



# Family Justice Council

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## Capacity to Litigate in Proceedings involving Children

**April 2018**

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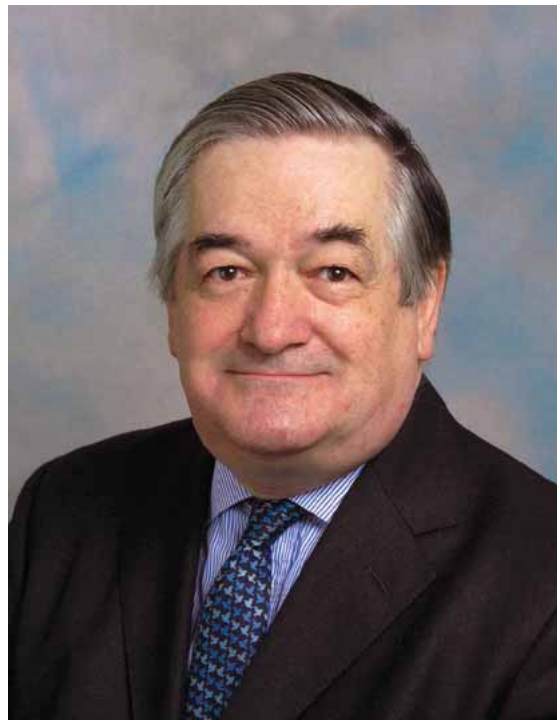
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## Foreword by the President, Sir James Munby

It is essential for the proper administration of family justice that those who lack capacity to litigate in the Family Court are quickly identified, assessed, and supported. This Guidance has been drafted, and its appendices compiled, in order to assist Judges in the Family Court to resolve capacity issues concerning parties to family law proceedings. It is designed to be practical and accessible, recognising that in private law proceedings in particular the party whose capacity is in question may be unrepresented. Lawyers instructed in family proceedings will also find this Guidance valuable, and they are strongly encouraged to use it.

The Guidance is not intended to be a definitive guide to the law in the area of mental capacity, but will point the Judge, and lawyers where involved, to the key rules and statutory provisions.

A number of appendices are attached to the Guidance; they represent useful aids to assist in implementing the court's investigation into questions of capacity and, where appropriate, identifying a litigation friend:

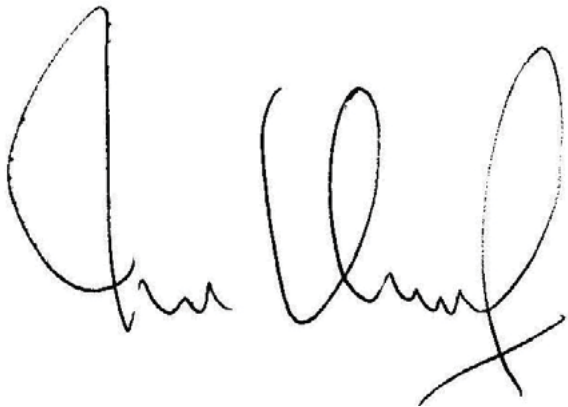


- Checklist for the appointment of a litigation friend (including the Official Solicitor) (Appendix 1);
- Draft certificate of capacity (a standard form of report for recording the assessment of the mental capacity of an adult to conduct their own proceedings) and notes for assessors (Appendix 2);
- Draft letter to independent expert and/or treating clinician in public law (Part IV Children Act 1989) proceedings, together with the Official Solicitor's certificate of capacity (Appendix 3);
- Draft letter to a friend or family member of an unrepresented person whose capacity is in question to seek information (Appendix 4);
- List of suggested information relevant to the finances of the protected party to support an application for legal aid (Appendix 5);

- Draft Order directed at other parties to the proceedings when inviting the Official Solicitor to act as litigation friend (Appendix 6);
- Draft Order (High Court) giving directions for disclosure against third parties (Appendix 7).

I am particularly grateful to Her Honour Judge Alison Raeside, to Malek Wan Daud (junior barrister member of the Family Justice Council), and to Helen Clift (Official Solicitor's Office) for their work on this Guidance. The section on public law children cases draws heavily from the guidance originally published in 2010 by the Family Justice Council; the Guidance in private law proceedings had been instigated by the Private Law Working Group, chaired by Mr Justice Cobb. The draft letter to family/friends (Appendix 4) was helpfully reviewed by AdviceNow to ensure its clearness of expression for those to whom it is likely to be directed; I am grateful to Clare Shirtcliff for providing advice in this regard.

I wish to commend highly the use of this Guidance; I believe that it will be an invaluable resource for the work of the Family Court.

A handwritten signature in black ink, appearing to read 'James Munby', written in a cursive style.

Sir James Munby  
President of the Family Division

## Glossary

In this Guidance:

'C100' is the form used for an application under section 8 of the Children Act 1989 for a child arrangements, prohibited steps, specific issue order or to vary or discharge or ask permission to make a section 8 order

'C110' is the form used for an application under the Children Act 1989 for a care or supervision order

'FHDRA' means First Hearing Dispute Resolution Appointment in private law proceedings

'FJC' means the Family Justice Council

'FPR' means the Family Procedure Rules 2010

'FP9' (form) is the Certificate of suitability of litigation friend

'LAA' means the Legal Aid Agency

'LIP' means litigant in person

'MCA 2005' means the Mental Capacity Act 2005

'MIAM' means a Mediation Information and Assessment Meeting which must take place before the issue of private law proceedings unless one of the circumstances specified in FPR r3.8(1) or 3.8(2) applies

'Official Solicitor' means the Official Solicitor to the Senior Courts

'PD' means Practice Direction supplementing the FPR

'PLO' means the Public Law Outline now incorporated into FPR PD12A

'PP' means protected party: that is a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct proceedings (as defined in FPR r2.3)

'PPP' means potential protected party; it is used in the private law section of this guidance to describe a person whose capacity to conduct the proceedings is being investigated.

## Introduction

1. This Guidance is directed to assist when the question of a party or intended party's capacity to conduct proceedings arises in public and private law cases about children. Each part of the document is self-contained and written with the understanding that in public law cases, parties are likely to be represented whereas in the majority of private law cases, parties are not. It is not intended to be a definitive guide to the law, but is designed to help the court manage the issue, particularly when parties appear without legal representation.
2. If the court is concerned that one of the parties involved in the proceedings lacks the mental capacity to conduct those proceedings, then that issue must be addressed as a priority<sup>1</sup>. Under

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<sup>1</sup> FPR r15.3(3) "Any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise".

the FPR<sup>2</sup> if someone is a “protected party” (“PP”) - that is, they lack the mental capacity to conduct the proceedings - they cannot conduct the litigation either as a LIP or through a solicitor. A “litigation friend” must be appointed to do so for them<sup>3</sup>.

3. The definition of a PP is a “party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct proceedings”<sup>4</sup>. The test to be applied is found at sections 2 and 3 of the MCA 2005 which need to be read with the overarching principles in section 1(2), (3) and (4) of that Act.
4. Sections 2 and 3 of the MCA 2005 provide as follows:-

2. *People who lack capacity*

- (i) *For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*

- (ii) *It does not matter whether the impairment or disturbance is permanent or temporary.*

- (iii) *A lack of capacity cannot be established merely by reference to-*

- (a) *a person’s age or appearance, or*

- (b) *a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.*

- (iv) *In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*

3. *Inability to make decisions*

- (i) *For the purposes of section 2, a person is unable to make a decision for himself if he is unable-*

- (a) *to understand the information relevant to the decision,*

- (b) *to retain that information,*

- (c) *to use or weigh that information as part of the process of making the decision,*  
*or*

- (d) *to communicate his decision (whether by talking, sign language or any other means).*

- (ii) *A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).*

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<sup>2</sup> FPR 2.3

<sup>3</sup> FPR 15.2 and PD15A

<sup>4</sup> FPR r2.3

(iii) *The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.*

(iv) *The information relevant to a decision includes information about the reasonably foreseeable consequences of–*

(a) *deciding one way or another, or*

(b) *failing to make the decision.*

5. The starting point in every case is the statutory principle (section 1(2) MCA 2005) that a person must be assumed to have capacity unless it is established that they lack capacity. It follows that it must be assumed that a person has capacity to conduct proceedings to which they are a party or intended party. It must be remembered that declaring that a party lacks capacity to conduct the proceedings before the court has very important legal consequences. Any such finding must have a sound basis in law supported by proper evidence<sup>5</sup>. It is not something to be done without very careful consideration since it deprives a person of their right to bring or respond to the litigation without the intervention of a litigation friend. The right to litigate before the court is a basic right protected by English law and safeguarded by the European Convention on Human Rights; it is therefore only to be restricted in limited circumstances.
6. It is not enough to support a finding that a party lacks capacity that their written documentation is scrawled or illegible, or that their behaviour at court is bizarre or out of control<sup>6</sup>. Those matters may alert the court to a need to investigate, but are not enough evidence on which a court may make a finding that a party lacks capacity. It is important to note that many people can find being involved in court proceedings or coming to court very stressful and so can behave out of character, or may find it hard to express themselves coherently. It is also possible that they may find representing themselves very difficult<sup>7</sup>. None of these matters can, by itself, justify a finding of lack of capacity.
7. In the pre-MCA 2005 case of *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889 Lord Justice Chadwick held that the test to be applied is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers

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<sup>5</sup> See also *Dunhill v Burgin* [2014] UKSC 18 where Lady Hale said "... people are assumed to have capacity to make their own decisions and should only be deprived of the right to do so in clear cases..." (paragraph 2)

<sup>6</sup> See, for example, *Baker Tilly v Makar* [2013] EWHC 759 (QB) where Sir Raymond Jack said "...the incident ... involved a serious loss of control but a brief loss of control... That incident has to be considered against the background of Miss Makar's appearances before other judges in the same period where no question as to capacity had arisen. The absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind."

<sup>7</sup> See *Durkan v Madden* [2013] EWHC 4409 Ch where Norris J found that from "the terms in which the evidence is couched that there may be confusion between Ms Madden's capacity and her ability, personally, to conduct litigation. It seems to be that it may well be the case that she is legally capable of making the relevant decisions but apprehensive about appearing in court, an experience that she would find stressful" (paragraph 20). Reviewing the evidence of her treating practitioner and her GP (who had signed her off work and indicated that she would find attendance at court and participation in legal proceeding stressful), Norris J considered that he could not be confident that either had addressed the requirements of ss.2-3 MCA 2005 rather than "simply assessing what impact attendance at court and participation in court proceedings might have on Ms Madden's health." He therefore held that the material adduced in evidence did not raise such an issue of capacity as to cause the adjournment of the proceedings before him. It is interesting to note that at the same time there were complicated bankruptcy proceedings in which the Official Solicitor had been appointed to act as litigation friend for Ms Madden.

and experts in other disciplines as the case may require, the issues on which their consent or decision is likely to be necessary in the course of those proceedings.

8. In the post MCA 2005 case of *Dunhill v Burgin* [2014] UKSC 18, Lady Hale approved this approach:

*13. The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in Masterman-Lister that capacity for this purpose meant capacity to conduct the proceedings .... This was also the test adopted by the majority of the Court of Appeal in Bailey v Warren [2006] EWCA Civ 51, [2006] CP Rep 26, where Arden LJ specifically related it to the capacity to commence the proceedings (para 112)... In my view, the Court of Appeal reached the correct conclusion on this point in Masterman-Lister and there is no need for us to repeat the reasoning which is fully set out in the judgment of Chadwick L.*

...

*15. ... There are, of course, litigants whose capacity fluctuates over time, so that there may be times in any proceedings where they need a litigation friend and other times when they do not. CPR 21.9(2) provides that when a party ceases to be a patient (now, a protected person) the litigation friend's appointment continues until it is ended by a court order. But a party whose capacity does not fluctuate either should or should not require a litigation friend throughout the proceedings. It would make no sense to apply a capacity test to each individual decision required in the course of the proceedings ....*

9. FPR Part 15 makes procedural provision in respect of PPs, PDs 15A<sup>8</sup> and 15B<sup>9</sup> provide full and detailed guidance about this issue, and the notes to the relevant sections in the Family Court Practice "Red Book" are very helpful. In addition, Part 3A of the FPR and PD3AA place a duty on the court to consider how vulnerable persons can be assisted to participate in proceedings and to give evidence. Those that lack capacity are expressly included. These provisions allow the court to give 'participation directions' to ensure that those lacking capacity are able to participate appropriately, and to enable their evidence to be given in the most effective manner.

10. There is some information available about the Official Solicitor (who can be asked to act as litigation friend on a 'last resort' basis) and about acting as a litigation friend on the Gov.uk website, including:

- The Checklist for the appointment of a litigation friend (including the Official Solicitor)<sup>10</sup>: <https://www.gov.uk/government/publications/appointing-a-litigation-friend-checklist>
- The Official Solicitor's Certificate of Capacity to Conduct Proceedings and guidance notes<sup>11</sup>: <https://www.gov.uk/government/publications/certificate-as-to-capacity-to-conduct-proceedings>

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<sup>8</sup> Protected Parties

<sup>9</sup> Adults who May be Protected Parties and Children Who May become Protected Parties in Family Proceedings

<sup>10</sup> Attached as Appendix 1

<sup>11</sup> Appendix 2



- The Official Solicitor’s Practice Note of January 2017 on his appointment in family proceedings
11. In addition, the judiciary and professionals may make enquiries of the Official Solicitor directly on 0203 681 2754 (private law family team); 0203 681 2755 (public law family team).
  12. There is also very useful information in clear and accessible language given in the Code of Practice to the MCA 2005 which is at: <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>.
  13. The BMA and the Law Society have published helpful guidance: “Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers” now in its 4th Edition.
  14. The Law Society has also published<sup>12</sup> a practice note – Meeting the Needs of Vulnerable Clients – which includes guidance about clients who may lack mental capacity to conduct proceedings.
  15. Although this guidance has both public law and private law sections the legal test of, and approach to, determination of capacity to conduct the proceedings is the same regardless of the proceedings. Practitioners should refer to both sections of the guidance when considering the issue of capacity to conduct proceedings.

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<sup>12</sup> On 2 July 2015

## Public Law

### Pre-proceedings

16. There are many groups of parents who are vulnerable in the context of social work involvement. This guidance deals only with a limited and specific group i.e. those whose disabilities are sufficiently severe that they lack capacity to conduct legal proceedings. Thus, for example, ‘*Court Orders and Pre Proceedings For Local Authorities*’ (2014)<sup>13</sup> or the 2007 guidance ‘*Good Practice in Working with Parents with a Learning Disability*’<sup>14</sup>, (please note that an updated version of the 2007 guidance was published in September 2016 by the Working Together with Parents Network – WTPN<sup>15</sup>) are useful by way of background and in terms of setting broad standards for Local Authorities to achieve, but neither document provides detailed guidance on the issue of parents who lack litigation capacity: see also The Children Act 1989 Guidance and Regulations - Volume 1 - Court Orders issued in 2008 and similar guidance for Wales with supplemental guidance being issued by the Welsh Government in April 2014<sup>16</sup>.
17. Obviously it is important that a parent’s particular difficulties are recognised and properly taken into account from the outset of the local authority’s involvement. The Guidance in Volume 1 (ibid) stresses the need for early family engagement and early identification of any capacity issues. However, as the Official Solicitor advises “*This recognition should not... ..focus on the issue of litigation capacity, as a) the intention is to try and work with the parents to avert litigation, and b) to concentrate on the issue of litigation capacity can give rise to the risk that a parent feels that the local authority is seeking to disempower the parent in the decision making process with regard to the child*”. Whilst an early cognitive functioning or psychiatric assessment or could not provide a definitive assessment of capacity, in certain cases it may be particularly helpful in informing local authority parenting and other social work assessments, while ensuring that a clear distinction is maintained between litigation capacity and parenting capability.
18. If a parent’s particular difficulties, including a lack of capacity to litigate, are not recognised where they ought reasonably to be, any assessment conducted by the local authority may be vitiated and will certainly be susceptible to subsequent challenge. There will also be unnecessary delay in ensuring that an appropriate assessment of the parent's own need for support is obtained (e.g. in England under the Care Act 2014 and in Wales under the Social Services and Well-being (Wales) Act 2014).
19. Where a parent lacks litigation capacity it must be appreciated that the parent may not have capacity to consent to their child being accommodated under section 20 of the Children Act

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<sup>13</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/306282/Statutory\\_guidance\\_on\\_court\\_orders\\_and\\_pre-proceedings.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306282/Statutory_guidance_on_court_orders_and_pre-proceedings.pdf)

<sup>14</sup> Issued jointly by DfES (DfE) and Department for Health in 2007;  
[http://webarchive.nationalarchives.gov.uk/20080910224541/dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_075119](http://webarchive.nationalarchives.gov.uk/20080910224541/dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_075119)

<sup>15</sup> <http://www.bristol.ac.uk/media-library/sites/sps/documents/wtpn/2016%20WTPN%20UPDATE%20OF%20THE%20GPG%20-%20finalised%20with%20cover.pdf>

<sup>16</sup> <http://wales.gov.uk/topics/health/publications/socialcare/guidance1/orders/?lang=en>

1989<sup>17</sup>. If the child is plainly at risk, the local authority should issue care proceedings, particularly where the child is very young, as this will afford the dual safeguard of legal representation for the parents and court oversight.

20. Once it is clear that proceedings are likely to be necessary, the local authority must comply with the requirements in the PLO (FPR PD12A). This includes answering yes or no to the question on the front of the application form C110A “*Are there factors affecting litigation capacity?*” and, if yes, completing section 4 (“*Factors affecting ability to participate in proceedings*”) of the application form. Section 4 requires information about:

- any factors affecting litigation capacity;
- any referral to or assessment by the Adult Learning Disability team, and/or any adult health service, where known, together with the outcome;
- any other factors which may affect the ability of the person concerned to take part in the proceedings.

21. Wall LJ in *RP v Nottingham CC and Another* [2008] EWCA Civ 462 in the Court of Appeal concluded that judgments on litigation capacity should not be made by social workers from the child protection team. He suggested that where a local authority had such concerns prior to the issue of proceedings “it should refer the parent to the Adult Learning Disability Team [or presumably an appropriate mental health resource] for help and advice. If that team thinks that further investigations are required it can undertake them; it should moreover, have the necessary contacts and resources to commission a report”. The referrals proposed will not necessarily provide information which clarifies the issue of litigation capacity because the person referred may not meet the eligibility criteria for the service or may not take up the referral. But if a referral does prove successful and proceedings are subsequently issued, the more detailed information about the parent’s difficulties and support needs will enhance the parent’s solicitors’ ability to advise their client, and, where concern exists, assist to address promptly the question of whether a litigation friend is required.

22. Good local authority practice would include:

- (i) Jointly agreed referral and assessment procedures between Children’s Social Care Services and Adult Learning Disability teams/Mental Health Services and any other partner agencies (e.g. maternity services). This is likely to involve commissioning decisions at a senior level<sup>18</sup>. The Social Care Institute for Excellence provides guidance about local authorities’ duties in relation to assessing people’s needs and their eligibility for publicly funded care and support<sup>19</sup> including in relation to the Care and Support (Eligibility Criteria) Regulations 2015. Regulation 2 explains about needs which meet the eligibility criteria; in particular that an adult’s needs meet the eligibility criteria if those needs arise from or are related to a physical or mental impairment or illness and as a result of the adult’s needs, the adult is unable to achieved two or more of the outcomes specified in the regulations and as a

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<sup>17</sup> See *Coventry City Council v (1) C (2) B (3) CA (4) CH* [2012] EWHC 2190 (Fam) in which the court gave guidance to social workers about parental consent to section 20 accommodation.

<sup>18</sup> Section 3 Care Act 2014 provides that a local authority must exercise its functions under Part 1 of the Act with a view to ensuring the integration of care and support provision with health provision and health-related provision in certain circumstances including where it considers that this would promote the well-being of adults in its area with needs for care and support and the well-being of carers in its area.

<sup>19</sup> <http://www.scie.org.uk/care-act-2014/assessment-and-eligibility/>

consequence there is, or is likely to be, a significant impact on the adult's well-being. The specified outcomes include carrying out any caring responsibilities the adult has for a child (regulation 2(2)(j)). For the purposes of the regulation an adult is to be regarded as being unable to achieve an outcome if the adult is unable to achieve it without assistance; is able to achieve it without assistance but doing so causes the adult significant pain, distress or anxiety; is able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of the adult, or of others; or is able to achieve it without assistance but takes significantly longer than would normally be expected<sup>20</sup>.

- (ii) The identification and assessment of children who may be suffering significant harm as the carer of a parent with a mental illness. Great care and sensitivity is required in making such assessments of the needs of the child under the carers' legislation in parallel with the family support and child protection sections of the Children Act 1989.
- (iii) The provision of all relevant documentation in an accessible form. The FJC has supported the publication of a booklet about care proceedings for parents with learning difficulties which has been translated into a range of languages. The booklet can be downloaded from the FJC publications page of the Judiciary website<sup>21</sup>.
- (iv) An enquiry of the local authority / mental health services to ascertain whether a lay advocate is already working with the parent. If so, it would be proper to enquire also whether the parent has expressed any view as to who should be their litigation friend if they are found, in the proceedings, to lack capacity to conduct those proceedings, or as to who should care for their child if the parent is unable to do so.
- (v) Otherwise, a lay advocate specialising in learning difficulties/mental health issues should be provided to support the parent during meetings such as child protection conferences, Family Group Conferences and with legal representatives.
  - A lay advocate is not an advocate in the legal services sense but provides support to help individuals articulate their concerns and engage with health, social care or other services.
  - They may be funded by local authorities in the exercise of their community care functions or NHS Trusts, or may be provided by charitable support.
  - Lay advocates cannot make decisions for the individual.
  - Continuity of lay advocate is important as is specialist training in child protection issues and access to specialist advice.

We are aware that lay advocacy services are not available in all areas and that many lay advocates lack knowledge or experience of court proceedings but advocacy support should be investigated and where possible arranged. The Norah Fry Research Centre at the

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<sup>20</sup> The WTPN September 2016 update of the 2007 *'Good Practice in Working with Parents with a Learning Disability,'* provides helpful guidance about legislative changes in this area since 2007.

<sup>21</sup> [The Court and your Child When Social Workers Get Involved](https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/fjc/reports-publications/fjc-publications/the-court-and-your-child/)  
<https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/fjc/reports-publications/fjc-publications/the-court-and-your-child/>

University of Bristol publishes an accessible format booklet about advocacy services which is available to download<sup>22</sup>.

(vi) There should be a speedy referral of a parent for legal advice about the case as a whole, as soon as serious concerns about their parenting capability are identified (e.g. via the local authority's Legal Department which can provide a list of local Children Panel solicitors). Legal Help is available for those who are financially eligible in public law cases and covers the initial meeting with the solicitor and follow up advice and assistance as appropriate, including correspondence and liaising with the local authority. The early establishment of the professional relationship with a solicitor will assist with early identification by the solicitor that their client may lack capacity to conduct the proceedings.

(vii) A parent may be helped to understand and to make decisions having regard to the local authority's concerns and the legal advice they receive, if they have a specialist lay advocate present to support them at meetings with social workers and lawyers and at court. There are voluntary organisations that may assist with this.

23. Caution is necessary before sending a Letter before Proceedings to a parent who may lack capacity to conduct the proceedings. There are two Letters before Proceedings: a Pre-Proceedings letter, inviting parents to a meeting to discuss concerns, in an attempt to avoid proceedings, and a Letter of Issue, which informs parents of the local authority's intention to issue proceedings. Such correspondence could easily exacerbate mental health difficulties or may simply not be accessible to the parent. Each case must be considered on its own facts and it may well be that personal discussion, involving an advocate and/or legal representative, should be undertaken before the sending of such a letter.

- Importantly additional non-means and merits tested funding for legal help in public law cases becomes available where the local authority has given written notice of proceedings in accordance with the DfE/Welsh Government guidance.
- Whilst written notice would usually take the form of a standard pre-proceedings letter, any written notice in accordance with the guidance and tailored as appropriate would satisfy the LAA criteria. Thus, where a parent lacks capacity to litigate, personal discussion and explanation of a notice would suffice, provided a copy were forwarded to their solicitor by the local authority, or indeed handed to them if they are present during the discussion.

24. If proceedings are to be issued it is imperative that Form C110A is properly completed and any potential issues about capacity identified (see paragraph 20 above). The local authority should also include in the social work statement under the heading "Summary" any concerns the local authority has that a parent may lack litigation capacity and attach any available evidence in support of their concerns to the statement. The statement must identify any direction sought by the local authority to resolve this issue under the heading "Case Management".

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<sup>22</sup> [Helping parents with learning difficulties to speak up:  
http://www.bristol.ac.uk/Depts/NorahFry/PlainFacts/NewPlainFacts/pdfs/pf49.pdf](http://www.bristol.ac.uk/Depts/NorahFry/PlainFacts/NewPlainFacts/pdfs/pf49.pdf)

## The court becoming aware of capacity issues once proceedings are issued

### The local authority

25. Applying the provisions of the PLO (FPR PD12A), on day 2 of proceedings the court will give standard directions on issue and allocation including appointment (if the person to be appointed consents) of a litigation friend for any PP or any non-subject child who is a party. This includes the Official Solicitor, where appropriate.
26. The local authority must therefore ensure, where possible, that the court has sufficient evidence to determine at the issue and allocation stage whether it needs to investigate if a party does lack litigation capacity or (where the evidence is clear and undisputed that a party is a PP) appoint a litigation friend at that stage.
27. However, all parties' legal representatives should be alive to the risk that the identification of learning disability or mental health difficulties directs the investigation, rather than the concern of the parent's solicitor; it is important to have in mind that the statutory presumption is that all adult parties have capacity to conduct proceedings (Section 1(1) MCA 2005).

### The Family Court and the High Court

28. The Family Court came into existence on 22.04.14. Judges of the Family Court include lay magistrates, District Judges (County Court, Magistrates Courts and Principal Registry of the Family Division), Circuit Judges and High Court Judges. The High Court retains jurisdiction for family proceedings but cases that can be heard in the Family Court are required to be heard in the Family Court.
29. Applications to the Family Court are allocated to the appropriate level of judge based on criteria set out in legislation and guidance issued by the President of the Family Division<sup>23</sup>. Wherever possible any question relating to allocation of proceedings will be dealt with at the Case Management Hearing (CMH).
30. FPR r1.1 (1) identifies the overriding objective of the rules as being to enable the court to deal with the case justly, having regard to the welfare issues involved. The parties are required to help the court to further the overriding objective (r1.3). The court is itself under a duty to further the overriding objective by actively managing cases (r1.4 (1)).
31. Active case management is defined as including: identifying at an early stage the issues (r1.4(b)(i)), deciding promptly which issues need full investigation *and* hearing and which do not and the procedure to be followed in the case (r1.4(2)(c), and giving directions to ensure that the case proceeds quickly and efficiently (r1.4(2)(l)). It follows that once the need to

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<sup>23</sup> President's Guidance on Allocation & Gatekeeping for Care etc Orders 22.04.14:

<http://www.justice.gov.uk/downloads/family-justice-reform/allocation-and-gatekeeping-guidance.pdf>

investigate a parent's capacity to conduct the proceedings is identified the court should give directions not only for the investigation of capacity but also for any hearing necessary to determine whether the parent is a PP and (if the parent is found to lack capacity) directions for the appointment of a litigation friend.

32. On receipt of an application with evidence of lack of capacity to conduct the proceedings, the court should give directions urgently in order to determine the issue of capacity and to identify a potential litigation friend. Where appropriate, the court should explain to a parent from the outset that they may wish to identify a potential litigation friend (the Official Solicitor is the litigation friend of last resort). An application for the appointment of a litigation friend must be accompanied by a completed "*Checklist for the appointment of a litigation friend (including the Official Solicitor)*" (see Appendix 1)<sup>24</sup>.
33. If an issue about a party's capacity to conduct the proceedings arises unexpectedly (e.g. because a parent's mental health deteriorates during the course of the proceedings) urgent directions should be given for an appropriate assessment and to resolve the capacity issue.
34. The Official Solicitor has an online referral form (available on Gov.uk) for referral to him of invitations to him to act as litigation friend in public law children cases<sup>25</sup>. If the Official Solicitor or another professional litigation friend is to be invited to act, the order should therefore be as follows:

Either [if a professional litigation friend is invited to act]

*"That X [named party] forward to Y forthwith/within ... days*

- (a) a copy of the order appointing the litigation friend and [if different] of the order recording the court's finding that [name of protected party] lacks capacity to conduct the proceedings*
- (b) a detailed letter of background information, including the stage of proceedings reached and the date of any pending hearing*
- (c) a paginated bundle with summary, statement of issues, and chronology "*

Or [if the Official Solicitor is invited to act as litigation friend]

*"That X [named party] forthwith/within.... days complete and forward to the Official Solicitor,*

- (a) the Official Solicitor's referral form for Children Act public law cases*
- (b) the documents identified in the referral form to be sent by email and*
- (c) the documents identified in the referral form to be sent by post / DX"*

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<sup>24</sup> Available to download at: <https://www.gov.uk/government/publications/appointing-a-litigation-friend-checklist>

<sup>25</sup> <https://www.gov.uk/government/publications/official-solicitor-referral-form-for-children-act-public-law-proceedings>

## The Parent's legal representatives<sup>26</sup>

35. The assessment of capacity to conduct the proceedings involves consideration of whether the party is capable of understanding issues "with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require"<sup>27</sup>. Sometimes, particularly patient, careful and repeated explanation and discussion with a solicitor/barrister, may enable a parent, with even a significant degree of learning disability, to conduct the proceedings without a litigation friend.
36. The parent's solicitor should have in mind that the parent may have had little or no experience of the court process or of giving instructions, or may have other difficulties such as literacy issues, language barriers, or sensory impairment (hearing impairment, visual impairment) to contend with which impact on their presentation.
37. The parent's solicitor should discuss with the parent their particular communication needs. It may be helpful to provide information in an accessible format (e.g. writing letters in a larger font and using double line spacing).
38. The parent's solicitor should give consideration to whether a lay advocate might assist their client during more formal dealings with the local authority, in discussion with their legal representatives or during any attendance at court.
39. Once instructed, if there is doubt as to capacity to conduct proceedings, the legal representative of a party is under a duty to draw it to the attention of the court. See paragraph 47 of the judgement of Wall LJ in *RP v Nottingham CC and Another* [2008] EWCA Civ 462: "*Both the relevant rules of Court and the leading case of Masterman-v-Lister (2003) 3 All ER 192 make it clear that once either counsel or (the solicitor) had formed the view that ... (the protected party)... might not be able to give them proper instructions, and might be a person under a disability, it was their professional duty to have the question resolved as quickly as possible*".
40. The parent should always be informed of any worries their legal representative has about the parent's capacity to conduct the proceedings, the purpose of any assessment directed at the issue, and the implications if they are found to lack such capacity.
41. Applying the provisions of the PLO, any issue about capacity and the appointment of a litigation friend must have been considered at the advocates meeting (which considers the information on the application form and annex documents) and any application for directions to determine any disputed issue about capacity and/or the appointment of a litigation friend shall be made at the CMH which is due to take place not before day 12 and not later than day 18.
42. It is the responsibility of the parent's solicitor to obtain an opinion about their client's litigation capacity. There may be occasions when it is appropriate to seek an opinion from a treating

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<sup>26</sup> See also the Law Society's practice note: *Meeting the Needs of Vulnerable Clients* - available at: <http://www.lawsociety.org.uk/support-services/advice/practice-notes/meeting-the-needs-of-vulnerable-clients-july-2015/>

<sup>27</sup> Paragraph 75 of Lord Justice Chadwick's judgment in *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162



clinician. Otherwise, an appropriately qualified independent expert must be identified. The solicitor must ensure that the assessor receives appropriate and adequate information about the legal framework for the assessment. The pro forma letter of instruction and the Official Solicitor's certificate of capacity to conduct proceedings and guidance notes<sup>28</sup> (Appendix 2) should be used. PD25B (The Duties of an Expert, the Expert's Report and arrangements for an Expert to attend Court) should be drawn to the attention of an independent expert.

43. Once received, the expert's report should, if possible, be explained to the parent. This can be a difficult task and the relevant expert may be able to assist as to how it can best be accomplished. The solicitor must advise the parent that they are entitled to dispute any opinion to the effect that they lack capacity. If the parent wishes to assert their own capacity the case must be listed urgently for the issue to be determined by the court. It may be necessary for the court to hear evidence from the expert and the parent concerned and any relevant witnesses.
44. A parent may decline professional assessment. In those circumstances, it will be for the court to determine the issue on the best evidence it has available.
45. Initially the identity of the litigation friend is a question for the PP and their solicitor. It is not an inter partes issue. The solicitor should explore whether there is any person the protected party would suggest in their circle of family and friends. It is for the court to decide whether the person proposed to be appointed complies with the conditions specified in FPR r15.4(3).
46. It is only if there is no-one identified to act as litigation friend, or the court refuses to appoint the proposed litigation friend that the case becomes a "last resort" case and an invitation may then need to be extended to the Official Solicitor (see paragraph 34).
47. Unless there is clear evidence that particular information would be harmful (not simply distressing) the solicitor should inform the PP:
  - (i) About the appointment of a litigation friend
  - (ii) About the role of a litigation friend
  - (iii) That the solicitor remains the PP's solicitor although acting upon the instructions of the litigation friend.
  - (iv) That whilst the litigation friend makes decisions about the conduct of the proceedings, it is for the parent to demonstrate that they are able to meet the welfare needs of their child
  - (v) About steps in the proceedings
  - (vi) Of court dates
  - (vii) About orders of the court.
48. If at any time there is credible reason to suggest that a PP may have regained capacity then it may be necessary for a further assessment to be conducted. The litigation friend or the PP should seek urgent directions for the obtaining of a further capacity opinion. In some cases, it may be appropriate to ask an expert instructed during the course of the case to conduct that

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<sup>28</sup> Also available to download at: <https://www.gov.uk/government/publications/certificate-as-to-capacity-to-conduct-proceedings>

review depending on the nature of their primary instructions. If a PP does recover or acquire capacity to conduct the proceedings, the litigation friend should immediately apply for their discharge so that the party can resume personal conduct of the proceedings. The court should give priority to such an application and if necessary list an urgent hearing.

### The Parent who acts as a Litigant in Person ('LIP')

49. A lack of litigation capacity must not be assumed simply because an LIP is difficult/hostile etc<sup>29</sup>. The presumption of capacity to conduct the proceedings can only be rebutted on the balance of probabilities having regard to the evidence.
50. Where the capacity of a LIP to conduct the proceedings is to be assessed, the standard letter of instruction/pro-forma certificate should be sent to the expert by whoever the court directs although this is likely to be the children's guardian. The letter of instruction should include the LIP's own comments about their capacity to conduct the proceedings.
51. Additionally, in the letter of instruction the expert should be informed that:
- (a) any LIP will generally be at a disadvantage facing professional legal representatives but that such disadvantage does not of itself give rise to a lack of litigation capacity;
  - (b) the legal representatives for the other parties are under a professional duty to ensure that the LIP is aware of what is happening during any hearing and that the judge and court staff will generally assist in explaining procedural issues;
  - (c) a LIP, with the court's permission, may attend a hearing with a 'McKenzie friend' whose role includes providing moral support, providing (non-legal) advice, taking notes during a hearing, and assisting the litigant with documentation;
  - (d) a LIP may be assisted out of court by taking advice either from a lawyer, other professional advisors, or from an advice organisation;
  - (e) conversely a LIP may decide to conduct the proceedings entirely unaided and provided that they have capacity to do so, it is a decision for that person as to what advice or assistance they seek and the extent to which they do so.
  - (f) there are a range of reasons why a litigant may decide to act in person including choice but when a parent in care proceedings, it will not be the case that they are unable to meet the cost of legal representation because they will be eligible for free legal aid.
52. If the LIP is found to lack capacity to conduct proceedings the LIP should be informed, as directed by the court, of the issues set out at paragraph 47 above.

### The role of the Litigation Friend

53. If the Official Solicitor is appointed to act as litigation friend it would be usual for the Official Solicitor to ensure continuity of representation by instructing the solicitor chosen by the PP. There are many obvious advantages in such a course including because the solicitor remains the primary point of contact for the parent. We accept however that the Official Solicitor and indeed any other litigation friend must retain discretion to appoint an alternative solicitor where necessary, and particularly if the solicitor instructed by the PP is not a member of the Law Society's Children Panel.

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<sup>29</sup> See *Durkan v Madden* [2013] EWHC 4409 and *Baker Tilly v Makar* [2013] EWHC 759 (QB)

54. It is the duty of any litigation friend, including the Official Solicitor, to fairly and competently conduct the proceedings on behalf of the PP in their best interests having regard to the evidence<sup>30</sup>.
55. Given the implications of Article 6 and the disempowering effect of the involvement of a litigation friend, the Official Solicitor's role as litigation friend is a complex and sensitive one.
56. As litigation friend the Official Solicitor will consider the PP's views and wishes as communicated via the solicitor as the case progresses. Those views, wishes and feelings will be communicated to the court by Official Solicitor. However, they will not be determinative of the Official Solicitor's approach to the conduct of the proceedings. Tensions will inevitably arise where the assessment of the Official Solicitor (or of any other litigation friend) of the parent's best interests in the litigation differs from the parent's own views. The views of the parent may carry greater or lesser weight depending on the stage the litigation has reached and the evidence at that time. The Official Solicitor is committed to presenting any realistic arguments and relevant evidence in relation to the issues before the court, the criterion being whether the point is "reasonably arguable", not whether it is likely to succeed.
57. It is acknowledged that a parent may need to "have their say" in court and that they should not be discouraged from doing so orally, or in writing, in a proportionate fashion, notwithstanding any decision by the Official Solicitor or any other litigation friend not to contest the proceedings. In appropriate cases the Official Solicitor will seek the court's agreement to the parent addressing the court for that purpose<sup>31</sup>.
58. There appear to be few, if any, cases where a non-professional litigation friend has been appointed to act on behalf of a parent in care proceedings. We recommend that an approach similar to that adopted by the Official Solicitor would be desirable on the part of any litigation friend.

### Extensions of the timetable in public law proceedings

59. Applying the PLO the expectation is that the court will be in a position to deal with the appointment of a litigation friend on day 2 or at the CMH due to take place no later than day 18. The court is required to dispose of the proceedings within 26 weeks.
60. However, in the circumstances of a particular case, the court may consider that it is necessary to extend the time by which the proceedings are to be resolved beyond 26 weeks to enable the court to resolve the proceedings justly (section 32(5) Children Act 1989). When refusing or granting an extension of the time for resolving the proceedings, the court is to take account of the guidance that extensions are not to be granted routinely and are to be seen as requiring specific justification (section 32(7) Children Act 1989). The Case Management Order must record the decision and the reason(s) for that decision and a short explanation of the impact which the decision will have on the welfare of the child (FPR r12.26C)<sup>32</sup>.

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<sup>30</sup> In *Re E (Mental Health Patient)* [1984] 1 All ER at pages 312-3 Sir Robert Megarry VC said: "The main function of a [litigation] friend appears to be to carry on the litigation on behalf of the plaintiff and in his best interests. For this purpose, the [litigation] friend must make all the decisions that the plaintiff would have made, had he been able. The [litigation] friend may, on behalf of the plaintiff, do anything which the Rules of the Supreme Court require or authorise the plaintiff to do... It is the [litigation] friend who is responsible to the court for the propriety and the progress of the proceedings. The [litigation] friend does not, however, become a litigant himself".

<sup>31</sup> See new FPR Part 3A and PD3AA and paragraph 64 (below)

<sup>32</sup> In *Re S (A Child)* [2014] EWCC B44 (Fam) Sir James Munby, P, identified three different forensic contexts in which an extension of time may be 'necessary', the first being where the case can be identified from the outset, or at least very early on, as one which it may not be possible to resolve justly within 26 weeks, one example being, cases where the parent's disabilities require recourse to special assessments or measures.

61. Applications for an extension should, wherever possible, only be made so that they are considered at any hearing for which a date has been fixed or for which a date is about to be fixed. Where a date for a hearing has been fixed, a party who wishes to make an application at that hearing but does not have sufficient time to file an application notice should as soon as possible inform the court and the other parties of the nature of the application and the reason(s) for it. The party should then make the application orally at the hearing.
62. If the court decides an extension is necessary, an initial extension to the time limit may be granted for up to eight weeks (section 32(8) Children Act 1989). If more time is necessary in order to resolve the proceedings justly, a further extension of up to eight weeks may be ordered by the court. There is no limit on the number of extensions that may be granted in a particular case.

### The giving of evidence

63. Whether a parent has or lacks capacity to conduct the proceedings does not determine whether the parent is a competent witness. It should not therefore be assumed that a parent who lacks litigation capacity cannot give evidence. There may be occasions, for example during a fact finding hearing where a child has suffered injury or has been sexually abused, where a parent's factual evidence of events may be very important for the protection of the child. The court should strive to facilitate the giving of the best possible evidence by any parent with a disability who is competent to give evidence by the use of special measures which could include the use of a Witness Intermediary<sup>33</sup>.
64. FPR Part 3A<sup>34</sup> has been introduced to address the issues of vulnerable persons giving evidence and participating in proceedings. Rule 3A.6 is directed towards protected persons and places a duty on the court<sup>35</sup> to consider whether it is necessary to make 'participation directions' to assist the PP in participating or giving evidence. Participation Directions<sup>35</sup> can include general case management directions or directions providing for special measures<sup>37</sup> including, for example, the use of an intermediary. In making a decision on the need for participation directions, the court must have regard to a list of factors<sup>38</sup> which expressly includes whether a party suffers from mental disorder or has a significant impairment of intelligence or social functioning. Practice Direction (PD3AA) will set out the need for a 'ground rules' hearing at which consideration will be given to issues such as the support to be provided to the PP, the conduct of the hearing and the manner in which evidence will be provided (both in chief and by way of cross-examination).

### Interveners

65. This guidance is concerned principally with parents who lack capacity to conduct proceedings. There may also be cases in which an intervener to the proceedings, for example someone who is a potential perpetrator of injuries to a child, either does not have the capacity to conduct the proceedings or is a child and not able, having regard to their understanding, to give instructions in relation to the proceedings. Very similar considerations, for example as to the role of the party's solicitor, would apply.

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<sup>33</sup> See also the Final Report of the Vulnerable Witnesses and Children Working Group dated February 2015 and available at: <https://www.judiciary.gov.uk/publications/final-report-of-the-vulnerable-witnesses-and-children-working-group/>

<sup>34</sup> In force 27<sup>th</sup> November 2017

<sup>35</sup> which must be recorded on the Order: 3A.9

<sup>36</sup> As defined in 3A.1

<sup>37</sup> As set out in 3A.8

<sup>38</sup> Rule 3A7

## The role of the Independent Reviewing Officer (IRO)

66. There is an important role for the IRO in ensuring that the local authority takes the right decision in the interests of the child whilst ensuring that due consideration is given to the wishes and feelings of a parent who lacks capacity and may find participation in Statutory Reviews difficult. The IRO will need to consider carefully how the parent may most appropriately be enabled to participate in the reviewing process, during and following proceedings. It may be appropriate to consider requesting the local authority to make a referral to a specialist independent advocacy service for the parent.
67. We would expect an IRO to question vigorously the legal status of any child accommodated under section 20 Children Act 1989 where it appears that a parent has an impairment of, or a disturbance in the functioning of, the mind or brain that may cause the parent to lack capacity to consent to a section 20 arrangement and/or impair their capacity to make decisions in the exercise of their parental responsibility.
68. If the child becomes/remains looked after following proceedings in which their parent was a protected party, the fact that the parent lacked litigation capacity should be identified and recorded on the face of any final order as a specific issue for consideration by the IRO.

## Private Law

### The court becoming aware of capacity Issues

69. In private law proceedings, litigation capacity issues in relation to either parent (or any other applicant or respondent) may come to the court's attention in a number of ways:-

- (i) By the issue being raised by an Applicant in the form C100 in relation to the Respondent:
  - (a) Form C100 requires the applicant under the heading 'Additional Information Required' to answer yes or no to the question: "Is this a case with an international element or factors affecting litigation capacity?" and if 'yes' in respect of the latter:-
  - (b) To complete section 7 ('Factors affecting ability to participate in proceedings'); section 7 requires information to be provided about:
    - any factors affecting litigation capacity;
    - any referral to or assessment by the Adult Learning Disability team, and/or any adult health service, where known, together with the outcome;
    - any other factors which may affect the ability of the person concerned to take part in the proceedings.
- (ii) If a party attends court with a family member/friend/supporter who raises the issue<sup>39</sup>;
- (iii) From Cafcass as a result of screening and checks or the Cafcass officer's assessment at the FHDRA;
- (iv) From a Mediator following a MIAM;
- (v) From the form C100 of an Applicant which suggests a lack of capacity;
- (vi) The appearance and behaviour at court of a party who may lack capacity<sup>40</sup>;
- (vi) From the lawyer of one or other party who has a duty to raise the matter with the court<sup>41</sup>.

70. Three very important points must be remembered:-

- (i) The statutory presumption in favour of capacity<sup>42</sup> which can only be displaced by evidence<sup>43</sup>;

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<sup>39</sup> The friend/supporter may produce a completed form FP9 as evidence in anticipation of this issue being raised. An FP9 is completed when someone offers to act as a litigation friend, and provides for suitable evidence in support of lack of capacity to be attached.

<sup>40</sup> But care needed: see *Baker Tilly v Makar* [2013] EWHC 759 where bizarre behaviour at court was not enough to justify a finding of lack of litigation capacity, and see Rimer LJ in *Carmarthenshire CC v Lewis* [2010] EWCA Civ 1567.

<sup>41</sup> *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889 at para 30; *P v Notts CC & OS* [2008] EWCA Civ 462 at para 99.

<sup>42</sup> MCA 2005 Section 1(2)

<sup>43</sup> As to the evidence needed, see below paragraph 10 and following. The court needs evidence to find both that there is impairment or disturbance in functioning of mind or brain as required by section 2 MCA 2005 and that such impairment or disturbance causes inability to make required decisions (as defined by section 3 MCA 2005).

- (ii) That capacity is issue specific (i.e. to the particular proceedings that are before the court in this case)<sup>44</sup> and;
- (iii) That capacity is time specific (i.e. to the time that the proceedings are before the court).

71. At PD15B at 3.2 the following point is made:-

*“Litigation capacity has to be considered in relation to the proceedings before the court. For example, a parent may have been found to lack litigation capacity in care proceedings about child A three years before the current proceedings. That finding about litigation capacity in previous proceedings is not evidence that the parent lacks litigation capacity in subsequent proceedings about child B. It may be that the subsequent proceedings are simpler in terms of the issues and evidence before the court or that the parent’s previous difficulty leading to lack of litigation capacity has improved.*

72. However, the court has a duty to investigate the issue of capacity whenever there is a reason to suppose that it is absent<sup>45</sup>. In this section of this Guidance, the term ‘potential protected party’ (“PPP”) is used to describe a party or intended party whose capacity to conduct the proceedings is being investigated.

73. A protected party must have a litigation friend to conduct proceedings<sup>46</sup> and no steps should usually be taken in the proceedings until a litigation friend is appointed<sup>47</sup>. It may take many weeks or even months for the question of litigation capacity to be resolved<sup>48</sup> and for a litigation friend to be both formally appointed and to be in a position to act; nevertheless, it is incumbent on a judge to ensure that this issue is resolved as quickly as possible.

### Staying the Proceedings/Urgent Orders

74. It may sometimes be necessary for orders to be made in relation to children as a matter of urgency and in order to safeguard their well-being. FPR r15(3) provides that steps may be taken in proceedings with the permission of the court<sup>49</sup>, and that steps which have been taken may be validated if the court so orders<sup>50</sup>. This gives the court a discretion to take limited steps to ensure the short-term well-being of children: It is suggested that such orders might include:-

- (i) Urgent decisions about where a child is to live;
- (ii) Urgent decisions about how a child will spend his time between his parents, including spending time in a contact centre;
- (iii) Urgent decisions on temporary leave to remove;

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<sup>44</sup> An example, in the Court of Protection in *A NHS Foundation Trust v Ms X* [2014] EWCOP35 where Cobb J found that Ms X lacked capacity in relation to decision making about treatment for anorexia but retained capacity for issues around her alcohol dependence disorder. Therefore, Cobb J’s decision making could only cover treatment in respect of the anorexia. See also the discussion by Munby J (as he then was) about capacity to litigate and the need to focus on the particular piece of litigation in relation to which the issue arises at paragraph 33 onwards of his judgment in *Sheffield City Council v E & S* [2004] EWHC 2808 (Fam)

<sup>45</sup> *Masterman-Lister* [2003] 1WLR 1511 per Kennedy LJ at paragraph 17

<sup>46</sup> FPR r15.2

<sup>47</sup> FPR r15.3(3) but see below

<sup>48</sup> Sometimes in cases involving children it is in one party’s interests that the proceedings are delayed and a judge must be alert to this fact.

<sup>49</sup> FPR r15.3.1 & 2 (note Lady Hale’s consideration of this power in civil proceedings in *Dunhill v Burgin (No 2)* [2014] UKSC 18).

<sup>50</sup> FPR r15.3.3

(iv) Ordering reports under section 7 or 37 of the Children Act 1989;

but these powers should not be used to approve or make final orders. Any orders made whilst capacity is being investigated must be reviewed when the issue has been resolved.

## Resolving the Issue of Capacity

75. In the event that litigation capacity is in issue, the court has to make a finding of fact on it<sup>51</sup>. It is important that any decision about litigation capacity is properly recorded on the face of an order<sup>52</sup>.
76. Whilst generally it is for the person who raises the issue of capacity to prove a lack of it, the practicalities of the situation (where LIPs are involved) are that it will frequently be for the court to identify and call for the necessary evidence that will help it decide the issue as quickly as possible.
77. The Official Solicitor has produced a pro forma document entitled “Certificate of Capacity to Conduct Proceedings”, together with Notes for the Assessor and Guidance Notes<sup>53</sup>. This is a short form of report to guide those who are giving their opinion on capacity as to the relevant and necessary information which is required by the court. The most straightforward way for the issue of capacity to be addressed is for a certificate of capacity to be filed by someone with the appropriate medical or psychological qualifications to complete it. The certificate must identify what the impairment or disturbance of the mind or brain is and why it causes the party to be unable to make the decisions necessary to conduct the proceedings. In many cases a court may feel that this certificate is all the evidence that may be required<sup>54</sup>; but in other cases there may be justification in obtaining a number of expert opinions.
78. It will be very unusual for the court to make a finding on capacity without any medical (or in the case of learning difficulties) psychological evidence. The court must identify an impairment or disturbance of the mind or brain (“the diagnostic test” – see s2(1) MCA 2005) and then must go on to find that the PPP cannot, because of the impairment or disturbance, make the decisions necessary to conduct the proceedings (“the functionality test”). It will be a rare case where the court will be able to do this without medical or psychological evidence<sup>55</sup>.
79. The first step is therefore to investigate whether the PPP has recently engaged with mental health services (perhaps a psychiatrist or a community psychiatric nurse) or other relevant health professionals, and to ask the PPP or the other party for the relevant contact details. Details of the PPP’s GP should also be obtained. If it is felt appropriate, the PPP could also be asked to consent to the court both obtaining their medical records and contacting their medical advisers and this should be recorded on the face of the order<sup>56</sup>.
80. If the PPP has been involved with mental health services, is receiving help from adult social services within a local authority, or is resident in a specialist accommodation, then ideally the court should be provided with a report from an expert (a psychiatrist, physician or a psychologist) who has considered the issue of the PPP’s capacity to conduct the proceedings

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<sup>51</sup> Whilst recognising that capacity can fluctuate. See PD15B paragraph 4.1

<sup>52</sup> See paragraph 86 below.

<sup>53</sup> Attached as Appendix 2

<sup>54</sup> See also PD15B paragraph 1.2 which states that in cases where a party is in a coma or persistent vegetative state that a letter from the treating doctor confirming the party’s condition is likely to be adequate evidence.

<sup>55</sup> See *Baker Tilly v Makar* [2013] EWHC 759

<sup>56</sup> See *Stevens R v Plymouth City Council* [2002] EWCA Civ 388 where Hale LJ, as she then was, discusses the confidentiality of the medical records of someone who lacks capacity in the context of Guardianship under the Mental Health Act 1983; but the basic principles apply.



before the court<sup>57</sup>. If that expert is able to complete the Official Solicitor's Certificate of Capacity to Conduct Proceedings, then that is likely to be of great assistance to the court.

81. The court itself may need to request the filing of the certificate of capacity to conduct the proceedings. In a straightforward case a judge may feel that a letter to a GP or treating physician from the court may be appropriate; but before a certificate can be signed, the practitioner will need to understand the nature and the complexity (or otherwise) of the proceedings<sup>58</sup> and the role of the PPP in those proceedings, as well as the issues in the case.
82. The court may consider inviting the GP and any other relevant agencies or professionals to assist the court in its task of determining litigation capacity by directing or requesting the GP to provide copies of any existing relevant reports about the PPP's mental health or relevant GP notes to the court. However, there are some difficulties in this course:
  - (i) How likely is it that the professionals will provide this information without an order?
  - (ii) How is the confidentiality of the patient to be maintained<sup>59</sup>?
  - (iii) Who will pay any relevant charges?
  - (iv) Who is to draft the relevant request?
83. If there have been other proceedings involving the same party before the court, it may be possible to draw on the medical evidence available in those other proceedings but real care needs to be taken because of the importance of looking at the issue in *these* proceedings at *this* time<sup>60</sup>. An opinion as to lack of capacity to conduct one set of proceedings is not determinative of the issue in another set of proceedings.
84. If no expert report can be obtained and the PPP refuses to consent to obtaining one (or refuses or does not attend for medical or psychological examination) then the court must consider what, if any other evidence might be available to assist the court in making its finding of fact and should give necessary directions.
85. The other party to the proceedings could be directed to file a statement or statements dealing with the PPP's capacity to conduct the proceedings and other family members could be invited to provide information to the court. It is open to the court to write to others to request letters or statements concerning capacity to litigate which will assist the court. Those who could be contacted could include schools, GPs, and local authority adult safeguarding teams. The court would have to draft such requests and would have to ensure that the confidentiality of the PPP is maintained by inviting the evidence to be provided only to the court in the first instance. A suggested draft letter is attached to this Guidance at Annex 4, helpfully provided by the Office of the Official Solicitor. The weight to be given to any such evidence (and the fact that the

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<sup>57</sup> But note that the view of the expert is not determinative. It is a matter for the court which may form a different view to the expert. See Baker J in *CC v KK* [2012] EWHC 2136 – a Court of Protection case about the person's capacity to make personal decisions about their residence and care, and *Re TZ (no 2)* [2014] EWCOP 973, another Court of Protection case.

<sup>58</sup> Lord Justice Kennedy, *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889 paragraph 27: *What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made*

<sup>59</sup> See the MCA 2005 Code of Practice paragraphs 4.55 and 4.56 which suggest that medical professionals should share information on capacity with those who are trying to assess it.

<sup>60</sup> *Baker Tilly v Makar* [2013] EWHC 759 QB

witness may not have been called) is all a question for the judge<sup>61</sup>.

86. Following the evidence gathering, the court must hold a hearing to determine the issue. It must consider all the available evidence about this issue. Care is needed when considering whether the PPP should give evidence on this issue, and special measures may be required in order to allow this to happen<sup>62</sup>. Part 3A of the FPR and the accompanying PD deal with the issue of vulnerable witnesses and will need to be referred to in order to allow the participation of the PPP and their evidence giving.
87. The test to be applied is to be found in the FPR r2.3 which by reference incorporates the test in the MCA 2005. A judgment on the issue should be delivered. If satisfied as to lack of capacity the court must set out why both the diagnostic and the functionality tests are satisfied. The presumption in favour of capacity should be recalled, and any findings made on the balance of probabilities. The finding should be recorded on the face of the order by recording that the PPP is “a protected party within the meaning of FPR 2010 Rule 2.3”. It is good practice for the evidence on which the court made its decision to be clearly recorded on the face of the order.
88. The court should never make “unless” orders which pressurise a PPP into complying with capacity assessments or medical examinations<sup>63</sup>. The fact that the PPP does not comply with orders or requests to be examined or indeed engage in the process is one of many factors that the court might take into account in determining the issue.
89. If capacity issues arise before the Magistrates which are likely to involve the court determining the issue, the matter should be transferred to a District or Circuit Judge depending on the level of complexity<sup>64</sup>.
90. If the court finds that the party lacks capacity, then the PPP becomes a ‘protected party’ (“PP”) within the meaning of r2.3 and FPR part 15 (Representation of Protected Parties) applies. A PP must act by a Litigation Friend and therefore one must be appointed to act on their behalf.

### Appointing a Litigation Friend

91. A person who has been appointed as a Deputy under an order of the Court of Protection may have been authorised to conduct the proceedings in question. A person with authority as a Deputy to conduct the proceedings in the name of a PP or on that party’s behalf is entitled to be the litigation friend of the PP in any proceedings to which that person’s authority extends<sup>65</sup>. The Court of Protection order must be filed to establish this point<sup>66</sup>.
92. If a person has been appointed as a Deputy under an order of the Court of Protection but not specifically authorised to conduct the Private Law proceedings, they may, nonetheless, be suitable for appointment as a litigation friend if they are willing to act.

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<sup>61</sup> The confidentiality issues are difficult. There has to be a balance struck between the confidentiality of the PPP and the Article 6 and 8 issues. A short judgment recording the court’s consideration of these factors is advisable, together with a preamble if appropriate. The PPP will have to be aware of the evidence filed as a result of this exercise.

<sup>62</sup> See PD15B at paragraphs 1.4-1.5 which suggests that a treating clinician may be able to comment on whether a PP would be able to give evidence and how, and the impact on the PP of doing so; the same would apply in respect of a PPP. Part 3A of the FPR relating to Vulnerable Persons (and PD3AA) now places a duty on the court to ensure that vulnerable people (including those who lack capacity) are assisted to participate and give evidence.

<sup>63</sup> *Carmarthenshire CC v Lewis* [2010] EWCA Civ 1567

<sup>64</sup> See the President’s Allocation & Gatekeeping Guidance and Schedule for Private Law cases 22/4/14; <http://www.justice.gov.uk/downloads/family-justice-reform/allocation-and-gatekeeping-guidance.pdf>

<sup>65</sup> FPR r15.4(2)

<sup>66</sup> FPR r15.5(2)

93. In the alternative if there is no Deputy authorised to conduct the proceedings in question, then any other person can be appointed as litigation friend provided that they:<sup>67</sup>
- (i) Can fairly and competently conduct the proceedings on behalf of the PP<sup>68</sup>;
  - (ii) Have no interest adverse to that of the PP;
  - (iii) Undertake to pay any costs which the PP may be ordered to pay in relation to the proceedings, subject to any right that person may have to be repaid from the assets of the PP (this does not apply to the Official Solicitor);
  - (iv) File a certificate of suitability (form FP9).
94. As well as family members, other possible litigation friends might be someone from the local authority's adult learning disability team, or a lay advocate from an independent advocacy service. It is well worth researching advocacy services in a particular locality or contacting mental health charities for details as to whether they are able to provide such services, for example:
- Just Advocacy (<http://justadvocacy.org.uk/>)
  - Rethink Mental Illness (<https://www.rethink.org/>)
  - Matrix Advocacy (<http://www.matrixsdt.com/>)
  - Age UK (<http://www.ageuk.org.uk/>), and POhWER (<http://www.pohwer.net/>)
95. However, the role of litigation friend is an onerous one, particularly in relation to the undertaking to pay costs. The difficulty in the Court identifying someone who is prepared to take this role cannot be underestimated.

### The appointment of the Official Solicitor as litigation friend

96. The court may make a direction inviting the Official Solicitor to act as litigation friend but cannot order the Official Solicitor to accept that invitation. The Official Solicitor's Practice Note on his appointment in family proceedings issued in January 2017<sup>69</sup> makes clear that such invitation will be accepted subject to three criteria being fulfilled<sup>70</sup>:
- (i) That there is undisputed evidence as to lack of capacity to conduct the proceedings (normally provided in the Official Solicitor's certificate of capacity to conduct proceedings) or that the court has made a finding that the party lacks capacity;
  - (ii) Confirmation that there is the security for the costs of legal representation of the PP to be met (the Official Solicitor does not charge for acting as litigation friend but does not provide legal services to the PP);

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<sup>67</sup> FPR r15.4(3)

<sup>68</sup> It must be noted that conducting the proceedings fairly and competently does not mean that the litigation friend is legally representing the PP which they are not able to do. See Charles J in *Re U F* [2013] EWHC 4289, a Court of Protection case where he said "A family member albeit rarely could demonstrate that he or she can act as litigation friend for P but would need to demonstrate that he or she can as P's litigation friend take a balanced and even handed approach to the relevant issues. That is a difficult task for a member of the family who is emotionally involved in the issues that are disputed within the family." See also *RP v Nottingham CC and Another* [2008] EWCA Civ 462 at paragraph 130. For a more recent case where a family member was appointed a litigation friend in a Court of Protection case about the welfare of the incapacitated person who was the subject of the application see *WCC v AB & SB* [2013] CPOLR 157.

<sup>69</sup> Practice Note of January 2017 (*The Official Solicitor to the Senior Courts Appointment in Family Proceedings and Proceedings under the Inherent Jurisdiction in Relation to Adults*;  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/355822/ospt-practice-note.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/355822/ospt-practice-note.pdf)

<sup>70</sup> See Appendix 6 for draft Order, and see Paragraphs [31 et seq and appendix 5 and 7] below for information and Orders that may be needed to assist in obtaining funding.

(iii) Confirmation that there is no one else able and willing to act as litigation friend and therefore that it is a case of last resort.

97. The protection for costs proviso would demand that the PP is entitled to legal aid or has sufficient funds of their own to discharge the costs of legal representation.

## Funding

98. Legal aid is available for applications for non-molestation orders and occupation orders<sup>71</sup> and also for other private law matters where the applicant for funding provides evidence that they have been, or are at risk of, domestic violence or that the child who would be the subject of the proceedings is at risk of abuse (see Regulation 33 and 34 of the Civil Legal Aid (Procedure) Regulations 2012 (as amended)). The application must also meet the relevant means and merits test. In this context the capacity of the applicant to conduct the proceedings may be relevant in relation to the prospects of success of any application before the court. In cases where the proceedings are in scope of legal aid a solicitor can make an application for legal aid to the Legal Aid Agency ('LAA') in the usual way.

99. Where, in children and finance cases, the matter is not in scope for legal aid because there is no evidence of domestic violence or child abuse then an application may be made for exceptional case funding. The applicant must, just as with an in scope case, meet the ordinary means and merits test<sup>72</sup>, and in addition must meet the criteria for exceptional case funding<sup>73</sup>. Guidance on how to make an application can be found at : <https://www.justice.gov.uk/legal-aid/funding/funding-guidance> and the specific criteria that need to be met are set out at : <https://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf>.

100. If the Official Solicitor is to be invited to act, then it will be beneficial if consideration is given to starting the process of gathering the information needed to allow an application for public funding to be made by the Official Solicitor on the PP's behalf<sup>74</sup>. A list of suggested information and a draft order are attached as Appendices 5 and 6 respectively. One option is to consider transferring the case to the High Court (or a Section 9 Judge) for the purpose of making orders<sup>75</sup> against third parties, directing the disclosure of financial information to the court which will detail the PP's financial situation<sup>76</sup>. Appendix 7 attaches a draft form of Order which could be used<sup>77</sup>.

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<sup>71</sup> Civil contempt proceedings are criminal for the purposes of legal aid and so criminal legal aid is available, see: <https://www.gov.uk/guidance/apply-for-legal-aid-for-civil-contempt-cases>

<sup>72</sup> There is often considerable difficulty in obtaining the necessary information and supporting documents for the means assessment. If such difficulty arises consideration should be given to transferring the proceedings to a judge who is nominated under the Court of Protection and therefore able (assuming the PP lacks financial capacity) to make Orders to facilitate the necessary disclosure for the purpose of a legal aid application or, if financially ineligible for legal aid, to make the necessary orders to secure payment of the costs by the PP's estate.

<sup>73</sup> The Solicitor should make it clear that the applicant for legal aid has been found to lack capacity to conduct the proceedings and therefore cannot as a matter of law act as a litigant in person.

<sup>74</sup> Even if a case is urgent, there is no mechanism to make an urgent ECFS application (i.e. it is entirely down to the LAA when they consider it, their standard response is that they will consider it within 20 working days). This means it is all the more important that the information and documents are provided without delay.

<sup>75</sup> The orders for third party disclosure should be separately drawn so as to preserve the confidentiality of the parties and children in relation to the issues in dispute.

<sup>76</sup> For example, an order to the DWP to disclose bank accounts which receive benefits will then allow the Official Solicitor to ask for a third party disclosure order against the bank to obtain the necessary statements.

<sup>77</sup> With particular thanks to the office of the Official Solicitor for the information contained in these paragraphs relating to funding.

## The Participation of PP in the proceedings

101. The same considerations apply in Private law cases as apply in Public Law cases in relation to a PP's participation in the proceedings. Reference should be made to Paragraphs 53 (supra) as to the role of the OS if representing the PP; and to Paragraphs 63 and 64 (supra) as to the steps which the court must take when considering how best to support the PP in participating and giving evidence. FPR Part 3A and PD3AA<sup>78</sup> place a duty on the court to consider both aspects of the PP's involvement, and provide guidance to the court as to the matters to take into account and the steps which can be taken to ensure the PP's participation and ability to give evidence. As in public law cases, it may be that the PP simply wishes to be present, to address the court informally, or to be helped to understand the outcome of a case and the court should strive to achieve this.

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<sup>78</sup> In force from 27/11/17

## Private Law Working Group Members

(reported February 2014)

Mr Justice Cobb	Chair
District Judge Aitken	PRFD
District Judge Arbuthnot Court)	Deputy Senior District Judge (Magistrates'
John Baker	Family Proceedings Court
Christine Banim	Cafcass
Christina Blacklaws	Co-operative Legal Services
Sue Bovill	Co-operative Legal Services
Melanie Carew	Cafcass
Eleanor Druker	Legal Aid Fund
Her Honour Judge Karp	South East Circuit
Adam Lennon	HMCTS
Kate Lyons	DfE
Steve Matthews	HMCTS
Nicola Massally	Judicial Office
Stuart Moore	Moj
District Judge David Owen	Court of Protection
Her Honour Judge Raeside	South Eastern Circuit
Paul Stewart	HMCTS
Jo Wilkinson	Judicial Office

PROTECTED PARTIES IN FAMILY PROCEEDINGS

Checklist for the appointment of a litigation friend (including the Official Solicitor)

*This checklist is to be completed where there is reason to believe that a party or prospective party to proceedings ('PP') lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings. It should be completed by PP's legal representative or, if none, any person (including a local authority) able to provide the relevant information.*

Name of party

Describe briefly the reasons for believing that PP lacks capacity to conduct the proceedings

*Evidence and finding as to capacity*

Has the court made a finding that PP lacks capacity to conduct the proceedings Yes / No

*(if so, give date and attach a copy of the order*

Date

Has an assessment of capacity been obtained?

Yes / No

*If so, give the date of assessment, name and occupation/professional qualification of the author and a concise summary of the conclusion. A copy should be attached if available.*

Has PP been informed of the assessment?

Yes / No

Does PP accept the assessment?

Yes / No

Has PP been informed of the effect and consequences of the assessment and of being a protected party?

Yes / No

If there is no assessment of capacity, what, if any, evidence is relied on to determine the question of capacity?

If an assessment is to be carried out, who is to make the arrangements and when?

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*Litigation friend*

Have enquiries been made as to whether any person other than the OS is suitable and willing to act as litigation friend? Yes / No

If so, is there any such person suitable and willing to act? Yes / No

If yes, state name, address and relationship, if any, to PP

If no enquiries have been made, give reasons and state when and how any enquiries are to be made.

*Funding*

Has a public-funding certificate been granted to PP Yes / No

If not, is PP eligible for public-funding? Yes (a) / No (b)

- (a) without assessment of merit or means
- (b) subject to merit and/or means

If no, how is security for costs to be provided to the Official Solicitor or other litigation friend?  
(eg PP's funds, with CoP authority if required, or undertaking by another party)

*Information for the Official Solicitor (where invited to consent)*

Have the following been provided to the OS?

- a copy of any court order or finding relating to capacity or the appointment of a litigation friend Yes / No
- a copy of any assessment of capacity (including any letter of instruction) Yes / No
- the information set out in this form (to be given in writing and including any relevant attendance note) Yes / No



If the OS consents to act as litigation friend for PP, who is to provide the case papers to him?

This form has been completed by:

*Name:*

*Position:*

*Address/phone/e-mail:*

*Further information*

- For further information about the appointment of the Official Solicitor, reference should be made to the *Practice Note: Official Solicitor: Appointment in Family Proceedings and Proceedings under the Inherent Jurisdiction in relation to Adults* (January 2017).
- For the procedure in relation to protected parties, see the Family Procedure Rules 2010, Part 15 and Practice Directions 15A and 15B

*Contacting the Official Solicitor*

To discuss any question in relation to the appointment of the OS in a particular case, contact may be made on: 020 3681 2755 (for public law children proceedings)

020 3681 2754

(for all private law family proceedings, including divorce, civil partnership and proceedings under the Family Law Act 1996)

## CERTIFICATE AS TO CAPACITY TO CONDUCT PROCEEDINGS

To the assessor:

The attached certificate of capacity to conduct proceedings is a standard form of report for recording the assessment of the mental capacity of an adult to conduct their own proceedings ('litigation capacity') where that adult is a party or intended party to proceedings in the Family Court, the High Court, a county court or the Court of Appeal. 'Conducting one's own proceedings' includes both conducting the proceedings through solicitors and conducting them as a litigant in person ('LIP').

This assessment of capacity is being requested because there is concern that the party or intended party to the proceedings lacks litigation capacity (within the meaning of the Mental Capacity Act 2005) and is therefore a 'protected party'.

Part 15 of the Family Procedure Rules 2010 and Part 21 of the Civil Procedure Rules 1998 provide that a protected party must have a litigation friend to conduct the proceedings on that party's behalf. The litigation friend, rather than the protected party, is responsible for making the decisions about the conduct of the proceedings.

The certificate is not intended for any purpose other than the assessment of whether the person lacks litigation capacity in relevant proceedings.

Before you carry out your assessment and complete the certificate you should:

- (1) Read the guidance notes attached.
- (2) Read the description of the proceedings provided at part 3 of the certificate and/or in the accompanying letter of instruction.
- (3) Consider chapter 3 of the Mental Capacity Act 2005, Code of Practice, issued by the Lord Chancellor in accordance with sections 42 and 43 of the Act.

The BMA/Law Society Legal Handbook, *Assessment of Mental Capacity - A Practical Guide for Doctors and Lawyers*, 4<sup>th</sup> edition also contains useful guidance.

*Your opinion:*

- (4) If it is your opinion that the person does lack litigation capacity please complete all 8 parts of the certificate; in such cases the certificate must identify what the impairment of, or disturbance in the functioning of the person's mind or brain is *and* why it causes the person to be unable to make the decisions necessary to conduct of those proceedings:
  - (a) please note that the assessment is by reference to the proceedings as a whole not by reference to each step in the conduct of the proceedings
  - (b) please consider if there are practicable steps which could be taken to enable the person to acquire capacity to conduct the proceedings.
- (5) If it is your opinion that the person does have litigation capacity, there is no need for you to, and you should not, give grounds for that opinion.

*Completing the certificate*

*Part 3 ("the information"):*

- (6) The description of the proceedings given to you should include the person's role in the proceedings, a summary of the issues involved (not simply the type of case), state whether the proceedings are particularly complex and what are the perceived difficulties in the person concerned making decisions about the conduct of the proceedings
- (7) If a person is represented by a solicitor, the solicitor will usually be the first to recognise or suspect that the person (their client) may lack litigation capacity. This is because the solicitor is in a unique position to make an assessment about their client's litigation capacity, as it is the solicitor who explains the information (including legal advice) relevant to the making of the decisions involved in conducting the proceedings.
- (8) If a person is a LIP (that is, without legal representation), that person will often be at a disadvantage in the conduct of the proceedings but that does not of itself give rise to a lack of litigation capacity. There is a range of reasons why litigants act in person including the lack of free or affordable representation or simply that acting in person is the person's choice.
- (9) Further:
  - (a) the legal representative for any other party is under a professional duty to ensure that an unrepresented party is aware of what is happening during any hearing;
  - (b) the judge will generally assist an unrepresented party by explaining procedural issues;
  - (c) a LIP may be permitted by the court to attend a hearing with a 'McKenzie friend' who may

- provide moral support to the LIP;
- take notes;
- help with case papers;
- quietly give advice on any aspect of the conduct of the case;

(d) the LIP may be assisted out of court by taking advice from a lawyer or from other professional advisors or from an advice organisation.

*Part 7 ("the person's views")*

- (10) A party or intended party is entitled to dispute any opinion that they lack litigation capacity. A protected party loses their autonomy to make decisions about the conduct of the proceedings, and the decisions made by the litigation friend about conduct of the proceedings may not always accord with the party's own wishes and feelings.
- (11) When completing part 7 you should therefore include any views expressed by the person themselves about their litigation capacity.

Please read these notes before completing the Certificate

### GUIDANCE NOTES

Where a party or intended party lacks mental capacity (within the meaning of the Mental Capacity Act 2005) to conduct their own proceedings ('litigation capacity'), their interests must be protected by the appointment of a 'litigation friend' who will conduct the proceedings on their behalf.

The Official Solicitor is usually approached, as a last resort, in cases where there is no other suitable person who is willing to act.

Medical or psychological evidence is usually required to establish whether the person lacks mental capacity

A person who lacks litigation capacity is known as a 'protected party' within the proceedings.

The Mental Capacity Act 2005 provides

#### *Section 2 - People who lack capacity*

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.*
- (3) A lack of capacity cannot be established merely by reference to—
  - a) a person's age or appearance, or*
  - b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.**
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*
- (5) No power which a person ("D") may exercise under this Act—*

- a) *in relation to a person who lacks capacity, or*
  - b) *where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.*
- (6) *Subsection (5) is subject to section 18(3).*

### *Section 3 - Inability to make decisions*

- (1) *For the purposes of section 2, a person is unable to make a decision for himself if he is unable—*
- a) *to understand the information relevant to the decision,*
  - b) *to retain that information,*
  - c) *to use or weigh that information as part of the process of making the decision, or*
  - d) *to communicate his decision (whether by talking, using sign language or any other means).*
- (2) *A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means)*
- (3) *The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.*
- (4) *The information relevant to a decision includes information about the reasonably foreseeable consequences of—*
- a) *deciding one way or another, or*
  - b) *failing to make the decision.*

So it can be seen that the Act contains a two-part test of capacity with diagnostic and functional elements:

- (1) Is there an impairment of, or disturbance in the functioning of, the person's mind or brain?  
and
- (2) Is the person unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

Please refer to the information set out in your instructions and/or the first box at question 3 of the certificate and any accompanying letter for details of the proceedings and relevant information about the circumstances of the person.

The assessment of capacity must be based on the party's or intended party's ability to conduct the specific proceedings and not other proceedings, or on their ability to make decisions in general. It does not matter whether the impairment or disturbance is permanent or temporary but the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

To have litigation capacity the party or intended party must be able to understand the information relevant to the decisions arising during the course of the proceedings, retain that information, use or weigh that information as part of the process of making the decisions, and to communicate his decision (whether by talking, using sign language or any other means).

The assessment of capacity to conduct proceedings may depend on the nature of the proceedings in train or in contemplation. The test to be applied is whether the party or intended party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which their consent or decision is likely to be necessary in the course of those proceedings. Some of the matters to be considered in assessing a party's or intended party's litigation capacity are as follows:

- (a) the party or intended party would need to understand how the proceedings were to be funded;
- (b) they would need to know about the chances of not succeeding and the risk of an adverse order as to costs;
- (c) they would need to have capacity to make the sort of decisions that arise in litigation;
- (d) capacity to conduct the proceedings would include the capacity to give proper instructions for and to approve the particulars of claim, and to approve a compromise.
- (e) for a party or intended party to have capacity to approve a compromise, they would need insight into the compromise, an ability to instruct solicitors to advise them on it, and an understanding of their advice and an ability to weigh their advice.

A lack of capacity cannot be established merely because of a person's age or appearance or his condition or an aspect of his behaviour.

When assessing capacity, practitioners must have regard to the statutory principles set out in section 1(2), (3), and (4) of the Mental Capacity Act 2005 and to the Mental Capacity Act 2005 Code of Practice (see above), in particular its Chapters 2, 3 and 4.

The relevant statutory principles are that:

*Section 1 .....*

- '(2) A person must be assumed to have capacity unless it is established that he lacks capacity.*
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision'*

The Code of Practice is available on line at:

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

If it is your opinion that the person does have capacity to conduct the proceedings, there is no need for you to give grounds for that opinion. However, if you are of the opinion that the person lacks capacity to conduct the proceedings, the Official Solicitor's certificate requires you to state in paragraphs 2 and 3 the grounds for that opinion.

This certificate relates only to the specific proceedings in which the party is, or intended party will be involved. A separate certificate may be required if the person is a party or intended party to any other proceedings.

Separate considerations apply to any question as to whether the person is subject to compulsory detention under the Mental Health Act 1983: in some cases the person concerned is liable to compulsory detention but may have litigation capacity, and in many cases the person concerned lacks litigation capacity but is not liable to compulsory detention.

Official Solicitor

2014



## CERTIFICATE AS TO CAPACITY TO CONDUCT PROCEEDINGS

\* You should read the whole of this form and the attached notes for guidance before completing this form. Please answer all questions as fully as you can.

Name of person concerned: \_\_\_\_\_ Date of birth: \_\_\_\_\_

The proceedings are \_\_\_\_\_

(and see paragraph 3 below)

Insert your full name and address (including postcode)  Give your professional qualifications	I _____  Of _____
For a definition of 'a person who lacks capacity' see note 2 attached	1. Nature of your professional relationship with the person concerned: ▪ I have acted as practitioner for the person concerned since _____ and last assessed him/her on _____ or ▪ I assessed the person concerned on _____ following a referral from _____  AND in my opinion _____ ▪ is capable (within the meaning of the Mental Capacity Act 2005) of conducting the proceedings* or ▪ lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings* (*strike through as appropriate)  If in your opinion _____ is a person who lacks capacity to conduct the proceedings please answer questions 2-8 below

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2. The person concerned has the following impairment of, or disturbance in the functioning of, the mind or brain (see note 2):

this has lasted since: \_\_\_\_\_

3. As a result, the person concerned is incapable of conducting the proceedings described below and/or in the attached letter of instructions.

Because: (please tick as many boxes as apply)

- the person is unable to understand the following relevant information (please give details):

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.....

and/or

- the person is unable to retain that information (please give details)

and/or

- the person is unable to use or weigh the following information as part of the process of making the decisions in the conduct of the proceedings:

or

- for cases where the person can in fact understand, retain and use / weigh the information the person is unable to communicate their decisions by any means at all (please give details):

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4. Do you consider that the person concerned might regain or develop capacity to conduct the proceedings in the future -

- Yes - please state why and give an indication of when this might happen
- No - please state why

5. Is the person concerned able to discuss the proceedings with my representative or with a solicitor instructed by me?

- YES     NO

Please comment

6. If so, is such discussion likely to affect the person detrimentally and if so, in what way?

- YES     NO

Please comment

7. Has the person concerned made you aware of any views in relation to the proceedings and / or in relation to their capacity to conduct the proceedings?

8. Any additional comments

**Statement of Truth:**

I confirm that insofar as the facts stated in this certificate are within my own knowledge I have made clear which they are and I believe them to be true and that the opinions I have expressed represent my true professional opinion.

Signed \_\_\_\_\_

Dated \_\_\_\_\_

LETTER TO INDEPENDENT EXPERT

Dear \_\_\_\_\_

[*name of person concerned*] (DOB \_\_\_\_\_)

[*name of person concerned*] is a party to court proceedings concerning their child[ren] which are continuing in the \_\_\_\_\_ court.

I am the solicitor for \_\_\_\_\_ and the lead solicitor for these instructions.

1. The parties and their representatives

In this case:

1. The local authority, \_\_\_\_\_ is represented by \_\_\_\_\_

Address: \_\_\_\_\_

Tel: \_\_\_\_\_ F: \_\_\_\_\_

Email: \_\_\_\_\_

2. The mother, \_\_\_\_\_ is represented by \_\_\_\_\_

Address: \_\_\_\_\_

Tel: \_\_\_\_\_ F: \_\_\_\_\_

Email: \_\_\_\_\_

3. The father, \_\_\_\_\_ is represented by \_\_\_\_\_

Address: \_\_\_\_\_

Tel: \_\_\_\_\_ F: \_\_\_\_\_

Email: \_\_\_\_\_

4. The child, \_\_\_\_\_ is represented by \_\_\_\_\_

Address: \_\_\_\_\_

Tel: \_\_\_\_\_ F: \_\_\_\_\_

Email: \_\_\_\_\_

The child's guardian is \_\_\_\_\_

5. Other parties \_\_\_\_\_

## 2. Background

The court is concerned that [*name of person concerned*] ] may be suffering from an impairment of, or a disturbance in the functioning of, the mind or brain, to the extent that they lack capacity, within the meaning of the Mental Capacity Act 2005 ('the MCA 2005'), to conduct the proceedings and are therefore a 'protected party' in the proceedings.

Part 15 of the Family Procedure Rules 2010 provides that a protected party must have a litigation friend to conduct proceedings on their behalf. Medical or psychological evidence is required to enable the court to decide whether [*name of person concerned*] lacks capacity. If the court decides that [*name of person concerned*] lacks capacity, a litigation friend will be appointed to act on their behalf. The litigation friend will be responsible for making the decisions about the conduct of the proceedings and will instruct the solicitor in place of, and on behalf of, the protected party.

You should be aware that capacity is issue specific so that whether or not [*name of person concerned*] either has, or lacks, capacity for other purposes is not determinative of whether or not [*name of person concerned*] has capacity to conduct these proceedings. Please note that the question of capacity to conduct the proceedings is to be considered by reference to the proceedings in question and "*not by reference to each step in the process of litigation*" (Lord Justice Kennedy at paragraph 27 in the case of *Masterman-Lister* referred to below).

The purpose of your instruction is to assist the court in deciding whether [*name of person concerned*] lacks capacity and a litigation friend should be appointed for them.

To assist you when considering the information relevant to [*name of person concerned*]'s capacity to conduct the proceedings I have set out below the legal framework for assessment of capacity to conduct proceedings and the context within which capacity to conduct the proceedings falls to be considered in this case.

## 3. Legal framework

You should have regard to the principles in Section 1(1)-(3) of the MCA 2005 when carrying out your assessment. They are: a person must be assumed to have capacity unless it is established that he lacks capacity; a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success; and a person is not to be treated as unable to make a decision merely because he makes an unwise decision.

Sections 2 and 3 of the MCA 2005 define what is meant by lack of capacity.

Section 2 and 3 provide (insofar as is material):

### *Section 2 - People who lack capacity*

- (1) *For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*

- (2) *It does not matter whether the impairment or disturbance is permanent or temporary.*
- (3) *A lack of capacity cannot be established merely by reference to—*
  - (a) *a person's age or appearance, or*
  - (b) *a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.*
- (4) *In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities...*

### *Section 3 - Inability to make decisions*

- (1) *For the purposes of section 2, a person is unable to make a decision for himself if he is unable—*
  - (a) *to understand the information relevant to the decision,*
  - (b) *to retain that information,*
  - (c) *to use or weigh that information as part of the process of making the decision, or*
  - (d) *to communicate his decision (whether by talking, using sign language or any other means).*
- (2) *A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).*
- (3) *The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.*
- (4) *The information relevant to a decision includes information about the reasonably foreseeable consequences of—*
  - (a) *deciding one way or another, or*
  - (b) *failing to make the decision.*

The Code of Practice ("the Code") which supports the MCA 2005 refers to a two-stage capacity test comprising:

- (i) Stage 1 (the "diagnostic test"): Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain?
- (ii) Stage 2 (the "functional test"): Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?

The leading case on the approach to capacity to conduct proceedings is that of *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 in which Lord Justice Chadwick held:

*"..the test to be applied...is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings... (paragraph 75)*



and

*...a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language; and that he should not be regarded as unable to make a rational decision merely because the decision which he does in fact make is a decision which would not be made by a person of ordinary prudence...*  
(paragraph 79)

In the same case Lord Justice Kennedy commented (at paragraph 26):

*"...the mental abilities required include the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision..."*

and (at paragraph 27):

*"... Of course, as Boreham J said in White's case, capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere..."*

#### 4. These proceedings

*The legal context for the proceedings*

I set out below the context within which [*name of the person concerned*] will need to be advised and give instructions.

The application before the court is an application for a care order under section 31 Children Act 1989.

Before a care order is made the court must be satisfied that the child concerned is suffering or is likely to suffer significant harm and that the harm or likelihood of harm is attributable to the care given to the child, or likely to be given to the child if the order were not made, not being what it would be reasonable to expect a parent to give to him; or that the child is beyond parental control. If a care order is made the child is placed in the care of the local authority, the local authority shares parental responsibility for the child with the child's parents, and has the power to determine the extent to which a parent or other person with parental responsibility for the child may meet their parental responsibility for the child.

A range of other possible orders may come up for consideration during the course of care proceedings; such orders may include:

- i) a special guardianship order ('SGO'): this is an order appointing one or more persons as special guardian(s) for the child - a special guardian has parental responsibility for the child and is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility for the child;

- ii) a child arrangements order: this is an order regulating arrangements relating to *with whom* a child is to live, spend time or otherwise have contact, and *when* a child is to live, spend time or otherwise have contact with any person
- iii) a supervision order: this is an order which puts a child under the supervision of a local authority; the supervisor is under a duty to advise, assist and befriend the supervised child, to take such steps as may be reasonably necessary to give effect to the order and where the order is not wholly complied with or the supervisor considers that the order may no longer be necessary to consider whether or not to apply to the court for its variation or discharge.

During the course of the care proceedings an application may (although not necessarily will) also be made by the local authority for a placement order. A placement order is an order authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the local authority.

If a placement application is made it will run concurrently with the care application and the hearing may follow immediately after the hearing about the care order (if a care order is made).

*The facts of this case*

[insert:

- *brief summary of the proceedings;*
- *brief summary of the issues on which [name of the person concerned] will have to make decisions;*
- *the proceedings are particularly complex because...;*
- *it is the view of the solicitors for [name of the person concerned] that he is unable to make decisions about the conduct of the proceedings because...;*
- *you should also say if the person concerned asserts their own capacity].*

## 5. Documents

I enclose:

1. [An indexed bundle of all documents filed in the case so far]<sup>79</sup>.
2. Practice Direction 25B (The Duties of an Expert, the Expert's Report and Arrangements for an Expert to Attend Court);
3. A copy of the Family Justice Council Guidance about capacity to litigate in proceedings about children;
4. Certificate of capacity to conduct the proceedings and guidance notes;
5. [Medical notes of the person concerned];
6. [Any other relevant assessments of the person concerned outside of the proceedings].

As the lead solicitor I will also send you copies of any relevant documents filed after the date of this letter.

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<sup>79</sup> This may not be necessary if the assessment is only of litigation capacity and a full summary of the facts of the case is provided

## 6. Contact with others

Pursuant to an order dated, you are being instructed by \_\_\_\_\_ but on the basis that you will provide an expert opinion independent of the person(s) from whom you have received your instructions or by whom you are paid.

It is expected that you will have one or more meetings with [*name of person concerned*] in order to carry out your assessment. If you believe that it would assist you to meet with, or speak to any other person as part of your assessment, please notify me and I will make the necessary arrangements.

It is essential both to your role as an independent expert and to the parties' perception of your independent status that there are no informal unrecorded discussions or correspondence with any of the professionals or the lay parties involved in the case.

I set out below the details of:

*[insert details of any other relevant person whom the expert may need to contact, for example, treating psychiatrist or other clinician, adult social worker, community psychiatric nurse, keyworker for the person concerned, lay advocate etc]*

If you need further information, please contact me and I will provide it after consultation with the other legal representatives. If documents are exchanged with one party, please copy them to all the others. Where possible, communication is best achieved by fax or letter.

## 7. Factual issues and your report

Unless you have been specifically asked to do so, you should avoid expressing a view regarding the factual disputes as this is, of course, the task of the court at the final hearing. Where appropriate, it will be of assistance if you are able to express your opinion on the basis of alternative findings regarding the factual disputes.

## 8. Your instructions

Please have in mind that your assessment is by reference to the proceedings as a whole not by reference to each step in the conduct of the proceedings.

1. Does [*name of person concerned*] lack capacity within the meaning of the Mental Capacity Act 2005 to conduct the proceedings?

Please give your reasons for your opinion as it is important that the evidence of lack of capacity (if that is your conclusion) shows how the impairment of, or disturbance in the functioning of the mind or brain causes the person's lack of capacity to make decision about the conduct of the proceedings.

2. In addition to any report you have been asked to provide, please would you complete in full the enclosed certificate of capacity to conduct the proceedings and return it to

me. You should read the guidance notes before completing the certificate. Please ensure when completing the certificate that you set out:

- your own qualifications and your experience in assessing capacity;
- your degree of familiarity with [*name of person concerned*];
- reference to the particular factors which impact on, or restrict capacity to conduct the proceedings;
- any particular tests carried out;
- whether capacity has fluctuated in the past, and/or
- if [*name of the person concerned*] may recover capacity to conduct the proceedings in a reasonable time frame, and if so, what that time frame may be and what support or assistance could be offered or practicable steps taken to that end;

[If there are care proceedings and an application for a placement order and, in your opinion, [*name of the person concerned*] lacks capacity in relation to one only of the applications before the court, please state that clearly.]

3. Please include within your report a record of any views expressed by [*name of person concerned*] about their capacity to conduct the proceedings.
4. If [*name of person concerned*] has capacity to conduct the proceedings please comment on:
  - (i) whether there are particular factors which (whilst not causing a lack of capacity to conduct the proceedings) nonetheless impact on, or restrict their ability to conduct the proceedings; and on
  - (ii) whether any support or assistance should be offered to [*name of person concerned*] or practicable steps which could be taken in order to assist in overcoming the difficulties identified by you at (i) above.
5. Please include in your report a full cognitive assessment of [*name of person concerned*] and comment on their present level of functioning.]

The certificate may be returned in advance of your substantive report, and should be returned as soon as possible, if it is your finding that [*name of person concerned*] does lack capacity to conduct the proceedings.

If, during the course of your assessment, other issues appear to you to become relevant, please immediately contact me as lead solicitor. After consultation with the other legal representatives, I will inform you if the scope of your instructions should be amended.

## 9. Expert's duties

I draw your attention to the Practice Direction which sets out the duties of an expert and the matters which must be included within an expert's report.

10. Timescale

[insert]

It is important that you comply with this time limit as the issue of [*name of person concerned*]'s must be resolved as soon as possible having regard to both the fact that delay in the progression of these proceedings is likely to prejudice the welfare of the child/ren and that if [*name of person concerned*] is found to lack capacity to conduct the proceedings, a litigation friend must be appointed for them.

11. Your fees

[insert]

Please do not hesitate to contact me if you wish to discuss this request, or if you need any further clarification or assistance.

Yours sincerely,  
AB X, Y, Z & Co

LETTER TO TREATING CLINICIAN

Dear \_\_\_\_\_

[*name of person concerned*] (DOB \_\_\_\_\_)

Address: \_\_\_\_\_

I am writing to you as I understand that [*name of person concerned*] is a patient of yours.

[*name of person concerned*] is a party to court proceedings concerning their child[ren] which are continuing in the Family Court at \_\_\_\_\_

I am the solicitor for \_\_\_\_\_

1. Background

The court is concerned that [*name of person concerned*] may be suffering from an impairment of, or a disturbance in the functioning of, the mind or brain, to the extent that they lack capacity, within the meaning of the Mental Capacity Act 2005 ('the MCA 2005'), to conduct the proceedings and are therefore a 'protected party' in the proceedings.

Part 15 of the Family Procedure Rules 2010 provide that a protected party must have a litigation friend to conduct proceedings on their behalf. Medical or psychological evidence is required to enable the court to decide whether [*name of person concerned*] lacks capacity. If the court decides that [*name of person concerned*] lacks capacity, a litigation friend will be appointed to act on their behalf. The litigation friend will be responsible for making the decisions about the conduct of the proceedings and will instruct the solicitor in place of, and on behalf of, the protected party.

The purpose of this letter is to ask for your opinion to assist the court in deciding whether [*name of person concerned*] lacks capacity and requires a litigation friend to be appointed for them.

You should be aware that capacity is issue specific so that whether or not [*name of person concerned*] either has, or lacks, capacity for other purposes is not determinative of

whether or not [*name of person concerned*] has capacity to conduct these proceedings. Please note that the question of capacity to conduct the proceedings is to be considered by reference to the proceedings as a whole not by reference to each step in the conduct of the proceedings.

You should have regard to the principles in section 1(1)-(3) of the Mental Capacity Act 2005 when carrying out your assessment. They are: a person must be assumed to have capacity unless it is established that he lacks capacity; a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success; and a person is not to be treated as unable to make a decision merely because he makes an unwise decision.

I enclose a certificate of capacity to conduct the proceedings for the purpose of making a report about litigation capacity and guidance notes. I would be grateful if you could read the guidance notes, complete the certificate and return it to me.

Please ensure when completing the certificate can you set out:

- your own qualifications and your experience in assessing capacity;
- your degree of familiarity with [*name of person concerned*];
- reference to the particular factors which impact on, or restrict capacity to conduct the proceedings;
- any particular tests carried out;
- whether capacity has fluctuated in the past, and/or if [*name of the person concerned*] may recover capacity to conduct the proceedings in a reasonable time frame, and if so, what that time frame may be and what support or assistance could be offered to that end.

If there are care proceedings and an application for a placement order and, in your opinion, [*name of the person concerned*] lacks capacity in relation to one only of the applications before the court, please state that clearly and explain why you have arrived at a differing conclusion.

I have set out more detail about the proceedings below so that you know the context within which [*name of the person concerned*] will need to be advised and give instructions to their solicitor.

## 2. These proceedings

The application before the court is an application for a care order under section 31 Children Act 1989.

Before a care order is made the court must be satisfied that the child concerned is suffering or is likely to suffer significant harm and that the harm or likelihood of harm is attributable to the care given to the child, or likely to be given to the child if the order were not made, not being what it would be reasonable to expect a parent to give to him; or that the child is beyond parental control. If a care order is made the child is placed in the care of the local authority, the local authority shares parental responsibility for the child with the child's parents, and has the power to determine the extent to which a parent or other person with parental responsibility for the child may meet their parental responsibility for the child.

A range of other orders may come up for consideration during the course of care proceedings; such orders may include:

- i) a special guardianship order ('SGO'): this is an order appointing one or more persons as special guardian(s) for the child - a special guardian has parental responsibility for the child and is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility for the child;
- ii) a child arrangements order: this is an order regulating arrangements relating to *with whom* a child is to live, spend time or otherwise have contact, and *when* a child is to live, spend time or otherwise have contact with any person
- iii) a supervision order: this is an order which puts a child under the supervision of a local authority; the supervisor is under a duty to advise, assist and befriend the supervised child, to take such steps as may be reasonably necessary to give effect to the order and where the order is not wholly complied with or the supervisor considers that the order may no longer be necessary to consider whether or not to apply to the court for its variation or discharge.

During the course of the care proceedings an application may (although not necessarily will) also be made by the local authority for a placement order. A placement order is an order authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the local authority.

If a placement application is made it will run concurrently with the care application and the hearing may follow immediately after the hearing about the care order (if a care order is made).

The facts of this case

[insert:

- *brief summary of the proceedings;*
- *brief summary of the issues on which [name of the person concerned] will have to make decisions;*
- *the proceedings are particularly complex because...;*
- *it is the view of the solicitors for [name of the person concerned] that he is unable to make decisions about the conduct of the proceedings because...;*
- *you should also say if the person concerned asserts their own capacity].*

### 3. Timescale

I would be grateful if you could return the completed certificate as soon as possible to avoid delay in progression of the proceedings which is likely to prejudice the welfare of the child/ren and because if [name of person concerned] is found to lack capacity to conduct the proceedings, a litigation friend must be appointed for them.

[add a line to advise of the date of next hearing especially if imminent]

Please do not hesitate to contact me if you wish to discuss this request, or if you need any further clarification or assistance.

Yours sincerely,  
ABX, Y, Z & Co

CONFIDENTIAL

Dear \_\_\_\_\_

<< case number >>

Re: [the person – include date of birth if known]

I am writing to you on behalf of the Family Court because I understand that you know [*the person*]. [The court has been given your name by [*the person*] as someone the Family Court can contact] [*the person*] is a party to court proceedings in the Family Court.

The proceedings began on [date] and are about [the person's] children >>.

The Family Court has become concerned that [*the person*] lacks the mental capacity to handle the proceedings; this is called 'litigation capacity'. If [*the person*] lacks this capacity they must have someone to make decisions about handling the proceedings for them and are not allowed to do so themselves. The law calls a person who does this a 'litigation friend'.

Normally the court would ask [*the person's*] solicitor for help investigating whether [*the person*] has capacity but [*the person*] does not have a solicitor at the moment.

So, instead I am asking you to help the court to make a decision about [*the person's*] capacity based on your own knowledge of [*the person*].

The Judge has asked me to explain that:

1. mental capacity means the ability to make decisions
2. every adult has the right to make their own decisions including about how they handle court proceedings if they have the capacity to do so.
3. that the mental abilities required to handle court proceedings include the ability to:
  - a. recognise a problem,
  - b. obtain and receive relevant information,
  - c. understand and retain relevant information, including advice
  - d. weigh up both information they have received, and the advice they have had, reach a decision, and
  - e. communicate that decision.

A person should not be considered unable to understand the information relevant to a decision if that person could understand the explanation if it was given to them in broad terms and in simple language.

People have the right to make decisions that other people might think are unwise. You may think the decision [*the person*] makes is unwise. This does not mean they lack capacity.

The Family Court is not asking for your opinion about whether [*the person*] does or does not have capacity; that is a decision for the court. Instead, the court is asking whether you are able and willing to help the court with information about [*the person*] taking into account the information the judge has provided about the mental abilities required to handle court proceedings.



I would be grateful if, when replying, you could tell me:

- how well you know [*the person*] and how you know them
- how often you see or have other contact (for example, by phone, text, email or on social media) with [*the person*]
- how much contact you have had with [*the person*] since the start of the court proceedings
- whether you think that [*the person*] has any difficulty with any of the following and, if so, why:
  - recognising a problem
  - obtaining and receiving information
  - understanding and retaining information
  - weighing up information when making a decision
  - communication (it is very important that the court is told about any difficulties a party has with communication)
- if you think that there is any practical support or assistance which could realistically be provided to [*the person*] to enable [*the person*] to overcome the difficulties you have described
- if you think that the difficulties you have described are temporary and, if so, why.
- If you feel confident to do so, please add to the bottom of your letter, “I confirm that the contents of this letter are true to the best of my knowledge and belief” and sign and date it.

Please do not discuss the fact that [*the person*] is involved in proceedings in the Family Court or this letter with anyone else because, as I am sure you will appreciate, the proceedings are about [*the person*] and their family and are confidential. You are of course free to discuss this letter and your reply with [*the person*] if you wish to do so or with a professional advisor.

The court will read and consider all the information that it gathers and will make a decision on [*the person's*] capacity. The fact that you have written to help the court will be shared with [*the person*].

If you have any questions about this letter, then the Court office may be able to assist you, or you should write to me at the address at the top of this letter.

Please could you head your own letter with the case number I have given at the top of this letter to make sure that it reaches the right court file. Your letter will be given to the judge who has to make the decision about [*the person's*] capacity provided your letter arrives at the court before [*date*].

Thank you for your help. We greatly appreciate it.

Yours sincerely,

ABX, Y, Z & Co

*For those cases where non-means tested legal aid is not available, the following information will assist in establishing whether, in principle, a party may be financially eligible for legal aid and therefore whether it may be possible to make an application for Exceptional Case Funding (in those cases which are ordinarily outside scope of civil legal aid) or for legal aid on the usual means and merits basis for those cases which remain in scope of civil legal aid.*

- a. The protected party's National insurance number;
  
- b. Information about the full extent of the protected party's income to include:
  - (i) all sources of income
  - (ii) the sums that are paid
  - (iii) the frequency of the payments (iv) evidence of the protected party's entitlement to that income (for example if in receipt of state benefits, the most recent correspondence from the DWP)
  
- c. Original or certified bank/building society/post office statements for any account(s) in the protected party's name and (if different) the account into which the protected party's income is paid; in each case for the most recent 3 months;
  
- d. Details of any capital and/or assets held by the protected party together with supporting documents confirming both ownership and value.

Draft Order on inviting the Official Solicitor to act as litigation friend:-

- (1) *The Court being satisfied that [.....] is a Protected Party within the meaning of r. 2.3 FPR 2010 [and that there is no other person identified to the Court as potentially suitable and willing to act as litigation friend for the Protected Party], the Official Solicitor is invited to consider acting as the litigation friend of the Protected Party.*
- (2) *All parties shall co-operate with, and respond promptly to, any request made by the proposed litigation friend for information / documents for the purpose of establishing the Protected Party's eligibility for legal aid or, if the Protected Party is financially ineligible for legal aid, how their legal costs may otherwise be paid.*
- (3) *In the event that any party is aware that the Protected Party has an attorney under a Lasting Power of Attorney or under an Enduring Power of Attorney, or a financial deputy appointed by the Court of Protection, or an appointee for State benefits, that party shall inform the proposed litigation friend of the identity of, and any known contact details for, that attorney, deputy or appointee forthwith.*

Appendix 7

[High Court only]

*UPON the court having invited the Official Solicitor to the Senior Courts to act as litigation friend of [\_\_\_\_\_]:*

- (1) HM Revenue & Customs, is hereby directed to release to the Official Solicitor to the Senior Courts such information and documents as he may require about the financial affairs of [\_\_\_\_\_] (including their National Insurance Number) within 7 days of any request. Liberty to HM Revenue & Customs to apply on 48 hours written notice to the Official Solicitor and to the parties.*
  
- (2) DWP is hereby directed to release to the Official Solicitor to the Senior Courts such information and documents as he may require about the financial affairs of [\_\_\_\_\_] within 7 days of any request. Liberty to DWP to apply on 48 hours written notice to the Official Solicitor and to the parties.*
  
- (3) Liberty to the Official Solicitor to the Senior Courts to apply in writing to the Court for any other third party disclosure order necessary to establish whether or not [\_\_\_\_\_] is financially eligible for legal aid or otherwise how their legal costs are to be discharged.*