



Adult Guardianship Measures Belgium

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Introduction

Belgium

- Substantive law

- Ratified Convention on Persons with Disabilities

- R(99)4

- R(2009)11



Introduction

Belgium

- Substantive law
 - Major substantive law reform 2013 in federal CC
 - Autonomy > Protection
 - Necessity, Subsidiarity, Proportionality
 - 'Framing'
 - Adults v Minors (comp. Hague 35 & 3')
 - Brochure



Introduction

Belgium

- Substantive law
 - Major substantive law reform 2013 in federal CC
 - Importance of Social Network
 - Standards
 - All-in-one: “Beschermden personen”



Introduction

Belgium

- PIL

- Code of PIL 2004
- Bilateral Treaties on Vulnerable Adults
- Hague 35 ratification in Fall `16/Spring `17



Substantive law

- Scope
 - Adult
 - Disability: physical or psychological, not social
 - “Incapacitated”
 - Prodigality
 - **Issue:** insolvency



Substantive law

- Extrajudicial protection: continuing PoA
 - Only PoA
 - Marriage!
 - Other
 - Formal conditions
 - Registration, no 'publicity'
 - Explicitly referring to incapacity
 - Not necessarily notarial



Substantive law

- Extrajudicial protection: continuing PoA
 - It is protection, but not a 'measure'?
 - No 'Incapacity' in Continental sense of word
 - No 'Court Confirmation'
 - Which protection
 - Legal
 - Compulsory Court Protection
 - Optional Court Protection



Substantive law

- Extrajudicial protection: continuing PoA
 - Assets
 - Personal matters?
 - Particular regulations (e.g. Advance Directives)
 - Living Will



Substantive law

- Extrajudicial protection: continuing PoA
 - **Case: Mr Z**
 - settlor of trust
 - notarial enduring PoA to spouse
 - no incapacity → abuse by trustee



Substantive law

- Extrajudicial protection: continuing PoA
 - **Case: Mr Z**
 - Catch-22 re: capacity
 - Declaratory judgment of 'incapacity'?
 - Judgment as certificate of PoA?



Substantive law

- Judicial protection
 - Determination of Incapacity
 - Powers of Assistance/Representation
 - Publicity



Substantive law

- Judicial protection
 - Determination of Incapacity (1/3)
 - Default: capacity (>< Certificate under Hague 35)
 - Bespoke incapacity for important acts pertaining to person/assets *except* list of severe health conditions
 - Authorization of adult by Court for certain acts
 - Always capacity for some acts
 - (Past) Act null and void: balancing interests



Substantive law

- Judicial protection
 - Determination of Incapacity (2/3)
 - Default: assistance needed
 - *except* list of severe health conditions
 - *except* prodigality: no exception to assistance
 - Exception: representation
 - Blended systems



Substantive law

- Judicial protection
 - Determination of Incapacity (3/3)
 - Interim evaluation by Court *except* list of severe health conditions – no report on this issue by administrator



Substantive law

- Judicial protection
 - Powers of Assistance/Representation (1/3)
 - Court Supervision
 - Reports
 - Authorization of important acts needed
 - Appointment of administrator *ad hoc*
 - Can issue any order



Substantive law

- Judicial protection
 - Powers of Assistance/Representation (2/3)
 - Administrator(s)
 - Who?
 - How many?
 - Standards?
 - Remuneration
 - Parents as administrators
 - Spouse/registered partner: *quid*



Substantive law

- Judicial protection
 - Powers of Assistance/Representation (3/3)
 - Confidential counsellor
 - Personal assistant
 - Spokesperson
 - Liaison officer
 - Whistleblower
 - Protected adult



Substantive law

- Judicial protection
 - Publicity...



PIL: Jurisdiction (1/2)

In general, alternatively, at time of petitioning:

1° Habitual residence in Belgium (= Hague 35)

2° Belgian nationality (> Hague 35)

Case

99 y old Belgian Miss Belgium 1930's living in Marbella (Spain)



PIL: Jurisdiction (2/2)

In particular:

3° (Im)movable assets in Belgium (> Hague 35)

4° Urgency (= Hague 35)



PII: Applicable Law (1/2)

Causes for incapacity:

1° Person's national law

2° Belgian law in case of renvoi by national law



PII: Applicable Law (2/2)

Determination of incapacity of adults & protection of incapacitated person and his assets:

1° Habitual residence at time of 'facts' giving rise to the 'approval' of protective measure

Remains applicable in case of relocation

2° If 'insufficient protection' sub 1: national law

3° If 1-2 impossible *de jure* or *de facto*: B law

UPIL: Recognition & enforcement

By operation of law for

- foreign judgments: art. 22 CoPIL
- foreign authentic instruments: art. 27 CoPIL

Simple and rapid procedure: art. 23 CoPIL



PIL: Co-operation

'Certificate': only for judicial protection measure
not for extrajudicial protection



Conclusions

- Too complex
- Scope of 'vulnerability'
- Scope of 'capacity'
- Scope of certificates
- PoA as protective measure