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This judgment is covered by the terms of an order made pursuant to Practice Direction 4C - Transparency. It may be published on condition that the anonymity of the incapacitated person and members of his family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

**Citation:** [2025] EWCOP 7 (T2)

Case No: 13116463\_\_

**COURT OF PROTECTION**

**MENTAL CAPACITY ACT 2005**

**Before: Her Honour Judge Hilder**

First Avenue House  
42-49 High Holborn,  
London, WC1V 6NP

Date: 20<sup>th</sup> February 2025

**IRWIN MITCHELL TRUST CORPORATION LTD**

**Applicant**

and

(1) KS  
(by her litigation friend, the Official Solicitor)

(2) AS  
(by her litigation friend, SH)

(3) AAS  
(by his litigation friend, SH)

**Respondents**

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Mr. James Poole (instructed by Irwin Mitchell LLP) for the Applicant  
Mr. Richard Dew (instructed by the Official Solicitor) for the First Respondent  
The Second and Third Respondents were excused from attendance

The hearing was conducted in public subject to a transparency order made on 10<sup>th</sup> August 2023 [C12]. The judgment was handed down on 20 February 2025. It consists of 15 pages, and has been signed and dated by the judge.

The numbers in square brackets and bold typeface refer to pages of the hearing bundle or, where the number is preceded by ‘A’, to the page of the three lever arch files of the authorities bundle.

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## JUDGMENT

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### A. The Issue

1. This matter concerns a young person under 16 years of age, who has substantial assets in England. Her appointed property and affairs deputy has applied for specific authorities in respect of expenditure from her funds. Her litigation friend contends that the Court of Protection has no jurisdiction to determine the application, and the deputyship appointment should be discharged.
2. The jurisdiction question arises because, as all parties agree, KS is now habitually resident in India. The parties have agreed that jurisdiction should be determined as a preliminary issue.

### B. Matters considered

3. I have considered the hearing bundle including:
  - a. for the Deputy
    - i. a statement by Katie Strong dated 24<sup>th</sup> February 2022 [B11]
    - ii. a case management summary assessment by Brownhills Associates dated 17<sup>th</sup> November 2022 [E11]
    - iii. a needs assessment dated 31<sup>st</sup> July 2023 [E20]
    - iv. a position statement
  - b. for the First Respondent, a position statement
  - c. for the Second and Third Respondents, a statement by Simon Heapy dated 17<sup>th</sup> February 2023 [D1]
  - d. a statement by RuS (the father of KS), dated 25<sup>th</sup> October 2023 [D25]
  - e. a statement by RaS (the mother of KS), dated 25<sup>th</sup> October 2023 [D30]
  - f. a letter from Khaitan & Co dated 31<sup>st</sup> October 2023 [F19]

### C. Factual background

4. KS was born in the UK and is a British citizen. She is now 14 years old. She has two younger siblings, who are joined as parties to these proceedings. Her parents originate from India and have family ties there but they too are British citizens. The family is Hindu.
5. KS suffered severe brain damage as a result of clinical negligence at birth. As a result she now has dystonic quadriplegic cerebral palsy, bilateral hearing loss, sight limitations, speech delay and epilepsy. She is able to mobilise but is unsteady and prone to falls. She requires 24-hour care. It is not in dispute that she will lack capacity to manage her property and affairs when she reaches adulthood.
6. By order made on 20<sup>th</sup> November 2017 [B32], settlement of a damages claim brought on behalf of KS was approved in the sum of £7.75 million with ASHE-linked periodical payments which are currently approximately £272 000 per year [G13].
7. Irwin Mitchell Trust Corporation Ltd (“the Deputy”) has been appointed as property and affairs deputy for KS by orders made on 17<sup>th</sup> October 2017 [B27] and 23<sup>rd</sup> February 2018 [B30].
8. In May 2018 the family moved to live in Gujarat, India. The move was initially undertaken on a trial basis but, although there has been some indication [D26] that KS may return to live in the UK in the future, the arrangement is now considered long term. KS lives with her family in rented accommodation and attends a private school. She visits the UK about once a year, for reasons largely related to healthcare. KS’s health is considered to be better in the Indian climate and she enjoys school, which was not the case in the UK [B16]. The expenditure required to meet her care needs is also lower [B17]. The family is very happy with present arrangements and her parents’ “strong wish” is for them to continue. [D26 – 8].
9. KS’s estate is held entirely in England, currently made up of:
  - a. approximately £66 000 in a deputyship account;
  - b. approximately £5.1 million in an Irwin Mitchell Asset Management portfolio;
  - c. approximately £490 in an NS&I investment portfolio;
  - d. approximately £1.1 million in the Court Funds Office;
  - e. £50 000 in premium bonds.
10. There is some evidence before the Court as to how the assets of a minor are managed in India:
  - a. Essentially, a minor is unable to purchase or hold immovable property but it could be purchased on behalf of the minor by her “natural legal guardian”. Once purchased, the property then could not be sold or transferred by that guardian without the prior permission of a court in India. Upon attaining majority, ownership passes and the guardian retains no rights over the property. [B17, opinion of Digant M. Popat at B82 – 91]]
  - b. Since KS is a Hindu residing in India, the Hindu Minority and Guardianship Act 1956 (“HMGA”) applies to her, without consideration of her citizenship. (The Guardians and Wards Act 1890 (“GWA”) also applies but the effective provisions are not materially different.) Section 6 of HMGA recognises a minor’s father as her “natural guardian”, and after him the minor’s mother. Guardianship applies to the

minor's person and property. The natural guardian is empowered to act "by default", without any requirement for appointment by a court or other authority. The law does not allow for the natural guardian voluntarily to relinquish that role, and the court will not appoint anyone other than the natural guardian unless the natural guardian has been found by the court to be unfit to take care. As long as the natural guardian is fit to take care of the person of the minor, the Court cannot appoint another person to take care of the minor's property. Once KS reaches 18, pursuant to the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999 ("NTA"), the natural guardian under HMGA continues to act, save that NTA does not permit foreign citizens to be guardians. Case law suggests that KS's parents may be able to nominate an Indian citizen as guardian for KS after she turns 18. [F19 – 28]

- c. The advice from Khaitan & Co [F19 – 33] is that "both UK and India exercise jurisdiction over KS's assets in England." India "will likely recognise that England has jurisdiction over assets located within its territory"; but on the other hand, such recognition "does not imply that India will also recognise IMTC in its role as Deputy (or in the role of a limited guardian) for controlling assets" in respect of which India is likely to consider that India also has jurisdiction in so far as requiring disclosure of those assets for tax purposes is concerned. There is a procedure for recognition of UK judgments, but the advice suggests that the Court of Protection does not come within that procedure.

11. In his statement, KS's father explains that the role of being her guardian would fall to him, and he would find that "onerous" [D27]. When the family moved to India "we did not foresee the English deputyship changing", and if the deputyship were lost, he would be "concerned". KS's mother's views are aligned with his [D31]. KS's parents want to be able to focus on KS's care needs, her continued progress and rehabilitation, and looking after her younger siblings. [D28]

#### Proceedings to date

12. By (undated) COP1 application [B1] the Deputy has applied for:
  - a. authority to purchase on behalf of KS two properties in India ("the property application");
  - b. authority to make lifetime gifts from KS's funds to her parents and siblings ("the gift application");
  - c. authority to pay fees (already incurred and anticipated) in respect of tax and property ("the fees application"); and
  - d. for a review of the deputyship security requirement.
13. By order made on 21<sup>st</sup> April 2022 [C5] the security requirement was increased to £750 000. In respect of the other parts of the application, KS was joined as a party and the Official Solicitor was invited to act as litigation friend for her. A timetable for further progression was set.
14. That timetable was subsequently extended by consent, by orders made by three different judges. On 4<sup>th</sup> August 2023, I made an order [C8] listing a hearing to decide the jurisdiction issues.

#### D. The jurisdiction question

15. The Official Solicitor's position is that:
  - a. the Court of Protection's jurisdiction over minors (as distinct from 'adults') is founded upon their habitual residence, reflective of the jurisdiction of the Family Court;
  - b. accordingly, the Court of Protection presently has no continuing jurisdiction in respect of KS;
  - c. jurisdiction over KS's property and affairs lies with India.
16. The Deputy asserts that the Court of Protection *does* have jurisdiction in this matter.
17. The Second and Third Respondents remain neutral as to the jurisdiction question, largely so as to avoid incurring unnecessary costs.

#### E. The Law

18. The modern Court of Protection is a creature of statute, namely the Mental Capacity Act 2005. It is a fully independent court of record, not in any sense a 'sub-division' of the Family Court. Pursuant to section 47(1) of its creating Act, the Court of Protection has in connection with its jurisdiction all of the same powers, rights, privileges and authority as the High Court.
19. Central to the Mental Capacity Act is the concept of 'best interests' decision-making but it is important to be clear that the question of whether or not the Court of Protection has jurisdiction is not a 'best interests' decision: *Re O (Court of Protection: Jurisdiction)* [2014] Fam 197.

#### Age

20. In respect of jurisdiction of the Court of Protection, section 2(5) of the Mental Capacity Act 2005 provides an apparently simple starting point: no power under the Act may be exercised in relation to a person under 16 years of age.
21. However, sections 2(6) and 18(3) carve out a significant exception to that simple age threshold: the powers under section 16 (“**to make decisions and appoint deputies: general**”) *may* be exercised in respect of P's *property and affairs* even though P is under 16 *if* the court considers it likely that P will still lack capacity to make decisions in respect of that matter when she reaches 18. It is clear from this that jurisdiction in the present matter is not excluded by reason of KS's age alone. The Court can and does commonly assume jurisdiction over property in England and Wales belonging to a child under the age of 16 who is likely still to lack capacity to manage their property for themselves when they reach majority.
22. Insofar as there is a problem with jurisdiction in this matter then, it turns on KS's habitual residence outside England and Wales.

#### International provisions

23. As set out in the descriptor of the Mental Capacity Act 2005, a significant purpose of the Act is to “make provision in connection with the Convention on the International Protection of Adults signed at the Hague on 13<sup>th</sup> January 2000...” This is a reference to the convention

commonly known as “Hague 35”. The relevant provisions are set out in Schedule 3 of the Act.

24. The scope of the jurisdiction under Schedule 3 is set out at paragraph 7:

“7(1) The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to –

- (a) an adult habitually resident in England and Wales,
- (b) an adult’s property in England and Wales,
- (c) an adult present in England and Wales or who has property there, if the matter is urgent, or
- (d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.”

25. The meaning of “adult” is spelled out at paragraph 4 of the Schedule:

“4(1) ‘Adult’ means (subject to sub-paragraph (2)) a person who –

- (a) as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests, and
- (b) has reached 16.

(2) But ‘adult’ does not include a child to whom the following applies –

- (a) the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co Operation in respect of Parental Responsibility and Measures for Protection of Children that was signed at The Hague on 19<sup>th</sup> October 1996.
- (b) (revoked)”

26. KS is outside the meaning of ‘adult’ because she has not yet reached 16.

27. KS is not excluded from the meaning of ‘adult’ by reason of paragraph 4(2) of Schedule 3. The Convention referred to there is commonly referred to as “Hague 34”. Between signatories, it applies to children until the age of 18. Therefore, the combined effect of the two subsections to paragraph 4 of Schedule 3 of the Act is that a child between the ages of 16 and 18 remains within the definition of ‘adult’ only if Hague 34 does not apply to them. India is not a signatory to Hague 34. So, when she reaches 16 and if she is still habitually resident in India, KS will be within the meaning of ‘adult’ because paragraph 4(2) of Schedule 3 will not apply to her.

28. It is common ground between the parties that the Court of Protection of England and Wales *would* have jurisdiction to determine the current application and to make the orders sought *if* either

- a. KS were over 16; *or*
- b. KS were habitually resident in England and Wales.

The difficulty in the current matter is that KS is neither of those things. How then do s18(3) and Schedule 3 of the Act fit together?

29. To answer that question, it is necessary to consider further the approach of Hague 34 [A152]. The following provisions are pertinent:

Article 2 [A152]

The Convention applies to children from the moment of their birth until they reach the age of 18 years.

Article 5 [A153]

- (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
- (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 14 [A156]

The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

30. Hague 34 is 'explained' in two supporting documents:

- a. The practical Handbook on the Operation of the 1996 Hague Child Protection Convention, published by the Permanent Bureau of the Hague Conference on Private International Law ("the Handbook") [A473]; and
- b. The Explanatory Report of Professor Paul Lagarde ("the Lagarde Report") [A653].

31. In chapter 3, under the heading "Which matters are covered by the 1996 Convention?" the Handbook sets out [A505]:

**“(g) The administration, conservation or disposal of the child’s property**

3.30 This category includes all measures directed to the protection of the property of a child. It may include, for example, the appointment of a guardian *ad litem* to protect the child's interests regarding certain property within the context of specific pending litigation.

3.31 However, it should be noted that the Convention does not encroach on systems of property law. The Convention does not therefore cover the substantive law relating to rights over property, for example, disputes in relation to the ownership/title of property.

32. In Chapter 4, under the heading "When do the authorities of a contracting state have jurisdiction to take measures of protection?" the Handbook sets out:

“4.4 The primary rule of jurisdiction in the Convention is that measures of protection in relation to children should be taken by the judicial/administrative authorities of the Contracting State of the habitual residence of the child.” [A514]

**“(b) What happens when a child’s “habitual residence” changes?**

4.8 Jurisdiction follows the habitual residence of the child so that when the child's habitual residence changes to another Contracting State, the authorities of the State of the new habitual residence will have jurisdiction.

4.9 Although the Convention does not provide for the concept of “continuing jurisdiction”, it should be remembered that a change of the habitual residence of the child does not terminate any measures already taken. These measures remain in force until, if necessary, other appropriate measures are taken by the authorities of the Contracting State of the child’s new habitual residence.

4.10 Where the child’s habitual residence changes from one Contracting State to another at a time when the authorities of the first Contracting State are seised of a request for a measure of protection (ie during pending proceedings), the Explanatory Report suggests that the principle of *perpetuatio fori*<sup>1</sup> does not apply and jurisdiction will therefore move to the authorities of the Contracting State of the child’s new habitual residence. Where it does occur, consideration might be given to use of the transfer of jurisdiction provisions.

4.11 Where the child’s habitual residence changes from a Contracting State to a non-Contracting State during proceedings for a measure of protection, the principle of *perpetuatio fori* also does not apply. However Article 5 of the Convention will cease to be applicable from the time of the change of the child’s habitual residence. Nothing therefore stands in the way of retention of jurisdiction by the authorities of the Contracting State under their non-Convention Rules (ie outside the scope of the Convention). However it is important to remember that in this scenario other Contracting States will not be bound by the Convention to recognise the measures which may be taken by this authority.” [A514 – 515]

33. In Chapter 8, under the heading “Will measures of protection remain in force despite a change of circumstances that eliminates the basis upon which jurisdiction was founded?” the Handbook sets out

“8.1 Article 14 of the Convention ensures the continuation in force of measures taken by an authority having jurisdiction on the basis of Articles 5 to 10 of the Convention, even when the ground of jurisdiction upon which the measures were taken has subsequently disappeared as a result of change of circumstances. The measures taken by the authority on the basis of Articles 5 to 10 will remain in force so long as they have not been modified, replaced or terminated by measures taken by any authorities that have jurisdiction under the Convention as a result of the new circumstances.

8.2 Article 14 is aimed at providing a degree of security and continuity for children and their families. Families need not fear that a move to another jurisdiction will, in and of itself, alter the arrangements that have been made concerning the care of the child. Article 14 also guards against “gaps” in the protection of children resulting from factual changes in their circumstances.” [A559]

34. The Lagarde Report includes the following observations:

“39 Article 5 is based on the supposition that the child has his or her habitual residence in a Contracting State. In the contrary case, Article 5 is not applicable and the authorities

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<sup>1</sup> This principle provides that jurisdiction, once determined, stays with the same court even though circumstances may change.



of the Contracting States have jurisdiction under the Convention only on the basis of provisions other than this one (Art. 11 and 12). But nothing prevents these authorities from finding themselves to have jurisdiction, outside of the Convention, on the basis of the rules of private international law of the State to which they belong.” [A698]

“42 ....in the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter, although the other Contracting States are not bound by the Convention to recognise the measures which may be taken by this authority.

43 This change of jurisdiction of the authorities in case of a change of the child’s habitual residence runs the risk that the authority which has newly acquired jurisdiction might very quickly take a measure which will annihilate that which was previously taken just before by the authority which previously had jurisdiction. Certainly, the measure taken in the State of the former habitual residence ought to be recognised in the State of the new habitual residence ...and remain in force there so long it has not been modified or replace (Art. 14...) but this retention in force would be illusory if the measure were too easily modified or replaced.” [A699]

And, in respect of Article 14:

“81 This text reproduces in substance Article 5, first paragraph, of the 1961 Convention. It ensures the maintenance in force of measures taken by the competent authority, even when the basis for jurisdiction on the part of this authority has subsequently disappeared as result of a change of circumstances, so long as the authorities which have jurisdiction following this change have not modified, replaced or terminated them.

This maintenance in force is necessary in order to ensure a certain permanence of the protection of the minor. If, for example, a guardian has been designated by the authorities of the first habitual residences of the child, it is necessary that this guardian may continue to exercise his or her functions, in the case where the child has come to reside habitually in another State. Certainly, in accordance with Article 5, paragraph 2, the authorities of this new State have jurisdiction henceforth in order to take measures for protection of the child but, so long as they have not acted, the measures taken before the change of residence should remain in force in order to ensure the continuity of the protection...

Article 14 applies only to measures taken in application of Articles 5- 10...

83 The maintenance in force of the measures taken is ensured only ‘according to their terms’. This specification takes into account the fact that the competent authority of the State of the habitual residence may have taken measures applicable only as long as the child resided in that State. For example, it may have provided that any change of residence would have to be the subject of a declaration to the public authorities of the new residence. Such an obligation cannot have extraterritorial effect and will not survive the change of habitual residence to another State. Likewise, if a child has been placed by the same authority under the surveillance of an administrative body charged with youth protection, it is clear that this measure cannot survive a change of the child’s habitual residence to another state since the national administrative body charged with protection can exercise its powers only on the territory of the State to which it belongs.” [A708]

### The Official Solicitor's position

35. Mr Dew contends (ps para 22) that the stipulation of 'adults' at paragraph 7 of Schedule 3 "on the face of it, takes away the jurisdiction conferred by section 18(3)" in respect of persons under 16. He asserts that "it cannot be the case" either:
- a. that s18(3) applies to all children wherever located; or
  - b. that s18(3) applies to no children at all.

And so, he looks for "the connecting factor... for persons under the age of 18/16."

36. Mr. Dew identifies "for Hague 34, and in all children matters" that "the principal connecting factor is ... habitual residence":
- a. Family Law Act 1986 sections 2, 2A and 3: the Family Court does not have jurisdiction unless:
    - i. it has jurisdiction under Hague 34; or
    - ii. if Hague 34 does not apply, the child is habitually resident in England and Wales or is present in England and Wales and not habitually resident in any part of the UK;
  - b. for Hague 34 the principal connecting factor is the habitual residence of the child or of a parent with parental responsibility, and there is no secondary jurisdiction on the basis of location of the child's property;
  - c. it has never been suggested that the High Court has an inherent jurisdiction based upon the location of a child's property.

37. Mr. Dew has considered whether the High Court has a more general jurisdiction over the property of children. He has concluded that it does not, relying on *Re Heyworth's Settlements* [1956] 2 All ER 21 and *Allen v. Distillers Company (Biochemical) Ltd* [1974] 1 QB 384. He suggests that the usual basis for a court to make orders in respect of a minor's property is via parental responsibility, as in *Re B* [2022] 4 WLR 34.

38. Mr Dew summarises the range of jurisdictions as follows:

"34.1 In respect of persons over the age of 18 the MCA has jurisdiction if that person is habitually resident in England and Wales or in respect of their property located in England and Wales (together with the other aspects identified by paragraphs 7(1)(c) and (d)).

34.2 In respect of persons between the age of 16 and 18, the MCA applies in the same way only where Hague 34 does not apply to them, e.g. because their state is not a signatory to the Convention.

34.3 In respect of all other children, the High Court has jurisdiction pursuant to the Family Law Act 1986 and Children Act 1989 based, pursuant to Hague 34, on their habitual residence.

34.4 There is an inherent jurisdiction, applying to both adults and children, which extends to persons who are nationals of England and Wales. That jurisdiction is, however, limited and cannot be used so as to cut across the statutory scheme(s).

34.5 There is no residual jurisdiction in the High Court to manage the property and affairs of children.”

39. In order to be satisfied of jurisdiction, the Court would need to find that the definition of ‘adult’ within Schedule 3 was intended to include persons under the age of 16 IF they had property in England and Wales. Such a conclusion “would not be consistent with” the terms of the Act, Hague 35 or Hague 35.

40. Mr. Dew identifies, if the Court of Protection is found to have jurisdiction, a risk of “concurrent and competing jurisdictions and conflicting decisions”. He suggests that India “may well not recognise that either the English Court or the English Deputy” have jurisdiction over KS’s affairs. And he asserts that there are “no policy reasons pushing for the Court to find that it has jurisdiction in respect of KS”. Indeed he goes so far as to suggest that “it could well be said that – based upon the statutory scheme – the Court is not obliged to devote its resources to a person who has ceased to have a home in this country and whose only connection with it is to property which is located or managed and that this should be a matter for the Courts of her home.”

41. As to the deputyship, Mr. Dew’s position has developed:

- a. at paragraphs 41 – 43 of the position statement, it is asserted that “where the jurisdiction does not exist or ceases to exist, there is no jurisdiction either for the court to make decisions or for any deputy to make decisions on P’s behalf... Accordingly, once KS ceased to be habitually resident the Deputy ceased to have authority to make decisions on KS’s behalf. The Deputyship must be discharged.” It follows from that position that “the [current] applications must be dismissed.”
- b. however, in oral submissions, Mr. Dew explained that he was “*not* saying the deputyship has magically died, [and does] accept that the deputyship validly continues at the moment. IMTC has a lawful authority because it is a continuing appointment.” The question, rather, is the extent to which the deputyship may be used once habitual residence has moved to India. He described Article 14 of Hague 34 as “a pro tem continuation measure.”

#### The Deputy’s position

42. Mr Poole starts from the position that, in a globally interlinked world, each jurisdiction determines its own rules as to the extent of its jurisdiction over assets or individuals; and jurisdictional boundaries are often unclear or uncertain. He posits a “general rule”, rooted in common law, that the courts of England and Wales have jurisdiction to deal with property situated in England and Wales:

- a. in *Logan v. Fairlee* (1821) 37 ER 822, where a minor resided in Scotland, it was held that a person resident in England must be appointed to receive their maintenance, so as to be answerable to the English court;
- b. In *De Weever v. Rochport* (1843) 49 ER 876, where both father and daughter were resident in Demerara (Guyana), Lord Langdale questioned whether it was possible to pay sums of maintenance to the father on behalf of the daughter, and instead directed that an attorney be appointed to receive these sums in England;
- c. In *Hope v. Hope* (1854) 43 ER 534, Lord Cranworth explained the long-standing practice that English courts would have jurisdiction to make orders on behalf of children resident abroad where property was held on their behalf in England, before going on to set out his exposition of the *parens patriae* jurisdiction.

43. The Deputy:

- a. agrees that Schedule 3 of the Mental Capacity Act is expressly limited to ‘adults’ because it is derived from Hague 35;
- b. agrees also that these provisions were consciously designed to complement Hague 34; but
- c. from Hague 34, identifies Article 5 and Article 14 as relevant; and, on that basis
- d. asserts that:
  - i. its appointment is not terminated by KS’s change of habitual residence; and
  - ii. it must follow that the Court of Protection retains its jurisdiction in respect of that deputyship.

44. Mr Poole makes two other arguments in support of the Court of Protection having jurisdiction:

- a. “the s47 argument” [ps paragraphs 54 – 57]:

Section 47 of the Act makes clear that the Court of Protection has all of the same power, rights, privileges and authority as the High Court. These powers, he says, “include the inherent power and authority to make orders concerning the property in England and Wales of people lacking capacity (including children who are likely to lack capacity when they reach majority.... even where the person is not habitually resident in the jurisdiction” – relying on Heywood and Massey: Court of Protection Practice at 14-002, *Re Knight* [1898] 1Ch 257 and Dicey, Morris and Collins at 22-011.

He acknowledges that these inherent powers cannot be relied upon to circumvent a statutory scheme but contends that “in this case there is a lacuna in that statutory scheme. In such circumstances the court can and should have recourse to the common law rules concerning its jurisdiction” – relying on Heywood and Massey at 14-005A and *DL v. A Local Authority* [2012] EWCA Civ 253.

These common law rules provide that the English courts will continue to have jurisdiction over KS’s property in England, and there is jurisdiction to appoint a person to administer that property, not least so that the courts can exercise oversight over KS’s property – oversight which her parents welcome. In the modern context, the appropriate appointment is a deputy and the appropriate court to exercise such oversight is the Court of Protection.

In oral submissions in support of this argument, Mr. Poole pointed me to the decision of Mostyn J in *R(SM) v. Court of Protection* [2021] EWHC 20146 (Admin), particularly at paragraph 27.

b. “the pragmatic argument” [ps paragraphs 58 and 59]

The Court of Protection is already seised of the matter and is generally the appropriate court. It would be a strange situation if the Court of Protection lacks jurisdiction on the day before KS’s sixteenth birthday but would suddenly have it the following day. Everyone is happy with the deputyship and it appears to be working well. “Were this a best interests decision, the facts would strongly favour continuation...”

F. Discussion

45. It is accepted that the appointment of the Deputy for KS amounts to a protective measure for the purposes of Hague 34. It is also accepted that the jurisdiction issue is not a best interests decision. It is clear, however, that whether or not the Court of Protection retains jurisdiction over KS’s property in England will have a very significant impact on the ability of KS and her parents to live the life they choose.
46. The pragmatic argument in favour of the Court of Protection retaining jurisdiction is attractive on the facts of this case, but pragmatism is not a proper basis for deciding an issue about jurisdiction. Other facts may point a different way.
47. The s47 argument: I agree with Mostyn J at paragraph 27 of *R(SM) v Court of Protection* that “there is no opacity in the language of s47(1).” The words are indeed “completely clear”: the statutory conferment on the Court of Protection of “the same powers, rights, privileges and authority as the High Court” is “in connection with its jurisdiction”.
48. I acknowledge that Mostyn J, having noted the difference in the heading of this section as between the Act (“General powers...”) and that which had earlier been proposed by the Law Commission’s draft Bill (“Supplementary powers...”), observed that the enacted version’s reference to ‘powers’ is not specified as was the Bill and “nor were they confined merely to matters incidental to the court’s jurisdiction.” However, I do not understand him to have been suggesting that s47 somehow extended the Court of Protection *jurisdiction* to encompass everything that the High Court does or could do, in particular “inherent power and authority to make orders concerning the property in England and Wales of people lacking capacity (including children who are likely to lack capacity when they reach majority)”. The inclusion of the words “in connection with its jurisdiction” has a limiting purpose.
49. Hague 34: it seems to me that the greatest assistance in understanding how s18(3) and Schedule 3 of the Mental Capacity Act 2005 fit together in respect of KS is derived from Article 14 of Hague 34 and the associated commentary in the Handbook and the Lagarde Report. Article 14 is explicit in providing that measures remain in force according to their terms, even if the basis of their jurisdiction has been eliminated by a change of circumstances. The supporting documents both address specifically the very situation which has occurred in this matter, namely a change of habitual residence from a Contracting State to a non-Contracting State:

- a. paragraph 4.11 of the Handbook spells out that “nothing ...stands in the way of retention of jurisdiction by the authorities of the Contracting State under their non-Convention Rules.”
  - b. paragraph 42 of the Lagarde Report echoes that position: “nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter.”
50. Nothing in Mr. Dew’s written or oral submissions persuades me that Article 14 is not in fact the starting point for considering KS’s position.
51. The question then becomes what is the jurisdiction of England and Wales which is retained? KS is not in the same position as children generally. She is in the sub-group of children who are likely to continue to lack capacity to manage their property and affairs once they attain majority. For that sub-group, when it comes to management of their property and affairs in England and Wales, Parliament has created a jurisdiction which is outside the Family Law Act 1986 and the Family Court. Accordingly, after careful consideration, it seems to me that the answer is embedded in the question – “retention” refers to continued possession, use or control of something which was held before. What existed before KS’s habitual residence changed to India was not (as Mr. Dew sees it) either the jurisdiction of the Family Court or of the High Court. It was the jurisdiction of the Court of Protection under s18(3) of the Mental Capacity Act 2005.
52. This conclusion is reinforced when checked against the apparent purpose of Article 14. As set out at 8.2 of the Handbook, the aim is “providing a degree of security and continuity for children and their families. Families need not fear that a move to another jurisdiction will, in and of itself, alter the arrangements that have been made.... Article 14 also guards against “gaps” in the protection of children resulting from factual changes in their circumstances.” This aim is just as relevant for children being moved (for it is rarely, if ever, *their* decision to move) to a non-Contracting State as it is for moves between Contracting States. And it is just as relevant for the sub-group of children who are likely to lack capacity to manage their property and affairs when they attain majority.
53. There is however a caveat in Article 14 – “so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.” The explanatory documents are less clear in their consideration of a move to a non-Contracting State but paragraph 43 of the Lagarde Report (in the paragraph next following such specific consideration) suggests that it is not distinguished from a move between Contracting States. It also acknowledges risk in an approach which encompasses potentially competing jurisdictions:
- “This change of jurisdiction of the authorities in cases of a change of the child’s habitual residence runs the risk that the authority which has newly acquired jurisdiction might very quickly take a measure which will annihilate that which was previously taken ..... Certainly, the measure taken in the State of the former habitual residence ought to be recognised in the State of the new habitual residence ...and remain in force there so long as it has not been modified or replaced”
54. The evidence before me at present is that “India will likely recognise that England has jurisdiction over assets located within its territory” [F29], albeit that this is clearly distinguished from any implication that India will also recognise IMTC in its role as Deputy. On the other hand, there are two potential routes to seeking recognition set out in the evidence, as well as a clear statement that “there is no strict legal requirement for Indian courts to approve the continuation of the deputyship

in England unless a question of KS's guardianship, control over KS's assets or a related issue is to be adjudicated upon in an Indian court." [F32] No such prospect is presently apparent.

55. I am concerned that the position taken by KS's Litigation Friend as to jurisdiction of this court would cause unworkable difficulties. It is the deputyship appointment, as distinct from the exercise of it, which is the protective measure. Being, as accepted, an appointment which continues (until termination either by the Court or the death of the protected person), how is a deputy to know the limits of their authority when habitual residence changes? Sometimes, and in this case, such a change is not a matter of a clear fixed date - at least until hindsight is available. In contrast, my conclusion (that the Court of Protection retains jurisdiction) gives clarity consistent with the aim of Article 14 of Hague 34, without offending against the position of KS's new state of habitual residence (according to the evidence before me).
56. As to "the connecting factor" for jurisdiction of the Court of Protection in respect of the property of persons under the age of 16 who are likely still to lack capacity to make relevant decisions when they reach the age of 18, it is unnecessary for me to seek to formulate any generality beyond KS's own circumstances. The Court of Protection undoubtedly had jurisdiction over KS's property in England and Wales when the Deputy was appointed; and it retains that jurisdiction after KS's habitual residence has changed to India, at least until a contrary step is taken in the new state of habitual residence.
57. I acknowledge that the conclusion may not be the same if, for example, a child had never been habitually resident in England but was awarded damages in England in respect of injuries sustained whilst on a brief holiday here. That situation will need to be considered further if/when it arises.

#### G. Conclusion

58. In this matter, I conclude that the Court of Protection retains jurisdiction over KS's property and affairs in England, and the Deputy's appointment stands.
59. I invite the parties to communicate directly with a view to agreeing further directions as to the substantive application, and to submit a COP9 application with a draft order within 28 days.

HHJ Hilder  
12<sup>th</sup> February 2025