

The Court of Protection

Briefing Document

The Essex Autonomy Project

Introduction

The Court of Protection (CoP), in its present form, was established by s 45(1) of the Mental Capacity Act (2005) and started operation from 1 October 2007. It is a superior court of record¹ that has jurisdiction over the property, financial affairs, personal welfare and healthcare of people who lack mental capacity to make decisions for themselves. The Court is able to set precedents and has the same powers and privileges in relation to mental capacity matters as the High Court. The statutory framework for the Court's operation is provided by the Mental Capacity Act (2005) and the Court of Protection Rules (2007).

History of the Court²

The origins of the CoP date from the Middle Ages when the crown assumed a *parens patriae* jurisdiction over the *persons* and *estates* of the mentally ill.³ In 1842, two Commissioners in Lunacy, later known as Masters in Lunacy, were appointed.⁴ Originally the Masters in Lunacy were little more than superior clerks reporting to the Lord Chancellor who, until 1852, was the sole judge in lunacy matters. The Masters in Lunacy acquired powers to make orders on their own in 1891.⁵ The number of Masters was reduced to one and the post of Assistant Master was created in 1922. The Office of the Master in Lunacy became an office of the Supreme Court in 1925 and was renamed the Court of Protection in 1947.

Contrary to the present Court, the Court of Protection between 1947 and 2007 was an office of the Supreme Court. The Master of the Court was a judicial officer who was assisted by assistant masters and nominated officers (civil servants).⁶ The Court's jurisdiction extended only to matters relating to the property and affairs of the mentally ill. Health and welfare matters were dealt with in the High Court (Family Division). The Court of Protection was run in an informal manner: solicitors or receivers would often write a letter or telephone and speak to an official who would either grant the required permission or if the issue was more complex, direct the case to the Master of the Court.⁷ The Court drew its powers from the MHA 1983 and the 'old' Court of Protection Rules 2001.

¹ 'Superior' refers to the fact that the court is presided over by judges as opposed to magistrates. A superior court of record means that all proceedings are recorded and published, and as such available to the public, whereas a magistrates' court does not record all proceedings. Due to the special procedural rules of the CoP, the last statement is not entirely true for the Court of Protection.

² A good overview on the Court's history can be found in the judgment *Re MB* [2005] EWCA Civ 1293.

³ The jurisdiction of the Court over personal welfare matters was only abolished in 1959 by the Mental Health Act. It was reinstated in 2005 by the Mental Capacity Act. Gordon Ashton, *A year on... The Regional Court of Protection*, article available at http://www.ecadviser.com/xq/asp/sid.0/articleid.2D4761D2-8694-4DAC-B111-E71D70BFA65E/eTitle.A_year_on_The_regional_Court_of_Protection/qx/display.htm (20.02.2011)

⁴ The Commissioners in Lunacy Act 1842

⁵ The Lunacy Act 1891.

⁶ Marc Marin, *The Family Lawyer and the Court of Protection* (Bristol: Jordan Publishing, 2010) pp. 24ff.

⁷ *Ibid.* 25.

Powers of the Court (ss 15-23 MCA)

The Court's general powers include: (1) **making declarations** as to whether a person has capacity or not; (2) **making substitute decisions** on both financial and welfare matters, either a.) directly or b.) through the appointment of deputies; (3) **deciding whether an LPA or EPA is valid** or hearing cases concerning objections to register an LPA or EPA with the Public Guardian.

(1) Under section 15 MCA, the Court can **make declarations** as to whether a person has capacity or not (either related to one specific decision or matters in general). It also gives the Court power to make declarations about whether an act or a proposed act was or would be **lawful** in relation to that person.

(2) Section 16 of the Act empowers the Court to **make a decision** (i.e. an order) on behalf of a person who lacks capacity ('P') in respect of P's personal welfare or property and affairs.

According to Section 17 MCA, personal welfare issues extend, in particular, to:

- a. deciding where P is to live;
- b. deciding what contact, if any, P is to have with any specified persons;
- c. making an order prohibiting a named person from having contact with P;
- d. giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P;
- e. giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.

According to Section 18 MCA, P's 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;
- :
- f. the carrying out of any contract entered into by P;
- :
- k. the conduct of legal proceedings in P's name or on P's behalf.

(3) Under section 16, the Court can also **appoint deputies** who are given authority to make decisions on behalf of the person lacking capacity.

The Court's preferred course of action is to make the decision directly on behalf of the incapacitated person. However, if there are a number of decisions which need to be made in the future, the Court can appoint a deputy.

Deputy appointment is surrounded by numerous statutory safeguards (e.g. appointment must be in the best interest of the person, supervision by the Public Guardian, annual report, Court of Protection visitors, etc.). Additionally, any Deputyship order the Court makes, will set out the Deputy's specific powers in relation to the protected person. Powers can relate to property and affairs only, health and welfare, or both areas.

The Court, to date, has been reluctant to appoint deputies (especially health and welfare deputies). This can be explained with the new approach of the law. One of the key principles of the MCA is that every person is assumed to have capacity unless it is proved otherwise. In practice, this means that even when a Deputy has been appointed, there is an ongoing duty to assess whether the person has capacity to make each separate decision as it arises.

Under the old law, the Court of Protection had the power to appoint a Receiver to deal with the property and affairs of someone who lacked capacity. **The Receiver's role was purely financial.** He had no authority to decide where a person should live or what healthcare they should receive. Such health and welfare decisions were the responsibility of the next of kin, in consultation with doctors, care professionals, and the client where appropriate.

(4) **Enduring Power/Lasting Power of Attorney** (ss 22-23 MCA)

The Court of Protection has the power to hear cases concerning objections to register an LPA or EPA and make decisions about whether or not an LPA or EPA is valid.

The caseload of the CoP

From October 2007 to December 2009, the Court received **39,579** property and affairs applications and **2734** health and welfare applications. The majority of the property applications were to appoint a 'property and affairs' deputy that resulted in **18307** actual appointments. The Court has also received a large number of applications from deputies and receivers for direct decision-making. EPA/LPA validity issues and objections to the registration of EPAs/LPAs amounted to **1584** applications. The Court has received much less welfare applications and has appointed only **195** welfare deputies - this low number is in-line with section 8.38 of the Code of Practice which states that 'deputies for personal welfare decisions will only be required in the most difficult cases'. Source: Court of Protection Report 2009.

Structure and Composition of the Court

The jurisdiction of the CoP is exercised by various levels of judges.⁸ Judges are nominated by the Lord Chancellor and pursuant section 46(2) MCA, they must be either:

- a. the President of the Family Division of the High Court; or
- b. the Vice-Chancellor; or

⁸ *ibid.* 31.

- c. a puisne judge of the High Court; or
- d. a circuit judge; or
- e. a district judge.

The President and the Vice-President of the Court are appointed by the Lord Chancellor and shall come from categories a.) b.) or c.). The Senior Judge (responsible for the administration and day to day running of the Court) is either a district or a circuit judge. There are six full time district judges working at the headquarters of the Court and there are 17 circuit judges and 31 district judges nominated to work part-time at one of the regional Courts.⁹ All High Court judges of the Family and Chancery Divisions were nominated to hear appeals.

Key people of the Court

President: Sir Nicholas Wall (President of the Family Division)

Vice-president: Sir Andrew Morritt (Chancellor of the Chancery Division)

Senior Judge: Denzil Lush (formerly Master of the Court of Protection)

Location of the Court

Main Registry: Archway Tower, 2 Junction Road, London N19 5SZ

Regional Courts: Birmingham, Bristol, Cardiff, Manchester, Newcastle, Preston

The “Secrecy” of the Court

Section 90 (1) of the Court of Protection Rules states that ‘the general rule is that a hearing is to be held in private.’ Section 12 of the Administration of Justice Act 1960, as amended by the Mental Capacity Act 2005, provides that any publication of information about CoP proceedings will be a contempt of court.¹⁰ Sections 91-93 COPR authorise the Court to allow public hearings or to permit the publication of court materials but only if there is ‘good reason’ to do so.

Independent News Media Limited and Others v A [2009] EWHC 2858 (Fam)

This case was the first that addressed the issue what the term ‘good reason’ meant. Hedley J envisaged a two stage approach. The first stage involves deciding whether there is a ‘good reason’ to open up the proceedings to the public. Here the threshold shall not be too high. The second stage is a balancing exercise of the competing interests (transparency, protection of the vulnerable, etc.).

The case concerned a disabled person called Derek Paravicini who was, in spite of his disabilities, a musical prodigy. The case before the CoP concerned the appointment of Derek’s family members as his deputies (Re P [2010] EWHC 1592 COP). The defendants (the Independent and other media

⁹ Ibid. 32. See also Court of Protection Report 2009, p. 8.

¹⁰ Ibid. 125.

organisations) sought access to these proceedings. The High Court decided to grant access. This was upheld by the Court of Appeal in **A v Independent News and Media Limited [2010] EWCA Civ 343**.

The Case Law of the Court of Protection

The classification of the cases follows the main powers of the Court of Protection. Accordingly, the following categories are distinguished:

1. Cases related to the registration or validity of LPAs/EPAs
 - a. Orders made by the Court on EPAs
 - b. Orders made by the Court on LPAs
2. Cases related to the appointment of deputies
3. Cases related to substituted decision making
 - a. Best interests assessment
 - b. Capacity assessment
4. Cases related to the jurisdiction of the Court
5. Cases related to the Deprivation of Liberty Safeguards (see Appendix to the DoLS briefing)

This taxonomy is not absolute. The content of the judgments overlap and one case often falls into more than one category.

1. Cases related to the registration or validity of LPAs/EPAs¹¹

a. Orders made by the Court on EPAs

Re Harries (order of Senior Judge Lush made on 22 June 2009) Re FH, M v Public Guardian [2010] WTLR 51

The witnesses wrote their full names and addresses on the EPA form but omitted to place their signatures above their names and addresses. The Public Guardian refused to register the instrument because he regarded it as defective and technically invalid. It was held that the handwritten names and addresses of the witnesses were sufficient proofs of identity, even in the absence of signatures.¹² Senior Judge Lush directed the Public Guardian to register the instrument.

Re J (order of Lewison J made on 12 March 2009) [2009] WTLR 435, Re J [2009] EWHC 436 (Ch)

The donor of an EPA may appoint substitute attorneys in the original EPA instrument. The following successive appointment was found valid: 'I ... appoint my wife [W] to be my Attorney ... but if she shall have predeceased me or shall be unable to act as my Attorney ... then in the alternative I appoint my son [A] and my son [B] and my son [C] jointly and severally to be my attorneys'.¹³

¹¹ The cases listed in this section come from the Public Guardian's website. The cases here are only exemplary; for detailed information and more cases, see <http://www.justice.gov.uk/guidance/protecting-the-vulnerable/mental-capacity-act/orders-made-by-the-court-of-protection/index.htm> (03.25.2011).

¹² Court of Protection Report 2009, p.16.

¹³ Ibid. 15.

Re King (order of District Judge Rogers made on 14 July 2009)

The Court severed an EPA provision that sought to authorise personal welfare decision making. 'In case that I am unable to take part in decisions about my medical care then I appoint my Attorney to represent my views about them if I am unable to do so'. [Only LPAs can authorise personal welfare decision making. EPAs are restricted to financial issues.]

Re Candy (order of Senior Judge Lush made on 18 March 2010)

The donor appointed two attorneys to act jointly and severally.¹⁴ She then imposed the following restriction: 'neither of my attorneys will act without the approval of the other'. The restriction was found invalid because it is inconsistent with joint and several appointments. This condition would have been valid if the attorneys had been jointly appointed.

b. Orders made by the Court on LPAs

Re Azancot (order of Senior Judge Lush made on 27 May 2009)

A personal welfare LPA contained a restriction which required that the attorney 'may only act under this power in the event that the donor is physically or mentally incapacitated'. The words 'physically or' were severed from the LPA, as the MCA prescribes that a personal welfare attorney may only make a decision if the donor lacks *mental* capacity to make it.¹⁵

Re P (order of Senior Judge Lush made on 9 June 2009)

The following restriction was found to be contrary to the joint and several appointments of three attorneys: 'I require that two attorneys must act at any one time so that no attorney may act alone.'

Re Collis (judgment of Senior Judge Lush made on 27 October 2010)

An application was made to the Court to cancel the registration of an LPA on the grounds that the donor lacked mental capacity to create an LPA at the date of execution. In his judgment, Senior Judge Lush set out the law relating to capacity to create an LPA.¹⁶ First, he summarizes the law relating to capacity to create an EPA (in particular Re K, Re F [1988] 1 All ER 358) and then he points out the relevant differences in the case of LPAs. The different requirements include:

¹⁴ <http://www.justice.gov.uk/guidance/protecting-the-vulnerable/mental-capacity-act/orders-made-by-the-court-of-protection/index.htm> (03.25.2011).

¹⁵ Ibid.

¹⁶ Ibid. An extract of the judgment is also available at the Public Guardian's website.

- an understanding that the LPA cannot be used until it is registered by the Public Guardian (this is not the case with an EPA);
- an understanding that, unlike an EPA, the donor can revoke an LPA at any time when he or she has the capacity to do so;
- an understanding that LPAs, unlike EPAs, are subject to the provisions of the Mental Capacity Act 2005 and, in particular, sections 1 (the principles) and section 4 (best interests);
- the requirement of the MCA that the donor shall be aware of the foreseeable consequences of not executing an LPA.

2. Cases related to the appointment of deputies

Re P [2010] EWHC 1592 (COP)

The case concerned the appointment of Derek Paravicini's parents and sister as financial and welfare deputies to Derek. Section 16 (4) of the MCA states that 'a decision by the court is to be preferred to the appointment of a deputy'. Justice Hedley acknowledges that the MCA seemingly suggests that the appointment of deputies shall be rare. However, he claims that in the case of family members Courts should be more sympathetic to their requests to be appointed as deputies.

An almost *contra legem* interpretation complemented with the following philosophical reasoning about the role of state in modern societies:

'... in a society structured as is ours, it is not the State ... 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.'¹⁷

There seems to be a discrepancy between this decision and the next two cases which follow the instructions of the MCA more closely.

Havering London Borough Council v LD and KD [2010] WTLR 69; KD and LD v Havering London Borough Council [2009] EW Misc 7 (EWCOP)

LD suffers from spastic quadriplegia and cerebral palsy, microcephaly and has a moderate to severe learning disability and epilepsy.¹⁸ He had been in the effective overall care of his mother (KD), but due to her own mental health problems, she was unable to provide sufficient care for LD after 2009. The Havering Council applied to the Court of Protection requesting, inter alia, that the Council be appointed as LD's personal welfare deputy. Judge Horowitz ruled that – besides the fact that deciding the case summarily was inappropriate – the District Judge had wrongly appointed the Council as personal welfare deputy without proper consideration of the requirements of the MCA (i.e. that the appointment of personal welfare deputies should only happen in *exceptional*

¹⁷ Re P [2010] EWHC 1592 (COP) para. 8. See also Alex Ruck Keene and Victoria Butler-Cole, 'Court of Protection Update: August 2010', 39 Essex Street, 17/8/10.

¹⁸ KD and LD v Havering London Borough Council [2009] EW Misc 7 para. 4.

circumstances, for example in cases where the protected person is at risk of harm from family members or there is a long history of disputes between the carers).

London Borough of Havering v LD and KD [2010] COP 1144388/03 (25 June 2010)

The judgment of Judge Horowitz was affirmed by HHJ Turner QC on appeal. In paragraph 42, he held that ‘specific decisions of the court are to be preferred to the ongoing appointment of a deputy and when a deputy must be appointed it is to be for the narrowest scope and the shortest time reasonably practicable in the circumstances’. He also ruled that ‘mere convenience to a local authority to avoid having to come to court’ was not relevant when it comes to the appointment of deputies (para. 43).

G v E [2010] EWHC 2512 (COP) (Fam)

This case reaffirms the opinion articulated in the previous case. Baker J refused to appoint E’s carers as either welfare or financial affairs deputies. He ruled that routine decisions concerning E’s day-to-day care (like holiday or respite care) can be taken by the carers without being appointed as deputies and if disagreement arises between the carers and/or other professionals, an application should be made to the Court of Protection to settle the dispute.¹⁹

This case is the continuation of G v E & Others [2010] EWHC 621 (COP) (for that case, see the DoLS briefing).

Baker v H & another [2009] WTLR 1719 (COP)

The applicant, Mr Baker is the professional property and affairs deputy of H, an 8 year old child who suffered serious brain injury as a result of mismanagement of his birth. There was a settlement with the hospital under which H received a lump sum of £1,211,714 and annual periodical payments (commencing at £25,000, rising to £32,000 at age 11 and £85,000 at age 18).²⁰ A house was purchased for H, leaving around £445,000 of capital and £25,000 yearly income under the control of Mr Baker. The first instance Court required that Mr Baker gives a security of £750,000 which he claimed to be disproportionate. Judge Hazel Marshall reduced the amount of security to £175,000 and elaborated on a list of factors that the Court of Protection shall take into account when setting securities for deputies.²¹ These factors are:

- The value and vulnerability of the assets which are under the control of the deputy.
- How long it might be before a default or loss is discovered.

¹⁹ G v E [2010] EWHC 2512 (COP) (Fam) para. 62.

²⁰ Baker v H & another [2009] WTLR 1719 (COP) para. 9.

²¹ Ibid. para. 55. See also: Court of Protection Report 2009, p. 17.

- The availability and extent of any other remedy or resource available to P in the event of a default or loss.
- P's immediate needs in the event of a default or loss.
- The cost to P of ordering security, and the possibilities and cost of increasing his protection in any other way.
- The gravity of the consequences of loss or default for P, in his circumstances.
- The status, experience and record of the particular deputy.

3. Substituted decision making – capacity and best interests assessment

a. Best interests assessment:

Re P [2009] EWHC 163 (Ch)

The Court of Protection was requested to appoint a deputy and execute a statutory will on behalf of a permanently incapacitated person. Lewison J interpreted the '*best interests*' requirement of the Mental Capacity Act. He argued that it is not a test of '*substituted judgement*' (what the person would have wanted, as in the MHA), but rather it requires a determination to be made by applying an *objective test* as to what would be in the person's best interests. He writes that '*the decision maker must form a value judgment of his own giving effect to the paramount statutory instruction that any decision must be made in P's best interests*'. Wishes, feelings and beliefs of the protected person should be taken into account (as explained in section 5.38 of the Code of Practice and in section 4 of the MCA) but they will not necessarily be the deciding factor.

Re S and S (Protected Persons), C v V [2009] WTLR 315

This case stands in opposition to the previous one. Judge Marshall held that where the protected person does express a wish or a view, which is *not irrational, impracticable and irresponsible*, then it should carry great weight in assessing the best interests of P.

Mr and Mrs S (aged 83 and 81, respectively) executed an Enduring Power of Attorney appointing their daughters (C and V), jointly, to be their attorneys. C refused to register the EPA, since she was not convinced about her parents' incapacity. V applied to the Court of Protection to be appointed as receiver (deputy) for her parents. The district judge established the incapacity of Mr and Mrs S and appointed V as their deputy. Judge Marshall overruled this order. She argued that the wishes of Mr and Mrs S, namely that 'if both daughters were unable to act jointly, neither of them should act singly' had not been taken into account. This is neither an irrational nor irresponsible requirement. Thus, she appointed an independent deputy in place of V.

An NHS Foundation Trust v D [2010] EWHC 2535 (COP)

This case concerned the medical best interests of D, a woman with schizophrenia, who was suffering from a prolapsed uterus, but believed 'that there is a conspiracy on the part of medical personnel to subjugate and experiment upon her, if not kill her'. The court was told that if she is left untreated, her condition could prove fatal. Macur J concluded that it was in D's best interests to retain her in hospital, to conduct the necessary examinations and thereafter operate her using all such restraint (physical or chemical) as necessary.

DH NHS Foundation Trust v PS [2010] EWHC 1217 (COP)

This case concerned a 55 year old woman with learning disabilities who refused to undergo surgery aimed at removing the cancer from her uterus. The judge ruled that it was in the patient's best interests to undergo operation and authorised the necessary use of force to sedate her and convey her to hospital.

b. Capacity assessment

A Primary Care Trust v P and AH (2009) EW Misc 10 (EWCOP)

P, aged 24, suffers from mild learning disability and a severe form of uncontrolled epilepsy. P lived for the majority of his life with AH who adopted him in 1993. There had been lengthy disputes over the treatment of P's epilepsy between AH and the medical authorities. At a certain point AH decided to withdraw all of P's anti-epileptic medication which caused life-threatening and prolonged seizures and resulted in P's hospitalization. The applicant (the Primary Care Trust) wanted to provide P with independent living accommodation with limited contact with his mother. AH sought to resume the care of P on a full time basis.

Hedley J stated that cases where a) a person is unable to *understand* the information relevant to the decision, b) is unable to *retain* that information or d) is unable to *communicate* his decision are relatively easy cases for capacity assessment. Difficult cases, such as this one, are related to section 3 (1) (c) MCA [the capacity actually to engage in the decision-making process].

The judge ruled that P lacked capacity. He took the following factors into consideration: (1) P's epilepsy, (2) P's learning disability, (3) P's enmeshed relationship with his mother, (4) P's inability to visualise any prospect of having a different view to his mother. The judge ruled that it was P's best interest to be removed from his mother and placed to a different environment.

It was one of the first CoP cases that were open to the public. The media was allowed to attend the hearing under the condition that the parties would not be named.

An independent living environment does not usually entail deprivation of liberty. However, the Court ruled that in this case it did so, because it severely limited the contact between P and his mother. Thus, the Court 'obliged' P to become independent from his mother.

A previous decision was delivered in the same case by Judge Potter in **A Primary Care Trust v AH [2008] EWHC 1403 (Fam)**.

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

Mr S, a 77 year old man, after suffering a stroke requested help at home with various chores. He befriended Mrs D, who became his primary carer. S gave gifts worth over £500,000 to Mrs D. S's financial deputy (his daughter) questioned the validity of these donations on the basis of incapacity. Mrs D sought a declaration from the Court that S possessed mental capacity when giving the mentioned gifts.

Justice Henderson stated that 'the fact that the decision is an unwise one does not, of itself, justify a conclusion of lack of capacity' and that 'a person in his lifetime has the freedom to act in a manner which is (for example) unwise, capricious, or designed to spite his relations'.²²

However, after having conducted his analysis, he came to the clear conclusion that S lacked capacity because he was unable to understand the information relevant to the decision, unable to retain it, and unable to use or weigh it as part of the decision making process.

Both cases are 'hard cases' in the sense that they are situated on the border between mental capacity and incapacity: the Court of Protection had to establish the lack of capacity to establish its jurisdiction. Nevertheless, certain *vulnerable person with mental capacity* can still enjoy protection under the inherent jurisdiction of the High Court. The inherent jurisdiction of the High Court was developed to cover the Bournemouth gap (i.e. to protect vulnerable and usually mentally incapacitated people). With the MCA and the setting up of the Court of Protection, those who lack capacity started to fall under the Court of Protection's jurisdiction, while the High Court retains its jurisdiction over those with mental capacity.

See: **A Local Authority v DL (2010) EWHC 2675 (Fam)** (the case of an elderly couple being abused and exploited by their son)

D Borough Council v AB (Rev 1) [2011] EWHC 101 (COP)

Alan has moderate learning disability. He had been living with a man called Kieron with whom he entered into homosexual relationship. Alan was also reported to 'harass' underage students in public. The local authorities sought an order authorising a restriction of contact between Alan and Kieron (and between Alan and another person) so as to prevent further sexual relations taking place. The order was granted by the District Judge. Since then Alan has been subjected to close supervision to prevent any further sexual activity on his part, other than private masturbation.²³

The test of capacity to marry was previously established in a set of High Court decisions. A distinctive feature of this test is that it is status-specific and not spouse-specific. A person either has

²² D v R (Deputy of S) and S [2010] EWHC 2405 (COP) para. 39.

²³ D Borough Council v AB (Rev 1) [2011] EWHC 101 (COP) para. 8.

the capacity to marry generally, or not.²⁴ The test of capacity to marry is closely related to the test of capacity to consent to sexual relations and the latter cannot be set higher than the former, 'for it would be an absurd state of affairs if a person had just sufficient intelligence to consent to marriage but insufficient capacity to consent to its consummation' (*analogia legis + argumentum a maiori ad minus*).²⁵ Thus the *test to consent to sex* is also *act specific* and according to the freshly devised test of Mostyn J, it requires the understanding of:

- The mechanics of the act
- That there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections
- That sex between a man and a woman may result in the woman becoming pregnant

According to the facts, Alan had little or no understanding of these conditions. The judge ruled that Alan does not have capacity to consent to sexual relations. However, he ordered the local authority to provide Alan with sex education in the hope that he thereby gains capacity. He ordered to revise the matter after nine months.

The act specificity of the test has been challenged in other decisions. In **R v C (Gary Anthony) [2009] 1WLR 1786**, Baroness Hale states: 'It is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.' This approach in the present case could have resulted in a less restrictive judgment (which e.g. authorises the relation between Alan and Kieron but not with others).

D County Council v LS (2010) EWHC 1544 (Fam) (COP)

This case examined the implications of R v C to a previous CoP decision. Although the original decision was not altered, Wood J stated that capacity requires not only an understanding of the relevant information but also the ability to retain and weigh it in the balance. Capacity to consent to sexual relations (and capacity to consent to marriage) is person and situation specific.

²⁴ Ibid. para. 16.

²⁵ Ibid. para. 15.

4. The Jurisdiction of the Court

Re F [2009] EWHC B30 (Fam)

The case deals with the test which has to be satisfied with regard to a person's capacity in order to found the jurisdiction of the Court of Protection under section 48 of the MCA (i.e. to make interim orders). The District Judge refused to make an interim order in the case of Mrs F because there was no conclusive evidence that she lacked mental capacity (the assessors had different and rather inconclusive opinions). The High Court stated that it is sufficient that the individual *may* lack capacity to establish the Court's jurisdiction under section 48 (i.e. there is 'good reason to believe' or there is 'a real possibility').

Re P and OM (unreported, 26 November 2008)

The High Court confirmed that the Court of Protection had jurisdiction in health and welfare matters over P, an incapacitated British citizen residing abroad. The Court ordered P's son to return his mother from Guyana to England in order to make decisions concerning her health and welfare. The Court's jurisdiction was founded upon the fact that paragraph 7 of Schedule 3 to the MCA gives jurisdiction over an adult *habitually resident* in England and Wales, and the Court accepted that a person cannot change their habitual residence once they lose their capacity (P was habitually resident in England and she was moved to Guyana after becoming incapacitated).

A somewhat similar question arose in the case **Re MN [2010] EWHC 1926 (Fam)**. The judge had to face the question whether the Court of Protection should recognise and enforce an order of a court of competent jurisdiction in California requiring the return of an elderly lady with dementia to that State. (For a detailed analysis of the case, see: Alex Ruck Keene and Victoria Butler-Cole, 'Court of Protection Update: August 2010', 39 Essex Street)

London Borough of Enfield v SA, FA, and KA [2010] EWHC 196 (Admin)

This case considers whether hearsay evidence is admissible in the Court of Protection.²⁶ SA suffers from a degenerative brain disorder (leukodystrophy) and epilepsy. The local authority applied to the CoP for an order to remove SA from the family home where she was *allegedly* the victim of physical abuse. It would have also prevented SA's removal from the UK for the purpose of marriage in Bangladesh. The judge held that the CoP (unlike other courts in most cases) can admit hearsay evidence. After admitting and examining the evidence, the Judge found that the allegations of

²⁶ Hearsay evidence is an oral or written statement made by someone who is not a witness in the case but which the Court is asked to accept as evidence for the truth of what is stated. See Elizabeth A. Martin (ed.), *A Dictionary of Law* (Oxford: Oxford University Press, 1994), p. 251.

physical assault were not proved but the allegations about making arrangements to have SA married were proved.

YA(F) v A Local Authority & Ors [2010] EWHC 2770 (Fam)

The question of whether the Court of Protection has jurisdiction to award damages for breaches of ECHR rights has been considered in this case. Charles J found that the Court of Protection has jurisdiction to award damages under the Human Rights Act.