

Reform of Guardianship Law Protection in Common Law – A cross-border comparison between France and Great Britain

Population movement between Great Britain and France

There is a significant population of Britons who now live on this side of the Channel, and similarly of French citizens who have chosen the United Kingdom as their home.

OECD statistics based on censuses from 2000 indicate that a sizeable proportion are aged over 65.¹

More recent official statistics are not yet available and there are conflicting estimates. However, it is evident that the numbers have increased. It is estimated that 260,000 Britons now live in France on a full-time or part-time basis,² and there are an estimated 500,000 second homes owned in France by Britons.³

Moving in the other direction, it is estimated that, since 1999, approximately 15,000 French citizens have moved to the United Kingdom annually.⁴ There are now some 300,000 French living in the United Kingdom, 70% of whom live in Greater London.⁵

British citizens aged over 15 living in France in 2000

	No of British in France	Expressed as % of total
15-24 years	9,223	12%
25-64 years	56,330	74%
65+ years	10,870	14%
Total	76,423	100%

French citizens aged over 15 living in Britain in 2000

	No of French in Britain	Expressed as % of total
15-24 years	18,327	21%
25-64 years	58,831	69%
65+ years	8,181	10%
Total	85,339	100%

Statistics relating to dementia

Alzheimer Europe

Alzheimer Europe is a European initiative pushing for greater recognition of Alzheimer's disease and dementia as a European public health priority. It is supported by the French government. The 'Paris Declaration' includes the following sobering statement:

*'In 2006, close to 5.4 million citizens in the European Union are living with Alzheimer's disease or another form of dementia. With the ageing of the populations in all the Member States of the European Union, these numbers are set to increase and researchers have predicted a doubling of these figures by 2040 in Western Europe and a trebling of these figures in Eastern Europe.'*⁶

Statistics of people with dementia in Europe

Alzheimer Europe have collated statistics on the numbers of people suffering from dementia in Europe from two major studies, Eurodem and Ferri.⁷

¹ Statistics available on <http://stats.oecd.org/WBOS/Index.aspx?QueryName=254&QueryType=View>.

² <http://www.guardian.co.uk/world/2008/mar/07/france>.

³ <http://www.newstatesman.com/200408020014>.

⁴ <http://www.guardian.co.uk/world/2006/apr/08/france.ashleyseager>.

⁵ <http://www.telegraph.co.uk/core/Content/displayPrintable.jhtml;jsessionid=FYO0HF11E2YS3QFIQMFCFGGAVCBQYIV0?xml=/property/2007/02/22/lpfrench122.xml&site=16&page=0> and <http://www.guardian.co.uk/uk/2008/mar/23/immigration.france>.

⁶ 'Paris Declaration on the political priorities of the European Alzheimer movement' available on .

⁷ Statistics available on the Dementia in Europe website at <http://www.dementia-in-europe.eu/?lm2=OWQAUJKRXAEZ>.

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Country	Age Group	Number with dementia (EURODEM)	% of population	Number with dementia (Ferri et al)	% of population
France (2005 figs)	30-99	847,808	1.36%	760,715	1.22%
UK (2004 figs)	30-89	660,573	1.11%	621,717	1.04%

A major new study on the impact of dementia in the United Kingdom was published in February 2007. It suggests that the number of people with dementia in the United Kingdom has increased to 700,000. It estimates that 1,000,000 people in the United Kingdom will suffer from dementia by 2025.⁸

Relevance to legal practitioners in France and the United Kingdom⁹

The ageing population in Europe and a corresponding rise in the numbers of people with capacity issues has led to legal reform in many member states of the European Union, including the United Kingdom.

The levels of cross border migration, including significant numbers of retired citizens, mean there is an increasing chance that lawyers will have to deal with foreign nationals with issues of capacity.

Example A

An elderly British couple have a 'maison secondaire' in France. They are noticeably forgetful. They decide to gift the maison secondaire to their local cleaning lady who they have known for three years.

Whose law applies to resolve any doubt as to whether they have a proper understanding (the requisite degree of mental capacity) to make such a gift of real property?

Would the answer be different if the couple had moved to France and become habitually resident?

Example B

The same elderly British couple also have a bank account in France. They decide to give €200,000 to their gardener in return for a promise that he will look after their vegetable plot for the rest of their lives.

Which court would deal with the issues of capacity? Does the answer differ according to whether they are temporarily or habitually resident in France?

Example C

You are asked for advice in relation to the affairs of a recently widowed French lady. She has a daughter living in Paris and a son who lives in London. She chooses to move to London to live with her son rather than with her daughter in Paris.

She sells the former matrimonial home (in France) and deposits the proceeds in her bank account. Subsequently she says that she has decided to transfer the sale proceeds to her son as a gift.

Leaving aside any issues relating to inheritance, who would decide whether she has capacity to make this gift?

Which court has jurisdiction?

An increase in such scenarios, in France, the United Kingdom and elsewhere, has given rise to the need for clarification as to which court has jurisdiction and in what circumstances.

The Hague Convention for the International Protection of Adults 2000 (the 'Convention') and its application to England & Wales

*'The aging of the world's population, combined with greater international mobility, has created the need for improved international protection for vulnerable adults by means of legal regulation and international co-operation. The increased lifespan in many countries is accompanied by a corresponding increase in the incidence of illnesses linked to old age. As international travel becomes easier, many people reaching the age of retirement decide to spend the last part of their lives abroad.'*¹⁰

8 'The Rising Cost of Dementia in the UK' A report into the prevalence and cost of dementia prepared by the Personal Social Services Research Unit (PSSRU) at the London School of Economics and the Institute of Psychiatry at King's College London, for the Alzheimer's Society, 2007, at http://www.alzheimers.org.uk/site/scripts/documents_info.php?categoryID=200120&documentID=342.

9 The United Kingdom has three constituent jurisdictions – (1) England & Wales, (2) Scotland, and (3) Northern Ireland. The Channel Islands are Crown dependencies and are not part of the United Kingdom (they owe allegiance to the reigning monarch direct – tradition has it that they do so in the monarch's capacity as Duke of Normandy). The Isle of Man is likewise a Crown dependency. Neither the Channel Islands nor the Isle of Man are part of the European Union.

10 'The Hague Convention of 13 January 2000 on the International Protection of Adults – Outline of the Convention, available at <http://www.hcch.net/upload/outline35e.pdf>.

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Many legal systems allow adults to arrange in advance how their affairs will be managed in the event that they become no longer capable of managing their affairs themselves, but this raises inevitable questions about which law will apply, who will look after those adults, and with what powers. The Convention 'addresses many of these issues by providing rules on jurisdiction, applicable law and international recognition and enforcement of protective measures.'¹¹

The United Kingdom, Germany, and France have now ratified the Convention. It will therefore come into force in those countries on 1 January 2009. However, in the United Kingdom, the ratification has been limited to Scotland only. In England & Wales, the Mental Capacity Act 2005 ('MCA'), which came into force on 1 October 2007, provides a complete set of rules concerning people who lack capacity and the conflict of laws.¹²

Section 63 and Schedule 3 of the MCA give effect to the Convention, and make related provision for the private international law of England & Wales. This came into force with the MCA in 1 October 2007, save that certain sections come fully into force in England & Wales once the Convention comes into force, on 1 January 2009.

A complicating factor is therefore that by 1 January 2009 the Convention will have full effect in England & Wales, but because this was achieved by virtue of domestic legislation rather than by ratifying the treaty, this will not be recognised by Scotland, Germany and France.

It is understood that the Ministry of Justice is working on full ratification for England & Wales.

Provisions of the Mental Capacity Act 2005 relating to jurisdiction

The MCA outlines the circumstances in which the Court of Protection (see below) will have jurisdiction over adults lacking capacity, based on the provisions of the Convention.

The Court of Protection will have jurisdiction in the following circumstances:

- for an adult lacking capacity habitually resident in England & Wales;
- for the property in England & Wales of an adult lacking capacity (this includes any chose in action or any interest in real or personal property);
- for an adult lacking capacity who is present in England & Wales, or who has property there, if the matter is urgent
- for an adult lacking capacity who is present in England & Wales who has a temporary protective measure proposed in relation to him, which only relates to England & Wales.¹³

Under MCA schedule 3, paragraph 7, the Court of Protection can also have jurisdiction over a British citizen if Article 7 of the Convention has been complied with. This means that if the English authorities feel that they are better placed to take measures than a Contracting State which has jurisdiction by reason of habitual residence, they can take action if they inform the State of habitual residence. This does not take effect if the State of habitual residence states that they have or will take the relevant measures, or has ruled that none are needed.

Under MCA schedule 3, paragraph 8 and Article 8 of the Convention, the authorities of a Contracting State who have jurisdiction over an adult lacking capacity can make a request to have jurisdiction transferred elsewhere, if they consider it to be in his interests. This section of the MCA will come into force on 1 January 2009. On this basis, if the Lord Chancellor agrees, the Court of Protection could accept jurisdiction over someone:

- who is British;
- whose previous habitual residence was England & Wales;
- who has property in England & Wales;
- who chose England & Wales as the authority able to take measures on his behalf in a written document related to his protection;
- who has someone prepared to undertake his or her protection who is habitually resident in England & Wales; or
- who is present in England & Wales, but in relation to the protection of his person only.

As things stand, the anomaly is that under Article 8 of the Convention, France may only make a request to another Contracting State, and in international law, England & Wales are not Contracting States. This raises an interesting technical legal problem. One view is that it seems that, under the MCA, the Court of Protection in England & Wales has the jurisdiction to receive a request from a Contracting State. France could therefore make a request, seemingly outside the terms of the Convention, and the English Court could still accept jurisdiction.

¹¹ *Ibid.*

¹² See Dicey, Morris & Collins *The Conflict of Laws* (Thomson, Sweet & Maxwell), chapter 21.

¹³ MCA 2005 schedule 3 para 7.

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Consider, for example, a British man who moved to Provence for his retirement, became habitually resident in France and then lost capacity. His daughter still lives in London, and would be prepared to take responsibility for his financial and personal affairs. Under the terms of Article 5 of the Convention, France has primary responsibility to take measures on his behalf, but France might think it was in his best interests to transfer this responsibility to the English Court of Protection, so that his daughter could care for him. France could not make the request under Article 8, because England and Wales is not a Contracting State. However, if they made a request to England, England could still accept the request under the MCA.

Which law will the Court of Protection apply?

As a general rule, the Court of Protection will apply English law. However, if it thinks that a matter has a 'substantial connection' with another country, it may apply that country's law. Similarly, it recognises that if a protective measure was taken in one state and implemented in a second state, the law of that second state governs its implementation.¹⁴ These provisions are based on Articles 13 and 14 of the Convention.

For example, if the Court decides that a person's property abroad needs to be sold abroad, the law of the second country should apply to the sale.

Mental Capacity Act 2005

Background and Human Rights

The MCA came into force on 1 October 2007. It followed many years of proposals for reform.

An important factor that influenced reform was a desire to better protect the human rights of those who are mentally incapacitated. The Law Commission, which advises the government on law reform in England & Wales, produced a report in 1995 on 'Mental Incapacity'

It cited the United Nations' 1971 'Declaration on the Rights of Mentally Retarded Persons', which stated that *'the mentally retarded person has a right to protection from exploitation, abuse and degrading treatment.'*¹⁵ The Law Commission identified the Declaration as part of a *'considerable body of international opinion which identifies unacceptable discrimination in the ways in which those who have mental disabilities (and especially mental illness) have been dealt with in the past by medical practitioners, the law and society as a whole.'*¹⁶

The United Kingdom finally gave effect in domestic law to sections of the European Convention on Human Rights by the Human Rights Act 1998. The explanatory notes which accompany the MCA note that it *'meets the state's positive obligation under Article 8 ... to ensure respect for private life.'*¹⁷

Overview of the Mental Capacity Act 2005

The main changes effected by the MCA are:

- For the first time, the level of capacity that a person must have to make a specific decision is given a statutory footing. Five statutory principles assist in deciding how decisions are made and who makes them.
- Enduring Powers of Attorney were abolished and replaced by Lasting Powers of Attorney (see below for explanation).
- Lasting Powers of Attorney can be used for financial decisions. They can also be used for delegating decisions about health and welfare (not previously permitted).
- A new Court of Protection was established with a higher status.
- The Court of Protection can decide welfare matters as well as financial matters.
- The Office of the Public Guardian was set up to act alongside the Court of Protection.
- A Code of Practice (the '**Code**') accompanied the MCA. The Code gives guidance and information about how the MCA works in practice.¹⁸
- A new legal right was created – a general authority to act in limited circumstances for an incapacitated person.
- Advance decisions to refuse medical treatment (*'Living Wills'*) were given statutory confirmation.

¹⁴ MCA 2005 schedule 3 paragraphs 11 and 12.

¹⁵ *Mental Capacity (Law Com No.231)* p. 17, citing the *Declaration on the Rights of Mentally Retarded Persons, 1971 UN General Assembly, 26th Session, Resolution 2856, para 6.*

¹⁶ *Mental Capacity (Law Com No.231)*, p. 23.

¹⁷ *Mental Capacity Act Explanatory Notes, para 10*, available at http://www.opsi.gov.uk/ACTS/acts2005/en/ukpgaen_20050009_en.pdf.

¹⁸ *The Code of Practice* is available online at <http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf>.

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The Court of Protection

The Court of Protection is the court in England & Wales which deals with the affairs of those who lack mental capacity. The MCA changed its status and procedures.

The Court can now:

- decide whether a person has capacity to make a particular decision;
- make declarations, decisions or orders involving the finances or welfare of people without capacity;
- decide whether a Lasting Power of Attorney or an Enduring Power of Attorney is valid;
- remove Deputies or Attorneys (who are the people appointed to act as representatives to make decisions for those who lack capacity) who fail to carry out their duties; and
- appoint Deputies.

The Office of the Public Guardian ('OPG')

The Office of the Public Guardian was established in October 2007. Its role is to protect people whose mental incapacity means that they are unable to make decisions.

It supports and supervises Attorneys and Deputies who make decisions on behalf of those who lack mental capacity, and if necessary acts with other organisations to investigate allegations of abuse by Attorneys and Deputies.

It also provides information on mental capacity to the public or professionals who may need it.

Deputies

The preference is to make individual orders in relation to specific types of transaction for those who lack capacity. However, the Court of Protection has the power to appoint a Deputy to make decisions for someone whose lack of capacity to make such decisions is likely to continue in the future. Deputies can be appointed to manage a person's property and affairs. It is also possible for the Court to appoint a personal welfare Deputy in limited cases.

A Deputy must be at least 18 years of age. Paid care workers should not normally act as a Deputy, because of the potential for there to be a conflict of interest.

The Court can appoint two or more Deputies and state whether they could act jointly or jointly and severally or jointly in respect of some matters and jointly and severally in respect of others. The powers and duties of a Deputy will be set out in orders made by the Court. They will be supervised by the OPG.

Enduring Powers of Attorney and Lasting Powers of Attorney

The Enduring Power of Attorney ('EPA') and Lasting Power of Attorney ('LPA') are the documents by which a donor appoints an Attorney to make decisions for him in the event of him losing capacity, but both can be used as normal powers of attorney before the donor loses capacity.

Jurisdiction relating to Enduring Powers of Attorney and Lasting Powers of Attorney

Under Article 15 of the Convention, matters relating to '*powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such an adult is not in a position to protect his or her interests*' are governed by the law of the country where the donor is habitually resident at the time of writing the document. This can be changed, if specified in writing, to the law of the state of which that person is a national, or in which he was formerly habitually resident, or in which that adult's property is located, with respect to that property. The manner in which the power is exercised is governed by the law of the state in which it is exercised.

Thus if a French national was habitually resident in England & Wales at the time of granting a power, by default the law applicable to it would be English law. However, he could specify in writing that he would like French law to be applied, on the basis of his nationality, or former habitual residence. This might be seen as desirable, for instance in the case of a Frenchman working in London for many years who has become habitually resident. Unless otherwise specified, English law will apply, but if his intention is ultimately to return to France, it would be beneficial to apply French law from the outset, in case he unexpectedly loses capacity.

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Interestingly, the Convention only relates to powers of representation to be used when an adult loses capacity. It is not clear in international law what the position is for EPAs and LPAs in so far as they are used when the donor still has capacity. One view is that the power would be divisible, so that the Convention would apply after the donor has lost capacity, and the *Hague Convention of 14 March 1978 on the Law Applicable to Agency* would apply beforehand.¹⁹

Enduring Powers of Attorney

Enduring Powers of Attorney, introduced in 1985, were the first English power of attorney which could continue to be used once the donor had lost capacity.

Since 1 October 2007, it has no longer been possible to create new EPAs, but existing EPAs, both registered and unregistered, remain valid. They are therefore still in use, and will be for many years to come.

When an Attorney believes that the donor is or is becoming mentally incapable, the Attorney is under a duty to register the EPA with the OPG. On that basis the Attorney is entitled to continue to use the EPA. When a decision is made to inform the OPG of an intention to register the power, the Attorney must notify the donor and specified relatives.

However, there are problems with EPAs. Notably, there are limited safeguards against abuse. They are restricted to property and financial affairs and so there is no possibility of using them for personal welfare decisions.

Lasting Powers of Attorney

Since 1 October 2007, it has no longer been possible to create an Enduring Power of Attorney. Instead a new power of attorney, the Lasting Power of Attorney, was introduced.

An LPA can be in one of two forms:

- a property and affairs LPA (which deals with financial matters and effectively replaces an EPA), and
- a personal welfare LPA (which covers decisions concerning personal welfare and healthcare).

An LPA must be produced in the prescribed form.²⁰ It must be signed by the donor, the Attorney(s) and at least one certificate provider (see below).

More than one Attorney may be appointed. They may be appointed jointly, jointly and severally, or a mixture of jointly and jointly and severally for different types of decision.

The donor can restrict an Attorney's powers, and can also give an Attorney non-binding guidance as to how to use those powers.

As with an EPA, Attorneys can make gifts in certain limited circumstances.

The donor may (but does not have to) name up to 5 people whom they wish to be notified when the LPA is registered. Unlike EPAs, the named persons do not have to be related to the donor.

At least one certificate provider is required for a valid LPA. A certificate provider is one of the key new safeguards of the LPA regime. The certificate provider's role is one of scrutiny to confirm that the donor fully understands the document he is signing. A certificate provider can either be someone who has known the donor personally for at least two years or a person with relevant professional skills and expertise including healthcare professionals and legal professionals. Some people cannot be certificate providers, importantly the Attorney and relatives of the donor or the Attorney.

An LPA is not valid until it has been registered with the OPG. This process involves notifying the notifiable persons and the donor and Attorneys and takes around six weeks. A registered LPA is immediately recognisable as it is stamped by the OPG on all pages.

Lasting Power of Attorney – Property and Affairs

This is effectively a replacement for an EPA. Attorneys acting under a property and affairs LPA can make decisions about financial and property matters.

Paragraph 7.36 of the Code gives a list of the kinds of decisions which an Attorney would be able to make (although the donor may exclude some of these). These might include:

- buying or selling property;
- opening, closing or operating any bank, building society or other account;
- giving access to the donor's financial information;
- claiming, receiving and using benefits, pensions, allowances and rebates on the donor's behalf;
- receiving any income, inheritance or other entitlement on behalf of the donor;

¹⁹ *Convention of 13 January 2000 on the International Protection of Adults, Explanatory Report by Paul Lagarde, paragraph 97*

²⁰ *The prescribed form is set out in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007/1253).*

continued:

- dealing with the donor's tax affairs;
- paying the donor's mortgage, rent and household expenses;
- insuring, maintaining and repairing the donor's property;
- investing the donor's savings;
- making limited gifts on the donor's behalf;
- paying for private medical care and residential care or nursing fees or applying for entitlement to NHS care;
- using the donor's money to buy a vehicle or any other equipment for other help they need;
- repaying interest and capital on any loan taken out by the donor.

Lasting Power of Attorney – Personal Welfare

A Lasting Power of Attorney Personal Welfare is a new document which had no previous equivalent in English law.

Under this kind of LPA, Attorneys can make decisions about the donor's personal welfare. This includes a wide range of matters. Although there is no definition of the term in the MCA it would include:

- determining where a person should live and with whom they should live;
- day to day care including diet and dress;
- who the person may have contact with;
- consenting to or refusing medical examination or treatment on a person's behalf;
- arrangements needed for a person to be given medical, dental or optical treatment;
- assessment for, and the provision of, community care services;
- social, leisure activities, education and training;
- rights of access to personal information;
- complaints about care and treatment.

What personal welfare decisions are excluded?

Some decisions which might be characterised as personal welfare decisions are specifically excluded. These are:

- The treatment of the mental disorder of a patient detained under the Mental Health Act 1983
- Family relationships, including consenting to marriage, civil partnership, sexual relations, divorce, dissolution of marriage or civil partnership, and placing a child for adoption
- Voting rights

The MCA also does not apply to adults who are vulnerable, but who nonetheless still have capacity.

How capacity is now assessed in England & Wales – a blend of common law and statute

How does the law define capacity and incapacity?

(a) Capacity

*'... means someone's ability to do something and, in a legal context, it refers to a person's ability to perform a specific juristic act, such as making a will, a gift, a contract., or generally being able to manage his or her property and affairs.'*²¹

(b) Incapacity

*'... the inability to enter into a transaction, is either imposed by the law for policy reasons or arises by reason of mental disorder. ... Nowadays, incapacity by operation of the law applies principally to children, the underlying policy being that they need to be protected from their own inexperience and imprudence and from the rapacity of others. Similar considerations apply in the case of mentally disabled adults.'*²²

Determining capacity in the legal context

Usually it is the doctor's function to assess capacity and the lawyer's to decide if it is established or not. The determination of whether a person is mentally capable or not is a judicial function; doctors are expert witnesses who provide the court with the evidence it needs to decide.

²¹ Lush *Elderly Clients: A Precedent Manual Jordans 1996*, p53.

²² *Ibid.*

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Capacity under the Mental Capacity Act 2005

The MCA is based on five statutory principles, which are set out in section 1 MCA:

- (a) A person must be assumed to have capacity unless it is established that he lacks it.
- (b) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (c) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (d) An act done or decision made under the MCA for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (e) Before the act is done or decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Some considerations of capacity in common law

Common law tests of capacity still exist alongside the MCA, and provide further guidance, for instance as to levels of capacity required in particular circumstances.

(a) *Re Beaney deceased*

The principal common law test in relation to assessing capacity to make a lifetime gift is set out in a case known as *Re Beaney deceased* [1978].²³ The case concerned a lifetime gift of the individual's principal asset, her home, to her eldest daughter. Mrs Beaney suffered from advanced dementia and a few days after being admitted to hospital she signed a deed of gift transferring her home to her daughter who had cared for her for a number of years. The following year she died intestate leaving few assets to be divided between her three children. Her younger children applied for a declaration to have the gift set aside on the basis of her mental incapability to make the gift at the relevant time.

It was held that the level of understanding required depends on the type of transaction. For a lifetime gift, if it is a small gift which is trivial in relation to the person's other assets, a low level of understanding is needed. However, if the gift disposes of the person's only valuable asset, and therefore pre-empts the succession of the estate, then the person needs as much understanding as if they were signing a will.

The degree of understanding is therefore:

- Subjectively assessed, and
- Function-specific in that it will vary according to the transaction concerned.

The Judge held that Mrs Beaney's dementia was very advanced and it was therefore impossible for her to have a lucid interval. She was not capable of understanding that she was making an absolute gift of property and accordingly the deed of gift was set aside.

(b) *Masterman-Lister v Brutton & Co (1&2)*[2002]²⁴ and the subjective approach

The case addresses whether a person was a patient for the purposes of conducting litigation (meaning someone unable to manage or administer his property and affairs by reason of mental disorder).

The Court of Appeal held that, for the purposes of conducting legal proceedings, the test of capacity to be applied is whether a party is capable of understanding, with the assistance of such explanation from legal experts and others as the matter might require, the issues on which his consent or decision is likely to be necessary in the course of the proceedings.

Decisions made on behalf of those who have lost capacity

Statutory Wills and other decisions taken by the Court of Protection

Section 16 MCA 2005 gives the court wide powers to make an order concerning a person who lacks capacity. That person is defined as 'P' (previously one referred to 'the patient' but that is no longer acceptable terminology because someone, P, may lack capacity in relation to one transaction but not in relation to other types of transaction):

"s.16(2) The court may –

- a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
- b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters."

²³ 1 WLR 770.

²⁴ EWCA Civ 1889.

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The court's power to make decisions in relation to P's property and affairs extends expressly to authorising:

- a gift of P's property;
- the settlement of P's property ; and
- the execution for P of a Will.

If the Court of Protection authorises the execution of a Will that document is known as a statutory will.

The test for capacity is time and function specific:

*"s.2(1) For the purposes of this Act, a person lacks capacity in relation to a matter if **at the material time** he is unable to make a decision for himself **in relation to the matter** because of an impairment of, or a disturbance in the functioning of, the mind or brain."*

"s.3(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable –

- a) to understand the information relevant to the decision,*
- b) to retain the information,*
- c) to use or weigh that information as part of the process of making the decision, or*
- d) to communicate his decision (whether by talking, using sign language or any other means)."*

There are 5 core principles to be applied by the Court of Protection in determining whether a statutory will may be made:

- the assumption that P is having a brief lucid interval at the time when the will was made;
- during that lucid interval it is to be assumed that P has full knowledge of the past and will realise that as soon as the will is executed he will relapse back into his actual mental state with his actual prognosis;
- P and not a hypothetical person has to be considered. Therefore, P's particular antipathies or deep affections for a particular person or cause must be considered;
- P must be assumed to be acting reasonably and must be assumed to be being advised by a competent solicitor; and
- the approach of P is "broad brush" rather than an "accountant's pen".

Impact of 'best interests' test

Section 1(5) MCA 2005 states that any act done, or decision made, for or on behalf of the person who lacks capacity must be done, or made, in his best interests.

Section 4 MCA 2005 stipulates that determining a person's best interests is done not merely on the basis of the person's age or appearance or condition or aspect of behaviour which might lead to unjustified assumptions about what might be in his best interests. Instead, all relevant circumstances must be considered and, in particular, the person making the determination must consider:

- a) whether it is likely that P will at some time have capacity in relation to the matter in question; and*
- b) if it appears likely that he will, when that is likely to.*

There is an obligation to permit and encourage P to participate as fully as possible as far as is reasonably practicable. Therefore, it may be appropriate at some point during an application for someone to visit P.

P's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity), the beliefs and values that would be likely to influence his decision if he had capacity, and the other factors that he would be likely to consider if he were able to do so must be considered.

The applicant must take into account, if it is practicable and appropriate to consult them, the views of:

- a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*
- b) anyone engaged in care of the person or interested in his welfare,*
- c) any donee of a Lasting Power of Attorney granted by the person, and*
- d) any deputy appointed for the person by the Court (s.4(7) MCA 2005).*

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