JUDICIARY OF
ENGLAND AND WALES

Court of Protection Report 2010

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Foreword by the senior judge

Senior Judge Lush

There were some changes in key personnel in the court during 2010. Following Sir Mark Potter's retirement at the end of March, Sir Nicholas Wall was appointed as President of both the Family Division and the Court of Protection. One of the last duties Sir Mark performed as President was to swear in three newly-appointed district judges - Elizabeth Batten, Anselm Eldergill and Carolyn Hilder – who have been seconded to sit at the central registry at Archway in north London. In September we bade farewell to District Judge Stephen Rogers, who returned to the county court after a three-year stint at Archway. He has an exemplary work ethic and put a lot of time and thought into training the judiciary at all levels and developing new procedures and directions orders during the implementation of the Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards.

Throughout the year there was a steady growth in the number of judges nominated to hear cases regionally, particularly at circuit judge level, and principally in the north of England. If one includes the President, the Vice-President and the full-time judiciary at Archway, there are now over one hundred judges authorised to exercise the court's jurisdiction under the Mental Capacity Act 2005.

On 29 July 2010 the Court of Protection Rules Committee published its review of practice and procedure. Its recommendations have been accepted in principle by the Lord Chancellor and the Ministry of Justice is considering how to take them forward. 94% of the court's workload involves property and financial matters, and an even higher percentage of these applications are non-contentious and raise no important point of law, principle or practice. There is no compelling reason why cases of this kind need to be considered by a judge and, in the interests of dealing with them more expeditiously and saving expense, the Ministry of Justice is consulting on the recommendation by the rules committee "for the exercise of the jurisdiction of the court, in such circumstances as may be specified, by its officers or other staff" as was envisaged in section 51 of the Mental Capacity Act.

In August 2010 the Ministry of Justice was told it had to make savings of £2bn from its annual budget of £9bn. Shortly afterwards a Lean Team was despatched to review work processes in the Court of Protection. "Lean" is a management philosophy developed by Toyota, the Japanese car manufacturer, and focuses on waste reduction. Within a matter of weeks we were beginning to see positive outcomes such as an improved turnaround time for issuing applications and improved flow of work to and from the judges. There were also some small but equally important changes that were environmentally friendly, such as using recycled paper and printing orders on both sides of the page.

As you will observe from the case summary section in this annual report, there has been a steady flow of reported decisions of the court, and in October the British and Irish Legal Information Institute (BAILII) provided a discrete Court of Protection database on its website (www.bailii.org/ew/cases/EWHC/COP). Many Court of Protection decisions were reported by BAILII before October 2010, but they generally appeared as decisions made by High Court judges in either the Family Division or Chancery Division. Hopefully, this new database will help put an end to the traditional Family-Chancery divide and promote a greater

sense of cohesion within the Court of Protection, as well as providing the public with a greater understanding of what actually goes on in the court.

The most widely reported case in 2010 was that of the Court of Appeal in *A v Independent News & Media Limited*, which considered whether the media should be allowed to attend and report on Court of Protection proceedings. In essence, it affirmed the general rule - set out in rule 90 of the Court of Protection Rules 2007 - that hearings are to be held in private. The Lord Chief Justice said that "just as the conduct of their lives by adults with the necessary mental capacity is their own affair, so too the conduct of the affairs of those adults who are incapacitated is their own business. Hearings before the Court of Protection should, therefore, be held in private unless there is good reason why they should not." On the facts of the particular case before it, which involved the autistic savant Derek Paravicini, the Court of Appeal found that there certainly was good reason for permitting the press to attend and report on the proceedings. They turned up in force at the hearing before Mr Justice Hedley on 13 May 2010 and there was extensive coverage in the press the following day. Notwithstanding this decision, the media have consistently portrayed the Court of Protection as a secret court. It's not and never has been a secret court. It's time this old shibboleth was finally laid to rest.

Denzil Lush
Senior Judge Court of Protection

1 Judiciary

The Mental Capacity Act 2005 (MCA) provides that the jurisdiction of the Court of Protection will be exercised by various judges nominated for that purpose by the Lord Chief Justice after consultation with the Lord Chancellor. The judges who may be nominated are the President of the Family Division, the Chancellor of the High Court, any judge of the High Court, circuit judges and district judges.

On 13 April 2010 Sir Nicolas Wall was nominated as President of the Court of Protection on his appointment as President of the Family Division, following the retirement of Sir Mark Potter on 5 April 2010. Sir Andrew Morritt (the Chancellor of the Chancery Division) was nominated as Vice President with effect from 1 October 2007, and Denzil Lush, the former Master of the Court of Protection was appointed senior judge.

During 2010 there were five full time district judges at the central registry in Archway, although this reduced to four when District Judge Stephen E Rogers' secondment ended in September. There are also more than 65 circuit and district judges who hear cases part time at various regional courts in England and Wales. A list of nominated judges is at Appendix A. In addition the President has nominated all High Court judges in the Family and Chancery Divisions to hear appeals and deal with the more complex cases.

The senior judge is responsible for overseeing and directing the work of the court, at the central registry. Initially the complement of full time judges was set at four, plus a part time judge to assist with the early transitional work caused by the MCA. The complement was increased to six to cover the additional expected work from arising from the Deprivation of Liberty Safeguards[1], which came into force in April 2009. District judges Elizabeth Batten, Carolyn Hilder and Anselm Eldergill joined the court in April 2010.

1 See Chapter 3

2 Court administration

The Court of Protection is part of the Royal Courts of Justice Group within Her Majesty's Courts Service[2].

The Court of Protection administration is responsible for processing all applications made to the court. It works closely with the judiciary in Archway and the judiciary and HMCS colleagues throughout England and Wales to provide a local and accessible service for court users.

During 2010, some administrative services were "shared" with the Office of The Public Guardian (OPG), which occupies the same premises in Archway, North London, as the court. These included a contact centre which dealt with general enquiries and requests for information about court and OPG work, plus other non-customer facing activities such as post-handling and record keeping.

In March 2010 the OPG transferred its post team and contact centre to satellite offices in the Midlands. The court established its own customer enquiry service to deal with all general enquiries and requests for information and set up its own post and registry (record keeping) teams. The court administration also underwent an internal restructuring in the spring of 2010. This was partly to accommodate the functions transferred from the OPG, but also to implement the business improvements brought about by the Lean transformation (see Chapter 4).

2 From April 2011 this is known Her Majesty's Courts and Tribunals Service (HMCTS)

3 Work of the court

Jurisdiction

The Court of Protection is a superior court of record with the same rights, privileges and authority as the High Court. The court has jurisdiction over the property, financial affairs, and personal welfare of those who lack the mental capacity to take decisions themselves.

The general powers of the court are to:

- decide whether a person has the capacity to make a particular decision for themselves;
- make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make these decisions;
- appoint a deputy to make ongoing decisions for people lacking capacity to make those decisions;
- decide whether a Lasting Power of Attorney (LPA) or Enduring Power of Attorney (EPA) is valid;
- remove deputies or attorneys who fail to carry out their duties; and
- hear cases concerning objections to the registration of an LPA or EPA.

In making a decision, the court must apply the statutory principles and the best interests checklist set out in the MCA. In addition, it should make the least restrictive order possible in the circumstances by:

- making the decision itself in preference to appointing a deputy.
- when appointing a deputy, limiting the extent of their powers and the length of their appointment as far as possible.

The vast majority of applications require the court to exercise its powers under the property and affairs jurisdiction. Very few applications are contested and nearly all are decided on the basis of paper evidence without holding a hearing. In around 95% of cases, the applicant does not need to attend court.

Property and Affairs Applications

During 2010, the court received 18,360 applications relating to its property and affairs jurisdiction and the vast majority of these were to appoint a deputy to manage the person's property and affairs. The court will appoint a deputy when it is necessary to make ongoing decisions on behalf of the person lacking capacity.

Around 15% of property and affairs applications were from existing deputies, either because they wished to change the powers set out in the order appointing them, or seeking reappointment because their appointment was time-limited.

Objections to the registration of EPAs and LPAs

The Public Guardian is responsible for registering EPAs and LPAs, but where there is an objection to registration, the Public Guardian cannot register the instrument until directed to do so by the court.

As can be seen from the figures in Chapter 6 there are far more objections to applications to register EPAs than LPAs. It is not entirely clear why this should be, although, as suggested in the 2009 report, it is probably because the policy objective of the MCA reducing ill-founded

objections in respect of powers of attorney have been met. In 2010 EPA objections outnumbered LPA objections by 3:1, although this is less than the first 18 months of operation, when there were six times as many EPA objections. This is due to there being fewer applications to register EPAs, which in turn means fewer objection applications, as well as the consistently high numbers of applications to register an LPA received by the OPG.

Lasting Powers of Attorney

The court has the power to determine whether the requirements for creating or revoking an LPA have been met, and to declare whether "…an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney".

In 2010, the court received 112 applications relating to the validity of an LPA, but this is a drop in the ocean compared to the number of applications to register received by the OPG[3]. All but seven of the applications relating to the validity of an LPA were made by the Public Guardian. If an LPA contains an ineffective clause, the Public Guardian is prevented from registering the instrument and is required to make an application to determine whether the instrument is valid[4].

Wills, settlements of property and trustees

The MCA restricts some of the decisions that a deputy can make on behalf of the person lacking capacity, including settling property, executing a will and exercising the powers of a trustee. In these instances, the court must make the decision and there are specific practice directions to Part 9 of the Court of Protection Rules setting out the procedure to follow and evidence required.

Personal Welfare applications

The MCA and the supporting Code of Practice both emphasise that personal welfare applications should only be made as a last resort. Section 50 of the Act imposes a general requirement for the applicant to seek the permission of the court before making an application and permission is required for nearly all personal welfare applications. The policy intention behind this is for permission to act as a 'gatekeeper' and to ensure that personal welfare applications are made in the best interests of the person. This is reinforced in the Code of Practice, which provides that "deputies for personal welfare decisions will only be required in the most difficult cases where:

- important and necessary actions cannot be carried out without the court's authority, or
- there is no other way of settling the matter in the best interests of the person who lacks capacity to make personal welfare decisions."

In the 2009 report, we noted that the court was refusing permission in up to 80% of personal welfare applications. In 2010, this figure reduced to around 70%. Permission is most likely to be refused in so called *hybrid* applications for the appointment of a deputy; that is where the applicant is seeking both personal welfare and property and affairs powers.

There are several reasons why the court does not consider it necessary to appoint a deputy to make personal welfare decisions. The main reason is that section 5 of the MCA confers a general authority for someone to make decisions in connection with another's care or treatment, without formal authorisation, provided: that P lacks capacity in relation to the decision; and it would be in P's best interests for the act to be done.

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3 In April 2008 the OPG received 4,000 applications to register; in April 2009 it received 8,000 applications, and in April 2010, 16,000 applications.

4 Paragraphs 11(2) and (3) of Schedule 1 to the Mental Capacity Act 2005

Another reason is that, when considering the appointment of a deputy, the court is required to apply the principles in section 16(4) that: "(a) a decision of the court is to be preferred to the appointment of a deputy to make a decision; and (b) that the powers of the deputy should be as limited in scope and duration as is practicable in the circumstances." In reality, a deputy is rarely needed to make a decision relating to health care or personal welfare, because section 5 already gives carers and professionals sufficient scope to act.

The final reason is that personal welfare decisions invariably involve a consensus between individuals connected with P - healthcare professionals, carers, social workers and family - about what decision is in P's best interests. If the court appoints a personal welfare deputy, particularly if it's done without a hearing and considering oral arguments from each side, it could upset the balance of that consensus, and could be seen to favour the deputy's views over others'.

Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards (DoLS) were introduced into the MCA by the Mental Health Act 2007. The DoLS provides a framework for approving the deprivation of liberty for people who lack the capacity to consent to treatment or care in a care home or hospital that, in their own best interests, can only be provided in circumstances that amount to a deprivation of liberty. There is provision for the Court of Protection to hear applications seeking to terminate authorisations, or vary the conditions of an authorisation.

The DoLS are supported by new court rules, a practice direction setting out the procedure for making applications and special application forms. Currently, all DoLS applications are allocated to judges of the Family Division of the High Court. As can be seen from Chapter 5, there is a growing body of case law relating to DoLS.

4 Review of performance

Regional hearings

Over half of court hearings take place in regional courts close to where the parties live, and in 2010 757 cases were heard outside of the central registry in London, a comparable figure to the 783 regional hearings in 2009. A breakdown of hearings by region is at figure 5 in Chapter 6.

Court User Group

The court user group was set up in April 2008 to provide a forum for consultation between the judges and professional and lay court users. It meets twice yearly under the chairmanship of Senior Judge Lush. The terms of reference of the committee are:

> *The purpose of the Court User Group is to provide a forum for discussion for matters causing concern for Court users and to obtain their views and comments on policy issues.*

The group also has a sub committee consisting of practitioners specialising in personal injury litigation, whose terms of reference are:

> *The purpose of the Damages Case Forum a part of the Court User Group is to provide a forum for discussion for matters causing concern for Court users who specialise in personal injury and clinical negligence cases, to obtain their views and for them to comment on policy issues.*

The court is fortunate to have such a dedicated and active user community, many of whom have acted as a 'critical friend' by reviewing draft publications and forms and using their own networks to promote improvements and initiatives. Many of the court user group played an active role in the rules committee.

A list of the members is at Appendix C.

Reporting of Court of Protection cases

Since the MCA came into being in October 2007, practitioners and judges have been hampered by a lack of reported case law and inconsistent reporting of judgments handed down by the Court of Protection. The cause of this was the Family/Chancery Division divide whereby significant decisions have tended to be reported in a similar way to before the MCA with cases decided by Family Division judges reported like other Family or Public Law cases and Cases decided by Chancery Division judges reported like other Chancery cases. This has made it difficult to locate relevant case law in the mainstream law reports.

Since the summer of 2010 Court of Protection cases have carried their own neutral citation of EWHC (CoP). There is also a discrete database of Court of Protection cases on the British and Irish legal Information Institute (BAILII) www.bailii.org/ew/cases/EWHC/COP. This has been in operation since October 2010, and covers both personal welfare and property and affairs cases, including a handful of decisions by circuit judges.

In addition to the formal reporting of cases, the OPG website (www.justice.gov.uk/about/opg.htm) has details of some significant cases in relation to the operation of LPAs, EPAs and other matters relating to deputies or attorneys. These are not judgments as such; as there is usually no hearing and the court has made a decision based on the papers alone. They are, nonetheless, a valuable resource for practitioners, and include, for example, decisions about replacement attorneys; severance of unreasonable, impractical and uncertain provisions; and delegation of trustee functions.

Review of Court of Protection Rules

In December 2009, Sir Mark Potter appointed Mr Justice Charles and Mrs Justice Proudman as joint chairs of an ad-hoc committee to review the Court of Protection Rules 2007 and the practice directions and forms which accompany the rules. The terms of reference of the committee were:

> *"The Court of Protection Rules Committee is an ad-hoc advisory committee established by the President of the Court of Protection. Its function is to review the Court of Protection Rules 2007 which govern practice and procedure in the Court of Protection. The aim of the committee is to produce recommendations for new rules or amendments to existing rules, and supporting practice directions and forms, which set out a fair and efficient procedure in rules which are both simple and simply expressed."*

The committee met on four occasions from February to May 2010 and the report of recommendations was published on 29 July 2010[5]. The recommendations were accepted by the President and agreed in principle by the Lord Chancellor. The recommendations include:

- The practice of the court should reflect the differences in the nature of the following categories of its work, namely (a) non-contentious property and affairs applications, (b) contentious property and affairs applications and (c) health and welfare applications;
- The court forms should be revised to cater for this recognition and to remove the duplication contained in the current forms including the abolition of separate forms for applications for permission;
- A recommendation that strictly defined and limited non-contentious property and affairs applications should be dealt with by court officers (e.g. applications for a property and affairs deputy by local authorities and in respect of small estates that do not include defined types of property). The provisions will include provision for a judge to review the decision and court officers will work under the close supervision of judges;
- Various procedural amendments to practice directions and rules in order to cater for problems encountered during the first three years of operation of the Court of Protection.

Officials from the Court of Protection and Ministry of Justice are working on the details of the proposals and are expected to consult on some new rules during 2011[6].

Lean engagement

During 2010, the court has continued to remodel its operation by applying *lean* principles, which aims to remove unnecessary delay and waste from work processes.

In March 2010, the court administration was restructured into two teams responsible for managing workflow from beginning to end. This had the immediate benefit of reducing the time taken to issue applications from fifteen plus days to the current norm of less than two days. It also ensured that instead of specialising in a particular area of work, staff could be trained by their peers to take on new areas of work, therefore providing flexibility to cope with varying demands of work.

In September 2010, the Court of Protection was selected to become a model court within HMCS and this has involved further intensive cultural change and new ways of working. The model court initiative will run throughout 2011, and the Court of Protection will become a

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5 A copy of the report can be downloaded from www.judiciary.gov.uk/media/media-releases/2010/news-release-2210

6 Consultation on new rules relating to authorised court officers taking certain court decisions launched in June 2011

beacon of good practice from which other courts can learn. The achievements and benefits in the first months of the model court engagement include:

- **Team information boards:** Improved management and monitoring of the daily workload and available resources, which has led to greater flexibility and response to demand, particularly by ensuring work is allocated equally across teams.
- **Problem solving:** Identification of issues and concerns at the point at which they occur and resolution through structured problem solving events that concentrate on looking at the route causes of the problem.
- **Judicial workflow:** Replacing the previous alphabetical split with a 'first in first out' system, removing the 'surname lottery' ; and introducing *box work* days so judges can deal more effectively with paper-based applications (which form the bulk of the work).
- **Cycle times:** Introducing standard waste free times for completing routine tasks; this has saved approximately 600 hours each month, which has been 'reinvested' into the business, helping reduce delays.
- **Staff development:** All team leaders have benefited from leadership training and junior staff have been involved in a pilot for personal development training, including access to personal mentors.

5 Case law

There were a significant number of decisions relating to the jurisdiction of the Court of Protection handed down or reported during 2010. In chronological order, these include:

1. ***Re Allen*** (Senior Judge Lush, 21 July 2009) In 1996 Mrs Allen executed an enduring power of attorney appointing her daughter to be her sole attorney. In 2008 the attorney applied to register the EPA, and her brother (the donor's son) objected on the ground that the attorney was unsuitable to be the donor's attorney. In particular, the objector claimed that the attorney made decisions about their mother without involving him. He claimed that the attorney had failed to consult him, but was under a duty to do so by virtue of section 4(7) (b) of the MCA 2005, as someone who is interested in his mother's welfare. In his judgment the Senior Judge held that: "The first line of section 4(7) provides that any best interests decision-maker "must take into account, if it is practicable and appropriate to consult them, the views of" various categories of individuals. In my judgment, where any attempt at consultation will inevitably be unduly onerous, futile, or serve no useful purpose, it cannot be in P's best interests, and it would be neither practicable nor appropriate to embark on that process in the first place."

2. ***City of Westminster v FS*** (No 11685959) (HH Judge Horowitz QC, 9 September 2009). FS was born in 1932, lives in Pimlico and has a persecutory belief structure. He was placed in a residential unit, the Jules Thorn home, on 21 January 2009. An interim declaration was made by the court that it was lawful to use diversionary tactics to keep him there. The declaration came up for review by a district judge on 10 August 2009. The Official Solicitor, as FS's litigation friend, asked for a report from an independent social worker, Stuart Sinclair. The district judge thought that instructing an independent social worker was unnecessary and not going to add any value to these proceedings. The Official Solicitor appealed and HH Judge Horowitz allowed the appeal stating that the district judge "should have explored a little better with the advocates and have brought into play the competing considerations of getting the case up and running properly and the inevitable knock-on effect in extending a deprivation order."

3. ***A NHS Trust, B PCT v DU, AO, EB and AU*** [2009] EWHC 3504 (Fam) (Mr Justice Hedley, 15 October 2009). DU was an 86 year woman of Nigerian origin, who had suffered a serious stroke and had been in hospital since October 2008. AO, EB and AU were members of her family. The relationship between the hospital and PCT and DU's family had broken down. There were several issues before the judge:
    - Should DU be returned to Nigeria?
    - If so, under what circumstances?
    - If so, should she have a PEG (percutaneous endoscopic tube) inserted before returning there, or should she continue to be treated through a nasal gastric tube?
    - If so, where should she reside before travelling there – in hospital or a nursing home?

    The judge decided it was in DU's best interests to be permitted to return to Nigeria subject to the making of practicable arrangements. The decision as to where she should stay in the interim "first and foremost is one that should be arrived at by agreement between the hospital and the family." "If agreement is reached, that takes precedence over any views which the court is now going to express, because those views indicate a default position on the basis of an absence of agreement" (paragraph 18).

4. ***G v E and A Local Authority and F*** [2010] EHWC 621 (Fam) (Mr Justice Baker, 26 March 2010). www.bailii.org/ew/cases/EWHC/Fam/2010/621.html E was born in 1990 and suffers from a rare genetic condition, tuberous sclerosis, as a result of which he has severe learning disability. Since 1995 F had been his foster mother. The local

authority removed him from F's care on 7 April 2009, when he was placed in the V Unit. On 15 June 2009 he was transferred to Z Road, a residential unit housing three men with special needs with a staff support ratio of 2:1. His sister, G, applied to the Court of Protection for the following declarations (which were granted):

- that E lacks the capacity to make a decision as to where he should live.
- that the local authority unlawfully deprived him of his liberty and infringed his Article 5 rights by placing him in the V unit without obtaining a DOLS authorisation.
- that the local authority had infringed his Article 8 rights by removing him from F's care without proper authorisation.

However, the judge declared that in the interim it was in E's best interests to continue to live at Z Road until the final hearing in July 2010. The judgment sets out in detail from paragraph 171 to 182 a very helpful "balance sheet" approach as approved by Thorpe LJ in *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FLR 549.
This judgment raises interesting issues at paragraph 104 *et seq* as to the capacity to enter into a contract (although it makes no reference to Social Security Commissioner Mesher's decision CH/2121/2006, 13 November 2006 - that if the landlord is aware of the incapacity to enter into a tenancy at the time the tenancy is entered into, this has the effect of creating a valid (but voidable) contract - voidable by the tenant - and so housing benefit is payable for such an arrangement).

5. ***A v Independent News & Media Limited and Others*** [2010] EWCA Civ 343. www.bailii.org/ew/cases/EWCA/Civ/2010/343.html The Official Solicitor appealed the decision of Mr Justice Hedley in *Independent News and Media Ltd & Others v A* [2010] WTLR 55, [2009] EWHC 2858 (Fam), and the appeal was heard by the Court of Appeal (The Lord Chief Justice, the Master of the Rolls, and the President) on 24 February 2010. The Court of Appeal dismissed the appeal on 31 March 2010. At paragraphs 18 and 19 of the judgment, the Lord Chief Justice explained the reason why, as a general rule, adult guardianship proceedings should be held in private (as is stated in rule 90 of the Court of Protection Rules 2007) in the following terms:
"The affairs of those who are not incapacitated are, of course, decided and handled privately, usually at home, sometimes with, but usually without confidential professional advice. None of these decisions is the business of anyone other than the individual or individuals who are making them. And that, as we emphasise, represents an entirely simple, and we suggest self-evident aspect of personal autonomy. The responsibility of the Court of Protection arises just because the reduced capacity of the individual requires interference with his or her personal autonomy.
The new statutory structure starts with the assumption that, just as the conduct of their lives by adults with the necessary mental capacity is their own affair, so too the conduct of the affairs of those adults who are incapacitated is private business. Hearings before the Court of Protection should therefore be held in private unless there is good reason why they should not. In other words, the new statutory arrangements mirror and rearticulate one longstanding common law exception to the principle that justice must be done in open court."

6. ***Surrey County Council v CA, LA, MIG and MEG*** [2010] EWHC 785 (Fam) (Mrs Justice Parker, 15 April 2010). This case involves two sisters, MIG who was born in 1991, and MEG, who was born in 1992. Both have learning disabilities and both lack the capacity to make decisions on residence and care, contact, education, medical treatment, and legal issues. Until April 2007 they were living with their mother CA, and their stepfather, LA. On three occasions they were placed on the Child Protection Register for non-accidental injuries. In April 2007 they were made subject to interim care orders brought by Surrey County Council, and were removed from the family home. MIG lives with a foster mother. MEG is in a residential care home, and receives medication (Risperidone). In January 2009 their stepfather, LA, was convicted of seven counts of rape relating to their elder half sister, HG, and sentenced to 14 years' imprisonment. CA

was convicted on one count of indecent assault on HG, and was sentenced to 9 months' imprisonment. She was released at the end of May 2009.
On the question of residence with CA, the judge held that "notwithstanding that MIG and MEG have lived for all their adult lives with their mother, the threshold has been passed where intervention is not only justified but essential for their protection and welfare, and that there are real and substantial risks if they were to return to her care" (paragraph 70).
On the question of contact, the judge held that:

- contact with the mother, CA, "should not be terminated unless there are strong grounds, in particular the wishes and feelings of the girls, to do so", however the expert evidence suggest that there must be ground rules for such contact (paragraph 98);
- it is not in the sisters' interest to have any form of contact with LA, save by way of a "goodbye letter" (paragraph 111); and
- it is extremely important that contact between MIG and MEG should take place (paragraph 114);

On the question of deprivation of liberty (which was alleged by counsel for MIG and MEG), the judge held that:

- the purpose of Article 5 is to prevent "arbitrary or unjustified deprivations of liberty". The placements of MIG and MEG in their respective homes were not arbitrary (paragraph 222);
- the fact of administration of medication in itself cannot create deprivation of liberty (paragraph 217);
- in neither placement is there "confinement in a restricted space for a not negligible length of time" (paragraph 228); and
- neither sister is deprived of her liberty within Article 5(b) nor is there any breach of the right to respect for private or family life pursuant to Article 8 (paragraph 237).

7. ***DH NHS Foundation Trust v PS*** [2010] EWHC 1217 (Fam) (Sir Nicholas Wall, President, 26 May 2010). www.bailii.org/ew/cases/EWHC/Fam/2010/1217.html PS, a 55 year old woman with learning disability and a phobia of needles, lacked the capacity to make decisions about her own healthcare and treatment. She has endometrial cancer, and the doctors treating her were in no doubt that she needed to undergo a hysterectomy and bilateral salpingo-oophorectomy (removal of the fallopian tubes and ovaries), and that without such surgical intervention, the tumour would spread, and ultimately lead to her death. In the past she had failed to attend hospital for treatment, and the clinical team concluded that special arrangements would need to be put in place both to ensure that she has the operation and that she remains in hospital for her post operative recovery. The President held that it was in the best interests of PS that she undergo the operation, and that, if persuasion failed, it may be necessary to sedate PS in order to get her to hospital and detain her there to recover after the operation. He concluded his short judgment by stating, "I am entirely satisfied that it was right to make the declarations sought by the Trust, and although the application is unusual and may involve the use of force, I am nonetheless impressed by the care and thought which have gone into ensuring that PS receives the treatment which she plainly needs, and which it is plainly in her interests to have."

8. ***A Local Authority v A (A Child) & Anor*** [2010] EWHC 978 (Fam) (Lord Justice Munby, 4 May 2010). www.bailii.org/ew/cases/EWHC/Fam/2010/978.html A and C are both female. A was born in 2001, and C was born in 1987. Both suffer from a rare genetic disorder called Smith Magenis Syndrome, characterised by "self injurious behaviour, physical and verbal aggression, temper tantrums, destructive behaviour, hyperactivity, restlessness, excitability, distractibility and severe sleep disturbances, which include frequent and prolonged night waking and early morning waking." Both live at home "in the exemplary and devoted care of their parents" in the area of the same local

authority. The only way that their parents can keep them safe at night is by locking their bedroom doors. The question arose whether this involves a deprivation of liberty, engaging Article 5 of the ECHR and, if so, what (if any) role does the local authority have in such cases. At paragraph 96 the judge held:
"What emerges from this is that, whatever the extent of a local authority's positive obligations under Article 5, its duties, and more important its powers, are limited. In essence, its duties are threefold: a duty in appropriate circumstances to investigate; a duty in appropriate circumstances to provide supporting services; and a duty in appropriate circumstances to refer the matter to the court. But, and this is a key message, whatever the positive obligations of a local authority under Article 5 may be, they do not clothe it with any power to regulate, control, compel, restrain, confine or coerce. A local authority which seeks to do so must either point to specific statutory authority for what it is doing – and, as I have pointed out, such statutory powers are, by and large, lacking in cases such as this – or obtain the appropriate sanction of the court. Of course if there is immediate threat to life or limb a local authority will be justified in taking protective (including compulsory) steps ... but it must follow up any such intervention with an immediate application to the court." At paragraph 163 he held: "In the outcome, all that is required is appropriate declaratory relief, essentially to the effect that neither A nor C is being deprived of her liberty."

9. ***In the matter of P*** [2010] EWHC 1592 (Fam)) (Mr Justice Hedley, 13 May 2010) www.bailii.org/ew/cases/EWHC/Fam/2010/1592.html The parents and sister of Derek Paravicini applied to be appointed as his deputies, both as to property and affairs and personal welfare. The Royal National Institute for the Blind raised two concerns about their application: one relating to his accommodation, and the other, the need possibly for an independent deputy in addition to the applicant family members.
Paragraph 9: "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."
Paragraph 26: "First, I am satisfied that both parents and the sister are and ought to be appointed as deputies to deal both with welfare and financial issues so far as DP is concerned. I also think it particularly desirable that at least one deputy should be of the same generation as DP. Secondly, I do not think it necessary that there should be an independent deputy appointed as the anxieties that give rose to a consideration of an independent deputy are, in my judgment, sufficiently met in the consideration that the court has given to the matter."
Paragraph 28: "Next, I propose to use my powers under section 19(9) to require the deputies to give notice to the public guardian in the event that DP's earnings should exceed the sum of £150,000 a year."
Paragraph 29: As regards whether the appointment should be joint or joint and several, the judge said: "There are obvious difficulties here when one starts to reflect carefully on what is at stake. It is obviously desirable that in a case like this, the deputies should have the power to act severally. … So I simply propose at this stage to direct that the deputies are empowered to act jointly and severally and they have to be trusted either to operate in agreement or, if there is serious disagreement on a material issue, to refer that matter to the public guardian or the court."

10. ***A Local Authority v Mrs A and Mr A*** [2020] EWHC 1549 (Fam)) (Mr Justice Bodey, 24 June 2010). www.bailii.org/ew/cases/EWHC/Fam/2010/1549.html Mrs A was born in 1980, and has severe learning difficulties. Her IQ is 53. She married Mr A in July 2008. He has an IQ of 65, and is clearly of a controlling nature. She had already had two children – a daughter born in September 2004 and a son born in 2005 – who were removed at birth, made the subject of a care order, and later adopted. The local authority applied for a declaration that Mrs A lacks the capacity to decide whether to use contraception. The judge rejected the local authority's submission that the capacity to

decide on this issue includes awareness of what is actually involved in caring for and committing to a child, because it set the bar too high. At paragraph 64 he held as follows: "So in my judgment, the test for capacity should be so applied as to ascertain the woman's ability to understand and weigh up the immediate medical issues surrounding contraceptive treatment ("the proximate medical issues") including:

(i) the reason for contraception and what it does (which includes the likelihood of pregnancy if it is not in use during sexual intercourse);
(ii) the types available and how each is used;
(iii) the advantages and disadvantages of each type;
(iv) the possible side-effects of each and how they can be dealt with;
(v) how easily each type can be changed; and
(vi) the generally accepted effectiveness of each.

I do not consider that questions should be asked as to the woman's understanding of what bringing up a child would be like in practice; nor any opinion attempted as to how she would be likely to get on; nor whether any child would be likely to be removed from her care."

11. ***Re London Borough of Havering v LD and KD*** (His Honour Judge Turner QC, 25 June 2010)[7]. Havering applied to be a personal welfare deputy of LD, a man aged 22 who has cerebral palsy and global developmental delay. The application was opposed by the Official Solicitor as litigation friend of LD and his mother, KD, 42, who has a persistent delusional disorder or paranoid schizophrenia. At paragraph 41 the judge said: "It has been the practice of the court to appoint welfare deputies only relatively rarely. That accords with the Code of Practice. The Official Solicitor considers the court's general approach to be correct and suggests it is to be applied in this case. I accept that submission. .. I do not consider this to be an especially unusual or difficult case. I consider that the issue of residence has recently and successfully been resolved by the court. Other issues raised in support of the application strike me as either routine (and thus properly subject to s.5 protection) or very major (and thus the better for court scrutiny). Court orders can in appropriate circumstances be obtained very swiftly indeed. I was not impressed by an argument on avoiding delay. "

12. ***G v E and others*** [2010] EWCA Civ 822 (The President, Lord Justice Thorpe and Mr Justice Hedley, 16 July 2010). www.bailii.org/ew/cases/EWCA/Civ/2010/822.html This was an appeal against Mr Justice Jonathan Baker's decision described in paragraph 4 above; the critical issue being, "was the judge right or wrong to reject the appellant's submission that Article 5 of the ECHR places distinct threshold conditions which have to be satisfied before a person accepted to be lacking capacity can be detained in his or her best interests under the statutory regime established by the Mental Capacity Act 2005?" Article 5(1) provides that "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … (e) the lawful detention of persons … of unsound mind."

    Dismissing the appeal, the Court of Appeal:

    - confirmed that the DOLs regime is compliant with Article 5, and has plugged the "*Bournewood* gap" (paragraph 57 of its joint judgment);
    - noted that the appellant relied very heavily on Strasbourg jurisprudence that concerned alleged mental illness and detention in a psychiatric hospital (derived from *Winterwerp*);
    - highlighted the fact that a substantial number of people are of 'unsound mind' for purposes of Article 5, because they have varying degrees of learning difficulties, but they are not "mentally ill", as such;

[7] The facts of this case were briefly described in the 2009 report in relation to an earlier decision *Re LD, KD & another v Havering* [2010] WTLR 69

- said that "E, sadly, is representative of a class of incapacitated adults who are not mentally ill, and to whom the provisions of the Mental Health Act 1983 do not apply" (paragraph 60);
- stated that (unlike cases falling under the Mental Health Act 1983 which require a psychiatric opinion) "Provided there is credible expert evidence upon which the court can be satisfied that the individual concerned lacks capacity that, in our judgment, is sufficient. It would be simply unreal to require psychiatric evidence in every case, quite apart from the fact that it would, in some cases, be irrelevant. To require such evidence would, in our judgment, make MCA 2005 unworkable" (paragraph 61);
- agreed with Richard Gordon QC, counsel for the Official Solicitor that the justification of detention under MCA 2005 is not a medical decision, but a decision for the court to be made in the best interests of the person whom it is sought to detain (paragraph 64);
- held that an interim declaration (even contained in an order made by consent, without independent consideration by the court of the evidence or findings of fact) can suffice to stop the clock running for purposes of regularizing a deprivation of liberty by reference to Article 5 ECHR (paragraphs 65 to 70);
- congratulated Mr Justice Baker on his handling of this case (paragraph 75), but in response to his plea for further resources to be dedicated to Court of Protection cases in the Family Division, the Court of Appeal indicated that this would not be possible, but that such applications be listed urgently before the President who "will be able to deal swiftly with any aspects of it which do not brook delay and who, if he is unable to retain it himself, will be able to allocate it appropriately" (paragraph 76).

13. ***RT v LT and A Local Authority*** [2010] EWHC 1910 (Fam) (Sir Nicholas Wall, President, 27 July 2010). http://www.bailii.org/ew/cases/EWHC/Fam/2010/1910.html
LT was born in 1987. When she was 2½ she was fostered by, and subsequently adopted by, RT and his wife. She has been variously diagnosed as having disorders of an autistic nature. Shortly before her eighteenth birthday, she moved into residential care. In October 2009 an inconclusive capacity assessment was undertaken regarding her capacity to return to live with her parents. Her father, RT, applied for a declaration that she had capacity to make decisions about (1) where she should live, and (2) what contact she should have with members of her family. Dr K, a consultant psychiatrist, considered that she lacked the capacity to decide where she should live, but that she did have the capacity to decide that she wanted contact with family members (paragraph 32). RT disagreed, and thought that she also had capacity to decide where to live.
Possibly the two most important paragraphs in the judgment are 40 and 49. At paragraph 40 the President said: "In my judgment, section 3 of the Act is at the heart of the case. The use of the word "or" in section 3(1) (c) demonstrates that the individual capacities set out in section 3(1) are not cumulative. A person lacks capacity if any one of the sub-sections (a) to (d) applies. In the instant case, I am satisfied that section 3(1) (c) applies."
In a postscript the President commented briefly on counsel's submission that pre-Act learning was now all obsolete, and that all that was required was an examination of the terms of the Act. At paragraph 49 he said: "What we now have is the Act (as amended) and the essential judicial task is to apply the plain words of the Statute to the facts of the case before the court. On the facts of this case, reference to authority is otiose: the evidence from Dr K, which I accept, plainly fits section 3(1) (c) of the Act, and there is no need to look anywhere else."

14. ***Re MN*** [2010] EWHC 1926 (Fam) (Mr Justice Hedley, 30 July 2010). MN is 89 and until recently lived in California, where in 2004 she made an Advance Health Care Directive appointing her niece PLH, who lives in Camberley, Surrey, to be her agent. In May 2009 PLH arranged for MN to be flown over to England. Proceedings were commenced in California and on 27 April 2010 Judge Cain revoked PLH's appointment as agent and ordered that MN be returned to California. His order has been stayed pending an appeal

in California. In the meantime, proceedings were brought in the Court of Protection in England. According to the expert psychiatrist, Dr Peter Jefferys, MN is capable of making the journey to California, but he has serious reservations as to whether her longer term best interests could be served by her so doing. In his judgment, Mr Justice Hedley considers in some detail the provisions of Schedule 3 to the Mental Capacity Act 2005 on the international protection of adults, and summarised the position in this case in paragraph 38 as follows:
"The basis of jurisdiction is habitual residence. In this case the key to that decision is whether PLH's authority as agent permitted this removal to England. If it did not, MN remains habitually resident in California and the courts of that State should exercise primary jurisdiction. If, however, it did, I am likely to conclude that MN is now habitually resident in England and Wales and jurisdiction belongs to this court. If that is so, I could not enforce the order of the Californian court unless, having conducted a full best interests enquiry on evidence, I concluded that her best interests required a return to California. On the other hand if jurisdiction belongs to California, I am likely to recognise and enforce the Californian order (if un-amended and there is no stay) and to give directions for implementation unless the carrier or Dr Jefferys were to advise otherwise, My best interests enquiry would essentially be confined to the journey. However this court could adopt a full best interests jurisdiction at the invitation of the Californian court."

15. ***Re RC Deceased, SC v London Borough of Hackney*** (Senior Judge Lush, 5 August 2010). www.bailii.org/ew/cases/EWHC/COP/2010/B29.html This was an appeal against a decision of a district judge to order SC to pay the London Borough of Hackney's costs for the last three days of a four day hearing before him. RC was born in 1915, and her care was funded by the London Borough of Hackney. SC is her niece. Because of SC's behaviour, Jewish Care, who run the care home in which RC lived, restricted SC's visiting hours to twice a week for one hour only. Eventually, they gave RC notice to quit. Another placement was found, but the chief executive of that home also intended to impose restrictions on SC's contact with her aunt. The district judge considered that SC had sabotaged the placement, and sought to punish her for her conduct by awarding costs against her. The Senior Judge allowed an appeal by SC, on the basis that the district judge had been wrong to hold that the general rule on costs in personal welfare cases (rule 157) applies to challenges to the validity of a Lasting Power of Attorney for health and welfare, and that the decision had been unjust because SC's conduct was really much the same as that of most of the litigants in person who appear in personal welfare proceedings in the Court of Protection.

16. ***VAC v JAD & Ors***. [2010] EWHC 2159 (Ch) (HH Judge Hodge QC, 16 August 2010). www.bailii.org/ew/cases/EWHC/Ch/2010/2159.html JAD was born in 1922, and has three children: VAC, FKD, and LJS. She suffered a stroke in 2003. In 2007 FKD sought to register an EPA in which JAD had appointed him as her sole attorney. Although it was purportedly signed by her on 26 January 2003, the prescribed form was marked "Crown Copyright 2005, printed September 2005." FKD and his sister LJS were required to pay back to their mother's estate assets worth £46,000 and £85,000 which they were looking after for her, and have done so.
JAD had made a will in 1995 leaving everything to her three children; a further will in 2004, leaving everything to LJS; and another will in 2006 leaving her residuary estate equally between FKD and LJS. In May 2009 VAC applied to the Court of Protection for an order authorising the professional deputy to execute a statutory will on behalf of JAD. District Judge Ashton held that "It is only the role of the Court of Protection to authorise a statutory will when there has been a material change of circumstances or there is a vacuum. It is not the role of this Court to adjudicate upon disputes as to the validity of wills." He was asked to reconsider his decision pursuant to rule 89, and directed that the application be referred to a Chancery circuit judge in Manchester. The application was heard by HHJ Hodge QC.
At paragraph 16 of the judgment, Judge Hodge said: "Given the importance attached by

the Court to the protected person having done the "right thing" by his will, it is open to the Court, in an appropriate case, to decide that the "right thing" to do, in the protected person's best interests, is to order the execution of a statutory will, rather than to leave him to be remembered for having bequeathed a contentious probate dispute to his relatives and the beneficiaries named in a disputed will. I therefore hold that the Court of Protection should not refrain, as a matter of principle, from directing the execution of a statutory will in any case where the validity of an earlier will is in dispute. However, the existence and nature of the dispute, and the ability of the Court of Protection to investigate the issues which underlie it, are clearly relevant factors to be taken into account when deciding whether, overall, it is in the protected person's best interests to order the execution of a statutory will."
At paragraph 22 he directed that there be an equal split of residue among JAD's three children, and stated: "In the light of Mr D's behaviour over the forged Enduring Power of Attorney, it is appropriate that he should be replaced as one of Mrs D's executors and trustees by her property and affairs deputy, who is a practising solicitor. However, neither such behaviour, nor the nature of his dealings, and those of Mrs S, with their mother's assets leads me to the view that it would be in the best interests of Mrs D to exclude either Mr D or Mrs S from an equal share of Mrs D's estate with their half-sister."

17. ***EG v RS, JS and BEN PCT*** (His Honour Judge Cardinal, Birmingham Civil Justice Centre, 3 August 2010). RS was born in 1963 and has a brain injury as a result of a road traffic accident in 1994. There is an ongoing dispute between his sister, JS, and his deputy for property and affairs and primary carer, CH, who happens to be JS's former husband. A female solicitor, EG, has been acting for CH in this dispute. In January 2009 EG applied to the court to be appointed as RS's personal welfare deputy. JS opposed the application. At a hearing in Birmingham on 25 August 2009 District Judge Owen refused EG's application for permission, and ordered her to pay the costs of JS, the Official Solicitor and the PCT because he considered that her application was ill-judged and misconceived. EG appealed. HH Judge Cardinal dismissed the appeal, apart from allowing by consent an order that the costs be paid by EG's firm, and not by her personally.
At paragraph 38(iv) he said: "I endorse the view that professionals should not be discouraged from making applications; but there must be a limit to such applications where there is clear opposition and acrimony given the role of the would-be Deputy hitherto. It seems to me that such an applicant ought to ask him or herself:
    - Am I in any way compromised by my intervention to date?
    - Is there any evidence of my taking sides too strongly?
    - Can I be sure all parties will indeed regard me as a neutral arbitrator?
    - Am I really suitable given the history of conflict with my client and my support of him?
    - Would my appointment mean more conflict?

    Had EG asked herself those questions then it is clear she would never have applied."

18. ***YA(F) v A Local Authority & Others*** [2010] EWHC 2770 (CoP)(Mr Justice Charles, 2 September 2010) www.bailii.org/ew/cases/EWHC/COP/2010/2770.html In January 2008 YA(F) took her son to hospital. He was subsequently discharged from hospital to a placement, the identity of which was withheld from her. Both the mother and son brought claims for breaches of their rights under the European Convention of Human Rights; principally under Article 8, which provides a right to respect for family and private life. After a detailed consideration of both the Human Rights Act 1998 and the Mental Capacity Act 2005, the judge stated at paragraph 45 that "it therefore seems to me, and I conclude, that both linguistically and purposively, albeit possibly against the instinct of a number of lawyers dealing with a welfare jurisdiction, the Court of Protection does have jurisdiction and thus power to award damages under the Human Rights Act."

19. ***LBL v RYJ and VJ*** [2010] EWHC 2665 (Mrs Justice Macur, 22 September 2010)

www.bailii.org/ew/cases/EWHC/COP/2010/2665.html RYJ was born on 28 April 1992. She suffered brain damage at birth and has a very low IQ. She is the only child of her mother VJ, who originates from Zambia. The relationship between mother and daughter is very difficult, and there have been allegations of domestic violence. From 2003 RYJ was a boarder at the National Centre for Young People with Epilepsy until her mother removed her in July 2008. She was then educated at home for a year until she was placed at St Mary's, Bexhill-on-Sea, where she is extremely happy. Her placement is funded by the LBL. Her mother contends that RYJ is not receiving educational provision she needs and has applied to the Special Educational Needs and Disability Tribunal to direct a transfer to another establishment. Although there appeared to be some inconsistency in RYJ's own views on this matter, at paragraph 49 the judge held that: "Quite clearly the fact of inconsistency is not necessarily a sign of confusion. Equally, confusion is not necessarily an indication of incapacity."
The judge went on to conclude that at this time RYJ "has capacity to make decisions about her care, contact and residence including the provision of education within the residential setting of St. Mary's, Bexhill-on-Sea. I determine that the inherent jurisdiction is not invoked in the circumstances of this case and is not available to displace RYJ's autonomy in decisions relating to care, contact and residence including education. The appointment of VJ to receive her benefits is reasonable and I do not seek by any means in this judgment to support her dismissal and substitution by another. I merely reflect that any attempt to constrain RYJ's decisions reached appropriately should be regarded as good reason to replace VJ as appointee."

20. ***In the matter of S, D v R and S*** [2010] EWHC 2405 (COP) (Mr Justice Henderson, 4 October 2010) www.bailii.org/ew/cases/EWHC/COP/2010/2405.html Mr S was born in 1933. He suffered a stroke in 2005 and was befriended by Mrs D, a legal secretary employed by his solicitors. On 15 separate occasions between 19 January 2006 and 11 April 2007 Mr S made gifts to Mrs D totalling £549,000. His daughter, R, was appointed as his deputy, and she commenced proceedings in the Chancery Division to set aside the gifts. The question before Mr Justice Henderson was whether Mr S has the necessary mental capacity to decide whether the proceedings should be discontinued or compromised.
At paragraph 43 the judge said that the decision whether to discontinue or to continue to prosecute the Chancery proceedings "cannot be taken, it seems to me, without at least a basic understanding of the nature of the claim, of the legal issues involved, and of the circumstances which have given rise to the claim. It would be an oversimplification to say that the claim is just a claim to set aside or reverse the gifts which Mr S made to Mrs D, because in the ordinary way a gift is irrevocable once it has been made and perfected by delivery or transfer of the relevant assets. If a gift is to be set aside or recovered, some vitiating factor such as fraud, misrepresentation or undue influence has to be established; and if the donor is to decide whether or not to pursue a claim, he needs to understand, at least in general terms, the nature of the vitiating factor upon which he may be able to rely, and to weigh up the arguments for and against pursuing the claim. Provided that the donor is equipped with this information, and provided that he understands it and takes it into account in reaching his decision, it will not matter if his decision is an imprudent one, or one which would fail to satisfy the "best interests" test in section 4. But if the donor is unable to assimilate, retain and evaluate the relevant information, he lacks the capacity to make the decision, however clearly he may articulate it." At paragraph 153 the judge stated that he was "satisfied, on the balance of probabilities, that Mr S is unable to make the decision whether or not to continue the Chancery proceedings (or, if it becomes relevant, to settle them)."

21. ***G v E and Manchester City Council and F*** [2010] EHWC 2512 (COP) (Fam) (Mr Justice Baker, 11 October 2010). This is a continuation of the proceedings already mentioned at paragraphs 4 and 12 above. E's sister, G, applied to be appointed jointly and severally with F as his personal welfare deputies, and to replace the Official Solicitor as his litigation friend. Mr Justice Baker dismissed both applications, accepting the

submissions of the Official Solicitor, and held that the vast majority of welfare decisions about incapacitated adults can be taken by carers and others without the need for anyone to be appointed as a welfare deputy. At paragraph 57 he said that, "The Act and the Code are therefore constructed on the basis that the vast majority of decisions concerning incapacitated adults are taken informally and collaboratively by individuals or groups of people working together. It is emphatically not part of the scheme underpinning the Act that there should be one individual who as a matter of course is given special legal status to make decisions about incapacitated persons." As regards the appointment of a litigation friend, the judge held that the court has complete discretion under rule 143 of the Court of Protection Rules 2007 as to whom it appoints as litigation friend.

22. ***A Local Authority v DL and Others*** [2010] EWHC 2675 (Fam) (Sir Nicholas Wall, the President of the Family Division, 14 October 2010). www.bailii.org/ew/cases/EWHC/Fam/2010/2675.html Although this is technically not a Court of Protection case, it involves interesting issues relating to the protection of vulnerable adults. Mr L is 85. Mrs L is 90. Neither of them lacks capacity. They live with their son DL, who is in his 50s. There are documented incidents of abuse of his parents by DL since 2005, and consistent reports that he is seeking to coerce his father into transferring ownership of the house into his name, and to have his mother placed in a care home against her wishes.
    The local authority wished to take steps to protect Mr and Mrs L from DL considered and rejected:
    - using the criminal law;
    - an application to the Court of Protection under the Mental Capacity Act 2005;
    - an application for an ASBO (anti-social behaviour order); and
    - an application under section 153A of the Housing Act 1996.

    In his judgment, the President considered two bases upon which he had jurisdiction to make a non-molestation injunction against DL:
    - the inherent jurisdiction of the High Court to protect vulnerable adults; and
    - section 222 of the Local Government Act 1972, which provides that where a local authority consider it expedient for the promotion of the interests of the inhabitants of their area, they may prosecute or defend or appear in any legal proceedings and, in the case of any civil proceedings, may institute them in their own name.

    The court has a jurisdictional basis to intervene under its inherent jurisdiction. Following the decisions of Mr Justice Munby in *Re SA (Vulnerable Adult with capacity: Marriage)* [2005] EWHC 2942 and *Re MM: Local Authority X v MM and KM* [2007] EWHC 2003 (Fam), it has an inherent jurisdiction over vulnerable adults who, although not lacking capacity, are reasonably believed to be (i) under constraint, or (ii) subject to coercion or undue influence, or (iii) for some other reason deprived of the ability to make a free choice. Although this was sufficient to dispose of the application, the facts also warranted action under section 222 of the LGA 1972.

23. ***Re MB, A County Council v MB, JB, and A Residential Home*** [2010] EWHC 2508 (COP) (Mr Justice Charles, 22 October 2010). www.bailii.org/ew/cases/EWHC/COP/2010/2508.html Mrs MB was 80 and suffered from Alzheimer's disease. She was admitted to A Residential Home on 22 February 2010. She successfully sought a declaration that from the expiry of a standard DOLS authorisation at midnight on 29 March 2010 until the making of an order by the court on 13 April 2010, she was unlawfully deprived of her liberty at A Residential Home, in breach of her Article 5 rights.

24. ***AVS v A NHS Foundation Trust*** [2010] EWHC 2746 (COP) (Sir Nicholas Wall, the President, 2 November 2010). www.bailii.org/ew/cases/EWHC/COP/2010/2746.html This judgment is unusual because it is an interlocutory decision, rather than a final

decision. AVS was diagnosed as having Creutzfeldt-Jakob Disease (CJD) in May 2008. His consultant neurologist is of the view that for the last eighteen months there has been "no evidence of awareness of self or environment." Since June 2008 AVS has received Pentosan Polysulphate (PPS) by way of intraventricular infusion. On 26 August 2010 the infusion pump malfunctioned, and the clinicians at the hospital concluded that it was not in AVS's best interests to replace the pump and continue administering PPS. On 8 October 2010 AVS's brother, CS, who is a solicitor, applied to the court to decide whether it was in AVS's best interests to undergo surgery to replace the infusion pumps, and for the administration of PPS to continue thereafter. CS holds a Lasting Power of Attorney for personal welfare and is authorised to give or refuse consent to life-sustaining treatment on behalf of AVS.

The President expressed the opinion that CS had not demonstrated the necessary objectivity to act as AVS's litigation friend in circumstances where CS's relationship with the NHS Trust had completely broken down. There was no medical evidence to support the course of action proposed by CS on his brother's behalf. All the medical evidence, advanced by the NHS Trust, was the other way. There was a suggestion that Dr P, from another NHS Trust, might take over AVS's case and would continue the procedure advocated by CS. At paragraph 24 the President stated: "It strikes me as unlikely in the extreme that the court would order a clinician to undertake a medical intervention which he, the clinician, did not believe to be in the best interests of the patient. Therefore, it seems to me that the current proceedings would be doomed to failure. In my judgment, therefore, these proceedings should stand dismissed unless Dr P provides a report properly identifying the *lis* upon which the court is being asked to adjudicate."

25. ***Re G (TJ)*** [2010] EWHC 3005 (COP) (Mr Justice Morgan, 19 November 2010). www.bailii.org/ew/cases/EWHC/COP/2010/3005.html Mrs G was born in 1928, and has a son N, and a daughter C. This was an application to authorise Mrs G's deputy to continue to make maintenance payments of £3,300 a month to C. At paragraph 65 of his judgment, the judge said: "Having identified the factors as best I can, it emerges that the principal justification, so far as Mrs G is concerned, for making the order for maintenance payments in favour of C, is that those payments would be what Mrs G would have wanted if she had capacity to make the decision for herself. I recognise that this consideration is essentially a "substituted judgment" for Mrs G. I am also very aware that the test laid down by the 2005 Act is the test of best interests and not of substituted judgment. However, for the reasons which I have tried to set out earlier, the test of best interests does not exclude respect for what would have been the wishes of Mrs G. A substituted judgment can be subsumed into the consideration of best interests. Accordingly, in this case, respect for what would have been Mrs G's wishes will define what is in her best interests, in the absence of any countervailing factors. There are no such countervailing factors here. I therefore conclude that an order which provides for the continuation of maintenance payments to C is in the best interests of Mrs G."

26. ***In the matter of J*** (Her Honour Judge Hazel Marshall QC, 6 December 2010). Mrs J was born in 1921 and lives in Surrey. This was an application by her son-in-law for an order revoking a Lasting Power of Attorney in which she had appointed a solicitor as her attorney. At paragraph 11 of the extract of the judgment, which appears on the Office of the Public Guardian's website, Judge Marshall held that: "In my judgment, they key to giving proper effect to the distinction between an attorney's behaviour and his behaviour in any other capacity lies in considering the matter in stages. First, one must identify the allegedly offending behaviour or prospective behaviour. Second, one looks at all the circumstances and context and decides whether, taking everything into account, it really does amount to behaviour which is not in P's best interests, it can be fairly characterised as such. Finally, one must decide whether, taking everything into account including the fact that it is behaviour in some other capacity, it also gives good reason to take the very serious step of revoking the LPA." At paragraph 13 she held: "on a proper construction of s 22(3), the court can consider any past behaviour or apparent prospective behaviour by the attorney, but that, depending on the circumstances and the apparent gravity of any

offending behaviour found it can then take whatever steps it regards as appropriate in P's best interests (this only arises if P lacks capacity), to deal with the situation, whether by revoking the power or by taking some other course."

27. ***D Borough Council v AB*** [2010] EWHC (101 COP) (Mr Justice Mostyn, 28 January 2011). AB ("Alan") is 41 and has a moderate learning disability. He also has a vigorous sex drive which has led to his having sexual encounters with persons of both genders. The local authority sought a declaration that Alan lacks capacity to consent to sexual relations. At paragraph 42 the judge held as follows: "I therefore conclude that the capacity to consent to sex remains act-specific and requires an understanding and awareness of:
    - The mechanics of the act
    - That there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections; and
    - That sex between a man and a woman may result in the woman becoming pregnant."

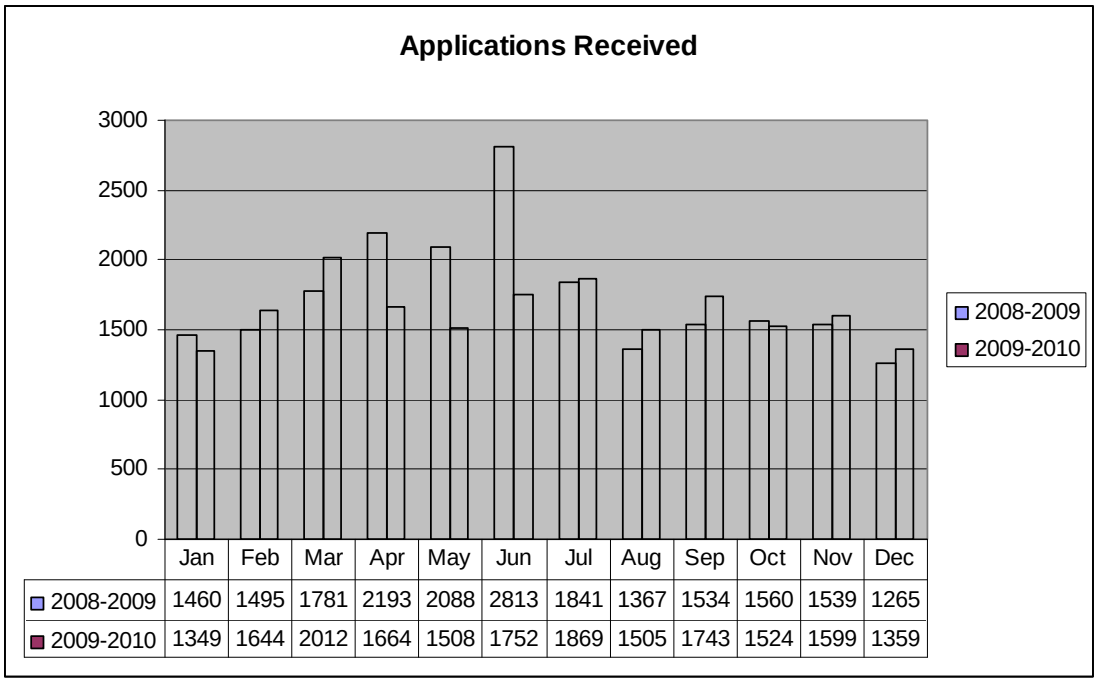
    At paragraph 46 the judge made a declaration that "at the present time Alan does not have the capacity to consent to and engage in sexual relations". The declaration was, however, of an interim nature, and the judge ordered the local authority to "provide Alan with sex education in the hope that he thereby gains that capacity". The matter is to be returned to the court in nine months for a review in order to see what progress has been made.

28. ***AVS v A NHS Foundation Trust and B PCT*** [2011] EWCA Civ 7 (Lord Justice Ward, Lord Justice Patten and Lady Justice Black, 17 January 2011). www.bailii.org/ew/cases/EWCA/Civ/2011/7.html This is an appeal against the decision of the President, which was discussed in paragraph 24 above. Giving the lead judgment dismissing the appeal, at paragraphs 38 and 39 Lord Justice Ward said as follows. "38. The harsh fact is that, although Mr NT and Professor R are willing to replace the pump, there is no evidence of their present ability to do so. No hospital has been identified where that surgery can be undertaken. Without a new pump being inserted, there is nothing Dr P can do. This litigation is going nowhere. What the court is being invited to do is no more nor less than to declare that if a medical practitioner is ready, willing and able to operate and if a medical practitioner is willing, ready and able to replenish the supply of PPS, then it would be in the best interests of the patient to do so. The President was correct to identify the need for evidence from Dr P to plug this gap in the claimant's case. Without that evidence that someone is "able and willing to take over the care of [the patient] and treat him with PPS," we are dealing with a purely hypothetical matter. A declaration of the kind sought will not force the respondent hospital to provide treatment against their clinicians' clinical judgment. To use a declaration of the court to twist the arm of some other clinician, as yet unidentified, to carry out these procedures or to put pressure upon the Secretary of State to provide a hospital where these procedures may be undertaken is an abuse of the process of the court and should not be tolerated. 39. Like the President, I have also reached the conclusion that the continuation of this litigation by permitting a lengthy hearing to be urgently arranged for numerous busy medical practitioners to be cross-examined truly would be "doomed to failure." If there are clinicians out there prepared to treat the patient then the patient will be discharged into their care and there would be no need for court intervention. If there is no-one available to undertake the necessary operation the question of whether or not it would be in the patient's best interests for that to happen is wholly academic and the process should be called to a halt here and now."

6 Volume of business

Applications received

Figure 1 shows the number of applications received during 2010 and includes those received during 2009 for comparison purposes. In all, the court received 1408 fewer applications in 2010 than 2009. The drop is due mainly to a reduction in applications by existing deputies. Most deputies who previously operated under the more restrictive receivership orders made before the MCA, have now been given full deputy powers.



	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2008-2009	1460	1495	1781	2193	2088	2813	1841	1367	1534	1560	1539	1265
2009-2010	1349	1644	2012	1664	1508	1752	1869	1505	1743	1524	1599	1359

Figure 1: Applications received

Applications and orders by type

Figure 2 gives a more detailed breakdown of the most common types of application received and orders made in 2010. Figure 3 provides a breakdown of applications made by the Public Guardian.

	2010			
	Jan-Mar	**Apr-Jun**	**Jul-Sep**	**Oct-Dec**
Property and affairs applications issued	4120	4701	4999	4540
Property and affairs orders issued	4013	2800	4223	4498
Property and affairs deputies appointed	3211	2091	2874	1261
Personal welfare apps issued	375	321	322	265
Personal welfare orders issued	43	34	103	38
Personal welfare deputies appointed	31	24	35	16
EPA objections	79	82	75	62
LPA objections	24	23	21	30
EPA directions	61	81	77	56
LPA validity applications	32	24	25	31

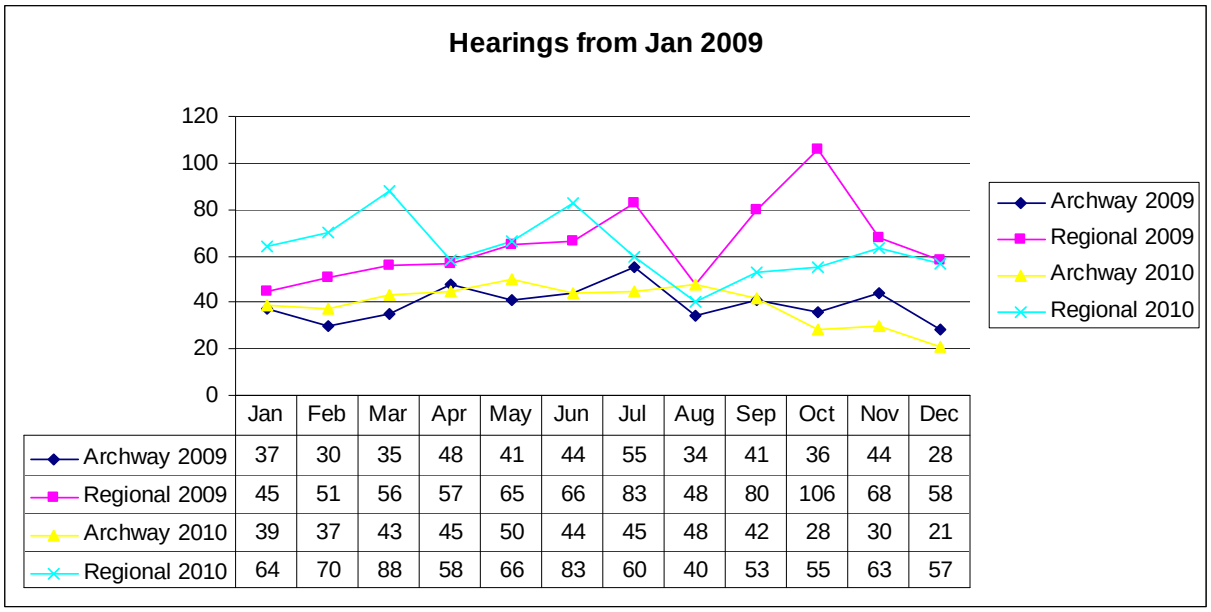
Figure 2: Applications by type

Application type	
Application Within Proceedings	88
Discharge Deputy (Other)	79
Discharge Deputy (P no longer lacks capacity)	2
EPA Directions	57
EPA Objection	6
EPA Validity	1
Interim Directions	8
LPA Directions	13
LPA Objection	2
LPA Validity	105
New Deputy Order	1
Other	2
Property & Affairs Deputy	3
Review Of Order	4
Total	**371**

Figure 3: Applications by the Public Guardian

Hearings

Figure 4 shows how hearings were divided between Archway and the regional courts. 757 cases were heard outside Archway and figure 5 shows how these were broken down between the regions. The percentage for London includes cases referred to High Court judges in the Royal Courts of Justice, but does not include cases heard in Archway.



	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Archway 2009	37	30	35	48	41	44	55	34	41	36	44	28
Regional 2009	45	51	56	57	65	66	83	48	80	106	68	58
Archway 2010	39	37	43	45	50	44	45	48	42	28	30	21
Regional 2010	64	70	88	58	66	83	60	40	53	55	63	57

Figure 4: regional hearings 2010

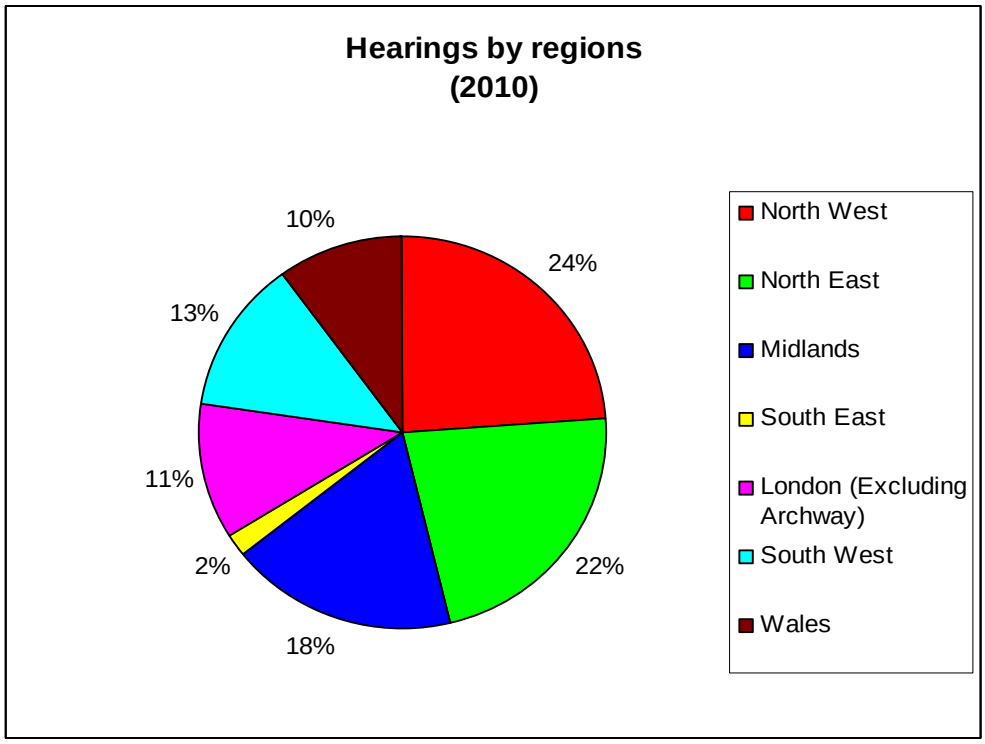


Figure 5: Breakdown of hearings by region

Appendix A Court of Protection judiciary

Full time judges[8]

Judge	Period of secondment
Senior Judge Denzil Lush	October 2007 (permanent)
District judge Elizabeth Batten	April 2010 to March 2012
District Judge Anselm Eldergill	April 2010 to March 2012
District Judge Carolyn Hilder	April 2010 to March 2012
District Judge Marc Marin[9]	October 2007 to present
District Judge Alex Ralton	April 2009 to March 2011
District Judge Stephen E Rogers	October 2007 to September 2010

North West region

Name	Resident Court
District Judge Michael Anson	Preston
District Judge Gordon Ashton	Preston
District Judge John Coffey	Liverpool
District Judge Charles Fairclough	Manchester
District Judge Anthony Harrison	Manchester
District Judge Charles Khan	Manchester
District Judge Ian Knifton	Birkenhead
District Judge Ranj Matharu	Liverpool
District Judge Louise Relph	Salford
District Judge Stephen E Rogers	Southport
His Honour Judge Martin Allweis	Manchester
His Honour Judge Kevin Barnett	Warrington

8 This includes all judges who sat full time at Archway during 2010.

9 District Judge Marin is included as part of the full time Court of Protection Judiciary although he sits only one week in five. He sits at Barnet Civil and Family Courts Centre for the remaining weeks.

Name	Resident Court
Her Honour Judge Margaret De HaaS QC	Liverpool
Her Honour Judge Barbara Forrester	Lancaster
His Honour Judge Allan Gore QC	Liverpool
His Honour Judge Iain Hamilton	Manchester
His Honour Judge David R Hodge, QC	Manchester
His Honour Judge Peter Hughes QC	Carlisle
Her Honour Judge Lindsey Kushner QC	Manchester
His Honour Judge Tony Lancaster	Preston
Her Honour Judge Lesley Newton	Manchester
His Honour Judge Phillip Pelling, QC	Manchester
Her Honour Judge Maureen Roddy	Manchester
Her Honour Judge Barbara Watson	Blackburn

North East region

Name	Resident Court
District Judge Margaret Glentworth	Leeds
District Judge Nicholas Goudie	Newcastle
District Judge Gordon Lingard	Bradford
District Judge John Mainwaring-Taylor	Teesside
District Judge Paul Mort	Sheffield
His Honour Judge Clive Behrens	Leeds
His Honour Judge Peter Hunt	Leeds
His Honour Judge Roger Kaye QC	Leeds
Her Honour Judge Judith Moir	Newcastle

Midlands region

Name	Resident Court
District Judge Tony Davies	Birmingham Civil Justice Centre
District Judge Sally Dowding	Birmingham Civil Justice

	Centre
District Judge David Millard	Nottingham
District Judge Debbi O'Regan	Birmingham
District Judge David Owen	Birmingham
His Honour Judge Martin Cardinal	Birmingham
His Honour Judge Christopher Plunkett	Birmingham
His Honour Judge Charles Purle QC	Birmingham
His Honour Judge Mark Rogers	Birmingham
Her Honour Judge Sybil Thomas	Birmingham

South East region

Name	Resident Court
District Judge Patrick Bazley-White	Ipswich
District Judge Michael Payne	Oxford

South West region

Name	Resident Court
District Judge John Sparrow	Southampton
District Judge Alan Thomas	Gloucester
District Judge Brian Watson	Bristol
His Honour Judge Paul Barclay	Bristol
Her Honour Judge Susan Darwall-Smith	Bristol
His Honour Judge David Tyzack QC	Plymouth

Wales and Cheshire region

Name	Resident Court
District Judge Richard Dawson	Cardiff
District Judge Owen Williams	Cardiff
His Honour Judge Pryce Farmer QC	Rhyl
His Honour Judge Crispin Masterman	Cardiff
Her Honour Judge Isabel Parry	Swansea

London region

Name	Resident Court
District Judge Penny Cushing	Principal Registry of the Family Division
District Judge Richard Harper	Principal Registry of the Family Division
District Judge Susan Jackson	Central London
District Judge Susannah Walker	Principal Registry of the Family Division
His Honour Judge John Altman	Principal Registry of the Family Division
His Honour Judge Mark Everall QC	Luton
His Honour Judge Rodger Hayward Smith QC	Chelmsford
Her Honour Judge Judith Hughes QC	Snaresbrook
His Honour Judge Michael Horowitz QC	Principal Registry of the Family Division
Her Honour Judge Hazel Marshall, QC	Central London
His Honour Judge David Turner QC	Chelmsford
Senior District Judge Philip Waller	Principal Registry of the Family Division

Appendix B Court leadership

President of the Court of Protection	Sir Nicholas Wall
Vice President of the Court of Protection	Sir Andrew Morritt
All judges of the Family and Chancery Divisions of the High Court	
Senior Judge	His Honour Judge Denzil Lush
Director Royal Courts of Justice Group	David Thompson
Head of Probate and Court of Protection	Helen Smith
Court Manager	Gabrielle Bradshaw
Deputy Court Managers	James Batey
	Ross Hamilton
	Fred Prempeh
	Neil Ross

Appendix C Court User Group

Member	Organisation
Stephen Ashcroft	Frenkel Topping
Colin Baker	Senior Courts Costs Office
Niall Baker	Irwin Mitchell Solicitors
Caroline Bielanska	Solicitors for the Elderly
Chris Bunting	Burroughs Day Solicitors
Eddie Fardell	Thomson Snell & Passmore Solicitors
Paul Gantley	Department of Health
Paul Greatorex	Barrister
Andrew Harding	Hugh James Solicitors
Janet Ilett	Official Solicitor
Elizabeth Jeary	Court Funds Office
Hugh Jones	Pannone & Partners Solicitors
Clive Lissaman	Marsh Insurance Ltd
Her Honour Judge Hazel Marshall, QC	Nominated Court of Protection judge and member of the Public Guardian Board
Jill Martin	Office of the Public Guardian
Fiona MacGillivray	Family Action
Nicola Mackingtosh	Mackintosh Law (representing Law Society)
Paul McNeill	Field Fisher Waterhouse Solicitors
Sophy Miles	Miles & Partners Solicitors (representing Law Society)
D Rees	Barrister
Tony Spiers	Withy King Solicitors
Helen Starkie	Moore Blatch Solicitors (representing Law Society)
David Street	Caerphilly County Borough Council and APAD10
Beverley Taylor	Official Solicitor
Martin Terrell	Thomson Snell & Passmore Solicitors
Michael White	Hammersmith & Fulham

[10] Association of Public Authority Deputies