Introduction

Following on from our previous updates on the work of the House of Lords Committee, below is a summary of the oral evidence heard since our last newsletter. It is possible to follow the progress of the Committee’s work on the dedicated web page where you will find full transcripts of the uncorrected oral evidence.

8 October 2013 – Social Work Evidence

On 8 October 2013, the Committee heard evidence from:

- Anna Ribas Gonzalez, British Association of Social Workers (BASW)
- Robert Nisbet, BASW
- Dr Ruth Allen, Chair of the Mental Health Faculty, The College of Social Work

Reasons for non-compliance by social workers with the Act and proposed solutions: Dr Allen spoke of the mismatch between the importance of the MCA 2005 and the weakness of the regulation, monitoring and governance surrounding it, which compared unfavourably to the MHA 1983. She also identified the difficulties with ensuring proper training and development of social workers, as well as the extent to which there was an underestimation of the extent to which the Act required a cultural and attitudinal shift in relationships between professionals and service users.

Non-compliance by other professionals: Robert Nisbet said that the areas of non-compliance that he had experienced was predominantly within frontline health professionals across primary care services, which he identified as being down to the fact that a considerable effort had gone into training care homes and social care staff, with health colleagues being relatively neglected or assumptions being made about the extent to which they were being trained. He also identified the challenges that the MCA 2005 posed to those used to the traditional ‘doctor knows best’ model. Dr Allen agreed with this, and argued that social workers should have the lead role in relation to systems where the MCA 2005 is being implemented in some form.

The application of the MCA 2005 in family/informal care settings: Robert Nisbet acknowledged that the profession had not done very well in terms of educating the public in terms of what the MCA 2005 is about. Whilst he indicated that he wanted to feel it was an Act which was wholly supportive of the role of families, he accepted that professionals had a considerable amount of work to do to bring that across, something that was not aided by the prevailing mood of distrust towards social workers.

Sanctions: Whilst recognising the role of the CQC, Dr Allen recognised that there had not been sufficient focus on the part of senior leaders on the organisational risk of non-compliance, such that it was too easy at the moment not to do very well with the MCA 2005.

Safeguarding: Dr Allen acknowledged that safeguarding had ‘absolutely’ taken precedence...
over the implementation of the MCA 2005 in its fullest form, whereas in fact safeguarding and personalisation are two sides of the same coin. Safeguarding therefore should be light-touch, intervening just enough to make the difference to keep the person safe. Robert Nisbet agreed that the emphasis had been upon risk-aversion, and emphasised the difficulty of being brave enough to allow unwise decisions, in part because of the power of the media. He stated that the consequential veering towards overprotection and safeguarding sometimes undermined some of the very important principles behind the MCA 2005. Anna Ribas Gonzalez in an answer to a subsequent question noted the weight traditionally placed on the duty of care owed by local authorities and the responsibility to manage risk, which ‘definitely’ influenced the perception of professionals as to what is best for the person.

**Code of Practice:** Robert Nisbet agreed that revisions to the Code of Practice would not necessarily make any substantial difference if it was not observed at the level of the local authority and the individual practitioner. Anna Ribas Gonzalez noted that she would wish to see the recent case law as to best practice be provided as guidance. Her main concern was to see better description in the Code of Practice as to what ‘significant decisions’ mean.

**Assessment of capacity and best interests:** Dr Allen recognised and regretted the difficulties posed for the proper assessment of capacity by the ‘assess-provide, assess-provide’ model which undermined the development of meaningful relationships with clients for appropriate lengths of time. Robert Nisbet also noted the extent to which professionals were not very good at showing their workings, so that, whilst they were very good at coming up with the answer, they were not good at showing how they came to that answer. Especially where records are based around tick boxes, it was very difficult to ascertain what really informed the decision, a ‘depressing’ state of affairs, obscuring the motivation of the professional and that they have actually considered the MCA 2005. Dr Allen added that staff often did not realise that it was an aspect of legally defensible decision-making, especially given the enormous interference with rights that was involved in intervening against someone’s apparent wishes. Robert Nisbet agreed that it would help, and would be good practice, for standard forms to have boxes requiring the assessor to put in the justification for the conclusion that they were reaching, but that this could not stand in isolation. He identified the need for proper supervision and scrutiny of how social workers were discharging their responsibilities. Dr Allen agreed with the need for supervision, but noted that this was not just a problem with the newly qualified, identifying the more frequent problem of customs and practices setting in without challenge. She acknowledged, though, that the MCA 2005 was conceived at a time when resources were greater, and that there was a lot less flexibility now. Efficiency and effectiveness, however, was not just about money, but included the need to work better with families, networks and the residual capacity of service users to enable them to make decisions and care for themselves.

**Access to information about the MCA 2005:** Robert Nisbet agreed that there was a lack of coordination around the provision of clearly accessible guidance to the operation of the MCA 2005, and, further, that, despite a number of very good publications, they were not grabbing people’s attention. Dr Allen identified the importance of the role of the third sector in translating some of the guidance as well as providing advocacy services. Robert Nisbet, though, identified that the voluntary sector could not take the necessary steps unless properly funded. Anna Ribas Gonzalez emphasised the importance of ensuring that awareness was raised before the point of crisis.

**Bringing about a culture shift:** Dr Allen recognised that the national programme of training best interests assessors under DOLS had been patchy in its quality, and suggested that it might be necessary to look to the development of national programmes of training that were in some way accredited for leaders in the MCA. The DOLS framework was a start, but would need to be built upon and revised to take account of the overall implementation of the MCA, in a similar way to what had happened in relation to safeguarding. Robert Nisbet identified concerns in relation to the quality of teaching of social work students and practitioners in relation to the law, and also as to the updating of social work training qualifications. Dr Allen considered that
the Professional Capabilities Framework provide the right framework to build proper post-qualification and CPD frameworks. She added that she considered that there needed to be an equivalent to the AMHP training framework for adult social work.

**Mediation:** Robert Nisbet stated that there were many cases which came before the Court of Protection which would have benefited from earlier intervention and earlier mediation between the parties, but emphasised that mediation is not a cheap alternative because it has to be done correctly, professionally and competently, and requires a degree of independence. He emphasised, however, that there was no reason why, as with family proceedings, mediation should not be the first port of call, rather than going to court. He noted, though, that there was an incorrect tendency to see IMCA services as mediation, which they were not.

**CQC:** Robert Nisbet felt that CQC was now making a difference having picked up the MCA and DOLS, but that there was a long way still to go. He considered that there would be benefit to CQC to having a similar body to the MHAC, particularly to inspect supervisory bodies under the DOLS regime. Dr Allen emphasised the need for CQC to help providers the confusion between the MHA and the MCA.

**13 October 2013 – Medical Professionals**

On 13 October 2013, the Committee heard evidence from:

- **Professor Sue Bailey OBE,** Vice Chair, Academy of Medical Royal Colleges and President of the Royal College of Psychiatrists
- **Dr Tony Calland MBE,** Chair of the Medical Ethics Committee, British Medical Association
- **Dr Dorothy Apakama,** Consultant in Emergency Medicine, College of Emergency Medicine
- **Professor Amanda Howe,** Honorary Secretary, Royal College of General Practitioners
- **Dr Julie Chalmers,** Lead on Mental Health Law, Royal College of Psychiatrists

**Compliance:** In response to it being to put her that non-compliance with the MCA 2005 was particularly high in emergency medicine and GP services, Dr Apakama noted that the College of Emergency Medicine had not conducted any research so as to have reliable data on the level of compliance, but anecdotally the level of compliance in emergency departments, whilst varying, was very good in most hospitals. Professor Howe questioned whether the evidence received by the Committee reflected actual experience of consultations or hearsay. She also speculated that some of the evidence received by the Committee reflected not a failure to assess capacity correctly but rather a failure to explain how capacity was being assessed. She put before the Committee information from a doctoral thesis examining the implementation of the MCA, which indicated that GPs and practice managers were very familiar with the MCA 2005, in part because there was clear guidance available, but were less comfortable with question of advance care planning. One particular problem she highlighted was the question of how effective recording of information relating to patients could be made to travel with them. Professor Bailey considered that there were unlikely to be legislative solutions to increase compliance: it was fundamentally something to be bedded in from the first day in medical school, and then to be kept updated on a dynamic basis thereafter.

**Capacity assessment:** Professor Howe amplified a suggestion in the written evidence from the Royal College of GPs that there be a capacity assessment in the annual health check to make clear that this was intended to suggest that the GP would use the opportunity of a non-acute situation to check with the patient is as enabled as possible to be engaged with their health care and to record any issues that may arise from that. Dr Apakama’s evidence was to the effect that Emergency Department staff had to do many capacity assessments (it forming an element of informed consent) and were very good it. Dr
Calland’s evidence was that assessing capacity was something that happened relatively infrequently in the GP setting, and that real difficulties arose where capacity is one issue rolled up with many in a consultation and may not be the primary one when the patient walks in. There was, therefore, some real difficulty in guaranteeing that the legislation is going to be complied with completely in such circumstances. Dr Chalmers’ evidence was to the effect that psychiatrists were generally very familiar with the legal test of capacity, but that the assessment of capacity was really quite difficult in clinical practice. The test required a binary assessment of capacity which can be a very fine balance, and two psychiatrists could come to completely different views on the same set of facts. Dr Chalmers further considered that there had been an overreliance on the cognitive component of the capacity test, whereas the very difficult part of the test was that of weighing in the balance. She considered that the effect of emotion was very underplayed, in particular in the case of people with borderline personality disorder, where the person can understand the treatment proposed, but their emotions can cause them to have problems weighing things in the balance; she considered that this was not fully appreciated by non-psychiatric doctors.

Best interests: Dr Apakama emphasised the difficulty of conducting best interests assessments in emergency situations because of a lack of information as to what the patients’ previous, wishes, beliefs or values were in the circumstances. Professor Howe, addressing the GP setting, considered that consultations were relatively ‘flat’ in hierarchy, but acknowledged that there may be a bias towards the doctor thinking that a test would be in the patient’s best interests because of clinical research; this did not mean that the legislation was unfit, but re-emphasising what it meant for modern clinical practice. Dr Chalmers stressed that she considered that psychiatrists were more familiar with working in a way which mirrored s.4 MCA 2005 in care planning, and the utility of the formal best interests process to enable very difficult decisions to be made. Dr Calland emphasised the importance of not limiting ‘best interests’ to medical factors alone, and of taking into account the relationships of the patient with others.

Do Not Attempt CPR: Dr Calland considered that the reason why difficulties had arisen in respect of DNACPR orders was because of failures in communication. Dr Apakama stressed that DNACPR orders were only made in the emergency setting in the rare circumstances where an advance decision is in place. Decisions not to attempt CPR in the emergency setting were made on a multidisciplinary basis. Professor Howe, speaking to the GP setting, noted that the issue tended to arise in the context of advance care planning, which was something that GPs were much less confident in addressing.

Deprivation of liberty: Dr Chalmers did not consider a definition of DOL was either possible or necessarily desirable, and that the view taken by Strasbourg was much more holistic than the ‘bricks and mortars’ view taken by the MHA 1983. She further emphasised the power of DOLS safeguards which, when they worked well, could promote autonomy and enhance people’s experience of being in a care setting. She indicated that she would find helpful in the A&E setting to have guidance as to what was not usually viewed as a deprivation of liberty. Dr Apakama echoed the need for guidance as to specific examples of care or action that would amount to deprivation of liberty. Dr Chalmers emphasised the utility of differentiating between what deprivation of liberty means in particular settings.

IMCAs: Dr Calland indicated a concern that IMCAs were potentially being used unnecessarily in medical settings, although he accepted that in some cases the decision was a multi-agency scenario in which the seemingly minor elements of the decision were an important part of the whole; he also accepted that his use of the word ‘trivial’ to describe some classes of decision was a fine example of medical paternalism.
• Terry Dafter, Joint Chair of the Mental Health Policy Network, Association of Directors of Adult Social Services

• Lorraine Currie, MCA/DoLS Manager at Shropshire Council

• Patricia Kearney, Director of Innovation and Development, Social Care Institute for Excellence (SCIE)

• Sanchita Hosali, Deputy Director, British Institute of Human Rights

• Paul Gantley, former Implementation Manager for the Mental Capacity Act, Department of Health

**Safeguarding/the MCA:** Lorraine Currie emphasised the danger that the MCA 2005 was easily subsumed within the greater work of safeguarding and its distinctiveness was lost. Terry Dafter added that, from the directors’ point of view, safeguarding was one of the areas which they were most vulnerable on. Lorraine Currie emphasised that the big difference between safeguarding and the MCA was that practitioners acted pretty much alone – even if it was the result of an multi-disciplinary meeting, but ultimately one practitioner puts their name to the assessment. It was, in consequence, important to recognise that not all staff were equally competent to take responsibility for all levels of best interests decision-making.

**Compliance:** Lorraine Currie emphasised the importance of the funding that had been received to conduct an audit of the MCA in practice, and the lessons that had been learned in consequence, in particular as to develop sharing of good practice regionally. She stressed, though, the fact that the local and national leads from the DoH had been lost too early.

**Best interests:** Both Lorraine Curie and Terry Dafter stressed the extent to which best interests decision-making did – and should – take into account resources.

**DOLS:** Lorraine Currie suggested that she was not entirely confident that DOLS referrals were being made when they should, and attributed this in part to the need for further training on the part of managing authorities, and to encouraging a climate where referrals were put in even if the outcome was that the safeguards were not ultimately applicable. She stressed the fact that the MCA 2005 was the forerunner of good practice in care homes. Terry Dafter agreed that part of the reason for the variation in the number of DOLS authorisations was down to training and awareness, although it was also down in part to need. Lorraine Currie emphasised the need for best interests assessment to be kept separate from the process of authorisation under the DOLS process.

**Access to justice:** Lorraine Currie made clear that she considered that the Court of Protection needed to be more accessible and cheaper, including by the need for removing the need for expert witnesses as routine, and by making better use of regional hearings. She would not support a tribunal system unless they were resourced and representation was not made freely available to people; she placed more emphasis on the need to speed up and make cheaper litigation in the Court of Protection.

**Implementation of the MCA:** Paul Gantley considered that the implementation of the MCA 2005 (and then the DOLS safeguards) was effective if considered from a narrow perspective of the processes and targets set by the DoH. That is not the same as saying that the Act was fully implemented or understood. The end of the implementation work came because of a wider political moment, and whilst there was a legacy, what was lost was a central focus. Resources are now dedicated to activity and numbers, rather than providing guidance. Patricia Kearney for SCIE noted that there was not yet a rigorous evidence base for the impact of the MCA 2005; whilst the Act was for the most part well-drafted, that was only the start of what was needed in the form of a major professional behaviour change as well as public awareness and perception. Sanchita Hosali for the BIHR emphasised their experience of there being a real lack of understanding of the MCA 2005 and what it really means in practice, and the almost complete invisibility of the role of human rights. Paul Gantley and Patricia Kearney agreed as to the difficulty of interpreting data (e.g. as to variation in DOLS authorisations).
**Guidance and publicity:** Paul Gantley accepted that the element of the MCA 2005 relating to planning for the future had not had as much publicity as others. Sanchita Hosali emphasised the difficulties caused both by the lack of central guidance and the fact that the Act fell between the MOJ and the DoH. She also suggested that the Code of Practice was seen as impenetrable, and as an attempt to explain the law, rather than an explanation of what it means in practice – in (negative) contrast to Codes of Practice in the equality law field. She emphasised on behalf of the BIHR that a rights-based approach helped set a framework to bring together the MCA, the MHA and safeguarding policies. Patricia Kearney suggested that the MCA was not unique in terms of the width of the audience of the policy, another example being the Putting People First concordat. SCIE had learned a lot from the implementation process as to how to focus a public campaign, and Ms Kearney noted that it was necessary to start with a triangle of safeguarding, the MCA and dignity within a human rights approach. Paul Gantley suggested that the challenge had not been unique, but it was rare in terms of the number of people who had to receive the information. In retrospect, he would have spent less time on the law and more time on trying to find the entry point in to the person who has to understand the law. He further emphasised the need not to think in silos, e.g. by way of diagnosis, but to extending clinical interactions or diagnostic moments into wider planning and awareness (e.g. diagnosis of dementia leading to a discussion of advance care planning). In a subsequent answer, he suggested that the route to better publicity lay in the dissemination of the experiences and stories of the ordinary members of the public and recipients of the services, which is not a matter for the professionals. Patricia Kearney suggested that there was still a need for simple and straightforward publicising about the role of the Court of Protection, for instance in Tesco.

**Compliance:** Paul Gantley suggested a reason for reports of wider non-compliance on the part of medical professionals was that social care had a legal framework that set things in motion, based on the question of whether there was a legal duty to do anything. On the other hand, medical professionals tended to rely in the first instance on trusted clinical practice, rather than to stop and consider potential legal consequences. He also suggested that clinicians often did not go through a proper consultation process because they had already identified what would be the right intervention for the person. To bring about a change in this approach required a significant cultural change through negotiation, debate and a certain amount of pain. Patricia Kearney noted that the recent SCIE guidance on DOLS was the first time that they were able to put in practice examples because SCIE was starting to get them, and the moment should be seized as data analyses and good practice was starting to happen. Both Paul Gantley and Sanchita Hosali agreed with the need to make clear what good practice is.

**29 October – The Regulators**

On 29 October 2013, the Committee heard evidence from:

- David Behan, Chief Executive, Care Quality Commission
- Andrea Sutcliffe, Chief Inspector of Adult Social Care, Care Quality Commission
- Paul Buckley, Director for Education and Standards, General Medical Council
- Marc Seale, Chief Executive and Registrar, Health and Care Professions Council

**Compliance:** David Behan emphasised that from the CQC perspective, the issue was now not about understanding the law, but about what represents best practice. There was, however, a variability in knowledge in this regard, including amongst CQC staff. Mental capacity and the practice around mental capacity needed to feature in all of the questions that CQC asked in respect of services. He considered that too much had been given to the lawyers, and not enough to what best professional practice should be, and that he would be looking to professional associations and regulators (including the GMC, with whom the CQC had recently signed a Memorandum of Understanding) to take the lead in relation to this to debunk the complexity. This fed into the definition of good professional practice, which was based on personalised care. This was not something that required a lawyer,
but professionals who know how to assess capacity and then put together care plans that identify how someone’s care is going to be promoted. He emphasised that mental capacity legislation represented a framework within which best practice needed to be demonstrated, allied to the promotion of well-being contained within the Care Bill.

**Training:** The CQC’s evidence demonstrated, David Behan said, that there was too much variability in (a) people’s understanding of the legislation; and (b) how that understanding influences their practice. The CQC was not the answer, but was part of the answer; the answer had to come from the way that commissioners – health and local authorities – commission services and the way that providers take on their responsibility to ensure that their staff are aware of the legislation and are able to operate it. It was essential that all staff understood the legislation, not so that they could tick a box but so that they understand what the practical implications were. The solution was not to push people through mental capacity training, but rather to give workshops so people can understand the practical implications, and coaching through appropriate decisions.

**Leadership:** David Behan emphasised the importance of the relationship between leadership culture and what gets done in organisations. This had been re- emphasised by the Francis Report, which was seminal because it had caused a debate about quality, safety and the importance of listening to people. The CQC would therefore be looking to inspect the quality of leadership including as to approach taken to mental capacity issues.

**Protection vs autonomy:** David Behan noted the extent to which there had been defensiveness around practice. Personalisation was the best way to bring about the empowering of people and to ensure that there was a human rights approach to practice. Services for people with learning disabilities and acute health needs were not as they could be, as had been demonstrated by the Mencap report *Death by Indifference*. Andrea Sutcliffe emphasised that if all of the services they inspected were assessed as to how they treated people with learning disabilities or dementia, this would give a very good insight into the way services were being delivered for everybody.

**Statutory powers:** David Behan said that he did not consider that the CQC needed further statutory powers in this regard. The issue with monitoring was as to the way in which the legislation was being delivered and supported to be delivered.

**DOLS:** David Behan accepted that there was more still to do for the CQC in terms of the monitoring of the legislation relating to DOLS. Part of this was to ensure that the CQC was able to model appropriate behaviour. Rachel Griffiths noted that where there were still Mental Capacity Act Leads in local authorities and hospitals, the understanding of the Act was stronger.

**Compliance in the health setting:** Paul Buckley accepted that the primary failing in terms of implementation was in relation to professional standards. The failure to understand or apply principles within the MCA 2005 was a symptom of that more fundamental professional failing. The primary failing is not in relation to the Act itself. It was one removed from the underlying professional failure to act in accordance with the standards that were set. Clearly, however, there was a relationship, because if the importance of the Act were properly understood, perhaps we may not see some of these failures that had been so well documented. He emphasised that one of the challenges faced was the sheer amount of information which needed to be assimilated. The GMC was therefore working on trying to find ways in which to simplify and find ways in which to engage doctors in some of the simple principles with which they could feel confident. The GMC was clear that any medical student graduating needed to be able to assess a patient in relation to a capacity issue. Marc Seale emphasised the importance of continuing professional development.

**Areas of difficulty in the health setting:** Paul Buckley noted that doctors struggled from time to time with dealing with patients with learning disabilities. There may also have been a tendency in the past to think issues around capacity were for particular specialities, when they were in fact issues for all medical professionals in contact with patients. Marc
Seale identified difficulties in the practicalities of managing the situation where paramedics were treating patients at home where they were being told that there was an advance decision in place.

5 November 2013 – The NHS and Carers

On 5 November 2013, the Committee heard evidence from:

- Hilary Garratt, Director of Nursing – Commissioning and Health Improvement, NHS England
- Moya Sutton, Head of Safeguarding, NHS England
- Dr Katherine Rake OBE, Chief Executive Officer, Healthwatch England
- Sheila Scott OBE, Chief Executive, National Care Association
- Nadra Ahmed OBE, Chairman, National Care Association

Reforms to the NHS: Hilary Garrett and Moya Sutton were asked about how the MCA featured in the recent changes to the NHS and explained the duties on various individuals and systems in place to ensure these were implemented. A rapid appraisal was carried out within the first few months after the changes were made on 1 April 2013 in relation to the MCA. That appraisal found great support for the change from 1 April 2013 with the relevant local authority becoming the supervisory body and also found that the CCGs felt they had access to advice about the MCA as and when they required it. Hilary Garrett explained that the authorisation for some CCGs was initially delayed because they did not yet have a DOLs lead with a clear job plan and clear policies and procedures to support that role.

Dr Rake spoke to the new role of Healthwatch, which looks at the health and social care system through the eyes of the individual consumer. She commented that whilst there is enormous potential, individuals are incredibly confused by the array of reforms and do not currently feel adequately listened to, engaged and involved in the decisions that affect their lives. Healthwatch wants to deal with the application of the MCA from an evidence base at a local level and take that up to a national level. Dr Rake identified individuals having ready recourse to an IMCA as a critical issue.

Complaints advocacy: Dr Rake stated that the current system of complaints advocacy is enormously complicated and very few people are aware of that function or what to expect. She suggested that there should, as a minimum, be some standards for complaint advocacy across health and social care with further work done to raise awareness that this type of support is available if required.

Monitoring and ensuring compliance with the MCA: Hilary Garrett and Moya Sutton discussed the collection of data about the implementation of the MCA and the way in which NHS England intends to address regional variation. In terms of ensuring adherence by GPs and other providers, they also spoke of the organisational arrangements and accepted that training was an issue, suggesting that NHS England would use revalidation and use the standard contract to ensure that took place as well as leadership at the local area level and the Chief Inspector of Primary Care.

Sheila Scott and Nadra Ahmed expressed the view that the MCA has been embraced by care providers as providing a valuable best-interests framework. Nadra Ahmed stated that in her experience where there were problems with the MCA this arose from a lack of multi-agency and multi-disciplinary working. Sheila Scott and Nadra Ahmed spoke of the need to involve care workers and families in training as well. They lamented that barriers were in place that made it very difficult for them to work with CCGs, for instance in providing training around the MCA. Sheila Scott and Nadra Ahmed both also expressed concerns that local authorities were moving people out of residential placements and into supported living, often without adequate assessments of the individuals or engagement with the staff who have been caring for them or their families.

Deprivation of liberty: Sheila Scott said there was inconsistency as to what was considered to
amount to a deprivation of liberty, for instance between different local authorities, and said there had been more deprivation of liberty authorisations than she had expected. She also stated that everyone said the paperwork was too complex. Nadra Ahmed agreed that there was not a national understanding of DOLS at present and consideration should be given to simplifying the process.

12 November 2013 – The Lawyers

On 12 November 2013, the Committee heard evidence from:

- Alex Ruck Keene, Barrister, 39 Essex Street
- Alex Rook, Partner, Public Law Department - Irwin Mitchell
- Julia Lomas, Partner, National Head of Court of Protection Department - Irwin Mitchell
- Michael Mylonas QC, Barrister, Serjeants’ Inn Chambers

The effectiveness of the MCA in changing practice: Michael Mylonas referred to the MCA’s codification of the way in which courts approach health and welfare decisions, suggesting there is perhaps now more uniformity as a result. Alex Ruck Keene said there is only so much the Court of Protection can do to bring about the culture change – a phrase used by almost all the witnesses giving evidence before the Committee – the MCA embodies. He spoke of the importance of publicity, citing the effect of the Neary judgment as an example, noting that the current President of the Court of Protection has placed great emphasis on enhancing transparency. Alex Ruck Keene also referred to the judgment of Baroness Hale in Aintree v James, emphasising that the purpose of the best-interests tests is to consider matters from the patient’s or from the person’s point of view. Alex Rook drew attention to the fact that the Court of Protection is forward-looking and as a consequence rarely looks backwards to ask what has happened and examine whether that was right or wrong. He said that the current costs rules meant that quite often there was no order that an authority paid the legal costs of proceedings, even where there had been non-compliance. Julia Lomas welcomed the development of a welfare jurisdiction, which was extremely helpful when issues arose for clients whose property and affairs she managed. She accepted that there had been an increase in the costs of running a deputyship, as opposed to a receivership, but explained this was partly due to the need to consult P on decisions that affect them on a day-to-day basis.

The types of decisions that should be ruled on by the Court of Protection: Alex Ruck Keene and Alex Rook were of the view that it would be very helpful to have a document that set out clearly the sorts of decisions that should be taken to the Court of Protection and who should be taking them. Alex Rook stated that it should be clear that local authorities were under an obligation to take matters to court.

The desirability of a statutory definition of deprivation of liberty: Michael Mylonas and Alex Ruck Keene referred to the anticipated judgment from the Supreme Court in Cheshire West but, over and above that, emphasised the importance of appropriate training for the people who are responsible for taking decisions about deprivation of liberty at a ground level to ensure they are empowered and confident to make the right decision. Michael Mylonas suggested an amendment to section 16A of the MCA to cover scenarios where someone is detained under the Mental Health Act but who requires treatment that is not for his or her health disorder, to address the so-called “new Bournewood Gap”.

Financial abuse of people who lack capacity: Julia Lomas set out her concerns about the effectiveness of the Office of the Public Guardian in terms of providing robust and effective supervision to prevent financial abuse of those who lack capacity, acknowledging at the same time that the OPG is extremely short of resources. She suggested that she would like to see more programmes to increase understanding and awareness of the Court of Protection, such as leaflets in every doctor’s surgery.

Regionalisation of the Court of Protection: Julia Lomas stated that with the increase in volume of applications concerning property and affairs it would help to have the courts regionalised as well as better training, to ensure greater consistency.
Alternatives to the Court of Protection: Michael Mylomas, Alex Ruck Keene and Alex Rook spoke in favour of an alternative mediation process that involved trained mediators being brought in at any early stage of the dispute resolution process. Alex Ruck Keene said that he had seen a number of cases where a good mediator has brought about a truly astonishingly good outcome and that mediation also has a crucial role to play in trying to salvage relationships that need to continue after the judge and the lawyers disappear. Alex Rook agreed that mediation would be more cost efficient, even though there still needs to be a paid mediator and families will often feel, particularly if they are in dispute with a local authority, that they want to have the benefit of legal advice before they go to mediation. Michael Mylomas suggested that as a precursor to bringing a case to the Court of Protection the local authority or primary care trust might be required to take a decision about mediation and perhaps approach a mediator. Alex Rook gave detailed reasons why the lack of legal aid is preventing people from accessing the Court of Protection.

Alex Ruck Keene and Julia Lomas did not support adding an intermediary-tier of a tribunal like-nature to the Court of Protection hierarchy. Alex Ruck Keene noted that there are already nominated district judges, who sit almost all the way around the country and suggested that the efficiency of the current system might be better addressed through a calibrated approach to expert evidence. Julia Lomas said that she would like to see the number of associated officers increase.

Reforms proposed by the President of the Family Division: Alex Ruck Keene referred to the detailed recommendations made by the Rules Review Committee, which he was pleased to see the President has indicated he intends to progress as quickly as possible. He recognised that, although property and affairs accounts for 94% of the court’s work, it is the health and welfare side that takes up the court’s time with big, long-running disputes and there needs to be a tightening of the way these are managed, more quickly, more efficiently and more proportionately. Julia Lomas said she would welcome the efficiencies that might be introduced as a result of bringing the court under the Family Division but was concerned that property and affairs matter should not simply be given to family judges as the core specialism of Court of Protection judges should be preserved or perhaps enhanced.

12 November 2013 – Deprivation of Liberty in Practice

On 12 November 2013, the Committee also heard evidence from:

- Elmari Bishop, Statutory Development and Training Lead/ MCA and DoLS, South Essex Partnership University NHS Foundation Trust (SEPT)
- Mark Neary, Parent of adult son found to be unlawfully deprived of his liberty by London Borough of Hillingdon

The benefits of the MCA 2005: Mark Neary stressed that he considered that, without the MCA 2005 having been in place, his son would now be in the care home in Wales that Hillingdon wanted to send him to. Had the Act not been in place, it would not have been possible to get the support of an IMCA or to bring the matter to Court. Elmari Bishop considered that the MCA 2005 was a vital piece of legislation, but that it is not always applied in the spirit that was intended. In particular, although it was intended to be an empowering piece of legislation, there were examples where it was being used to compel and coerce.

Non-compliance: Elmari Bishop identified the main reason for non-compliance amongst professionals as being a lack of understanding, as opposed to a lack of knowledge. Whilst professionals often blamed the MCA 2005 for being over-complex, in reality it was quite a simple and workable piece of legislation being applied to very complex situations. Another reason for failure was that there was a lack of support for individual practitioners from managers and organisations; there were also insufficient penalties for non-compliance. Mark Neary considered that, as with most things in the adult social world, the MCA 2005 was at some point going to be hijacked and what started as a brilliant idea was going to become mis-appropriated for cost-cutting or other agendas.
Elmari Bishop reiterated that she considered that there was nothing wrong with the MCA 2005 (although the DOLS could perhaps be simplified). There was, however, a cultural change required that required decisions to be made in a different professional framework. The biggest challenge was to involve the family, which required a real cultural change. Mark Neary considered that the MCA 2005 lacked sufficient emphasis upon scrutiny, but agreed with the need for – and the size of – the cultural change.

**Obstacles to proper decision-making:** Elmari Bishop considered that most professionals now understand that capacity needs to be assessed, and the process, but that it not always applied within the principles of the MCA 2005. The biggest problem, she considered, not with the assessment of capacity, but the subsequent decision-making process. She considered that the DOLS process was unduly complicated, and that what a deprivation of liberty was too open to interpretation; a simplified definition and clearer guidance would assist. Mark Neary considered that too often the best interest decision is made before capacity is considered; there was also a failure to include those who know the person best in the process of capacity assessment; he also considered that it was very difficult to assess a person who is experiencing something for the first time.

**Statutory definition of deprivation of liberty:** Elmari Bishop reiterated that this would be helpful. Mark Neary emphasised that he considered that the problem was the name, and wanted to have it renamed something like ‘appropriate care safeguards.’ He was strongly in favour of a statutory definition, weighed against what the person’s life was like before and after the deprivation took place. Elmari Bishop agreed that the name caused difficulty because of the negative connotation.

**IMCAs:** Mark Neary did not consider that the IMCA who had acted in his son’s case had felt any pressure to follow the local authority line; he wished that it was possible to approach an IMCA directly rather than having to be referred by the local authority. Elmari Bishop said that she considered that IMCAs were quite good and a really valuable resource, but that they did not have sufficient power to challenge. She had seen cases where social workers had made official complaints and IMCAs had backed off. She considered that IMCAs should be commissioned entirely independently from local authorities, and that there should be easier ways in which to access them.

**Improving implementation:** Elmari Bishop identified the importance of managing change, managing resistance to change and getting support from all levels from board level down. The main source of resistance was from professionals who felt that their professional decision-making was being challenged. It was necessary to explain things to staff in ways that they understood – the most difficult group to get on board being doctors. The change that she saw was not so much from her work, but from the support they started to get from different professional groups who then carried the message forward. The other thing that helped were a few bad CQC inspections, in particular focusing on DOLS. This meant that the commissioners then caught on to the idea of the MCA and DOLS and started requiring 3-monthly reporting. It was therefore not just the internal support but the external drivers that were necessary. This included the risk of substantial damages, such as those awarded in the G v E case, as well as the risk from CQC inspections. Mr Neary said from his experience of running an internet group relating to the MCA that the usual story from those family members who contact him is that no authorisation is in place when it should be, and that there is a substantial power imbalance between the number of professionals making best interests decisions against one or two family members and the person being deprived of their liberty.

**Lack of information:** Mark Neary emphasised the enormous change that took place at the transition from children’s to adult services. He emphasised that the families of the people moving from children’s to adult services needed transition material around the MCA 2005. In particular, he stressed the need for education of family members to identify for them that they are making best interests decisions against one or two family members and the person being deprived of their liberty.
their rights and what powers the professionals do and do not have: as with the position under the MHA 1983. Mr Neary considered that the Code of Practice was pretty good, although he noted its costs, and suggested most families would not go out and buy a copy. He noted that there were some useful internet sites, particularly around carers.

DOLS variations: Mark Neary could not make head or tail of the regional variations, and the fact that it was difficult to assess what they meant absent information as to the number of people within the scope of DOLs. Elmari Bishop considered that it was very hard to quality control DOLS because it was specific to individual cases; the only way she found could be done in the psychiatric setting was to look at all the patients and the ones who might fall within the scope of DOLS and see whether it has been considered for them. This made it all the more important that there was a strong internal monitoring system to monitor quality, along with yearly audits. She noted that, whilst there were some peer reviews done between neighbouring local authorities, there was no standard national procedure; she agreed that there was no method for ensuring consistency throughout the country.

19 November 2013 – the Official Solicitor and Public Guardian

On 19 November 2013, the Committee heard evidence from:

- Alastair Pitblado, Official Solicitor to the Senior Courts
- Alan Eccles, Public Guardian and Chief Executive, Office of the Public Guardian

Changes to the case law as a consequence of the MCA: Alastair Pitblado was asked whether he considered that the case law had changed significantly as a result of the MCA. He said that the outcome is essentially the same for property and affairs applications, although the test is now best interests whereas before it was, to a large extent, substituted judgment. He pointed to the enormous increase in the number of health and welfare applications and commented that the issues being determined by the court are much more diverse than the issues that were being determined by the Family Division under the inherent jurisdiction before the MCA came into force.

Deprivation of liberty: Mr Pitblado did not think it was possible to define deprivation in the statute as the question of whether or not a person is deprived of their liberty is a question that relates to Article 5 of the convention. As long as Article 5 remains in force by virtue of the HRA, the interpretation of Article 5 by the European Court of Human Rights is the relevant interpretation. He supported amending the MCA to address the so-called new Bournewood gap, where someone is further deprived of their liberty within a secure setting, explaining that Schedule 1A is currently too tightly drafted to include cases where, for instance, a person requires restrictive treatment that does not fall within the scope of the Mental Health Act or someone in an ordinary prison is placed in solitary confinement.

Financial abuse of people who lack capacity: Mr Pitblado said he had been told by his property and affairs lawyers that the changes brought about the MCA have meant there is greater scope for property and affairs deputies, previously receivers, to use P’s funds without authority, either through ignorance or intention. Under the previous regime, receivers only had access to P’s income, not capital, and if they wanted to apply P’s capital they needed the prior authority of the court. He expressed concern that the deputyship order is drafted in such a way that many deputies often consider that they can do what they want with P’s money, even to the extent of paying it to themselves or members of their family. He said that on the welfare side there had been greater protection and emphasis on the rights of those who lack capacity as a result of the MCA.

Costs and delays in the Court of Protection: Mr Pitblado explained that he acts as a litigation friend of last resort and that he sometimes has to refuse cases if there is no available funding. He agreed that obtaining expert reports can add significantly to the costs of delays but nonetheless supported this on the basis that neither he nor his staff, nor the solicitors he retains on behalf of P, are expert social workers. They are not experts in the creation of care plans; in the assessment of whether a care plan is a
good care plan; in whether or not it is safe for the
to go home; if they do go home what
adjustments are necessary to enable them to go
home; or whether a particular care home is
providing adequate care. He stated that very
often he did not consider it was possible to do
without experts, where the court is properly
assessing best interests, and referred to the
availability of obtaining reports under Section 49
report of the MCA. He accepted that generally
that the use of experts does increase delays but
said that he would not be asking for experts
unless he thought it was appropriate in that case
and necessary for him to properly represent P.
He said that it was his policy to try and get
welfare cases finished as soon as he can, to free
up case managers to manage other cases and
because the litigation is not good for P or P’s
family. He takes the view that unless there is
currently an issue to be determined, we should
try and get the case finished, rather than waiting
to see what happens in six months.

In relation to property and affairs applications, Mr
Pitblado said that he had been assured that these
were not taking any longer than they used to in
the old Court of Protection.

**Publicity in the Court of Protection:** Mr Pitblado
said that he never tries to stop the press from
attending Court of Protection cases on the basis
that they are private; although he will be
concerned to protect P’s anonymity. He referred
to the current process whereby the press apply to
be allowed to attend and then ask the judge for
permission to report on X, Y and Z. It would be
preferable, he said, if the press could attend
without that process, which adds to the overall
costs and was not something he felt he needed to
be looking at. He stated it was very important
that judgments are published, commenting that
they largely are now, in part because it is
otherwise easy for disgruntled family members to
distort the facts. He was supportive of more
cases being heard closer to where people live,
recognising that it is not necessary for all cases to
be heard by judges of the High Court.

**Office of the Public Guardian:** Alan Eccles
explained that the MCA had given a clear focus to
the primary responsibilities of the Office of the
Public Guardian (“OPG”), namely the registration
of lasting powers of attorney, the supervision of
court-appointed deputies and safeguarding
investigations. There has been a significant
increase in the OPG’s workload, year on year.
Over 49,000 lasting powers of attorney were
registered in 2008/9 and it is predicted that
300,000 will be registered this year. The OPG is
currently consulting on four main areas:
simplifying the application forms for lasting
powers of attorney, putting its registers online, a
review of supervision and the potential to be able
to make a full application for a lasting power of
attorney online. Mr Eccles spoke of the
desirability of having a register that could be
searched 24 hours a day, including for instance by
health professionals in Accident & Emergency,
who needed to see whether or not an LPA exists
and, if so, what it says. The consultation is
considering whether care professionals should
have access to more information on an online
register than a member of the public.

In terms of supervision, Mr Eccles said that in
some ways he was quite pleased that he did not
have any supervisory responsibility for attorneys,
which would be a virtually impossible task given
the numbers involved. He said that his office
instead issues guidance and practice notes for
attorneys and gave the example of a recent
practice note about gifting. He does have a clear
supervisory function for deputies. All lay
depuies are contacted by the OPG within eight
weeks of their appointment, explaining the role
of the OPG and asking about how they are getting
on with their order; are they comfortable with
the order; do they understand the responsibilities
that the order places on them; how are they
planning to deal with P’s assets; are there some
big decisions over the next year that need to be
made; how are they going to deal with that? It is
essential to guide people to the right behaviour in
the first twelve months of appointment, whether
they are a new professional who has never acted
as a deputy before or a lay person. Every deputy
is also required to complete an annual report
and explain how they have involved P in the
decision-making process during that year.

In response to a question about whether it is the
role of the Public Guardian to exercise some
control over the costs incurred by deputies, Alan
Eccles noted that the costs of deputies are
controlled by a practice direction issued by the
Court of Protection but mentioned that a recent
stakeholder group meeting agreed that it is the
role of the Costs Office to tax the detail once costs have been incurred but the OPG might get involved with the question of proportionality of costs. Fraud committed by attorneys or deputies is most commonly drawn to the attention of the OPG by whistleblowers, but the OPG’s biggest ambition is to develop a secure online account that could, for instance, flag large transactions and require deputies to give an explanation.

Mr Eccles supported the calls made by his predecessor for a power to compel third parties to provide financial information and for the power to delay registration of an LPA, pending an investigation into any concerns. He said that in the last six months his colleagues within the Ministry of Justice have agreed to work up a policy solution to these issues.

26 November 2013 – The Judges

On 26 November 2013, the Committee heard evidence from:

- Mr Justice Charles, Judge in Charge of the Court of Protection
- Senior Judge Denzil Lush, Senior Judge of the Court of Protection
- District Judge Margaret Glentworth
- District Judge Elizabeth Batten

Proposals to assist the Court of Protection to fulfil its mandate: The judges were asked whether the mandate and overall structure established for the Court of Protection by the MCA were appropriate and, if so, whether there are statutory amendments or other proposals that the Committee could make that would assist the court to fulfil its mandate or otherwise improve its efficiency, accessibility or the administration of justice. Mr Justice Charles said that he was not initially a supporter of having a specialist statutory court but thinks that the court has become appropriate. He said there were two main themes, which have been going on a long time and could significantly improve the performance of the court. The first is a system to sensibly transfer cases to the circuits or regions that require a hearing, and the second is a failure to keep the rules under review and up to date.

Mr Justice Charles also said that the transparency provisions need to be reviewed, noting that new family rules introduced very helpful provisions as to what court papers could be used for. He suggested that it would be incredibly useful if there was a column saying to whom court papers could be disclosed and for what purpose, for example “recognised researcher” for “recognised research” would enable people carrying out research to get access to papers without having to obtain court orders.

Mr Justice Charles also identified two specific areas where statutory change would be welcome. He said that section 16(4) of the MCA, which says that preference should be given to a court order over the appointment of a deputy, should be revisited as there are costs implications, so far as P is concerned, in most applications about property and affairs and greater flexibility would be of assistance with regard to welfare deputies. His second suggestion was revisiting Schedules A1 and 1A, which are extremely difficult to follow. He said that when you write a judgment on them you feel as if you have been put in a washing machine and spin dryer and then come out.

Senior Judge Lush said that, in a way, the MCA represents thinking from the early 1990s and he is not entirely convinced that it is consistent with Article 12 of the UN Convention on the Rights of Persons with Disabilities and the Committee might want to explore statutory amendments that give a wider range of powers to the court.

The types of decisions that should be ruled on by the Court of Protection: Mr Justice Charles and District Judge Batten said they did not have experience of cases in the Court of Protection that should not be there. Their concern was that they only see the cases that come before them and do not know what other cases are out there that perhaps should be coming to the Court of Protection.

Statutory definition of deprivation of liberty: Mr Justice Charles said that he will applaud if the Supreme Court comes up with a definition of deprivation of liberty, noting that it will be very difficult to have a definition that adds greatly to the application of Article 5 and the relevant European and English cases. He was doubtful that a statutory definition would assist but
suggested that if greater clarity comes from the Supreme Court that could be put into the Code of Practice.

**Best interests test:** Senior Judge Lush expressed the view that it would be better if the MCA had retained the concept of benefit, which existed in this jurisdiction since time immemorial, rather than using a test of best interests or substituted judgment. He said that he finds best interests quite difficult to apply in safeguarding cases for example, as the checklist in section 4 of the MCA sets out a series of hurdles and in some cases the factors that are to be taken into account do not work, for instance where the views to be taken into account are those of the people who are committing the offences.

**Code of Practice:** Senior Judge Lush raised a concern that it is very hard to get a copy of the Code of Practice and that he often sees cases where, for instance, attorneys have been involved in excessive gifting and perhaps fraud and have not read the Code. He suggested it would assist if the Code were broken down into chunks of no more than 50 pages in length, to be sent out to attorneys when lasting powers of attorney were registered. He said that he thinks the Code, more than anything else in the MCA, triggers the way we look at people with disabilities and how they are treated and it is not reaching the public.

**Evidence as to capacity:** District Judge Batten said that in terms of the capacity assessment that is undertaken when an application is being made to the Court of Protection, the functional-test part of the assessment - whether someone can understand, retain, use, weigh or communicate information - can be completed very well by people such as speech therapists, occupational therapists, mental health nurses or social workers with experience of doing capacity assessments. Mr Justice Charles spoke about the difficulty for the court in assessing litigation capacity where a party asserts they have litigation capacity but other parties have a real doubt about that. He referred to the need for experts who are asked the appropriate questions and the difficulties faced by the Official Solicitor acting as litigation friend, given his significant resource problems. District Judge Glentworth said that she has not experienced a problem in finding appropriate experts in her geographical area but acknowledged that there can be delays where there is a question as to whether a person could, with assistance, acquire the capacity to deal with matters, as that needs to be investigated.

**Alternatives to the Court of Protection:** The judges were asked to give their views on the desirability of an intermediary level of justice at the tribunal level, similar to the mental health tribunals, as a way of making the Court of Protection more accessible. Mr Justice Charles said that retaining the court is a better solution, provided that it has a greater local presence than it does now, because the issues that arise under the MCA are not as hard-edged as those that arise under the Mental Health Act and the best interest decision to be made is often multifaceted and dynamic. It would probably be quite difficult to reconstitute the same tribunal if more than one hearing was required. Mr Justice Charles said that the Court of Protection operates on a reasonably informal basis and is not much more formal than a tribunal. District Judge Glentworth echoed the need for greater decentralisation and spoke of the real problems caused by the fact that, for example, they are unable to issue applications in Leeds. She said that there is in fact increasing centralisation in the court service. Senior Judge Lush noted that the Law Commission’s report on mental capacity in 1995 discussed the question of whether there should be a court or a tribunal in considerable detail and, having initially thought that a tribunal was better, went for the court. Similarly, the House of Lords Select Committee on Medical Ethics decided that a court was more appropriate than a tribunal for this jurisdiction.

**Communicating with the public:** Mr Justice Charles said that he had written asking judges to make their judgments public documents by putting them on BAILII or the 39 Essex Street website, commenting that although there is a historical reluctance to do so, he thinks this will change. He agreed with the suggestion made by Senior Judge Lush that the Code of Practice could be made available in bite-sized chunks. The simplified forms also have a role in explaining the processes of the court and what will happen on a step-by-step basis. Mr Justice Charles said it would be helpful if there was a website written by the judges in the Court of Protection. District Judge Batten said that this would allow careful
thought to be given as to how to present information in a way that is accessible to the public and users of the court.

**The presence of P during hearings in the Court of Protection:** Senior Judge Lush estimated that P is present during between 5 and 10 percent of cases, based on anecdotal evidence. At present there are not particularly clear guidelines on when P should be present. They are always welcome to attend proceedings but are not necessarily expected to attend. When they are able to do so, their oral evidence can carry significant weight. District Judge Glentworth said she had checked her records and seen that P had been present in approximately 10 percent of her cases. She said she applied similar principles to those she applies in child care proceedings if she is asked to see a child, making sure that they are aware she will listen to what they say but not setting up any false expectations that if they tell her their wishes this will happen. In property and affairs cases where there is a warring family and the court is concerned about P not being represented, District Judge Batten explained it was possible to obtain further evidence, for instance through a section 49 report from a social worker, and Mr Justice Charles said that it was always possible to join P as a party, and ensure they have an appropriate litigation friend.

**Jurisdiction of the Court of Protection:** The judges were asked if there are recurrent themes or particular problems that arose because cases before the Court of Protection inevitably involve other statutes. Mr Justice Charles referred to the administrative law problem, which he is able to solve by sitting in the Administrative Court but other judges are unable to do that and need to send the case up. Mr Justice Charles said that the inherent jurisdiction of the High Court can sometime be used to avoid cases causing considerable distress to family members and P because it raises issues about capacity. Using the inherent jurisdiction can be a way of relieving a burden on P, who may be particularly vulnerable and in the middle of a warring family, because if P should not have the responsibilities that the family are trying to place on them the court can make that decision instead.

**Publicity in the Court of Protection:** Mr Justice Charles said that he understood that the President’s proposals are a work in progress and he envisages an incremental approach. He noted that the President is currently looking at judgments, but thinks that he will undoubtedly turn his eye to access to court papers and how these can be used. Mr Justice Charles said that to his mind the impact on the proceedings of letting in more sunlight and more transparency outweighs the difficulties that in some cases some people might have in having their privacy invaded. He pointed to the advantage of both sides of the case having greater access to the media, thereby reducing the chances that the reporting will be very partisan. He said the other major advantage of greater openness is that it would improve the performance of all involved in the court process.

**Mediation:** The final question for the judges was about the lack of incentive for family members to reach agreement before coming to court in property and affairs cases where, for the most part, the costs are met from P’s funds. They were asked whether there was a case for requiring mediation in advance of coming to court, with some sanction that if, despite the mediation, they went to court they might be faced with the costs. District Judge Glentworth said that there is no mediation service allied to the work of the Court of Protection in the way that the Family Division has a first appointment system. In response to whether it might be possible to use a local authority mediation service, District Judge Batten said that, particularly in property and affairs cases, it can be that nobody in the family wants anything to do with the local authority, so it may be that the local authority is not the best resource for that. She was not aware of any structure in place but said that anything that encourages the parties to see how damaging it is to their family relationships and particularly how distressing it would be must be to P, would help, as would thinking about the financial cost and the likely outcome.
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