4 PAPER BUILDINGS

Court of Protection Seminar

5th May 2011

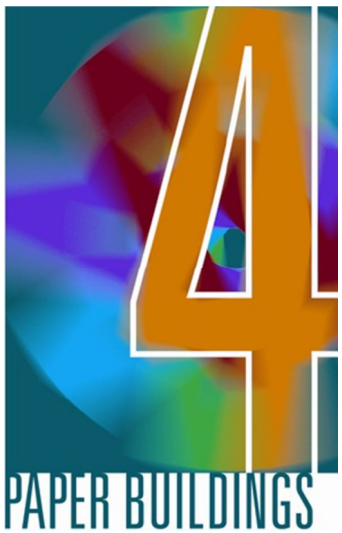
CHAIR
Robin Barda

TOPICS & SPEAKERS:

Court of Protection - Welfare
Sally Bradley

The Property and Affairs of Mentally Incapacitated Adults:
Cases of Interest Following The Coming Into Force of the Mental Capacity Act 2005
James Copley

A Mediation process for Court of Protection Matters
Angela Lake-Carroll



The Chambers of Jonathan Cohen QC

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Section 1

4 Paper Buildings: Who we are

The Chambers of Jonathan Cohen QC
4 Paper Buildings

"This dedicated family set has expanded rapidly in recent years and now has a large number of the leading players in the field."
Chambers UK 2010

At 4 Paper Buildings, Head of Chambers Jonathan Cohen QC has 'developed a really strong team across the board'. 'There is now a large number of specialist family lawyers who provide a real in-depth service on all family matters.' The 'excellent' 4 Paper Buildings 'clerks are very helpful' and endeavor to solve problems, offering quality alternatives if the chosen counsel is not available.'
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4 Paper Buildings is consistently ranked as a leading family set of chambers, with currently 20 members recommended in the legal directories in all areas of family law

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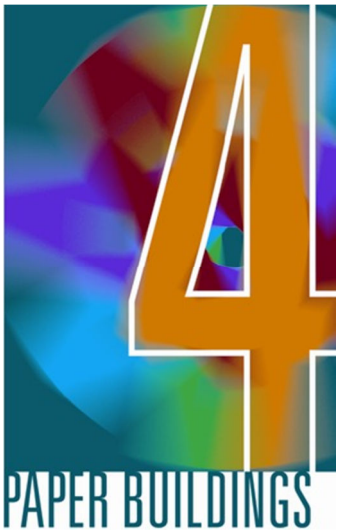

Section 2

Court of Protection – Welfare

Sally Bradley

Court of Protection: Rules and Procedure

Introduction

1. The Court of Protection Rules 2007 (CoP 2007) set out the rules and procedure for all proceedings in the Court of Protection. As with the Civil Procedure Rules, the overriding objective of the CoP 2007 is to deal with cases justly.[1] The court is to have regard to the principles contained in the Mental Capacity Act 2005 (MCA 2005), which include '*ensuring that P's interests and position are properly considered*'.[2]

2. This overview looks at some of the key aspects of the CoP 2007, in particular:

- Commencing proceedings
- Responding to an application
- Parties
- Litigation friends
- Urgent and interim applications
- Applications within proceedings
- Evidence
- Appeals

Commencing proceedings

Application form:

3. Proceedings in the Court of Protection are started by filing either an application form (COP1) or permission form (COP2). The form should state:

a) the matter which the applicant wants the court to decide;
b) the order which the applicant is seeking;

[1] Rule 3(1)
[2] Rule 3(3)(b)

c) the name of the applicant, P, any person as a respondent whom the applicant reasonably believes to have an interest which means that he ought to be heard in relation to the application;

d) any person whom the applicant intends to notify in accordance with rule 70; and

e) if the applicant is applying in a representative capacity, what that capacity is.[3]

4. The application form must be supported by evidence in a witness statement or within the application form itself, verified by a statement of truth. The evidence must set out the facts on which the applicant relies and all material facts known to the applicant of which the court should be made aware.[4] The documents to be filed with the application form are listed in Annexe 1.

Permission:

5. The general rule is that an applicant must apply for permission before starting proceedings. Permission is not required where the application,

is made by:

a) a person who lacks, or is alleged to lack, capacity;

b) anyone with parental responsibility for a person lacking or alleged to lack capacity, if he has not yet reached 18;

c) the donor or a donee of a lasting power of attorney to which the application relates;
d) a deputy appointed by the court for a person to whom the application relates;

[3] Rule 63
[4] PD9A

e) a person named in an existing order of the court, if the application relates to the order[5];

f) the Official Solicitor or Public Guardian[6];

or concerns:

g) P's property and affairs, unless it relates to the court's jurisdiction under the Trustees Act 1925 and the Trusts of Land and Appointment of Trustees Act 1996[7];

h) a lasting power of Attorney or an instrument which is, or purports to be, a lasting power of attorney[8];

permission is also not required where:

i) the application is made within ongoing proceedings[9];

j) a person files an acknowledgment of service or notification for any order proposed that is different from that sought by the applicant[10].

6. The application for permission must be filed together with a draft of the application form and an assessment of capacity form (COP3). Within 14 days of the permission form being issued, the court will either grant permission, refuse permission without a hearing, or fix a date for the hearing of the application. In the event that the court fixes a date for an oral hearing, the court will notify the parties of the date of the hearing. Anyone who wishes to take part in the hearing

[5] Section 50, MCA 2007
[6] Rule 51(1)
[7] See Rule 52
[8] Rule 51(2)
[9] Rule 51(3)
[10] Rule 51(4)

then has 21 days to file an acknowledgment of notification (COP5) stating that they wish to take part.[11]

7. In deciding whether or not to grant permission, the court will consider:

a) the applicant's connection with the person to whom the application relates;

b) the reasons for the application;

c) the benefit to the person to whom the application relates of the proposed order or direction; and

d) whether the benefit can be achieved in any other way.

Service:

8. The applicant must serve the application form on any person named as a respondent as soon as is practicable or, in any event, within 21 days of issue. The applicant has seven days from the date of service to file a certificate of service with the court.[12] Where the person to be served is a protected party, service should be made on the person who is authorised to conduct the proceedings on P's behalf or, if there is no such person, the person with whom P lives or who acts as P's carer. Where the person to be served is a child, service should be made on a person with parental responsibility.

Notification:

9. The whole tenor of the MCA 2005 is to involve P in the proceedings as much as possible. Accordingly, where P is not joined as a party, the applicant must notify

[11] Rule 57
[12] Rule 66

P of the application and the progress of proceedings.[13] In particular, the applicant must notify P:

(a) that an application form has been issued by the court or been withdrawn;

(b) that an appellant's notice has been issued by the court or been withdrawn;

(c) that a final order has been made;

(d) of any other matter as the court may direct.[14]

10. In addition, the applicant is under a duty to notify other interested parties about the proceedings.[15] This reflects the aim of the MCA 2005 to involve a broad range of people who have an interest in P's welfare in the proceedings. The applicant must seek to notify at least three people who are likely to have an interest in being notified that an application has been made. There is a presumption that members of P's family are likely to have an interest in being notified of the application. The applicant should notify interested parties, using form COP15:

a) that an application form has been issued;

b) whether the application relates to the exercise of the court's jurisdiction in relation to P's property and affairs, or his personal welfare, or both;

c) of the order or orders sought.[16]

Responding to an application

[13] Rule 69
[14] PD7A
[15] Rule 70
[16] PD9B

11. Anyone who is served with or notified of an application form has 21 days to file an acknowledgment of service, using form COP5, if they wish to take part in the proceedings. A party who was not served or notified with an application form, but nevertheless wishes to take part in the proceedings, must apply to be joined as a party using form COP10.[17]

12. The acknowledgment of service must state:

a) whether the person acknowledging service or notification consents to the application;

b) whether he opposes the application and, if so, on what grounds;

c) whether he seeks a different order from that set out in the application form and, if so, set out what that order is.

The acknowledgment of service must also provide an address for service, which must be within the jurisdiction of the court, and be signed by him or his legal representative.

Parties

13. Any person with a sufficient interest in the proceedings may apply to be joined as a party. An application to be joined must be made by way of an application notice which states the full name and address of the person seeking to be joined as a party, his interest in the proceedings, whether he consents to or opposes the application, and whether he proposes that a different order should be made.[18] The court is under a duty to identify at an early stage who the parties to the proceedings should be.[19] The court will therefore keep under review the status of the parties in the case and of any person who seeks to be joined.

[17] PD9C
[18] Rule 75(2)
[19] Rule 5(2)(b)(ii)

14. A person seeking to be joined must file a witness statement with their application notice which should contain evidence of the person's interest in the proceedings and, if he proposes that an order different from that set out in the application form should be made, the evidence on which he intends to rely.[20]

15. In cases involving serious medical treatment, an organisation which is or will be responsible for providing clinical or caring services to P should usually be named as a respondent in the application form.[21]

Litigation friends

16. A litigation friend must be appointed to act for P, a child or a protected party. A protected party is defined as a person who lacks capacity to conduct proceedings but is neither a child nor P.[22] The litigation friend must be capable of fairly and competently conducting proceedings and have no interests adverse to those of the person they are representing.[23]

17. An application for an order appointing a litigation friend should be made using form COP9, supported by evidence. A court order is not required for the appointment of a litigation friend for P or where the litigation friend is the Official Solicitor.[24] A court order is also not required for a deputy to act as a litigation friend who has already been appointed to conduct legal proceedings in the name of the protected party. To act as a litigation friend in those circumstances, the deputy must file and serve a copy of the court order which appointed him on all parties to the proceedings, in compliance with the general rules of service. Where there is no deputy appointed, a person wishing to act as a litigation friend without a court order must file and serve a certificate of suitability (COP22).[25]

[20] Rule 75(3)(a)
[21] PD9E
[22] Rule 141
[23] Rule 140
[24] PD17A
[25] PD17A

18. If P or a protected party no longer lacks capacity, the litigation friend's role will continue until it is brought to an end by a court order. An application for such an order may be made by the formerly protected party, his litigation friend, or any other party to the proceedings. The applicant must serve the application notice on all other parties to the proceedings as soon as is practicable or, in any event, within 21 days.[26]

19. In the case of a child who reaches 18, the litigation friend's role will automatically come to an end, without the need for a court order.[27]

Urgent and interim applications

Urgent applications:

20. Applicants should bear in mind the guidance provided by Practice Direction 10B before making an urgent application:

> *In some cases, urgent applications arise because applications to the court have not been pursued sufficiently promptly. This is undesirable, and should be avoided. A judge who has concerns that the facility for urgent applications may have been abused may require the applicant or the applicant's representative to attend at a subsequent hearing to provide an explanation for the delay.*

21. Applications without notice are generally discouraged, unless giving notice would defeat the purpose of the application. If an order is made without notice, it should contain an undertaking by the applicant to serve the application notice, evidence in support and any order made, on the respondent and any other person the court may direct as soon as is practicable or as ordered by the court. It should also make provision for a return date at which the other parties can be present.[28]

22. In cases of exceptional urgency, the court will allow an application to be made without the issue of an application form, provided that the applicant undertakes

[26] Rule 146-147
[27] Rule 146(2)
[28] PD10B

to file an application form on the next working day. An order made before the issue of the application form should state in the title after the names of the applicant and the respondent, "*the Applicant and Respondent in an Intended Application*".

23. Applications may also be made by telephone in exceptional circumstances. Applicants should telephone 084 5330 2900 during business hours and 020 7947 6000 after business hours.[29]

Interim remedies:

24. Under Rule 82(1) the court has the power to grant an interim injunction, an interim declaration, or any other interim order it considers appropriate. The criteria for the granting of an interim order are that:

a) there is reason to believe that P lacks capacity in relation to the relevant matter;

b) the matter is one to which the courts power under the MCA 2005 extends; and

c) it is in P's best interests to make the order, or give the directions, without delay.[30]

Applications within proceedings

25. Applications within ongoing proceedings should be made by way of an application notice (COP9). The application notice must include:

a) a draft of the order sought;

b) a brief summary of the grounds on which the applicant is seeking the order or direction;

c) the name of the person to whom the application relates (P);

[29] PD10B
[30] Section 49, MCA 2005

d) the case number, if available;

e) the full name of the applicant; and

f) where the applicant is not already a party, his address.[31]

26. The application notice must be supported by evidence set out in either a witness statement or the application notice, verified by a statement of truth. The application notice and evidence in support must be served as soon as is practicable and, in any event, within 21 of the application notice being issued. The applicant then has seven days to file a certificate of service. Service can be dispensed with:

a) where there is exceptional urgency;

b) where the overriding objective is best furthered by doing so;

c) by consent of all parties;

d) with the permission of the court; or

e) where permitted by a rule or other practice direction.[32]

Evidence

Witnesses

27. The general rule is that any fact which needs to be proved at a final hearing is to be proved by oral evidence or, at any other hearing, by written evidence.[33] The witness statement stands as the witness' evidence in chief unless the court orders

[31] Rule 79, PD10A
[32] PD10A
[33] Rule 96(1)

otherwise.[34] Witness statements must be included in or attached to form COP24. A witness who wanted to file a witness statement but was unable to do so may apply, without notice, for permission to file a witness summary.[35]

28. Any party may apply to the court for a witness summons. A witness summons is binding if it is served at least seven days before the date on which the person summoned is required to attend court. At the time of service, the witness must be offered or paid a sum reasonably sufficient to cover his travel expenses and compensation for loss of time by attending court.[36]

Reports

29. The court has the power under section 49 of the MCA 2005 to call for a report to be written on any issue relating to P. The court can call on a report to be written by the Public Guardian, the Court of Protection Visitor, an employee of the local authority or a NHS body, or such other person as the court may direct.[37]

Experts

30. The court's permission is required to file expert evidence unless the evidence is filed with the application form or permission form and relates to P's capacity or best interests.[38] Any party seeking permission to adduce expert evidence must:

a) identify the field in respect of which he wishes to rely upon expert evidence;

b) where practicable, identify the expert in that field upon whose evidence he wishes to rely;

[34] Rule 96(2)
[35] Rule 101
[36] Rule 106
[37] Rule 49
[38] Rule 120

c) provide the court with any other material information about the expert; and

d) provide the court with a draft letter of instruction to the expert.[39]

31. A party may put written questions to an expert called by another party or a single joint expert. The questions must be put within 28 days of the date on which the expert's report was served. It should be noted that the instructing party is responsible for the payment of the expert's fees and expenses, including the expert's costs of answering questions put by another party.[40]

Disclosure

32. The CoP Rules refer to general and specific disclosure. General disclosure requires a party to disclose the documents on which he relies and those documents which adversely affect his own case, another party's case or support another party's case. An order for specific disclosure requires a party to disclose documents or classes of documents specified in the order, or carry out a search for documents and disclose any documents located as a result.[41] Where a court makes an order for either general or specific disclosure, the party against whom the order is made is under an ongoing duty to disclose documents in accordance with the order.[42]

33. A party wishing to inspect a document must give written notice to the party in possession of the document. That party then has 14 days to comply with the request and must permit inspection at a convenient time and place.[43]

Appeals

[39] Rule 123
[40] Rule 125(7)
[41] Rule133
[42] Rule 135
[43] Rule 137

34. Permission to appeal is required for all appeals, except against an order for committal to prison. An application for permission may be made to either the first instance judge or an appeal judge. Where permission to appeal is refused by the district judge who made the first instance decision, a further application for permission can be made to:

a) the President;

b) the Vice-President;

c) a judge nominated by virtue of s 46(2)(a)-(c);

d) a circuit judge.

If permission was refused by a circuit judge, a further application can be made to any of the judges listed above other than a circuit judge.[44]

35. The test for permission is that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. Permission may be granted on a limited basis or with conditions.[45]

36. An appellant has 21 days to appeal from the date of decision. The appellant must serve the appellant's notice on each respondent as soon as is practicable or, in any event, within 21 days of issue. The appellant then has seven days to file a certificate of service.[46] The same timetable applies if a respondent is seeking permission to appeal or for the decision to be upheld for different reasons to those given by the first instance judge.[47]

37. P must be notified that an appellant's notice has been issued and of the date on which the hearing will take place. It must be explained to P who the appellant is,

[44] Rule 172
[45] Rule 173
[46] Rule 175
[47] Rule 176

the issues raised by the appeal and what will happen if the court makes the order or direction that has been applied for.[48]

38. A second appeal can only be heard by the Court of Appeal. The Court of Appeal's permission is required, which will only be given if the appeal raises an important point of principle or there is some other compelling reason for the Court of Appeal to hear it.[49]

[48] Rule 43
[49] Rule 182

Annexe 1: Documents to be filed with the application form

Type of document or instrument	**When document is to be filed**
Any order granting permission	If permission is required.
Assessment of capacity form (COP3)	Unless already filed with the permission form.
Annex A: Supporting information for property and affairs applications (COP1A)	Where an order relating to P's property and affairs is sought.
Annex B: Supporting information for personal welfare applications (COP1B)	Where an order relating to P's personal welfare is sought.
Lasting power of attorney or enduring power of attorney	Where the application concerns the court's power under section 22 or 23 of, or Schedule 4 to, the Act (where available).
Deputy's declaration (COP4)	Where the application is for the appointment of a deputy.
Order appointing a deputy	Where the application relates to or is made by a deputy.
Order appointing a litigation friend	Where the application is made by, or where the application relates to the appointment of, a litigation friend.
Order of the Court of Protection	Where the application relates to the order.

Order of another court (and where the judgment is not in English, a translation of it into English: (i) certified by a notary public or other qualified person; or (ii) accompanied by written evidence confirming that the translation is accurate).	Where the application relates to an order made by another court.

COURT OF PROTECTION – WELFARE ISSUES

(i) Deprivation of liberty

a. **G v E [2010] EWCA Civ 822**
b. **P and Q v Surrey County Council [2011] EWCA Civ 190**
c. **City of Sunderland v MM & Ors [COP 1155573T-01]**
d. **Re A [2011] EWHC 727 (COP)**
e. **Re C [2010] EWHC 3448 (COP)**
f. **A County Council v MB [2010] EWHC 2508 (COP)**
g. **Re A [2010] EWHC 978 (Fam)**

(ii) Welfare deputies

a. **G v E [2010] EWHC 2512 (COP) (Fam)**
b. **LD v LB Havering (Case No.1144388/03; 25.6.10)**
c. **Re P [2010] EWHC 1592 (Fam)**
d. **EG v RS, JS and BEN PCT [2010] COP case number 10237109**

(iii) Transfer of proceedings.

a. **A Local Authority v PB [2011] EWHC 502 (COP)**,
b. **B (A Local Authority) v RM (2010) EWHC 3802 (Fam).**

(iv) Jurisdiction

a. **YA (F) v a Local Authority, YA (M), a NHS Trust and a PCT [2010] EWHC 2770 (COP) Re MN [2010] EWHC 1926 (Fam).**

(v) Inherent jurisdiction

a. **LBL *v RYJ and VJ* [2010] EWHC 2665 (COP) (22 September 2010)**

(vi) Capacity to consent to marriage and sexual relations.

a. **D County Council v LS [2010] EWHC 1544 (Fam)**
b. **R v C (Gary Anthony) [2009] 1WLR 1786**
c. **MM v Local Authority X [2007] EWHC 2003 Fam**
d. **D Borough Council v AB [2011] EWHC 101 (COP)**

(vii) Capacity generally

a. **AVS v A NHS Foundation Trust [2011] EWCA Civ 7**
b. **RT & LT v A Local Authority [2010] EWHC (Fam) 1910**
c. **The PCT v P, AH and a Local Authority (Bailii citation [2009] EW Misc 10 (EWCOP); COP Case No: 11531312)**
d. **D County Council v LS [2010] EWHC 1544 (Fam)**

(viii) Residence

a. **R(W) v LB Croydon [2011] EWHC 696 (Admin)**
b. **A Local Authority v PB and P [2011] EWHC 502 (COP)**
c. **AH v (1) Hertfordshire Partnership NHS Foundation Trust (2) Ealing Primary Care Trust [2011] EWHC 276 (COP)**

(ix) Reporting restrictions and media attendance

a. **London Borough of Hillingdon v Steven Neary [2011] EWHC 413 (COP)**
b. **A v Independent News and Media Ltd [2010] EWCA Civ 343**

Update Summary

1. This update looks at recent developments in the Court of Protection in the following areas:

- Deprivation of liberty
- Appointing welfare deputies
- Transfer of proceedings
- The Court's jurisdiction
- Inherent Jurisdiction
- Capacity to consent to marriage and sexual relations
- Capacity in general
- Residence
- Reporting restrictions/Media Access

2. Deprivation of liberty

2.1 In **G v E** [2010] EWCA Civ 822, the Court of Appeal took the opportunity to offer guidance on the application of Article 5 ECHR in cases concerning vulnerable adults.

2.2 E, a 19 year old man, suffered from the rare genetic condition known as tuberous sclerosis, which left him with severe learning difficulties. He had resided with his foster carer F for 10 years under section 20 of the Children Act 1989. He remained with F after turning 18 under an adult placement. The local authority subsequently removed E from F's care without seeking the consent of either E or F, or by bringing proceedings in the Court of Protection. E's sister, G, applied to the Court of Protection for declarations that the local authority had unlawfully detained E in breach of his rights under Article 5 and Article 8 and in breach of the Deprivation of Liberty Safeguards (DOLS) under the Mental Capacity Act (MCA) 2005.

2.3 Mr Justice Baker held at first instance that the local authority had breached E's Article 5 and 8 rights by removing him from F. However, relying on an interim decision of Ryder J that the detention of E was in his best interests, E's detention could be justified.

2.4 The issue for the Court of Appeal was whether the Judge had been right to reject G's submission that Article 5 of the ECHR required that distinct threshold conditions be satisfied before a person, who was accepted to lack capacity, could be detained in his or her best interests.

2.5 The Court of Appeal rejected G's appeal and gave the following guidance for cases concerning deprivation of liberty.

a) The court is concerned with best interests, not a diagnosis of capacity. While the latter does require medical evidence under DOLS, the question of best interests does not necessarily require medical evidence. G's appeal had conflated these two considerations and had therefore misunderstood the court's role.

b) The Article 5 considerations should not be seen as a separate or prior test before considering best interests. The two should be considered in tandem as the requirements of Article 5 were encompassed in the statutory requirements of the MCA 2005, in particular by the phrase in Section 4, '*all the relevant circumstances*'.

c) Article 5 does not impose any threshold conditions which have to be satisfied before a best interests assessment under DOLS can be carried out. That determination should be carried out as soon as Article 5 is engaged.

d) The ECHR jurisprudence relied upon by G concerned alleged mental illness and detention in a psychiatric hospital. In such cases, the Mental Health Act 1983 requires a psychiatric opinion that detention is necessary. However, in the present case, though E was found to lack capacity, he did not suffer from a psychiatric condition. A clear distinction should be drawn between cases of this type, which are common in the Court of Protection, and cases concerning mental illness. As the Court stated in regard to such persons, at paragraph 60:

'They are, of course, 'of unsound mind' within ECHR Article 5, but in our judgment it plainly does not follow either that they are mentally ill, or that ECHR Article 5 requires psychiatric evidence as a threshold to the deprivation of their liberty. Indeed, learning difficulties often lie outside the expertise of the psychiatrist, but firmly within that of the psychologist.'

3. In **Re P and Q; P and Q v Surrey County Council [2011] EWCA Civ 190**, the Court of Appeal heard an appeal against the decision of Mrs Justice Parker in **Re MIG and MEG [2010] EWHC 785 (Fam)**. Parker J's decision had caused controversy for seeming to blur the distinction between an objective deprivation of liberty and whether the deprivation could be justified. She stated that '*it is permissible to look at the "reasons" why [the protected parties] are each living where they are*' in determining whether someone is objectively being deprived of their liberty. She then refused to grant a declaration that the care arrangements for two sisters aged 18 and 19 made by a local authority amounted to a deprivation of their liberty, contrary to Article 5 (ECHR).

3.1 The Court of Appeal upheld the decision of Parker J, but on different grounds to those at first instance. The Court reviewed the relevant considerations for the objective test of whether someone is being deprived of their liberty:

a. **Objections:** a person's objection to being confined and, equally, the absence of any objection is an important factor;

b. **Medication: '***the administration to a person of medication, at any rate of antipsychotic drugs and other tranquilisers, is always a pointer towards the existence of the objective element: for it suppresses her liberty to express herself as she would otherwise wish. Indeed, if the administration of it is attended by force, its relevance is increased.*' (Wilson LJ, para.26).

c. **Purpose:** The purpose of the deprivation of liberty is not a relevant factor. Parker J had therefore been wrong to rely on the fact that the purpose of the care package had been to further the girls' best interests.

However, the '*relative normality*' of the situation under review is relevant (Wilson LJ, para.28).

3.2 The decision should mark the end of the controversy surrounding the role of intention and best interests in objectively assessing whether a person has been deprived of their liberty. However, the '*relative normality*' test gives the court a wide discretion to determine whether the test is met and may lead to further uncertainty.

4. In **A v A [2011] EWHC 727**, the President gave further guidance on the role of the Court of Protection in deprivation of liberty cases. The case concerned an 85 year old man (A) who suffered from dementia and memory and cognitive impairment. He had been discharged from hospital in June 2010 and placed in a nursing home. An urgent authorisation was requested and approved on 30 June 2010.

4.1 A objected to the ongoing deprivation of his liberty. The Official Solicitor, acting on A's behalf (in proceedings brought in January 2011), submitted that there should be an up-to-date assessment of A's capacity and best interests. The local authority opposed any further assessment.

4.2 The President stated that, had this been a children's case, he would have found in favour of the local authority and brought the matter to a summary conclusion. But the conditions set by the MCA 2005 for depriving a person of their liberty meant that further assessment was necessary:

> 'I am very conscious that the Act has laid down stringent conditions for the deprivation of liberty, and that the court cannot simply act as a rubber stamp, however beneficial the arrangements may appear to be for the individual concerned. In the instant case, A wishes to challenge the authorisation which deprives him of his liberty. Parliament has decreed that he should be entitled to do so, and has created safeguards to protect those deprived of their liberty against arbitrary action.'

4.3 In **City of Sunderland v MM & Ors [COP 1155573T-01]** RS and MM were both 80 and had been cohabiting for 4 years. They enjoyed an intimate relationship. The local authority justified interference on the basis that it was necessary to protect MM. These concerns were largely raised by MM's daughters.

4.4 HHJ Moir decided to terminate contact between the individuals; a decision which was initially taken by the care home in which MM resided following an admission to hospital and a subsequent transfer to that home. The difficulty was that contact between the individuals had been suspended for 10 months as a result of administration difficulties.

4.5 HHJ Moir found that:

(i) The rights of those other than P had to be recognised and taken into consideration;

(ii) Administrative difficulties alone cannot justify an extended interference with Article 8 rights;

(iii) The local authority has a positive obligation to secure the private and family life of P and those with whom they enjoy such private and family life. This obligation was found to be greater than the negative obligation imposed on public authorities not to interfere with those rights.

5. In **Re C [2010] EWHC 3448 (COP)** the court was concerned with a 21 year old man (C) who as a result of a car accident was in a persistent vegetative state. C's family, his treating consultant, and two experts agreed that it was in C's best interests for his artificial nutrition and hydration to be withheld because it was futile. However, the staff caring for C did not agree with this. They believed that C had shown some level of awareness.

5.1 The court found that it was in C's best interests for the intravenous to be withheld, and C would be moved to a new unit for this to take place, because his current care team did not support it. The court confirmed that no issue under Article 2 and 3 ECHR arose.

5.2 The decision the court made demonstrates that the Mental Capacity Act 2005 will not affect the approach to be taken in persistent vegetative state cases.

6. In **A County Council v MB [2010] EWHC 2508 (COP)** an 80 year old woman (MB) with severe Alzheimer's disease was removed from her husband's care because of concerns about his methods of dealing with her and placed in a residential home. She sought a declaration that she was unlawfully deprived of her liberty after the expiration of standard authorisation given under Schedule A1 to the MCA 2005 and prior to the making of an order under s. 16 MCA authorising her deprivation of liberty at a residential home. The question for the Court was whether the continued deprivation of liberty was in accordance with Deprivation of Liberty Safeguards (DOLS) provided by the MCA 2005, or was unlawful.

6.1 The deprivation of liberty could not be rendered lawful by s 4B of the 2005 Act, which permitted deprivation of liberty for life-sustaining treatment or doing any vital act necessary to prevent a serious deterioration in adult's condition. The evidence showed that s 4B and the tests it contained had not been considered by the relevant decision makers at the time.

6.2 An urgent DOL authorisation came into force at the exact time that it was given on a particular day. It is good practice to record the actual time at which an urgent authorisation was given on the form.

6.3 The calculation of the maximum period of 7 days for an urgent DOL authorisation and any extension should include the whole of the day on which the urgent authorisation was actually given, and should end at the end of the last full day.

6.4 Schedule A1, paras 75–77, of the 2005 Act prevented the giving of a second urgent DOL authorisation in respect of a particular detention; para 77 was not directed to preventing only continuous urgent authorisations. Therefore, the continued detention of the wife could not have been authorised by an urgent authorisation, but only by a further standard authorisation. In the circumstances, the only effective basis for obtaining immediate and continuous DOL authorisation had been to obtain it from the court.

6.5 The court set out guidance as to good practice to avoid unlawful deprivations of liberty on expiry of an authorisation (paragraph 60,67,70, 74, 75, 100).

a. *In the case of an "existing detention" there can only be one urgent authorisation and therefore after the end of the first urgent authorisation it can only be authorised by either (i) a standard authorisation, or (ii) a court order;*
b. *All involved should be very aware of the relevant periods of an existing authorisation and time the steps to be taken to continue it, or address problems as to the continuation of a deprivation of liberty, before it expires.*

d. *The "period of grace" or extension to the end of the existing standard authorisation (see paragraph 62(3)) is the period provided by DOLS to take appropriate steps if the supervisory body is precluded from giving a standard authorisation if all of the assessments are not positive.*

e. *Assessors should have regard to the alternatives that are practically available and in the case of the best interests assessor their ability to set the maximum length of any standard authorisation (see paragraph 51(2)).*

f. *The court is the forum identified by DOLS and the MCA to resolve (i) a breakdown of the authorisation of a deprivation of liberty by the authorisation process set by Schedule A, and (ii) whether P can lawfully be deprived of his liberty if an authorisation (or a further authorisation) cannot be granted or is disputed.*

g. *Applications can be made to the court under s. 21A in respect of authorisations that have been granted and the section specifies the limited extent of the relief that can be given thereunder.*

h. *It is unlikely that s. 21A will be applicable where the problem is that an authorisation or a further authorisation cannot be given. But then, and in other circumstances, an order that authorises a deprivation of liberty can be sought under ss. 4A, 16, 47 and 48 from the court.*

i. *If they are urgent, such applications to the court can be brought before the High Court Judge in the Family Division designated to hear urgent applications in and out of court hours.*

j. *Supervisory bodies and managing authorities should take steps (i) to bring the statutory provisions relating to applications to the court to the notice of their decision makers, and (ii) to ensure that they are aware that pending a court decision they can either:*

   (I) rely on s. 4B, and that to do so they should expressly address the test set out therein and record their reasoning as to why they believe it is satisfied, or

   (II) seek an interim order from the court to authorise a continuation of an existing detention.

k. *An application to the court can be made and dealt with as a matter of urgency and supervisory bodies and managing authorities should take steps to ensure that their decision makers know, or have easy access to the current methods to contact (i) the Court of Protection and the DoL team at the court and (ii) the Family Division of the High Court to make an urgent application.*

7. In **Re A [2010] EWHC 978 (Fam)** X and Y suffered from a genetic disorder that caused severe behavioural problems, and consequently they were locked in their bedrooms on their own every night. Experts and the local authority were

generally supportive of that approach. The court was required to determine whether X and Y had been deprived of their liberty within the meaning of the European Convention on Human Rights 1950 Art.5(1). The local authority submitted that it would breach its positive obligations under the Convention if it failed to prevent the deprivation of liberty or to seek the court's sanction to render it lawful.

7.1 Where the state knew or ought to have known that a vulnerable child or adult was subject to restrictions on their liberty by a private individual that arguably gave rise to a deprivation of liberty, its positive obligations under Art. 5 would be triggered. That included the duty to investigate whether there was a deprivation of liberty. If it was subsequently satisfied that there was no deprivation of liberty, the local authority had discharged its immediate obligations. However, its positive obligations might require it to continue to monitor the situation in the event that circumstances changed. If it concluded that the measures imposed did or might constitute a deprivation of liberty, it was under a positive obligation, under Art. 5 to take reasonable and proportionate measures to bring that state of affairs to an end. If there were no reasonable measures that it could take, or measures were objected to by the individual or his family, the local authority could ask the court to determine whether there was a deprivation of liberty and, if there was, to obtain authorisation for its continuance.

7.2 Generally, a local authority would only be justified in seeking a without-notice order for the removal of an incapacitated or vulnerable adult in the kind of circumstances which in the case of a child would justify a without-notice application for an emergency protection order.

7.3 As X and Y both lacked the relevant capacity to consent to the restrictions they had been subjected to, the subjective element was satisfied. However, the reasonable, proportionate and appropriate regime implemented by the parents was in the best interests of X and Y and fell significantly short of anything that would engage Art.5. Typically, in the context of the care of children or vulnerable adults by their parents in the family home, there would not be deprivation of liberty.

8. **Appointing a deputy**

8.1 The court's power to appoint a deputy, whether to manage the financial affairs or to take welfare decisions on behalf of a person found to lack capacity, is governed by section 16 of the MCA 2005. The court must consider whether or not it is in the protected party's best interests for a deputy to be appointed:

.

> *(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that*
> *(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and*
> *(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.*

8.2 Useful guidance on the circumstances in which a welfare deputy should be appointed is provided by the MCA 2005 Code of Practice. The circumstances are, where:

- someone needs to make a series of linked welfare decisions over time and it would not be beneficial or appropriate to require all of those decisions to be made by the court;
- the most appropriate way to act in the person's best interests is to have a deputy, who will consult relevant people but have the final authority to make decisions;
- there is a history of serious family disputes that could have a detrimental effect on the person's future care unless a deputy is appointed to make necessary decisions;
- the person who lacks capacity is felt to be at risk of serious harm if left in the care of family members. In these rare cases, welfare decisions may need to be made by someone independent of the family, such as a local authority officer.

8.3 The case of **LD v LB Havering** (Case No.1144388/03; 25.6.10) provides a further example of the Court's reluctance to appoint a welfare deputy. HHJ Turner QC, sitting as a Judge of the High Court, refused to appoint a welfare deputy despite the recommendations of two social work experts that such an appointment should be made.

8.4 Where it is found that a welfare deputy should be appointed, a member of the protected party's family should ordinarily be appointed unless there is a substantial dispute between family members. This was made clear by Hedley J in **Re P** [2010] EWHC 1592 (Fam) who stated that where a family member put themselves forward to act as a welfare deputy, '*the court ought to approach such an application with considerable openness and sympathy*' (para.9). This was cited with approval by Baker J in **G v E**, with the qualification that this '*does not, however, justify the appointment of family members as deputies simply because they are able and willing to serve in that capacity*' (para.61).

8.5 If a deputy is appointed, the Court will be alive to any conflicts of interest which prevent the deputy acting in P's best interests. In **EG v RS, JS and BEN PCT** [2010] COP case number 10237109, a solicitor applied to be P's health and welfare deputy, despite the fact that she was also acting for P's sister's estranged husband in contact proceedings. His Honour Judge Cardinal made a costs order against EG, concluding that, although courts should not discourage professionals from seeking appointments as deputies, there should be a limit to such applications. The applicant '*ought to ask himself or herself: am I in any way compromised by my intervention to date?*' and '*Can I be sure all parties will indeed regard me as a neutral arbitrator?*'

9 The Court's Jurisdiction/Transfer of Proceedings.

9.1 There are clearly overlaps between the remit of the Court of Protection and that of the Family Division and Administrative Court. Two recent cases have shed some light on where the boundaries of the three jurisdictions lie.

9.2 The public law function of the Court of Protection was raised in **A Local Authority v PB [2011] EWHC 502 (COP)**, in particular the jurisdiction of the Court to review a best interests' decision taken by a local authority. The case concerned a man in his forties (P) with severe leaning difficulties and other

disabilities. P had been well looked after by his parents throughout his life, but was taken into a residential home after an incident to which the police had been called. P's mother asserted that he should live at home with a support package provided by the local authority. The local authority refused to provide any such package.

9.3 Human rights and other public law challenges to the decisions of local authorities which arise in family proceedings are generally dealt with '*within the four walls*' of the welfare jurisdiction of the Family Division. In **A Local Authority v PB**, Charles J did not express a definitive view on the jurisdiction of the Court of Protection in challenges of this kind. The jurisdictional questions in the case would be deferred to a further hearing. He did state, however, that the public authorities involved, including the local and health authorities, the Official Solicitor and the court, needed to be aware of these jurisdictional issues at an early stage to '*ensure that the Court of Protection is not utilised for an inappropriate purpose*' (para.29).

9.4 Charles J then went on to take a swipe at the way in which parties in the Court of Protection failed to properly identify the factual and legal issues in the case:

> 'To my mind, it is contrary to the interests of the parties and the public interest that cases of this type should be conducted as, in effect, a voyage of discovery, by the courts and the parties, by reference to generalised and descriptive witness statements, which make and raise in various ways a range of allegations, some of which are extremely serious.' (para.38)

9.5 To avoid such 'voyages of discovery', Charles J stated that parties in all welfare cases in the Court of Protection should serve on the other parties a document setting out:

(i)The facts which the party will ask the Court to find, the disputed facts which the court need not determine, and the findings which he/she asks the court to make in relation to the facts found.
(ii)The investigations he/she has made of alternatives for the care of P.

(iii)The factors which the Court should take into account in reaching its conclusions.

(iv)The relief sought by the party and, with reference to the relevant factors, why those factors support the granting of the relief sought.

(v)The relevant law.

9.6 In **B (A Local Authority) v RM (2010) EWHC 3802 (Fam),** Hedley J gave guidance on the circumstances in which cases in the Family Division should be transferred to the Court of Protection. Such transfers are governed by the Mental Capacity Act 2005, Transfer of Proceedings Order 2007 /1899, in particular Article 3. The matters to which the court should have regard in any application for transfer to the Court of Protection are, per Hedley J at para.28:

> 'One, is the child over 16? Otherwise of course, there is no power. Two, does the child manifestly lack capacity in respect of the principal decisions which are to be made in the Children Act proceedings? Three, are the disabilities which give rise to lack of capacity lifelong or at least long-term? Four, can the decisions which arise in respect of the child's welfare all be taken and all issues resolved during the child's minority? Five, does the Court of Protection have powers or procedures more appropriate to the resolution of outstanding issues than are available under the Children Act? Six, can the child's welfare needs be fully met by the exercise of Court of Protection powers? These provisional thoughts are intended to put some flesh on to the provisions of Article 3(3); no doubt, other issues will arise in other cases. The essential thrust, however, is whether looking at the individual needs of the specific young person, it can be said that their welfare will be better safeguarded within the Court of Protection than it would be under the Children Act.'

9.7 In **B (A Local Authority) v RM (2010) EWHC 3802 (Fam),** the applicant local authority applied for a care order in relation to a child aged 16 (M). M had been diagnosed as having a severe learning disability, autism and Tourette syndrome. M would never be able to live independently. Difficulties in caring for her then escalated and there was evidence of self-inflicted injury. M

attended a school some distance from her home and had regular contact with her siblings.

9.8 The Court of Protection declared that it was in M's her best interests that she should remain at the school and that she should not be removed without the agreement of the local authority and the mother or other order of the court.

10 **Jurisdiction.**

In **YA (F) v a Local Authority, YA (M), a NHS Trust and a PCT [2010] EWHC 2770 (COP)** the court was concerned with a young man (YA) who had complex disabilities and lacked capacity to determine his own best interests in respect of where he should live, his care, and contact with his birth family. M and YA, through the Official Solicitor, brought claims for declaratory relief and damages in reliance on the Human Rights Act 1998,s.7(1)(b), arising out of the fact that P, had been taken to hospital by M, and when discharged had been placed in an unknown location to M, and sought a transfer to the Queen's Bench Division. The applicant local authority and Primary Care Trust applied to strike out the human rights claim of the respondent mother and the Official Solicitor on the basis that the declaratory relief sought was not a declaration as to the lawfulness of any act done in relation to P (MCA s.15(1)(c)). They also argued that the Court of Protection did not have the jurisdiction to grant M a remedy under s. 8(1) of the HRA 1998, or enable her to rely upon her Convention rights as the victim of a breach.

10.1 The applications were refused. It was not disputed that the Court of Protection had jurisdiction to deal with P's claim based on Convention rights and that he could seek declaratory relief in those proceedings (see para.17 of judgment).

10.2Charles J said that as a matter of construction and application of the MCA 2005, the Court of Protection had jurisdiction to hear M's argument that acts relating to P constituted breaches of her Convention rights and to make declarations as to the lawfulness of those acts (paras 23-25, 30). The basis for this was that the primary purpose of the MCA 2005 was to create a new

statutory court which was given jurisdiction to consider and deal with issues concerning the best interests of such individuals. M was a necessary party to the best interest decisions made for P, and by virtue of Article 8 ECHR a consideration of the impact of events on family members was required. It was not Parliament's intention, where the Article 8 rights of family members of P were engaged, and acts relating to P were undertaken, to deny the court jurisdiction to make declarations as to the lawfulness of those acts by reference to the family's Convention rights. The underlying purpose of s.7(1)(b) of the HRA, was to enable a proper party to proceedings to raise claims based on Convention rights.

10.3 The court had jurisdiction to award damages under the 1998 Act. By virtue of MCA s.47(1) the Court of Protection had the same powers as the High Court in awarding damages.

11. **Inherent jurisdiction**

11.1 In **LBL v RYJ and VJ [2010] EWHC 2665 (COP)** the applicant local authority sought a declaration that the first respondent lacked capacity to make day-to-day decisions, and the appointment of a Health and Welfare Finance Deputy. Alternatively, it sought to invoke the inherent jurisdiction of the court to obtain orders empowering it to direct where she should reside, be educated and with whom she should have contact with, and appointing it to receive benefits payable to her.

11.2 (R), aged 18, suffered from epilepsy due to brain injury and had significant learning disabilities. The second respondent (V), (R)'s mother had previously suffered a mental breakdown. V did not think R had capacity to make decisions as to care, residence and education but did in relation to decisions as to contact. There had been an interim order that R lacked capacity to litigate and make decisions regarding care, contact, residence, property and financial affairs. V argued that R was not receiving the necessary educational provision required by her statement of special educational needs and sought to have her transferred to another establishment. The Official Solicitor took issue on R's

behalf with the assertion that she lacked capacity in other than financial matters and argued against the use of the inherent jurisdiction to make orders.

11.3 Macur J found that with regard to the functional test set out in the Mental Capacity Act 2005 s.2, once the diagnostic threshold had been passed, capacity to make day-to-day decisions was to be assessed in relation to the particular type of decision at the time when it needed to be made, and not the person's ability to make decisions generally or in the abstract.

11.4 The inherent jurisdiction of the Court is considerably more limited than previously thought and can only properly be exercised so as to secure unencumbered decision-making rather than, for example, allowing decisions to be taken on behalf of a vulnerable adult.

12. **Capacity to consent to marriage and sexual relations**

12.1 **D County Council v LS [2010] EWHC 1544 (Fam)** concerned the question of capacity to consent to marriage and sexual relations. The case returned to court a year after the substantive proceedings had been concluded. The Council and the OS sought directions on the effect, if any, of the House of Lords decision in **R v C (Gary Anthony)** [2009] 1WLR 1786 on the original findings.

12.2 Wood J had based his original decision in **D County Council v LS** that the respondent had capacity in relation to a number of matters including capacity to consent to sexual relations and marriage, on the earlier decision of Munby J in **MM v Local Authority X** [2007] EWHC 2003 Fam. At paragraph 84 of his judgment, Munby J had set out the test to be applied as follows:

> '*Generally speaking, capacity to marry must include the capacity to consent to sexual relations. And the test of capacity to consent to sexual relations must for this purpose be the same in its essentials as that required by the criminal law. Therefore for present purposes the question comes to this. Does the person have sufficient knowledge and understanding of the nature and character – the sexual nature and character – of the act of sexual intercourse, and of the reasonably*

foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse (and, where relevant, to communicate their choice to their spouse)?

12..3 In **R v C (Gary Anthony)** the HL made it clear that consent to sexual relations was person and situation specific. Baroness Hale criticised the relatively low test set by Munby J:

> '*I am far from persuaded that those views were correct, because the case law on capacity has for some time recognised that, to be able to make a decision, the person concerned must not only be able to understand the information relevant to making it but also be able to "weigh [that information] in the balance to arrive at a choice."'*

Although **R v C (Gary Anthony)** was a criminal case, the test to be applied is the same in the criminal and civil contexts, as Wood J restated in **D County Council v LS**.

12.4 Wood J chose not to vary his original judgment on capacity in light of the judgement of the House of Lords, largely because neither the Council nor the OS were asking for any variation. He did state, however, that it was necessary in the light of **R v C (Gary Anthony)** to distinguish between those matters which go directly to a person's capacity to make a choice, and those matters which can only be relevant to a best interests decision (paragraph 40). The two matters should be considered sequentially: first, the factors effecting capacity to choose and, secondly, if the person lacks capacity, the factors relevant to the best interests decision.

12.5 The question of the test to be applied in determining whether a person can consent to have sexual relations arose again in **D Borough Council v AB [2011] EWHC 101 (COP)** before Mostyn J. The case concerned a 41 year old man, Alan, with 'moderate' learning disabilities. Alan had commenced a relationship with a man called Kieron, with whom Alan lived. The local authority sought a

declaration from the Court that Alan lacked capacity to consent to sexual relations and an order restricting contact between Alan and Kieron.

12.6 In **MM v Local Authority X [2007] EWHC 2003 Fam** (dealt with in the previous edition of this CoP update), Munby J had defined an act-based test for capacity:

> 'does she have sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent?'

12.7 This approach had been thrown into doubt by the House of Lords decision in **R v C (Gary Anthony) [2009] 1WLR 1786**, which had criticised without overruling the test based simply on whether the person understands the nature of the sexual act and in **D County Council v LS [2010] EWHC 1544 (Fam)**, Wood J had attempted to find a compromise approach by incorporating a partner-based as well as act-based element into the test.

12.8 This was rejected by Mostyn J in **D Borough Council v AB**:

> 'I do think, with the greatest possible respect, that there has been a conflation of capacity to consent to sex and the exercise of that capacity. There is also a very considerable practical problem in allowing a partner-specific dimension into the test. Consider this case. Is the local authority supposed to vet every proposed sexual partner of Alan to gauge if Alan has the capacity to consent to sex with him or her?' (para.35).

12.9 So, the act-based definition of capacity to consent to sexual relations, drawn from Munby J but developed by Mostyn J, requires the person to have an awareness and understanding of:

a) The mechanics of the act;
b) That there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections; and

c) That sex between a man and a woman may result in the woman becoming pregnant.

12.10 Applying this test to Alan's case, the Court found that he failed all three criteria in relation to heterosexual sex and that, for homosexual sex, he failed the second criteria. Protective measures would therefore be put in place and the Court made an interim declaration that Alan lacked capacity. The local authority was ordered to provide sex education classes to Alan in the interim in the hope that he would gain capacity. The local authority had been seeking a final declaration: leave to appeal has been granted to the local authority. The Court of Appeal may well be called upon to provide further guidance on an issue which continues to cause controversy.

13. **Capacity generally**

13.1 In **AVS v A NHS Foundation Trust [2011] EWCA Civ** 7 the court was concerned with a man who suffered from sporadic Creutzfeldt-Jakob disease (CJD). His life expectancy was 4 months. He underwent experimental treatment in attempt to slow the progression of the disease but not cure him, where a pump was implanted and a bi-lateral intra ventricular catheter to dispense Pentosan Polysulphate (PPS) infusions into P's brain. The treatment failed. P's brother, CS, brought proceedings and argued that it was in P's best interests for the pump to be replaced and that the infusions continue, despite the fact that P remained in a vegetative state. Neurological opinion at the hospital did not support a continuation of the treatment.

13.2 The Court of Protection ordered the applicant to respond to the medical opinion within 14 days, otherwise there was no suit pending. The Court also replaced CS as P's next friend with the Official Solicitor, and limited the number of witnesses to be called.

13.3 The Applicant appealed all of the Court's directions, primarily arguing that there remained a live issue as to P's best interests.

13.4 The Court of Appeal refused permission to appeal and said:

(i) *It was not the role of the court to decide hypothetical questions* (paragraph 32).

(ii) *The court's intervention is necessary to overcome a reluctance or reticence to provide/refuse treatment where there is a fear that providing such treatment (or omitting to provide it) would be unlawful, or render the clinician open to criminal or tortuous action.* (paragraph 34)

(iii) *The litigation is going nowhere because there is not anyone who is able to carry out the procedure.* (paragraph 38)

(iv) *To obtain a declaration in order to use it to twist the arm of a clinician to carry out the procedure, or put pressure on the Secretary of State to provide a hospital where the procedure will be undertaken is an abuse of the process of the court and should not be tolerated* (paragraph 38).

14. In **RT & LT v A Local Authority [2010] EWHC (Fam) 1910** the court was concerned with whether a 23 year old woman, L, with a significant social functioning and interaction disorder lacked capacity to decide where to live and what contact to have with members of her family. L had been adopted by the applicant, R, and his wife. She was placed into residential care at 17 and then returned home. An authorisation for the Deprivation of Liberty was granted and R issued proceedings.

14.1 The President found that L did not have capacity to make either decision. Under s. 1(3) MCA 2005 all practicable steps had been taken to help L make the relevant decision but without success. The President was satisfied that s. 1(3) MCA applied because L was unable to use or weigh the information relevant to the decision, as part of the process of making a decision. He found that on the balance of probabilities her disability infected her understanding within the meaning of s. 3(1)(a) in combination with s. 3(4) MCA.

15 In **The PCT v P, AH and a Local Authority (Bailii citation [2009] EW Misc 10 (EWCOP); COP Case No: 11531312)** P aged 24 suffered from severe epilepsy and lived with a lady called AH who had adopted him when he was younger. There were

disputes over P's medical treatment and whether he suffered from ME. AH, without medical advice, withdrew his anti-epileptic medication a few days before he suffered from prolonged epileptic seizures. The case came before the President, and he made an order that P be admitted to hospital and undergo a full assessment to discover whether he had ME and the appropriate treatment.

15.1 Hedley J was then faced with two conflicting proposals: the Primary Care Trust supported by the Local Authority and the Official Solicitor wished to provide P with independent living accommodation with limited contact with AH. Whereas, AH wanted to resume the care of P.

15.2 In applying section 3(1) MCA 2005, Hedley J made clear at (paragraph 34-5) that '*The difficult case is where the attention is on subsection (c), that is to say the capacity actually to engage in the decision making process itself and be able to see the various parts of the argument and to relate the one to another.'*

15.3 Hedley J found that P did lack capacity to make the relevant decisions and it was in his best interest that he was in a placement away from AH. In reaching this decision he made these observations:

(a) P's epilepsy impacted his functioning;

(b) P's learning disability which was at the lower end of mild;

(c) P's difficult relationship with AH which was found to restrict his ability to think about his future;

(d) P's inability to think independently of his mother.

This decision was an infringement of P's and AH's article 8(1) rights and went against P's wishes but the alternative of P returning to AH's care justified the breach in accordance with Article 8(2).

16. **Residence**

In **R(W) v LB Croydon [2011] EWHC 696 (Admin)** a local authority's decision that a young adult (W) who was autistic and had learning difficulties, and to whom the local authority was obliged to provide accommodation for under the National Assistance Act 1948 s.21, was to be moved from his existing placement to a different facility for supported living was unlawful.

16.1 The court found that the local authority failed to facilitate sufficient consultation with his parents and the existing service provider. The cost of the placement was an important issue. Whilst the local authority was allowed to have regard to cost when reaching a decision, it was required by the National Assistance Act 1948 (Choice of Accommodation) Directions 1992, the Community Care Assessment Directions 2004 and the MCA Code of Practice to consult (W), his carers, his family and in these circumstances, his care providers, before making a final decision.

16.2 The local authority could terminate a placement because of costs but before undertaking such a decision it must ensure proper consultation takes place. In addition, under MCA s 4(7), the views of anyone engaged in caring for the person, including family members and professionals, had to be considered before making the decision.

17. In **A Local Authority v PB and P [2011] EWHC 502 (COP)** the court was concerned with a best interest case which involved the residence and care arrangements for P, who suffered from a life-long learning disability and was in the care of his mother for the whole of his life but was removed to the care of the local authority.

17.1 In this case Charles J provided helpful comments regarding the interaction between the MCA 2005 and judicial review proceedings and specifically what is the court to do when the local authority declines to put an option before it for consideration? He said that the court, in exercising its best interests jurisdiction is 'choosing between available options' (paragraph 22). He also said that the local

authority's failure to put an option forward may give rise to judicial review proceedings.

17.2 The Judge also provided useful guidance on directions to be given before a fact finding hearing in the Court of Protection. Each party should serve on the other a document setting out (paragraph 46):

(i) *(a) The facts that he/she/it is asking the court to find; (b) The disputed facts that he/she/it asserts the Court need not determine; (c) The findings that he/she/it invites the Court to make by reference to the facts identified in.*

(ii) *With sufficient particularity the investigations he/she/it had made of the alternatives for the care of P and as a result thereof the alternatives for the care of P that he/she/it asserts should be considered by the Court and in respect of each of them how and by whom the relevant support and services are to be provided;*

(iii) *By reference to (i) and (ii) the factors that he /she/it asserts the Court should take into account in reaching its conclusions;*

(iv) *The relief sought by that party and by reference to the relevant factors the reasons why he/she/it asserts that those factors, or the balance between them, support the granting of that relief; and*

(v) *The relevant issues of law*

18. In **AH v (1) Hertfordshire Partnership NHS Foundation Trust (2) Ealing Primary Care Trust [2011] EWHC 276 (COP)** several commissioning authorities proposed to move 12 residents of a specialist residential service into facilities within the community. The residents suffered from lifelong disabilities. Their needs could not be met other than in the specialist residential service. The court had to decide whether a move would be in the relevant service user's best interests.

18.1 The commissioning authority believed that a move to a residential facility within the community would benefit the residents on the basis that such a move would

be in accordance with best practice. Jackson J concluded, however, that it was not possible to identify a single dependable benefit arising from the proposed move.

18.2 He said at paragraph 80:

> *"This case illustrates the obvious point that guideline policies cannot be treated as universal solutions, nor should initiatives designed to personalise care and promote choice be applied to the opposite effect."*

19. **Reporting Restrictions**

19.1 The issue of the reporting restrictions which apply in the Court of Protection was raised in **A (by his litigation friend the Official Solicitor) v Independent News Ltd and Others** [2010] Civ 343. The OS appealed against a decision to allow the media to report on a hearing of an application by A's family in the Court of Protection. A had severe learning difficulties and was blind. He was a musical prodigy and his story had generated considerable interest from the press and public.

19.2 The Court of Appeal upheld the first instance decision to lift the reporting restrictions. The Court restated the general rule that Court of Protection cases should be heard in private. Under Rule 93(1)(a) of the Court of Protection Rules, the restrictions on access and reporting can be lifted if there is a '*good reason*' for doing so. The Court held that there was clearly a good reason to lift the restrictions, given the public's interest in the case which was in no way prurient. More generally, as the Lord Chief Justice stated:

> '*It is valuable for the public to be fully informed of precisely what happens in a court in which the overwhelming majority of hearings are, in accordance with the statutory structure governing its process, to be conducted in private* (paragraph 17).'

19.3 The Court also offered important guidance on the balance to be struck between Article 8 and Article 10 in considering this issue. The Court suspected that in many cases the consideration of Article 8 would add little, if anything, to the decision of the court under Rules 90-93. Nevertheless, the court should specifically consider the Article 8 rights of any party whose private life may in some way be intruded upon (paragraph 24).

19.4 In relation to the media's Article 10 rights, Hedley J had held at first instance that they were engaged only after a '*good reason*' had been established to lift the reporting restrictions. This was rejected by the Court of Appeal, which held that the media's Article 10 rights were engaged from the time of the media's application for the restrictions to be lifted (paragraph 32). This did not effect the final determination of the appeal.

20. The Court of Protection has faced the same accusation as the Family Division from certain parts of the press: that it is a secret court, handing down draconian judgments without proper scrutiny. The general rule, set out in Rule 90(1) of the Court of Protection Rules 2007, is that proceedings in the Court of Protection are held in private. However, the Court has been increasingly willing to exercise its power under Rule 90(3)(a) to authorise any person or class of persons to attend a private hearing and under Rule 92(1) to allow the hearing to be in public..

21. In **LB of Hillingdon v Neary [2011] EWHC 413 (COP)** Mr Justice Jackson allowed the press to attend and identify the parties. The case concerned Steven Neary, a 20 year old man with autistic spectrum disorder and severe learning disability. In December 2009, Steven had been placed in the care of the local authority for a few days' respite, with his father's agreement. At the end of the respite period, the local authority came to the view that it would not be in Steven's best interests to return to the care of his father. Steven remained in the care of the local authority until December 2010.

21.1 The father and the Official Solicitor argued that the local authority's refusal to allow Steven to return home was unlawful. A final hearing is listed for 23 May 2011. The

matter came before Jackson J on the preliminary issue of whether the press should be allowed to attend.

21.2 Jackson J approved the two-stage test set out by Hedley J in **Independent News and Media v A [2010] EWCA Civ 343**. First, the Court should ask whether there is a 'good reason' to make an order to allow the media to attend. Secondly, if there is a 'good reason', the Court should then decide whether the requisite balancing of Article 8 and Article 10 justifies the making of the order.

21.3 The media offered three arguments as to why there was a 'good reason' that they should be allowed to attend:

> '(1) Firstly, there is a public interest in the work of the Court of Protection, and the way it uses its considerable powers to make orders which affect the lives of vulnerable citizens.
>
> (2) Secondly, in this case it is alleged that the rights of Steven and of his father were seriously infringed for a prolonged period by the decision of the local authority to prevent Steven returning home after the intended period of respite.
>
> (3) Thirdly, the issues now before the court have to some extent already been aired in the public domain, and the parties to the proceedings have been named. Steven's case was featured in his local newspaper, the Uxbridge Gazette, in July 2010. It was then covered by the BBC in August 2010 on Radio 4's "You and Yours" and on BBC London News. It has more than once been featured in Private Eye. An online petition for Steven's return, launched by Mr Neary, generated some 8000 signatures.'

21.4 On the basis of these arguments, Jackson J had no hesitation in finding that the 'good reason' limb was satisfied.

21.5 On the balancing exercise, the Court found that the fact that the names of the parties were already in the public domain and that there was no evidence that there would be any detriment to the parties from being under the media spotlight, weighed in favour of allowing the media to attend. All applications of this type will of course turn on their own facts, though Jackson J did offer some important guidance on the considerations for the Court. To summarize:

1) Hearings before the Court of Protection should be held in private unless there is good reason why they should not be.

2) On the other hand, the scheme of the rules explicitly contemplates cases where hearings will not be conducted in private, even to the extent that it specifically permits the court to sit in public, something that has not been suggested in this case.

3) Publicity can have a strong effect on individuals, particularly if they are not used to it, or if, like Steven, they are vulnerable to anxiety and to changes in their environment. Any evidence that suggests a real possibility of a detrimental effect from publicity must weigh heavily.

4) There is a genuine public interest in the work of this court being understood. Not only is this healthy in itself – the presence of the media in appropriate cases has a bracing effect on all public servants, whether in the field of social services or the law – but it may also help to dispel misunderstandings.

5) The ability of the media to participate need not be limited to cases involving extraordinary individuals. The question is not whether the individual is exceptional, but whether the issue is one of genuine public interest.

6) A distinction can be drawn between cases which have not been in the public eye and those which have, to a greater or lesser extent. In the former case, if the proceedings are conducted in private, there may very well be no story. In the latter case, the proceedings do not create the story, and the question is whether the media should be allowed to follow its continuation in court.

7) Once the parties' names are publicly attached to the proceedings, the court's ability to control that information is lost. Accordingly, parties should not be named at the outset where any real possibility can be foreseen of the balance falling the other way at the end of the proceedings.

On the other hand, it is in no one's interests for proceedings to be stultified by the withholding of information that is already in the public domain.

22. **Rules of evidence and disclosure**

Several general points of principle were restated by Mr Justice McFarlane in **Enfield LBC v SA (by her litigation friend the Official Solicitor) FA and KA [2010] 1 FLR 1836.**

(a) Court of Protection proceedings under the Mental Capacity Act 2005 fall within the very wide definition of 'civil proceedings' under the Civil Evidence Act 1995. Hearsay evidence is therefore admissible (paragraphs 29-30). Furthermore, hearsay evidence that originated from a person who was not competent as a witness is also admissible under Rule 95(d) of the Court of Protection Rules 2007. The fact that a person was not a competent witness would effect the weight to be attached to the evidence, not its admissibility (paragraph 36);

(b) the Court of Protection Rules 2007, unlike the rules in family proceedings, do not impose a duty of full and frank disclosure. However, full and frank disclosure should be made in fact finding cases in the Court of Protection, given that the principles are essentially the same whether the vulnerable complainant is a child or an incapacitated adult;

(c) when looking at evidence from a witness who was engaged in providing therapy to an individual who then, during the course of the therapeutic relationship, made statements that were produced as evidence of truth, the court must bear in mind the warning given by Butler-Sloss LJ in *Re D (Child Abuse: Interviews)* [1998] 2 FLR 10 that such therapeutic interviews are 'generally unsuited to use as part of the court evidence';

(d) the decision of the House of Lords in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35 applies to cases in the Court of Protection: once findings of fact have been made, the case is part heard, and the trial should not resume before a different judge (paragraph 113).

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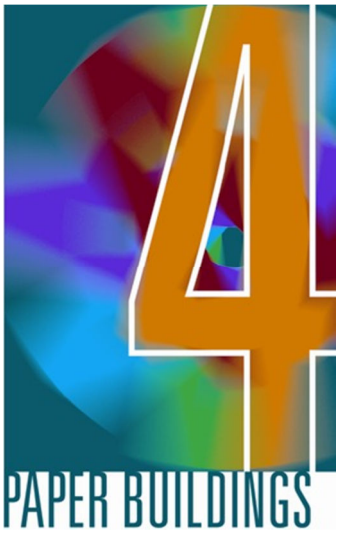

Section 3

The Property and Affairs of Mentally Incapacitated Adults:

- Cases of Interest Following The Coming Into Force of the Mental Capacity Act 2005

James Copley

The Property and Affairs of Mentally Incapacitated Adults:
Cases of Interest Following The Coming Into Force of the Mental Capacity Act 2005

1.1 Prior to the coming into force of the Mental Capacity Act 2005 (on 1 October 2007) the Court of Protection had jurisdiction to administer the property and affairs of mentally incapacitated adults under part VII of the Mental Health Act 1983. This included the making of gifts, settlements of property, the execution of statutory wills and the appointment of Receivers. The Court of Protection also decided on questions as to the validity and operation of enduring powers of attorney under the Enduring Powers of Attorney Act 1985.

1.2. The most significant change effected by the MCA 2005 was the new jurisdiction to make decisions as to medical treatment and personal welfare. The Court of Protection continues to exercise broadly the same functions in respect of property and affairs. Receivers are no longer appointed: instead there are property and affairs deputies. Enduring powers of attorney can no longer be created but those made before 1 October 2007 are still regulated in the same way. From 1 October 2007 lasting powers of attorney can be executed authorising others to deal with property and affairs (as well as to decide questions as to personal welfare). The Court of Protection determines questions as to the validity and operation of lasting powers of attorney.

The new approach to decision making under the MCA 2005

2.1 It had been thought by many commentators that the MCA 2005 would have little effect on the way decisions were made regarding property and affairs. In fact the decision making process is entirely different.

2.2 In ***Re P* [2009] EWHC 163 (COP)**[1] the Court was determining an application for the making of a statutory will. Lewison J reviewed the law prior to the coming into force of the 2005 Act. The Court would do what P might be expected to do, assuming he was having a "brief lucid interval": sometimes called the substituted judgment approach. Lewison J held that this was not the approach to be adopted under the 2005 Act. Decisions (whether made by the Court or by others) must be made in P's best interests (MCA 2005, s 1(5)). The structured decision making process in s 4 MCA 2005 must be followed:

4 Best interests
(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
(a) the person's age or appearance, or

[1] http://www.bailii.org/ew/cases/EWHC/COP/2009/163.html

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
(3) He must consider—
(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
(b)if it appears likely that he will, when that is likely to be.
(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
…
(6) He must consider, so far as is reasonably ascertainable—
(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
(b) the beliefs and values that would be likely to influence his decision if he had capacity, and
(c) the other factors that he would be likely to consider if he were able to do so.
(7) He must take into account, if it is practicable and appropriate to consult them, the views of—
(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
(b) anyone engaged in caring for the person or interested in his welfare,
(c) any donee of a lasting power of attorney granted by the person, and
(d) any deputy appointed for the person by the court,
as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).
…

2.3 Parliament had endorsed the "balance sheet" approach. P's past and present wishes and feelings must be taken into account, but they are not determinative. Lewison J quoted paragraph 5.38 of the Code of Practice:

In setting out the requirements for working out a person's 'best interests', section 4 of the Act puts the person who lacks capacity at the centre of the decision to be made. Even if they cannot make the decision, their wishes and feelings, beliefs and values should be taken fully into account – whether expressed in the past or now. But their wishes and feelings, beliefs and values will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the person's best interests."

2.4 In deciding what provision should be made in a statutory will, Lewison J accepted that P's best interests could be served by giving effect to his wishes and said:

But what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done "the right thing" by their will. In my judgment the decision maker is entitled to take into account, in assessing what is in P's best interests, how he will be remembered after his death.

The best interests test applied

3.1 In ***Re M*** **[2009] EWHC 2525 (COP)**[2] Munby J agreed with the judgment of Lewison J in Re P. Munby J likened the decision making process to that under s 1 of the Children Act 1989 and s 25 of the Matrimonial Causes Act 1973. There was no hierarchy as between the factors which have

[2] http://www.bailii.org/ew/cases/EWHC/COP/2009/2525.html

to be borne in mind beyond the overarching principle that what is determinative is the evaluation of what is in P's best interests. The weight to be given to the various factors would differ depending on the circumstances of the particular case. In some cases there may be factors of "magnetic importance" influencing or determining the outcome (echoing the words of Thorpe LJ in Crossley v Crossley [2008] 1 FLR 1467).

3.2 In Re M the property and affairs deputy sought an order authorising the execution of a statutory will. P's current will appointed Z her executor and gave Z the whole of her estate. The will had been executed a few months after P had begun to live with and be cared for by Z and his family. Whilst living with Z, P had transferred to Z at least £177,000 (being substantially all of her savings and capital with the exception of her house). Previously Munby J had directed P's removal from Z's care to a care home and that P should have no further contact with Z and his family. Z had failed to comply with orders requiring disclosure relating to the payments made to him. Munby J had authorised the deputy to commence proceedings in the Chancery Division to recover the money.

3.3 Munby J declined to proceed on the basis that the inter vivos payments and the execution of the will were procured by undue influence. The Court of Protection had no jurisdiction to rule on the validity of a will and the propriety of the payments might be the subject of litigation in the Chancery Division. There were however key reasons or magnetic factors why Z should be excluded from benefit. First, when P signed the will it was in the expectation that she would live with Z for the rest of her life. Second, Z had already received substantial sums from P. Either the sums were properly obtained (in which case Z had no further claim on P's bounty), or the sums were improperly obtained (in which case it could not be in P's best interests to reward Z by making provision for him in her will). Third, Z had failed to act in P's best interests and had acted in defiance of orders made in furtherance of her best interests.

3.4 The Court authorised the making of a statutory will broadly reflecting P's previous wills, making provision for a neighbour and nine charities.

3.5 In ***Re D (Statutory Will)*** **[2010] EWHC 2159 (Ch)**[3] P had executed a will in 1995 leaving modest legacies to her eleven grandchildren and providing for her residuary estate to be shared equally between her three children. A subsequent will executed in 2004 left the whole of her estate to her youngest daughter, Mrs S. A further subsequent will executed in 2006 purported to leave her estate to Mrs S and P's son, Mr D, in equal shares. There were doubts as to the validity of the 2004 will and even more serious concerns about the 2006 will (not least because it was

[3] http://www.bailii.org/ew/cases/EWHC/COP/2010/2159.html

purported to have been executed only eight months before Mr D attempted to register an enduring power of attorney which was found to have been a forgery).

3.6 P's eldest daughter, Mrs C, applied for the authorisation of a statutory will. DJ Ashton held that it was not the function of the Court of Protection to adjudicate on disputes as to the validity of wills and that if a will was validly made the Court of Protection should not interfere with it. HHJ Hodge QC agreed (noting what Munby J said in Re M above) that the Court of Protection had no jurisdiction to rule on the validity of any will. However it was not in P's best interests for her estate to be eroded by litigation after her death and for her memory to be tainted by the bitterness of a contested probate dispute between her children. A statutory will was authorised in substantially the same terms as the 1995 will.

3.7 ***Re G (TJ)* [2010] EWHC 3005 (COP)**[4] Morgan J considered the best interests test as it applied to inver vivos payments rather than the making of a statutory will. In previous proceedings, prior to the coming into force of the MCA 2005, Morgan J had authorised lifetime gifts from P (and her husband who had since died) to their two adult children, applying the substituted judgment test. Morgan J had also directed the receiver to pay regular maintenance to P's daughter.

3.8 The receiver (now the deputy) sought a direction that the maintenance payments should continue to be paid to P's daughter. The issue was whether the payments would be in the best interests of P. If best interests was to be equated to self-interest, then what self-interest of P would be advanced by making payment to her daughter?

3.9 Morgan J found assistance from the judgements in Re P and Re M (above) but found some difficulty with the factor mentioned by Lewison J in Re P, namely being remembered for having done the right thing (quoted above at para 2.4 above). In a case such as this where P has not participated in the decision and the decision does not reflect P's actual wishes, the decision is taken by the court and not by P. Further, other family members (perhaps P's son who did not participate in the proceedings) might not think that the court has done the right thing.

3.10 Morgan J ultimately based his decision on the previous finding that P would have wanted the payments to be made to her daughter if she had capacity to make the decision for herself. Whilst the previous finding this was a "substituted judgment", the MCA 2005 did not exclude respect for what would have been P's wishes. A substituted judgment can be subsumed into the consideration of best interests.

[4] http://www.bailii.org/ew/cases/EWHC/COP/2010/3005.html

The appointment of deputies

4.1. ***Re P* [2010] EWHC 1592 (Fam)**[5] concerned a young man who was blind and with a severe learning disability which meant he required one to one care. He was also a talented musician with a growing reputation and career which would need careful handling owing to his particular needs. His parents and sister applied to be appointed as personal welfare and property and affairs deputies. The Royal National Institute for the Blind (as intervener) did not oppose the application but raised the issue of whether there should in addition be an independent deputy.

4.2 Hedley J was evidently impressed by P's parents and sister and decided there was no need for an independent deputy. The Judge quoted s 16(4) MCA 2005 which provides:

> *When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that -*
> *(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and*
> *(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.*

4.3 Hedley J continued:

> *A provisional reading of those principles might be thought to sit rather uncomfortably with the concept of appointing deputies at all. Since the principle of appointing deputies is fundamental to this part of the Act, it must be appreciated that Section 16(4) has to be read in the context of the fact that, ordinarily, the court will appoint deputies where it feels confident that it can. It is perhaps important to take one step further back even than that, and for the court to remind itself that in a society structured as is ours, it is not the State, whether through the agency of an authority or the court, which is primarily responsible for individuals who are subjects or citizens of the State. It is for those who naturally have their care and wellbeing at heart, that is to say, members of the family, where they are willing and able to do so, to take first place in the care and upbringing, not only of children, but of those whose needs, because of disability, extend far into adulthood. It seems to me at least that the Act ought to be read subject to that overriding policy aim.*
>
> *Therefore, the court ought to start from the position that, where family members offer themselves as deputies, then, in the absence of family dispute or other evidence that raises queries as to their willingness or capacity to carry out those functions, the court ought to approach such an application with considerable openness and sympathy.*

4.4 In ***G v E* [2010] EWHC 2512**[6] there were contested applications for the appointment of personal welfare and property and affairs deputies. In a widely reported judgment the court had previously found that the local authority, Manchester City Council, had breached P's Article 8 rights by removing him from the care of F and had subsequently unlawfully deprived P of his liberty by placing in him in two residential units[7]. The court ultimately ordered that P should return to the care of F. F and G (P's sister) applied to be appointed personal welfare deputies and for the appointment of G and an unidentified professional as property and affairs deputies.

[5] http://www.bailii.org/ew/cases/EWHC/Fam/2010/1592.html
[6] http://www.bailii.org/ew/cases/EWHC/COP/2010/2512.html
[7] http://www.bailii.org/ew/cases/EWHC/Fam/2010/621.html

4.5 Baker J held that the vast majority of decisions about incapacitated adults were to be taken informally and collaboratively by individuals or groups of people consulting and working together. Section 5 of the MCA 2005 created a statutory defence to protect all persons who carry out acts in connection with the care or treatment of an incapacitated adult, provided they reasonably believe that it will be in that person's best interests for the act to be done. Where there is disagreement which cannot be resolved the issue should usually be determined by the court. The words of s 16(4) MCA 2005 were clear. They do not permit the court to appoint deputies simply because "it feels confident it can" but only when satisfied that the circumstances and the decisions which will fall to be taken will be more appropriately taken by a deputy or deputies rather than by a court, bearing in mind the principle that decisions by the courts are to be preferred to decisions by deputies. Even then, the appointment must be as limited in scope and duration as is reasonably practicable in the circumstances

4.6 The application for the appointment of F and G as personal welfare deputies was dismissed. Routine decisions concerning P's day-to-day care could be taken by F as his carer. Decisions about his education should be taken collaboratively by F, G, his teacher, and other relevant professionals. Decisions about possible medical treatment should be taken by his treating clinicians in consultation with F and G. Decisions about who should look after P in the event that F is no longer able to do so should equally be considered when the need arises in a collaborative way.

4.7 The application for the appointment of G and another person as property and affairs deputies was also dismissed. P's income consisted of state benefits alone and his savings were less than one thousand pounds. State benefits can be managed by an appointee, appointed by the Department of Work and Pensions. The appointment of a deputy for property and affairs would become appropriate were P to be awarded a significant sum of damages as a result of his forthcoming claim against the local authority, in which case the application could be renewed.

4.8 ***DP v JCP*** **Eld LJ 25** was a case where P's assets were such as to require a property and affairs deputy to be appointed. DP, P's son, applied to be appointed as deputy. DP's four siblings opposed the application. DJ Marin declined to appoint DP as deputy. DP was unlikely to communicate with and behave appropriately towards his siblings. There was a difficult question as to what was to happen to the ashes of P's late wife which would require a neutral and dispassionate approach on the part of the Deputy. A penal deputy was appointed to deal with P's property and affairs.

4.9 In ***Re S and S (Protected Persons)*** **[2008] EWHC B16**[8] a couple, Mr and Mrs S, appointed their two children, C and V, as their attorneys under an enduring power of attorney. The EPA provided that the children could act jointly, not jointly and severally. The couple became incapable of managing their affairs and V wished to register the EPA but C did not. V accordingly applied to be appointed as receiver and the application was later treated as an application to be appointed property and affairs deputy. C opposed the application, arguing that an independent professional deputy should be appointed. Mr and Mrs S had consistently expressed the wish that their daughters should act together or that an independent deputy should be appointed. At first instance DJ Rogers concluded that V's competence and integrity were not in issue: she had conducted her parents' financial affairs over many years. V was appointed as a property and affairs deputy.

4.10 HHJ Hazel Marshall QC allowed the appeal. By choosing to appoint their daughters as joint (and not joint and several) attorneys, Mr and Mrs S had shown that they wanted their daughters to make joint decisions. The district judge had failed to pay proper regard to Mr and Mrs S's expressed wishes. An independent panel deputy was appointed.

Costs

5.1 The Court of Protection Rules 2007 provide for costs as follows:

Property and affairs – the general rule
156. Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to his estate.

Personal welfare – the general rule
157. Where the proceedings concern P's personal welfare the general rule is that there will be no order as to the costs of the proceedings or of that part of the proceedings that concerns P's personal welfare.

Apportioning costs – the general rule
158. Where the proceedings concern both property and affairs and personal welfare the court, insofar as practicable, will apportion the costs as between the respective issues.

Departing from the general rule
159. —(1) The court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances, including–
(a) the conduct of the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(c) the role of any public body involved in the proceedings.
(2) The conduct of the parties includes–
(a) conduct before, as well as during, the proceedings;
(b) whether it was reasonable for a party to raise, pursue or contest a particular issue;
(c) the manner in which a party has made or responded to an application or a particular issue; and
(d) whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response.

[8] http://www.bailii.org/ew/cases/EWHC/Fam/2008/B16.html

5.2 Circumstances justifying a departure from the general rule in r 156 were present in ***Re Reeves*** **[2010] WTLR 509**. P had suffered a brain injury in a road traffic accident and was awarded damages for personal injury, including a substantial element to pay for his future care. P's property and affairs deputy approached St Helen's Council to ascertain whether it was potentially liable to contribute to P's costs of care. The Council, erroneously relying upon the judgment of the Court of Appeal in ***Peters v East Midlands SHA*** **[2009] EWCA Civ 145**, required the deputy to apply to the Court of Protection for authority to make the request for a contribution to P's costs of care.

5.3 Senior Judge Denzil Lush held that the Council's position was misconceived. In ***Peters*** the deputy for the claimant had given an undertaking not to apply for public funding of the claimant's care without seeking the permission of the Court of Protection. No such undertaking had been given by Mr Reeves' deputy. The deputy had authority, indeed he had a duty, to claim all state benefits to which P may be entitled. The Council was ordered to pay the costs of the application.

5.4 In ***EG v RS*** **[2010] EWHC 3073 (CoP)**[9] CH was P's brother in law. P's sister, JS, was CH's estranged wife. CH and JS were involved in an acrimonious dispute regarding the welfare and finances of P. CH was represented by a solicitor, EG. EG applied to be appointed as P's personal welfare deputy. Given that EG had represented CH, it was impossible that she could be seen as being an impartial deputy. The application was doomed to fail. A departure from the general rule in r 157 was justified.

5.5 In ***Re KS*** **(unreported, HHJ Cardinal, 17.5.10)** Mr St was P's carer. Mr St made allegations of cruel treatment of P by P's parents. Mr St applied to be appointed P's personal welfare deputy. In due course Mr St was granted permission to bring proceedings and the Official Solicitor was appointed as P's litigation friend. Mr St found the proceedings expensive. Mr St was reassured by the appointment of the Official Solicitor and felt that the matters he had raised had come to the appropriate attention of others and the court. Mr St sought leave to withdraw as a party.

5.6 The proceedings were withdrawn with no findings having been made as to Mr St's allegations. The Official Solicitor and the local authority were satisfied as to the welfare arrangements for P. Mr St sought his costs. District Judge Owen decided that the general rule in r 157 should not be departed from. HHJ Cardinal dismissed Mr St's appeal. As a matter of principle HHJ Cardinal was prepared to accept that it may well be right for a whistleblower to have his costs, but that

[9] http://www.bailii.org/ew/cases/EWHC/COP/2010/3073.html

must depend on the allegations being found to have some merit. Here the allegations were neither proved nor disproved.

5.7 In ***Re RC (Deceased)*** **[2010] WTLR 1831** SC was ordered to pay the costs of the last three days of a four day hearing. P, who was SC's aunt, executed a lasting power of attorney for personal welfare appointing SC to be her attorney. The hearing had dealt with the question of the validity of the LPA, P's future placement and the appointment of a welfare deputy. Senior Judge Denzil Lush allowed SC's appeal. The judgement is of interest for a number of reasons.

5.8 First, the Judge found that the district judge had been wrong to find that the general rule as to costs in r 157 (no order in personal welfare cases) applied to the personal welfare LPA. The format, procedures for execution and registration and grounds for objection to registration were the same regardless of whether the LPA dealt with personal welfare or property and affairs. The general rule for both types of LPA should be r 156 (costs to be paid from P's estate).

5.9 Second, the Judge found that the district judge ought to have considered SC's ability to pay the costs awarded, relying upon ***Re Cathcart*** **[1892] 1 Ch 549**.

5.10 Third, whilst almost everyone else in the proceedings were exasperated by SC and SC was infuriating to deal with, she was devoted to her aunt and fanatical about what she believed to be in her best interests. SC was not untypical of many litigants in person who appear in health and welfare proceedings. The purpose of a general rule is that it should apply in a typical case.

Procedure

6.1 ***Re Kittle*** **[2010] WLTR 651**. A first cousin was not a "family member" within the meaning of reg 8(3) of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007. A first cousin was not disqualified from giving an LPA certificate.

6.2 ***Re Harries*** **[2010] WTLR 51**. The witnesses to an enduring power of attorney had written their names and addresses but had failed to sign as required by reg 3 of the Enduring Powers of Attorney (Prescribed Form) Regulations 1990. The handwritten names were sufficient proof of their identity and their intent as to constitute signatures. The enduring power of attorney was valid.

6.3 ***Re H*** **[2009] EWHC B31 (COP)**[10]. Detailed guidance was given by HHJ Hazel Marshall QC as to the determination of the level of security required to be given by a property and affairs deputy.

[10] http://www.bailii.org/ew/cases/EWHC/COP/2009/B31.html

6.4 ***Re J (Enduring Powers of Attorney)* [2009] EWHC 436**[11]. An enduring power of attorney which appointed P's wife as his attorney and, in the event that P's wife predeceased him or was unable to act, appointed P's three sons jointly and severally to be his attorneys was valid.

Miscellaneous

7.1 ***Haworth v Cartmel* [2011] EWHC 36 (Ch)**. A bankruptcy order was annulled as the bankrupt had lacked capacity to make decisions in response to the service of the statutory demand and bankruptcy petition.

7.2 ***Thorpe v Fellowes Solicitors* [2011] EWHC 61 (QB)**[12] was a professional negligence claim against a firm of solicitors who had acted for P in the sale of her house. It was alleged that P did not have capacity to decide to sell. The claim comprehensively failed. Although P was suffering from dementia at the time of the sale, she retained capacity to make the decision to sell. In any event P's dementia would not have been apparent to a reasonably competent solicitor.

7.3 In ***Dunhill v Burgin* [2011] EWHC 464**[13] the claimant suffered a head injury resulting in severe traumatic brain injury when struck by the defendant's motorcycle in 1999. Liability was disputed. In 2003 the claim was settled at court for £12,500, when the claimant was represented by a solicitor and counsel. In 2009 the claimant applied to set aside the consent order on the basis that she did not have capacity to conduct proceedings. Silber J held that the claimant did have capacity to make the decision to settle.

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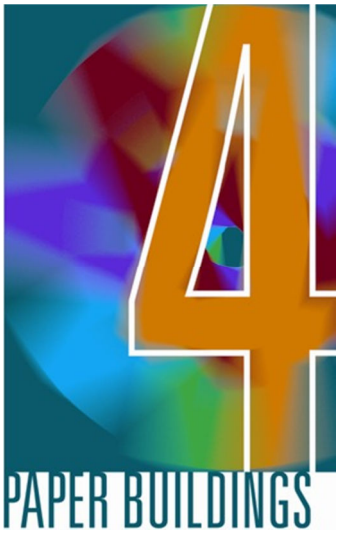
[11] http://www.bailii.org/ew/cases/EWHC/Ch/2009/436.html
[12] http://www.bailii.org/ew/cases/EWHC/QB/2011/61.html
[13] http://www.bailii.org/ew/cases/EWHC/QB/2011/464.html



Section 4

A Mediation process for Court of Protection Matters

Angela Lake-Carroll

A Mediation Process for Court of Protection Matters

Angela Lake-Carroll
Independent Consultant

Court of Protection

D v R (Deputy for S) and S [2010] EWHC 2405 (COP)

"*It is the kind of case, I would venture to add, which cries out for mediation and a realistic settlement… A trial of the action is likely to be a painful and damaging experience for all concerned, and I repeat my hope that the parties will, even now, be able to come to a settlement.*" *[Mr. Justice Henderson]*

Issues suitable for a mediation process

- Pre-proceedings
- Resolving inter-family conflicts
- Resolving issues between local authority, health care providers and family members
- Issues relating to property and affairs if, when and where appropriate
- Issues relating to any dispute within proceedings the resolution of which would improve/resolve the issues to be heard
- Review of situation if/where conflicts arise

MCA: Court of Protection s.17

In respect of **personal welfare matters** extend in particular to:

- decisions on where the person is to live;
- decisions as to what contact (if any) he or she is to have with specified persons;
- giving or refusing consent to medical treatment; and
- directing a change of person with responsibility for the person's healthcare.
- It is the Court which will rule on the validity of LPAs and which will determine the meaning or effect of an LPA.

MCA: Court of Protection s.16

In respect of **property and affairs** extend in particular to:

- (a) the control and management of P's property;
- (b) the sale, exchange, charging, gift or other disposition of P's property; (c) the acquisition of property in P's name or on P's behalf;
- (d) the carrying on, on P's behalf, of any profession, trade or business;
- (e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;
- (f) the carrying out of any contract entered into by P;
- (g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;
- (h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;
- (i) the execution for P of a will;
- (j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;
- (k) the conduct of legal proceedings in P's name or on P's behalf.

Links with Family Mediation Process

- Issues commonly involve family members e.g. partners/spouses/adult children/extended family members
- 'Personal welfare matters' particularly require sensitivity as to the feelings and emotions of those involved
- Family relationships and the resolution of family conflicts caused by Court of Protection involvement can be a key component
- 'Best interests' and requirement to consider '[past and present] wishes and feelings' parallel with CA 1989

Links with Civil Mediation Process

- Pre-mediation convening
- Individually drawn Agreement to Mediate
- Multiple confidentiality where appropriate
- Management of multi-party process
- Legal representatives in attendance/as participants
- Value and validity of separate meetings and caucusing

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Principles of Family Mediation

- The mediation process is voluntary
- The mediation process is confidential [*Re D* (Minors) (*Conciliation*: Disclosure of Information [1993] Fam 231)]
- Decision making remains with participants
- Mediators act neutrally/impartially and have no interest in any outcome

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Principles of Civil Mediation

- A flexible process
- conducted confidentially
- by a neutral person who actively assists parties in working towards a negotiated agreement of a dispute or difference,
- with the parties in ultimate control of the decision to settle and the terms of resolution.

. . . In either model, mediation is conducted 'in the shadow of the law' (Mnookin and Kornhauser 1997)

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Confidentiality

Ramsey J., on review of confidentiality and privilege in relation to mediation held that:

1. Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.

Confidentiality

2. Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.

3. Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure without prejudice privilege.

[Farm Assist Ltd. v. DEFRA, QBD., Tech. and Construction Court, 2009]

What does the model encompass?

- **On instruction**, mediator receives all relevant information, contacts all parties to introduce self, explain process and discuss terms for mediation and the issues to be resolved as perceived by each party. Mediator also establishes who needs to be present and whether all parties attend with authority to make decisions/agree on any outcome. (convening stage 1)
- **Agreement to Mediate** drafted and agreed by all parties to the proceedings (convening stage 2)
- **At the start of the mediation**, separate meetings held with all parties prior to meeting together [confidentiality offered to each party] (convening stage 3)

What does the model encompass?

- **On meeting together**, agreement to mediate signed by all present. Parties reminded that they may, at any point break to discuss progress, take advice etc., and may meet again with mediator separately if they so wish. (caucusing can be used if necessary) All parties are reminded that they may end the mediation process at any time – as can the mediator if it appears little or no progress can be made.
- **At the conclusion of the mediation process**, mediator drafts outcome statement/memorandum of understanding which is provided to all parties

Power Imbalances/equality of arms

- Mediators must consider carefully issues of power imbalance and inequality of arms
- Power imbalance is often inherent in personal welfare matters – and particularly in regard to deprivation of liberty cases
- Mediators must also consider the 'equality of arms' between participants – especially where family members may be unrepresented

A New Model?

- A number of mediators from a range of procedural backgrounds are devising models for practice
- Some are choosing to base practice in either family or civil procedures
- Is either model appropriate?
- Should there be a distinct model relating to CoP mediation?
- Should there be some form of regulation/oversight of practice?
- Who will/should monitor outcomes and gather research evidence?
- Is there provision for complaint/disciplinary process as a result of poorly conducted mediation?

Section 5

Court of Protection Handout & Crib Sheet (notes only)

Henry Clayton

Court of Protection: the basics

The Court of Protection makes decisions on behalf of *vulnerable adults who lack capacity*. If the person concerned has capacity, but is vulnerable nonetheless then it may be necessary to apply under the inherent jurisdiction of the High Court (*A v DL, RL and ML* [2010] EWHC 2675 (Fam)).

The relevant statute is the Mental Capacity Act 2005. By s.47(1) of the Act the Court of Protection has the same rights, powers and privileges as the High Court. Procedure is governed by the Court of Protection Rules 2007. There is also an explanatory Code of Practice.

Common abbreviations and definitions

- **P** = person who lacks, or is alleged to lack, capacity

- **MCA** = Mental Capacity Act 2005

- **Deputy** = an individual appointed by the Court of Protection with authority to take decisions on P's behalf on financial and/or welfare matters. The deputy is under a fiduciary duty towards P. The extent of deputy's powers depends upon the wording of the order appointing him. (See MCA s.16-21)

- **EPA** = Enduring Power of Attorney: allows the donor to select the person who will manage his property and affairs in the event he becomes mentally incapable of doing so (ie. does not relate to welfare). The power of attorney takes effect immediately, but unlike a normal power of attorney it does not lapse upon the donor becoming mentally incapable, rather it endures beyond that event once registered by the donee. There is a gap between loss of capacity and registration during which the attorney's powers are limited. Onus on the attorney to register the power made EPAs open to abuse by donees. (MCA sch 4)

- **LPA** = Lasting Power of Attorney: introduced by MCA s.9-14. LPA can be made in respect of welfare decisions as well as property decisions if P lacks capacity for that

particular decision. A separate consideration of capacity for each act is required. An LPA is not effective until registered. (MCA sch 1)

- **Public Guardian** = office whose statutory function is registration and supervision of deputies, EPAs and LPAs. There is often a requirement to file accounts or reports with the Public Guardian. In reality its resources are limited and supervision is basic.

General Principles (MCA s.1)

- There is a presumption of capacity
- All practicable steps must first be taken to help P make the decision for himself
- P does not lack capacity merely because he takes an unwise decision
- Any decision on P's behalf must be in his best interests
- Where a person lacks capacity, a decision made on his behalf should be the least restrictive possible

Lack of capacity – gives the CoP jurisdiction to act (MCA s.2-3)

An inability to make a decision is not established by:

- A person's age or appearance; or
- A condition of his, or aspect of his behaviour which might lead others to make unjustified assumptions about his capacity.

A person is deemed unable to make decisions for himself if he is unable:

- To understand the information relevant to the decision;
- To retain that information (possibly only for a short period);
- To use or weight that information as part of the process of making the decision; or
- To communicate his decision (whether by talking, using sign language or other means)

The burden of proof is the balance of probabilities.

The MCA does not normally apply to persons who are under 16 years old except insofar as the decision concerns property and affairs and P is likely to lack capacity when he turns 18.

Best Interests – basis on which the CoP exercises its powers (MCA s.4)

The decision must not merely be based upon:

- P's age or appearance;
- A condition of his, or aspect of his behaviour which might lead others to make unjustified assumptions about what might be in his best interests.

All of the relevant circumstances must be considered by the decision maker, including the past and present wishes of P and whether any beliefs or values would be likely to influence P's decision if he had capacity.

The decision-maker also needs to consult appropriate individuals.

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Section 6

Profiles of 4 Paper Buildings Speakers

Robin Barda

Year of call: 1975

Education & Qualifications

BA (Oxon)
Qualified Collaborative Lawyer

Specialist practice areas

Adoption
Care Proceedings
International Child Cases and Child Abduction
Children Act Proceedings
Injunctions
International Movement of Children
Medical Treatment: Children and Patients
Publicity, Media and Children
Rights of Cohabitees - Family Law
Wardship/Inherent Jurisdiction
Forced Marriage
Court of Protection

ADR

Collaborative Lawyer

Profile

Robin specialises in all aspects of childs work including residence and contact disputes, adoptions, child abductions, and public law applications. He carries out a considerable amount of work for local authorities, guardians and parents, mostly in the High Court at the Principal and other District Registries, but also in County Courts and in the Court of Appeal. Robin's cases have involved clients across a broad spectrum of wealth, including well-known personalities, and cases which have received media attention.

Professional Memberships

Family Law Bar Association
London Common Law and Commercial Bar Association

South Eastern Circuit
Kent Bar Mess
Gray's Inn

Languages

Conversational French

What the directories say

Busy, Robin Barda regularly appears in the High Court representing parents, children and guardians in public children matters.
Recommended as a Leading Family Junior in Chambers and Partners 2011

The extremely senior Robin Barda. Barda is respected by judges and is an expert on cases that involve complex medical evidence.
Recommended as a Leading Family Junior in Chambers and Partners 2010

Robin Barda is probably best known for child abduction work but does, however, carry out the full range of family law work, handling everything from ancillary relief and cohabitee disputes to adoption and contract disputes. Solicitors value his "quiet and understated yet highly effective style."
Recommended as a Leading Family Junior in the area of children in Chambers and Partners 2009

Robin Barda deals mainly with child abduction, but his broad practice covers the whole sweep of family law. He is especially well regarded in the public law sphere, where "the care he vests in such cases" is commended.
Recommended as a leading junior in Family/Children in Chambers & Partners 2008

'Robin Barda is "Excellent" in children cases.'
Recommended as a leading junior in Family/Children in Chambers & Partners 2007

Sally Bradley

Year of call: 1989

Education & Qualifications

BA (Hons) French Birmingham University
CPE (Central London)
Qualified Collaborative Lawyer

Specialist practice areas

Adoption
Care Proceedings
International Child Cases and Child Abduction
Children Act Proceedings
Civil Partnerships
Divorce
Inheritance & Family Provision
Injunctions
International Movement of Children
Matrimonial Finance
Medical Treatment: Children and Patients
Publicity, Media and Children
Rights of Cohabitees - Family Law
Wardship/Inherent Jurisdiction
Court of Protection

ADR

Collaborative Lawyer

Profile

Sally specialises in the areas of Family, Crime and Mental Health.

In the area of family law Sally has extensive experience in Children Act work (both public and private). She is regularly instructed on behalf of local authorities, parents and children's guardians. Sally has specific expertise on cases involving ritual and sexual abuse.

Sally is instructed by local authorities and families in respect of Children Act matters and Secretary of State determinations under the National Assistance Act. She is also regularly instructed in financial relief on divorce.

She has a great deal of experience in the publicity, media and children field. Sally has been instructed in a number of applications by a TV company to lift reporting restrictions in respect of Children Act proceedings.

Sally is regularly instructed in "vulnerable adult cases" on issues of "capacity" and "best interests" and linked Court of Protection Proceedings.
She also has a criminal defence practice - Predominately defends in cases of murder, manslaughter, rape, child cruelty, multi-million pound drug and money laundering conspiracies (R v Carranza-Reyes and others) and fraud.

Sally was the Junior in the judicial review proceedings of the DPP for failing to charge the Directors of the Southcoast Shipping with manslaughter in relation to the "Marchioness" disaster and the linked private prosecution, an authority on abuse of process/delay R v Bow Street Magistrates' Court ex parte Southcoast Shipping [1993] QB 645

Professional Memberships

Family Law Bar Association
Association of Lawyers for Children
Criminal Bar Association
Liberty
Affiliate Member of Resolution

Languages

French, German

James Copley

Year of call: 1997

Education & Qualifications

LLB (Hons)(Manc)

Specialist practice areas

Civil Procedure
Company & Commercial
International Child Cases and Child Abduction
Employment
Children Act Proceedings
Professional Negligence
Civil Partnerships
Real Property & Landlord and Tenant
Divorce
Inheritance & Family Provision
Matrimonial Finance
Rights of Cohabitees - Family Law
Court of Protection

Profile

James has a busy family practice covering all aspects of family law, with an emphasis on ancillary relief, Inheritance Act claims, and cohabitees' property disputes. A good deal of James's ancillary relief work involves complex property/trust issues and personal insolvency. James regularly acts on behalf of intervenors including trustees of family trusts, mortgagees and trustees in bankruptcy.

James undertakes a variety of real property work, encompassing mortgages, trusts, conveyancing, adverse possession and boundary disputes. He has a wide experience of commercial and residential landlord and tenant matters, including business tenancy renewals and dilapidation claims.

In the employment field James is instructed by employers and employees, dealing with redundancy, unfair dismissal, sex, race and disability discrimination, equal pay claims and employer's liability claims. He has a particular interest in TUPE and redundancy issues

consequent on business reorganisation.

James has frequently acted for clients in mediations and other forms of alternative dispute resolution. James is professionally qualified as a family mediator with Family Mediators Association, one of the co-founders of the UK College of Family Mediators and an association with over 15 years experience in family mediation.

Professional Memberships

Family Law Bar Association
Family Mediators' Association

What the directories say

James Copley stands out.
Recommended as a Leading Family Junior in The Legal 500, 2010

James Copley 'gets to grips with the facts of the case quickly and is always honest with clients.'
Recommended as a Leading Family Junior in The Legal 500, 2009

James is recommended as a Leading Family Junior in The Legal 500 2008

James is recommended as a Leading Family Junior in The Legal 500 2007

James is recommended as a Leading Family Junior in The Legal 500 2006

alc associates

Independent Consultancy, Mediation, Training and associated skills

Angela Lake-Carroll is a founding partner of alc associates (established in 1992). She maintains an independent portfolio of work related to family law (private and public law children matters), family law related business consultancy, mediation and collaborative law practice. She is formerly Director of Children and Family Services for the Legal Services Commission of England and Wales.

A graduate of Law and Psychology, she also holds the Certificate of Qualification in Social Work and holds a post-graduate qualification in Child Psycho-Analytic Studies. She is an accredited family mediator and professional practice consultant, member of Resolution, former member of the Family Mediators Association and a collaborative practitioner. She writes and provides national training for family and collaborative practitioners and for family mediators. She works in other fields of mediation and dispute resolution including commercial, medico-legal, Court of Protection and educational disputes

Angela was Chief Executive and Director of Professional Practice for the Family Mediators Association (1994 – 2000) and was author of the Association's Foundation Training Programme. She is a co-author of the Oxford and Oxford Brookes Universities Validated Post Graduate Certificate and Diploma Courses in Family Mediation; and is also author of the course in Mediation and Law (International and National Perspectives) for Oxford University (Kellogg College Graduate School of Continuing Education). In 2002 she was commissioned by ADR Group to write a course in mediation training for the Slovenian Family Justice Department. She has also acted as Consultant to Family Court Welfare Services (now CAFCASS), and has written and presented training for professionals in these fields of work.

Angela has also been a contributor to Government policy, notably in regard to separating families, domestic abuse, the joint review of public law children proceedings, Legal Aid, transparency in the family courts and the Chief Medical Officer's consultation in regard to medical experts in children cases.

Angela is author of the 'Living Apart Together' guides for Resolution (www.Resolution.org.uk) and has produced a range of guides for parents, step-parents and grand-parents who are dealing with family transitions. She has also compiled a comprehensive Book List for Children and Young People in separated and step-families. She is a contributing author to Family Law and other professional journals.

She is a member of The Law Society's Family Law Protocol Drafting Group, former member of Resolution's Accreditation Advisory Group, and was an ex-officio member of the Family Justice Council. She is also a Member of the Law Commission's Legal Advisory Group for their commissioned report on co-habitation, member of the National Youth Advocacy Service Professional Advisory Group and a former member of the Independent Tribunal Service (Child Support Appeals) and of the Panel of Guardians ad Litem. She is a consultant for Resolution's 'Parenting After Parting' programme and author of Resolutions' Family Consultant familiarisation training.

Angela is currently an independent Consultant with Mills and Reeve LLP and Cambridge Family Law Practice.

Section 7

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