

*Status: Point in time view as at 23/07/2010.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, SCHEDULE 3. (See end of Document for details)*

## SCHEDULES

### SCHEDULE 3

Section 63

#### INTERNATIONAL PROTECTION OF ADULTS

##### PART 1

##### PRELIMINARY

##### *Introduction*

1 This Part applies for the purposes of this Schedule.

##### *The Convention*

- 2 (1) “Convention” means the Convention referred to in section 63.
- (2) “Convention country” means a country in which the Convention is in force.
- (3) A reference to an Article or Chapter is to an Article or Chapter of the Convention.
- (4) An expression which appears in this Schedule and in the Convention is to be construed in accordance with the Convention.

##### *Countries, territories and nationals*

- 3 (1) “Country” includes a territory which has its own system of law.
- (2) Where a country has more than one territory with its own system of law, a reference to the country, in relation to one of its nationals, is to the territory with which the national has the closer, or the closest, connection.

##### *Adults with incapacity*

- 4 <sup>F1</sup>(1<sup>F1</sup>) “Adult” means <sup>F2</sup>subject to sub-paragraph (2)<sup>F2</sup> 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.
- <sup>F3</sup>(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 19 October 1996;
  - (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.<sup>F3</sup>

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### Textual Amendments

- F1** Sch. 3 para. 4 renumbered as Sch. 3 para. 4(1) (coming into force in accordance with reg. 1(2) of the amending S.I.) by virtue of [The Parental Responsibility and Measures for the Protection of Children \(International Obligations\) \(England and Wales and Northern Ireland\) Regulations 2010 \(S.I. 2010/1898\)](#), reg. 17, **Sch. para. 10(b)**
- F2** Words in Sch. 3 para. 4 inserted (coming into force in accordance with reg. 1(2) of the amending S.I.) by [The Parental Responsibility and Measures for the Protection of Children \(International Obligations\) \(England and Wales and Northern Ireland\) Regulations 2010 \(S.I. 2010/1898\)](#), reg. 17, **Sch. para. 10(a)**
- F3** Sch. 3 para. 4(2) inserted (coming into force in accordance with reg. 1(2) of the amending S.I.) by [The Parental Responsibility and Measures for the Protection of Children \(International Obligations\) \(England and Wales and Northern Ireland\) Regulations 2010 \(S.I. 2010/1898\)](#), reg. 17, **Sch. para. 10(b)**

### *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,
  - (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.

### *Central Authority*

- 6 (1) Any function under the Convention of a Central Authority is exercisable in England and Wales by the Lord Chancellor.
- (2) A communication may be sent to the Central Authority in relation to England and Wales by sending it to the Lord Chancellor.

## PART 2

### JURISDICTION OF COMPETENT AUTHORITY

#### *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,

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- (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.
- (2) An adult present in England and Wales is to be treated for the purposes of this paragraph as habitually resident there if—
- (a) his habitual residence cannot be ascertained,
  - (b) he is a refugee, or
  - (c) he has been displaced as a result of disturbance in the country of his habitual residence.
- 8 (1) The court may also exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to an adult if sub-paragraph (2) or (3) applies in relation to him.
- (2) This sub-paragraph applies in relation to an adult if—
- (a) he is a British citizen,
  - (b) he has a closer connection with England and Wales than with Scotland or Northern Ireland, and
  - (c) Article 7 has, in relation to the matter concerned, been complied with.
- (3) This sub-paragraph applies in relation to an adult if the Lord Chancellor, having consulted such persons as he considers appropriate, agrees to a request under Article 8 in relation to the adult.

#### *Exercise of jurisdiction*

- 9 (1) This paragraph applies where jurisdiction is exercisable under this Schedule in connection with a matter which involves a Convention country other than England and Wales.
- (2) Any Article on which the jurisdiction is based applies in relation to the matter in so far as it involves the other country (and the court must, accordingly, comply with any duty conferred on it as a result).
- (3) Article 12 also applies, so far as its provisions allow, in relation to the matter in so far as it involves the other country.
- 10 A reference in this Schedule to the exercise of jurisdiction under this Schedule is to the exercise of functions under this Act as a result of this Part of this Schedule.

### **PART 3**

#### **APPLICABLE LAW**

##### *Applicable law*

- 11 In exercising jurisdiction under this Schedule, the court may, if it thinks that the matter has a substantial connection with a country other than England and Wales, apply the law of that other country.

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- 12           Where a protective measure is taken in one country but implemented in another, the conditions of implementation are governed by the law of the other country.

*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)(c), 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.
- 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 than 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).
- 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) above.

*Protection of third parties*

- 16   (1) This paragraph applies where a person (a “representative”) in purported exercise of an authority to act on behalf of an adult enters into a transaction with a third party.
- (2) The validity of the transaction may not be questioned in proceedings, nor may the third party be held liable, merely because—

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- (a) where the representative and third party are in England and Wales when entering into the transaction, sub-paragraph (3) applies;
  - (b) where they are in another country at that time, sub-paragraph (4) applies.
- (3) This sub-paragraph applies if—
- (a) the law applicable to the authority in one or more respects is, as a result of this Schedule, the law of a country other than England and Wales, and
  - (b) the representative is not entitled to exercise the authority in that respect (or those respects) under the law of that other country.
- (4) This sub-paragraph applies if—
- (a) the law applicable to the authority in one or more respects is, as a result of this Part of this Schedule, the law of England and Wales, and
  - (b) the representative is not entitled to exercise the authority in that respect (or those respects) under that law.
- (5) This paragraph does not apply if the third party knew or ought to have known that the applicable law was—
- (a) in a case within sub-paragraph (3), the law of the other country;
  - (b) in a case within sub-paragraph (4), the law of England and Wales.

#### *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 of another country if its application would be manifestly contrary to public policy.

### **PART 4**

#### RECOGNITION AND ENFORCEMENT

#### *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) A protective measure taken in relation to an adult under the law of a Convention country other than England and Wales is to be recognised in England and Wales if it was taken on a ground mentioned in Chapter 2 (jurisdiction).
- (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.

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- (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.
- 20 (1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales.
- (2) No permission is required for an application to the court under this paragraph.
- 21 For the purposes of paragraphs 19 and 20, any finding of fact relied on when the measure was taken is conclusive.

#### *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.

#### *Measures taken in relation to those aged under 16*

- 23 (1) This paragraph applies where—
- (a) provision giving effect to, or otherwise deriving from, the Convention in a country other than England and Wales applies in relation to a person who has not reached 16, and
  - (b) a measure is taken in relation to that person in reliance on that provision.
- (2) This Part of this Schedule applies in relation to that measure as it applies in relation to a protective measure taken in relation to an adult under the law of a Convention country other than England and Wales.

#### *Supplementary*

- 24 The court may not review the merits of a measure taken outside England and Wales except to establish whether the measure complies with this Schedule in so far as it is, as a result of this Schedule, required to do so.

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- 25 Court of Protection Rules may make provision about an application under paragraph 20 or 22.

## PART 5

### CO-OPERATION

#### *Proposal for cross-border placement*

- 26 (1) This paragraph applies where a public authority proposes to place an adult in an establishment in a Convention country other than England and Wales.
- (2) The public authority must consult an appropriate authority in that other country about the proposed placement and, for that purpose, must send it—
- (a) a report on the adult, and
  - (b) a statement of its reasons for the proposed placement.
- (3) If the appropriate authority in the other country opposes the proposed placement within a reasonable time, the public authority may not proceed with it.
- 27 A proposal received by a public authority under Article 33 in relation to an adult is to proceed unless the authority opposes it within a reasonable time.

#### *Adult in danger etc.*

- 28 (1) This paragraph applies if a public authority is told that an adult—
- (a) who is in serious danger, and
  - (b) in relation to whom the public authority has taken, or is considering taking, protective measures,
- is, or has become resident, in a Convention country other than England and Wales.
- (2) The public authority must tell an appropriate authority in that other country about—
- (a) the danger, and
  - (b) the measures taken or under consideration.
- 29 A public authority may not request from, or send to, an appropriate authority in a Convention country information in accordance with Chapter 5 (co-operation) in relation to an adult if it thinks that doing so—
- (a) would be likely to endanger the adult or his property, or
  - (b) would amount to a serious threat to the liberty or life of a member of the adult's family.

## PART 6

### GENERAL

#### *Certificates*

- 30 A certificate given under Article 38 by an authority in a Convention country other than England and Wales is, unless the contrary is shown, proof of the matters contained in it.

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*Powers to make further provision as to private international law*

- 31 Her Majesty may by Order in Council confer on the Lord Chancellor, the court or another public authority functions for enabling the Convention to be given effect in England and Wales.
- 32 (1) Regulations may make provision—
- (a) giving further effect to the Convention, or
  - (b) otherwise about the private international law of England and Wales in relation to the protection of adults.
- (2) The regulations may—
- (a) confer functions on the court or another public authority;
  - (b) amend this Schedule;
  - (c) provide for this Schedule to apply with specified modifications;
  - (d) make provision about countries other than Convention countries.

*Exceptions*

- 33 Nothing in this Schedule applies, and no provision made under paragraph 32 is to apply, to any matter to which the Convention, as a result of Article 4, does not apply.

*Regulations and orders*

- 34 A reference in this Schedule to regulations or an order (other than an Order in Council) is to regulations or an order made for the purposes of this Schedule by the Lord Chancellor.

*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.



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