CIVIL JUSTICE COUNCIL

The Procedure for Determining Mental Capacity in Civil Proceedings

Final Report

November 2024

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1. EXECUTIVE SUMMARY

1.1 The issue of whether an adult party to court proceedings has the mental capacity to conduct the proceedings ("litigation capacity") is one of fundamental importance. Under the Civil Procedure Rules (CPR) a person who lacks litigation capacity is a 'protected party' and must have a 'litigation friend' appointed to conduct the litigation on their behalf. If it is wrongly decided that the party lacks capacity, the appointment of a litigation friend to take decisions on their behalf will represent a significant infringement of their personal autonomy. If it is wrongly decided that the party has capacity and can conduct the proceedings for themselves, they may be denied meaningful access to justice.

1.2 Although CPR Part 21 sets out the procedure applying to protected parties, neither the CPR nor its Practice Directions (PDs) set out any procedure for determining *whether* a party lacks litigation capacity. The Court of Appeal recommended more than 20 years ago[1] that consideration be given to addressing this gap, but that does not appear to have happened and no action has been taken.

1.3 Where the party whose litigation capacity is in doubt is legally represented, the issue can usually be resolved without the involvement of the court. The Working Group does not seek to propose any changes in relation to such cases.

1.4 However, in many other cases the issue can be much more difficult to resolve and will require the involvement of the court. Such cases include unrepresented parties and represented parties who dispute the suggestion that they lack capacity and/or will not cooperate with any process of assessment. In the absence of any clear provision in the CPR, for many years judges, parties and legal representatives have been forced to come up with ad hoc solutions. This has led to inefficiency, inconsistency of practice, and actions being taken without a clear legal basis.

1.5 One 'ad hoc' solution that many respondents to the consultation referred to was the practice of having an 'informal' litigation friend in place prior to the issuing of a claim. It seems to be common for arrangements to be made for such a person to assist a claimant and for this person to attend hearings to approve settlements. Given the extent of work undertaken prior to issue, often resulting in settlement, particularly in personal injury and

[1] *Masterman-Lister v Brutton* [2002] EWCA Civ 1889, Kennedy LJ at [17].

clinical negligence claims, the view was expressed that the appointments of litigation friends prior to the issuing of a claim be formalised. The CJC supports this.

1.6 It is the strong view of the Working Group, and the almost unanimous view of the judges and practitioners whom it consulted, that there should be clear provision and guidance on the procedure for the determination of issues of litigation capacity. This should principally be set out in the CPR and/or a new PD, to ensure that there is a single, easily identifiable, and authoritative source. In relation to some of the issues identified, other measures may be needed, such as professional guidance, judicial training and even legislation.

1.7 Given the huge diversity of civil cases and the wide range of issues that may arise, a single procedure, to be applied in all cases, would be inappropriate. Instead, courts should be provided with a 'menu of options' together with guidance as to the relevant principles to be applied, to ensure an appropriate approach can be adopted in each case, giving effect to the overriding objective.

1.8 The key principles and recommendations can be summarised as follows:

a. In dealing with issues of capacity, the court must take into account, in particular (i) the fundamental importance of the issue; (ii) the right for those with capacity to conduct their own litigation; (iii) the need to protect the interests of the party who may lack capacity, at a time when they are unable to protect their own interests; (iv) the need to protect the interests of other parties to the substantive proceedings; and (v) proportionality.

b. The court's role must be a quasi-inquisitorial one, in which the court is responsible for ensuring that it has the evidence it considers necessary to determine the issue, albeit that the work of gathering such evidence will necessarily be delegated to others.

c. Issues of litigation capacity should be identified and determined at the first available opportunity.

d. Although the presumption of capacity[2] is an important starting point, it must not be used to avoid proper determination of the issue where it arises, even where it may be difficult to obtain evidence.

[2] MCA 2005 s1(2): "A person must be assumed to have capacity unless it is established that he lacks capacity".

e. The determination of a party's *current* litigation capacity[3] is not generally one in which other parties have a right to be heard, although in some cases it may be so inextricably interlinked with the substantive issues that they must be given a right to be heard.

f. However, all parties (under the overriding objective) and their legal representatives (as part of their professional ethical duties) have a responsibility to assist the court in identifying and determining issues of litigation capacity.

g. Where the party whose capacity is in doubt is legally represented, the legal representatives should carry out the work of investigating the issue. In other cases, a range of options should be available to courts for the delegation of this work. This would include existing options and may also require the introduction of further options, based on procedures currently available in the Court of Protection (COP).

h. There should be a clear power for the court to order disclosure of evidence relevant to the issue of litigation capacity, together with guidance to ensure that this is only used where it is necessary and proportionate.

i. Generally, once the court has decided that an issue of litigation capacity requires determination, it should direct that no further steps be taken in the proceedings, and that existing orders be stayed, pending determination of the issue. However, this should be subject to a power to order otherwise, based on a 'balance of harm' approach.

j. In relation to hearings to determine the issue of a party's litigation capacity, the court should consider what measures are necessary to protect the party's rights to privacy, confidentiality, and legal professional privilege. Open justice and the need for transparency are of crucial importance in civil court proceedings. However, in order to protect legal professional privilege, confidentiality and privacy, the court should have the power to (i) hold all or part of the hearing in private; (ii) exclude other parties to the substantive proceedings; (iii) make anonymity orders and/or impose reporting restrictions, where those measures are unavoidably necessary.

k. A party who is found to lack litigation capacity must have a right of appeal, which may require modifications to usual appeal procedures to ensure that it is effective.

l. Proper funding must be made available for the investigation and determination of issues of litigation capacity, including the creation of a central fund of last resort.

[3] As distinct from other issues such as past litigation capacity (and so the validity of steps previously taken in the proceedings) and issues of "subject matter capacity" (e.g. capacity to make a will or enter into a contract which is the subject of the proceedings, or capacity to comply with an injunction sought in the proceedings).

1.9 Ultimately, this report is only a first step in what may well be a long journey to achieving a system for determining issues of litigation capacity which is fit for purpose. Some improvements can be made quickly, simply and at little or no cost. Others will require further detailed consideration, further funding and/or legislative intervention and so may take some time. However, given the importance of the issue and the current absence of provision, it is not an option to simply ignore the issue.

2. INTRODUCTION

About the Civil Justice Council

2.1 The Civil Justice Council (CJC) is an advisory public body, established under the Civil Procedure Act 1997. Its statutory duties include keeping the civil justice system under review; considering how to make the civil justice system more accessible, fair, and efficient; and making proposals for research. In carrying out its statutory functions, the CJC makes recommendations to the Lord Chancellor, the judiciary, and the Civil Procedure Rules Committee (CPRC) on the development of the civil justice system.

About the Working Group

2.2 In July 2022, the CJC agreed to set up a Working Group to consider the procedure for determining mental capacity in civil proceedings. This followed an approach to the CJC by Daniel Clarke, a practicing barrister, following the publication of his article in Legal Action magazine, which identified shortcomings in the rules in relation to the procedure for determining capacity to conduct proceedings ("litigation capacity") in the civil courts.[4]

2.3 A Working Group was set up to consider the issues. The members of the Working Group are set out at Appendix 1. The Working Group's terms of reference were:

- To consider how the civil courts approach mental capacity, with regard to the procedure and common practice used to determine whether a party lacks capacity to conduct proceedings (i.e. is a protected party within the meaning of Part 21 CPR), and
- To make recommendations to improve rules, PDs or other matters, with particular consideration of the following areas:
  - How an issue relating to a party's mental capacity is identified and brought before the court.
  - The procedure for investigating the issue.
  - The procedure for determining the issue.
  - The position of the substantive litigation pending determination of the issue.

[4] Daniel Clarke, 'Mental Capacity: Focus', *Legal Action*, December 2021/January 2022 pp23-25.

- The particular issues arising as regards:
  - Litigants in person.
  - Parties who do not engage with the process of assessment of capacity.

2.4 Following a series of provisional discussions within the Working Group, it was decided to begin with a consultation and a Consultation Paper was published in January 2024.[5] As part of the consultation, a seminar was held on 1 March 2024, which was well attended by stakeholders across the civil justice system. The consultation period ended in March 2024, with responses received from a wide range of organisations and individuals.[6] The Working Group is extremely grateful for the insights and views shared both at the event on 1 March 2024 and in the written consultation responses.

2.5 The CJC wishes to thank each of the Working Group members for their invaluable work in identifying the key issues and framing this report.

The issue: lack of provision in CPR

2.6 Part 21 of the CPR sets out the procedure in relation to 'protected parties'. A protected party is defined in CPR 21.1(1) as 'a party who lacks capacity within the meaning of the Mental Capacity Act 2005 to conduct the proceedings'. CPR 21 provides that:

a. A protected party must have a litigation friend to conduct proceedings on their behalf;
b. Any settlement of a claim made in relation to a protected party must be approved by the court;
c. If during proceedings a party lacks capacity to continue to conduct the proceedings, no party may take any further step in the proceedings without the court's permission until the protected party has a litigation friend; and
d. Any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise.

2.7 CPR Part 21 also sets out the procedure for the appointment of a litigation friend, which can be done in one of two ways: by the filing of a certificate of suitability by the litigation friend, or by order of the court.

[5] https://www.judiciary.uk/wp-content/uploads/2023/12/CJC-Capacity-Consultation.pdf
[6] https://www.judiciary.uk/wp-content/uploads/2024/11/CJC-Procedure-for-Determining-Mental-Capacity-in-Civil-Proceedings-consultation-responses-public.pdf

2.8 All of these provisions are predicated on it being established that a party lacks capacity and is therefore a protected party. Neither the CPR nor its PDs make any provision for cases in which a party's capacity is in doubt: how the issue is to be identified, investigated, or determined (the provisions regarding the appointment of litigation friends also assume that there is a person suitable, able, and willing to undertake the role).

2.9 The issue was identified more than 20 years ago in *Masterman-Lister v Brutton*[7] when Kennedy LJ observed that neither CPR 21 nor the previous court rules made any provision for "a judicial determination of the question whether or not capacity exists". Kennedy LJ recommended that the Rules Committee consider the issue, but held that meanwhile: "courts should always, as a matter of practice, at the first convenient opportunity, investigate the question of capacity whenever there is any reason to suspect that it may be absent …".

2.10 The absence of clear rules and guidance as to how the issue of potential lack of litigation capacity should be dealt with, by both the courts and legal representatives, is problematic. What became clear during the Working Group's discussions and in the consultation, is that many judges, legal representatives, advisers, and others involved in the civil justice system work hard to ensure that parties who may lack capacity are supported and that steps are taken to enable them to participate in the proceedings. But the absence of any clear procedure or guidance means that procedures are developed on an ad-hoc basis, which is inefficient and leads to inconsistency of approach and that some "work arounds" that are employed may lack any proper basis. Moreover, a great deal of work that has to be undertaken by legal representatives, charities, and statutory bodies in supporting litigants who may lack capacity is unpaid and is unsustainable. Further, the lack of data on the numbers of litigants who lack litigation capacity makes it very difficult to assess the scale of the problem.[8]

2.11 An issue highlighted during the consultation was the incredible diversity of the civil justice system, which includes a wide range of types of claim, types of procedure and types of party. In some categories of claim, both parties generally have legal representation; in others, it is common that neither is legally represented or that one party is usually unrepresented. Some

[7] [2002] EWCA Civ 1889, at [18]

[8] It appears that HMCTS does not hold data on the number of litigation friends appointed to conduct litigation in the civil courts. While such data would cover both infants as well as adults who lack capacity and would only reveal cases in which incapacity was established, it would be helpful if *some* data could be captured.

types of claim will usually involve one 'institutional party' and one individual, while others will usually involve only individuals. Given such diversity, the Working Group concluded that a 'one size fits all' approach was inappropriate. Rather, what is needed is a 'menu of options', together with better guidance, to enable judges to take an appropriate and proportionate approach to the issue. For parties and legal representatives, clearer guidance on their duties to the court and their professional obligations is needed. For all those involved in the civil justice system, better training will also ensure that the issue is dealt with in a more consistent and fair manner.

2.12 The context in which the Working Group considered these issues is one in which the civil court system is operating with reduced personnel (both judicial and administrative) and in which cuts to legal aid have resulted in more unrepresented litigants appearing before the courts.[9] The current move towards digitalised processes may increase the accessibility of the civil justice system to litigants in person but, at the same time, may result in fewer personal interactions in which issues of capacity may be identified. It is important that when new digital processes are designed, it is borne in mind that some litigants may lack the capacity to conduct their own litigation. Well-designed processes may provide the opportunity to ensure that such issues are highlighted at an early stage and could offer guidance to all parties on the nature of litigation capacity.

2.13 Some of the recommendations set out in this paper would require both additional funding and changes to the organisation and culture of the civil courts. But the Working Group hopes that, in the short term, other changes can be made which would nonetheless have a significant impact. It is hoped that this report contributes to a process of significant change to ensure that the rights of litigants who lack capacity are properly protected.

2.14 The issues the Working Group has considered raise difficult questions but there can be no doubt about the importance of the courts' task. The determination of a party's mental capacity raises fundamental issues about that person's civil rights, rights safeguarded by the

[9] See e.g. Gabrielle Garton Grimwood, 'Litigants in person: the rise of the self- represented litigant in civil and family cases' (Briefing Paper Number 07113, 14 January 2016, House of Commons Library);House of Commons Justice Committee, 'Court Capacity: Sixth Report of Session 2021–22' (HC 69, 27 April 2022) at pp11-12, which reported a reduction of permanent HMCTS staff of almost 30% between 2010/11 and 2020/21; and, the National Audit Office report Government's Management of Legal Aid, February 2024.

European Convention on Human Rights (ECHR).[10] A party who lacks the capacity to conduct their own litigation must have their interests protected, but this must be balanced against a party's right to conduct litigation, if they have the capacity to do so. As stated by the Court of Appeal in the case of *RP v Nottingham City Council*:[11]

> *… the question of litigation capacity is one of considerable importance. When a person is treated as a protected person (previously a patient), he or she is thereby deprived of civil rights, in particular his right to sue or defend in his or her own name. These are important rights, long cherished by English law and now safeguarded by ECHR. Thus the basic right of people to manage their property and affairs for themselves is one with which no lawyer and no court should rush to interfere.*

The scope of this report

2.15 The Working Group set out to consider the issues and make recommendations under the following headings:

- The nature of the issue and role of the court.
- Identification of the issue.
- Investigation of the issue.
- Determination of the issue.
- Substantive proceedings pending determination.
- Funding and costs.

2.16 While the task of the Working Group was limited to the issue of litigation capacity, the work built on the previous CJC report on vulnerability, which led to the introduction of PD 1A.[12]

2.17 The Working Group did not address other issues relating to litigation capacity of which it is aware, including:

a. Issues relating to children and litigation capacity, including the test to apply to determine their capacity.

b. The appointment of and the role of litigation friends.

[10] The right of equal access to the court is also guaranteed by Article 13 of the UN Convention on the Rights of Persons with Disabilities (CRPD). Although the CRPD is not part of English law, the UK has committed itself to bringing its laws and policies into compliance with the Convention.

[11] [2008] EWCA Civ 462, Wall LJ at [115].

[12] Vulnerable-witnesses-and-parties-consultation-September-2019.pdf (judiciary.uk)

c. Issues arising during the enforcement stage of proceedings, which in many cases will be the first time a party lacking capacity engages with the court process.

2.18 The Working Group is aware of other work being undertaken which will impact on the issues of litigation capacity. For example, an Enforcement Working Group was recently set up by the CJC, which issued a call for evidence in July 2024. The Law Commission is currently undertaking a consultation on contempt of court proceedings (across the civil, criminal, and family courts). The CJC's aim is that this report and the recommendations will help to ensure sufficient focus on issues of litigation capacity in other work being undertaken to improve the civil justice system.

3. THE NATURE OF THE ISSUE AND THE ROLE OF THE COURT

3.1 The identification and determination of any issue of an adult party's capacity to participate in proceedings is a matter of fundamental importance, in ensuring that (a) parties who have capacity are not wrongly deprived of their right to conduct their own litigation; and (b) parties who do not have capacity have effective access to justice.

3.2 In many cases, there will be no need for the court to become involved in the identification, investigation and/or determination of issues of parties' litigation capacity: if a party is represented and their representative suspects they may lack capacity, the representative will take steps to investigate the issue and either (a) the party will be found to have capacity and the representative will continue to act in the usual way; or (b) the party will be found to lack capacity, will not dispute that finding, and a litigation friend will be appointed.[13]

3.3 In other cases, however, it will be necessary for the court to become involved. This will usually be where the party is unrepresented, disputes the suggestion that they lack capacity, and/or refuses to engage with the investigation and determination of the issue.

The nature of the issue

3.4 Where there is no dispute between the party and their legal representatives and there is evidence to support the lack of litigation capacity, it has been held that another party should not generally be permitted to challenge the appointment of a litigation friend.[14] In other words, a party's current litigation capacity is not usually an *inter partes* issue, such that other parties will have no legitimate interest in the determination of the issue.

3.5 The CJC considers that this should remain the starting point, even where there is an issue as to a party's current litigation capacity (i.e. whether a litigation friend needs to be appointed to conduct the litigation on their behalf) which requires determination by the court. The issue is part of case management in furtherance of the overriding objective, rather than a

[13] See, *Masterman-Lister v Brutton* [2002] EWCA Civ 1889, at [30].
[14] *Folks v Faizey* [2006] EWCA Civ 381.

substantive issue between the parties. *Current* litigation capacity is fundamentally an issue between the party, their legal representative (if any) and the court.

3.6 However, other parties may have a legitimate interest in the determination of issues about the party's capacity in other respects: both *past* litigation capacity affecting the validity of steps taken by them and/or the court in the period before a litigation friend was appointed,[15] and issues relevant to the substantive proceedings ('subject matter capacity'), e.g. past capacity to make a will or enter into a contract whose validity is in issue, or current capacity to understand an injunction being sought.

3.7 Respondents to the Working Group's consultation suggested that, in some cases, the issue of a party's current litigation capacity may be inextricably linked to substantive issues between the parties. In such cases, other parties may have a legitimate interest in the determination of the issue and should be given an opportunity to be heard.

3.8 Also, clearly the party whose litigation capacity is in issue *does* have an interest in the determination of the issue and must have proper opportunity to dispute any suggestion that they lack capacity.[16]

The role of the court

3.9 The following matters are important when considering the role of the court:

a. The court is a public authority within the meaning of the Human Rights Act 1998 and must ensure that it acts compatibly with parties' rights under the ECHR;

b. A party's current litigation capacity is primarily an issue for the party, their legal representatives (if any) and the court;

c. The party may, by definition, be incapable of conducting the proceedings; and

d. Any legal representative will face professional difficulties taking instructions when they suspect their client lacks capacity and no litigation friend is in place.

3.10 In light of this, it is the view of the CJC that the usual adversarial model, with the parties choosing what evidence and submissions to advance and the court adjudicating on these, is not an appropriate one in relation to the determination of a party's litigation capacity. Instead, the procedure must be a quasi-inquisitorial one, with the court taking ultimate responsibility for ensuring that, insofar as possible, it has the necessary evidence to

[15] *Evesham and Pershore Housing Association Ltd v Werrett* [2015] EWHC 1060 (QB).
[16] See *Folks v Faizey*, Keene LJ at [25].

determine the issue. This is already reflected to some extent in the authorities[17] and the Equal Treatment Bench Book, at least in relation to unrepresented parties.[18]

3.11 In practice, most of the work of investigation will need to be delegated to others but it is important to recognise that the investigative work will be carried out on behalf of the court in its quasi-inquisitorial role, given that this represents a departure from the usual adversarial approach to litigation.

Recommendations and principles to be incorporated into amended Rules/Practice Direction

- **A clear procedure is needed for cases in which the court is required to determine a party's litigation capacity. This should be set out in CPR Part 21 and/or in a Practice Direction, to provide a clear, accessible, and authoritative source to which parties, legal representatives and judges can turn.**
- **It is not possible to devise a *single* procedure that will be appropriate in every case. Rather, the rules and/or Practice Direction should aim to set out the relevant principles and provide a range of tools the court can use to investigate and determine the issue. These can be used as appropriate in the particular circumstances of the case, in accordance with the overriding objective including taking into account, in particular:**
  - **The fundamental importance of the issue of litigation capacity.**
  - **The need to protect the interests of the party whose capacity is in doubt, including their interests in the relation to the substantive proceedings and their right to privacy, confidentiality, and legal privilege, pending determination of the issue at a time when they may have limited ability to protect their own interests.**
  - **The interests of all other parties to the substantive proceedings.**
  - **The principle of proportionality.**

[17] See *Masterman-Lister*, above ("…the court should … investigate the question of capacity…")
[18] Chapter 5, para 53: "Where a party is not represented, it is for the judge to investigate or consider if that person has capacity to conduct that litigation, as a matter of priority…"

- **The 'starting position' must be that the determination of a party's current litigation capacity is essentially a matter of case management, the purpose of which is to further the overriding objective, so as to enable cases to be dealt with justly and at proportionate cost, and to ensure that parties are on an equal footing, and can participate fully in proceedings, so far as practicable.**
- **In such a determination, given that the issue of litigation capacity is first and foremost an issue as between the party and the court, and the court is bound by the ECHR to consider how to secure the party's rights under Article 6, it is operating in a quasi-inquisitorial way. This means that other parties to the substantive claim will have no general *right* to participate in the process by which a person's *current litigation capacity* is determined. However, there may be circumstances in which the other parties should be given an opportunity to be heard.**
- **The court's quasi-inquisitorial role means that the court is responsible for ensuring it has the necessary information to determine the issue. But it will need to delegate the majority of the work involved to the parties, their representatives and/or third parties. Any issue as to a party's current litigation capacity should, where possible, be identified, investigated, and determined as a preliminary issue at the earliest opportunity, subject to exceptions where the substantive proceedings are likely to involve determination of some of the same issues.**

4. IDENTIFICATION OF THE ISSUE

Parties with legal representatives

4.1 When a party has legal representation, the primary duty to identify a possible issue about the capacity of that party is with their legal representatives. Legal representatives have a duty to satisfy themselves that their client has the mental capacity to give instructions to bring or defend a claim. If it is clear that the party lacks litigation capacity, the legal representatives should make arrangements for the appointment of a litigation friend. If there is uncertainty about the party's litigation capacity, the legal representatives will obtain the necessary medical or other evidence (assuming funding is available). So, these recommendations will mostly be relevant when the party whose litigation capacity is at issue is a litigant in person, or when the legal representatives are of the view that their own client lacks litigation capacity and the client contests this. The problem is that there is no clear guidance for judges or other parties to the proceedings as to how concerns about a party's litigation capacity should be identified, and brought to the court's attention.

4.2 The experience of members of the Working Group is that the issue is not consistently identified or raised at an early stage of proceedings, sometimes due to misplaced reliance on the 'presumption of capacity'.[19] The authorities and existing guidance are clear that, while the presumption is important, where there is good reason for cause for concern and legitimate doubt as to capacity to litigate, it cannot be used to avoid taking responsibility for assessing and determining capacity.[20] Moreover, the late identification of the issue, sometimes even after final orders have been made, causes significant procedural difficulties and increases costs, as well as potentially resulting in substantive injustice.

4.3 When the party has legal representation, in most cases, the legal representatives will both identify and investigate the issue. Unless there is disagreement between the party and their legal representatives, the legal representatives will either continue to act on the party's instructions, if satisfied they have capacity, or make arrangements for the appointment of a

[19] Mental Capacity Act 2005 section 1(2): "A person must be assumed to have capacity unless it is established that he lacks capacity."

[20] Equal Treatment Bench Book, Chapter 5 paras 9 and 43; citing *Royal Bank of Scotland PLC v ABI* UKEAT/0266/18, Swift J at [26].

litigation friend.[21] A disagreement may arise if the legal representatives have concerns that the party may lack litigation capacity but the party disputes this and/or refuses to engage in an investigation (which may involve attending appointments or consenting to the disclosure of medical records).

4.4 It is well-established that if a legal representative has doubts about their own client's litigation capacity, they are under a professional duty to resolve the issue as quickly as possible by investigating the issue for themselves and, if necessary (in particular, where the client disputes the suggestion of incapacity), raising the issue with the court.[22]

4.5 However, the relevant threshold for engaging this duty is not consistently expressed in case law or professional guidance, with various formulations used, even within the same source. Formulations include "suspicion", "reasonable suspicion", "doubt", "perception" or "belief" that the party lacks capacity, or that they *may* lack capacity. This is not helpful for legal representatives, in the context of an issue that is already very difficult to navigate in practice.

Other parties and their representatives

4.6 The duties on parties or their legal representatives where they have concerns about another party's litigation capacity are less clear.[23] In *Masterman-Lister*, Kennedy LJ also said: "Sometimes the doubts may arise in relation to an opponent acting in person, and then it *may* be appropriate to bring the issue of capacity before the court."[24]

4.7 The Working Group is of the view that there is such a duty but, whether or not it has been established, a duty should be confirmed in the following terms:

a. In the case of other parties: such a duty must come within the parties' duties under CPR r.1.3, to help the court further the overriding objective of dealing with cases justly, which includes "ensuring that the parties … can participate fully in proceedings" (r.1.1(2)(a)).

[21] See e.g. *Masterman-Lister,* Kennedy LJ at [30]: "A responsible solicitor acting for a claimant or defendant has doubts about the capacity of his client, and seeks a medical opinion. If the opinion suggests that the client lacks the necessary capacity then the solicitor arranges for the appointment of a litigation friend". This assumes that a suitable litigation friend is available and willing to act.

[22] See e.g. *McFaddens (A Firm) v Platford* [2009] EWHC 126 (TCC), and *RP v Nottingham CC* [2008] EWCA Civ 462, Wall LJ at [47].

[23] There is currently a limited duty on social landlords to consider this before issuing a claim for possession: Pre-Action Protocol for Possession Claims by Social Landlords, para 1.5(b)(i).

[24] At [30], *emphasis added*.

PD 1A provides that "the court, with the assistance of the parties, should try to identify vulnerability of parties or witnesses at the earliest possible stage of proceedings" (para 6).

b. In the case of other parties' legal representatives: since a duty to raise the matter of their own client's potential incapacity arises from the representative's overriding duty to the court,[25] the same should apply in relation to other parties.

c. The duty in relation to other parties applies only after proceedings are commenced and not at the pre-action stage.

4.8 However, there is no clear statement to this effect in the CPR (or PDs) or in the relevant professional guidance. It would be helpful if the issue were addressed in both.

4.9 The threshold for triggering these duties should be consistent between the rules and any professional guidance, and should be the same as the threshold for triggering a legal representative's duty in relation to their own client.

4.10 Although the same duties would *apply* whether or not the other party is represented, in practice they are less likely to be *triggered* in relation to a represented party. Generally, a party's own legal representatives are in the best position to assess their litigation capacity and can be assumed to be acting in accordance with their own professional duties. However, there may be cases in which another party or their representatives have information not known to the party's legal representatives. In such cases, the appropriate way of discharging the obligation is likely to be to notify the party's legal representatives, to enable them to consider the matter.

Recommendations and principles to be incorporated into amended Rules/Practice Direction

- **The presumption of capacity[26] is an important principle. But, where there are good reasons to suspect that a party might lack capacity to conduct proceedings, the**

[25] See e.g. *McFaddens (A Firm) v Platford* [2009] EWHC 126 (TCC), [2009] PNLR 26, HHJ Toulmin QC at [380]
[26] MCA 2005 s1(2): "A person must be assumed to have capacity unless it is established that he lacks capacity"

presumption should not be used to avoid proper investigation and determination.[27] **This applies even where it may be difficult to gather the necessary evidence.**

- **It should be made clear in the CPR / relevant Practice Directions, that the parties' duty to assist the court in furthering the overriding objective includes a duty to assist in identifying and determining any issue as to the litigation capacity of any party.**

- **It should be made clear in relevant professional guidance, that legal representatives' duties to the court includes a duty to assist in identifying and determining any issue as to the litigation capacity of another party, as well as their own client.**

- **Although the duty on other parties and their representatives exists whether the party whose capacity is in issue is represented or unrepresented:**
  - **It will rarely be triggered in relation to a represented party, as it can generally be assumed that the party's representatives are complying with their own duties.**
  - **Where another party or their representative has relevant information which they suspect is not known to the representatives of the party whose capacity is in issue, the duty will usually be discharged by passing that information to the party's representatives. Only rarely would it be necessary or appropriate to raise the issue directly with the court.**

- **There should be a single, clear formulation of the threshold for triggering the duty of parties (under the overriding objective) and legal representatives (under their professional obligations) to raise an issue as to a party's litigation capacity.**

- **The threshold should be one of "reasonable grounds to believe that the party may lack litigation capacity".**

- **Any concern about a party's litigation capacity should be raised at the earliest possible stage and it is recommended that:**
  - **The issue of a party's possible lack of litigation capacity is highlighted in the relevant pre-action protocols. This will help to ensure that appropriate steps are**

[27] ETBB, Ch 5, para 9; citing *Royal Bank of Scotland Plc v AB* [2020] UKEAT/0266/18/DA, Swift J at [26].

taken at an early stage to determine whether or not a party has litigation capacity, and whether a litigation friend is needed.

- **Court guidance is made available to parties bringing or defending claims to direct their attention to the issue of litigation capacity, and to enable the party to raise concerns with the court.**

- **A party or legal representative (or other relevant person, e.g. family member) should be permitted to raise the issue with the court without a formal application.**

- **Clearer professional ethical guidance is required setting out the circumstances in which legal representatives have a duty to raise with the court:**
  - **Any issue that arises as to the litigation capacity of their own client; and**
  - **Any issue that arises as to the litigation capacity of another party.**

5. INVESTIGATION OF THE ISSUE

5.1 Having identified that a party *may* lack litigation capacity, some investigation will be needed before the issue can be determined. Although the court will be adopting an inquisitorial role when deciding whether or not a party has litigation capacity, the civil courts lack the resources and expertise to conduct extensive investigations for itself. While medical evidence is not always required, in many cases no determination will be possible without at least obtaining medical records or, in some cases, commissioning a medical expert to make a determination.

What evidence is needed?

5.2 To determine whether or not a party lacks litigation capacity, the court will need to decide (1) whether they are unable to understand, retain, use and/or weigh the information relevant to the decisions needed for the conduct of proceedings, or to communicate those decisions, and if so, (2) whether that inability is caused by an impairment or disturbance in the functioning of their mind or brain.

5.3 In light of the second part of the test, the courts have generally tended to require some form of medical evidence to determine the issue of capacity,[28] although this is not always necessary.[29] In any event it may be impossible to commission an expert assessment of capacity. This could be because it is not possible to engage the party in the assessment process or because no funding is available. In such cases, the court may have to rely on any existing medical records that may be available, together with any relevant witness evidence from family, friends and professionals involved with the party, as well as hearing from the party themselves.[30]

[28] See e.g. *Masterman-Lister*, Kennedy LJ at [17]; *Baker Tilly (A Firm) v Makar* [2013] EWHC 759 (QB), Sir Raymond Jack at [8].

[29] See *Hinduja v Hinduja* [2020] EWHC 1533 (Ch); and *Re Thirumalesh (dec'd)* [2024] EWCA Civ 896

[30] For a helpful discussion on this point, in the family law context, see *Z v Kent CC* [2018] EWFC B65, , HHJ Lazarus at [40].

5.4 The nature of the investigation and evidence required will depend in part on the nature and complexity of the issues and must be proportionate to the matters at stake in the proceedings.[31]

Who should investigate?

5.5 While it is the responsibility of the court to ensure that the issue of a party's possible lack of litigation capacity is investigated appropriately, the civil courts do not have the resources to conduct investigations at anything other than a basic level, e.g. a judge asking questions of the party in question during a case management hearing or before a hearing commences. In most cases the investigation will need to be delegated by the court to a third party.

5.6 Existing options include:

a. The party's legal representative (if any). Where a party is represented, their legal representative should investigate any issue as to their capacity, to satisfy their own professional obligations as well as to assist the court. The Working Group consider that this remains the most appropriate course of action.

b. Another party's legal representative. The Working Group agreed that, given the potential for conflicts of interest, it is not appropriate for another party's legal representative to provide anything more than limited administrative assistance to the court.

c. The Official Solicitor. In addition to being the litigation friend of last resort, the Official Solicitor's role includes making inquiries and reporting to the court about such matters as the court thinks fit, known as "*Harbin v Masterman* inquiries".[32] This may include the issue of the litigation capacity of a party. However, not only is this subject to the Official Solicitor's agreement, but the Official Solicitor's office would not have capacity to take on significant number of such inquiries without a very substantial increase in resources.

d. A litigation friend, under an interim declaration of incapacity.[33] CPR contains a power to make interim declarations,[34] but there is limited guidance on the evidential threshold

[31] See *Galo* at [59], below.

[32] *Harbin v Masterman* [1896] 1 Ch 351; see Statement of the Official Solicitor, appended as a supplement to *RP v Nottingham CC* [2008] EWCA Civ 462, [2008] 2 FLR 1516, at para 8.

[33] This course of action was adopted in one case under the Family Procedure Rules: *CS v FB* [2020] EWHC 1474 (Fam).

[34] r.25.1(1)(b)

for exercising the power. This is in contrast to the statutory power of the Court of Protection to take interim steps on the basis of "reason to believe that P [the party] lacks capacity".[35]

5.7 Consideration should be given to the creation of further options including:

a. A power for courts to make interim declarations of incapacity (as in the Court of Protection) for the limited purpose of allowing a litigation friend to investigate and present evidence for a final determination on the issue of the party's capacity.
b. Accredited legal representatives, under an interim declaration of incapacity (as in the Court of Protection).
c. Medical visitors (as in the Court of Protection).
d. Reports from NHS bodies and/or local authorities (as in the Court of Protection).

5.8 Whatever the most appropriate option, it is important that there is a clear jurisdictional basis for the court to delegate the task of investigating a party's litigation capacity, and that it is done on an explicit basis.

5.9 The experience of the Working Group, and some of the respondents to the consultation, was that judges often rely on the unpaid work of law centres and other charities (such as Shelter), as well as local authorities (who may be party to the proceedings) to assist in both supporting the party and obtaining the necessary evidence. Reliance on the voluntary efforts of agencies that are present only in some cases and in some areas is clearly insufficient and unsustainable. The general lack of support for vulnerable individuals in the community was highlighted by the experience within the Working Group of cases in which judges have adjourned possession hearings to enable a party to obtain a GP report or letter, only for the person to return to court having been unable to obtain such evidence, or, failing to return for the adjourned hearing.[36]

5.10 The Working Group did consider the proposal that a case might be transferred to the Court of Protection or to a dual ticketed judge for the determination of capacity. This was rejected on the basis that this would be impossible under the current jurisdictional rules and would not be feasible in any event, given the limited resources of the Court of Protection. Further, it is the role of the civil courts to 'case manage' civil proceedings, and this includes ensuring that appropriate arrangements are made for vulnerable parties and witnesses under PD 1A.

[35] MCA 2005 s48.

[36] This was thought to be a particular issue in rural areas where the party's journey to the court is more likely to be long and expensive.

This includes identifying and determining whether a party lacks litigation capacity so as to require the appointment of a litigation friend.

Orders for disclosure

5.11 It seems to be assumed that courts can order the disclosure of relevant records (primarily medical and social care records) by third parties,[37] though the basis for this is not entirely clear. It may be possible as an exercise of the court's usual powers of non-party disclosure.[38] However these provisions are not obviously well-suited to this issue, with the relevant test in the CPR directed to adversarial issues.[39] It may also be possible as an exercise of the inherent jurisdiction of the High Court, but it is unclear whether the same would be true in the county court.

5.12 The Working Group was in agreement that it is important that the court has a power to order disclosure where necessary and proportionate and that the power has a clear basis.

5.13 The court is most likely to consider exercising such powers when a party refuses to consent to their treating clinician disclosing their medical records. This raises important and difficult issues for medical professionals who have duties of confidentiality to their patients. In addition to these issues, the relationship between a party and their GP or treating psychiatrist may be crucial to the party's well-being and is likely to be undermined if the clinician is required to disclose confidential medical records against their patient's wishes.

5.14 Consultation with the representative bodies for medical and other relevant practitioners and those representing the interests of individuals likely to be affected will be necessary before any recommendation regarding the courts' powers of disclosure are finalised.

[37] See e.g. *Bradbury v Paterson* [2014] EWHC 3992 (QB), Foskett J at [50].
[38] Senior Courts Act 1981 s31 / County Courts Act 1984 s 53.
[39] CPR r.31.17(2)(a) requiring that "the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings".

Recommendations and principles to be incorporated into amended Rules/Practice Direction

- **Any Practice Direction should include guidance for judges as to when medical evidence will be required (including specifically commissioned expert reports) to enable the court to adopt a proportionate approach to the determination the issue of litigation capacity.**

- **Where investigation of a party's litigation capacity is necessary, a Practice Direction should also contain guidance for judges setting out the court's options in terms of delegating the work of such investigation. This may include a combination of existing options and consideration of the creation of further options, as set out above.**

- **There should be:**
    - **A clear power (either by way of clarification as to the scope of existing powers or, if necessary, by the creation of a new power) for the court to order disclosure of relevant documents from third parties where it is necessary and proportionate to do so.**
    - **Guidance as to the exercise of such a power, balancing the importance of correctly determining a party's litigation capacity against other factors, including the party's rights to privacy and confidentiality and the likely impact on important relationships with medical and other professionals who may be required to give disclosure. The relevant professional and patient representative bodies should be consulted on the contents of such guidance.**

6. DETERMINATION OF THE ISSUE

6.1 Following an investigation, there may be an obvious conclusion as to whether the litigant does (or does not) have litigation capacity. Where there remains an issue as to the party's litigation capacity, the court must determine the issue by way of a hearing at which the party must have proper opportunity to be heard. One issue that arose in discussions was the role of a party's legal representatives at such a hearing. The Working Group agreed that a representatives' proper role is to assist the court to ensure that the relevant factual and legal material is drawn to its attention and its significance understood, but not to advocate for a finding one way or the other.

6.2 A party found to lack capacity must have a right to challenge the determination.[40] This should take the form of an appeal rather than a review by another judge of the same level, with appropriate procedural modifications to ensure that the right can be exercised by the party.[41]

6.3 The Working Group considered the issue of whether a legal representative is bound to continue to act in cases where the court has found the party has capacity, but the legal representative believes the client lacks capacity. The majority were of the view that the representative must continue to act (which is consistent with the Bar Council's current advice) but several members of the Working Group were concerned about the professional difficulties this raises and would welcome clearer professional guidance on the issue.

Privacy and anonymity

6.4 A particularly difficult issue was that of privacy and anonymity for the party whose capacity is to be determined.

6.5 Some members of the Working Group and some respondents to the consultation were of the view that such hearings should generally be heard in private (with other parties to the

[40] *RP v United Kingdom* [2013] 1 FLR 744

[41] It would be necessary that the party should be able to conduct the appeal for themselves, with appropriate assistance if necessary, rather than being required to conduct it through a litigation friend.

substantive proceedings excluded), and potentially also with anonymity and/or reporting restrictions orders in place. The bases for this view included the following:

a. The procedure is a quasi-inquisitorial one and the other parties to the substantive proceedings will generally have no legitimate interest in the determination of the issue.
b. The hearing is likely to involve information relating to the party whose capacity is in issue, which is private, confidential, subject to legal privilege[42] and/or may prejudice the party's interests in the substantive proceedings.
c. The hearing will take place at a time when the party may be incapable of properly protecting their own interests in this regard, and when any legal representative will be unable to take instructions in order to do so (being unable to act on instructions from the client and having no litigation friend in place).
d. Although the general rule is that hearings are to be held in public with the names of the parties made public (CPR r.39.2), there are other contexts in which the starting point is one in favour of greater privacy, e.g. in relation to anonymity orders for infant settlement approval hearings.[43]
e. Respondents to the consultation drew attention to the accepted practice in settlement approval hearing that the other party will not attend some or all of the hearing, given that privileged advice will be disclosed.

6.6 Other members of the Working Group and other respondents were of the view that such hearings should generally be held in public and without such restrictions, subject to the court's power to order otherwise where necessary and proportionate in the particular case. The bases for this view included the following:

a. The fundamental importance of the constitutional principle of open justice.
b. The general trend, in recognition of this, towards greater transparency even in jurisdictions where privacy and reporting restrictions have traditionally been the default position. For example, Court of Protection cases are now usually held in public subject to restrictions upon what can be said about the subject of the proceedings.[44]

[42] The evidence of any legal representative about their communications with the party is likely to be relevant, as a key issue is whether the party can understand, retain, and weigh information, and communicate any decisions, so as to have capacity to conduct the proceedings. The support that has been given or offered to the party will also be relevant.

[43] *X v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96

[44] Court of Protection Practice Direction 4C.

c. The particular importance of openness in relation to decisions which affect a party's fundamental rights and may infringe their right to personal autonomy.

d. The need for a reasoned judgment capable of appeal.

e. That the usual approach, in which the court can depart from the principle of open justice if necessary and proportionate in the particular case, is capable of sufficiently protecting the relevant interests.

6.7 Ultimately, striking a balance between these competing factors, the Working Group does not recommend any specific starting point in favour of determination hearings being held in private or subject to anonymity or reporting restrictions. However, the court should expressly consider, of its own motion, whether and to what extent such measures are necessary in each case.

Recommendations and principles to be incorporated into amended Rules/Practice Direction

- **Professional guidance should make clear the nature of legal representatives' role at a hearing to determine the issue of a party's litigation capacity.**

- **In all cases where a hearing is listed, the court should expressly consider whether and to what extent it is necessary and proportionate to order that all or part of the hearing be held in private, subject to anonymity and/or reporting restrictions orders.**

- **The power to hold the hearing in private should include the power to exclude other parties to the substantive proceedings from all or part of the hearing.**

7. SUBSTANTIVE PROCEEDINGS PENDING DETERMINATION

7.1 CPR 21.3(2) provides that a person may not, without the court's permission, make an application against or take any step in proceedings (other than issuing and serving a claim form or applying for the appointment of a litigation friend) against a party who lacks litigation capacity (a protected party) until they have a litigation friend.

7.2 However, no provision is made for a situation in which a party *may* lack litigation capacity and the issue needs to be determined. While the determination should be made as soon as possible, there will inevitably be a period after the issue has been raised with the court but before any determination.

7.3 The Working Group considers that the starting point in relation to the proceedings, pending a determination of a party's capacity should be the same: that no steps be taken pending the determination (and the appointment of a litigation friend, if found necessary) without the court's permission.

7.4 Similarly, there is an argument that any existing orders should be stayed pending the determination; in particular, any orders which might result in irremediable prejudice to the party before the issue of their litigation capacity is determined (e.g. injunctions with a power of arrest).[45] However, any decision by the court prohibiting further steps pending a determination, or imposing a stay on existing orders, must take into account the interests of other parties to the proceedings and/or third parties. A 'balance of harm' test should be applied by the court in such situations (similar to that found in section 33(7) of the Family Law Act 1996 in relation to occupation orders).[46]

[45] See e.g. *MTA v Lord Chancellor* [2024] EWCA Civ 965; and also the CJC's report, *Anti-social Behaviour in the Civil Courts* (July 2020) at para 202-205.

[46] Section 33(7) requires the court to balance the 'significant harm' likely to be suffered by the applicant or child if the order is not made, with any 'significant harm' likely to be suffered by the respondent or child if an order is made.

Recommendations and principles to be incorporated into amended Rules/Practice Direction

- **Once the court has decided that a determination of a party's litigation capacity is needed, the starting points should be that, pending that determination:**
  - **No steps may be taken in the case without the permission of the court; and**
  - **The court will stay any orders previously made in the proceedings, subject to the court's power to make alternative provision (on its own motion or on the application of either party).**

- **In deciding whether to give permission for specific steps to be taken and/or whether to impose a stay on the enforcement of existing orders, the court should apply a 'balance of harm' test, similar to that set out in s.33 of the Family Law Act 1996.**

8. FUNDING AND COSTS

8.1 If the court is to investigate and determine a party's litigation capacity, this will entail costs over and above the costs ordinarily incurred in litigation. These may include the costs of expert reports or even just the cost of obtaining a letter from a clinician, as well as the additional costs of legal representatives. Additionally, if the court is to delegate the task of investigating the issue to third parties, the time and costs of the third parties needs to be considered.

8.2 Two broad issues arise in this regard: first, that of the upfront payment of the additional costs, and second, that of who should be ordered to bear the costs at the end of the case. In relation to the latter, difficult issues arise, but the Working Group ultimately considered that in most cases these can adequately be dealt with by the courts under their broad discretion in relation to costs, on a case-by-case basis. It is the former issue that presents greater difficulties in ensuring that the procedure for determining capacity can progress and does not grind to a halt.

8.3 In certain cases, the court has the power to order other parties to fund the costs of the investigation. This will usually be appropriate only in cases where the party whose capacity is at issue is the defendant and the other party is a substantial public or corporate body.

8.4 Some parties who may lack litigation capacity are eligible for legal aid, but the current legal aid regulations governing applications and the evidence required to establish financial eligibility can make it impossible for legal aid to be granted at an early stage, if at all.[47] This often results in a great deal of unfunded work being undertaken at an early stage by legal representatives. Where such work cannot be done because of the financial pressures on the organisations, the party may fail to engage with the proceedings at all, or do so without representation.

8.5 Many others are not eligible for legal aid, because their case falls outside the scope of cases for which funding is generally available or because their income or capital exceeds the

[47] For 'Legal Help', which enables legal representatives to provide assistance short of representation in court proceedings, the party must sign a form and provide evidence of income and savings. If the party is unwilling to do so (or the legal representatives believe them not to be capable of understanding what they are signing) there will be no funding arrangement. The experience of the Working Group, and the evidence provided during the consultation, suggests that a significant amount of unfunded work is done by legal representatives, particularly those working for law centres and other charities.

relevant financial eligibility thresholds.[48] Nonetheless, many will still be unable to pay for representation or may be unwilling to pay for the investigation of their litigation capacity when they dispute any suggestion that they might lack capacity.

8.6 In some cases, another party may agree to pay the costs. Usually this will be where the party whose capacity is in issue is a defendant and the claimant is willing and able to meet the costs to ensure that the litigation can progress. And it has been held that the High Court has the power, under its inherent jurisdiction, to direct another party to meet the costs,[49] although it is not clear whether the county court has the same power.

8.7 In many cases, the current situation often results in significant amounts of unfunded work being undertaken by the party's legal representatives and also by statutory bodies, such as local authorities. This is unsustainable.

8.8 Ultimately, additional funding will be needed to enable the courts to do justice in all cases where one party may lack litigation capacity. This could include the following: funding to increase the capacity of the courts in terms of judicial and administrative staff and time; increasing the funding for the Official Solicitor; funding alternative third-party assistance for the courts; creating a distinct form of legal aid funding to pay the costs of obtaining expert evidence and the support of lawyers for the discrete task of determining a party's litigation capacity. The Northern Ireland Court of Appeal recently observed:

> "*the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to every litigant's fundamental rights of access to a court and to a fair hearing. An assessment in any given case that a litigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. The need for a simple, accessible, expeditious and cheap framework to give effect to the assessment that any litigant should have the benefit of a litigation friend is incontestable. In the absence of this - coupled with the necessary*

[48] Many parties on passported benefits, including disability benefits, are not eligible for legal aid because of the additional capital thresholds that apply. Even if eligible for a legal aid certificate, a party may be required to pay a contribution to the Legal Aid Agency before a certificate will be granted. If there is no financial deputy in place the logistics of this are problematic and can cause significant delays before a certificate is granted.

[49] Bradbury v Paterson [2014] EWHC 3992 (QB), Foskett J at [46(c)].

related public funding – […] *our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing*." [50]

Recommendations

- **Non-means tested legal aid should be made available for cases within the scope of legal aid, limited to the investigation and determination of a party's litigation capacity.**

- **Legal aid regulations should be amended to make provision for providers to sign legal aid forms to apply for legal aid for the purpose of investigating the issue of capacity.**

- **A 'fund of last resort' is established by Government to ensure that the court can fulfil its function of managing cases to ensure access to justice for litigants who may lack the capacity to conduct their own litigation.**

[50] *Galo v Bombardier Aerospace UK* [2023] NICA 50 at paragraph 59.

Other miscellaneous recommendations

- **A new judicial Working Group on litigation capacity should be established, or an existing judicial Working Group commissioned to produce clearer judicial guidance.**

- **The Judicial College should review judicial training materials on capacity issues, building on recent revisions to the Equal Treatment Bench Book. Regular face-to-face training is essential to ensure that judges have the knowledge and skills to deal properly with issues of litigation capacity.**

- **Data should be collected by HMCTS on the numbers of adults in civil cases who act through a litigation friend.**

- **The Civil Justice Council should review the progress of recommendations made in this report after a suitable period of time has passed.**

- **Consideration should be given to making a provision for the appointment of a litigation friend prior to a claim being issued, so that during a period when negotiations are proceeding and evidence being obtained, legal representatives can be assured that a person who may lack litigation capacity has their interests properly protected and that they can rely on instructions given.**

Table of abbreviations and acronyms

Abbreviation or acronym	Meaning
BSB	Bar Standards Board
CILEx	Chartered Institute of Legal Executives
CJC	Civil Justice Council
COP	Court of Protection
CPR	Civil Procedure Rules
CPRC	Civil Procedure Rules Committee
ECHR	European Convention on Human Rights
ETBB	Equal Treatment Bench Book
HMCTS	His Majesty's Courts and Tribunals Service
MCA	Mental Capacity Act
MOJ	Ministry of Justice
PD	Practice Direction
SRA	Solicitors Regulation Authority

Appendix 1

Working Group Membership

1. Co-Chair Diane Astin – Housing member of the Civil Justice Council
2. Co-Chair Daniel Clarke – Barrister, Doughty Street Chambers
3. Alex Ruck-Keene KC – Barrister with specialist practice
4. Susan Hardie – Senior Lawyer, Office of the Official Solicitor
5. Sophy Miles – Barrister and former solicitor with specialist practice
6. Catherine Hose – Lead Solicitor with Shelter[51]
7. DJ Michelle Temple – District Judge
8. Rebecca Scott – Director of Legal Services and Senior Solicitor with RCJ Advice
9. HHJ Karen Walden-Smith – Circuit Judge member of the Civil Justice Council

Secretariat support was provided by Amy Shaw – Deputy Secretary to the Civil Justice Council

[51] Catherine Morley – Lead Solicitor with Shelter, stepped back from the Working Group in March 2023 and was replaced by Catherine Hose.

Appendix 2

Schedule of recommendations

Recommendations for consideration by the Civil Procedure Rules Committee[52]:

(1) A clear procedure is needed for cases in which the court is required to determine a party's litigation capacity. This should be set out in CPR Part 21 and/or in a Practice Direction, to provide a clear, accessible, and authoritative source to which parties, legal representatives and judges can turn.

(2) Consideration should be given to making a provision for the appointment of a litigation friend prior to a claim being issued, so that during a period when negotiations are proceeding and evidence being obtained, legal representatives can be assured that a person who may lack litigation capacity has their interests properly protected and that they can rely on instructions given.

The principles on which such a procedure should be based:

(3) It is not possible to devise a single procedure that will be appropriate in every case. Rather, the rules and/or Practice Direction should aim to set out the relevant principles and provide a range of tools the court can use to investigate and determine the issue. These can be used as appropriate in the particular circumstances of the case, in accordance with the overriding objective including, taking into account, in particular:

a. The fundamental importance of the issue of litigation capacity;
b. The need to protect the interests of the party whose capacity is in doubt, including their interests in the relation to the substantive proceedings and their right to privacy, confidentiality, and legal privilege, pending determination of the issue at a time when they may have limited ability to protect their own interests;
c. The interests of all other parties to the substantive proceedings;
d. The principle of proportionality.

[52] Amendments to CPR are the responsibility of the CPRC which makes recommendations to the MR. Practice Directions are made by the MR (authority delegated to the MR by the Lord Chief Justice – see Part 1 of Schedule 2 of the Constitutional Reform Act 2005, and section 5 of the Civil Procedure Act 1997).

(4) The 'starting position' must be that the determination of a party's current litigation capacity is essentially a matter of case management, the purpose of which is to further the overriding objective, so as to enable cases to be dealt with justly and at proportionate cost, and to ensure that parties are on an equal footing, and can participate fully in proceedings, so far as practicable.

(5) In such a determination, given that the issue of litigation capacity is first and foremost an issue as between the party and the court, and the court is bound by the ECHR to consider how to secure the party's rights under Article 6, it is operating in a quasi-inquisitorial way. This means that other parties to the substantive claim will have no general right to participate in the process by which a person's current litigation capacity is determined. However, there may be circumstances in which the other parties should be given an opportunity to be heard.

(6) The court's quasi-inquisitorial role means that the court is responsible for ensuring it has the necessary information to determine the issue. But it will need to delegate the majority of the work involved to the parties, their representatives and/or third parties. Any issue as to a party's current litigation capacity should, where possible, be identified, investigated and determined as a preliminary issue at the earliest opportunity, subject to exceptions where the substantive proceedings are likely to involve determination of some of the same issues.

(7) The presumption of capacity is an important principle. But, where there are good reasons to suspect that a party might lack capacity to conduct proceedings, the presumption should not be used to avoid proper investigation and determination. This applies even where it may be difficult to gather the necessary evidence.

(8) It should be made clear in the CPR / relevant practice directions, that the parties' duty to assist the court in furthering the overriding objective includes a duty to assist in identifying and determining any issue as to the litigation capacity of any party.

(9) Although the duty on other parties and their representatives exists whether the party whose capacity is in issue is represented or unrepresented:

a. It will rarely be triggered in relation to a represented party, as it can generally be assumed that the party's representatives are complying with their own duties.

b. Where another party or their representative has relevant information that they suspect is not known to the representatives of the party whose capacity is in issue, the duty will

usually be discharged by passing that information to the party's representatives. Only rarely would it be necessary or appropriate to raise the issue directly with the court.

(10) There should be a single, clear formulation of the threshold for triggering the duty of parties (under the overriding objective) and legal representatives (under their professional obligations) to raise an issue as to a party's litigation capacity.

(11) The threshold should be one of "reasonable grounds to believe that the party may lack litigation capacity".

(12) Any concern about a party's litigation capacity should be raised at the earliest possible stage and it is recommended that:

a. The issue of a party's possible lack of litigation capacity is highlighted in the relevant Pre-Action Protocols. This will help to ensure that appropriate steps are taken at an early stage to determine whether or not a party has litigation capacity, and whether a litigation friend is needed.

b. Court guidance is made available to parties bringing or defending claims to direct their attention to the issue of litigation capacity, and to enable the party to raise concerns with the court.

(13) A party or legal representative (or other relevant person, e.g. family member) should be permitted to raise the issue with the court without a formal application.

Medical Evidence:

(14) Any Practice Direction should include guidance for judges as to when medical evidence will be required (including specifically commissioned expert reports) to enable the court to adopt a proportionate approach to the determination the issue of litigation capacity.

Delegation of the investigation:

(15) Where investigation of a party's litigation capacity is necessary, a Practice Direction should also contain guidance for judges setting out the court's options in terms of delegating the work of such investigation. This may include a combination of existing options and consideration of the creation of further options, as set out above.

Orders for disclosure:

(16) There should be:

a. A clear power (either by way of clarification as to the scope of existing powers or, if necessary, by the creation of a new power) for the court to order disclosure of relevant documents from third parties where it is necessary and proportionate to do so.
b. Guidance as to the exercise of such a power, balancing the importance of correctly determining a party's litigation capacity against other factors, including the party's rights to privacy and confidentiality and the likely impact on important relationships with medical and other professionals who may be required to give disclosure. The relevant professional and patient representative bodies should be consulted on the contents of such guidance.

(17) In all cases where a hearing is listed, the court should expressly consider whether and to what extent it is necessary and proportionate to order that all or part of the hearing be held in private, subject to anonymity and/or reporting restrictions orders.

(18) The power to hold the hearing in private should include the power to exclude other parties to the substantive proceedings from all or part of the hearing.

(19) Once the court has decided that a determination of a party's litigation capacity is needed, there should be a presumption that, pending that determination:

a. No steps may be taken in the case without the permission of the court; and
b. The court will stay any orders previously made in the proceedings, subject to the court's power to make alternative provision (on its own motion or on the application of either party).

(20) In deciding whether to give permission for specific steps to be taken and/or whether to impose a stay on the enforcement of existing orders, the court should apply a 'balance of harm' test, similar to that set out in s.33 of the Family Law Act 1996.

Recommendations for consideration by the relevant professional regulatory bodies – BSB, SRA, CILEx, Law Society:

(21) It should be made clear in the relevant professional guidance, that legal representatives' duties to the court includes a duty to assist in identifying and determining any issue as to the litigation capacity of another party, as well as their own client.

(22) Although the duty on other parties and their representatives exists whether the party whose capacity is in issue is represented or unrepresented:

a. It will rarely be triggered in relation to a represented party, as it can generally be assumed that the party's representatives are complying with their own duties.
b. Where another party or their representative has relevant information that they suspect is not known to the representatives of the party whose capacity is in issue, the duty will usually be discharged by passing that information to the party's representatives. Only rarely would it be necessary or appropriate to raise the issue directly with the court.

(23) There should be a single, clear formulation of the threshold for triggering the duty of parties (under the overriding objective) and legal representatives (under their professional obligations) to raise an issue as to a party's litigation capacity.

(24) The threshold should be one of "reasonable grounds to believe that the party may lack litigation capacity".

(25) Clearer professional ethical guidance is required setting out the circumstances in which legal representatives have a duty to raise with the court:

a. any issue that arises as to the litigation capacity of their own client; and
b. any issue that arises as to the litigation capacity of another party.

(24) Professional guidance should make clear the nature of legal representatives' role at a hearing to determine the issue of a party's litigation capacity.

Recommendations for consideration by the Ministry of Justice and the Legal Aid Agency:

(25) Non-means tested legal aid should be made available for cases within the scope of legal aid, limited to the investigation and determination of a party's litigation capacity.

(26) Legal aid regulations should be amended to make provision for providers to sign legal aid forms to apply for legal aid for the purpose of investigating the issue of capacity.

(27) A 'fund of last resort' is established by Government to ensure that the court can fulfil its function of managing cases to ensure access to justice for litigants who may lack the capacity to conduct their own litigation.

Recommendations for consideration by the Judicial College:

(28) A new judicial Working Group on litigation capacity should be established, or an existing judicial Working Group commissioned to produce clearer judicial guidance.

(29) The Judicial College should review judicial training materials on capacity issues, building on recent revisions to the Equal Treatment Bench Book. Regular face-to-face training is essential

to ensure that judges have the knowledge and skills to deal properly with issues of litigation capacity.

Recommendation for HMCTS:

(30) Data should be collected by HMCTS on the numbers of adults in civil cases who act through a litigation friend.

For the CJC to monitor:

(31) The Civil Justice Council should review the progress of recommendations made in this report after a suitable period of time has passed.