Update on practice and procedure in the Court of Protection

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Introduction

1. This paper focuses upon four developments of relevance to practitioners in the Court of Protection:¹

   (i) Committal for contempt of court;

   (ii) Litigation friends and the desirability of P being a party to (and participating in) proceedings;

   (iii) Expert evidence; and

   (iv) Legal aid funding.

Committal for Contempt of Court

2. The Court of Protection has come under intense media scrutiny in recent weeks in connection with the ‘Wendy Maddocks’ case. Ms Maddocks was committed to custody for five months for contempt of court back in August 2012, after she was found to have breached the orders of the court by removing her father from his care home, taking him to see solicitors and bringing him to court, and harassing staff employed by social services and the care home. Her case made headlines when Ms Maddocks spoke to the press upon her release, after serving six weeks of her sentence.² The full transcript of the committal decision and the initial best interests decision (where Ms Maddocks was warned about possible contempt proceedings) are now available online.³

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¹ It draws upon recent 39 Essex Street newsletters but the views expressed are my own.


³ The committal decision is reported as Stoke City Council v John Maddocks [2012] EWHC B31 (COP) and is available at: www.bailii.org/ew/cases/EWHC/COP/2012/B31.html. The best interests decision is reported as SCC v LM [2013] EWHC 1137 (COP) and is available at: www.bailii.org/ew/cases/EWHC/COP/2013/1137.html.
3. The resultant blaze of publicity led Chris Grayling, Secretary of State for Justice, to write to Sir James Munby, the President of the Family Division and the President of the Court of Protection, on 2 May 2013 in the following terms:\(^4\)

“As you will be aware, the issue of transparency in the Court of Protection has recently attracted media attention. While we want to ensure that we balance the interests of safeguarding vulnerable adults with those of increasing the transparency of proceedings, I would welcome your views on how we might best achieve this.

... I would like to invite you to consider if you might extend the scope of your work on transparency in the family courts to include arrangements for the Court of Protection.”

4. On 3 May 2013 the President and Lord Judge, Chief Justice of England and Wales, responded to the media attention by issuing Practice Guidance on Committal for Contempt of Court.\(^5\) The Practice Guidance, which applies to the Court of Protection and the Family Division, is a clarion call for open justice:\(^6\)

“It is a fundamental principle of the administration of justice in England and Wales that applications for committal for contempt should be heard and decided in public, that is, in open court.”

5. The Court of Protection (like the Family Division) is vested with a discretionary power to hear a committal application in private.\(^7\) The Guidance is clear that this discretion “should be exercised only in exceptional cases where it is necessary in the interests of justice.”\(^8\) The Guidance does not indicate when this test of exceptionality might be met; but it is clear that neither the proceedings being in the Court of Protection, nor a risk that private information will be disclosed, will suffice.\(^9\)

6. The Guidance provides that committal applications should, at the outset, be listed and heard in public.\(^10\) Before deciding to continue the hearing in private, the judge should give a judgment in

\(^4\) The terms of the letter were reported by the Local Government Lawyer: see www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=14079%3Ajustice-secretary-calls-for-review-of-transparency-in-court-of-protection&catid=52&Itemid=20

\(^5\) The Practice Guidance is available on BAILII at: www.bailii.org/ew/cases/EWHC/COP/2013/B4.html.


\(^7\) Court of Protection Rules 2007, Rule 188(2) provides that when determining an application for committal the court will hold the hearing in public unless it directs otherwise.

\(^8\) Practice Guidance on Committal for Contempt of Court, paragraph 3.

\(^9\) As publication can be restrained by an appropriate order: Practice Guidance on Committal for Contempt of Court [2013] EWHC B4 (COP), paragraph 3.

\(^10\) Practice Guidance on Committal for Contempt of Court, paragraph 5.
public setting out the reasons for doing so. If, at the conclusion of any committal application heard in private, the court finds that a person has committed a contempt of court, it should sit in public and state:

(a) the name of the person;

(b) in general terms the nature of the contempt of court in respect of which the committal order is being made; and

(c) the punishment being imposed.

This requirement is already contained in the Court of Protection Rules. In the words of the Guidance:

“This requirement is mandatory; there are no exceptions. There are never any circumstances in which any one may be committed to custody without these matters being publicly stated.”

7. Finally, the Guidance imposes a responsibility upon a judge who makes a committal order to take appropriate steps to ensure that a transcript is prepared at public expense and a copy is published on the BAILIIL website and is also available upon payment of an appropriate charge.

Litigation friends

8. P requires a litigation friend if he or she is to be a party to proceedings in the Court of Protection. The present demands upon the finite resources of the Official Solicitor to act in this capacity are well known. In light of this, and bearing in mind that the Official Solicitor is a litigation friend of last
resort, courts are looking increasingly often to alternative litigation friends including family members, IMCAs and relevant persons representatives to fulfil this role.\textsuperscript{18}

9. However, in some cases where a suitable litigation friend cannot be found and the Official Solicitor is unable to act (for instance because there is no means of ensuring that the associated legal costs will be met), some judges have reportedly asked whether P in fact needs to be a party at all. Analysing the Court of Protection Rules, this appears to be a legitimate question. The starting point in the Rules is that P will not necessarily be a party, as Rule 73(4) provides: "\textit{Unless the court orders otherwise, P shall not be named as a respondent to any proceedings.}” There is no separate rule about when it will be appropriate to join P. The general rule about joining parties, found in rule 73(2), requires the court to be satisfied that it is "desirable to do so for the purpose of dealing with the application.” There are various provisions in the Court of Protection Rules for notifying P at various stages of the application.\textsuperscript{19} There are also rules about P participating in the hearing; but these provide only that the court may hear P on the question of whether or not an order should be made (whether or not he is a party to the proceedings)\textsuperscript{20} and the court may proceed with a hearing in the absence of P if it considers it would be appropriate to do so.\textsuperscript{21} As such, there is no requirement in the Rules for the court to join P as a party or to expressly address the question of whether P should participate in the hearing.

10. This does not square with the caselaw of the European Court of Human Rights. In \textit{Lashin v Russia} [2013] ECHR 63 the Court considered the participation of Mr Lashin in proceedings to determine his capacity. In the course of its decision the Court expressed concern at his lack of involvement (at para 82):

"As to the procedural aspect of the domestic decisions, the Court first of all observes that ... the domestic court refused to restore the applicant’s legal capacity. The court made this decision without seeing or hearing him (see paragraph 16 above). The Court recalls that in such cases the individual concerned is not only an interested party but also the main object of the court’s examination (see \textit{X. and Y.}, cited above, § 83, with further references; see also \textit{mutatis mutandis}, \textit{Winterwerp}, cited above, § 74). \textit{There are possible exceptions from the rule of personal presence} (see, as an example, \textit{Berková v.}\textsuperscript{18,19,20,21}

\textsuperscript{18} See \textit{AVS v An NHS Foundation Trust} [2010] EWHC 2746 (COP) at paragraphs 12-13 and 45-46 and \textit{AVS v An NHS Foundation Trust} [2011] EWCA Civ 7 at paragraphs 24 and 29; \textit{AB v LCC} [2011] 3151 (COP) at paragraph 17; and \textit{WCC v AB and SB} (COP Case 12194275).

\textsuperscript{19} See Rules 40-49 and 69, Court of Protection Rules 2007.

\textsuperscript{20} Rule 88(1), Court of Protection Rules 2007.

\textsuperscript{21} Rule 88(2), Court of Protection Rules 2007.
Slovakia, no. 67149/01, §§ 138 et seq., 24 March 2009); however, departure from this rule is possible only where the domestic court carefully examined this issue. In the present case, however, the District Court merely stated that the applicant’s personal presence would be “prejudicial to his health”, and there is no evidence that the court ever sought a doctor’s opinion on that particular question, namely what effect appearing in court might have had on the applicant. The Court is not aware of any other obstacles to the applicant’s personal appearance in court. The Court considers that a simple assumption that a person suffering from schizophrenia must be excluded from the proceedings is not sufficient.” (Emphasis added)

11. The Court went on to find there was a breach of Mr Lashin’s rights under Article 8, in part because he was not personally present in court (see para. 93). In light of the European Court’s emphasis on the importance of P participating in proceedings, where this is possible and appropriate, it is difficult to see how it could be consistent with Articles 8 and 6 to make final declarations as to capacity and best interests (or potentially even significant interim declarations on best interests) if P is not a party to proceedings. Although it remains relatively uncommon in this jurisdiction for P to attend a hearing or give evidence, it is highly advisable to give careful consideration to this question and, if it is decided that P is not to attend or give evidence, to record the reasons for this decision.

Expert evidence

12. Expert evidence is pivotal to the outcome of all but the most clear-cut health and welfare cases in the Court of Protection. Such evidence goes to one or both of the key questions the court must determine: capacity and best interests.²² But despite the value that expert evidence often brings to a case, the pressure to justify the instruction of expert witnesses is intensifying in these tight financial times. There are frequently disputes between parties over who will join in the instruction and how expert fees should be apportioned (particularly where side letters are sent or the expert is asked multiple rounds of questions after their report has been written).

13. On my reading of the Court of Protection Rules, there is no power to compel a party to join in the instruction of an expert witness. The only power that exists in this regard is to require two or more

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²² The opinion of a suitably qualified clinical psychologist or psychiatrist is essential in any case where there is doubt as to whether or not P has capacity in the relevant regards. In relation to best interests in welfare proceedings, the court will, rightly or wrongly, often place great weight on the views of an independent social worker. In serious medical treatment cases, the court benefits from an independent second opinion.
parties seeking to submit evidence to instruct a single joint expert. For example, if a local authority does not wish to join in the instruction of an independent social worker (instead inviting the court to rely upon its own social work expertise), it does not appear that the court could compel it or any other party to join in such an instruction.

14. Any party may use an expert report obtained by another party as evidence in any hearing in the proceedings. The main disadvantage of not joining in the instruction is the loss of influence over the selection of the expert and the terms of the letter of instruction. Significantly, even parties that do not join in the instruction may be ordered to contribute to the costs of the expert evidence. Rule 123(6) provides that “The court may limit the amount of the expert’s fees and expenses that the person who wishes to rely upon the expert may recover from another party” and there is a power to depart from the general rule that there will be no order as to costs. In cases where a party materially benefits from the evidence of an expert it has not instructed, there may be a good argument for requiring it to contribute to the cost of obtaining that evidence.

15. The Court of Protection Rules require the court to restrict expert evidence to that which is “reasonably required” to resolve proceedings. It is noteworthy that in the family law arena this was replaced with a test of necessity from 31 January 2013. Even where the court accepts that the evidence is either reasonably required, or indeed necessary, the parties in receipt of legal aid will not necessarily receive funding for expert fees from the Legal Aid Agency (‘LAA’).27

16. Two recent applications for judicial review arising from family law proceedings illuminate the difficulties confronting legally aided parties in this respect. Both cases involve challenges to decisions of the LSC/LAA to refuse to provide funding for the full cost of expert reports.

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23 Rule 130, Court of Protection Rules 2007.
26 Rule 121, Court of Protection Rules 2007.
27 The LAA assumed the role of the Legal Services Commission (‘LSC’) on 1 April 2013.
28 The ramifications of these difficulties are not confined to the legally aided parties: Rule 131 provides that unless the court directs otherwise, the instructing parties are jointly and severally liable for the payment of the expert’s fees and expenses. More generally, if the LAA refuses to pay for expert evidence there will be increased pressure on the other parties to do so. This is likely to be a particular problem for local authorities, to whom the courts may look as an alternative public body for the purposes of funding reports but who have their own severe resource constraints.
JG (A child) v The Legal Services Commission

17. The first case, JG (A child) v The Legal Services Commission [2013] EWHC 804 (Admin), was handed down on 9 April 2013 and is summarised in the May issue of the COP newsletter. In short, the LSC refused to pay for the full cost of an expert report in the context of private family law proceedings, which began when a child’s father made an application for residence and contact. The child was in receipt of public funding but her two parents were not.

18. The district judge in the family proceedings ordered that cost of the expert’s report was to be funded by the child. Her solicitors duly arranged for a report to be obtained at a cost of £12,000 and did not seek prior approval from the LSC. Upon learning of the difficulties with obtaining the necessary funding from the LSC, the judge purported to amend the previous order to add that “the court has carried out a means assessment of both parents and found that they are unable to afford any part of these fees ...”

19. The LSC maintained that it would only fund one third of the cost of the report. That decision was judicially reviewed, and the Law Society and the Secretary of State for Justice intervened. Ryder J acknowledged that there were sound reasons, recognised in the decided cases, why there should be an apportionment of costs in cases where there is joint expert evidence and that it will only be appropriate to depart from the principle of equal apportionment in exceptional cases (at para 51). He went on to say at paras 75-76):

“Where the court has genuine reason to believe that a non-legally aided party may not be able to pay in full for the expert evidence on an equal apportionment basis, the court must undertake a robust scrutiny of that party’s means. Courts should not accept that a person does not have sufficient means simply on the basis of an assertion to that effect by the party looking to avoid payment.

What is a robust scrutiny will depend on the circumstances of the case. An important consideration, however, should be the party’s financial eligibility for legal aid where that still exists. If the party would not qualify for legal aid on the basis of their means, this is a factor which should point very strongly in favour of that party having to pay their full share of the cost of an expert’s report.”

20. Ryder J accepted that if the LSC paid the costs of a report on behalf of a person who does not satisfy the criteria for legal aid eligibility, that person in effect obtains the benefit of legal aid payments to
which he or she is not entitled. He went on to consider the application of Articles 6 and 8 ECHR in the context of family law proceedings and commented (at para 87):

“... At the point where a court has exhausted all of the ordinary mechanisms to obtain evidence that is necessary in order to make a decision that is in the best interests of a child, an access to justice argument may arise. The court like the LSC is a public authority. The LSC (or more accurately now the Legal Aid Agency through the Director of Legal Aid Casework) is required by section 10 of the 2012 Act to make civil legal services available to an individual where it is necessary to make the services available if (a) failure to do so would be a breach of that individual’s Convention rights or any enforceable EU rights to the provision of legal services or (b) it is appropriate that they should be provided having regard to the risk that failure to do so would involve such a breach. The saving provision in the new legal aid scheme succinctly reflects a similar obligation upon the court but the exceptionality of the language should be noted.”

21. Ryder J considered that the orders made by the court were unlawful because the court’s decision was affected by the fact that the child was the only party in receipt of public funding. He summarised the relevant principles as follows:

(i) in the ordinary course, where a single joint expert is instructed, the parties should bear the cost of the report equally;

(ii) the court may not make any different order from that which would ordinarily be made because a party is in receipt of legal aid; and

(iii) where a court has made an order that a party in receipt of legal aid should bear a certain cost, the LSC has the power to refuse to provide funds for those costs, as long as its refusal is not irrational or otherwise unlawful in a public law sense.

22. On the facts of the present case, the LSC’s response was not unlawful. In the course of the judgment, Ryder J noted that there was a duty on the child’s guardian in the family law proceedings to “obtain such professional assistance as is available which the children’s guardian thinks appropriate or which the court directs be obtained”. He stated (at para 15):

“That obligation has been the most elusive component of this case, encapsulating as it does something which the children’s guardian almost certainly intended in the suggestion made to the child’s solicitors: a suggestion which was not carried through into the case management decisions of the court. Had a rigorous analysis occurred of the reason for the request for the expert i.e. its purpose and who wanted it and who might benefit from it, the
order in the case would have reflected not what eventually appeared, namely that the child’s father in this case would be hampered in the presentation of his case without the expert’s report but, that the report was necessary to enable the children’s guardian to perform her duties. Alas, the papers do not provide a clear answer to the question why the children’s guardian could not advise the court from a social work perspective about family relations and functioning or the impact on the child as one would expect if a guardian was saying ‘I need assistance to do my job’. There is no reasoning on the face of the orders of the court or in any record of its proceedings which provides an analysis of what the report was for and hence whether it should have been a report commissioned and funded by one party or a single joint expert report commissioned by all.” (Emphasis added)

R (T) v Legal Aid Agency

23. The second case is R (T) v Legal Aid Agency [2013] EWHC 960 (Admin), handed down on 26 April 2013. There the underlying family law proceedings were brought by a local authority, which sought care orders for six children who had been removed from the care of their parents, Mr and Mrs T. The court granted permission to the four parties jointly to instruct (i) a named adult psychologist to report on the parents and (ii) a well-known service (‘the MFS’) to carry out a multi-disciplinary assessment of the parents and children. The district judge ordered that the following issues should be addressed:

“(a) (i) The attachment between the parents and the children
(ii) The parents’ capacity to meet the needs of the children.”

24. The following further directions were made in relation to the expert evidence:

“(b) the proposed assessment and report are necessary to the resolution of this case for the following reasons: a multi-disciplinary assessment is necessary for the court to determine whether the parents are able to meet the children’s needs.

(c) this case is exceptional on the facts because there are allegations of neglect in respect of six children under 10 years

(d) the costs to be incurred in the preparation of such report shall be paid by the parties in equal shares and are wholly necessary, reasonable and proportionate disbursement on the funding certificates of the publicly funded parties in this case

(e) the court considers the hourly rate of £90 to be reasonable in the context of their qualifications, experience and expertise. Judgment Approved by the court for handing down (subject to editorial corrections) T v Legal Aid Agency
(f) the field in which this expert practises and the particular expertise which they bring to bear on this case is highly specialised. There is no realistic prospect of finding an alternative expert with the necessary expertise at a lower fee.

(g) the issues in this case are not appropriately addressed within the evidence before the Court.”

25. MFS estimated that the cost of its multi-disciplinary assessment would be between £23,550 and £31,650 (based on the rate of £90 per hour). Aware that there were difficulties with obtaining funding approval, the district judge directed that she considered the total amount of £31,650 to be reasonable in the context of the experts’ qualifications, expertise and experience. The order went on to record that their particular expertise is highly specialised and there is no realistic prospect of finding an alternative expert with the necessary expertise at a lower fee. The LSC initially refused to approve some of the costs on the basis that it erroneously believed that part of assessment was not eligible for legal aid (see para 6). The LSC subsequently issued a further decision it calculated that the cost of the report should be £19,170 (over £4,000 less than the minimum amount calculated by MFS) and restricted the prior authority to the solicitors to one quarter of that amount.

26. MFS refused to carry out the multi-disciplinary assessment unless the funding was in place as it explained:

“I have already explained that we are running at a loss, having to charge half of our original fees, and that our NHS Trust will not tolerate further reductions, or acceptance of protracted complications caused by the changes within the LSC and the inconsistencies in how each case appears to be managed.

There is clearly a much wider and significant issue here that needs to be addressed, in particular the impact these delays are having on vulnerable/at risk children and families, a situation which is completely out of our hands.

For the purposes of further clarity and in order to conclude this matter I will explain for a final time the following. We are only ever able to offer external assessments when;

a) based on the suitability of each case

b) when we have availability

c) subject to referral processes being completed within a suitable timeframe, i.e. funding is in place.
It is totally unacceptable that we are approaching the 5 month stage since the SA was sent.

... 

Whilst appreciating how hard you have worked on this referral I had already indicates to you that this case could no longer remain on our waiting list, and unfortunately in light of the above I am confirming that this referral is now closed to our service.”

27. As a consequence of this impasse, an application was made to judicially review the decision of the LSC. Collins J referred to the detailed guidance given on legal aid funding in the context of family law proceedings by Sir Nicholas Wall, P in *A Local Authority v S and others* [2012] EWHC 1442 (Fam); [2012] 1 WLR 3098. That guidance, given almost twelve months ago, is highly recommended to anyone who has not already read it. The key points of interest for present purposes may be summarised as follows:

(i) Where the party or parties who seek to instruct an expert are publicly funded there is no doubt that the LSC (now the LAA) has the power to refuse to fund the instruction or fund the instruction in part only. Such a decision can be challenged by way of judicial review.

(ii) Advocates should explain to the judge why a particular expert is required, noting that the current pressure of work means that the judge may not have time to master the details of the documents in the case but that where possible the court should read the relevant papers and record this on the face of the order.

(iii) Where the court takes the view that the expert’s report is necessary for the resolution of the case, it should say so and should give reasons. The reasons need not be lengthy or elaborate. They must, however, explain to anyone reading them why the decision maker has reached the conclusion he or she has, particularly if the expert’s rates exceed the maximum rates ordinarily allowable. This can be done by way of preamble to the order, or by a short judgment, delivered at dictation speed or inserted by the parties with the judge’s approval.

(iv) There is a need for the LSC (now the LAA) to deal with applications promptly and, particularly if the application is being refused, or only granted to a limited extent, to give its (at least concise) reasons for its decision. Whilst the solicitor seeking prior authority can go
ahead regardless, and instruct the expert at the rate the expert demands, such a suggestion, in reality, is unreal.

28. In a coda to the judgment, the President set out a suggested form of order concerning expert evidence.

29. Returning to **R(T) v Legal Aid Agency**, Collins J set out the guidance from **A Local Authority v S and others** concerning the need for the LSC to give reasons for its decisions and went on to say (at paras 14-16):

“**I echo and endorse what the President there says. While there is no statutory requirement for reasons to be given by the defendant, the law has developed to require reasons where fairness so dictates. Cases such as these where children may be removed from parental care involve Article 8 of the ECHR and the welfare of the child which is paramount. There is an obvious requirement that all proper steps are taken to enable a judge to reach an informed decision when dealing with those rights. The parties and the court are in my view clearly entitled to understand why a refusal to allow what the court has considered necessary has been made so that it can, if appropriate, be challenged speedily.**

The letter [from the LSC] gives no reasons to explain why the full sum put forward is not approved. Since the defendant appeared through its representative, Mr Michael Rimer, at the hearing of **S** it was clearly aware of the President’s guidance. Guidance in this field from so authoritative source as the President, in a reserved judgment after hearing submissions from, amongst others the LSC, gives rise to a public law duty upon the LSC, capable of being enforced, as the President said, by judicial review. Ms Hewson has sought to rely on the real difficulties faced by the defendant in dealing with the increasing number of applications for prior approval. In the **S** case it had been shown that following the new funding order in October 2011 introduced as part of the legal aid reform programme designed to save costs applications for prior approval of experts increased from 216 in November 2011 to 1855 in April 2012. That increase has, I was told, continued. Ms Hewson said that 4 employees in an office in Wales now had to deal with some 100 applications each week. That I suspect was something of an exaggeration but the point she was seeking to make was that the burden on those responsible for making the decision was such that they did not have the time to enter into any discussion nor to give any substantial reasons. Attempts to save costs in one way can have an effect which increases costs in another. If as a result of the new rules introduced in October 2011 greater pressure is imposed resources must be provided to meet that pressure. In **R(H) v Ashworth Hospital Authority** [2003] 1 WLR 127 at paragraph 76 Dyson LJ said this:-

‘I absolutely reject the submission that reasons which would be inadequate if sufficient resources were available may be treated as adequate simply because sufficient resources are not available. Either the reasons are adequate or they are not and the sufficiency of resources is irrelevant to that question.’
These observations apply a fortiori where there is an absence of reasons when reasons are required.

It is also important for the expert to explain why the work which will be charged for is needed, particularly if, as here, the overall figure is large. Those instructed to do work in publicly funded cases must recognise that they will be asked for such explanations and so should spell out in sufficient detail, which need not be extensive, why the work regarded by them as necessary will be needed. It may be obvious in some cases and no more than an indicator of the anticipated hours within a bracket for a particular piece of work may be needed.”

30. Collins J was also critical of the LSC for failing to attend court when first directed to do so by the district judge. The policy of the LSC not to attend hearings, but to offer instead to speak to the judge by telephone, appears to remain in place, despite the fact that it was described by the President in S as “manifestly unsatisfactory”.

31. Critically, Collins J went on to hold that the LSC would need very good reasons to refuse prior approval where a judge had decided, and given reasons why, such expert evidence was necessary (at para.17):

“Now that the instruction of experts can only follow if a judge so orders because he or she is satisfied and gives reasons for being satisfied that it is necessary it seems to me that the [LAA] should only refuse to give prior approval if it has very good reasons so to do. While the judge’s decision is not binding, it must carry very considerable weight. If there is good reason to reject it in whole or in part the [LAA] should engage with the court. This can I suspect be dealt with in many cases in writing. If the judge, having considered the [LAA]’s representations, maintains his or her decision it is difficult to see how a continued refusal to give effect to it could be other than unreasonable. In some cases oral representations may be considered necessary. If the defendant is prepared to engage in this way extra costs will be avoided and it seems to me to be an entirely reasonable way of dealing with the problem. Where, as here there is a bracket, it is difficult to justify approval of a lesser sum than the maximum (assuming the proposed work seems overall to be needed) since, if less than the maximum is carried out, payment cannot be sought for more than is one.” (Emphasis added)

32. On the facts of the case, Collins J stated that no reasons were given. He continued (at para.20):

“This might not have led to any relief beyond a declaration if I were persuaded that the only result could be that the decision was confirmed. Not only am I not so persuaded but I find it difficult to see that it would be reasonable, at least without engaging with the judge whether in writing or orally, to fail to comply with what she has decided is necessary.”

33. The decision of the LSC was quashed accordingly.
Lessons for the Court of Protection

34. What are the lessons from these cases for practitioners in the Court of Protection? There is perhaps a need to approach the instruction of expert witnesses with greater care in some cases. There is a sense that multiple experts in Court of Protection proceedings have become par-for-the-course but the winds of change are blowing. As such, it is advisable to:

(i) observe the requirements of rule 123(2) of the Court of Protection Rules\(^\text{29}\) (as this may avoid disputes between parties or with the LAA down the line);

(ii) invite the court to expressly recite in the preamble to the order:

a. what relevant papers it has read;

b. the reasons why it considers that the expert evidence is necessary or reasonably required to resolve proceedings, which should include the reasons why the evidence would not otherwise be available to it as part of the proceedings;

c. the reasons why the volume of work is required, if it is a particularly complex report;

d. the reasons why there is any need to exceed the maximum rates usually allowable by the LAA; and

e. the reasons why there is any departure from:

\(^{29}\) Rule 123 provides:

(1) Subject to rule 120, no party may file or adduce expert evidence unless the court or a practice direction permits.

(2) When a party applies for a direction under this rule he must—

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

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

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

(d) provide a draft letter of instruction to the expert.

(3) Where a direction is given under this rule, the court shall specify the field or fields in respect of which the expert evidence is to be provided.

(4) The court may specify the person who is to provide the evidence referred to in paragraph (3). See also Practice Direction 15A, Expert evidence.
i. the principle that the costs of a single joint expert will be shared equally between the instructing parties (particularly if this has the effect of placing a disproportionately high cost burden on the party or parties in receipt of legal aid). This should include a robust scrutiny of the means of any party claiming to be unable to afford the cost of the instruction; or

ii. the principle that the instructing parties are to be jointly and severally liable for the costs of a single joint expert.

35. Finally, two further (fairly obvious) requirements for expert evidence should not be overlooked:

(i) the need to identify an expert or experts with the appropriate expertise (the importance of this is underscored by the comments of the Court of Appeal in CYC about the limitations of the evidence given by Dr Payne); and

(ii) the need for the expert evidence (and especially expert evidence on capacity) to be up to date (the European Court in Lashin found a breach of Article 8 in part because the domestic court confirmed Mr Lashin’s incapacity status on the basis of a report prepared two years earlier.)

Funding proceedings in the Court of Protection

Recent reforms

36. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’) and its associated regulations came into force on 1 April 2013. All cases that fall within scope are subject to new eligibility and merits criteria.

37. The eligibility criteria have been set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations (SI 2013/480). However, the recently issued consultation paper, ‘Transforming legal aid: delivering a more credible and efficient system’ (discussed below), foreshadows that the Government intends to consult on detailed proposals for revised eligibility criteria in autumn 2013.30

38. The merits criteria have been set out in the Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104) (**Merits Regulations**). From 1 April 2013, full representation is only available in Court of Protection proceedings to the extent that the proceedings relate to:  

(a) a person's right to life;  
(b) a person's liberty or physical safety;  
(c) a person's medical treatment (within the meaning of the Mental Health Act 1983);  
(d) a person's capacity to marry, to enter into a civil partnership or to enter into sexual relations; or  
(e) a person's right to family life.

39. There are a number of other requirements that must be met before funding will be approved. These include a requirement for the Director of the LAA (in practice the designated LAA caseworker) to be satisfied that the Court of Protection has ordered, or is likely to order, an oral hearing, and that it is necessary for the individual to be provided with full representation.

40. As a general rule, no legal aid (of any kind) will be available in respect of the creation of lasting powers of attorney (**LPA**) or the making of advance decisions, although it will be available in relation to determinations and declarations by a court under the Mental Capacity Act 2005 as to the validity, meaning, effect or applicability of a LPA that has been created or an advance decision that has been made.

41. On 26 February 2013 the Lord Chancellor published Guidance on Civil Legal Aid and Guidance on Exceptional Funding (in both Inquests and non-Inquests). The section relating to Court of Protection work states as follows:

**“Mental Capacity Act (Merits Regulation 52)**

**General**

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31 Regulation 52(3), Merits Regulations.  
32 Regulation 52(2)(a), Merits Regulations.  
33 Regulation 52(2)(b), Merits Regulations.  
34 References to “the Procedure Regulations” are to the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098).
9.7 Where legal services are required for eligible clients in relation to issues under the Mental Capacity Act 2005, Legal help will be the normal vehicle for funding such advice and assistance as the client requires. Legal help in relation to the 2005 Act is funded as Mental Health non-Tribunal work under the rules contained in the 2010 Standard Civil Contract Specification.

9.8 For cases where an application to the Court of Protection may be necessary, the relative accessibility of the Court in reaching a decision in many cases will make a grant of Legal Representation unnecessary as support will be available when needed through legal help. Similarly legal help may be used to settle potential disputes through negotiation, mediation or other settlement (Merits Regulation 52(2)).

9.9 However there will be some cases before the Court of Protection that raise fundamental issues for the client which will require legal representation at an oral hearing. For example, important cases concerning decisions over the giving or withholding of medical treatment in respect of people who lack capacity to consent to that treatment. The criteria for funding legal representation in these circumstances are set out in regulation 52 of the Merits Regulations. Legal aid for advocacy is only permitted for proceedings in the Court of Protection which are set out in paragraph 4 of Part 3 of Schedule 1 to the Act.

9.10 If legal representation is required for an individual case before the Court of Protection where proceedings do not fall within paragraph 4, Part 3, Schedule 1 to the Act, an application can be made for Exceptional Case Funding.

Merits Criteria

9.11 There are two important considerations when determining applications under Regulation 52 in order that legal representation before the Court of Protection can be made available. The first is to consider whether the case falls within the ambit of Regulation 52(3) in relation to the person (referred to in the guidance below as —P) who is the subject of the proceedings. This will be the person who lacks or is alleged to lack capacity to make important decisions on their own behalf. The second test is whether the Court of Protection has ordered, or is likely to order, an oral hearing.

9.12 Many welfare cases concern accommodation issues for which advocacy may not be available in accordance with Part 3 of Schedule 1 to the Act. However accommodation cases will be within scope if they concern P’s family life (Merits Regulation 52(3)(e)). This is likely to be the case where either the issue is whether or not P should remain with his or her family or where a change of accommodation would have a serious impact on contact between P and his or her family. However, the cost benefit criteria will of course need to be applied (Merits Regulation 52(1)(a)).

9.13 The second consideration is that it is necessary for the individual to be provided with full representation in the proceedings (Merits Regulation 52(2)). The Court has the discretion as to whether to hold an oral hearing to decide the application before it and will give directions on whether an oral hearing is required during proceedings. In the most urgent and important cases Legal Representation may be granted before the Court has made any
determination on whether to direct an oral hearing, whilst in other cases it may be appropriate to await what directions the Court makes before a decision on the need for representation is made.

However in practice many cases will be those for which an oral hearing is likely to be directed by the Court. If legal representation was granted but the Court subsequently directed that an oral hearing was not required consideration would be given to withdrawal of the determination.

9.14 In general the Legal Aid Agency will only grant legal representation if the applicant wishes to put forward a new and significant argument which would not otherwise be advanced. Generally there should not be more parties separately represented before the Court than there are either cases to put or desired outcomes (Merits Regulation 39 (e)).

9.15 Cases that fall to be considered under Regulation 52 must still satisfy all relevant merits criteria in Regulations 39, 41 (a) and (b), 42 and 43. The most important criteria will often be prospects of success. Many (but not all) of the cases described under Regulation 52 also fall within the test of ‘Overwhelming Importance to the Client’ as defined in Regulation 2 and the cost benefit test in Merits Regulation 42(3) will be appropriate. For cases of overwhelming importance to the client the requirement is to have at least borderline prospects of achieving the outcome desired by the applicant (Merits Regulation 43(b)(ii)). For this purpose in relation to applications on behalf of the family of P the issues will be treated as of overwhelming importance to the applicant if they are of overwhelming importance to P (Merits Regulation 2).

9.16 Cost benefit will be an important consideration in many cases before the Court of Protection. All costs will be subject to the reasonable private paying individual test at Regulation 7. Cost benefit is unlikely to be an issue in medical treatment cases (Merits Regulation 42(3)), especially for P. It is recognised that parties other than P may well have no direct and tangible interest or benefit other than the desire to secure the best outcome for P. This interest will be taken into account under the reasonable private paying individual test but in all cases the likely costs must be proportionate to the importance of the issues to the applicant (Merits Regulation 7).

**Lasting Power of Attorney/Advance Decisions**

9.17 The Legal Aid Sentencing and Punishment of Offenders Act 2012 makes it clear at paragraph 5 (3) of Part 1, Schedule 1 that the creation of lasting powers of attorney (LPAs) and the making of advance decisions (ADs) under the Mental Capacity Act 2005 are not within the scope of Civil Legal Aid. However, services provided in relation to determinations and declarations by a court as to the validity, effect or applicability of LPAs and ADs are within the scope of the scheme (paragraph 5(1) of Part 1, Schedule 1).

9.18 Legal Help may be appropriate in some circumstances in relation to an application or proposed application to the Court of Protection under ss.22 or 23 of the 2005 Act concerning questions about the validity or operation of LPAs. Similarly, it may in some cases be appropriate to provide legal help concerning questions under s.25 of the 2005 Act about the
validity and applicability of ADs. Legal help should only be provided, however, where there is sufficient benefit to the client in terms of their financial circumstances or potential decisions concerning medical treatment or other welfare matters (MR 32).”

42. There is one piece of positive news. Under the Civil Legal Aid (Remuneration) Regulations (SI 2013/422), the independent expert maximum hourly rates for psychiatrists is now set at £135 in any area (whereas it was previously £90 in London) and the maximum hourly rates for psychologists is now £117 in any area (previously £90 in London). These increased rates apply to cases commenced after 1 April 2013 but will be short-lived if the Government implements the proposal to reduce expert fees in the current consultation paper, outlined below.

Consultation on further reform

43. The Ministry of Justice published a new consultation paper, ‘Transforming legal aid: delivering a more credible and efficient system’, on 9 April 2013. The deadline for responses is midnight on 4 June 2013 and the Government is due to respond to the consultation in autumn 2013. It is fair to say that the proposals in the consultation paper have attracted considerable controversy.

44. The key proposals of relevance to practitioners in the Court of Protection (and community care) are summarised briefly below.

Introducing a residence test

45. There are presently no nationality or residency restrictions on eligibility for civil legal aid. The Ministry of Justice proposes to introduce a two-limbed residence test. First, the individual must be lawfully resident in the UK, the Crown Dependencies or British Overseas Territories at the time the application is made.35 This would have the effect of excluding foreign and British nationals from applying outside the UK, the Crown Dependencies or British Overseas Territories as well as any “illegal visa over-stayers, clandestine entrants and failed asylum seekers.”36

46. Second, the individual must have resided lawfully in the UK, Crown Dependencies or British Overseas Territories for a continuous period of 12 months. This 12 month period of lawful residence

35 ‘Transforming legal aid: delivering a more credible and efficient system’, paragraph 3.49.
36 ‘Transforming legal aid: delivering a more credible and efficient system’, paragraph 3.49.
could be immediately prior to the application for civil legal aid, or could have taken place at any point in the past.\(^{37}\)

47. The residence test would be carried out by the legal aid provider who was dealing with the application for civil legal aid. They would need to see and take copies of evidence for this purpose, such as evidence of British nationality (e.g. a passport), evidence of a right to reside (e.g. a valid EEA Passport), evidence of a right of abode (e.g. a certificate of entitlement as a result of Commonwealth ancestry) or any other evidence of being present legally (e.g. a visa).\(^{38}\)

48. The proposals contain exceptions to the residence test for armed forces personnel or asylum seekers.\(^{39}\) In addition, legal aid will continue to be available where necessary to comply with obligations under EU or international law.\(^{40}\) Section 10 of LASPO contains a power for legal aid to be granted in exceptional circumstances where a case is excluded from the scope of the civil legal aid scheme.

Ceasing to pay for permission work in judicial review proceedings

49. The Ministry of Justice proposes that legal aid providers should only be paid for work carried out on an application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if permission is granted by the Court. The consultation paper states:

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\text{“3.71 Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the strength of a claim, for example, and to engage in pre-action correspondence aimed at avoiding proceedings, as is required by the Pre-Action Protocol for Judicial Review. Where a permission application was made the claimant would continue to be technically in receipt of legal aid for the permission stage of the case, and so would continue to benefit from cost protection, and would therefore not be personally at risk of paying costs if the permission application were unsuccessful.”}
\]

\[
\text{3.72 We recognise that the merits criteria are in place to help weed out weak cases, however we do not consider that these are sufficient by themselves to address the specific issue we have identified in judicial review cases. When making an application for legal aid, the provider certifies their assessment of the merits of the case based on their detailed knowledge of the}
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\(^{37}\) ‘Transforming legal aid: delivering a more credible and efficient system’, paragraph 3.50.

\(^{38}\) ‘Transforming legal aid: delivering a more credible and efficient system’, paragraph 3.51.

\(^{39}\) ‘Transforming legal aid: delivering a more credible and efficient system’, paragraph 3.55-3.59.

\(^{40}\) ‘Transforming legal aid: delivering a more credible and efficient system’, paragraph 3.53-3.54.
case and specialist understanding of the law in the relevant area. The LAA is necessarily strongly guided by the provider’s assessment of the prospects of success of the proposed judicial review claim in deciding whether the claim should receive funding. We consider that it is appropriate for all of the financial risk of the permission application to rest with the provider, as the provider is in the best position to know the strength of their client’s case and the likelihood of it being granted permission.

...  

3.74 We do not consider that it would be sensible to make an exception and allow funding to be provided where a provider says the case was in any event of substantive benefit ...

3.75 In addition, depending on the circumstances, it may well be possible for the provider to recover their costs in these situations, either as part of a settlement between the parties or through a costs order from the court. For example, if the challenge is to a failure by a public authority to make a decision, and the decision is taken after the permission application is made, permission may well be refused because the case is academic, however, the claimant can pursue a costs order and the court can grant any costs reasonably incurred by the claimant if, arguably, the proceedings have brought about the making of the decision.

3.76 The same reasoning applies in relation to cases where an application for permission for judicial review is made and the case is withdrawn because the defendant concedes or the parties settle the case.”

Removing legal aid for borderline cases

50. Legal aid is currently available where the prospects of success are assessed as borderline, which means that it is not possible, by reason of disputed law, fact or expert evidence, to (a) decide that the chance of obtaining a successful outcome is 50% or more; or (b) classify the prospects as poor.

51. The consultation paper contains a proposal to abolish the borderline prospects of success category, citing concerns that the current merits criteria are too lax in this regard.  

Reduction in expert fees

52. The Ministry of Justices proposes to reduce the current specified standard fees for all experts by 20%, noting that “the market has adjusted to the new [reduced] hourly rates”, imposed following a consultation in 2010.  

41 Transforming legal aid: delivering a more credible and efficient system’, paragraphs 3.80-3.90.
Conclusion

53. These are interesting times for practitioners in the Court of Protection. In keeping with the theme of change, as mentioned in the April issue of the newsletter, the Court of Protection is due to move to the Principal Registry of the Family Division at First Avenue House, 42-49 High Holborn, WC1V 6NP. It has been reported that the Court of Protection will occupy three courts and six chambers spread across the fifth and seventh floors at First Avenue House from October 2013.

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42 ‘Transforming legal aid: delivering a more credible and efficient system’, paragraph 7.10.
43 ‘Transforming legal aid: delivering a more credible and efficient system’, paragraph 7.3.