

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

SCHEDULES

Schedule 3: International protection of adults

169. This makes provision as to the private international law of England and Wales in relation to persons who cannot protect their interests. In particular, it 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) (the “Hague Convention”) (the text of which is available at: <http://www.hcch.net/e/conventions/menu35e.html>).
170. It should be noted that for the purposes of the Hague Convention, England and Wales, Scotland and Northern Ireland are treated separately because they constitute separate jurisdictions. The provisions of *Schedule 3* are intended to be compatible with the provisions of Schedule 3 to the Adults with Incapacity (Scotland) Act 2000 which provided for the private international law of Scotland in this field and implemented the Hague Convention for Scotland. Scotland is as yet the only country to have ratified the Convention, which will enter into force only once it has been ratified by three states. However, *Schedule 3* provides private international law rules to govern jurisdictional issues between Scotland and England/Wales, irrespective of whether the Convention is in force.

Part 1: Preliminary

171. This Part contains relevant definitions and introductory provisions. The definition of “adult” in *paragraph 4* is consistent with the Act but is not the same as the definition provided in the Hague Convention.

Part 2: Jurisdiction of competent authority

172. *Part 2* of the Schedule provides the grounds, based on Articles 5 to 11 of the Hague Convention, on which the Court of Protection will exercise its jurisdiction under the Act when dealing with cases with an international element. *Paragraph 7(1)* provides that the court may exercise its jurisdiction in relation to: an adult habitually resident in England and Wales; an adult’s property in England and Wales; an adult present in England or Wales or who has property there, if the matter is urgent; or an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.
173. *Paragraph 7(2)* provides that an adult present in England and Wales is to be treated as habitually resident if his habitual residence cannot be ascertained, he is a refugee or he has been displaced as a result of disturbance in the country of his habitual residence.
174. Once the provisions of the Convention are in force the court will also be able to exercise jurisdiction, in so far as it cannot otherwise do so under the provisions of *paragraph 7*, in relation to a British citizen with a closer connection with England and Wales than with Scotland or Northern Ireland. The jurisdiction may be exercised provided that the court considers that it is in a better position to assess the interests of the adult, that

certain requirements as to notification of other Convention countries are complied with and that other Convention countries which may have jurisdiction on certain grounds have not dealt, or are not dealing with the matter (*paragraph 8(2)(c)* and Article 7 of the Hague Convention).

Part 3: Applicable law

175. *Part 3* of the Schedule makes provision as to which law is to apply in various situations. Although the Court of Protection will normally apply the law of England and Wales, and the conditions of implementation of any protective measure taken abroad will be governed by the law of England and Wales if implemented here, the court may apply the law of another country if it thinks that a matter has a substantial connection with that country (*paragraphs 11 and 12*).
176. In addition the donor of a foreign power akin to an LPA may specify that the law applicable to the existence, extent, modification or extinction of the power is to be the law of a country of which he is a national, in which he is habitually resident, or in which he has property. If the power is exercised in England and Wales the law of England and Wales shall, however, apply to the manner of the exercise of the power. Regulations may apply the provisions of *Schedule 1* (lasting powers of attorney: formalities) to such foreign powers (*paragraphs 15*).
177. The court may disapply or modify a lasting power (including a foreign power) where the power is not exercised in a manner sufficient to guarantee the protection of the donor or his property. In these circumstances the court must, so far as possible, have regard to any foreign law applicable by virtue of this (*paragraph 14*).
178. This Part provides protection for a third party who enters into a transaction with a representative on behalf of a person, where that representative was actually not entitled so to act under the law of a country other than England and Wales applicable by virtue of this Part. Protection is provided if the third party neither knew nor ought to have known that such a law was applicable (*paragraph 16*); ensures that mandatory provisions of the law of England and Wales apply regardless of any other system of law that would apply (*paragraph 17*); and provides that nothing in this Part of the Schedule requires or enables the application in England and Wales of a provision of the law of another country that is manifestly contrary to public policy (*paragraph 18*).

Part 4: Recognition and enforcement

179. *Part 4* of the Schedule provides for the recognition and enforcement of protective measures taken in other countries. It provides that a protective measure 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. It also provides that a protective measure taken in another Convention country is to be recognised provided that it was taken on a ground provided for in the Convention (the same grounds on which the Court of Protection will exercise jurisdiction under Part 2) (*paragraph 19(1) and (2)*).
180. However the court may refuse to recognise a protective measure where it thinks that the case in which the measure was taken was not urgent, the adult was not given an opportunity to be heard, and that omission amounted to a breach of natural justice. The court may also refuse to recognise a protective measure if recognition of the measure would be manifestly contrary to public policy, the measure would be inconsistent with a mandatory provision of the law of England and Wales, or the measure is inconsistent with one subsequently taken or recognised in relation to the adult (*paragraph 19(3) and (4)*).
181. *Paragraph 20* provides for any interested person to 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.

*These notes refer to the Mental Capacity Act 2005
(c.9) which received Royal Assent on 7 April 2005*

182. *Paragraph 22* provides for an interested person to 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.

Part 5: Co-operation

183. *Part 5* of the Schedule provides for co-operation between authorities in England and Wales and authorities in other Convention countries.

Part 6: General

184. *Part 6* includes powers to make further provision as to private international law by Order in Council and regulations (*paragraphs 31 and 32*). An Order in Council under paragraph 31 will be subject to the negative resolution procedure in Parliament. Regulations under *paragraph 32(1)(b)* will be subject to the affirmative resolution procedure (see *section 65*).