

Incapacitated Adults – English and French Perspectives

Introduction

As clients look to own property in foreign markets, practitioners are faced with an ever increasing numbers of clients with international connections. This article examines the issues faced when a client lacks the mental capacity to manage their own property and affairs. In particular, it focuses on circumstances when an English national owns property in France, and the incapacitated adult (hereafter, 'the adult') wishes to dispose of that property.

Practitioners may also be required to advise where a client has taken up permanent residency in France. The second part of the article will look at this issue.

At the outset, it will be necessary to establish the personal law of the adult as this will prescribe the formalities enabling a sale or a division of immovable property in France.

Scenario 1: British nationals who own property in France

Where a British national domiciled in England and Wales, owns or co-owns property in France, then the personal law of that adult will be English law. The English Court of Protection is the body which has jurisdiction if an adult lacks the mental capacity to manage their own finances/affairs.

In a situation where a person has previously appointed an attorney or attorneys pursuant to an Enduring Power of Attorney ('EPA'), then once the person is becoming or has become mentally incapable of managing their own finances and affairs, the attorney(s) have a duty to register the EPA with the Court of Protection. However, even if an attorney has registered the EPA with the Court, s/he *cannot* dispose of that adult's foreign property without first approaching the Court of Protection. Similarly, where a Receiver has been appointed by the Court for an adult, s/he must also seek the Court's authority before acting.

The relevant applicant (usually, the attorney or Receiver) must apply to the Court of Protection for authority to grant a power of attorney in French form to be signed by his/her Receiver/ Attorney to enable the sale/gift of the property in France to take place.

The application will need to be supported by medical evidence of the fact that the adult is incapable by reason of mental disorder of managing and administering his/her property and affairs.

The Court will require details of the land to be sold (e.g. freehold/co-ownership, title number, property value), what the beneficial interest of the adult is in the property, the details of any other beneficial owners or anyone else who has an interest in the property.

The application should be made at the earliest possible opportunity, when it has been decided to dispose of the property, as an application will normally take at least six weeks to be considered by the Court. Care should be taken to work sufficiently in advance with the French Notaire to ensure that there are no penalties involved in respect of the French sale contract if there is an imminent completion date. This can arise where for instance a husband or wife has signed a sale contract on behalf of themselves and their spouse and it is only nearing completion that the difficulty of obtaining a valid signature on the sale deed on behalf of the spouse subject to a measure of protection in the UK is discovered.

The costs of the property disposal are therefore threefold: (a) the cost of instructing English solicitors to make an application to the Court of Protection; (b) the application fee; and (c) the costs of the French Notaire.

It should be noted that a notarially certified translation of the Court Order authorising the appointment of an attorney will be required.

From October 2007, the application process may change due to the effect of the *Mental Capacity Act 2005*. Moreover, a new system of agency, known as Lasting Powers of Attorney, will be introduced by that Act. Similarly, Receivers will be replaced by persons to be known as Deputies.

Scenario 2: French permanent residency/UK nationals

In France, according to the principles set out in Article 3, paragraph 3 of the civil code, the rules which govern the protection of the person suffering from an incapacity depend on that person's personal law. It is the personal law of the adult to be protected which determine the regime of protection and the rules related to the supervision of his or her affairs.

Where a measure of protection is required for an adult who is resident in France on a permanent basis and where no measure of protection exists already in the UK, the position is more complex. Under French territorial rules, the jurisdiction which will have competence will be that of the "domicile" of the person to be protected. Where a British national is *domiciled* in France as defined under French law (equivalent to permanent residency in France), the French Judge (*Juges des Tutelles*) will be competent to bring in a measure of protection. An application to the French Court may be made and the procedure to be followed will depend on the *lex fori* (France). But it is the foreign national's personal law which will have to be applied. This presents numerous difficulties for the French Court and the Cour de Cassation has stated in Jurisprudence that the French Courts can have recourse to the measures of protection available according to French law if there is urgency and there is an absence of legal protection in force already effected under the personal law.

In France there are different levels of protection, which can be instituted depending on the individual case. These in general can be divided into cases where assistance is required and those where full representation is required:

La sauvegarde de justice:

This is the lowest level of protection, which is used, where a person requires a temporary legal protection or to be represented for the carrying out of certain specific acts. It can only last 2 months and **is** renewable for another 6 months upon medical request.¹ The adult

¹ The Loi du 5 mars 2007 will provide the *sauvegarde de justice* can only last for a period of one year renewable only once

conserves in principle his or her civil capacity, but any acts, which he passes, can under certain conditions, be rescinded where these appear to be excessive.

La Curatelle:

This might be thought of as the middle stage of protection and it is opened in principle for a maximum period of five years for the benefit of a person, who whilst not being unable to act for himself, needs to be assisted or controlled in a continuous manner in the important acts of his or her day-to-day life, due to an alteration of his or her personal faculties.

The person concerned can in principle carry out certain tasks, e.g. signing of a Will and administration. However, the assistance of his or her *curateur* (the nominated appointee) will be required for the most serious acts, for instance, a disposal.

Flexibility is introduced so that the Judge can moderate the capacity of the protected person by increasing or diminishing his or her capacity according to the circumstances.

La Tutelle:

This is the most complete form of protection and it is a question now of agency rather than assistance. The protected person needs to be represented in a continuous manner for all the day-to-day living tasks. The nomination of the *Tuteur* (the Receiver) will be mentioned in the margin of the birth certificate of the protected person, so as to provide notice to third parties.

The *Tuteur* will either act alone or depending on the circumstances, with the authorisation of the Judge (*Juges des Tutelles*). A *Conseil de famille* (family council) can be set up to provide advice and assistance and the *Tuteur* will act after authorisation from the council in many instances.

Case study:

Mrs. X, British national, who had been living in France for 10 years, was diagnosed with Alzheimer's disease. Her medical condition had deteriorated gradually over the years and Mrs X. found herself no longer capable of dealing with her day-to-day transactions (i.e. payment of the bills, managing a bank account etc). A measure of protection was found to be inexistent in France and therefore a system was set up as a matter of urgency.

The French judge of guardianship put in place a measure of protection for Mrs. X in accordance with her level of incapacity.

Mrs. X. was placed under managed guardianship. The Judge took into consideration the composition of the assets to be managed and considered it unnecessary to establish a complete guardianship at this stage. Mrs. X. had to be continuously represented for most but not all civil transactions (managing a bank account, payment of bills, signing contract etc.)

Taking into account the nature of the assets to be protected and where no member of the family could have been appointed, the Judge appointed an employee of the health authority as *gérant de tutelle* (guardian). The *gérant de tutelle* was responsible for drawing up an inventory of the assets of the protected person and for producing accounts to the Judge once a year.

Avoiding the problem for the future, the new EPA for France – “*Mandat de protection future*” (MPF)

Until very recently these were the only legal measures available when a person was suffering from incapacity. However, the law of 5 March 2007² saw the introduction of the *Mandat de Protection future* (the mandate for future protection), equivalent to a sort of Enduring Power of Attorney which has been long awaited. This means that it will be possible to sign a power appointing a representative to act, should the person be unable to look after his or her interests alone by reason of an alteration to his/her mental faculties.

The form of the mandate will vary depending on the use to be made in the future, e.g., a sale of an asset would need a *Mandat de Protection future* (MPF) signed through a notarial deed. A simple power signed under hand would be limited to day-to-day management issues.

It is possible for a power to be signed at the present time, but it will only be able to take effect from 1 January 2009. The MPF is an important step forward for France designed to widen the mechanisms available due to the increasing number of adults subject to a measure of protection. For clients owning property in France, it may be advisable in certain circumstances for them to set up an MPF to avoid the need for proceedings in the future, should issues of incapacity become relevant.

In practice, it is not unusual to find a dual measure of protection being introduced, involving the two parallel regimes. This can arise when, for instance, an Enduring Power of Attorney is registered after the adult becomes resident in France enabling the English assets to be administered. If it subsequently becomes apparent that a measure is required to ensure the day to day bills are managed in France, then the French Judge can make an order for a measure under French law to be introduced. Whilst the system can work in practice, it is not sustainable on legal principles. The Hague Convention on the protection of adults of 13 January 2000 (when in force) is designed to provide a solution to problems such as this and the many other difficulties experienced in practice.

Hague Convention on the protection of adults of 13 January 2000

The Mental Capacity Act 2005 (effective from October 2007) substantially clarifies the position in relation to incapable adults with international connections, due to the fact that it is intended to give effect to the Hague Convention on the International Protection of Adults ('the Convention'). Section 63 of the *Mental Capacity Act 2005* states that Schedule 3 of that Act gives effect to the Convention in England and Wales. Scotland has already ratified the Convention.

The Convention sets out the private international law rules governing the protection of incapable adults. The purpose of the Convention is to set out rules among the contracting countries for determining which country's court/authorities have jurisdiction and which country's law applies, in situations involving incapable adults who have connections with more than one country. The Convention is therefore concerned with jurisdiction, rather than the prescription of individual country member's laws. The general premise under the Convention is that the law of the country where the incapable person habitually resides will prevail. There are, of course, exceptions to this.

Schedule 3 of the *Mental Capacity Act 2005* determines which jurisdiction should apply when a national of one country is in another. The Act can only apply to an 'adult', i.e., a person of 16 years or over who, 'as a result of an impairment or insufficiency of his personal

² Effective from 1 January 2009

faculties, cannot protect his interests'.³ Part 2 of Schedule 3 sets out the grounds upon which the Court of Protection can exercise its jurisdiction under the Act when dealing with an adult who has international connections. Paragraph 7(1) provides that the Court may exercise its jurisdiction in relation to:

- (a) an adult habitually resident in England and Wales,
- (b) an adult's property in England and Wales,
- (c) an adult person 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.'

Whilst the Court will ordinarily apply the laws of England and Wales, it may apply the law of another country 'if it thinks that the matter has a substantial connection' with another country.⁴ So, for instance, French law could be applied where the Court felt that the matter had a substantial connection with that country.

Whilst France and the United Kingdom are signatories to the Convention, the Convention needs to be ratified by three member states before it comes into force. Thus far, Germany has ratified the Convention, therefore, it will require two further member states to ratify the Convention before it will come into force. Some parts of Schedule 3 will not be effective until the Convention has come into force.⁵

Conclusion

Due to the increase in numbers of British nationals owning property in France, practitioners are now facing multi-jurisdictional issues. This is further complicated when the client does not have the mental capacity to manage their own finances and affairs or even instruct the practitioner. These issues need to be addressed at an early stage to avoid complication and penalties for non-compliance with property completion dates.

For more information please contact:

Dawn Alderson

Partner
020 8394 6373
Dawn.Alderson@russell-cooke.co.uk

Patrick Delas

Solicitor
020 8394 6387
Patrick.Delas@russell-cooke.co.uk

Veronique Cardon

Solicitor
020 8394 6355
Veronique.Cardon@russell-cooke.co.uk

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³ Paragraph 4, Part 1, Schedule 3, *Mental Capacity Act 2005*.

⁴ Paragraph 11, Part 3, Schedule 3, *Mental Capacity Act 2005*.

⁵ Paragraph 35 of Schedule 3 makes it clear that certain paragraphs in the Schedule will only have effect if the Convention is in force in accordance with Article 57.