Seminar E:
It's Complicated: Multijurisdictional Incapacity

Saturday, March 22

Speakers:

Stuart C. Bear, Minneapolis, Minnesota
Clare Maurice, London, England
Margaret R. O'Sullivan, Toronto, Ontario, Canada
Tina Wüstemann, Zurich, Switzerland

Stuart C. Bear
Partner
Chestnut Cambronne PA, Minneapolis, Minnesota

Stuart C. Bear is a partner, shareholder, and the President of Chestnut Cambronne PA and holds a national reputation for providing the highest level of succession planning services for individuals and businesses; including single individuals, married couples, domestic partnerships, blended families, and seniors. His practice specializes in wills, trusts, disability planning, powers of attorney, living wills, asset protection, and Medical Assistance planning. A native of Superior, Wisconsin, Stuart received his B.A. Degree from the University of Minnesota, Phi Beta Kappa, and his J.D. Degree from William Mitchell College of Law.

Stuart is distinguished as a fellow of the American College of Trust and Estate Counsel (ACTEC). Its members are elected to the College by demonstrating the highest level of integrity, commitment to the profession, competence and experience as trust and estate counselors. He has also been designated a Minnesota Super Lawyer, as well as one of the Top 40 Estate Planning Lawyers in Minnesota, by Super Lawyers magazine. Stuart is AV rated by Martindale-Hubbell, a testament to his peers ranking him at the highest level of professional excellence.

Stuart is a member of the Minnesota State Bar Association's Elder Law Section serving as past Chair of the Elder Law Governing Council, member of the Probate and Trust Law Section, and member of the Real Estate Section. He is also a current member of The National Academy of Elder Law Attorneys, Inc. (NAELA). Stuart has also been recently elected to membership in The International Academy of Estate and Trust Law (TIAETL). Stuart is a frequent speaker at legal education seminars for attorneys, financial planners, and community organizations, including being a featured speaker at ACTEC and the Heckerling Institute on Estate Planning sponsored by the Miami School of Law on the prevention of the financial exploitation of seniors and selection of the proper fiduciary. He is currently an Adjunct Professor at the University of St. Thomas School of Law, located in Minnesota, where he teaches courses on wills and estates.

Clare Maurice
Senior Partner
Maurice Turnor Gardner, London, England

Clare Maurice is the Senior Partner of Maurice Turnor Gardner, and is recognized as one of the leading figures within the private wealth industry.

As one of the world's foremost private client solicitors, Clare Maurice has an unrivalled profile. Identified as a top-ranked solicitor by Chambers & Partners, the Legal 500, Spear's, Best Lawyers, Who's Who Legal and the Private Client Global Elite to name but a few, Clare's clients benefit from her wealth of experience in advising individuals and families on the tax and structural challenges of global wealth.

In 2011 Clare was elected an International Fellow of the American College of Trust and Estate Counsel. She is also a longstanding Academician of The International Academy of Estate and Trust Law of which she is also a Past President. In 2024 Chambers HNW awarded Clare the Outstanding Contribution award for the year.

Margaret O'Sullivan
Managing Partner
O'Sullivan Estate Lawyers, Toronto, Ontario

Margaret's practice involves all aspects of trust and estate work for domestic and international private clients, including estate planning; will and trust planning; incapacity planning; estate litigation; advising executors, trustees and beneficiaries and administration of estates and trusts, with a focus on high net worth domestic, cross border and multijurisdictional succession issues.

Margaret is recognized in The Best Lawyers in Canada 2024, Legal Week's Private Client Global Elite 2024 representing the top 250 private client lawyers worldwide, in the 2024 Edition of The Canadian Legal Lexpert Directory as one of the most frequently recommended estate planning lawyers and as a thought leader, in The Who's Who Legal: Private Client 2024 and in The Who's Who Legal: Canada 2024.

She is one of nine top-ranked Band 1 private wealth client lawyers in Canada in Chambers High Net Worth 2024 Guide. Her firm was selected as one of the "Top 10 Wills, Trusts and Estates Boutiques" by Canadian Lawyer Magazine for 2023-24. She is the recipient of the 2014 Society of Trust and Estate Practitioners (STEP) Founder's Award for Outstanding Achievement and the Ontario Bar Association's 2013 Award of Excellence in Trusts and Estates Law.

Prior to establishing an independent practice, Margaret was a partner in the Toronto office of the national Canadian law firm Stikeman Elliott where she directed the firm's trusts and estates practice.

She has practiced exclusively in the area of trusts and estates since her call to the bar in 1983.

Tina Wüstemann
Partner
Bär & Karrer, Zurich, Switzerland

Tina Wüstemann co-heads Bär & Karrer's private client department. She has over 25 years of experience in private client matters and is regarded as a leading prac-titioner in this field. She serves as a board member in relation to several charitable organisations, as a member of the advisory board of the Department of Economics, University of Zurich, and as a board member of the ETH Zurich Foundation. Tina Wüstemann is a fellow of the American College of Trust and Estate Counsel (ACTEC), and a member of the Society of Trust and Estate Practitioners (STEP) and the International Academy of Estate and Trust Law (TIAETL).

In Chambers and Partners HNW 2024, Tina Wüstemann is listed in Tier 1 for Private Wealth Law as well as Tier 2 for Family/Matrimonial in Switzerland. In 2022, she was awarded by STEP Private Clients as 'Trusted Advisor of the Year' and by Lex-ology Index (formerly Who's Who Legal) as Private Client Lawyer of the Year 2023 (global) and Lawyer of the Year 2019 (Switzerland). She is listed as Thought Leader in Global Elite 2024 (Private Client), Global Leader 2021 and National Leader Swit-zerland 2021 (Private Client). In 2022, Tina Wüstemann was also awarded the Europe Women in Business Law Award 2022 as 'Best in trusts & estates', marking the sixth time she has received this recognition following 2021, 2020, 2019, 2017 and 2014.

American College of Trust and Estate Counsel

Session E: It's Complicated: Multijurisdictional Incapacity

Saturday, March 22, 2025

8:00 a.m. to 9:30 a.m.

Case Study with Analysis

Scene 1: Meeting with Margaret and Tina Wüstemann at Tina's offices. Tina asks how she can be of help to Margaret and asks for some background information

Margaret:

It was 4:00 a.m. in the morning when I received a phone call from the hospital in St. Moritz, Switzerland. My younger sister, Meredith, had a bad fall while skiing and was semi-conscious with some lucid moments and with multiple fractures. In searching through Meredith's wallet, the hospital found a small card listing me as Meredith's attorney for health and medical care and her contact information.

Meredith and I have always been close, although we have chosen very different paths in life. I became a law professor at the University of Miami School of Law, married, and raised 3 children, while enjoying the sunshine and Florida lifestyle in Coral Gables.

Meredith however has led a peripatetic life. She never married or had children, but there has always been some romance in her life. Meredith's current relationship of six months is with Thor, who told me he is in "private equity" and who recently moved in with Meredith. I have always wondered if "private equity" means Meredith's. He has a lavish, high-flying lifestyle. Meredith graduated from the Wharton, and pursued a career working for several major pharmaceutical companies as a senior executive, and she has lived and worked in the U.K., Switzerland and the U.S. But like me, she is a U.S. citizen, born and raised in Southern Florida, but she currently lives in London, U.K. which she regards as her permanent home (habitual residence) As far as I know, Meredith has left a trail of assets in many places, including I think several bank accounts in Switzerland and her ski condo in St. Moritz, and her flat in Notting Hill in London. And I think she has several large investment accounts and bank accounts in Miami and also some smaller U.K. accounts.

I was stunned by the news from the hospital, so I immediately booked a flight to Zurich. Before leaving, as I am usually very well-organized, I quickly found a copy of the Florida Advance Directive for Health Care (Living Will and Designation of Health Care Surrogate) and as well a Durable General Power of Attorney, which Meredith prepared with a Florida lawyer. She gave a copy to me in case anything happened, and each appoints me as Meredith's sole attorney.

At the Clinic Gut in St. Moritz, I went to the nursing station on Meredith's floor, and I told the nurse that I was Meredith's health care attorney, and I wanted to find out her condition. The clinic told me to speak to Meredith's "spouse" Thor, who they said is in charge of her care. He was just down the hallway on his cell phone playing angry birds. Thor and I exchanged words over who has authority for Meredith, and the upshot is that Thor has now banned me from her hospital room. Before I left the room, Thor told me that the Clinic Gut requires an advance payment for Meredith's further treatment and that I, as a relative, should make it as soon as possible.

I'm jet-lagged and frustrated and decided to immediately get legal advice. As well, I am concerned with how the hospital charges will be paid for. They are extremely high. I'm in no financial situation to help pay for them. So I decided to arrange a meeting with you, since I understand you are a renowned private client lawyer with one of Zurich's leading firms and an office in St. Moritz, which I found on the Internet. What can I do? I'm really stressed out!

Advice from Tina Wüstemann:

1. **Recognition of Florida Health Care Directive and Florida Durable General Power of Attorney in Switzerland**

- Florida Health Care Directive names Margaret as the sole attorney to make medical decisions in case of incapacity of Meredith → equivalent to a Swiss Living Will

- Florida Durable General Power of Attorney allows Margaret as sole attorney to manage Meredith's finances on her behalf, both during lifetime and in case of incapacity of Meredith. A general Power of Attorney under Swiss law expires if the principal loses capacity unless stated otherwise. In the latter case, the competent Swiss Adult Protection authority may appoint a representative if the incapacitated person is unable, at least in principle, to control and supervise the appointed person. If a power of attorney

is to be valid only *after* the onset of incapacity, it is under Swiss law called an Advance Care Directive. → The Florida Durable Power of Attorney is not an equivalent to a Swiss Advance Care Directive but rather akin to a Swiss general power of attorney.

Can Margaret rely on the Florida documents when dealing with the Swiss Clinic Gut and/or the Swiss banks?

- Whether or not the Florida documents are valid and recognized in Switzerland is determined in accordance with the the Hague Convention on the International Protection of Adults of 13 January 2000 (HCIPA) and the Swiss Private International Law Act (PILA).

- Validity of Florida Health Care Directive**:** U.S. has not joined the HCIPA and the UK only ratified it for Scotland. Switzerland applies HCIPA also to non-signatory states. Therefore, HCIPA is applicable to the Florida Health Care Directive. The existence, extent, modification and extinction of powers of representation within the meaning of the HCIPA (i.e. the Florida Health Care Directive) are governed by the law of the state of the adult's habitual residence at the time of the agreement or act. → The validity of the Florida Health Care Directive is a question of Florida law, assuming that Meredith was still living in the U.S. when she drew up the document.

- Validity of Florida Durable Power of Attorney**:** Unclear whether the Florida Durable Power of Attorney is covered by the HCIPA after the onset of the person's incapacity, or whether it is not covered by the HCIPA but rather by the Swiss conflict of law provisions under the PILA. If the HCIPA is applicable, Florida law is decisive. If not, under the provisions of the PILA, the applicable law to determine the validity of the Florida Durable Power of Attorney would be the law in which the appointed person – here Margaret – has her habitual residence. Therefore, Florida law is applicable under both the HCIPA and the PILA as to whether the Florida Durable General Power of Attorney is valid.

2. Exercise of Powers set out in the Florida Health Care Directive and Florida Durable Power of Attorney in Switzerland

- Pursuant to Art. 15 para. 3 HCIPA, the manner in which powers of representations are exercised is governed by the law of the state in which they are exercised.

- Florida Health Care Directive: The question of how and whether the Swiss hospital must involve Margaret to make medical decisions for Meredith is considered as 'manner of exercise' under the HCIPA and thus a question of Swiss law.

- Florida Durable General Power of Attorney: It is unclear in Swiss doctrine whether the exercise of a foreign Durable General Power of Attorney is governed by HCIPA or the provisions of the Swiss PILA. Both under the HCIPA and the provisions of the PILA, however, Swiss law is applicable.

3. What are Margaret's rights to information about Meredith's health?

- Standard Swiss Living Wills release doctors explicitly from medical confidentiality, allowing them to give medical information to the representative.
  If no such clause exists, the doctors must still provide the representative with all relevant information about the proposed medical treatment (informed consent).
  →As Swiss law applies to this question, and assuming that the Florida Health Care Directive is valid under Florida law, Margaret is entitled to information about Meredith's health by virtue of her status as a sole attorney for health and medical care.

The Swiss clinic nevertheless claims that Thor is in charge of Meredith's care. Does Thor have a right of information?

- Under Swiss domestic law, cohabitation partners have a statutory right of information under certain circumstances but questionable whether applicable in international cases. HCIPA applies to statutory information rights but is silent on applicable law. PILA contains no provisions on non-marital unions and hence not clear which law applies.

→European Law Institute suggested to European Commission in relation to the HCIPA that statutory representation rights should be governed by the law of the state in which the adult concerned has his or her habitual residence at the time when the powers are exercised. The PILA (applicable law on marriage), similarly provides that "[T]the effects of marriage are governed by the law of the state in which the spouses are domiciled." This could be applied in analogy in case of partners who are not married. → UK law would be applicable as to whether Thor has information rights, as both Thor and Meredith live in London.

Assuming Thor has a right of information under U.K. law → Question of priority: Margaret or Thor?

- Under Swiss law: person appointed by a Living Will has priority over persons who have a statutory right of representation. Applicable law on question of priority of representation in international cases: controversial and no case law (doctrine in favor of law governing representation, i.e. Florida law in the present case). Recommended to assess the situation under Swiss, U.S. (Florida) and English law. → Under Swiss law Margaret would have priority over Thor in making medical decisions for Meredith.

4. What if Swiss Clinic continues to refuse to provide Margaret information?

- In practice: Margaret should hire a lawyer to contact ombudsman service at hospital (Clinic Gut: Quality Management). If problem not resolved, in public hospital: ask for a reasoned decision. Not possible in private hospital (Clinic Gut → private clinic)

- Alternative: Margaret as closely related person to Meredith should contact competent adult protection authority near St. Moritz, complaining that Florida Health Care Directive is not accepted by Clinic in St. Moritz and ask for instructions/sanctions. Competent authority would be however generally the U.K. as the place of residence of Meredith (art. 5 para. 1 HCIPA). But: in case of urgency (art. 10 para. 1 HCIPA / Art. 85 para. 3 PILA) → emergency jurisdiction of Swiss adult protection authority to issue instructions if relief sought from the UK takes too long and could thus cause irreparable

harm to Meredith. As a back-up, should the Swiss authorities not consider themselves competent, UK authorities could be contacted as a precaution.

5. Is Margaret liable for incurred and future hospital expenses?

- Contract with hospital governed by Swiss law. Private hospital → private law; public hospital → administrative law. Here private law (Clinic Gut is private clinic). Contract binds only the parties (here Meredith – hospital) and hence no liability for Margaret as regards costs already incurred. (But: in Swiss public hospitals, in some cantons, joint and several liability of spouses/parents/registered partners). No liability for costs of treatment that Margaret decides to be carried out on Meredith's behalf unless stated otherwise in contract→ review contract with hospital.

6. Can Margaret access Meredith's Swiss bank accounts to pay medical costs?

Does Meredith have accident insurance which provides coverage? If not, can she access Meredith's Swiss bank accounts based on Florida Durable General Power of Attorney?

- Swiss hospitals often ask for advance payments for patients not living in Switzerland, except in emergency cases where they need to treat the patient under any circumstances. Although Margaret is appointed as sole representative under a valid Florida Durable General Power of Attorney, Swiss banks generally do not accept it. A representative who wants to act with a foreign power of attorney for an incapacitated person in Switzerland usually needs an official certificate or decree that third parties can rely on.

- Can U.S. or UK. authorities issue a certificate or decision? If so, this may be accepted by the Swiss bank directly or following the recognition of the foreign decision by the Swiss competent Adult Protection Authority near St. Moritz. However, these procedures take time and the advance payment is urgently needed. Alternative: access to Meredith's Swiss bank account through decision of Swiss adult protection authority? Jurisdiction of Swiss

authority in emergency cases (Art. 10 HCIPA/Art. 85 para 3 PILA). Swiss Adult Protection Authority may set up guardianship to authorize payments from the Swiss account, Margaret may be appointed as guardian, if she is deemed suitable by the authorities.

Margaret:

After meeting with Tina Wüstemann, I decided to contact Meredith's employer, to find out what healthcare benefits are available, and how the hospital charges in Switzerland can be paid for. The insurance company, who seemed fine to deal with me over the phone, advised me after a few days that they won't pay the high private care fees of the Swiss hospital. To maintain coverage, Meredith had to be transported by air ambulance back to the U.K., to a U.K. hospital, which had to be done immediately and which I arranged and paid for.

There's now an enormous hospital bill in Switzerland of over $100,000 Swiss Francs that I have to contend with. I decided I should get some U.K. advice on how to handle Meredith's care and finances as her attorney. Thor has now also returned to London, to the flat he has been sharing with Meredith, and I think he feels like he has been outmanoeuvred. I am concerned there will be a repeat performance in London of what happened at the hospital in St. Moritz.

As well, Thor is now demanding that his bar and restaurant bills at the Grand Hotel Des Bains Kempinski in St. Moritz be paid and his flight back to London. He says Meredith always paid for their travel bills, and he has also told me he needs money to pay for his food and entertainment and car lease in London, and his personal training and spa treatments, which Meredith also paid for.

I decided to get U.K. legal advice from Clare Maurice, who I have been told is a well renowned specialist in international estate and incapacity planning, and who Tina Wüstemann recommended to me, but I also found her on the internet. Just before my meeting with Ms. Maurice, I was looking through Meredith's stack of bills on her desk in her flat, and I found one from a local solicitor's office for legal fees for wills and powers of attorney. I searched further through the pile, and I found correspondence and copies of a will and the originals or registered Lasting Powers of Attorney for Meredith prepared or registered less than three months ago. To my surprise, Thor and I are appointed as joint and several co-attorneys for property and financial

affairs and for health and welfare under both Lasting Powers. The solicitor who drew up the LPAs is appointed as replacement attorney for financial affairs. There is no replacement for health and welfare.

Scene 2: Meeting with Clare Maurice at her offices.

Advice from Clare Maurice:

1. **Existing documents which could be relevant to position now that Meredith is back in the UK and the UK LPAs have been found**

- HCD - equivalent to a Lasting Power of Attorney for Health and Welfare or advance decision in UK- depending on wording- but it's US not UK.
- Durable General Power of Attorney - > like a UK LPA for property and affairs- but again it’s US.

Neither of the above documents can be used in the UK (though ? in actual terms re HCD) without an order of the UK Court of Protection (COP).

- But seem to have UK (England and Wales) Lasting Powers of Attorney (LPAs) of both sorts which are registered with the Office of the Public Guardian (OPG) so no need to consider use of US powers or Swiss docs in UK.
- UK LPAs were made by Meredith while she had capacity and was habitually resident in England and Wales (details of what HR means) and are in correct form and registered so will be valid for use in UK.
- Basic structure of LPAs - LPAs for finance can be used by attorneys while M had capacity (if appropriately drafted) - but only with her consent. Once capacity lost, LPA can be used without consent of M. Assume throughout all scenes that Meredith lacks capacity.
- LPA for health and welfare- can only be used when M has lost capacity.
- H and W - If the LPA was known about - H and W might be useable in Switzerland - question of Swiss law as far as and E and W concerned but LPA made in form valid under E and W law as law of habitual residence so likely to be OK-but E and W law says that manner of exercise of an LPA is a matter of the law of the place where is it used so again depends on whether Swiss law is happy with it.

2. Decisions-Options and Powers

What do the LPAs allow the attorneys to do?

- **Attorneyship appointments** - Margaret and Thor are appointed jointly and severally under both documents - they can act independently of each other but must work as a team and keep each other informed as to their actions. If Thor is unhelpful re registering the LPA for finance with the bank, Margaret can register alone and she can then act- but he can't. There was an option for Thor and Margaret to be appointed jointly but Meredith chose not to select that when she made the LPAs. In that situation, they would have had to act together in all matters.
- **Solicitor is replacement attorney** - if one of Margaret and Thor dies, loses capacity etc. solicitor will step in — and if drafting done right, will act J and S with the other attorney. If Margaret and Thor really fall out, one attorney could agree to renounce and replacement would then step in. If both renounce, replacement will be sole attorney.
- **Limitations on powers - finance** - can't be used to make a gift other than very small ones (usual Xmas and Birthday), set up a trust or sign a will. **H and W** - can't be used re euthanasia but can be used to consent to refuse all treatment (unless excluded in LPA). LPA for H and W can be used to decide where the donor of the LPA lives, or where they travel - see below. All decisions must be made in Meredith's best interests (see s4 MCA 2005 for criteria).
- **If anyone unhappy with actions of an attorney they can complain to the OPG** — don't need to be family member, another attorney etc. OPG has a range of powers - mainly investigate attorneys' actions, go to court to get authority for an action or revoke the LPA, sack an attorney and replace with a deputy etc. If attorneys disagree - go to OPG for help but often end in court unless agreement reached.
- **Use of financial LPA in UK** - unless LPA is restricted (not usual) the attorneys can use it to take any actions re her UK assets - other than gifting etc. So can sell flat, liquidate shares (if are any in UK) pay bills etc. So no issue - if money in the UK- in paying bills etc. Attorneys must act in best interests and that would include paying bills relating to Meredith's needs and expenses.
- **Accounting**- no requirement to keep an account but all attorneys must be ready to account to the OPG if required by them to do so.

- **Medical expenses**. On the basis that Meredith is UK resident and hasn't been out of UK for long, NHS will provide medical care for free in an NHS hospital (unless Meredith's immigration status is an issue - see below) now she is home and if the long term outcome is that she needs very significant care in a care home/ hospital setting going forward, likely that NHS will pay for this too. If the hospital is a private one then it's a question for the insurers-travel or work policies- or indeed both.
- **Immigration**- how did Meredith get to live in the UK permanently. She might have come on a work visa but usually doesn't allow permanent residence. If she is here illegally, must sort out status asap or maybe removed. Same issue with Thor (although he isn't Margaret's problem) How long has he been in the UK and if not UK, under what authority?
- **Thor's expenses**. Margaret can pay flat expenses as although Thor lives there, Meredith owns it and is responsible for its costs. Thor's costs. If they had been married, this would have been easy - husbands and wives have a legal responsibility to support each other financially - but a new boyfriend? Not sure. Looks like gifts which would be an issue without an order of the COP.
- There is some case law on attorneys having powers to pay maintenance but it seems to kick in in specified relationships - parent and child for example - and not short romantic ones as here.
- Paying for Thor's Swiss expenses – I would check the contract at the hotel- bet Meredith signed for the room/food etc. for herself and Thor, so argument that right to pay for both from her money.
- **Right to information about health**. Both attorneys can require this for doctors etc. - and medical records. No attorney, however, has a right to demand any kind of treatment for Meredith - that's a doctor's decision - so their powers are limited to consenting to treatment proposed or refu
- sing it. (check terms of the LPA in case limitations).

3. **What if there is no money in the UK? Can the UK LPA be used in US / Switzerland to access funds?**

- These are usually questions for the places where the money is and as we have local POAs in both places — leaving aside if the Swiss accept theirs - these should give the appointed attorneys/guardian authorities to access funds in those places.

- [The big question- which is a US/Swiss question - is whether attorneys in those places have the power to pay expenses somewhere else - i.e. UK. I have got one of these at present- *US citizen, UK resident, money in Switzerland - US DPOA only. US attorneys happy to pay UK expenses from Swiss assets - sure COP would support them doing so on best interests argument.]*
- The rules governing the enforceability of PoAs in foreign countries are set out in the Hague Convention on the Protection of Adults 2000. Switzerland is a signatory, but it has only been ratified in Scotland for the UK. Therefore, the PoAs of the other jurisdiction are not automatically recognised in England.
- For an English financial PoA to be recognised in Switzerland, a court application will likely be needed for a ruling on enforceability. Some institutions may accept foreign financial PoAs without court intervention, but they will more often than not need to be notarised, apostilled and formally translated at a minimum. For healthcare PoAs the general practice is less stringent – as the English healthcare LPA is similar in form to the Swiss Patient Decree, it is likely that it will be recognised as valid by medical professionals in Switzerland without court intervention.
- Final worry- what's all this about a new will? Need to check what it says and see it works- in UK, Switzerland and the US. COP can make what's called a statutory will for Meredith if it is not suitable. What does the Will say? Does Thor benefit? What if Meredith did actually marry Thor in secret? In Switzerland he was introduced as Meredith's spouse – this would be a game changer but would also mean that unless the will that was found, had been executed AFTER they got married, it would have been revoked by the subsequent marriage. No presumption of advancement from a wife to a husband. [Tina Wüstemann: While a UK Will covering the St. Moritz Ski Condo would from a Swiss perspective be recognized, the UK grant of probate must be unlimited. Under the new Swiss conflict of law provisions applicable as per 1 January 2025, UK inheritance law – and no longer Swiss (forced heirship) law – would be decisive).

Going back to the US?

- Can Thor, Margaret authorise this as attorneys under any kind of POA?
  LPA H and W does allow attorneys to decide where donor lives if they lack capacity to decide but on a practical level even though she is a US citizen, her health may mean there is an issue in getting her home- air ambulance arrangements etc and trouble at Heathrow-

and there will need to be careful arrangements at the US end for the care she needs- and how it is to be paid for.

- If trouble about this, COP has powers to make an order about residence.
- Moving back to the US has other implications- tax/ will for example.

Margaret:

Unfortunately, Meredith's condition has not improved, and has now in fact, declined. After my meeting with Ms. Maurice over two weeks ago, Meredith is now in a semi-vegetative state. There are mounting bills that need to be paid for the chalet in Switzerland and for the flat in London and hospital charges not covered under Meredith's insurance. Thor was not co-operative in going to the bank near Meredith's flat to see if we could add ourselves to her account as her co-attorneys under the Lasting Power of Attorney. I am really exhausted from having spent more than a month away from my family.

I've decided that the best course of action is to return to Florida and for Meredith to be moved to a local facility near me, for what may be her final days. I can then visit her every day and look after her treatment, and deal with local banks using my Florida Durable General Power of Attorney. I do not know what all of the ramifications may be, including any tax considerations, and also, if Meredith remains in a semi-vegetative state, can I use my Florida Designation of Health Care Surrogate, which appoints me sole attorney to take Meredith with me to Florida? It's not "kidnapping" is it, if it's your sister?

So I called up Clare Maurice, and we decided that U.S. and Florida advice should be sought. Clare arranged for a Zoom call with her and Stuart Bear, who she told me is a leading Miami trust and estate lawyer, called to the bars of Minnesota and now Florida, and that he left behind the harsh Minnesota winters, and now sports a glowing Floridian tan. [Clare said she met Stuart at a recent annual meeting of the American College of Trust and Estate Counsel where she was impressed by his urbane manner, practical approach, as well Clare being English, by his Florida tan.]

Scene 3: Zoom call with Clare, Margaret and Stuart

Advice from Stuart Bear:

I. Relocating Meredith to Florida using Florida Advance Directive for Health Care

a. Recommended provisions to include in Florida Advance Directive:

i. Provide for my Residence: “In the event it is not reasonable to maintain me in my personal residence consistent with my wishes as set forth above, then to make all necessary arrangements for me at any hospital, hospice, nursing home, convalescent home or similar establishment and to assure that all my essential needs are provided for at such a facility.”

ii. Transport my Person: “If the jurisdiction in which I am then located would not allow compliance with my directions in this Advance Directive for Health Care, my agent shall have the authority to relocate me at my expense to a jurisdiction where my directions may be fulfilled.”

iii. Enabling Power: “If this Advance Directive for Health Care is presented in a jurisdiction other than Florida and such jurisdiction does not refer to Florida law to interpret and determine the validity of this Advance Directive for Health Care, I intend such jurisdiction will interpret and determine the validity of this Advance Directive for Health Care under the applicable law(s) interpreting this as my creation thereunder of a durable power of attorney for health care, health care surrogate (or proxy) appointment and living will; the entire Advance Directive for Health Care constituting a statement of my desires regarding medical treatment pursuant to my right to privacy.”

iv. Reimbursement of Costs: “My agent shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by my agent on my behalf under any provision of this Advance Directive for Health Care but generally my agent shall not be entitled to compensation for services rendered hereunder.”

b. As Clare previously discussed, the UK will not honor Meredith's Florida Advance Directive for Health Care without an order of the UK Court of Protection.

c. Practice tip: make subsequently executed documents consistent regarding fiduciary selection and powers.

II. Estate Taxes

a. No Florida State Estate Tax

b. Federal Estate and Gift Tax

i. Because Meredith is a U.S. citizen, she is subject to the U.S. Federal Estate and Gift Tax.

ii. Any asset owned by a U.S. citizen, regardless of where it is located is subject to U.S. Federal Estate and Gift Tax.

iii. Exemption

1. Current limit: $13.99M per individual for a U.S. citizen or foreign national domiciled in the United States

2. January 1, 2026, sunset to approximately $7.0-$7.5M

3. Unlimited marital deduction to spouse who is U.S. citizen.

4. Marital deduction does not apply when spouse is not a U.S. citizen.

III. UK IHT

Even if Meredith is relocated and dies in Florida before 6 April 2025, whether or not she is UK domiciled or deemed domiciled UK, IHT will be due on her UK real estate over £325,000 – unless she and Thor were married and it passes to Thor spouse exempt (assuming neither were UK domiciled). The same applies to the UK bank accounts but the application of the US/UK estate tax treaty may assist, depending on whether or not Meredith was a UK national or not.

If Meredith dies after 5 April 2025, then the new rules will apply and her IHT position (on anything other than UK situate assets) will depend on her residence status and when she became UK tax resident and how long she has been UK tax resident.

Margaret:

I followed Clare's and Stuart's advice and I was successful in moving Meredith back to Florida to a private hospital with excellent care. Unfortunately, soon after Thor arrived. We have had many heated discussions because Thor feels Meredith should be taken off of life support, which I oppose. I am unclear on which power of attorney prevails and what the hospital's role is. I am also concerned that Thor is not acting in Meredith's best interest. I did not read the copy of the Will I found in her London flat, but I seem to recall a lot of "Thor" mentioned. An additional concern is that the Swiss police have now opened a police investigation into Meredith's ski "accident". Apparently, there is a witness who saw an altercation between Thor and Meredith immediately before she fell down a steep cliff in an out of bounds ski area. I decide to get further advice from Stuart Bear who was so helpful in our earlier Zoom call and Clare.

Scene 4: Meeting with Stuart Bear

Advice from Stuart Bear

I. Multiple Advance Directives

a. UK Lasting Powers of Attorney

i. A power of attorney executed in "another state" is valid in Florida if, when the power of attorney was executed, the power of attorney and its execution complied with the law of the state of execution.[1]

ii. "Another state" is "a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States."[2]

iii. In Parisi v. de Kingston, the Court held Argentina did not fall within the definition of "another state," and thus a power of attorney executed in

1 F.S.A. § 709.2106(3)

2 *Parisi v. de Kingston*, 357 So. 3d 1254 (Fla. Dist. Ct. App. 2023), reh'g denied (Apr. 5, 2023)

Argentina was not valid in Florida when it did not strictly comply with Florida's statutory execution requirements.[3]

iv. The UK lasting power of attorney is only valid in Florida if it is executed in strict compliance with Florida Statutes.

b. Florida Advance Health Care Directive

i. An advance directive may be amended or revoked at any time by a competent principal: (a) by means of a signed, dated writing; (b) by means of the physical cancellation or destruction of the advance directive by the principal or by another in the principal's presence and at the principal's direction; (c) by means of an oral expression of intent to amend or revoke; or (d) by means of a subsequently executed advance directive that is materially different from a previously executed advance directive.

ii. Language of UK Lasting Power of Attorney:

1. Is there express language that revokes all previous documents?

2. Is the Lasting Power of Attorney materially different that would result in the Florida Advance Directive being held to be revoked?

II. Guardianship

If the hospital is presented with the Advance Directive for Health Care and Lasting Power of Attorney they may require a guardian be appointed to make medical decisions.

a. Any Florida resident who is 18 years of age or older is qualified to act as guardian.[4]

b. A nonresident may serve as guardian of a resident ward if he or she is a spouse of the ward.[5]

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3 Id.

4 F.S.A. § 744.309(1)(a).

5 F.S.A. § 744.309(2).

c. Every prospective guardian must complete an application for appointment as guardian. The application must list the person's qualifications to serve as a guardian.[6]

d. Notice of the filing of a petition to determine incapacity and a petition for the appointment of a guardian if any and copies of the petitions must be served on and read to the alleged incapacitated person.[7]

e. Within 5 days after a petition for determination of incapacity has been filed, the court shall appoint an examining committee consisting of three members. One member must be a psychiatrist or other physician. The remaining members must be either a psychologist, a gerontologist, a psychiatrist, a physician, an advanced practice registered nurse, a registered nurse, a licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or any other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion.[8]

f. If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity.[9]

g. If the court finds there is not an alternative to guardianship that sufficiently addresses the problems of the incapacitated person, a guardian must be appointed to exercise the incapacitated person's delegable rights.[10]

IV. UK Will – if Thor benefits - Issues to be considered – possible challenges

a. Undue influence – we only have evidence of Thor's current domineering behaviour after the accident, and it could be that he is behaving this way due to shock and anxiety. However, a will made as a result of fraud or undue influence will not be regarded as the act of the deceased and will not be admitted to probate. It is up to

6 F.S.A. § 744.3125(1).
7 F.S.A. § 744.331(1).
8 F.S.A. § 744.331(3)(a).
9 F.S.A. § 744.331(6)
10 F.S.A. § 744.331(6)(b).

the person alleging that a will is made as a result of fraud or undue influence to prove it.

Undue influence arises where the testator no longer retains real freedom of choice but surrenders to coercion or intolerable pressure. Where the testator is weak, undue influence is obviously more likely to be found, but there is no presumption of undue influence in the case of a will which means that claims are rarely successful as there is usually insufficient evidence available to prove that the influence was undue. It is important to understand that there is nothing wrong with persuasion. To amount to undue influence the testator must be coerced into making a will which they do not wish to make. Those who consider challenging on the basis of undue influence will inevitably lose if they have no evidence beyond persuasion. As costs in probate actions are normally awarded against the unsuccessful party, this can be very expensive.

b. Thor and Meredith were married:

– if before the new Will was made, it will have been revoked, but Thor may have a claim under the intestacy rules. In order to inherit, a surviving spouse or civil partner:

- must survive the intestate by 28 days, and
- have been married to or in a civil partnership with the deceased at the time of death

If these rules apply, as Meredith left no children, Thor would be entitled to Meredith's entire estate.

However, the domicile status of the deceased who has died intestate may be a relevant factor in applying the intestacy rules set out in Administration of Estates Act 1925 (**AEA 1925**), but AEA 1925 does not place any condition on the domicile status of a relative who becomes entitled under AEA 1925, s 46. For these purposes the changes to "domicile" as it applies to UK tax law, will not be relevant.

The intestacy rules in AEA 1925, s 46 will apply to:

- all the moveable property of the deceased wherever situated provided the intestate was domiciled in England or Wales. If the deceased was domiciled elsewhere, then as a matter of English private international law, succession to moveable property will be governed by the law of their domicile
- all the immovable property of the deceased in England or Wales whether the deceased was domiciled there or elsewhere

Therefore, the extent to which the UK intestacy rules will apply will depend on what type of assets the deceased left and where those assets were located at death, as well as the deceased's domicile status.

The intestacy rules in AEA 1925, s 46 would not generally apply to the deceased's immoveable property situated outside England and Wales. However, this would depend on the laws of the jurisdiction in which the property is situated and the complex interaction of the relevant laws.

If Meredith died domiciled outside England and Wales, NCPR 1987, SI 1987/2024, r 30 provides that a district judge or registrar may order that a grant is issued to:

- The person entrusted with the estate administration by the court where the deceased died domiciled,
- the person beneficially entitled to the estate by the law of the place in which the deceased died domiciled, or
- to such person as the district judge or registrar may direct

- after the new will – we have seen that a challenge on the grounds of undue influence is unlikely to be successful, however if Thor was responsible for Meredith's death, there is a principle of English law that it would be inequitable to permit the perpetrator of a crime to benefit from that crime. In these circumstances, however, whatever the outcome of the Swiss police's investigation into Thor's involvement, he will not be troubled by the application of the Forfeiture Act 1982 which only applies to deaths in England and Wales.

c. If they were not married – and the Will is valid, it is difficult to see how any benefit Thor receives can be challenged. The only saving grace is, in the event that although you recalled seeing Thor's name all over it, if he thinks it is not enough, it is unlikely he will be able to bring a claim under the Inheritance (Provision for Family and Dependents) Act 1975, because even if Meredith was domiciled in England and Wales at her death (a pre-requisite), he would have to demonstrate that (i) he was living Meredith as her spouse for two years immediately before her death (we believe they had only been dating for 6 months at most) or (ii) that he was being maintained by Meredith. While it might appear that Meredith had paid for everything for them both, the Court would take into account the length of time for which, and basis upon which, the deceased maintained the applicant, the extent of the contribution made by way of maintenance, and whether and, if so, to what extent the deceased assumed responsibility for the maintenance of the applicant.

   In any event, given that Thor is "something in private equity" I am not worried about him at all.

It's Complicated: Multijurisdictional Incapacity - Capacity under Swiss Law

Paper ACTEC Palm Springs, California, March 2025
Tina Wüstemann/Océane Kessler, Bär & Karrer Ltd., Switzerland

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A The Concept of Capacity under Swiss Law

I Capacity in General

The Swiss Civil Code (CC) defines capacity in Art. 16 CC as follows: "*A person is capable of judgement within the meaning of the law if he or she does not lack the capacity to act rationally by virtue of being under age or because of a mental disability, mental disorder, intoxication or similar circumstances.*" Capacity of adults is presumed unless there are specific circumstances suggesting otherwise.[1] This

[1] Swiss Federal Supreme Court, ATF 134 II 235, consid. 4.3.3; **Aebi-Müller**, R. E., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, N. 3.6.

does not mean, however, that a person with the conditions specified in Art. 16 CC, is automatically considered incapable. For incapacity to be presumed, the condition must result in a lack of capacity to act rationally in the specific case.

Under Swiss law, the concept of capacity consists of two elements: firstly, the intellectual element, namely the ability to perceive the meaning, purposefulness and effects of a certain action, and secondly, the will or character element, namely the ability to act with reasonable judgement and in accordance with one's free will.[2] Capacity is a relative concept and therefore must be assessed separately for each legal act in question.[3]

A person with a medical condition that affects their mental state may be perfectly capable of entering into a contract to buy furniture. On the same day however, they may not be able to complete a complex transaction, because, for example, they lack the cognitive ability to understand the financial and legal consequences of the transaction. On a "good" day, a person with dementia may be able to think clearly and thus be capable of judgment, but the next day this may not be the case. Therefore, capacity is highly dependent on the facts of the individual case. Note that the "all or nothing" principle applies: A person is either capable or incapable of a given transaction. According to Swiss law, a person cannot be "partly" capable.[4]

In general, the *burden of proof* for incapacity is on the party claiming incapacity, given that adults are presumed to have capacity.[5] However, the burden of proof is reversed if the person was in a permanent state of weakness that normally precludes rational behavior. The Swiss Federal Supreme Court has assumed such permanent states of weakness particularly in cases of dementia of a certain severity.[6] In these cases, the burden of proof is therefore reversed and the party claiming the validity of the legal transaction in question must prove that the person had capacity at the time of transacting.[7] This requires proving that the person had a "lucid interval".[8]

[2] Swiss Federal Supreme Court, ATF 134 II 235, consid. 4.3.2; **Fankhauser**, R., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 16 para. 3.

[3] Swiss Federal Supreme Court, ATF 134 II 235, consid. 4.3.2; **Fankhauser**, R., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 16 para. 34.

[4] **Hotz**, S., *Kurzkommentar ZGB*, Büchler/Jakob, 2nd edition 2018, Art. 16 para. 11.

[5] Swiss Federal Supreme Court, ATF 124 III 5, consid. 1b).

[6] Swiss Federal Supreme Court, BGer 5A_191/2012 dated 12 October 2012, consid. 4.2; BGer 5A_436/2011 dated 12 April 2012, consid. 5.4; BGer 5A_723/2008 dated 19 January 2009, consid. 3.1, 4.1, BGer 5C.282/2006 dated 2 July 2007, consid. 3.1.

[7] Swiss Federal Supreme Court, BGer 5A_272/2017 dated 7 November 2017, consid. 5.3; BGer 5A_401/2022 dated 6 March 2023, consid. 5.3.2, 5.4.

[8] Swiss Federal Supreme Court, BGer 5A_71/2014 dated 30 April 2014, consid. 3.

II Testamentary Capacity and Financial Elder Abuse

Although advanced age is not in itself a reason for incapacity,[9] succession arrangements are often contested on the grounds of incapacity.[10] Basically, the testator must have at least a basic understanding of the amount and composition of their assets and the ability to recognize persons entitled to inherit or claiming a share of the inheritance.

If there is any indication of potential incapacity, it is advisable for a person planning their succession to take steps to ensure the robustness of their planning. Repeated changing, unclear, or contradictory instructions may be interpreted as a sign of lack of capacity. If the content of a last will is to be changed, it must be done carefully. The court will take into account not only the contested last will itself, but also previous last wills, when assessing capacity.[11] If the new last will is substantially amended, e.g. a complete change of beneficiaries, it is advisable to explain the reasons for the change in a comprehensible manner.

One precaution is to have the last will publicly notarised. However, the fact that a last will has been notarised does not automatically mean that the testator had capacity at the time. It is only indicative, not binding proof in court.[12]

Another point to bear in mind in relation to succession planning of elderly people, although not directly related to capacity, is the problem of alleged heir hunters. Under Swiss law, it is possible to declare a person unworthy of inheritance and therefore unable to inherit. One reason for unworthiness to inherit is if a person induced the deceased to make or revoke a testamentary disposition or prevented him or her from doing so by malice, coercion, or threat.[13] This reason may be particularly important if the deceased favored trusted person such as doctors, lawyers, or care givers.[14]

This point is illustrated by a 2021 judgment of the Swiss Federal Supreme Court:[15] In this particular case, the alleged heir hunter was a nursing specialist who had cared for the deceased for 17 years. He was also her general representative. Due to the lack of social and family contacts, he was the only person of reference for the deceased, apart from her psychiatrist. The Court found that there was a deep connection between the nursing specialist and the deceased, which, however, was also characterized by a strong dependence. The nursing specialist was more than a caregiver to the deceased, in letters she wrote of love and friendship. Although

[9] Swiss Federal Supreme Court, BGer 5A_272/2017 dated 7 November 2017, consid. 5.4; BGer 5A_436/2011 dated 12 April 2012, consid. 5.2.2.

[10] **Blattner**, J., "Demenz im Erbrecht", *Aktuelle Juristische Praxis* 12 1285-1301, 1286, (2022).

[11] **Sommer**, S., "Testierfähigkeit von Demenzkranken", *Aktuelle Juristische Praxis* 4 491-501, 494, (2020).

[12] Swiss Federal Supreme Court, ATF 124 III 5, consid. 1c); **Blattner**, J., "Demenz im Erbrecht", *Aktuelle Juristische Praxis* 12 1285-1301, 1290, (2022); **Hell**, T. C., *Die Testierfähigkeit und deren Beweis*, Sutter-Somm, 2022, para. 225.

[13] Art. 540 para. 1 CC.

[14] **Hell**, T. C., *Die Testierfähigkeit und deren Beweis*, Sutter-Somm, 2022, para. 234; **Wüstemann**, T., "Switzerland: fighting the scourge", 24 *Trusts & Trustees* 1 79-85, 81, 84, (2018).

[15] See Swiss Federal Supreme Court, BGer 5A_993/2020 dated 2 November 2021.

the nursing specialist was aware of this, he did not make it clear that it was just a matter of money for him. Thus, the nursing specialist took advantage of the deceased's misinterpretation of their relationship. The Court assumed that the deceased would have revoked her testamentary disposition if she had been informed of the actual circumstances.

III Adult Protection Authority

If a person shows signs of an impaired capacity, such as acting in a way that damages his or her assets, a report can be made to the adult protection authority (APA). Anyone may notify the APA if they consider a person to be incapacitated pursuant to Art. 443 CC.[16] The competent APA is the one at the place of residence of the person concerned. The APA guarantees the protection and support of individuals who lack capacity and who thus no longer are in a position to look after themselves.[17] Therefore, the APA will implement the necessary protective measures if it becomes aware of an individual who suffers from incapacity.[18]

Given that the adult protection law is based on the principles of subsidiarity and proportionality pursuant to Art. 389 CC, state measures are subsidiary to individual incapacity planning as well as statutory measures.[19] Consequently, the APA only appoints a guardian or issues other protective measures if the incapacitated individual has no prior planning in place and if the statutory representation rights are insufficient or inapplicable.[20] Depending on the extent to which the individual is no longer able to care for him - or herself, different measures can be implemented.[21] The APA also monitors the appointed guardian, reviews, and approves his or her reports and accounts.[22] Currently, there are ongoing efforts to revise the Swiss adult protection law. Among other things, when appointing a guardian, the APA shall be obliged to verify whether individuals close to the incapacitated person are suitable to assume this role.[23]

B Incapacity Planning

Given the subsidiarity of state measures, each individual has the option of setting forth binding instructions in advance by issuing (i) a living will (Living Will or also called Patient Decree) for medical treatments in case of incapacity and/or (ii) an

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[16] **Maranta**, L., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 443 para. 7; **Häfeli**, C., *Kindes- und Erwachsenenschutzrecht*, 3rd edition 2021, para. 768.

[17] Art. 388 para. 1 CC; **Biderbost**, Y., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 388 para. 5; **Häfeli**, C., *Kindes- und Erwachsenenschutzrecht*, 3rd edition 2021, para. 280.

[18] **Biderbost**, Y., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 388 para. 8.

[19] **Häfeli**, C., *Kindes- und Erwachsenenschutzrecht*, 3rd edition 2021, para. 284, 286; **Meier**, P., *Zürcher Kommentar Zivilgesetzbuch Art. 388-404 ZGB*, Schmid, 2021, Art. 389 para. 20 *et seq.*, 27.

[20] **Biderbost**, Y./**Henkel**, H., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 388 para. 2; **Häfeli**, C., *Kindes- und Erwachsenenschutzrecht*, 3rd edition 2021, para. 284.

[21] **Biderbost**, Y., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Vor Art. 388 – 399 para. 7, 8; **Meier**, P., *Zürcher Kommentar Zivilgesetzbuch Art. 388-404 ZGB*, Schmid, 2021, Art. 389 para. 47 *et seq.*

[22] **Vogel**, U., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 415 para. 1.

[23] Press release of the Swiss Federal Council dated June 7, 2024 available at: https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-101292.html (accessed February 2025).

advance care directive (ACD) (similar to a durable/lasting power of attorney as known in the UK/USA).[24] The statutory provisions applicable in cases of incapacity in the absence of prior personal planning are outlined below as well as the planning instruments available under Swiss law.

It is important to note that once a person is incapacitated, he or she can no longer issue any planning instruments.[25] Thus, it is advisable to do so before any signs of incapacity occur irrespective of any medical diagnosis. The planning instruments should be updated occasionally, as one's preferences may change over time.

I Incapacity and Non-Medical Decisions

1 Statutory Provisions for Incapacity in the Absence of Prior Planning

Swiss law grants individuals significant autonomy to determine their arrangements in the event of incapacity. The adult protection law promotes the right of self-determination and places a strong emphasis on family solidarity.[26]

When incapacity occurs and decisions (of a non-medical nature) need to be made on behalf of the person who lacks capacity, the following hierarchy applies:

1. The nominee is initially determined in accordance with the nominator's advance care directive (ACD, *Vorsorgeauftrag*; see B.I.2 below), provided that the directive has been validly issued and the transaction in question is covered by it. If there is a valid power of attorney in place before the person becomes incapacitated, and that power of attorney is valid both before and after the onset of incapacity, it remains valid, and the person can continue to be represented by that power of attorney.[27]

2. In the absence of a valid ACD or power of attorney, the spouse or registered partner has a statutory right to represent the person, provided that they are living with the person or personally caring for them. However, there are statutory limitations to the right of representation. Note that the preliminary draft for the revision of the Swiss law on adult protection provides that also de facto life partners shall have a statutory right to representation, if they cohabit with the person lacking capacity or regularly and personally provide him or her with support.

3. Absent a valid ACD, power of attorney, or person with statutory right of representation, responsibility falls to the APA.

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[24] **Reusser**, R., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 2.7.

[25] Cf. **Häfeli**, C., *Kindes- und Erwachsenenschutzrecht*, 3rd edition 2021, para. 107, 153.

[26] Dispatch of Swiss Federal Council dated 28 June 2006, "Botschaft zur Änderung des Schweizerischen Zivilgesetznic hes", *Bundesblatt* 7001-7138, 7013, (2006).

[27] **Jungo**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 360 para. 12c; note that the nominee must inform the APA if the person becomes permanently incapacitated, which then can decide whether the interests of the incapacitated person are protected.

Consequently, in the absence of an ACD or a guardian appointed by the APA, spouses or registered partners residing with an incapacitated individual have a statutory right to act as the individual's representative pursuant to Art. 374 para. 1 CC. This right of representation encompasses ordinary transactions such as (i) all legal acts typically required to meet the need for support, (ii) the proper management of income and other assets, and (iii) the authority to open and manage correspondence, if necessary, according to Art. 374 para. 2 CC. For legal acts involving exceptional asset management (e.g. real estate transactions), the spouse or registered partner must obtain the consent of the APA.[28]

In practice, third parties will frequently request evidence of the power of representation. Consequently, spouses or registered partners may submit a request to the APA for the issuance of a formal certificate attesting their power of representation.[29]

In the event that an incapacitated individual has made no prior arrangements, and the statutory provisions are insufficient, the APA issues the necessary and appropriate protection measures, such as appointing a guardian.[30] Note that matters of a "highly personal nature",[31] such as the right to marry and divorce, the right to make or revoke a will, or to conclude an inheritance contract,[32] cannot be dealt with by another person (or by an authority).

2 Advance Care Directive

An ACD is a unilateral declaration of intent, in which the principal can appoint a representative to take care of his or her affairs in the event that he or she loses his or her capacity.[33] Any individual with capacity to act who thus has reached the age of 18 and has capacity pursuant to Art. 16 CC may issue an ACD.[34] The principal may revoke the ACD at any time as long as he or she is still capable of judgment.[35]

Either natural persons or legal entities can be appointed as representatives.[36] Moreover, it is possible to appoint several representatives in general or to act as

[28] Art. 374 para. 3 CC; **Reusser**, R. E., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 374 para. 52.

[29] **Fountoulakis**, C./**Aebi-Müller**, R. E., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 6.65.

[30] Art. 389 CC; **Biderbost**, Y., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 389 para. 5 *et seq.*; **Biderbost**, Y./**Affolter-Fringeli**, K., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 8.2.

[31] See Art. 19c para. 2 CC.

[32] **Fankhauser**, R., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 19c para. 5.

[33] **Jungo**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 360 para. 14a.

[34] **Jungo**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 360 para. 19b.

[35] Art. 362 CC; **Jungo**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 360 N 14a.

[36] **Wohlgemuth**, M., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 4.12.

agents with regard to different matters, e.g. personal care, financial affairs, and representation in legal matters.[37]

Personal care generally relates to matters of everyday living, such as administrative tasks, dealing with mail and taking decisions about the principal's residential situation and can include medical treatments (see B.II.2 below).[38] A representative acting as an agent with regard to financial affairs must submit the principal's tax returns, manage his or her assets, if applicable, and take care of financial matters in general.[39] The rights and duties of a representative can be defined precisely and certain areas or tasks can be explicitly included or excluded from the power of representation.[40]

The following persons may issue an ACD under Swiss law provided they have the legal capacity to do so:

- Individuals who are habitually resident in Switzerland;
- Swiss citizens irrespective of their habitual residence;
- Individuals who were formerly habitually resident in Switzerland; and
- Individuals with assets located in Switzerland (in this case the ACD must be limited to those assets).[41]

A Swiss ACD must be either in the form of a holographic will (i.e., written by hand in its entirety, dated, and signed) or a public deed (i.e., notarisation by a Swiss civil public notary).[42] As the ACD is a so called "absolute strictly personal right", substitution is not allowed.

Upon request, the civil registry office will register the fact that an ACD has been issued and the location where it is being stored in the Swiss Central Civil Register "Infostar", albeit without mentioning its content. This ensures that an ACD can be found in a timely manner in the event that the principal becomes incapacitated.

The APA is also responsible to put the ACD into effect once the person becomes incapacitated. The competent APA is the one at the domicile of the person concerned (Art. 442 para. 1 CC). In case of emergencies, the APA at the place of the habitual residence of the incapacitated person concerned is also competent. According to Art. 363 para. 2 CC, to validate the ACD and thus put it into effect, the

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[37] **Jungo**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 360 para. 34; **Häfeli**, C., *Kindes- und Erwachsenenschutzrecht*, 3rd edition 2021, para. 103; **Wohlgemuth**, M., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 4.15.

[38] **Biderbost**, Y., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 391 para. 14; **Wohlgemuth**, M., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 4.16.

[39] **Wohlgemuth**, M., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 4.24.

[40] **Jungo**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 360 para. 34.

[41] **Fountoulakis**, C., "Der Vorsorgeauftrag im internationalen Rechtsverkehr (Teil II)", *Anwaltsrevue* 7-16, 9, (2023).

[42] **Jungo**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 361 para. 5 *et seq*.

competent APA has to verify whether (i) the ACD has been validly executed, (ii) the requirements for its effectiveness are met, (iii) the appointed representative is fit for his or her duties, and whether (iv) further adult protection measures are required. Subsequently, the appointed person can accept or reject such a mandate.

If all requirements are met and the appointed person accepts the mandate, the APA will issue a certificate to the authorised representative. This certificate can be used to prove the legitimation to act as representative to third parties such as banks, authorities, and doctors.

The ACD becomes ineffective with the death of the incapacitated person or if he or she regains capacity.[43]

The advantage of an ACD is that the APA is less likely to be actively involved in the event of legal incapacity. Since the principle of subsidiarity applies, the APA only intervenes if necessary, meaning only if there is neither an ACD in place nor the statutory representation by the spouse/registered partner is applicable or if these measures are insufficient[44]. Thus, provided that the person's interests are safeguarded, no additional protective measures by the APA are required such as the appointment of a guardian supported and supervised by the APA.

3 Durable Power of Attorney

A power of attorney authorises a person to represent or act on behalf of the principal in relation to third parties and may be restricted to certain matters. Generally, a power of attorney expires under Swiss law once the principal becomes incapacitated.[45] Nevertheless, if agreed otherwise, the power of attorney remains effective if the principal is incapacitated or even beyond his or her death.

In principle, a power of attorney does not have to meet any form requirements. Nonetheless, for evidence purposes it is recommended that a general power of attorney be executed in writing and signed by the principal. In contrast to an ACD, a validation procedure is not required for a power of attorney, even if it is a durable one.

It is disputed whether a durable power of attorney remains valid if the incapacity of the principal is not only temporary but lasting. Thus, in practice a durable power of attorney will often not be accepted if the principal suffers from lasting incapacity. Furthermore, the APA may appoint a guardian if the incapacitated person is unable, at least in principle, to control and supervise the appointed person.

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[43] Cf. **Jungo**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 360 para. 39, Art. 369 para. 1.

[44] **Fountoulakis**, C., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 6.27.

[45] **Watter**, R., *Basler Kommentar Obligationenrecht I*, Lüchinger/Oser, 7th edition 2020, Art. 35 para. 4.

In practice, Swiss banks usually require a specific power of attorney limited to the respective bank accounts/securities deposits. Given that an ACD must be validated by the APA first, which can often be a time-consuming procedure, it is recommended to also issue a durable power of attorney to cover the period in time before the ACD enables the appointed representative to act. However, if the principal is incapacitated, banks may not recognise the durable power of attorney and insist on an ACD.

It is important to note that a power of attorney cannot solely be valid after the onset of the principal's incapacity without adhering to the formal requirements of the ACD, as it is treated as such.[46]

II Incapacity and Medical Decisions

Under Swiss law, consent is required for all medical treatments except for urgent cases.[47] Medical treatments without consent are unlawful, as they are considered a violation of the right to physical integrity.[48] Consent requires adequate prior information about the medical treatment and justifies the violation of the right to physical integrity.[49] Consequently, if the consent requirement is not fulfilled, there may be consequences under civil and criminal law. Furthermore, the consent requirement emphasises the patient's right to self-determination.[50]

Consent to medical treatments can primarily be given by the capable person in need of treatment. If the affected person is incapacitated, consent can also be given in advance by instructions in the Living Will or the ACD, or the representatives appointed therein.[51]

Absent prior personal arrangements, persons close to the incapacitated person have a statutory right of representation and are entitled to consent to medically indicated treatments.

1 Statutory Provisions for Incapacity in the Absence of Prior Planning

Absent a representative appointed in a Living Will or ACD the following persons are entitled to represent the person and to consent to or refuse a medical treatment in the following order according to Art. 378 CC:

- A deputy with a right to act as representative in relation to medical procedures;

[46] **Jungo**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 363 para. 12d.

[47] **Wyss**, S., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 372 para. 2.

[48] **Meili**, A., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 28 para. 46 *et seq.*; **Boente**, W., *Zürcher Kommentar Zivilgesetzbuch Art. 360-387 ZGB*, Schmid, 2015, Art. 370 para. 23.

[49] **Wyss**, S., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 370 para. 1.

[50] **Köbrich**, T., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 5.3.

[51] **Köbrich**, T., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 5.5.

- Any person who as a spouse or registered partner cohabits with the person lacking capacity of judgement or who regularly and personally provides him or her with support;

- Any person who cohabits with the person lacking capacity of judgement and who regularly and personally provides him or her with support;

- Issue who regularly and personally provide the person lacking capacity of judgement with support;

- Parents, if they regularly and personally provide the person lacking capacity of judgement with support;

- Siblings, if they regularly and personally provide the person lacking capacity of judgement with support.[52]

Due to the highly personal nature of the right to physical integrity, a representative can only consent to medically indicated treatments.[53] Generally, the attending physician is responsible for ensuring that an incapacitated person receives appropriate medical treatment. The representative must be consulted to plan the required treatment (so-called 'shared decision-making'). Whenever possible, the incapacitated patient should be involved in the planning of the required treatment.[54] Ultimately, the representative must give the final approval for any planned medical treatment of any incapacitated individual which also requires prior adequate information about the treatment.[55]

In the event that multiple individuals have the authority to act as a representative, the attending physician is permitted to assume in good faith that all parties involved are acting in accordance with the consent of the others.[56] In situations of doubt or if the representative is absent, the doctor must make medical decisions based on the presumed will of the patient.[57] Overall, this process necessitates careful consideration and clear communication among all parties involved.[58]

2 Living Will

Under Swiss law, it is possible to make arrangements in a Living Will in case of incapacity regarding medical decisions.

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[52] **Eichenberger**, T., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 378 para. 2.

[53] **Eichenberger**, T., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 378 para. 13.

[54] **Eichenberger**, T., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 378 para. 14.

[55] **Köbrich**, T., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 5.27; **Boente**, W., *Zürcher Kommentar Zivilgesetzbuch Art. 360-387 ZGB*, Schmid, 2015, Art. 378 para. 77.

[56] **Häfeli**, C., *Kindes- und Erwachsenenschutzrecht*, 3rd edition 2021, para. 157; **Boente**, W., *Zürcher Kommentar Zivilgesetzbuch Art. 360-387 ZGB*, Schmid, 2015, Art. 374 para. 59.

[57] **Boente**, W., *Zürcher Kommentar Zivilgesetzbuch Art. 360-387 ZGB*, Schmid, 2015, Art. 372 para. 90.

[58] **Köbrich**, T., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 5.28.

A Living Will enables any individual of sound mind to make binding arrangements regarding medical measures (e.g. refuse or withdraw life-sustaining treatment) in the event that he or she is no longer capable of expressing his or her wishes.[59] A person is considered to have the capacity to issue a Living Will, if he or she understands the consequences of his or her decisions and is able to assess their impacts on a particular medical condition.[60]

The Living Will can determine which medical treatment the principal agrees to or refuses in case of incapacity.[61] Alternatively, the principal may appoint one or more natural persons as representatives who are thereby entitled to discuss all medical measures with the attending physician and to decide if and which medical measures shall be taken in the case of incapacity of the principal.[62] However, the principal may also give precise instructions or guidance to his or her representative regarding how he or she is to decide in such a situation.[63] Thus, the provisions of a Living Will are intended for the attention of any appointed representative as well as any attending physician.

While a Living Will increases the probability that a certain medical treatment will correspond to the wishes of the principal – who at that point in time is no longer able to communicate – it can also bring an immense relief to close family members who may otherwise find themselves forced to make a very difficult decision without being sure of the respective wishes in such a situation of the person concerned. Additionally, a Living Will can serve as a guiding document that reflects the ethical values and principles in relation to medical treatments.[64]

Notably, in the case of a specific medical diagnosis or treatment, a Living Will should be discussed with a competent medical practitioner. It is advisable for individuals, even those in good health, who have not received an acute medical diagnosis, to consider establishing a Living Will and discussing their wishes with close relatives in the event of a medical emergency.

A Living Will must be issued in writing, dated, and signed by the individual (Art. 371 para. 1 CC). However, it does not have to be handwritten or notarised, unless it is included in an ACD.[65] Given the minimal formal requirements, it is recommended that a Living Will and an ACD be drawn up separately. In particular, given that the validation procedure of an ACD takes time and medical decisions often have to be made quickly. The existence of and the location where the Living Will is stored can be recorded on one's health insurance card.[66] Thereby, attending physicians are

[59] **Köbrich**, T., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 5.6.

[60] **Wyss**, S., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 370 para. 7.

[61] **Wyss**, S., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 372 para. 13.

[62] **Wyss**, S., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 372 para. 19.

[63] **Wyss**, S., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 370 para. 23.

[64] **Köbrich**, T., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 5.16.

[65] **Wyss**, S., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 371 para. 3; **Köbrich**, T., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 5.38.

[66] **Wyss**, S., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 372 para. 3.

informed about the existence of the Living Will. Additionally, it is recommended to give copies of the Living Will to one's general practitioner, relatives, and the designated representatives.[67]

The content of a Living Will meaning the decisions regarding medical treatments can also be included in an ACD (see B.I.2 above).[68] Nonetheless, given that a Living Will – not included in an ACD – is valid without a formal act of the APA, it is advisable to issue a Living Will separate from an ACD, as medical decisions often need to be made promptly.[69]

If a person issues both a Living Will and an ACD, it is recommended to note in the latter that the separate Living Will takes precedence over the ACD with regard to medical measures.

C Cross-Border Issues

Cross-border issues can quickly arise in the context of incapacity planning: a person relocates to Switzerland or moves from Switzerland abroad; a person has assets in Switzerland but lives abroad; a person has an accident in Switzerland and medical decisions need to be made; etc. Where such international aspects are prevalent, due consideration should be given and potential problems addressed with foresight.

Private law issues of international nature are governed by international treaties and subsidiarily by the Swiss Private International Law Act (PILA).[70] Regarding incapacity in cross-border cases the Hague Convention on the International Protection of Adults of 13 January 2000 (HCIPA) and the PILA determine the international jurisdiction, the applicable law and the recognition of foreign instruments equivalent to the ACD and the Living Will.[71] Pursuant to Art. 85 PILA the HCIPA is also applicable with regard to non-signatory states.[72]

Particularly important for incapacity planning are the regulations on "power of representation" in the case of loss of capacity. The HCIPA ensures that a power of representation is effective in another signatory state.[73] The term power of representation as used in the HCIPA covers all the possible instruments of the various states aimed at appointing representatives in the event of loss of capacity,

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[67] **Boente**, W., *Zürcher Kommentar Zivilgesetzbuch Art. 360-387 ZGB*, Schmid, 2015, Art. 371 para. 39; **Köbrich**, T., *Fachhandbuch Kindes- und Erwachsenenschutzrecht*, Fountoulakis/Affolter-Fringeli/Biderbost/Steck, 2016, para. 5.48.

[68] **Jungo**, S., *Basler Kommentar Zivilgesetzbuch I*, Geiser/Fountoulakis, 7th edition 2022, Art. 361 para. 4.

[69] **Häfeli**, C., *Kindes- und Erwachsenenschutzrecht*, 3rd edition 2021, para. 157.

[70] Art. 1 PILA; **Grolimund**, P./**Loacker**, L. D./**Schnyder**, A. K., *Basler Kommentar Internationales Privatrecht*, Grolimund/Loacker/Schnyder, 4th edition 2021, Art. 1 para. 1, 25.

[71] **Fountoulakis**, C., "Der Vorsorgeauftrag im internationalen Rechtsverkehr (Teil II)", *Anwaltsrevue* 7-16, 7, 8, (2023).

[72] **Schwander**, I., *Basler Kommentar Internationales Privatrecht*, Grolimund/Loacker/Schnyder, 4th edition 2021, Art. 85 para. 137; **Siehr**, K./**Markus**, A. R., *Zürcher Kommentar zum IPRG*, Müller-Chen/Widmer Lüchinger, 3rd edition 2018, Art. 85 para. 1.

[73] See https://www.hcch.net/en/instruments/conventions/specialised-sections/adults (accessed February 2025).

including the Swiss ACD[74] as well as the Swiss Living Will when it appoints a person to make decisions about medical treatment in the event of incapacity.[75] Powers of representation that are valid both before and after the onset of incapacity, such as a power of attorney, are subject to the provisions of the HCIPA only after incapacity has occurred. Those that terminate with the incapacity of the principal, are not subject to the HCIPA at all.[76]

According to Art. 5 HCIPA, the authorities at the place of habitual residence of the incapacitated person are generally competent to issue adult protection measures.[77] Consequently, they are also competent to declare the ACD effective.[78] Likewise, based on Art. 15 HCIPA, the powers granted by an ACD or similar instrument are governed by the law of the state of the incapacitated person's habitual residence at the time the document was executed whereby the principal can opt for (i) the law of the state of his or her citizenship, (ii) the law of the state of his or her former habitual residence, or (iii) the law of the state in which property is located for a planning instrument with respect to that specific property.[79]

According to Art. 22 HCIPA, foreign durable powers of attorney and other powers of representation are recognised in Switzerland if issued in a signatory state or, alternatively, if issued at the habitual residence of the incapacitated person or recognised in such a state. Given that Switzerland also applies the HCIPA with regard to non-signatory states, they are also recognisable if they are issued in a non-signatory state.[80] Despite this clear legal position, Swiss banks sometimes do not accept foreign durable powers of attorney.

The law of the state in which a power of representation is exercised governs the manner in which such powers are exercised.[81] This includes obligations of the representative such as making an inventory, providing an accountability report, and so on.[82]

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[74] **Fountoulakis**, C., "Der Vorsorgeauftrag im internationalen Rechtsverkehr (Teil II)", *Anwaltsrevue* 7-16, 8, (2023); **Renz**, N., *Der Vorsorgeauftrag und seine Validierung*, Alexander et al., 2020, para. 417.

[75] **Fountoulakis**, C., "Der Vorsorgeauftrag im internationalen Rechtsverkehr (Teil II)", *Anwaltsrevue* 7-16, 15, (2023); **Pair**, L. M./**Gloor**, P. S., "Vorsorgeaufträge: Wie mit internationalen Bezügen umzugehen ist", *Der Treuhandexperte* 5 298-302, 302, (2020).

[76] **Schwander**, I., "Kindes- und Erwachsenenschutz im internationalen Verhältnis", *Aktuelle Juristische Praxis* 10 1351-1374, 1366 (2014); **Lagarde**, P., *Explanatory Report on the Hague Convention of 13 January 2000 on the International Protection of Adults*, The Hague Conference on Private International Law, 2017, para. 97.

[77] **Schwander**, I., *Basler Kommentar Internationales Privatrecht*, Grolimund/Loacker/Schnyder, 4th edition 2021, Art. 85 para. 149.

[78] **Fountoulakis**, C., "Der Vorsorgeauftrag im internationalen Rechtsverkehr (Teil II)", *Anwaltsrevue* 7-16, 10, 11, (2023); **Schwander**, I., "Kindes- und Erwachsenenschutz im internationalen Verhältnis", *Aktuelle Juristische Praxis* 10 1351-1374, 1367 (2014).

[79] **Schwander**, I., *Basler Kommentar Internationales Privatrecht*, Grolimund/Loacker/Schnyder, 4th edition 2021, Art. 85 para. 164.

[80] Cf. **Schwander**, I., *Basler Kommentar Internationales Privatrecht*, Grolimund/Loacker/Schnyder, 4th edition 2021, Art. 85 para. 79, 170.

[81] **Schwander**, I., *Basler Kommentar Internationales Privatrecht*, Grolimund/Loacker/Schnyder, 4th edition 2021, Art. 85 para. 165.

[82] **Fountoulakis**, C., "Der Vorsorgeauftrag im internationalen Rechtsverkehr (Teil II)", *Anwaltsrevue* 7-16, 13, (2023).

D Summary

To summarise, the Swiss adult protection law emphasises the importance of self-determination and provides individual planning instruments such as the ACD and the Living Will to regulate personal, legal, and financial interests in the event of incapacity. These instruments allow individuals to make binding provisions and appoint representatives to act on his or her behalf, ensuring that the wishes of the incapacitated individual are respected if he or she is no longer able to express him- or herself. It is advisable to issue these planning instruments early on, as they require the principal to be capable of judgment at the time of creation.

Moreover, even if no planning instruments are set up, the adult protection law grants spouses or registered partners or other individuals close to the incapacitated person statutory rights to act as representatives. The intervention of the APA is subsidiary to these individual planning instruments and statutory representation rights. Thus, the APA only issues the necessary protective measures if any issued individual planning instrument, the statutory representation rights, if applicable, and the support of close persons are insufficient for the welfare and protection of the individual lacking capacity. Overall, the Swiss adult protection law offers a comprehensive approach to incapacity planning, balancing individual autonomy with necessary state interventions.

In an international context, Switzerland applies the HCIPA also with respect to non-signatory states. Thus, generally powers of representation and measures taken in a contracting or non-contracting state are recognised in Switzerland. However, it is still advisable to verify the recognition of issued planning instruments in the case of incapacity for any country where the instrument in question might need to be recognised before the onset of incapacity of the principal.

E Annex: Cross-Border Case Study

The following case study shall illustrate different issues that may arise in cross-border cases:

> Meredith, a US-citizen, was on a skiing holiday in St. Moritz, Switzerland, with her boyfriend Thor. Thor and Meredith live together in London. One day, while on the ski slopes of St. Moritz, Meredith had a bad fall which caused several fractures. She was going in and out of consciousness with some lucid moments. Due to the severity of her injuries, she was transferred to the Clinic Gut in St. Moritz.
>
> Hospital staff found a small card in Meredith's wallet listing her sister, Margaret, as Meredith's attorney for health and medical care and giving Margaret's contact information.

The hospital staff contacted Margaret. Margaret immediately flew to Switzerland and took a copy of Meredith's Florida Advance Directive for Health Care (Living Will and Designation of Health Care Surrogate) and Durable General Power of Attorney with her. Meredith had given a copy of both documents to Margaret in case anything would happen. Both documents appoint Margaret as Meredith's sole attorney and were drawn up while Meredith was living in the U.S. and do not contain a choice of law.

At the hospital, Margaret went to the nursing station on Meredith's floor, and told the nurse that she was Meredith's health care attorney, and wanted to find out about her condition. The hospital told her to speak to Meredith's "spouse" Thor, who they said is in charge of her care. Thor was just down the hallway on his cell phone playing angry birds. Thor and Margaret exchanged words over who has authority for Meredith, and the result was that Thor purported to ban Margaret from Meredith's hospital room. Before she left the room, Thor told her that the hospital required an advance payment for further treatment and that, as a relative, Margaret should pay it.

Margaret is frustrated and decides to seek legal advice immediately. She is also concerned about how the advance payment will be paid for.

Margaret brings a copy of the Florida Advance Directive for Health Care and the Durable General Power of Attorney with her to the meeting with the lawyer.

I Qualification of the Documents

A Florida Advance Directive for Health Care (Designation of Health Care Surrogate) is a document that names another person as representative to make medical decisions in the event of incapacity. The Swiss equivalent would be a Living Will according to Art. 370 para. 2 CC.

A durable general power of attorney gives someone power of attorney over finances and other areas of life. It is valid both before and after the person granting the power of attorney becomes incapacitated.

A power of attorney under Swiss law generally expires when the principal loses his or her capacity. However, it is possible to state that the power of attorney is to remain in force even after the onset of incapacity, in which case it will continue to be valid. Note that the APA may appoint a deputy if the incapacitated person is unable, at least in principle, to control and supervise the appointed person.

If a power of attorney is to be valid only after the onset of incapacity, it is an ACD under Art. 360 CC and must comply with the formal restrictions in order to be valid. A durable general power of attorney is therefore not an equivalent to an ACD under

Swiss law but an equivalent to a power of attorney under Art. 32 *et seq.* Swiss Code of Obligations (CO).

II Validity of the Document: Applicable Law

An arrangement which aims at appointing representatives in the event of loss of capacity is considered a 'power of representation' under Art. 15 HCIPA. However, the U.S. has not joined the HCIPA and the UK only ratified it for Scotland. But Art. 18 HCIPA states that the provisions of the Chapter III of the HCIPA (which includes Art. 15 HCIPA) apply even if the law designated by them is the law of a non-contracting state. In addition, Switzerland has extended the scope of application of the HCIPA also to relations between Switzerland and non-signatory states with regard to the provisions on applicable law and the recognition and enforcement of foreign decisions or measures. Therefore, the provisions of the HCIPA are applicable with regards to the Florida Advance Directive for Health Care (Designation of Health Care Surrogate).

The existence, extent, modification and extinction of powers of representation within the meaning of the HCIPA are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, consequently, the validity of the document is a question of U.S. law (Florida law), assuming that Meredith was still living in the U.S. when she drew up the document and no choice of law was made.

With the durable general power of attorney this remains unclear. It is disputed whether a durable general power of attorney is covered by the HCIPA after the onset of the person's incapacity, or whether it is not covered by the HCIPA but by the PILA. If the HCIPA is considered applicable, the same applies as with the Florida Advance Directive for Health Care (U.S. law (Florida law) is applicable). If not, Art. 126 PILA applies. Assuming that there is no choice of law, the applicable law of the validity of the power of attorney would be the law in which the appointed person – here Margaret – has her habitual residence. Therefore, U.S. law (Florida law) is also applicable on the question whether the durable general power of attorney is valid.

III Applicable Law for Exercising Powers Derived from the Documents

Pursuant to Art. 15 para. 3 HCIPA the manner in which powers of representation are exercised is governed by the law of the state in which they are exercised. This includes inter alia, the duty of care, compensation (although this is disputed), obligation to draw up an inventory, an accountability report, etc. Furthermore, the question of how and whether the hospital must involve the person appointed to make medical decisions for the incapacitated person is considered as 'manner of exercise' and is therefore in this case a question of Swiss law. Therefore, the manner of which the Florida Advance Directive of Health Care is exercised in Switzerland is a question of Swiss law.

When it comes to the durable general power of attorney, as mentioned, it is not clear whether the applicable law is determined by the HCIPA or PILA. If the HCIPA is considered applicable, it is Swiss law. If the PILA is applicable, it is either U.S. (Florida) law or Swiss law (see provisions of Art. 126 para. 2 PILA).

IV Right to Information

1 Margaret's right to information?

Standard Swiss Living Wills usually contain a clause releasing the doctor from medical confidentiality, allowing him/her to give information to the representative. If no such clause exists, the doctors must provide the representative with all relevant information about the proposed medical treatment (*informed consent*). Usually, to make a well-founded decision it is required to have detailed information about the patient's condition. The Health Act of Canton of Graubünden (Clinic Gut is located in the Canton of Graubünden) explicitly states that the doctors must provide information on the state of health and the diagnosis of the disease is required.

As Swiss law applies to this question, and assuming that the Florida Advance Directive for Health Care is valid under U.S. law (Florida law), Margaret is entitled to information by virtue of her status as an attorney for health and medical care.

However, the hospital claims that Thor is in charge of Meredith's care. The first question is whether Thor, as Meredith's boyfriend, has the right to represent Meredith at all. Under Swiss law a person who lives with the incapacitated person and provides him or her with regular and personal support may, under certain conditions, represent him or her with regard to medical treatments. This is considered a statutory right of representation. However, the question arises as to whether this provision is applicable at all, given the international nature of the situation.

In general, the provisions of the HCIPA also govern statutory rights of representation. However, the HCIPA is silent as to which law is applicable to these statutory rights. It was discussed to include a provision on statutory rights of representation (*ex lege* representation) in the HCIPA. However, the HCIPA was not amended in this regard, on the grounds that this did not appear to be a practical issue.

The question must therefore be answered in accordance with the international law of the state concerned. This means that the provisions of the Swiss PILA must be consulted, but PILA does not provide rules on non-marital unions. There is therefore no definitive answer to this question.

The European Law Institute suggested to the European Commission "*that legislative measures taken by the EU aiming at complementing the Hague Convention should take into account the ex lege power of representation by family members as a measure of protection of the adult in personal or patrimonial matter.*" In particular, it considered it appropriate that *ex lege* representation should be governed

by the law of the state in which the adult concerned has his or her habitual residence at the time when the powers are exercised.

An analogy to the provisions of Art. 48 PILA (applicable law on marriage) seems legitimate. Art. 48 PILA states that "*[T]the effects of marriage are governed by the law of the state in which the spouses are domiciled.*" In the end, following this approach leads to the same result as the analysis of this point by the European Law Institute. In this case, English law would be applicable, as both Thor and Meredith live in London.

Assuming that Thor has a right of representation under English law and that Margaret's appointment is valid, the question arises as to who has priority.

Under Swiss law, defining the person who is authorized to represent an incapacitated person regarding medical decisions, is dependent on the order stipulated by the adult protection law. A person appointed by a Living Will has priority over the statutory right of representation of a person, cohabiting with the incapacitated person and regularly and personally providing him or her with support.

The question of which law governs the matter of who has priority for representation has yet to be resolved. In Swiss doctrine, it is argued that the law applicable to the power of representation should apply. It should be noted that Swiss courts have not yet provided clarification on this issue. It is therefore advisable to assess the situation under Swiss, U.S. (Florida) and English law. Under Swiss law Margaret would have priority over Thor in making medical decisions for Meredith.

2 Enforcement of Margaret's right to information?

If it is established that Margaret takes priority over Thor when it comes to medical decisions, and the hospital still refuses to inform Margaret and refuses to accept her decisions, it may be helpful that a lawyer contact the hospital. Most hospitals in Switzerland have an ombudsman service, which would be the point of contact (for the Clinic Gut it is the quality management).

If the problem is not resolved, in public hospitals it is possible to demand a reasoned decision, which can be appealed. Note that this does not apply to private hospitals, as in the present case.

Finally, under Swiss law, any person closely related to the patient may contact the APA in writing and claim that the Living Will is not being complied with (Art. 373 para. 1 CC). The APA may take the necessary measures, in particular issuing instructions and imposing criminal sanctions for non-compliance. Note that even in international cases, the Swiss APA will apply Swiss law.

However, the Swiss APA is only competent under certain circumstances, as the HCIPA states that the competent authority is generally the authority of the place of habitual residence of the individual concerned, which in this case would be the

UK authorities. Consideration should be given to establishing a Swiss jurisdiction as this is likely to be much quicker than involving the UK authorities.

It could be argued that the Swiss authorities are responsible under Art. 10 para. 1 HCIPA, which confers jurisdiction in cases of urgency. A situation of urgency within the meaning of Art. 10 para. 1 HCIPA exists where the situation is likely to cause irreparable harm to the adult or his or her property if relief is sought only through the normal channels, in this case that means action of the APA in the UK.

Note that – as non-convention states are involved – there is also the possibility for jurisdiction under Art. 85 para. 3 PILA, which says that *"(…), the Swiss judicial or administrative authorities have jurisdiction if this is necessary for the protection of a person or of their property.*".

It could be argued that medical decisions need to be made immediately and that wrong decisions could put Meredith in danger. As a back-up, if the Swiss authorities do not consider themselves responsible, the UK authorities could be contacted as a precaution.

V Liability for Hospital Expenses

A contract for medical treatment in a Swiss hospital is usually governed by Swiss law, even if the patient is a foreigner (unless there is a choice of law). The legal relationship between the patient and the doctor or hospital may be private or public. Treatment in a public hospital is governed by public law, while treatment by a private doctor or a private hospital is governed by private law. If a patient is treated in a public hospital but receives private medical care (e.g. treatment by an attending or chief physician or in the private ward of a public hospital), there is a so-called split contractual relationship: a private contract for treatment with the doctor and a contract for accommodation, catering and care with a public hospital.

The Clinic Gut in St. Moritz is a private hospital. The contract between Meredith and the hospital is therefore governed by private law. A contract binds only the parties to it, a contract that imposes obligations on a third party is not valid. Therefore, it is clear that Margaret cannot be held liable for the costs already incurred for Meredith's treatment.

Note that the situation may be different if the contract is under administrative law (i.e. a treatment in a public hospital): Some cantonal regulations governing hospital fees state that spouses, custodial parents and registered partners are jointly and severally liable with the patient for the costs.

For the costs of any further treatment that Margaret may decide to carry out on Meredith's behalf, Margaret cannot be held liable, unless the hospital's contract states otherwise. It is therefore important to clarify this point with the hospital and have the contract reviewed. If there is no such obligation in a contract, Art. 32 CO

applies: "*The rights and obligations arising from a contract made by an agent in the name of another person accrue to the person represented, and not the agent.*" Therefore, Meredith will be liable for the costs incurred and there is no basis to hold Margaret liable.

VI Advance Payment

Hospitals often require an advance payment for patients who do not live in Switzerland. The situation is different in emergencies, where there is a duty on the part of medical personnel to provide treatment.

If the hospital where Meredith is being treated asks for an advance on the cost of treatment that is no longer emergency first aid, they are allowed to do so. In this case, if not already done, it is recommendable to check whether Meredith has an accident insurance and if so, to contact it.

If she does not have one, or if the accident insurance does not cover the advance, it must be considered whether Margaret has access to any of Meredith's bank accounts.

Regarding the Swiss bank account, although Margaret has a valid durable general power of attorney, Swiss banks generally do not accept it. A person who wants to act with a foreign power of attorney for an incapacitated person usually needs an official certificate that third parties can rely on. Under Swiss law, such a certificate can only be obtained with an ACD and not with a 'normal' power of attorney. The certificate is issued after the ACD has been validated by the competent APA.

It is therefore necessary to determine whether the U.S. or UK authorities can issue a certificate or decision. If so, Margaret can ask the competent Swiss authority to recognize the foreign ruling. This usually takes some time. In this case, it is important, that the advance payment can be made quickly.

Another way would be to contact the Swiss APA. The Swiss authorities may have jurisdiction under Art. 10 HCIPA or Art. 85 para. 3 PILA. The APA may take the necessary measures to ensure that an advance payment can be made. What measures they ultimately take, depends very much on the authority in question. For example, as would be likely in this case, they could set up a guardianship to authorise payments from the account. They could appoint Margaret as guardian if they think she is suitable.

VII Margaret's Expenses

Under Swiss law, a person appointed by a Living Will generally performs the duties free of charge, unless otherwise specified. However, the appointed person is entitled to reimburse his or her expenses. The same applies to persons with a statutory

right of representation. Whether or not Swiss law applies to this issue in an international context is disputed.

This issue has been addressed relating to representatives authorized by an ACD, which by analogy can be applied to representatives authorized by a Living Will. According to one view it is a question of the 'manner of exercise' within the meaning of Art. 15 para. 3 HCIPA and therefore – in this case – Swiss law would apply. According to another view, it is a question of the 'existence, extent, modification, and extinction' of a power of representation (Art. 15 paras. 1 and 2 HCIPA) and therefore a question of the law, which is applicable to the power of representation, in this case U.S. law. A third view is that the HCIPA is not applicable at all to this question, because the HCIPA is silent about the law applicable to the relationship between the representative and the represented person. This issue must therefore be resolved – in this case by the PILA – which leads to the result, that this question is governed by the law, which is applicable to the power of representation (in this case U.S. law). Therefore, the prevailing view is that this issue should be addressed under the law applicable to the power of representation – in this case, U.S. law.

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American College of Trust and Estate Counsel Annual Meeting 2025

Mental capacity

Jurisdictional review - England and Wales

How does your jurisdiction define incapacity in substitute decision making?

1. INTRODUCTION

Historically, the law in England and Wales relating to capacity was almost exclusively a creature of common law with extensive case law sources. The principles enunciated in case law went back as far as 1806 with one of the more frequently cited cases, Banks v Goodfellow[1], decided in 1870. To confuse matters the test of capacity to carry out a specific juristic act; for example, making a Will, gift, contract or Power of Attorney was different in each case.

Momentous change was delivered with the coming into force of the Mental Capacity Act 2005 (**MCA 2005**) on 1 October 2007.

The common law defined incapacity as the inability to enter into a transaction either imposed by law for policy reasons or which arose by reason of mental disorder or disability. The purpose of the MCA 2005 was to introduce a new test for mental capacity and to bring the previously disparate sources of law under one roof. As a result, England and Wales now has a new Court of Protection (**COP**), a new Office of the Public Guardian (the **OPG**) and new independent mental capacity advocates.

2. MENTAL CAPACITY ACT 2005 - OVERVIEW

2.1 MCA 2005 created a comprehensive integrated jurisdiction for the making of personal welfare, healthcare and financial decisions on behalf of those who may lack capacity to make specific decisions for themselves. MCA 2005 also set out a blueprint for the appointment of a substitute decision-maker, either by an individual (via a power of attorney) or by the Court (via the appointment of a deputy). A Code of Practice has also been published (**MCA Code**).

2.2 Section 1 of MCA 2005 sets out five guiding principles designed to emphasise that acts performed on behalf of vulnerable individuals under the scope of the MCA 2005 must be done in their best interests and require regard to be made as to whether the purposes of the acts can be achieved in a manner which is less restrictive on the person's rights and freedoms.

2.3 The five guiding principles are summarised as follows: (1) there is a presumption of capacity unless it is established that capacity was lacking; (2) all practicable steps must be taken to help a person decide before deeming them unable to make a decision; (3) a person is not treated as unable to decide because the decision made is unwise; (4) the act done/decision made for a person who lacks capacity must be done, or made, in his best interests; and (5) before an act/decision is made, regard must be had as to whether the purpose for which the decision is needed can be achieved in a less restrictive way.[2]

[1] Banks v Goodfellow (1869-1870) LRS QB549
[2] Mental Capacity Act 2005, s 1(1).

2.4 The first three principles are relevant to the assessment of capacity. The starting point of the Act is to enshrine in statute the presumption found in the common law that an adult has full legal capacity unless it is established that they lack it, even when the choice they make is an unwise one. All practicable steps must also be taken to help the person make the decision in question.

2.5 The MCA Code confirmed this approach and also that the aim of the legislation is to *protect people who lack capacity to make particular decisions but also to maximise their decision-making abilities or their ability to participate in decision-making, as far as they are able to do so*. Anyone using the powers or provisions conferred by MCA 2005 must act in accordance with the statutory principles in MCA 2005.

3. DEFINING LACK OF CAPACITY

Before MCA 2005 came into force, the lack of a clear statutory definition of capacity or lack of capacity caused confusion and difficulty, not least to professionals who needed to assess decision-making capacity. Case law provided a number of tests of capacity depending on the kind of decision in issue, but the Law Commission recommended that to provide certainty and clarity there should be a single statutory definition of capacity. The MCA Code made it clear that the case law decisions on lack of capacity are not overtaken by MCA 2005 and that judges can decide which tests to use. MCA 2005 operates in conjunction with the common law tests for capacity and does not replace the tests. There has been a significant amount of case law about this post MCA 2005 particularly in relation to the making of a Will.[3] As matters currently stand, the case law definition of testamentary capacity is the accepted one for use rather than the MCA 2005 definition.

4. OTHER POINTS ON THE DEFINITION OF LACKING CAPACITY

4.1 Decision and time specific

Capacity is a functional concept (which the common law accepted) which relates to a specific decision and not a person's ability to make decisions generally. The result is that individuals should not be labelled as incapable because they have been diagnosed with a particular condition, or because of pre-conceived ideas about their abilities due, for example, to their age or appearance or behaviour (see MCA 2005 Section 2(3)). It must be shown that the individual lacks capacity for each specific decision at the specific time when the decision needs to be made.

4.2 MCA 2005 test of lack of capacity

The MCA 2005 definition imposes a two-stage test to decide whether a person lacks capacity to make a decision - see Sections 2 and 3 MCA 2005. Section 2 sets out that the person will lack capacity if their inability to make a decision is as a result of "an impairment of, or a disturbance in the functioning of the mind or brain".[4] Capacity lacked for other reasons would therefore not fall under the MCA 2005. The impairment or disturbance must, however, be sufficient to cause the person to be unable to make the decision at the relevant time.

Section 3 of MCA sets out the test for assessing whether a person is unable to make the decision for themselves. The test is in three parts plus a final issue concerning communication.

> "(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

[3] Leonard v Leonard [2024] EWHC 321; Langley v Qin (judgement handed down in April 2024 but not yet published).
[4] MCA 2005, s 2(1).

(a) to understand the information relevant to the decision,

(b) to retain that 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).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.[5]"

The first limb requires the individual to have a basic understanding of the information relevant to the decision. The second limb requires the information to be retained for long enough for it to be considered and used. This can be for a short period as long as it is long enough to make the decision in question. The final limb of the test is that the decision-maker must be able to communicate that decision, and examples are given of forms of communication.

The MCA test can be used for many types of decision but is, of course, the test of capacity to create a Lasting Power of Attorney to manage property and financial affairs. There were also common law tests in relation to the capacity to manage affairs. In *A, B and C v X and Z*[6] an early but important case on the approach of the Courts to determine capacity to manage property and affairs the judge considered both the common law and the MCA test, making the point that, unlike the tests for other actions such as making a Will which relate to a single time specific action, the management of affairs relates to a continuous state of affairs "whose demands may be unpredictable and may occasionally be urgent".

What Powers of Attorney are available and how are they used?

1. General Powers of Attorney

A General Power of Attorney (see Powers of Attorney Act 1971) is a deed whereby authority can be given by a donor to another to manage the affairs of the donor. However, General Powers are usually automatically revoked by operation of law when the donor becomes mentally incapable. They are also revoked on the death of the donor. There is no

[5] MCA 2005, s 3.
[6] A, B & C v X, Y & Z [2012] EWHC 2400 (COP).

requirement for any type of registration. Decisions can only be made about financial and contractual matters.

2. Trustee Powers of Attorney

In 1994 the Law Commission recommended that there be a special regime for the delegation of trustee functions. The regime divided such delegation between situations where the donor has a beneficial interest in the property in the trust and a general scheme for all other trusts. Any trustee functions delegated to an attorney - whether under a general, enduring or lasting power - must comply with the provisions of Section 25 of the Trustee Act 1925 as amended by the Trustee Delegation Act 1999. The regime is limited as far as the powers of attorneys are concerned; Section 25 powers can also operate only for a period of 12 months but may be renewed annually.

3. Enduring Power of Attorney (EPA) - overview

The first kind of durable power were EPAs, originally created under the Enduring Powers of Attorney Act 1985 (**EPAA 1985**). However, on the coming into force of MCA 2005 on 1 October 2007, the EPAA 1985 was repealed but is largely reproduced in Schedule 4 of the MCA 2005. It is supplemented by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.

No new EPAs can therefore be made after 30 September 2007. However, EPAs created before that date are still valid, the consequence is that the Enduring and Lasting Power of Attorney systems run in parallel. An EPA could only be created using a prescribed form. As an EPA is now very rare, this paper does not deal with the requirements and limitations of EPAs.

5. Lasting Powers of Attorney- overview

Lasting Powers of Attorney (**LPAs**) replaced EPAs under MCA 2005. The first LPAs could be made after 1 October 2007.

Although LPAs must be made on a specified statutory form (like EPAs), there were significant differences between EPAs and LPAs; the differences in providing additional safeguards to deal with some of the concerns about the misuse of EPAs.

Points to note- see specimen LPAs

- There are two types of LPA - Finance, and Health and Welfare. Individuals can make one or both.
- Attorneys can be appointed more flexibly: joint, joint and several or hybrid - and replacement attorneys.
- A trust corporation can be appointed but only in relation to financial matters.
- An LPA will survive incapacity. A financial LPA can be used as soon as it is registered or limited to use when capacity has been lost. Health and welfare can only operate when capacity has been lost.
- Additional powers can be added, but not all kinds of powers. There are strict gift limitations which cannot be breached.

- Governing law wording can be included to help when the LPA is intended to be used outside England and Wales.

- It is possible to include certain safeguards such as directing that certain persons should be notified when the LPA is registered.

- Crucially, an LPA must be registered with the OPG before it can be used and must contain a certificate from an independent person or professional or friend (certificate provider) confirming the donor had capacity (and other things).

- Registration has been taking a very long time, in some cases up to 20 weeks. But according to the OPG, current processing time takes between 8 to 10 weeks.

- No interim powers are available while the LPA is being registered.

- Attorneys must act in accordance with the five principles referred to in paragraph 2.2, particularly principle (4), namely, to act in the individual's best interests. They must also have regard to the MCA Code.

- The passing of the Powers of Attorney Act 2023 has paved the way for the creation of digital LPAs. It will enable a fully digital LPA to be rolled out by the OPG once secondary legislation is passed to implement the relevant parts of the Act. In its current form, however, only amendments to allow certification of copies of power of attorneys by Chartered Legal Executives have come into force. The hope is that through a digitlaised LPA system, everyone (including the donor) will sign the LPAs online, so no wet ink signatures are required. The risk of losing the LPAs when posting the relevant sections to the attorneys, or the completed power to the OPG will be eliminated, reassuring the donor that their LPA will be safely received and registered without delay. However, there is significant concern amongst those advising on LPAs that a move to entirely digital LPAs will bring with it greater possibilities of fraud.

Court supervision of incapable persons in England and Wales

1. Court of Protection

The COP is a superior court of record created by MCA 2005, it exercises powers under MCA 2005 through designated judges in the existing judicial framework. The judges of the COP are judges of the High Court and a number of circuit judges and district judges nominated by the president. A number of district judges together with the senior judge sit at the COP's central registry in London. Other judges sit at their own courts in England and Wales. From 2011 a number of Court officers were also nominated to exercise the COP's authority in the making of routine or non-contentious decisions. Although the jurisdiction can deal with both financial and welfare cases, in practice serious welfare cases are dealt with by High Court judges and other cases by district judges. By number there are significantly more applications to the COP for financial rather than health and welfare matters. The COP is separate from the OPG. The OPG, whose role is derived also from the MCA 2005, is presently responsible for registering EPAs and LPAs and dealing with the supervision of deputies appointed by the COP.

2. The jurisdiction of the COP

The COP has a wide jurisdiction. Under Sections 15 and 16 of MCA 2005 it may:

- make a declaration as to a person's capacity to make a decision;

- make a declaration that a particular act done in relation to a person who lacks capacity is lawful;
- make a decision on behalf of a person who lacks capacity;
- appoint a deputy to make decisions on behalf of a person who lacks capacity to make those decisions.

The Court of Protection Rules 2007 set out the formal rules and procedures for the COP and these are supplemented by practice directions.

3. Deputies

The COP's jurisdiction is exercisable where a person lacks capacity in relation to a matter if at the material time he cannot 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.[7] The COP, however, needs to address as well where the person lacks capacity, whether it should intervene and on what basis. In so doing the COP will also consider the five principles and in particular whether there is a no less restrictive way of making the decision. The COP will also want to be clear whether there is any LPA or EPA in place.

Broadly, the COP's choice is often between making a single decision on behalf of the incapable person or to appoint a deputy to act for them. Deputies can be appointed for health and welfare or finance. It is most unusual for a deputy to be appointed for health and welfare matters. Where property and affairs are concerned, an application for the appointment of a deputy is often necessary. This reflects the position where property and affairs are sufficiently complicated relative to the donor's capacity to make decisions. For example, it may be that the incapable person can manage some of their finances but not all.

4. Who can be appointed as deputy

There is no order of priority for a deputy. The decision as to who should be appointed is in the discretion of the COP and will be made when the application and all the relevant facts are before the COP. A close adult relative is normally the COP's preference but this is not always the case. A deputyship appointment is often for one person but joint deputies, either jointly or jointly and severally, can also be appointed. The COP is reluctant to appoint someone whose interests conflict with those of the person they will represent and has in the past been reluctant to appoint anyone resident outside England and Wales, although this is now more common.

5. Application papers

There are a considerable number of forms required to make the application to the COP for the appointment of a deputy which is a formal court application. As well as the application form itself (COP1) there is a supporting information form with separate types for property and affairs and welfare, plus a declaration by the deputy. The most important form, however, is often Form COP3 - the assessment of capacity form or the medical certificate which is provided by a medical practitioner, psychologist or psychiatrist who has examined and assessed the capacity of the person to whom the application relates. It is possible for others, for example, a registered therapist such as a speech therapist or occupational therapist to also

[7] MCA 2005, s 2(1).

complete the form. The person completing the form does need to know enough relevant information about the person in respect of whom a deputyship order is to be applied for and the first section of the form lists the orders which the Court has been asked to make.

6. Application procedure, notices and orders

Once the papers are prepared, they are filed at the COP together with an application fee. Proceedings are not formally started until the COP issues the application form and time limits run by reference from that date of issue. The COP issues the form and will then proceed either to issue directions including, for example, joining the vulnerable person as a party and requiring service on the Official Solicitor usually as a litigation friend, or on others who may be joined as parties or setting the matter down for a directions hearing. In a non-contentious application (which is the majority), the applicant is then required to proceed with notifying the person for whom a deputy is to be appointed and other close relatives, but the matter does not proceed to any kind of hearing. It may also be helpful to provide the COP with a draft of the deputyship order in the applicant's preferred form.

Whether the application is contentious or not, the application usually concludes with the issue of a deputyship order. This sets out the scope of the deputy's authority to act, provides for the payment of costs incurred and sets the security which must be provided in the form of a deputyship bond which the deputy must put in place once the Court has confirmed the level of security set.

7. Supervision of deputies

Supervision of deputies is conducted by the OPG. The COP has set the supervision level based on the size of the estate which the deputy is managing but the deputy will have to provide an annual account and report and pay an annual fee.

Recognition of a foreign Power of Attorney in England and Wales

1. Jurisdiction of Court of Protection

Schedule 3 MCA 2005 provides for the jurisdiction of the COP where international situations arise. Paragraph 7 of Part 2 of the Schedule to MCA 2005 gives the COP power to exercise its functions under MCA 2005 in relation to either an adult habitually resident in England and Wales, an adult's property in England and Wales or in certain circumstances, an adult present in England and Wales who has property there.

The majority of Schedule 3 relates to the recognition and enforcement in England and Wales of what is called a protective measure; a widely defined term which clearly covers the equivalent of deputyship orders made in a place of habitual residence.

2. Recognition of foreign powers in England and Wales

The issue as far as Powers of Attorney is concerned is whether they can be recognised in England and Wales under the provisions of Schedule 3.

In a recent case *Various applications concerning foreign representative powers*[8] Her Honour Judge Hilder (as she then was) considered five separate applications which each asked the COP to make orders to give effect in England and Wales to representative powers originating

[8] (2019) EWCOP 52.

in a foreign jurisdiction. The powers related to Lasting Powers of Attorney or their equivalent in British Columbia, New Zealand, Ontario, Spain and Singapore. The Court considered the documents individually but also considered three broad issues:

(a) can a foreign Power of Attorney be a 'protective measure';

(b) is there a capacity threshold to the COP's jurisdiction; and

(c) where there is a valid and operable foreign Power of Attorney, is the full original jurisdiction of the COP under Section 16 MCA 2005 limited.

The Judge held:

- that it was possible for a declaration under Section 15 MCA 2005 and Rule 23(6) to be made confirming that the attorney will be acting lawfully when exercising their authority under their foreign power in England and Wales; and

- the donor must be an adult within the meaning of Schedule 3 paragraph 4 MCA 2005 and the donor must lack capacity to make decisions themselves.

In the alternative, the attorney could seek an order of the COP under its full jurisdiction under Section 16 MCA 2005. This would effectively appoint a deputy for property and affairs or where the adult's property in England and Wales was limited and the attorney was simply seeking to remit the property to the estate where the adult is habitually resident, by making a single order authorising the attorney to make this transfer.

As this would be an order made under the full jurisdiction, the COP would need evidence that the adult lacked the relevant capacity within Section 2 MCA 2005 and also be satisfied that the appointment or authority to transfer was in the best interests of the adult.

Her conclusions in relation to whether a Power of Attorney was a protective measure were less clear; she noted that the COP was minded to take the view that a Power of Attorney could be transformed into a protective measure through a process of registration linked to the loss of capacity.

3. Is a separate Power of Attorney in England and Wales a good idea?

On the basis that an LPA works well in England and Wales even if the maker of the LPA is not habitually resident here, we are firmly of the view that it is simpler to execute a Lasting Power of Attorney under English law rather than having to persuade others that a foreign Power of Attorney can be used in England and Wales. Whilst the bureaucratic exercise of executing a LPA can be tiresome, it is nothing when compared to the work involved in applying to the COP. It will be worthwhile putting an LPA in place if capacity ever becomes an issue.

4. Using an LPA outside England and Wales

We are often asked whether a UK LPA can be used outside England and Wales.

As Powers of Attorney are unilateral and at present there is no internationally recognised legal standard and the laws to ensure international recognition are limited in scope, the options for a power of attorney used outside England and Wales are:

- a local durable power in all the places where one might be needed (which could be heavy on the paperwork and not all countries have durable powers in their law) or
- considering whether a document made in the place of habitual residence can be used in other places.

Schedule 3 MCA 2005 states that if the donor of an LPA is habitually resident in England and Wales when the power is granted, the law of the LPA is England and Wales law. This can sensibly be confirmed by including a choice of law clause in the LPA itself and also by confirming the donor's habitual residence in England and Wales at the time of making the LPA.

These provisions are useful when seeking to use an England and Wales LPA abroad; the country where it is sought to use the LPA may well find that this is easy to do on the basis that the LPA is valid under the law of habitual residence as this is often a tiebreaker where a conflict of laws point arises. But ultimately it is a question of local law and we would always recommend that advice should be taken.

5. STEP Global Representative Power (GRP)

STEP has a lofty ambition to bring uniformity, coherence and simplicity to the protection of adults and their property. Legislation on capacity representation varies in jurisdictions across the world. Although some have implemented robust legislation, many have yet to adopt a power of attorney framework. STEP is calling on jurisdictions globally to implement robust legal frameworks for safeguarding incapable clients through powers of representation.

STEP has produced this GRP, which, along with the Guiding Principles, is aimed to provoke greater international discussion around the themes of loss of capacity, while promoting legislation that is consistent in the cross-border context. This is a template and a benchmark for a lasting or enduring Power of Attorney designed to be globally recognised and portable across borders. It has been designed as a model 'best practice' template to be used by governments globally when developing new legislation or reviewing existing provisions.

The documentation relating to the GRP, produced by a Committee of STEP in November 2023, comprises a set of guiding principles, a model application form, guidance on the form itself and a template certificate. The essential features of the GRP are:

- consistency of language which can be applied in cross-border situations;
- suggestions re format and terms;
- consistent standards focused on protecting the interests of adults who are not in a position to protect their own interests by reason of an impairment or insufficiency of their personal faculties (Hague Convention definition);
- consistent legislation as to processes, validity, awareness, use in cross border context and acceptance;
- safeguards against the misuse of GRPs covering issues of restrictions on who can make one, restrictions on powers of the attorneys, record keeping and disclosure, supervision in each jurisdiction, limitations on matters such as gifting.

LP1H Lasting power of attorney - Health and care decisions
LP1F Lasting power of attorney - Financial decisions

February 2025
Clare Maurice
Maurice Turnor Gardner LLP

With grateful thanks to Julia Abrey, Withersworldwide for her guidance

IT'S COMPLICATED: MULTIJURISDICTIONAL INCAPACITY

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I. Florida Power of Attorney/Designation of Health Care Surrogate

a. Domicile

Domicile is established when there is a good faith intention to establish a particular residence as a permanent home, coupled with the physical move to the new residence, as evidenced by positive overt acts.[1] The best proof of domicile is where the individual says it is, because intent is highly significant.[2] Removal from one's domiciliary jurisdiction without the intent to change one's domicile is insufficient.[3] Once established domicile continues until it is superseded by a new domicile.[4]

Intention to change residence must be shown by positive overt acts and one must have mental capacity necessary to form such intention.[5]

b. Power of Attorney

Legal document appointing another person (referred to as "agent") to make financial and property decisions. Pursuant to F.S.A. § 709.2201(2)(c), a Power of Attorney can authorize an agent to "make all health care decisions on behalf of the principal," if such authority is specifically granted in a durable power of attorney. It is best practice to have a separate document granting authority to make health care decisions.

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[1] *Keveloh v. Carter,* 699 So.2d 285 (Fla. 5th DCA 1997)
[2] *Id.*
[3] *Id.*
[4] *Wade v. Wade,* 93 Fla. 1004, 113 So. 374 (1927).
[5] *In re Guardianship of Florence M. Mickler,* 152 So. 2d 205 (Fla. Dist. Ct. App. 1963), aff'd, 163 So. 2d 257 (Fla. 1964).

i. Execution

To be valid the principal must have the requisite capacity to sign the power of attorney. The power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public. F.S.A. § 709.2105(2).

A power of attorney executed on or after October 1, 2011, is valid if its execution complies with F.S.A. § 709.2105.[6]

A power of attorney executed in "another state" which does not comply with the execution requirements of this part is valid in this state if, when the power of attorney was executed, the power of attorney and its execution complied with the law of the state of execution.[7]

"Another state" is "a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States."[8]

In *Parisi v. de Kingston,* the court ruled that the power of attorney executed in Argentina did not fall within definition of "another state," under the statute which would allow for a power of attorney executed in "another state" to be valid in Florida. The court then turned its analysis to determining if the power of attorney document was executed in a manner which complied with Florida's requirements. The court held that the Argentina power of attorney document was not executed in compliance with Florida law, because the document lacked two subscribing witnesses, who were present at the time the principal signed the document before a notary public.

Therefore, the UK power of attorney is only valid in Florida if is executed in strict compliance with Florida Statutes.

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[6] F.S.A. § 709.2106(1)
[7] F.S.A. § 709.2106(3)
[8] *Parisi v. de Kingston*, 357 So. 3d 1254 (Fla. Dist. Ct. App. 2023), reh'g denied (Apr. 5, 2023)

ii. Multiple Agents

A principal may designate two or more persons to act as co-agents.[9] Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently.[10]

iii. Termination

A power of attorney terminates when: (a) the principal dies; (b) the principal becomes incapacitated, if the power of attorney is not durable; (c) the principal is adjudicated totally or partially incapacitated by a court, unless the court determines that certain authority granted by the power of attorney is to be exercisable by the agent; (d) the principal revokes the power of attorney; (e) the power of attorney provides that it terminates; (f) the purpose of the power of attorney is accomplished; or (g) the agent's authority terminates and the power of attorney does not provide for another agent to act under the power of attorney.[11]

If any person initiates judicial proceedings to determine the principal's incapacity or for the appointment of a guardian advocate, the authority granted under the power of attorney is suspended until the petition is dismissed or withdrawn or the court enters an order authorizing the agent to exercise one or more powers granted under the power of attorney.[12]

iv. Revocation

A principal may revoke a power of attorney by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal. The principal may give notice of the revocation to an agent who has accepted authority under the revoked power of attorney.[13]

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[9] F.S.A. § 709.2111(1)
[10] Id.
[11] F.S.A. § 709.2109(1).
[12] F.S.A. § 709.2109(3).
[13] F.S.A. § 709.2110(1).

Except as provided in subsection (1), the execution of a power of attorney does not revoke a power of attorney previously executed by the principal.[14]

c. Designation of Health Care Surrogate

A Designation of Health Care Surrogate is a legal document (sometimes referred to as an advance directive) appointing another person (referred to as "surrogate") to make health care decisions or receive protected health information, or both.[15]

"Health care decision" means: (a) informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives; (b) the decision to apply for private, public, government, or veterans' benefits to defray the cost of health care; (c) the right of access to health information of the principal reasonably necessary for a health care surrogate or proxy to make decisions involving health care and to apply for benefits; (d) the decision to make an anatomical gift pursuant to part V of this chapter.[16]

i. Execution

A Designation of Health Care Surrogate shall be signed by the principal in the presence of two subscribing adult witnesses.[17] The person designated as surrogate shall not act as witness to the execution of the document designating the health care surrogate. At least one person who acts as a witness shall be neither the principal's spouse nor blood relative.[18]

An advance directive executed in another state in compliance with the law of that state or of this state is validly executed for the purposes of this chapter.[19] It is likely a Court would apply the same definition for "another state," as it did in *Parisi v. de*

[14] F.S.A. § 709.2110(2).
[15] F.S.A. § 765.202(1).
[16] F.S.A. § 765.101(6).
[17] F.S.A. § 765.202(1).
[18] F.S.A. § 765.202(2).
[19] F.S.A. § 765.112

Kingston. Therefore, the UK power of attorney is only valid in Florida if is executed in strict compliance with Florida Statutes.

ii. Multiple Agents

There is no law prohibiting naming multiple health care surrogates. However, it is not recommended to name multiple health care surrogates as the health care provider may require all named representatives to act jointly.

iii. Revocation

Unless the document states a time of termination, the designation shall remain in effect until revoked by the principal.[20]

An advance directive may be amended or revoked at any time by a competent principal: (a) by means of a signed, dated writing; (b) by means of the physical cancellation or destruction of the advance directive by the principal or by another in the principal's presence and at the principal's direction; (c) by means of an oral expression of intent to amend or revoke; or (d) **by means of a subsequently executed advance directive that is materially different from a previously executed advance directive.**[21]

Practice tip: when executing subsequent documents in different jurisdictions, it is best practice to have the documents name the same agent/surrogate and grant the same authority.

Practice tip: if you intend to revoke a previous advance directive, it is recommended to execute a revocation by separate writing and include language in the subsequent advance directive that previous advance directives are revoked.

iv. Statutory Proxy

A proxy is a competent adult who has not been expressly designated to make health care decisions for an incapacitated

[20] F.S.A. § 765.202(7).
[21] F.S.A. § 765.104(1).

individual, but who is authorized under statute to make health care decisions for that individual.[22]

The individual of highest priority that is willing, available, and competent to act serves, as follows:

1. A guardian authorized to make decisions about health care on the patient's behalf.
2. The patient's spouse.
3. A child of the patient that is 18 years of age or older, or if the patient has more than one adult child, a majority of those available.
4. The patient's parent.
5. A sibling of the patient that is 18 years of age or older, or if more than one, a majority of those available.
6. An adult relative of the patient: exhibiting special care and concern for the patient; maintaining regular contact with the patient; and familiar with the patient's activities, health, and religious or moral beliefs.
7. A close friend of the patient.
8. A clinical social worker who meets certain additional requirements set out by statute.[23]

[22] F.S.A. § 765.101(19).
[23] F.S.A. § 765.401(1).

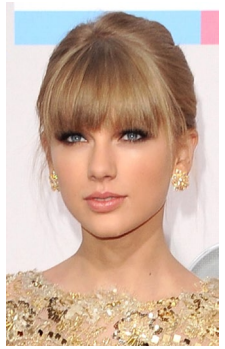
ACTEC 2025 Annual Meeting

It’s complicated: Multi-Jurisdictional Incapacity

Saturday 22nd March 2025

Who’s Who

Thor Samuelsson



Meredith O’Sullivan

Stuart Bear

Clare Maurice

Margaret O’Sullivan

Tina Wüstemann

St Moritz

London

Miami

Thank you