

CROSS-BORDER INCAPACITY:



DEALING WITH A LACK OF COHESION BETWEEN JURISDICTIONS

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Navigating the sensitivities of a client who has lost capacity is difficult even in a relatively straightforward case. Matters become far more complicated in circumstances where multiple jurisdictions are involved.

Unfortunately, there is a lack of cohesion between how many jurisdictions deal with capacity. This means that you could be faced with a scenario where provisions put in place in one jurisdiction are not recognised in another resulting in an attorney being left unable to deal with assets in that jurisdiction. As the global population continues to age this issue is only likely to arise more regularly in practice.

Position in England and Wales

The relevant legislation for establishing whether or not a person has capacity to make particular decisions in England and Wales is the Mental Capacity Act 2005. There are effectively two ways to deal with an individual who has lost capacity to manage their affairs in England.

1. A Lasting Power of Attorney (LPA).

These are split into an LPA for property and financial affairs and an LPA for health and welfare.

A person needs to have the requisite capacity in order to execute an LPA. Therefore it requires advanced planning to ensure that an LPA is in place before a client loses capacity. It is by no means an easy conversation to have as no individual really wants to consider a scenario where they can no longer make decisions for themselves. However, an LPA offers significant advantages over a court order (as discussed below). The donor will have the opportunity to choose their attorneys and set out the scope of the LPA. As discussed in further detail below having the conversation in advance also offers the opportunity to consider how to deal with all of an individual's worldwide assets.

In contrast if no action until an individual loses capacity all decisions, including the identity of their attorneys, will be taken for them via the Court of Protection.



2. Deputyship

If an individual loses capacity and an LPA is not in place then an application will need to be made to the Court of Protection to appoint a Deputy to act on behalf of that individual. A Deputy, once appointed, has similar powers to that of an Attorney appointed under an LPA. However, it is worth noting that the procedure is far more complex and costly than implementing an LPA. Further expenses and complexities can arise in circumstances where there is a dispute between those wishing to take control of the individual's financial affairs.

International scope

The Hague Convention on International Protection of Adults (the "Convention") came into force on 1 January 2009. The idea behind this convention was to set out a cohesive set of rules that apply to all convention countries. This means that an attorney appointed in one Convention member state should be able to act on that individual's behalf in relation to assets located in another member state. The Convention should therefore offer a solution to the cross-border issue. Unfortunately, while the UK has signed the convention, only Scotland has ratified it.

So where does this leave an individual who has lost capacity in England?

The key areas the Court of Protection has jurisdiction over are:

1. Property owned by an adult located in England;
2. An adult habitually resident in England regardless of where their property is located; and
3. An adult present in England.

In addition, the High Court, but not the Court of Protection has jurisdiction to take protective steps in relation to British nationals outside England.

When seeking to establish whether or not an attorney has power over an individual's assets outside England, it will be necessary to look at the local laws of that jurisdiction. These issues can be considered and local legal advice taken at the time an LPA is being put in place. For some jurisdictions it may be possible to just add particular wording to the LPA in order to ensure it is recognised there. For others it may be necessary to put in place a completely separate power of attorney or equivalent. In circumstances where a deputy is being put in place, the process is likely to be far more complex and could involve multiple court applications in different jurisdictions.

Position in offshore jurisdictions

Some offshore jurisdictions have recently updated their capacity laws and recognise LPAs for example:

1. **Jersey: The Capacity and Self Determination (Jersey) Law 2016 which came into effect on 1 October 2018 which means it is now possible for a Jersey resident to grant an LPA.**
2. **Guernsey: The Capacity (Baliwick of Guernsey) Law, 2020 which is about to come into force. This law also introduces LPAs and is many of its provisions are similar to the Mental Capacity Act 2005.**

These changes mean it should be relatively easy for a person to enter into a LPA which is compatible in both England and these jurisdictions, although local legal advice will need to be taken.

However, in relation to other jurisdictions it is likely to be more complex and there may be circumstances where separate arrangements need to be made in different jurisdictions.

Conclusion

This area would be made far more straightforward if England was to ratify the Convention. This would mean that the issues of cross-border incompatibility would be resolved in relation to a significant number of jurisdictions.

At present, however the best approach is to consider this issue at an early stage not after individual has lost capacity. Not only will this allow the individual to have input into the provisions being put in place but it will allow their advisors to consider the full extent of their foreign assets and pre-empt any issues of incompatibility between jurisdictions.

