



Neutral Citation Number: [2010] EWHC 1926 (Fam)

IN THE HIGH COURT OF JUSTICE
IN THE COURT OF PROTECTION
FAMILY DIVISION

Case No: COP1176198T

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2010

Before :

THE HON. MR. JUSTICE HEDLEY

RE: MN

Eason Rajah (instructed by **Withers LLP**) for the **Applicant**
Marcus Scott-Manderson Q.C. and **Alex Ruck-Keene** (instructed by **The Official Solicitor**)
for the **1st Respondent**
David Rees and Ruth Hughes (instructed by **Lawrence Graham LLP**) for the **2nd**
Respondent

Hearing dates: 12th and 13th July 2010

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE HEDLEY

This judgment is being handed down in private on Friday 30th July 2010 It consists of thirteen pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The Hon. Mr. Justice Hedley :

THE ISSUE

1. The question in this case is whether, and, if so, according to what criteria, should this court recognise and enforce an order of a court of competent jurisdiction in California requiring the return of MN to that State. MN lacks capacity to make all relevant decisions and the Californian court has control of her property. A particular issue is the extent to which this court should consider the best of interests of MN in reaching a conclusion on enforcement.
2. At the moment the Californian order is stayed pending appeal and is therefore incapable of enforcement. Nevertheless the parties acceded to the court's suggestion that, as time had been made available, the issues should be considered so that both the parties and the Californian courts would be aware of the approach which would be adopted by this court.

THE BACKGROUND

3. MN is now 89. Although born in the UK, she was a 'GI bride' and after the war settled with her American husband in the U.S.A. At the beginning of 1956 they moved to California where MN lived until the events shortly to be narrated which occurred in May 2009. MN's husband died in February 2000. MN is, or has been left as, a comparatively wealthy woman with an estate valued around \$19 million.
4. On 10th September 2004 MN made and signed an Advance Health Care Directive. At the time of so doing it appears that she had the requisite capacity to decide so to do; no-one has suggested to the contrary. Subsequent to that her faculties deteriorated. Although it is not possible to say when she lost capacity to make relevant decisions, it again appears common ground that such capacity had been lost before May 2009.
5. At the time of making the Directive MN appointed her niece PLH as her agent. At all times material to this case PLH has been both habitually resident and domiciled in the UK. An important question to be addressed in this case is that of the scope of her authority as agent.
6. There are real grounds for belief that a son of PLH had been making use of MN's funds at a time when she lacked capacity to authorise that. MN had continued to live on her own at her former matrimonial home with the assistance of a care team. In May 2009 the son got both MN and a carer and other into his car and drove to Seattle and then on to Vancouver. PLH organised her aunt's transport from Vancouver to the UK. For the last 12 months MN has lived at PLH's home in Camberley, Surrey. It is not suggested otherwise than that she has been well cared for.

THE AMERICAN PROCEEDINGS

7. Enquiries undertaken both before and after MN's removal from California led to an application by the Public Guardian of Santa Clara to become temporary conservator of MN's estate and on 14th July 2009 such appointment was made. On 18th August 2009 SY was appointed as MN's advocate in the Californian proceedings. In due course DD was appointed as temporary conservator and on 16th February she applied

for her position to be made permanent. The matters came before Judge Cain on 27th April, 2010.

8. That hearing was one in which parties were heard but no oral evidence deployed. The judge decided that the Directive reflected the wishes of MN and he removed PLH as her agent, appointed DD as permanent conservator of both person and estate of MN and directed her return to California. The judge affirmed that order on 7th June 2010 and PLH appealed both orders to the relevant Circuit Court of Appeal. By an order of 2nd July 2010 Judge Cain (as he had power to do) directed a return of MN to California notwithstanding the appeal. That order has of itself been stayed. There are prospects of a contested interim application in the Court of Appeal in respect of those stays.
9. It is accepted that in considering recognition and enforcement, the Court should sensibly have regard to all three orders of 27th April, 7th June and 2nd July 2010. The question in practice is whether this court should order MN's return to California. The court there has approved the necessary arrangements including the use of an air ambulance.

THE ENGLISH PROCEEDINGS

10. PLH issued proceedings in the Court of Protection on 2nd October 2009. SY had already been authorised by the American court to participate in the English proceedings in which the Official Solicitor acts as MN's Litigation Friend. Those proceedings initially appeared fairly conventional.
11. On 11th June 2010 SY applied to The Court of Protection to recognise and enforce the Californian Orders and the matters was unsurprisingly transferred to the High Court. The court has the advantage of reports from an eminent consultant psychiatrist, Dr. Peter Jefferys, who is both skilled and experienced in these areas. Amongst the matters considered, Dr. Jefferys is of the view that MN is capable of making the journey to California but has serious reservations as to whether her longer term best interests could be served by her so doing. Hence the importance of determining the relevant criteria for the decision whether to enforce the Californian order.

THE ENGLISH LEGAL FRAMEWORK

12. On 13th January 2000 there was signed the Hague Convention on the International Protection of Adults. Section 63 of the Mental Capacity Act 2005 (the Act) implemented Schedule 3 of the Act so that it gives effect to the Convention and "(b) makes related provision as to the private international law of England and Wales." The UK has ratified the Convention only in respect of Scotland and the U.S.A. has not done so at all. Accordingly the provisions of the Convention do not apply in this case but it is nevertheless governed by Section 63 and Schedule 3 of the Act.
13. It is therefore necessary to look at the structure of Schedule 3. This has some definitions of its own as e.g. in paragraph 4 where "adult" is defined as 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." This is in contrast to the definition in Sections 2 and 3 of the Act. Anyone who comes within sections 2 and 3 will come within paragraph 4 whereas the reverse does not follow. It matters not in fact in this

case as MN is clearly within both definitions. Part 2 deals with jurisdiction and provides (so far as is material) as follows –

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.*
 - (2) *An adult present in England and Wales is to be treated for the purposes of this paragraph as habitually resident there if –*
 - (a) *his habitual residence cannot be ascertained,*
 - (b) *he is a refugee, or*
 - (c) *he has been displaced as a result of disturbance in the country of his habitual residence.*
8.
 - (1) *The court may also exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to an adult if sub-paragraph (2) or (3) applies in relation to him.*
 - (2) *This sub-paragraph applies in relation to an adult if –*
 - (a) *he is a British citizen,*
 - (b) *he has a closer connection with England and Wales than with Scotland or Northern Ireland, and*
 - (c) *Article 7 has, in relation to the matter concerned, been complied with.*

One then turns to the question of applicable law in paragraphs 11 and 12 –

11. *In exercising jurisdiction under this Schedule, the court may, if it thinks that the matter has a substantial connection with a country other than England and Wales, apply the law of that other country.*
12. *Where a protective measure is taken on one country but implemented in another, the conditions of implementation are governed by the law of the other country.*

Part 4 deals with recognition and enforcement.

14. It is necessary to set out these provisions (save for those applicable only to Convention cases) in some detail -

19. (1) *A protective measure taken in relation to an adult under the law of a country other than England and Wales is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country.....*

(3) *But the court may disapply this paragraph in relation to a measure if it thinks that –*

(a) *the case in which the measure was taken was not urgent,*

(b) *the adult was not given an opportunity to be heard, and*

(c) *that omission amounted to a breach of natural justice.*

(4) *It may also disapply this paragraph in relation to a measure if it thinks that –*

(a) *recognition of the measure would be manifestly contrary to public policy,*

(b) *the measure would be inconsistent with a mandatory provision of the law of England and Wales, or*

(c) *the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adults.....*

20. (1) *An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales.*

(2) *No permission is required for an application to the court under this paragraph.*

21. *For the purposes of paragraphs 19 and 20, any finding of fact relied on when the measure was taken is conclusive.*

Enforcement

22. (1) *An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than England and Wales is enforceable, or to be registered, in England and Wales in accordance with the Court of Protection Rules.*

(2) *The court must make the declaration if –*

(a) *the measure comes within sub-paragraph (1) or (2) of paragraph 19, and*

(b) the paragraph is not disapplied in relation to it as a result of sub-paragraph (3), (4) or (5).

(3) A measure to which a declaration under this paragraph relates is enforceable in England Wales as if it were a measure of like effect taken by the court.....

Supplementary

24. *The court may not review the merits of a measure taken outside England and Wales except to establish whether the measure complies with this Schedule in so far as it is, as a result of this Schedule, required to do so.*

25. *Court of Protection Rules may make provision about an application under paragraph 20 or 22.*

No Rules have been made under paragraph 25. With that background and framework in mind, I can now turn to the issues to be determined in this case.

THE CASE FOR RECOGNITION & ENFORCEMENT

15. This application is brought by SY. It will be convenient to set out the essence of the case in broad terms, returning to detail only when it is necessary so to do. It would appear that MN never took American citizenship but she was given permanent resident status and it is beyond doubt that as May 2009 opened she was habitually resident in the U.S.A.
16. SY submits that a crucial aspect of this case is the 2004 Directive. Not only does that demonstrate her views then but they are to be taken and respected as her views now that she has lost capacity. Moreover, so SY contends, the Directive does not have the effect of conferring authority on PLH to act as she did in June 2010 in bringing MN to the UK and keeping her here since. The Californian court has decided both that the Directive represents her views and that it accords with her best interests and accordingly the resulting order should be recognised and (subject to the stay being removed) enforced.
17. The terms of the Directive are clearly highly material. Central to this part of the argument is Part 3 which is in these terms –

Part 3

INSTRUCTIONS FOR PERSONAL CARE

3.1. INDEPENDENT LIVING. I wish to live in my home for as long as that is reasonably possible without endangering my physical or mental health and safety and to receive whatever assistance from household employees or personal care givers may be necessary to permit me to do so; provided, however, that in the event my agent determines that appropriate household employees or personal care givers are not available without putting my financial position or physical or mental health or safety at risk, then I wish to

live in the least restrictive and most home-like setting deemed appropriate by my agent. I further request that I live as near as possible to my primary residence in order that I may visit with friends and neighbours to the degree my agent believes that I will benefit from such relationships. I wish to return home as soon as reasonably possible after my hospitalization or transfer to convalescent care. If my agent determines that I am no longer able to live in my home, I wish that my agent consider alternatives to convalescent care which will permit me as much privacy and autonomy as possible, including such options as placing me in an assisted living facility or board and care facility.

3.2. SOCIAL INTERACTION. I wish to be encouraged to maintain my social relationships and to engage in social interaction even if I am no longer able to recognize my family and friends or to fully participate in social activities.

The authority of the agent is set out in paragraph 1.3 and includes this: "... (b) to make personal care decisions for me to the same extent that I could make those decision for myself if I had the capacity to do so, including, without limitation, determining where I will live....."

It seems to me that PLH had authority to determine where MN should live (until her displacement by the court) provided it complied with Part 3 and (importantly) it was a decision taken in good faith in the best interests of MN.

18. SY submits both that the manner of the removal raises serious questions over the making of the decision in good faith in the best interests of MN and more particularly that any such power was not in the circumstances engaged under Part 3. He says that because she was satisfactorily living in her own home with a care package, there is no reason shown as to why she could not have continued so to do. She has continued to have a care package in England.
19. One then comes to SY's argument under the Act and in particular under Schedule 3. He notes correctly that the terms of paragraph 19(1) and 22(2) are mandatory. If the Californian order qualifies and paragraph 19(1) is not disapplied the order must be made. He submits that the Californian order is a protective measure taken in relation to an adult and lawfully made under the laws of California. There was some argument as to whether this order was a protective measure. Paragraph 5 defines protective measures broadly and without prolonging this judgment with a detailed analysis of paragraph 5, I am satisfied that these orders do indeed constitute protective measures and thus I accept the submission of SY thus far.

JURISDICTION OF HABITUAL RESIDENCE

20. This then leads to the question of jurisdiction under paragraph 7. SY submits that MN's habitual residence remains in California, and thus the court's jurisdiction is confined to recognition and enforcement. He submits that habitual residence can be determined in this case and the court should not have recourse to paragraph 7(2)(a) to found jurisdiction. I agree. The issue as it seems to me is this: where was MN habitually resident when the orders sought to be recognised and enforced were made?

If in California, then this court's powers are limited to those in Part 4; but if in England and Wales, this court has full, original jurisdiction under the Act.

21. It was apparent in the end that no-one really dissented from this view. Moreover, there was some further agreement as to how to determine habitual residence. It was of the essence of SY's submissions that if PLH removed MN with no authority under the Directive to do so, then the habitual residence of MN could not be changed by that unilateral act. Although there was general acceptance of the fact that the mere passage of time if sufficiently long could effect a change of habitual residence even if the original removal were wrongful, it was accepted on the facts of this case that no such length of time had elapsed. PLH submits, as I have said, that she had authority to remove MN to the UK. If she did not have that authority, she is driven to accepting that the habitual residence of MN cannot at present be established in England and Wales.
22. It follows that in my judgment the question of authority to remove is the key in this case to the question of habitual residence. Habitual residence is an undefined term and in English authorities it is regarded as a question of fact to be determined in the individual circumstances of the case. It is well recognised in English law that the removal of a child from one jurisdiction to another by one parent without the consent of the other is wrongful and is not effective to change habitual residence – see e.g. *RE PJ* [2009] 2 FLR 1051 (CA). It seems to me that the wrongful removal (in this case without authority under the Directive whether because Part 3 is not engaged or the decision was not made in good faith) of an incapacitated adult should have the same consequence and should leave the courts of the country from which she was taken free to take protective measures. Thus in this case were the removal 'wrongful', I would hold that MN was habitually resident in California at the date of Judge Cain's orders.
23. If, however the removal were a proper and lawful exercise of authority under the Directive, different considerations arise. The position in April 2010 was that MN had been living with her niece in England and Wales on the basis that the niece was providing her with a permanent home. There is no evidence other than that MN is content and well cared for there and indeed may lose or even have lost any clear recollection of living on her own in California. In those circumstances it seems to me most probable that MN will have become habitually resident in England and Wales and this court will be required to accept and exercise a full welfare jurisdiction under the Act pursuant to paragraph 7(1)(a) of Schedule 3. Hence my view that authority to remove is the key consideration.
24. The construction of the Directive and the extent of the authority conferred and indeed the validity of its exercise are, of course, matters to be determined under Californian law. The parties agree that the present state of the expert evidence is unsatisfactory in relation to this issue. What then is to be done? The alternatives as it seems to me are these: either this issue is specifically determined by Judge Cain and/or the Court of Appeal in the current Californian proceedings or the parties must agree on a single joint expert competent to advise the court on this point. Clearly if the matter is specifically addressed in the Californian court process, any party here would have great difficulty in persuading me to take another view.
25. If it transpires that on 27th April 2010 MN was indeed habitually resident in England and Wales then that will be the end of recognition and enforcement proceedings

because the qualifying condition of paragraph 19(1) will not be made out. The court will have to conduct a full welfare enquiry and SY will (if he wishes to continue) have to submit that MN's welfare is best served by a return to California subject to further consideration as to the argument as to whether the proper law is that of California. If on the other hand she was habitually resident in California on that date then Part 4 of Schedule 3 is engaged and the question then arises as to whether the mandatory terms of Part 4 are in any way disapplied. It is to that that I must now turn.

THE MANDATORY NATURE OF PART 4 OF SCHEDULE 3

26. Paragraph 19(1), if engaged, makes recognition mandatory unless that paragraph is disapplied (in non-Convention cases) by virtue of paragraph 19(3) and/or (4). This is not the case for a minute consideration of the six grounds that may lead to the disapplying of the paragraph. In my view none of the grounds in sub-paragraph (3) can apply on the facts of this case. The measure is urgent (as the passage of time is likely to be a relevant consideration) and MN was heard and represented and there is no breach of natural justice. Nor can sub-paragraph 4(c) be applicable. There remains for consideration sub-paragraphs 4(a) and (b). Although there was a reference in the submissions of PLH to questions of public policy, it does not seem to me a relevant consideration here. A decision of an experienced court with a sophisticated family and capacity system would be most unlikely ever to give rise to a consideration of 4(a); the use of the word 'manifestly' suggests circumstances in which recognition of an order would be repellent to the judicial conscience of the court. That leaves sub-paragraph 4(b).
27. This raises a matter both of importance and difficulty. The issue is the extent to which the court takes best interests into account. PLH submits that if recognition of an order is not in the best interests of MN then to recognise (and enforce) such an order would be contrary to a mandatory provision of the law namely Section 1(5) of the Act. Thus a best interests exercise must always be undertaken to ensure that Section 1(5) is not contravened.

THE BEST INTERESTS ISSUE

28. If such an argument were right, it would of course drive a coach and four through the summary and mandatory nature of Part 4 of Schedule 3. A principal purpose of Part 4 is to ensure that a person is returned to the jurisdiction of her habitual residence so that her best interests may be protected there. The parallel with the Hague Convention of 1980 and our jurisprudence on child abduction is obvious. PLH's submission on this in effect is: be that as it may, a proper construction of the Act requires the court to apply Section 1(5) whatever the draftsman's intentions may have been. It is worth observing that on any view best interests are to some extent a relevant consideration. Reference has already been made to paragraph 12. Clearly best interests have to be considered in the context of implementing the enforcement of an order. That raises the difficult question of how far does one take best interests.
29. The problem is starkly posed by the facts of this case. Assuming that the court can and does recognise and enforce the Californian orders, it will have to give directions for implementation. Paragraph 12 is accordingly engaged. It follows that in giving directions for implementation best interests have to be considered even though the decision to enforce has been taken without reference to Section 1(5). Those best

interests issues clearly engage her capacity to make the journey from the home of PLH to her home in California. The evidence of Dr. Jefferys might well persuade me that that journey can be undertaken consistently with her best interests. But should one look further ahead? How will she cope next week or next month or until the conclusion of proceedings? Dr. Jefferys is specifically unwilling to comment on that and indeed those issues come very close (in the case of an elderly lady with dementia) to a full best interests enquiry.

30. Does Section 1(5) apply in these circumstances? It provides that – “(1) The following principles apply for the purposes of this Act(5) An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests...” The words are plain enough. In my judgment they give rise to this question: is a decision to recognise and/or enforce an order a decision made for or on behalf of MN?
31. In his extensive and helpful submission the Official Solicitor recognises the difficulty of this question. In the end, I have concluded that a decision to recognise under paragraph 19(1) or to enforce under paragraph 22(2) is not a decision governed by the best interests of MN and that those paragraphs are not disapplied thereby by paragraph 19(4)(b) and Section 1(5) of the Act. My reasons are really threefold. First, I do not think that a decision to recognise or enforce can be properly described as a decision ‘for and on behalf of’ MN. She is clearly affected by the decision but it is a decision in respect of an order and not a person. Secondly, this rather technical reason is justified as reflecting the policy of the Schedule and of Part 4 namely ensuring that persons who lack capacity have their best interests and their affairs dealt with in the country of habitual residence; to decide otherwise would be to defeat that purpose. Thirdly, best interests in the implementation of an order clearly are relevant and are dealt with by paragraph 12 which would otherwise not really be necessary.
32. The trouble is that this may lead both to hardship and artificiality. In cases involving abducted children the hardship of sending a child back for the parent to make a relocation application is (if the application succeeds) real but is probably no greater than a major inconvenience. Here, however, the position is different. MN may survive the return journey. PLH may have the right to submit to the Californian court that it is in MN’s best interests to live with her in England. It may, however, be that she could not survive another trip and so any welfare enquiry in California would be rendered nugatory. It seems to me that the only way that could be overcome would be for PLH to ask the Californian court to stay any implementation of the order for return until a welfare enquiry had been undertaken by that court. What attitude the Californian court might take to such an application is a matter on which I should not speculate.
33. However, it is just possible that such an issue may have exercised Judge Cain’s mind. In the course of the hearing on 1st July, the learned judge makes this comment –

THE COURT: Okay. Think about it for a second. I’ve got a lot of stuff earlier from doctors who reviewed this case without ever having met her, just looking at some records and surmising certain things as to how it would be detrimental or not to her. They’ve never even seen her. At least the court over there has got her over there. They’ve got the warm body. Sounds terrible, but

that's the reality. We don't have her here to make those first-hand assessments. I think they are in the best position.

My concern is, as I said before at the outset, by leaving the matter the way it stands now, the London court has nothing to deal with. There's no reason for them even to look into that risk because there's no valid court order requiring her to be returned.

He clearly had in mind MN's best interests and he clearly had in mind that this court may be in a better position to do a current evaluation. No doubt to his great relief, the learned judge will not have been troubled by the difficulties of construing Section 1(5) and Schedule 3 of our Act and thus will have had no reason to have in mind the distinction I have felt bound to draw between paragraph 12 and Section 1(5).

WHERE COULD OR SHOULD WELFARE BE DETERMINED?

34. If California remains the court of principal jurisdiction (a matter depending no doubt on the determination as to PLH's authority), it has three courses open to it as I see it. First it could continue SY's authorisation to seek to enforce the order, in which case this court will determine welfare under paragraph 12. Secondly, it could allow MN to remain in England whilst the Californian court conducts a full welfare assessment on evidence, in which case there is no real role for this court. Thirdly, it could invite this court as a matter of urgency to conduct a full welfare enquiry into MN's best interests, in which case this court could and would assume full jurisdiction under paragraph 7(1)(c) of Schedule 3. That of course would involve the Californian court yielding jurisdiction over the person of MN without prejudice to its jurisdiction over her estate.

IMPLEMENTATION OF ENFORCEMENT ORDER

35. That leaves for determination the question of implementation under paragraph 12. There are two aspects to that issue: first, matters relating to the journey itself; and secondly the question of whether this court should look beyond her arrival at her home in California. As to the first, Dr. Jefferys' evidence persuades me at the moment that the journey could be undertaken. It has to be said, however, that were the current stay to remain in place for an appreciable period, this court may well need an updated assessment from Dr Jefferys. PLH submits, however, that I should also consider whether the sedation and restraint, that Dr. Jefferys anticipates may be necessary and advises, and which may need to be authorised is consistent with MN's human rights. My answer to that is that I have no intention of granting any such authorisations. Her repatriation is to be undertaken by Air Ambulance and it is for the carrier to decide whether and, if so, on what terms MN will be transported. They must treat her in reliance on Californian law or not at all.
36. As to how far ahead the court should look, this is difficult. However, I have concluded that the court should look no further than the time that will be required to arrange an inter-partes hearing in Santa Clara i.e. a period measured in days rather than weeks. I think I am bound to assume, on the basis of habitual residence in California, unless and until Judge Cain indicates to the contrary, that her best interests are served by being in her own home in California. The question, as to whether she remembers it or not or knows where she is are essentially for the Californian court unless it requests otherwise. In those circumstances subject only to confirmation from

the carrier that they remain willing to effect the transfer and to the need for further review by Dr. Jefferys in the event of significant delay, I would be prepared to implement an order for return.

THE PURPOSE OF THE JUDGMENT

37. I have said that in some ways this is all academic because of the stay currently in force imposed by the Court of Appeal. However, all parties agreed that it may be helpful if the Court could set out the basis on which it would approach the question of recognition, enforcement and implementation. I have a further hope in that the judgment may be of some assistance to Judge Cain and/or the Court of Appeal in setting out the position of the English court, what it would and would not do of its own volition and what it could do only at the invitation of the Californian court.

SUMMARY OF CONCLUSIONS

38. It may also be helpful to summarise the position. The basis of jurisdiction is habitual residence. In this case the key to that decision is whether PLH'S authority as agent permitted this removal to England. If it did not, MN remains habitually resident in California and the courts of that State should exercise primary jurisdiction. If, however, it did, I am likely to conclude that MN is now habitually resident in England and Wales and jurisdiction belongs to this court. If that is so, I could not enforce the order of the Californian court unless, having conducted a full best interests enquiry on evidence, I concluded that her best interests required a return to California. On the other hand if jurisdiction belongs to California, I am likely to recognise and enforce the Californian order (if un-amended and there is no stay) and to give directions for implementation unless either the carrier or Dr. Jefferys were to advise otherwise. My best interests enquiry would essentially be confined to the journey essentially. However this court could adopt a full best interests jurisdiction at the invitation of the Californian court.

FINAL OBSERVATIONS

39. This judgment does scant justice to the learning deployed by counsel for which I am very grateful and which I have carefully considered. However, parties recognised that the need for a decision was pressing given this lady's age and mental capacity. I have therefore sought to do no more than recite the relevant facts, identify the law which I have applied, state my conclusions or indicate my approach and to trace the reasoning which has led to them. I am confident that that is sufficient at the first instance stage and will allow parties to consider the future for MN and to seek to act in her best interests.