22.5 The three ways in which a country may 'connected' with the donor pursuant to paragraphs 13(3) and (4) appear to leave a lacuna: what is the applicable law where the donor was not a national of England and Wales, was not habitually resident in England and Wales, and had no property in England and Wales when he signed the foreign power? Over time since the granting of the power, any one of those three characteristics may have changed, leading to an application to the court of England and Wales for recognition of the power. No provision is made in Schedule 3 for that situation.

22.6 Fewer complications arise in respect of the *exercise* of a foreign power – paragraph 13(5) provides that the law applicable is (always) the law of the country where it is exercised.

22.7 However, what is the position where the law of England and Wales is more restrictive than the extent of the power properly granted in accordance with the laws of a different country?

22.8 Article 16 of the Convention provides an additional safeguard where the *exercise* of a foreign power is considered to be insufficiently protective:

Article 16

Where powers of representation referred to in Article 15 are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult, they may be withdrawn or modified by measures taken by an authority having jurisdiction under the Convention. Where such powers of representation are withdrawn or modified, the law referred to in Article 15 should be taken into consideration to the extent possible.

[10] Although by Rule 23.2(2) the domestic instruments are expressly excluded from the scope of Schedule 3.

22.9 The current domestic provisions mirror this approach at paragraph 14 of Schedule 3:

> 14 (1) Where a lasting power is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the court, in exercising jurisdiction under this Schedule, may disapply or modify the power.
>
> (2) Where, in accordance with this Part of this Schedule, the law applicable to the power is, in one or more respects, that of a country other England and Wales, the court must, so far as possible, have regard to the law of the other country in that respect (or those respects.)

22.10 The interplay between subparagraphs (1) and (2) is not spelled out. However, in order to be consistent with paragraph 13(5), in my judgment the two subparagraphs must together be interpreted as meaning that the court may disapply or modify a power so as to provide for its *exercise* in England and Wales to be no wider than the restrictions in the laws of England and Wales; and, in considering whether to disapply or modify the power, the court must have regard to the applicable law of the other state only to that extent.

22.11 The wording of paragraph 14(1) suggests that the jurisdiction to disapply or modify a power does not arise until the lasting power has actually been exercised in an insufficiently protective manner. However, in oral submissions Mr Rees agreed that it would "offend common sense and the protective nature of the court" if the court were made aware of an intention so to use the power, and stood by waiting for it to happen. The present tense in the paragraph must accommodate the court's ability to disapply or modify the power so that, when it is exercised, it is exercised in an appropriately protective manner.

22.12 Paragraphs 17 and 18 of Schedule 3 together provide "longstop" provisions which avoid the court having to give effect to foreign powers of attorney if it would be repugnant to do so:

> **Mandatory rules**
>
> 17 Where the court is entitled to exercise jurisdiction under this Schedule, the mandatory provisions of the law of England and Wales apply, regardless of any system of law which would otherwise apply in relation to the matter.
>
> **Public policy**
>
> 18. Nothing in this Part of this Schedule requires or enables the application in England and Wales of a provision of the law in another country it is applications would be manifestly contrary to public policy.

22.14 Paragraph 15 of Schedule 3 provides the attractive possibility of a domestic register of foreign powers:

> 15. Regulations may provide for Schedule 1 (lasting powers of attorney: formalities) to apply with modifications in relation to a lasting power which comes within paragraph 13(6)(c).

However to date no regulations have been made pursuant to paragraph 15, so it is not presently possible to register a foreign power of attorney with the Office of the Public Guardian of England and Wales.

23. Procedural rules:

23.1 There are specific procedural rules in respect of applications made in connection with the Court's additional jurisdiction under Schedule 3 of the Act. They are set out in Part 23 of the Court of Protection Rules 2017. Three distinct types of application are envisaged, in subparagraphs 4, 5 and 6 respectively. Together, they are defined by paragraph 23.2(3) as "Schedule 3 applications":

> **23.1 Applications in connection with Schedule 3 to the Act – general**
>
> (1) This Part applies to applications made in connection with Schedule 3 to the Act.
>
> (2) A practice direction may make additional or supplementary provision in respect of any of the matters in this Part.
>
> **23.2 Interpretation**
>
> (1)...
>
> (2) Notwithstanding the provisions of paragraph 13(6) of Schedule 3 to the Act, 'lasting power' does not include:
>
> (a) a lasting power of attorney within the meaning of section 9 of the Act; or
>
> (b) an enduring power of attorney within the meaning of Schedule 4 to the Act.
>
> (3)...
>
> **23.3 Application of these Rules in relation to Schedule 3 applications**
>
> (1) These Rules and accompanying practice directions apply in relation to Schedule 3 applications as if for 'P' there were substituted 'the adult.'
>
> (2) For the purposes of rule 1.2(4) and Part 17, the question of whether the adult has capacity to conduct proceedings in relation to a Schedule 3 application is to be determined in accordance with Part 1 of the Act.

(3) The permission of the court is not required for a Schedule 3 application.

23.4 Applications for recognition and enforcement

(1) An application for a declaration under paragraph 20 (recognition) or paragraph 22 (enforcement) of Schedule 3 to the Act is to be made in accordance with Part 9 and any practice direction made under rule 23.1(2).

(2) Without prejudice to its powers under Parts 6 (service) and 7 (notice), the court may dispense with service and notice where it thinks just to do so, having regard in particular to –
  (a) whether the adult or (as the case may be) any respondent to the application is within the jurisdiction; and
  (b) the need for applications for declarations of enforceability to be determined rapidly.

23.5 Applications in relation to lasting powers – disapplication or modification

An application under paragraph 14(1) of Schedule 3 to the Act for the court to disapply or modify a lasting power is to be made in accordance with Part 9 and any practice direction made under rule 23.1(2).

23.6 Applications in relation to lasting powers – declaration as to authority of donee of lasting power

An application for a declaration under section 15(1)(c) of the Act that a donee of a lasting power is acting lawfully when exercising authority under that lasting power is to be made in accordance with Part 9 and any practice direction made under rule 23.1(2).

23.2 The relevant Practice Direction is PD23A, which includes the following provisions in respect of how a Schedule 3 application is to be made:

Procedure for making a Schedule 3 application

7. A Schedule 3 application is to be made in accordance with Part 9 of the Rules subject to the modifications set out in this practice direction.

8. A Schedule 3 application is made by filing a COP1 application. The form shall be completed on the footing that the adult to whom the application relates is 'P' for the purposes of the form….

9. Notwithstanding the terms of Practice Direction 9A, an applicant making a Schedule 3 application is not required to file –

(1) a COP3 assessment of capacity form;

(2) any of the annexes listed in Practice Direction 9A

unless the applicant is also asking the court to make additional declarations and/or orders under sections 15 and/or 16, in which case the applicant should also file a COP3 assessment of capacity form and such annexes as the applicant would have been required to file had he or she been seeking only those declarations and/or orders under sections 15 and/or 16 of the Act.

....

12 A Schedule 3 application should be accompanied by a COP24 witness statement by or on behalf of the applicant. The evidence filed in support of the application should include –

(1) Where the application is made under rule 23.4 for recognition and/or enforcement of a protective measure under paragraph 20 or 22 of Schedule 3 to the Act:
   (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 Schedule 3 of the Act;
   (b) An officially authenticated copy (and where necessary a 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 to enable the court to be satisfied –

      (i) That the case in which the measure was taken was urgent; alternatively

      (ii) That 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 to enable the court to be satisfied that the steps leading to the protective measure being made complied with any relevant provisions of the European Convention on Human Rights.
   (f) Details of any previous measures relating to the adult which have been the subject of a previous Schedule 3 application (whether or not such application was successful)
   (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.

(2) Where the application is made under rule 23.5 to disapply or modify a lasting power under Schedule 3 of the Act or under rule 23.6 for

declarations as to the authority of the donee of a lasting power, a certified copy of the lasting power (and where necessary a certified translation thereof).

23.3 The Practice Direction also makes provision for how the court progresses a Schedule 3 application after issue:

Procedure after Issue

13 A Schedule 3 application is an excepted application for purposes of Practice Direction 3B (Case Pathways....

14. When a Schedule 3 application is issued the application will be put before a judge to give directions. The judge will case manage the application and decide whether to allocate it to a pathway. Specifically the judge will consider whether to make one or more of the directions set out in rule 1.2(2) to enable the adult to whom it relates to participate in the application or to secure the adult's interests and position.

15.Where the judge considers that the adult should be joined as a party to the proceedings the judge will direct the filing of a COP3 Assessment of Capacity form or other expert evidence directed at the issue of the adult's capacity to conduct the proceedings before the court. (Rule 23.3(2) provides for the issue of the adult's capacity to conduct the proceedings before the court to be determined by reference to Part 1 of the Act.)

16. An application under rule 23.4 for recognition and/or enforcement of a protective measure should be dealt with rapidly, and in reviewing the papers the court will consider whether the order sought can be made without holding a hearing.

17. A Schedule 3 application under rule 23.4 for recognition and/or enforcement of a protective measure which –

(1) purports to authorise a deprivation of liberty of the adult to which it relates (other than a temporary or transient deprivation of liberty associated with the transfer of the adult to or from a specified place); or

(2) purports to authorise medical treatment

will usually -

(1) be determined after holding a hearing; and
(2) be allocated to the Senior Judge or a Tier 3 Judge.

E. DISCUSSION

24. This legal framework means that, where an adult holds property in England and Wales which is likely to require on-going management, there are various options open to the holder of a foreign power of representation ("R") to ensure that he or she has the necessary powers of management on their behalf:

24.1. R may simply rely on the power, using it directly to demonstrate their authority (having regard to paragraphs 13 and 14 of Schedule 3).

In practice, this approach is generally not found to be effective because, as the cases of BMA, AB and AJC each demonstrate, financial institutions in England and Wales usually seek some domestic confirmation of authority.

24.2. R may obtain an order from the country where the donor is habitually resident permitting him to manage the donor's property (essentially the equivalent of a deputyship order); and then seek recognition of that order under Schedule 3 Part 4 / Rule 23.4.

In order to grant recognition, the Court of Protection would require evidence satisfying the requirements of PD23 paragraph 12(1).

None of the five cases before me involve such an application. Given that powers of attorney are typically granted with a view to avoiding any need for court proceedings, it is not difficult to see why this approach – which requires proceedings in two courts – is not commonly favoured.

24.3. R may seek a declaration under s15(1)(c) and Rule 23.6 that he will be acting lawfully when exercising authority under the power in England and Wales.

There is some suggestion from commentators that this should be R's application of choice.[11]

In order to grant such a declaration, the Court of Protection would need to determine, in accordance with paragraph 13 of Schedule 3:

(a) which law governed the existence, extent, modification or extinction of the power;
(b) whether the creation of the power met the requirements of that law;
(c) what (if any) restrictions are placed by the foreign law on R's powers or their exercise.

That determination would require evidence of the relevant foreign law to be filed.

If a declaration were to be made as sought, it should make clear and express the requirement (from paragraph 13(5) of Schedule 3) that the *exercise* of the power in England and Wales must comply with the law of England and Wales; ie must be in

[11] See the Mental Capacity Report of 39 Essex Chambers for April 2018, page 27.

accordance with the principles of section 1 of the Act and any restrictions in the authorities which may be given to attorneys.

Mr. Rees has posed a question as to whether there is a "threshold" for the exercise of the court's jurisdiction to make this type of declaration: is it exercisable in respect of *any* foreign power of attorney, or must the donor be an "adult" within the meaning of Schedule 3 paragraph 4, or must the donor lack capacity within the meaning of section 2 of the Act? The question is significant because, if there is no threshold of capacity within the meaning of section 2 of the Act, the Court may be making declarations in respect of persons who would otherwise be outside its jurisdiction.

Mr. Rees suggests that for the court's jurisdiction to make this type of declaration to arise, the donor of the power must be an "adult" within the meaning of Schedule 3 paragraph 4. I agree. That seems to have been the approach taken by Baker J in *HSE v. PA & Ors* [2015] EWCOP 38 at paragraph 44, and is consistent with the 'scope of jurisdiction' provisions on paragraph 7(1) of Schedule 3 - "*The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to*" "*adults*" in various circumstances.

24.4. Orders under s16 of the Act: "full, original jurisdiction."

None of the five cases before me involve an application for the court to exercise its full, original jurisdiction but it is an ordinary part of that jurisdiction – pursuant to section 16(6) – that the court may 'make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.'

There are two ways in which the exercise of the full, original jurisdiction may assist:

(a) by making an order which appoints R as the adult's deputy for property and affairs; or
(b) where the adult's property in England and Wales is limited and R is simply seeking to remit such property to the state where the adult is habitually resident, by making a "one-off" order authorising R to make the transfer.

In either case, the court would need evidence that the adult lacked relevant capacity within the meaning of section 2 of the Act, and to be satisfied that the appointment/ authority to transfer is in the best interests of the adult.

This approach raises the question of whether the existence of an apparently valid and operable foreign power of attorney changes the situation: in such circumstances, *should* the court exercise its jurisdiction?

The Convention seems to expect that a foreign power of attorney would be allowed to take effect, and the court of the State where the property is situated would intervene only if satisfied that the power is not being exercised in a manner sufficient to guarantee

to protection of the person or property of the donor[12]. However, this is a point where the Convention and Schedule 3 diverge (see paragraph 20.5 above):

a. under Article 9 of the Convention, the jurisdiction of the State where the adult has property extends *only* as far as taking measures compatible with measures made by the State of habitual residence;
b. under Schedule 3, no equivalent limitation is imposed on the powers of the Court of Protection.

Mr Rees suggests that the existence of a valid foreign power of attorney is a material consideration when considering what is in the best interests of the adult in question, but it is not a bar to the exercise of the full, original jurisdiction of the court. I agree.

24.5. R may apply for orders of recognition of the power of representation as a 'protective measure.'

This seems to be the application intended by the applicants in all of the five cases before me. The case of BMA 1236379T concerns a power of representation held by the Public Guardian and Trustee of British Colombia by virtue of a Certificate of Incapability. The other four cases concern private mandates of various types. To determine the applications, it is necessary to consider further what constitutes a 'protective measure' for the purposes of the recognition provisions of Schedule 3 paragraph19.

25. What constitutes a 'protective measure'? I considered the question of what constitutes a "protective measure" in the matter of *Re JMK* [2018] EWCOP 5. On a paper application, without the benefit of legal argument, I came to the conclusion that:

> "... reference to 'protective measures' in Schedule 3 is intended, and generally understood, to refer to arrangements that have been made or approved by a foreign court. It may not be spelled out explicitly but the language of paragraph 19(3) in particular confirms that intention and understanding: each of the circumstances in which the mandatory requirement can be disapplied clearly envisages court proceedings. I have not found any authority which casts doubt on that understanding. JMK's Power of Attorney has been through no court process at all. It is not even subject to a system of registration. It therefore does not fall within the general understanding of the term 'protective measure' for the purposes of recognition by this Court pursuant to Schedule 3."

26. I went on to state that "If validly executed, a Power of Attorney is better characterised as an exercise of autonomy (even if it provides for a time when the donor is no longer capable of autonomous decision-making) than as a 'protective measure.'"

27. With the benefit of submissions from Mr Rees, I have come to the view that understanding "protective measure" as limited to arrangements that have been made or approved by a foreign court is unduly restrictive. I have been referred to paragraphs 8.30 – 8.32 of *The International Protection of Adults,* where the authors set the definition of 'protective measures' in the context of earlier international agreement as follows:

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[12] See Lagarde Report paragraph 108

"As with Hague 34, the description given in Article 3 of Protective Measures is deliberately wide so as to seek to avoid unnecessary arguments as to the precise classification of a particular measure of protection. The scope of the measures envisaged by Article 3 is very wide-ranging, encompassing measures along the spectrum from assistance with the acts of daily living to compulsory placement in a foreign psychiatric institution.

Further light upon the width of the measures falling within the scope of Hague 35 can be shed – we suggest – by the Practical Handbook to Hague 34, in which the Permanent Bureau note (by reference to Article 3 of that Convention, in which a similar list of measures is set out) that:

> It should be noted that the examples given in Art. 3 are not rigid categories: measures of protection may well encompass one or more of the examples given.... In addition, depending on the measures available in a Contracting State's domestic law, 'measures of protection' will not necessarily emanate from a formal judicial or administrative tribunal: eg, an official of a public authority, such as a police officer or social worker, may be empowered under domestic law to take a 'measure of protection' in respect of a child, usually in a situation of urgency. If the function of the measure is to protect the child, unless it falls within a category provided for in Art. 4, it would appear to fall within the material scope of the Convention.

It is suggested that a similar functional approach would apply to identifying whether a measure constitutes a Protective Measure falling within the scope of Hague 35."

28. Mr. Rees suggests that, on this view, a DoLS authorisation under Schedule A1 of the Act could be a 'protective measure.' Such authorisation does not involve any court procedure but it clearly has a degree of state involvement and is intended for protective purposes. I am persuaded that an interpretation of Schedule 3 paragraph 5(3) which could encompass such an authorisation is more appropriate.

29. Such interpretation does not however necessarily encompass private mandates. In essence, a power of attorney is a private arrangement between a donor and his chosen attorney(s). The capacitous donor is making provision for his own affairs. That the arrangements may continue if the donor loses capacity is not sufficient to render them a measure directed to the protection of the person or property of an 'adult.' Therefore, a power of attorney is <u>not</u> susceptible to an application for recognition or enforcement. That conclusion was uncontroversial[13] at least until 2017. Where there is no further step of registration of a power of attorney with either a court or an administrative body, it remains uncontroversial.

30. However, with the publication of the updated (2017) version of the Lagarde Report, there appears to have been a change in position in respect of *registered* powers:

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[13] See paragraphs 13(2)(b) and 24 of "The 2000 Hague Convention on the International Protection of Adults Five years On", Alexander Ruck Keene, February 2014

a. The original text of the Lagarde report indicates at paragraph 146 that a confirmation of powers by a state authority (judicial or administrative) "is not a measure of protection within the meaning of the Convention."

   The authors of *The International Protection of Adults* restated this at paragraph 9.11 – 9.13.

b. The revised (2017) version of the Lagarde Report suggests quite the opposite – that the intention of the discussions which led up to Convention was that registration or confirmation of a private mandate *could* transform it into a 'protective measure:'

   > "146... The first version of this report, which was based on a reading of the Convention text, set forth that this confirmation is not a measure of protection within the meaning of the Convention. ... However, some delegations have since asserted that this analysis is not one which, according to them, flows from the discussion, difficult as it was. According to this view, a confirmation could constitute a measure of protection within the meaning of Article 3 and it could only be given by the competent authority under the Convention..."

   This seems to suggest that the intention underpinning the Convention *may* have been that a *registered* power *could* be susceptible to an application for recognition and enforcement.

31. Mr. Rees sums up the position as follows:

> "There are clearly arguments both ways...... it is clearly arguable that private mandates such as powers of attorney fall entirely outside the regime of 'protective measures' whether or not they are subject to registration. [Or]...the registration of a power of attorney could be said to involve the designation of a person having charge of a person's property (see Sch 3 para 5(1)(d)) and as such the court may take the view that such powers could be capable of being protective measures."

32. However, he then qualifies the latter argument as follows:

> "...even if registration or confirmation of a power of attorney is potentially capable of amounting to a protective measure, the measure must still be directed to the protection of the person or property of an 'adult.' As such it is suggested that registration or confirmation could only ever render a power of attorney a protective measure where the registration process is directly related to the adult's loss of capacity (and perhaps involves a formal consideration of this by the court or tribunal undertaking the registration.) Where the confirmation or registration process is not directly related to the loss of capacity (such as happens with an English LPA), it is suggested that this would not be sufficient to transform the power into a 'protective measure.'"

33. Interesting though this debate may be, it does not affect the conclusion in respect of the Continuing Power of Attorney in *Re JMK* (because there was no suggestion of any registration or confirmation), and it is not determinative of any of the five cases currently before the court (because only TCM 13303939 involved any form of registration, and that registration was not related to loss of capacity.)

34. If, when an appropriate application is made, the court were minded to take the view that a power of attorney can be transformed into a protective measure through a process of registration linked to loss of capacity, application of the recognition and enforcement provisions of Schedule 3 Part 4 still require that the circumstances of disapplication under paragraph 19 (3), (4) and (5) do not apply.

F. DETERMINATION OF THE INDIVIDUAL CASES

35. BMA 1236379T

35.1. The Public Guardian and Trustee of British Colombia seeks recognition of his appointment as Committee of the Estate of BMA pursuant to a Certificate of Incapability issued under the British Colombia Adult Guardianship Act.

35.2. The issue of the Certificate of Incompatibility in respect of BMA appears not to have been part of a formal court process but to have been the responsibility of designated officials within health authorities. The effect of the Certificate in British Colombia appears to satisfy the functions described in Schedule 3 paragraph 5(1)(a), (b), (c), (d) and (f). On the functional understanding of the term (as set out in paragraph 27 above), I am satisfied that the Certificate is a 'protective measure.'

35.3. In order to recognise the Certificate under Schedule 3 Part 4, I need first to be satisfied that BMA is an 'adult' within the meaning of Schedule 3, and was habitually resident in British Colombia when it was issued. Both of these facts are apparent from the COP24 statement filed by Mr. Brettell.

35.4. Further, I need to be satisfied that the mandatory requirement to recognise the protective measure pursuant to paragraph 19(1) should not be disapplied pursuant to paragraphs 19(3), (4), or (5). There is nothing in the evidence currently available to suggest that the Certificate was issued as a matter of urgency, but also nothing to suggest that BMA was given an opportunity to be heard. Further information is required for the recognition application to be determined.

35.5. However, there is an alternative method of addressing what appears to be the purpose of the application. In practical terms, the application seeks to put funds standing to the credit of BMA in an English bank account under the same management as any assets she has in her country of habitual residence. This could be achieved by making a 'one-off' order under the full, original jurisdiction of the Court of Protection (as set out in paragraph 24.4 above).

35.6. On the basis of the COP3 assessment filed with the application, I am satisfied that BMA lacks capacity to manage her property and affairs and in particular to arrange for the transfer of her funds to her place of habitual residence.

35.7. I am satisfied that, by definition, the Public Guardian and Trustee of British Colombia is a fit and proper person to take charge of BMA's funds.

35.8. The extent of funds in question is relatively modest but it would manifestly be in BMA's interests to have such funds used for her benefit rather than remaining inaccessible. There is no suggestion that BMA has any further assets in England and Wales which may require further orders. BMA's sisters and nephew have been informed of the application and have raised no objection. I am satisfied that it is in the best interests of BMA to make a one-off order for transfer of her funds.

35.9. The order will authorise the Public Guardian and Trustee of British Colombia to transfer funds held to the credit of BMA with National Westminster Bank to her account in British Colombia; and, for the avoidance of any institutional doubts, will further authorise the National Westminster Bank to act upon the instructions of the Public Guardian and Trustee of British Colombia to arrange such transfer.

35.10. I have considered Rule 1.2 of the Court of Protection Rules 2017 and am satisfied that BMA's interests and position are properly secured, as is the general approach in most non-contentious property and affairs applications, without making any further direction for her participation in these proceedings.

36. <u>AB 13285001</u>

36.1. This application seeks recognition of an Enduring Power of Attorney granted in New Zealand. It is clear from the information filed with the application that AB has been habitually resident in New Zealand since 1989.

36.2. The authority granted by the power is expressed to continue notwithstanding supervening incapacity of AB. Therefore being "of like effect" to lasting powers and enduring powers within the meaning of the Act, I am satisfied that the power granted by AB falls within the definition of paragraph 13(6) of Schedule 3.

36.3. There is no suggestion of any form of registration or confirmation of the power with any type of official body in New Zealand. I am therefore satisfied that there is no basis on which it could be considered a "protective measure" within the meaning of Schedule 3 paragraph 5; and therefore no basis for the recognition which is sought.

36.4. However, the purpose of the application appears to be to enable the person with powers of representation in the place of AB's habitual residence to deal with HMRC in relation to AB's only property in England and Wales – a widow's pension paid by a UK based company pension scheme.

36.5. There are two ways in which this purpose could possibly be achieved.

36.6. Firstly, the court could treat the application as one seeking a declaration under s15(1) of the Act that GB will be acting lawfully in exercise of the Enduring Power of Attorney in respect of AB's property and affairs in England and Wales.

36.7. In order to make such a declaration, the court would need to be satisfied that AB is an 'adult' and was habitually resident in New Zealand at the time of granting the power. The information filed by GB is sufficient for these purposes. However the court would also need to be satisfied that AB's Enduring Power is a valid one under New Zealand law (that she had capacity to grant it, that it complies with any formalities required,

that it remains valid, and whether there are any restrictions imposed on the powers of an attorney). Further evidence would be required to address these matters.

36.8. Alternatively, the court could make a 'one-off' order under section 16 of the Act, authorising GB to manage AB's English tax affairs. (It appears that there is no issue with actual payment of the pension. The pension administrator has raised no issues and GB is already receiving the funds on behalf of AB.)

36.9. In order to make such an order, I would need to be satisfied that AB lacks capacity within the meaning of section 2 of the Act to manage her affairs with HMRC, and that the order would be in the best interests of AB. No COP3 assessment has been filed but, from the combination of GB's statement and the letter from the administrator of the care facility where AB lives, I am satisfied that AB presently lacks capacity to manage her affairs with HMRC. I am further satisfied that it is in her best interests that someone is authorised to manage those affairs on her behalf, and that the person whose authority is accepted in her place of habitual residence, whom she herself chose to manage her affairs (her daughter, whom she moved half way round the world to live near) is the appropriate person to be so authorised.

36.10. I have considered Rule 1.2 of the Court of Protection Rules 2017 and am satisfied that AB's interests and position are properly secured, as is the general approach in most non-contentious property and affairs applications, without making any further direction for her participation in these proceedings.

37. <u>GED 13257265</u>

37.1. The application is brought by GED's husband ED as attorney under of a Continuing Power of Attorney of Ontario.

37.2. There is no suggestion that the power has been the subject of any form of registration or confirmation. I am therefore satisfied that there is no basis on which it could be considered a "protective measure" within the meaning of Schedule 3 paragraph 5; and therefore no basis for it to be recognised pursuant to Schedule 3 paragraph 19.

37.3. The purpose of the application appears to be to put funds standing to the credit of GED in an English bank account under the same management as any assets she has in her country of habitual residence.

37.4. There are two ways in which this purpose could possibly be achieved.

37.5. Firstly, the court could treat the application as one seeking a declaration under s15(1) of the Act that ED will be acting lawfully in exercise of the Continuing Power of Attorney in respect of GED's property and affairs in England and Wales.

37.6. In order to make such a declaration, the court would need to be satisfied that GED is an 'adult', was habitually resident in Ontario at the time of granting the power and had capacity to grant it. Additionally the court would need to be satisfied that GED's Continuing Power complied with formalities required under Ontario law, that it remains valid, that it is 'of like effect' within the meaning of Schedule 3 paragraph 13(6), and whether there are any restrictions imposed on the powers of an attorney. The information presently filed does not address these matters and further evidence would be required.

37.7. Alternatively, the court could make a 'one-off' order under section 16 of the Act, authorising ED to transfer the balance of GED's NatWest account to her Ontario account.

37.8. In order to make such an order, I would need to be satisfied that GED lacks capacity within the meaning of section 2 of the Act to transfer her funds from NatWest to Ontario, and that the order would be in the best interests of GED.

37.9. No COP3 assessment or other evidence of GED's present capacity has been filed. The documents presently filed offer no explanation as to where GED is habitually resident, or how she came to have a bank account in England and why it is in her best interests to transfer the funds held there to Ontario, or whether she has any other assets in England and Wales, or whether the Continuing Power has been accepted as effective in Ontario. Details (including whether the account is in GED's name) are not provided of neither the NatWest account or the Your Credit Union account. Further evidence to address all these matters is required.

37.10. Choosing between the options (either s15 declaration or s16 order) comes down to a matter of proportionality pursuant to Rule 1.1(1) of the Court of Protection Rules 2017. The s15 declaration option would require expert evidence; the s16 order option could be addressed by the filing of a COP3 assessment, a COP24 statement (with documentary exhibits as appropriate) by ED and confirmation of notification of GED and the other attorneys appointed under the Continuing Power. On that basis, the s16 option is in my judgment the more appropriate.

37.11. Taking the s16 option, I have considered Rule 1.2 of the Court of Protection Rules 2017 and am satisfied that AB's interests and position are properly secured, as is the general approach in most non-contentious property and affairs applications, without making any further direction for her participation in these proceedings.

37.12. I will direct that ED notifies GED and his fellow attorneys of his application forthwith and files by 20th December 2019:

a. COP20A and B Certificates;
b. a COP3 assessment of GED's capacity to manage her property and affairs and, in particular, to decide whether to transfer funds from England to Ontario;
c. a COP24 statement which gives a narrative explanation of GED's habitual residence, how she came to have a bank account in England (with details of the account), whether she has any other assets in England and Wales, whether the Continuing Power has been accepted as effective in Ontario (including details of the attorneyship account), and why it is considered to be in GED's best interests to transfer her funds from England to Ontario.

37.13. In the event that the further documents are not filed as directed, the application will on 23rd December 2019 stand automatically dismissed without further order.

38. <u>AJC 13286102</u>:

38.1. This application seeks recognition of a Spanish power of attorney.

38.2. There is nothing in the certified translation of the power which indicates that the authority conferred continues after AJC loses capacity. Therefore I cannot be satisfied that AJC's power is "of like effect" within the meaning of Schedule 3 paragraph

13(6), or that it is a 'protective measure' within the meaning of Schedule 3 paragraph 5. So, there is no basis for the recognition sought.

38.3. Not being satisfied that AJC's power is "of like effect," I cannot make a declaration under section 15 of the Act that the attorneys would be acting lawfully in exercising the power. In any event, in order to make such a declaration, the court would further need to be satisfied that AJC is presently an 'adult' within the meaning of Schedule 3 paragraph 4 and was at the time of granting the power habitually resident in Spain (or that Spain was then a 'connected country' and he specified in writing that Spanish law was applicable to the power); and that the power was created in accordance with Spanish formalities and continues in effect. Evidence would be required as to any restrictions which Spanish law places on the exercise of the power. None of these matters is addressed in the evidence currently before the court.

38.4. The purpose of the application appears to be to enable AJC's daughter (and son) to manage his state and private pensions in the UK and his Barclays bank account. These requirements are more extensive than could appropriately be addressed in a 'one-off' order.

38.5. There appear to be three remaining options. The Spanish court could be invited to appoint a *Tutor* or *Curador* on the basis that AJC is habitually resident in Spain, and then for an application to be made to have that order recognised. That option is beyond the powers of the Court of Protection to direct, and so nothing further is required from the Court at this point.

38.6. A second option would be that, if he retains capacity to do so, AJC executes an English Lasting Power of Attorney. Again, that does not require anything further from the Court of Protection.

38.7. Finally, if AJC lacks capacity within the meaning of section 2 of the Act, the court could appoint a property and affairs deputy for him. In order to achieve this DG would need to submit a COP3 assessment of AJC's capacity to manage his property and affairs. (It would be sensible also to ask the assessor to address whether AJC presently has capacity to execute Lasting Powers of Attorney.) There would also need to be filed a fully completed form COP1A, and a COP4 declaration by DG (and also by her brother if the intention was that he should be appointed as well.)

38.8. I will make an order refusing the application as submitted but providing, if the applicant so wishes, that she may file a COP1A, COP3 and COP4(s) with a view to the court appointing (a) property and affairs deputy(ies) for AJC. I will dispense with any requirement to file a further COP1 but provide that, if the other documents are not filed by 20th December 2019, the proceedings shall thereupon stand automatically concluded without further order.

39. TCM 13303939

39.1. This application seeks recognition of a Lasting Power of Attorney registered with the Office of the Public Guardian of Singapore.

39.2. I am satisfied from the medical evidence filed that TCM is an 'adult' within the meaning of Schedule 3 paragraph 4.

39.3. It is clear from the prescribed information on the form used to execute the power that it is "of like effect" within the meaning of Schedule 3 paragraph 13(6).

39.4. Although completion of a process of registration of the power is a pre-condition of it taking effect, that registration is not linked to a lack of capacity on the part of TCM. Rather, it is linked to the granting of the power – the requirement is that the power is registered within 6 months of the date on which the donor signs it. Therefore I am not satisfied that TCM's Lasting Power of Attorney constitutes a 'protective measure' within the meaning of Schedule 3 paragraph 5.

39.5. The purpose of the application appears to be to enable TCM's wife and daughter to make decisions on behalf of TCM in respect of his welfare (also his property and affairs but since he does not have any in England and Wales, this is less of a driving factor.)

39.6. It is necessary to consider whether there are alternative means of meeting the purpose of the application.

39.7. Firstly, the possibility of a declaration pursuant to section 15 of the Act, that the attorneys will be acting lawfully when exercising authority under the power: there is a difficulty with meeting the requirements of Schedule 3. The evidence is that, at the time of granting the power, TCM was habitually resident in Singapore. The power is therefore not within the requirements of Schedule 3 paragraph 13(1). However, the evidence also indicates that England was not 'a connected country': at the time of granting the power TCM was not a UK national, he was not habitually resident in England and Wales, and he had no property in England and Wales. Moreover, TCM has given no written specification that the law of England and Wales should apply. So the power is not within the requirements of Schedule 3 paragraph 13(2) either. It falls into the lacuna identified at paragraph 22.5 above: Schedule 3 paragraph 13 makes no provision for the law applicable to the "existence, extent, modification or extinction" of this power.

39.8. It has been suggested that "logic, and fidelity to the principles of the Convention[14]" point to the applicable law in these circumstances (in respect of "existence, extent, modification or extinction" of the power) being the law of the state of habitual residence at the time of granting the power, ie Singapore. I agree. That approach also seems to me most closely consistent with the approach taken in Schedule 3 paragraph 13(2).

39.9. The information presently before the court is sufficient for me to be satisfied that TCM's power complies with the necessary formalities under Singapore law, is 'of like effect' within the meaning of Schedule 3 paragraph 13(6), remains valid, and is not subject to any relevant restrictions on the powers of the attorney.

39.10. More straightforwardly, pursuant to Schedule 3 paragraph 13(5) the law applicable to the *exercise* of TCM's power within England and Wales is the law of England and Wales. Paragraph 14(1) of Schedule 3 comes into play. (On a strict reading of paragraph 14(2), that subparagraph does not. Any respect in which the law of Singapore is applicable to TCM's power is not "in accordance with this Part of the

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[14] See paragraph 38 of "The 2000 Hague Convention on the International Protection of Adults Five years On", Alexander Ruck Keene, February 2014

Schedule" but because of the approach I have taken to a lacuna in that Part of the Schedule.)

39.11. The division of the proceeds of sale of TCM's house between his children may have been completely proper within the terms of the power when exercised in Singapore but, by the principles and provisions of the Act, it would almost certainly amount to gifting beyond the authority of an attorney and therefore an exercise of the power "not...sufficient to guarantee the protection of the person or property of the donor" as provided in Schedule 3 paragraph 14(1). In my judgment, if a section 15 declaration is to be made in respect of TCM's power, a modification is required to limit the power of gifting by the attorneys to the limits set out in section 12 of the Act.

39.12. I am not aware of any past exercise of the power in respect of welfare decisions such as to cause concern. However there is a divergence between the terms of the power and the provisions of the Act in respect of consent to life-sustaining treatment. TCM ticked the box to give his attorneys authority to give or refuse consent to the carrying out or continuation of treatment. There is no place on the form for making specific provision in respect of *life-sustaining* treatment. In contrast, section 11(7)(c) of the Act contemplates an attorney being authorised in the same terms of TCM's power *but* section 11(8) provides that such authority does not extend to life-sustaining treatment "unless the instrument contains express provision to that effect."

39.13. In order to ensure that the exercise of TCM's power in England and Wales is sufficient to guarantee the protection of his person in equal terms to those provided by the law of England and Wales, it is necessary in my judgment to modify the power so as to make clear specifically that it does not extend to giving or refusing consent to *life-sustaining* treatment. Further, I consider it appropriate to make that part of any s15 declaration, even acknowledging that there has to date been no suggestion that the power has actually been exercised outside those limitations. To wait for such a situation to arise before making such a modification would clearly be unworkable and probably ineffective.

39.14. If, contrary to the position set out in paragraph 39.10 above, Schedule 3 paragraph 14(2) *does* apply to the court's jurisdiction to modify TCM's power, I am satisfied that these two modifications have full regard to the law of Singapore up to the point where it is not compatible with the restrictions of the law of England and Wales – as set out in paragraph 22.10 above. Alternatively, I am satisfied that they are justified on the basis of paragraphs 17 and 18 of Schedule 3.

39.15. The second possible option for addressing the purpose of the application would be for the court to exercise its 'full, original jurisdiction,' on the basis that TCM is now habitually resident in England and Wales. Further evidence would need to be filed to satisfy the court that TCM lacks relevant capacity.

39.16. Given that TCM receives no income and has no assets here, it is not clear that a property and affairs deputyship order would assist.

39.17. The evidence is that TCM is presently well cared for within his family, with no issues or disputes arising. In determining whether a welfare deputyship order would be in the best interests of TCM, the court would need to take into account the existence and extent of the power as a written statement of his wishes. However, if that is the only basis on which the legal framework of deputyship is being considered, and there is a more direct way of giving effect to TCM's own decisions, in my judgment it is preferable to use the more direct approach.

39.18. So, in conclusion, in so far as the application in respect of TCM seeks recognition of his power of attorney pursuant to Schedule 3 paragraph 19, the application is refused because the power is not a 'protective measure.' Instead, I shall make a declaration pursuant to section 15 of the Act that the attorneys will be acting lawfully when exercising authority under the power in England and Wales, subject to modifications that the authority to make gifts is limited to the circumstances set out in section 12 of the Act and that the authority to give or refuse consent to treatment does not extend to life-sustaining treatment to accord with section 11(8) of the Act.

HHJ Hilder
8th November 2019