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Pending Hague Convention on Protection of Incapacitated Adults

The adoption and ratification of the proposed Hague Convention on the Protection of Incapacitated Adults will provide an expeditious and certain means of solving international problems involving the disabled and the elderly. This article looks at some of the issues addressed by the convention and at the complex process involved in its creation and execution.

By Russell E. Carlisle

The pending Hague Convention on Incapacitated Adults shows promise in resolving some of the more difficult issues presented in international situations. As its full title, "Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of the Protection of Adults" implies, the convention once adopted and ratified will provide a mechanism for

the recognition and enforcement of documents, such as powers of attorney, appointing representatives to act on behalf of incapacitated adults in countries other than their place of execution, as well as the recognition and enforcement of decrees of courts and administrative agencies establishing protective regimes on behalf of incapacitated adults in other jurisdictions.

The Need for Internationally Recognized Standards

At present, such documents, appointed representatives, and decrees of courts in foreign jurisdictions are recognized only on the basis of the doctrine of comity. Comity is the recognition that one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of persons under the protection of its laws. Such recognition is given out of deference and respect, not obligation.¹ Comity applies only to the final judgments of the courts of foreign countries subject to due process and notice requirements and not necessarily to judgments that are interlocutory in nature as is often the case in guardianship or conservatorship matters.²

Sally Hurme of the American Association of Retired Persons relates the case of "Margery" in the September/October 1997 issue of *Elder Law Forum*. Margery felt threatened by her children in the United States who wanted to establish a guardianship and place her in a nursing home. Hence, she returned to her native Greece only to find that her children that live there have the same idea. Guardianship proceedings were instituted in both places. The legal questions are numerous and complicated by the competing jurisdictions. Under the proposed Convention on Incapacitated Adults

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the two most important issues—the definition of capacity and the definition of jurisdiction—are dealt with. Article 1, Section 1, states the purpose of the convention and defines a protected adult as “one, who, by reason of an impairment or insufficiency of their personal faculties is not in a position to protect their interests.” Article 5, Section 1, places jurisdiction under the judicial or administrative authorities of the contracting state of “habitual residence” except in the case of emergency (Article 10) or in the case that the incapacitated adult has real property in a contracting state (Article 9). While habitual residence is not defined, it is a concept carried over from the Hague Convention on the Protection of Children adopted in 1996,³ where it is the primary basis of jurisdiction.

An actual case of conflicting guardianship jurisdiction between two countries arose in the case of *In Re Guardianship of Walpole*.⁴ In that case, Brian David Walpole, an incapacitated adult, returned to his native United Kingdom after the death of his mother in an automobile accident in which he was also injured. He had previously had a guardianship in Broward County, Florida. Walpole was also the beneficiary of his mother’s testamentary trust, that had a situs in Broward County, Florida. The guardianship received additional funds from the settlement of the accident case. First Union National Bank was the successor guardian of the property and also trustee.

The ward’s affairs in the United Kingdom were administered by a public trustee. The public trustee brought an action in Florida to terminate the guardianship and transfer the assets to the United Kingdom. The probate judge denied the petition and was affirmed on appeal on the grounds that he had acted within his discretion as a probate judge.

The Convention on Protection of Incapacitated Adults, if adopted and ratified by both countries, would eliminate the need for and the expense of such action, as well as provide for a solution. While there were no court proceedings in Florida regarding the change of the ward’s residence, it seems clear that the ward’s habitual residence under the terms of Article 5, Section 1, was in the United Kingdom after his mother’s death. He was also physically present there and was incapable of returning to the United States. In addition, protective measures were in force in the United Kingdom under Article 3 of the convention, although the

Florida guardianship antedated that proceeding. Thus, under the convention the tribunal in the United Kingdom could have ordered the transfer of the guardianship funds. The order of the United Kingdom tribunal would then be recognized and enforced under the provisions of Articles 21 and 26 of the convention. However, a different result might occur with regard to the testamentary trust, because the convention specifically excludes trusts from its application in Article 4, Paragraph d. This is due to the fact that there is another Hague Convention on Trusts, which has been ratified by the United Kingdom, and is signed, but not yet ratified, by the United States. Thus, there remains a question as to where jurisdiction might lie to change the situs or place of administration of the testamentary trust, as contrasted with changing the terms of the testamentary trust.

Under the headline “Living Will: Intent Undone,” the *New York Times* Travel Section of January 29, 1997 chronicles the unfortunate case of a female U.S. citizen who suffered a heart attack while in Salzburg, Austria. The victim in the story was unable to express her wishes as to care or treatment because of irreversible brain damage. She had in place a living will, a health care power of attorney naming her daughter as her representative, and a “do not resuscitate” order. She was resuscitated and maintained on a ventilator for two weeks, notwithstanding the efforts of her family and their attorneys in Austria to obtain recognition of the advance medical directives. None were accepted by the Austrian institutions. She was returned to the United States by air ambulance. Once in the United States, her life support was removed based on the medical advance directives recognized in the United States. She died four days later.

Article 13, Paragraph 1, of the convention would have avoided this complication because it provides for the law of the habitual residence of the incapacitated adult to be the applicable law as to powers of representation granted by an adult to be exercised when such adult is not in a position to protect her interests. Thus, the law of her state of habitual residence would apply and, assuming that such law gave effect to medical advance directives, would have been recognized by Austria.

However, this resolution is not without its problems even if the Convention on Incapacitated Adults is adopted. The first obstacle is the determi-

nation of capacity, if required, in order to bring the power of representation into force. Article 14 of the convention provides: "Whatever law may be applicable to powers of representation . . . , with regard to the manner of their exercise the law of the State where they are exercised shall be taken into consideration." Thus, if the law of the state of exercise provides that powers of representation terminate in incapacity, specific instructions in powers of representation such as refusal or termination of life support in the event of incurable illness may nevertheless fail.

In discussing the provisions of Article 13 of the convention, Professor Paul Lagarde noted in the Report of the Special Commission for the Convention on the Protection of Adults, at The Hague in September 12, 1997 that "[t]his type of mandate, which seems to be quite common in certain states, particularly in North America, is unknown in a number of European states, including France, where the mandate necessarily comes to an end in the event of onset of incapacity." However, he goes on to state that

[t]he mandate in cases of incapacity, by contrast is governed by Article 13 Paragraph 1 of the preliminary draft, by the law of the state of habitual residence at the time of the agreement or unilateral act (establishing the power of representation). When conferred, even in France, by a French person having his or her habitual residence in New York, it is valid and remains so.

He also suggests that the proper resolution of this problem is for the grantor of the power of representation to designate the law governing the exercise of the power of representation as that person is entitled to do under Article 13, Paragraph 2, of the convention.

The problem of powers of representation containing medical advance directives is the basic unresolved issue in the draft convention. Many civil law jurisdictions lack the concept of consent to medical treatment, which is now fully accepted in the United States as a result of the U.S. Supreme Court decision in *Cruzan v. Missouri Department of Health*⁵ and the Patient Self Determination Act of 1990.⁶ The U.S. delegation to the Hague Conference of Private International Law participating in the Special Commission for the proposed Convention on Incapacitated Adults agree that medical and surgical decisions are among the mea-

sures of protection for incapacitated adults contemplated by the convention. It was agreed at the most recent meeting of the delegation on August 1, 1998, in conjunction with the American Bar Association Annual Meeting in Toronto, that the delegation would seek to add to Article 3 of the draft convention, an additional paragraph: "(i) the determination of law applicable to powers of representation granted by an adult."

This proposed amendment to the pending draft convention, and any other amendments agreed to by the U.S. delegation, will be presented at the next meeting of the Special Commission for the Convention on Incapacitated Adults now scheduled for September 20 through October 1, 1999. This special commission is diplomatic in character and will adopt the final form of the convention for execution and ratification by the member states.

The Hague Conference Procedure

The Hague Conference on Private International Law is an international organization with its head office in The Hague, Netherlands. Its purpose is to identify, propose, draft, and obtain ratification of conventions in private international law problem areas. The basic organization consists of 45 countries each of which contributes financially to the support of the conference. There is a permanent professional staff housed at The Hague to carry on the continuing work of the conference. Non-member countries may participate in the various sessions and deliberations of The Hague Conference. Other international organizations such as the International Bar Association, the bar associations of various countries, and United Nations agencies and organizations often participate as observers in the work of the conference.

The Hague Conference on Private International Law has adopted 34 proposed conventions during its existence. The Convention on the Protection of Children is the most recent. The various subject matters include commercial transactions, protection of the rights of individuals, jurisdiction and procedure, and the recognition of trusts and successions. The Hague Conference on Private International Law operates on a four-year cycle. Any member may propose a convention on a subject deemed to be of interest to one or more other members. Such a proposal is usually accompanied by a report, or "Note," identifying the problems to

be addressed by the proposed convention and the possible solutions and limitations.

Once a convention is proposed, a draft text of the convention is usually referred to a working group consisting of delegates of several member states interested in the subject matter of the proposed conventions. The working group meets, edits, and revises the draft. Next, the draft resulting from the session of the working group is referred to all members for comment. Member states usually invite comment from interested parties in their country or other interested organizations. The comments of interested parties are then submitted to the national delegations of the member states. The delegations in turn present them at a Special Commission of the Hague Conference where other members are present. In this context, the special commission debates the various provisions of the proposed convention and attempts to reach consensus on them.

The Status of This Convention

Such a special commission was held September 3 through 12, 1997, with regard to the proposed Convention on Protection of Incapacitated Adults. The deliberations of the special commission are then submitted to a reporter selected by the delegates of the special commission to place the proposed convention into final form and to prepare a report explaining the draft convention and commenting on the various proposals and how consensus was reached.

The final draft of the proposed convention with its accompanying report is then submitted to the member states, and in turn to the interested parties within those states, for final comment. This is the current status of the proposed Convention on Protection of Incapacitated Adults.

The delegations then return to a Diplomatic Session of the Special Commission of the Conference where final revisions are made and the proposed convention is adopted in final form. The final revision phase for the proposed Convention on the Protection of Incapacitated Adults is set for September 20 through October 1, 1999. Once adopted, the convention is sent to the member states and to all other countries for signature and ratification. The U.S. procedure for ratification is for the President to sign and the Senate to ratify. This procedure varies in other countries. Once signed and ratified, the convention is the law of the

land with the same force and effect as any other treaty.

Implementation usually requires the designation and funding of a "Central Authority" in each member state to receive and send decisions under the convention to other countries. The purpose of a Central Authority in each member state that ratifies the convention is principally to act as a clearinghouse and to facilitate the exchange of information. It is especially appropriate in a federal system, such as the United States, where the law applicable to incapacitated persons is almost exclusively a matter of state law.

With regard to procedural matters, Gloria F. DeHart of San Francisco, chair of the U.S. delegation on the proposed Convention on Incapacitated Adults, stated that the normal procedure would be for the tribunal or agency having jurisdiction in the sending state to send a document or decree for which recognition or enforcement is sought directly to the tribunal or agency having jurisdiction over the person or property affected. It would not go through the Central Authority in either country, although the Central Authority in the receiving country might assist in identifying the proper tribunal or agency.

Using the *Walpole* case as an example, with the assumption that both the United States and the United Kingdom ratified the Convention on Incapacitated Adults, if the court of protection in the United Kingdom entered an order for the support of the ward, which it wanted recognized and enforced by the U.S. guardian of the property, it would send its order first to the First Union Bank as guardian of the property. If enforcement was necessary, the matter would be presented to the probate division of the circuit court in Broward County, Florida. In the reverse case, if the guardian or the Florida court had an order it wanted recognized in the United Kingdom, such as an Order Approving Annual Accounting, it would send the order to be recognized directly to the court of protection in the United Kingdom.

Copies of the proposed Convention on Incapacitated Adults, together with the report by Professor Lagarde, may be obtained from the Private International Law Section of the U.S. Department of State, 2430 E. Street N.W., Washington, D.C. 20037-2800, telephone (202) 776-8425, telefax (202) 776-8482. Comments may be directed to Peter Pfund, Esquire, Special Advisor for Private Inter-

national Law at the State Department, or to Gloria F. DeHart, Chair of the U.S. Delegation and Attorney Advisor International, 50 Fremont Street, Suite 300, San Francisco, CA, 94105, telephone (415) 356-6187, telefax (415) 356-6190.

Endnotes

1. *See* Nahar v. Nahar, 684 S. 2d 225 (Fla. 1995).

2. *See* Restatement (Second) Conflict of Laws §§ 92, 96 (1971); *Cardenas v. Solis*, 570 So. 2d 996 (Fla. 1990).

3. 35 INT'L LEGAL MATERIALS 1399 (1996).

4. 639 S.2d 60 (Fla. 1994).

5. 497 U.S. 261 (1990).

6. 43 U.S.C § 1395 et seq. (1994).