

THE INTERNATIONAL PROTECTION OF ADULTS

Edited by

RICHARD FRIMSTON

Partner, Russell-Cooke LLP

ALEXANDER RUCK KEENE

Barrister, Honorary Research Lecturer at the University of Manchester

CLAIRE VAN OVERDIJK

Barrister, Tutor at University College London

ADRIAN D WARD

Partner, T C Young LLP

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PREFACE

Disabilities, and in particular intellectual disabilities, create issues which cross all of the subject areas into which the law is traditionally divided. Likewise, the issues created by the consequences of intellectual disabilities do not respect the borders created by mankind's division of our globe into states and Law Districts (as we term them). In an era of increasing human mobility, such legal issues present ever more frequent and diverse challenges to practising lawyers such as the four editors of this book. We are two barristers and two solicitors, three practising in England and one in Scotland, and all of us members of the Society of Trust and Estate Practitioners. For a variety of reasons we have developed many professional contacts and friendships across the world. Even within our own small island, we have encountered significant legal difficulties and uncertainties when such legal issues have crossed our own internal borders. Both from our concern for people caught in such cross-border situations on a wider international scale, and our curiosity to understand the broader legal issues and challenges presented by such situations, we conceived a project of creating a book to try to bring clarity to such matters or—where they remained uncertain—to focus the questions which demand clearer answers.

The task would have been impossible for the four of us alone. Friends and their friends, contacts and their contacts, have responded with outstanding generosity to our requests for help in our attempt to assemble a global picture. This work is the result of our and their enthusiasm and efforts, and those of all others acknowledged in the following Further Acknowledgements section.

The Hague Convention on the International Protection of Adults (Hague 35)¹ and the explanatory report thereto by Professor Lagarde are reproduced in the Appendix. The languages of the Hague Conference are French and English. We are grateful to Professor Lagarde for his support and have published his Foreword in the original French with a translation. Hague 35 and the Lagarde Report are fundamental to an understanding of our subject, and we devote the whole of Part II of this book to a detailed analysis of the background to and the provisions of the Convention. If this book should help achieve any general outcomes, these would include the following two:

- (1) Firstly, only eight states have so far ratified Hague 35. We hope that many more states will take the view that they should ratify without further delay,

¹ The Hague, 13 January 2000, 2600 UNTS 3.

- so that they will remove at least one of the potential impediments affecting people within their borders, or having interests which cross their borders.
- (2) The second is that Hague 35 will be reviewed² and extended to meet issues which we have identified as not addressed, or not yet addressed adequately or with sufficient clarity, by the Convention.

To the extent that the above two matters remain unaddressed, to that extent will potential unfair and unnecessary discrimination against people with relevant disabilities remain unaddressed. They are one of the categories of people with disabilities in relation to which the UN Convention on the Rights of Persons with Disabilities³ ('UN CRPD') applies. The UN CRPD is not a Private International Law instrument. We touch upon it at various points in the book, but its full impact on all relevant areas of law, including Private International Law, is yet to be worked through and realized.

This book does not cover mental health law. Whilst the law relating to mental health and the law relating to those with intellectual disabilities have certain common historical origins, and states have provisions that provide for the (sometimes compulsory) treatment and detention of those with mental illness, in modern legal systems intellectual disabilities and mental illness are treated separately. This is reflected in the scope of Hague 35, which is primarily focused upon the Private International Law issues relating to the effects of intellectual disabilities; we have remained faithful to that scope.

Those, other than the editors themselves, who have written chapters or other material for this book are termed 'contributors'. Their authorship is credited in the Table of Contents. These include the chapters for seven of the eight Hague 35 states, the overall format of which we have sought to standardize, but not to the extent of unhealthy rigidity⁴. Those who have provided information from which chapters or parts of this book have been written, or at least assembled, by the editors are termed 'correspondents'. They include all those who fully or partly completed the questionnaire reproduced in Appendix A1 from which all of the descriptions of states which are not as yet Hague 35 states, in chapters 25–52, have been created—in each case—by one of the four editors, in many cases with considerable further assistance from correspondents. While we have sought to provide substantial coverage of all Hague 35 states, it has not been possible—nor

² Article 52 of Hague 35 provides that '[t]he Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.' Even the availability, as a first step, of the adopted Conclusions and Recommendations of such a Special Commission would be likely to enhance the operation of Hague 35.

³ New York, 13 December 2006, 2515 UNTS 3.

⁴ The chapter covering Scotland is grouped with the other jurisdictions of the British Isles, in Part III (A), but although written on a larger scale sets the overall format followed for the other Hague 35 states.

was it ever our intention—to achieve worldwide coverage of all other states. We have covered as many as has been possible for us within the constraints of our collective ability to identify suitable correspondents, elicit required information, and create all the individual country chapters, within a reasonable timescale. In the case of federal countries and confederations whose component states each have their own adult protection regimes, we have sought to include some representative states. The formatting of chapters 25–52 differs from that adopted for Hague 35 states, and for ease of cross-reference is more uniform, though not rigid. Contact details for the editors can be found at the end of this Preface. Contact details for all of our contributors and correspondents appear on pages xli et seq.

Authorship of chapters is attributed in the Table of Contents, and in many cases they were written by one or more of the editors, working as a team in close cooperation. In relation to Part II, Alex acknowledges the support given by the Institute of Advanced Legal Studies in London where he was a Visiting Fellow for the academic year 2013–14. He writes that along with the invaluable comments of his co-editors, he also acknowledges with gratitude the insights and practical assistance given by, amongst others, Professor Paul Beaumont of the University of Aberdeen; Helen Clift of the Office of the Official Solicitor and Public Trustee in London; Philippe Lortie and Maja Groff, both of the Permanent Bureau of the Hague Conference on Private International Law; Professor Nigel Lowe of the University of Cardiff; Jill Martin, former Legal Adviser to the Office of the Public Guardian in England and Wales; Professor Peter McEleavy of the University of Dundee; Professor Alex Mills of University College London; David Rees of 5 Stone Buildings; Dr Christopher Staker of Thirty Nine Essex Street Chambers; and Beverley Taylor, at the time of the Office of the Official Solicitor and Public Trustee. These acknowledgements, all specific to Part II, are in addition to those in the following Further Acknowledgements section.

Of the chapters in Part III (A) Claire was principal author of the chapter for England and Wales, and Adrian of the chapter for Scotland, which could equally well have been included with the other Hague 35 Law Districts in Part III (B), where editing roles were allocated as set out in the Table of Contents. However, these allocations in relation to Parts III (B) and (C) were not the same as the identities of editors who made initial contact with contributors and correspondents in those respective countries. The editors all contributed in various ways to Part IV.

Whilst every care has been taken to ensure the accuracy of the contents of this work, no responsibility for loss occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by any of the editors, the contributors, the correspondents or the publishers. Non-lawyers who use this book should be particularly aware that areas of law which it describes are often more complex and at times less certain than one might expect: appropriate legal advice should always be taken on any particular matters which arise. We seek to state

relevant laws as near as our working methods permit to 28 May 2014, but have referred to some subsequent developments where these can be anticipated with reasonable confidence, or inserted during the process of publication.

A particular cause of potential difficulty in a work of this nature is the terminology employed. Key definitions are specific to each regime, whatever the similarities or differences in terminology employed and however terms may be translated; and Hague 35 has its own definitions which in some respects are wider than those of most jurisdictions. Chapter 1, explaining the significance of these points, was written towards the end of the process of creation of this book, which in total spanned a period of some two years. In that time we four editors have learned much about the topics addressed in this volume; a process of learning, and of gathering and analysing material, which we expect to continue, and in time to lead to fresh editions. Suggestions for extension and improvement of our coverage will therefore be welcome, and should be made to the editors.

We hope that this present volume will bring some help and understanding to situations worldwide where aspects of the consequences of intellectual disabilities cross borders between jurisdictions.

Further Acknowledgements

In addition to the general and specific acknowledgements in the Preface, we thank Gordon R. Ashton for first drawing us together as a team and generously encouraging this project; and we acknowledge with gratitude the help and support given by all of the contributors and correspondents, all those who helped us identify them, the institutions, offices, and firms which gave them time and facilities in preparing their contributions, and the Society of Trust and Estate Practitioners and many of its members. We thank the Hague Conference on Private International Law and the Council of Europe for permitting reproduction of selected material. Richard and Adrian thank their respective firms, Russell-Cooke LLP and TC Young LLP, and their members and colleagues, for their encouragement and support; and Adrian—lacking the technological skills of his younger co-editors—in particular thanks Evelyn Brookmire for all her skilled help and support, and for keeping track of multiple countries and constant changes to text as several chapters evolved with increasing urgency right up to our deadline. During intense and complex final editing we also received valuable help from Zenny Saheel, a law student at Edinburgh Napier University temporarily with T C Young LLP. Beyond these, we have all benefited hugely from so much help from so many people in our journey through this subject that it would be impossible to list them all; but they all know who they are, and we thank them too.

Preface

And when we each separately wrote down our thoughts, we were unanimous in thanking each other for invaluable comments, for unfailingly instant response to cries for help when professional pressures intervened, for the reasoned consensus always achieved, and for friendships forged.

Adrian D Ward

adw@tcyoung.co.uk

Alex Ruck Keene

alex.ruckkeene@39essex.com

Claire van Overdijk

cvo@no5.com

Richard Frimston

richard.frimston@russell-cooke.co.uk

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