

Private client news - spring edition: Lasting powers of attorney and Brexit - brakes on?

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Whether an England and Wales Lasting or Enduring Power of Attorney for Property and Financial Affairs (EPA or LPA) can be used to deal with the assets of the maker outside England and Wales is a complex subject. Will one jurisdiction recognise or enforce a valid LPA and, if so, in what circumstances? What happens if the maker of the LPA no longer has mental capacity to deal with their foreign assets? Is the LPA or EPA of any use? The problem is increasingly making itself felt as both international ownership and dementia grow.

Hague Convention XXXV of 13 January 2000 on the International Protection of Adults ought to provide straightforward solutions to this kind of cross-border mental capacity conundrum. The idea was for there to be an easy-to-operate mutual recognition system – if the document was valid in the country of the habitual residence of its maker, that country would issue a certificate to say so – which would be accepted by the country where the document was to be used. Simple. All it needed was for countries to sign up to the Convention and ratify it, and for the terms of the Convention to be wide enough to cover all the documents which might need to be used in this way. Not so simple.

Some countries have signed up and ratified – France, Germany and Austria for example – but not that many. Within the UK only Scotland has ratified it; England and Wales have not and the ‘sticking plaster’ provided by Schedule 3 Mental Capacity Act 2005 (which sought to provide some kind of interim solution until we did ratify) is not wholly satisfactory. No country outside Europe has ratified.

The second problem is possibly worse. Although it is absolutely clear that orders of the English Court of Protection would be covered by the Convention’s recognition system if we do get round to ratifying, it is not clear if LPAs and EPAs are.

Leaving this aside, however, the best hope of moving towards achieving something akin to an international LPA (which would be highly desirable) is for more countries to sign up and ratify... and here is where Brexit may come in. Discussions about ratification by England and Wales have been going on in Europe for some time, but with our leaving the European Union, it does not seem likely that there will be appetite to ratify the Convention. Such modest momentum towards ratification as has been generated to date is likely to hit the buffers.

For the time being, therefore, it must be best to take advice wherever it is likely that a power of attorney will be needed and, if necessary, to create a separate power under the relevant local rules.

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