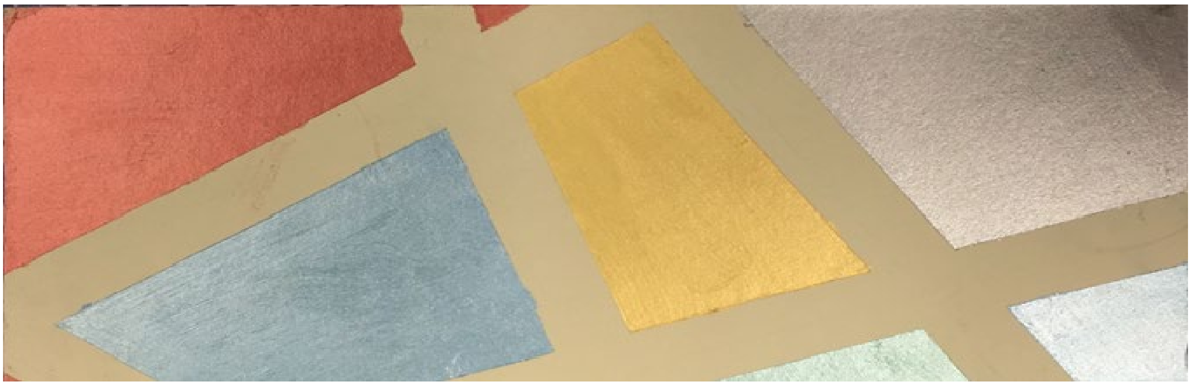

Welcome to the September 2026 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on post-*AGNI* developments, two capacity conundrums in one case and 'over-litigation' in a PDOC case;

(2) In the Property and Affairs Report: an update from the Property and Affairs Court User Group meeting and the OPG is recruiting lawyers;

(3) In the Practice and Procedure Report: the Court of Appeal resets the approach to personal welfare deputies, and cross-border cases involving Scotland;

(4) In the Mental Health Matters Report: recent cases concerning the relationship between the MHA and the MCA and an excoriating judgment on "detainability;"

(5) In the Children's Capacity Report: *AGNI* and children and the Joint Committee on Human Rights reports on the human rights of children in care;

(6) In the Wider Context Report: litigation capacity complexities, and recent medical guidance documents concerning consent, voluntarily stopping eating and drinking, and eating disorders and critical care.

(7) In the Scotland Report: a Practice Note that has caused some consternation.

A reminder that that whilst Chambers have launched a new and zippy version of our website which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via here.

The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

Short note: personal welfare deputies – a reset

In *Re HB (Appointment of Personal Welfare Deputy)* [2026] EWCA Civ 960, the Court of Appeal gave authoritative, appellate level guidance, as to the appointment of personal welfare deputies. In giving the lead judgment, Sir Stephen Cobb, the new President of the Court of Protection, expressly moved away from the approach of the previous Vice-President, Hayden J, in the *Lawson* case. At paragraph 63, Sir Stephen indicated that deputyship may well be appropriate in cases involving "some or all of the following features:"

> *i) The applicant for the PWD stands in some special relationship in relation to P, such as in this case where the applicants are his parents with a special ability to understand and communicate with and for P;*
>
> *ii) Where P's wishes and feelings, their beliefs and values and the things which are important to them (see Aintree at §32 above) would be likely to be enhanced by the appointment of a PWD, to make choices for them as an individual human being;*
>
> *iii) In circumstances in which it is likely that more than one decision will need to be made in the foreseeable future (see the Code at 8.39, Watt and Parr above); a series or "stream" (Parr) of decisions in respect of P is reasonably anticipated;*
>
> *iv) When P is moving from childhood to adulthood and transitioning between children's and adult's services, where it may well be in P's best interests to have someone acting as his agent for decision-making; transitional difficulties for young adults with lifelong impairments may justify short-term solutions;*
>
> *v) The appointment may be particularly appropriate where it can be shown (as here) that public bodies have failed, or threaten to fail, properly to apply the MCA 2005 framework, particularly in relation to consultation with families;*
>
> *vi) Decision-making in the foreseeable future needs to be prompt and agile in order to respond to an evolving set of circumstances.*

Importantly, the Court of Appeal also made clear that:

> *It is important to remember in this case and in others like it that the statutory scheme permits the disclosure and sharing of relevant information about P, as appropriate, where it is in P's best interests and necessary for meaningful consultation; such a practice is entirely in accordance with the current Code of Practice (see para.16.19-16.23). There*

> *are many examples in the post-Lawson caselaw to which we were taken of authorities failing to consider this important information-sharing power under the provisions of sections 4 and 5 MCA 2005 (see for example, Cwm Taf Morgannwg University Health Board v RW & Anor [2026] EWCOP 10 (T3), and NHS South East London Integrated Care Board v JP (by his litigation friend, the Official Solicitor) & others [2025] EWCOP 8 (T3), London Borough of Lewisham v SL (by her litigation friend, the Official Solicitor) [2025] EWCOP 51 (T3)). Indeed, in this case the Judge rightly acknowledged this point (see again §21 above: "the system of collaborative decision making … does not always run as the statute intends"). I accept Mr Ruck Keene's argument that concerns about the failure of this type of information-sharing between professionals and P's family does not of itself justify the appointment of a deputy; I caution myself against treating deputyship as a mechanism to overcome professional hesitation or institutional risk-aversion. I further accept that appointing a deputy cannot alter the limits of public law decision-making; decisions by public authorities (e.g., as to resource allocation) must remain constrained by public law principles. A PWD cannot compel the creation of options or override resource-based decisions by asserting that a particular course is in the individual's best interests. (emphasis added)*

The latter point can be seen as an (implicit) confirmation that, whatever else the *Epsom* *(Townsend)* case means in the context of medical treatment, those exercising functions under the MCA 2005 cannot magic up more in the name of best interests than would be available were the person to have the relevant decision-making authority.

The decision also contains a discussion of the concept of autonomy which – spoiler alert – is not likely to be assistance in deciding whether to appoint a deputy or indeed (we suggest) more broadly in relation to the MCA 2005, given its "*inherent elasticity in a range of contexts* [which] *makes it, in my judgment, an uncertain and inapposite tool*" (paragraph 69). For more on the ethical issues in play here, you may find this book and /or podcast of interest.

We will be keeping a very close eye on whether the judgment leads to the increase in the number of personal welfare deputies that social media 'chat' suggests that it is likely to.

Confidentiality and collateral use of documents

Hinduja v Hinduja & Ors [2026] EWCOP 34 (T3) (Bacon J)

Practice and procedure (Court of Protection) – other

Summary

The issue in this case was crisply summarised by Bacon J in the opening paragraph: "[t]*his hearing concerns the latest development in a long-running family feud between members of the Hinduja family. The issue before the court is whether documents disclosed into the Court of Protection proceedings concerning the late Srichand Parmanand Hinduja (SP) should now be permitted to be used in other actual or contemplated proceedings, and if so on what terms.*"

Much of the decision is concerned with (necessary) micro-analysis of specific documents / classes of documents and whether they were covered by specific orders and/or legal privilege. However, of wider relevance is Bacon J's analysis of two issues that arise relatively often in Court of Protection proceedings: (1) the principles that apply where a party seeks to release / vary the confidentiality restrictions imposed in those proceedings; and (2) what (if any) used can be made by a party of documents disclosed into Court of Protection proceedings for other purposes (so-called 'collateral use' of documents).

As to the first issue, Bacon J reviewed the case-law, including the recent decision of the Court of Appeal in *Gardner*, and held that they

> 53. […] *indicate that where one or other party to proceedings in the Court of Protection seeks to release or vary the confidentiality restrictions imposed in those proceedings, including after the death of the person the subject of the proceedings, the following general principles will apply:*
>
> *i) The court will need to consider on a case-by-case basis the justification for disclosure of the relevant documents, and it will be for the person seeking disclosure to justify their request.*
>
> *ii) The question to be asked is whether the specific interest in disclosure outweighs the ongoing interest in the protection of the confidentiality of personal and sensitive information contained within documents filed or disclosed in the Court of Protection proceedings, given the sensitive context in which those documents were provided, and the legitimate expectations of confidentiality on the part of all those involved in the proceedings.*
>
> *iii) If disclosure is granted, it should be limited to what is essential to achieve the particular objectives justifying disclosure.*

As to the second issue, that of collateral use, Bacon J noted the similarities between COPR 5.10 and the equivalent provision (CPR 31.22) in the Civil Procedure Rules, and (at paragraph57) the "well-established" principles in the latter governing the circumstances in which permission will be given by the court under CPR r. 31.22(1)(b) for collateral use, such as use in other proceedings. In particular:

> *i) The court will only grant permission under CPR r. 31.22(1)(b) if there are special circumstances that constitute a cogent reason for permitting collateral use: Tchenguiz v SFO, §66(i). The grant of permission is exceptional, in the sense that it is not routinely given: Duke of Sussex v MGN [2023] EWHC 1617 (Ch), §6.*
>
> *ii) The burden is on the party making the application to demonstrate cogent and persuasive reasons for allowing the collateral use sought: Lakatamia v Su, §53. That burden is a particularly heavy one where the permission is sought by or for the benefit of a person who is not a party to the action in which the documents were disclosed: ACL Netherlands v Lynch [2019] EWHC 249 (Ch), §30.*
>
> *iii) The court must also be satisfied that there is no unwarranted prejudice to the disclosing party. That means prejudice beyond the mere fact that the documents are able to be used for collateral purposes. Ultimately the court must balance the legitimate interests of the party seeking permission against the legitimate interests of the disclosing party: Duke of Sussex, §§6–7.*
>
> *iv) What constitutes "use" of a document for the purposes of CPR r. 31.22 is very broad, and is regarded as extending to reviewing the documents for the purposes of considering whether they are relevant to other proceedings. Accordingly, absent some provision in*

> *the relevant order, doing anything other than realising, in the course of review for the purposes of the proceedings in which documents are disclosed, that a document or documents would be relevant to actual or contemplated other proceedings, may constitute a collateral use: Tchenguiz v Grant Thornton [2017] EWHC 310 (Comm), [2017] 1 WLR 2908, §§29–31; Lakatamia v Su, §§57, 59(i).*
>
> *v) The appropriate course is therefore a two-stage approach. First, as soon as it is identified that there may be documents relevant to actual or contemplated other proceedings, the relevant party should seek permission to review those documents in order to determine whether it is desirable to use them in those other proceedings. Secondly, once that review has taken place, the relevant party can seek permission to deploy those documents in the other proceedings: Lakatamia v Su, §59(ii)–(iii).*

Bacon J held at paragraph 58 that the principles set out should apply for applications for permission under the equivalent provision in COPR 5.10(1)(b). At paragraph 59, she also endorsed the observations of the leading textbook on disclosure that applications for permission:

> *"ought to specify clearly the documents in respect of which permission is sought and similar care should be taken in drawing up any order, listing the documents by way of schedule in appropriate cases so there can be no doubt which documents are covered. In general, it is inappropriate to seek a release in respect of disclosed documents wholesale, not least because the court needs to carry out a balancing exercise and it is only in special circumstances that the restriction or undertaking is to be modified."*

Such that:

> *60. In general, therefore, a blanket application for permission in respect of an entire set of documents is unlikely to be appropriate; rather the application should normally be made by reference to specific documents, in order to demonstrate why the circumstances are such as to justify the use of those documents for the collateral purpose sought. A targeted approach is, moreover, likely to be particularly important in Court of Protection proceedings in light of the particular context in which documents have been disclosed in those proceedings, as discussed above.*

One observation about privilege is relevant, namely Bacon J's endorsement of the common ground of the parties that "*the Court of Protection's ability to waive privilege on SP's behalf came to an end when SP died, and that any request for further waiver of privilege must now be made to SP's personal representatives, whoever they are*" (paragraph 63).

Comment

The Court of Appeal in *Gardner* invited the Court of Protection Rules Committee to consider the issues of practice and procedure arising out of the provision (strictly, not the disclosure) of position statements to observers of proceedings. This case makes clear that the observations in *Gardner* are of wider relevance in terms of reaffirming the core proposition that Court of Protection proceedings attract a (necessary) degree of confidentiality, and that any lessening of that confidentiality needs to be accompanied by suitable safeguards.

Scottish orders before the English courts (1)

CW v Hartlepool Borough Council and Scottish Borders Council [2026] EWCOP 40 (T3) (Theis J)

International jurisdiction of Court of Protection - Recognition and enforcement

Summary

CW, aged 33, had emotionally unstable personality disorder, cognitive deficits and epilepsy. In December 2022 Scottish Borders Council placed her in a care home in Hartlepool under a three-year welfare guardianship order made by Jedburgh Sheriff Court. The placement was intended to be temporary whilst alternative placements closer to home were being sought. No application was made to recognise and enforce the order under Schedule 3. When the care home sought a DoLS authorisation in February 2023, Hartlepool initially rejected the request because it had not placed CW but ultimately granted a standard authorisation in March 2023 and a subsequent authorisation was challenged s.21A in June 2025. Two months later the guardianship order expired unrenewed, Scottish Borders having been unable to obtain the medical report needed to renew it.

In October 2025 HHJ Boothroyd declared, on an agreed but ‘finely balanced’ basis, that CW remained habitually resident in Scotland. Scottish Borders duly applied to the Sheriff Court for a fresh order in January 2026. The Sheriff found that CW consistently did not want to return to Scotland, that the council had no intention of moving her and that there was no suitable placement north of the border, and on 29 May 2026 dismissed the application for want of jurisdiction. Scottish Borders then came to the Court of Protection – which had meanwhile been authorising CW’s deprivation of liberty under paragraph 7(1)(d) of Schedule 3 – for a declaration that CW was now habitually resident in England and Wales. CW, through the Official Solicitor, supported that; Hartlepool was neutral.

Applying the principles summarised in *Aberdeenshire Council v SF* [2023] EWCOP 28, and noting that an earlier determination did not prevent the court revisiting the question (*Neath and Port Talbot CBC v CK* [2025] EWCOP 47), Theis J held that CW’s habitual residence had moved to England (paragraph 59). None of the factors was determinative but together they support that conclusion: over three and a half years in Hartlepool; a placement no longer regarded as temporary, with no active search for alternatives; the council’s own change of position, accepted by the Sheriff; and CW’s now stable wish not to return to Scotland, even though she described the care home as a “*mental prison*” and her room as a “*cell*” and wanted to live elsewhere in Hartlepool. Her integration in the community was minimal but, as the judge observed, a deprivation of liberty regime “*by definition limits her ability to integrate*” The court cautioned against placing too much weight on the passage of time, or on any suggestion that a person is ‘settled’, where they are subject to compulsory confinement (paragraph 58). CW’s ordinary residence, in contrast, remained in Scotland under Schedule 1 to the Care Act 2014, so Scottish Borders continued to fund and case-manage the placement (paragraph 51).

Of wider significance is the agreed list of good practice points for cross-border placements which Theis J endorsed with “*modest modifications*” (paragraphs 14-20). Before placing, the Scottish authority should follow Chapter 21 of the Care and Support Statutory Guidance and notify the English authority. After placing, there should be a “*timely application*” for recognition and enforcement under paragraph 19 of Schedule 3 “*to provide a clearly understood legal framework for decision making*;” the receiving authority should be told of any deprivation of liberty, which can be drawn to its attention through the unauthorised deprivation of liberty route in paragraphs 67-73 of Schedule

A1; the *RF* requirements and the *DM* measures should be considered, along with Articles 6 and 8 ECRH, even where Article 5 is not engaged; habitual residence should be kept under review throughout; renewal should be considered in good time, with an application to the Court of Protection before expiry if habitual residence has shifted; and the judicial protocol for direct communications between the UK jurisdictions should be used to share determinations, particularly on habitual residence, without delay.

Comment

The guidance at paragraph 15 perhaps deserves a caveat. Scottish Borders' solicitor described it as 'unfortunate' that the 2022 order was never 'ratified' in England (paragraph 45), and the good practice list treats a Schedule 3 application as a matter of course. But such active steps in relation to a Scottish guardianship order are only necessary if the guardian is going to insist on their decision-making authority in this jurisdiction. In Scotland there is no equivalent of s.5 MCA 2005, which is why the guardian needs formal authority there (see *Argyll and Bute Council v RF (No 2)* [2026] EWCOP 41 (T3) at paragraph 45. However, the Adults with Incapacity (Scotland) Act does not limit the authority of the guardian by reference to the presence of the 'adult' in Scotland; further, by paragraph 19(1) of Schedule 3 to the MCA 2005, a 'foreign' protective measure taken on the basis of the person's habitual residence in the other jurisdiction is recognised by operation of law. There is, therefore, no need for any application under Schedule 3 so as to ensure the recognition of the status of guardian. Once the adult is in England, s.5 MCA 2005 protects those delivering their care and treatment, and any deprivation of liberty is authorised by DoLS or the court.

Therefore, if the guardian is happy to let s.5 MCA 2005 take its course, and not to insist on their decision-making authority, the Scottish order can simply continue in the background without further formality. Thus, for three and a half years CW's care and confinement in Hartlepool were lawful on the basis of s.5 MCA and Schedule A1, not the Jedburgh order, and the order's expiry in August 2025 changed nothing on the ground. Recognition – and more to the point a declaration of enforceability – matters where: (1 the guardian wants to do something that s.5 does not cover – eg to override the English decision-makers or to convey the adult back across the border against their will; or (2) where the order itself is to be relied upon as the authority for the deprivation of liberty, at which point the Article 5 scrutiny in *RF(1)* and *DM* is required.

Two other points are worth noting. For someone not ordinarily resident in the area of any English or Welsh local authority, the DoLS supervisory body is the local authority for the area in which the care home is situated (Schedule A1, paragraph 182(3)), and paragraph 16 of the guidance now spells out how an unauthorised deprivation of liberty should be brought to the receiving authority's attention. Second, the case illustrates how habitual residence and ordinary residence can part company: the Court of Protection now has jurisdiction over CW's welfare while a Scottish council, whose Sheriff Court has disclaimed jurisdiction, remains responsible for funding and managing her care. It also shows the ratchet by which a 'temporary' placement becomes a permanent one – not by decision, but by the absence of one. Once the Sheriff had declined jurisdiction, it is difficult to see what other conclusion was open; the alternative was a legal vacuum filled indefinitely by paragraph 7(1)(d).

Scottish orders before the English courts (2)

Argyll and Bute Council v RF (No 2) [2026] EWCOP 41 (T3) (Theis J)

International jurisdiction of Court of Protection - Recognition and enforcement

Summary

Sixteen months after the application for recognition and enforcement of RF's Scottish guardianship order foundered in *Argyll and Bute Council v RF* [2025] EWCOP 12 (T3) ('*RF(1)*'), the council returned with a new order and succeeded. Although by the time of the hearing the Official Solicitor supported the application, Theis J considered it important to set out why the second attempt succeeded where the first had failed.

RF, aged 65, had a learning disability and a personality disorder. Born and raised in Scotland, where his two siblings still live, he had been at a placement in London since December 2023 following a series of failed Scottish placements, hospital admissions and six months in prison. The doors were locked, he was supervised at all times (2:1 in the community), he wanted to return to Scotland and he could not visit his family as he wished, so he was deprived of his liberty on the multifactorial test in *Attorney General for Northern Ireland's Reference (Deprivation of Liberty)* [2026] UKSC 16 (paragraph 76). He remained habitually resident in Scotland. In *RF(1*) the court had refused to recognise a three-year order because RF had not been given an opportunity to be heard, which was a breach of natural justice (Schedule 3, paragraph 19(3)), and because recognition would have been inconsistent with a mandatory provision of the law of England and Wales and manifestly contrary to public policy (paragraph 19(4)). In the meantime the Court of Protection continued to authorise his deprivation of liberty under its temporary jurisdiction in paragraph 7(1)(d) of Schedule 3 (paragraph 19).

The council went back to the Sheriff Court. The 2025 order was first reduced from three years to one and then, on 13 February 2026, a fresh one-year order was made re-appointing the Chief Social Work Officer as welfare guardian with powers including residence, conveyance and return, access, the level of care and supervision, and restraint. This time RF was present and represented by a legally qualified safeguarder, appointed for the duration of the order; the Sheriff had psychiatric and mental health officer reports and a report from an independent advocate commissioned by the council. Two statements from the safeguarder explained the review machinery: the advocate visited RF monthly and reported to the safeguarder; advocate and safeguarder conferred every three months; the safeguarder could act of her own motion, including by applying for recall or variation under ss.71 and 74 of the Adults with Incapacity (Scotland) Act 2000, independently of the council; and she was 'confident' that legal aid would be granted for any such application.

Measured against the seven Article 5 requirements distilled in *RF(1)* at paragraph 56 (repeated at paragraph 57), Theis J was satisfied that the one-year duration now aligned with the MCA 2005 framework in this jurisdiction which, whilst not a determining factor, was a relevant consideration and a "useful guide" to the reasonable interval for review (paragraphs 73, 78). The internal review structure required by Article 5(4) was provided by the monthly visits, the reporting and the quarterly meetings (paragraph 79), and RF's ability to take proceedings was secured by the safeguarder's standing, independence and likely funding (paragraph 80). RF had been heard for the purposes of paragraph 19(3), the Winterwerp criteria were met, and recognition was neither manifestly contrary to public policy nor inconsistent with a mandatory provision (paragraph 81). The order was recognised and enforced; Theis J also made clear that paragraphs 18 and 19 of Mostyn J's Schedule 3 checklist in *Re SV* [2022] EWCOP 52 should be updated accordingly (paragraph 83).

Comment

Read with *Midlothian Council v DM* [2025] EWCOP 61 (T3),[1] this decision completes the picture. Two models of Article 5 compliance have now passed muster: Midlothian's review clause on the face of the order plus council-funded advocacy and litigation, and now Argyll and Bute's legally qualified safeguarder appointed for the life of a one-year order, with a monthly advocate and with a route back to the Sheriff Court funded by the Scottish Legal Aid Board. The common denominators are a twelve-month order, the adult present and independently represented when it is made, somebody independent seeing the adult regularly, and a real (and funded) means of getting back to court. Scottish authorities placing adults in England should no longer be arriving at the Court of Protection with the bare three-year order that failed in *SF* and *RF(1)*.

Two features nonetheless merit attention. First, the Official Solicitor rightly pressed that where the same public body both confines and authorises, anxious scrutiny is called for even on a limited review, and that the 2026 order contained no specified limits on the deprivation of liberty of the kind an English order would carry (paragraph 63): what has been recognised includes open-ended powers to convey, return and restrain. Second, the funding of any challenge rests on the safeguarder's confidence that legal aid would be granted rather than on a guarantee. That was enough here, but it is less than the council's unconditional commitment in *DM*, and the advocate on whom the monthly monitoring depends is commissioned by the detaining authority.

Perhaps the more sobering point is chronological. Proceedings began in May 2024, RF has been confined in London against his wishes on interim authorisations for over two years, and the placement in Scotland to which everyone agrees he should return has still not been found (paragraphs 17, 75). Recognition and enforcement gives his detention a lawful framework but it has not got him home (yet).

[1] A decision which did not make its way to the archives until July 2026, for some reason.

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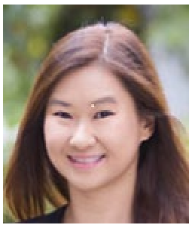

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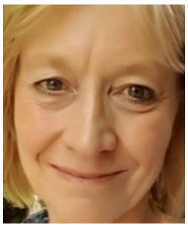

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in October. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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