

PARENTS WHO LACK CAPACITY TO CONDUCT PUBLIC LAW PROCEEDINGS

The difficult issues arising in public law care cases where a parent lacks capacity to conduct the proceedings were referred to the Family Justice Council for consideration by the Family Procedure Rules Committee. There have been a number of developments which render such consideration timely: the decision of the Court of Appeal in *RP v Nottingham CC and Another (2008) (EWCA Civ 462)*; the emphasis on pre-proceedings work with parents contained in the Public Law Outline issued in April 2008; the implementation of the Mental Capacity Act 2005.

We are grateful for the views of those Local FJCs and individuals identified in Appendix 1 and the ready cooperation of the Official Solicitor, through his representative Helen Clift.

This guidance does not address the position of a parent who lacks capacity to conduct litigation only by reason of their age.

What follows is an attempt to summarise current good practice in procedural terms.

1. The Family Proceedings Rules 1991 as amended define “protected party” as a party or an intended party, who lacks capacity within the meaning of the Mental Capacity Act 2005 to conduct the proceedings. The Mental Capacity Act at s1 sets out the

general principle that a person must be assumed to have capacity unless it is established that he lacks capacity. At s2(1) it provides that 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 disturbance in the functioning of the mind or brain, whether the impairment or disturbance is permanent or temporary. There are parents whose lack of litigation capacity is lifelong, for example those with profound learning disabilities or is likely to be permanent, for example where it is the result of a neuro-degenerative illness such as multiple sclerosis or dementia. There are other individuals whose lack of capacity is associated with, for example, specific acute periods of mental illness or following brain injury, and who may regain capacity as their health improves. Thus litigation capacity may sometimes fluctuate and indeed in some individuals it may be affected by the stress of proceedings.

There are also cases where a party's capacity to conduct the proceedings is open to debate between competent experts. These, for obvious reasons, are difficult cases. The BMA and the Law Society has published helpful guidance: "*Assessment of Mental Capacity, A Practical Guide for Doctors and Lawyers*" (now in its 3rd edition).

Pre- proceedings

2. There are many groups of parents who are vulnerable in the context of social work involvement. This paper purports only to deal with a limited and specific group, those whose disabilities are sufficiently severe that they lack the capacity to conduct legal

proceedings. Thus for example the detailed guidance issued by the DCSF in 2007 entitled “*Good Practice in Working with Parents with a Learning Disability*” is useful by way of background and in terms of setting broad standards for Local Authorities to achieve but it does not directly address the issue of parents who lack litigation capacity.

3. 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. 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 assessment could not provide a definitive diagnosis, it may be particularly helpful in enabling the Local Authority to undertake parenting and other social work assessments on an informed basis.

4. If a parent’s difficulties are not recognised, 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. under s47 of the National Health Service and Community Care Act 1990.

5. Where a parent lacks litigation capacity it must be appreciated that it is very improbable that s/he has the capacity to consent to their child being accommodated under s20 of the Children Act. If the child is plainly at risk, the Local Authority should issue care proceedings, particularly where the child is very young. That affords the dual safeguard of legal representation of the parents and court oversight. We hope that forthcoming DCSF guidance to Local Authorities may address this, among the other complex issues relating to s20 accommodation

6. Once it is clear that proceedings are likely to be necessary, the Local Authority must bear in mind that the PLO will require the Local Authority to file a case summary which includes “a summary of any concerns which the Local Authority may have about the mental capacity of an adult to care for the child or prepare for the proceedings”. In the Nottingham case, Wall LJ 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 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 will enhance the

parent's solicitors' ability to advise and to address the question of a litigation friend promptly.

7. Good Local Authority practice would include:

7.1. 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. The Social Inclusion Unit's *'Think Family'* and the Department of Health's *'A Fair access to Services'* guidance provide important guidance when assessing thresholds for adult social care services. In particular, when adult services are deciding whether the threshold is reached for the provision of a service, they should take into consideration that a lower threshold will be appropriate in recognition of the additional pressures and needs for assistance of a person with a learning disability or mental health problem who has parental responsibilities. However, experience in many different areas shows that the threshold for qualification for adult services remains very high. We hope that Local FJCs may address this issue with Local Authority representatives so that local good practice may be shared and some degree of consistency achieved.

7.2. 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.

- 7.3. An enquiry of 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 any “expression of views” has been made and whether this document deals with the issues of who should be the individual’s litigation friend if they lack capacity or their views as to who should care for their child if such a situation arose.
- 7.4. 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, FGCs and with legal representatives. 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. There may be a role for Local FJCs in identifying and promoting awareness of existing lay advocacy services and in supporting appropriate training.
- 7.5. The provision of all relevant documentation in an accessible form. [The FJC has supported the publication of suitable booklets about care proceedings for parents with learning difficulties which are currently being translated into a wide range of languages. They can be downloaded from the publications page of the FJC website at www.family-justice-council.org.uk.]
- 7.6. The speedy referral of a parent for legal advice, about their litigation capacity as well as the case as a whole, as soon as serious concerns about their parenting are

identified, perhaps via the Local Authority Legal Department who 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.

8. Caution is necessary before sending a **Pre proceedings letter** to a parent who may lack capacity. Such correspondence could easily exacerbate mental health difficulties. 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 favoured over the sending of such a letter.

We are aware that additional non means and merits tested funding for legal help in public law cases only becomes available where the local authority has given written notice of proceedings in accordance with the DCSF/Welsh Assembly 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 LSC criteria. Thus where a parent lacks capacity, 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.

Once proceedings are issued -

The Local Authority

9. The Local Authority issuing care proceedings should complete Section 5 of the Case Summary (concerns re: mental health) attaching any available evidence as to any potential lack of litigation capacity and within Section 6 of their Case Summary, should identify the directions sought to resolve this issue

10. The Local Authority “Allocation Record and Timetable for the Child” should indicate a request for immediate transfer with a First Hearing in the Care Centre if there is evidence as to lack of capacity to conduct the proceedings and the need for an appointment of a litigation friend

Family Proceedings Courts

11. If there is evidence as to lack of parental capacity to conduct the proceedings, the FPC should transfer the case immediately for first appointment in the Care Centre.

12. If there is insufficient information for the FPC allocator to make a properly informed decision, the FPC should retain the case and give Directions in order to fulfil its duty to investigate the issue of capacity at the earliest opportunity (unless there are other grounds which require the case to be transferred to the Care Centre).

13. If the issue of capacity to conduct the proceedings arises unexpectedly, or the mental health of a party deteriorates during proceedings being conducted within the FPC, then again directions should be given as above and if evidence of lack of capacity to

conduct the proceedings is available, then the case should be transferred urgently to the Care Centre.

Care Centre/High Court

14. Unless the Family Proceedings Court has already given appropriate directions, on receipt of an application with evidence of lack of capacity to conduct the proceedings, the Care Centre should give directions urgently in order to resolve the identity of the litigation friend/guardian ad litem. Where appropriate, the court should explain to a parent from the outset that they may wish to identify a potential litigation friend other than the Official Solicitor.

15. If an issue of capacity to conduct the proceedings arises unexpectedly then urgent directions should be given in order to obtain an appropriate assessment and resolve the issue.

16. Standard Directions, if a professional litigation friend or the Official Solicitor is to be invited to act, should be as follows:

“That X (named party) forward to Y/Official Solicitor forthwith

(a) a copy of the order appointing the litigation friend/inviting the Official Solicitor to act

(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 ”

The Parent's legal representatives

17. Local FJCs should encourage local legal practitioners to share details of local psychologists and psychiatrists who are capable of providing reliable and speedily opinions as to litigation capacity

18. 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.” Sometimes, particularly patient, careful and repeated explanation and discussion with a solicitor/barrister, may enable a parent, with even significant degree of learning disability, to participate in proceedings without a litigation friend. By s1(2) of the Mental Capacity Act a person is not to be treated as unable to make a decision unless all practicable steps to enable him to do so have been taken without success.

19. It would be helpful if a solicitor provides a parent with accessible written information and also gives consideration as to whether a lay advocate might assist the parent during their more formal dealings with the Local Authority or in discussions with their legal representatives or during any attendance at court.

20. 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

para 47 Wall LJ's judgment in the Nottingham case: *“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”*

21. The parent concerned should always be informed of any worries the legal representative has about their 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.

22. It is the responsibility of the parent's solicitor to obtain an opinion on litigation capacity. There may be occasions when it is appropriate to seek an opinion from a treating 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 Official Solicitor's standard letter of instruction, proformas and questions should be used. They are attached at Appendix II. Unless a treating clinician is instructed, the PLO Practice Direction in relation to Experts should be drawn to the attention of any assessor.

23. 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 s/he is entitled to dispute any opinion to the effect that they lack capacity. If the parent wishes to assert his/her 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. 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.

24. Initially the identity of the 'litigation friend' is a question for the protected parent and his/her 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. If so, and the solicitor feels able to provide the certificate under Rule 9.2(7)(c) FPR 1991, then it is for the Court to decide whether or not to accept that certificate.

25. It is only if there is no-one identified to act, or the solicitor feels unable to provide the R9.2 certificate or the court refuses to accept the R9.2 certificate that the case becomes a "last resort" case and an invitation may need to be extended to the Official Solicitor.

26. On average, the Official Solicitor receives 20 invitations each week from courts to act as litigation friend for a parent involved in proceedings under the Children Act 1989 and the Adoption and Children Act 2002. There appear to be no records available referring to litigation friends other than the Official Solicitor, but in our combined experience such appointments are rare.

27. Unless there is clear evidence that particular information would be harmful (not simply distressing) the solicitor should inform the protected party

27.1 About the appointment of a litigation friend

27.2 About the role of a litigation friend

27.3 That the solicitor remains the protected party's solicitor although acting upon the instructions of the litigation friend.

27.4 That whilst the litigation friend makes decisions about the conduct of the proceedings, it is for the parent to demonstrate that he/she is able to meet the welfare needs of their child

27.5 About steps in the proceedings

27.6 Of court dates

27.7 About orders of the court.

28. If there is credible reason to suggest that a party may have regained capacity then it may be necessary for a further assessment to be conducted. The litigation friend or the protected party should seek urgent directions for the obtaining of further expert advice. In some cases it may be appropriate to ask an expert instructed during the

course of the case to conduct that review depending on the nature of their primary instructions. If the party's capacity to conduct the proceedings is regained then the litigation friend/guardian ad litem should immediately apply for his or her discharge so that the party can resume personal conduct of the proceedings. The court should give priority to such an application.

The Parent who acts as a Litigant in Person

29. A lack of litigation capacity must not be assumed simply because a litigant in person is difficult/hostile etc. The presumption of capacity to conduct the proceedings can only be rebutted on the balance of probabilities having regard to the evidence.
30. Where the capacity of a LIP 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 LIPs own comments on the issue.
31. In relation to the letter of instruction, additional information to the expert should include that the LIP will generally be at a disadvantage facing professional legal representatives but that this does not of itself give rise to a lack of litigation capacity.
32. If the LIP is found to lack capacity to conduct proceedings he should be informed, as directed by the court, of the issues set out at 27 above.

The role of the Litigation Friend

33. If the Official Solicitor is appointed to act, guidance is set out in a Practice Note issued April 2001 “The Official Solicitor: Appointment in Family Proceedings” (available at <http://www.officialsolicitor.gov.uk/os/children.htm>).
34. It would be usual for the Official Solicitor to ensure continuity of representation by instructing the solicitor chosen by the protected parent. The solicitor remains the primary point of contact for the parent. There are many obvious advantages in such a course. We accept 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 protected party is not a member of the Law Society Children Panel.
35. It is the duty of any litigation friend, including the Official Solicitor, to fairly and competently conduct the proceedings on behalf of the protected party in their best interests having regard to the evidence. Given the implications of Art 6 and the disempowering effect of the involvement of a litigation friend, the role of the Official Solicitor is a complex and sensitive one.
36. The Official Solicitor will consider the protected party’s views and wishes as communicated via the solicitor as the case progresses. Those views, wishes and feelings will be set out in the Official Solicitor’s final statement. However they will not be determinative of the Official Solicitor’s approach. Tensions will inevitably

arise where the Official Solicitor's assessment of the parent's best interests in the litigation differ from the parent's own view. 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.¹

37. 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.

38. 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 assume that an approach similar to that adopted by the Official Solicitor would be desirable on the part of any litigation friend.

¹ Sir Robert Megarry V-C said in *Re E (mental health patient)* [1984] 1 All ER at pages 312-3 "*The main function of a next friend appears to be to carry on the litigation on behalf of the plaintiff **and in his best interests**. For this purpose the next friend must make all the decisions that the plaintiff would have made, had he been able. The next friend may, on behalf of the plaintiff, do anything which the Rules of the Supreme Court require or authorise the plaintiff to do, though the next friend must act by a solicitor: see Ord 80, r2. **It is the next friend who is responsible to the court for the propriety and the progress of the proceedings**. The next friend does not, however, become a litigant himself". [added emphasis]*

The giving of evidence

39. There is a distinction between the capacity to conduct proceedings and the competence to give evidence. It should not 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 and/or a Registered Witness Intermediary. In relation to the latter, for further information see <http://frontline.cjsonline.gov.uk/guidance/victims-and-witnesses>.

Interveners

40. This paper is concerned principally with parents who lack capacity. There may also be circumstances 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

The role of the Independent Reviewing Officer

41. 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. Unless a parent already has an independent advocate, a referral to such services should be made by the IRO prior to the review taking place

42. We would expect an IRO to question vigorously the legal status of any child accommodated under s20 where it appears that a parent may lack litigation capacity.

43. If the child becomes/remains looked after following the proceedings, the fact of parental lack of litigation capacity should be identified and recorded on the face of any final order as a specific issue for consideration by the IRO. It will then be for the IRO to consider carefully how the parent may most appropriately be involved in future reviewing processes.

Conclusion

We trust that this guidance will prove helpful. We would welcome any comments upon its implementation and any suggestions for improvement or amendment which may be sent to fjc@justice.gsi.gov.uk for the attention of HHJ Newton.

The Family Justice Council

April 2010

Appendix I - list of respondents

Appendix II - Official Solicitor proformas

Appendix 1

List of respondents

District Judge Gordon Ashton (Court of Protection)

Avon LFJC

Humberside LFJC

Lancashire LFJC

Manchester LFJC

Merseyside LFJC

Northants LFJC

Northumbria LFJC

SE Wales LFJC

Staffordshire LFJC

Surrey LFJC

June Thoburn (member Norfolk LFJC)

Appendix 2

1. Certificate as to capacity to conduct proceedings
2. Letter to independent expert
3. Letter to treating clinician

Terminology:

The term presently in use in the Family Procedure Rules is *guardian ad litem*.

The guidance uses the term *litigation friend*. In either case, the basis for appointment is the same

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	<p style="text-align: center;">I</p> <p style="text-align: center;">of</p>
For a definition of ‘a person who lacks capacity’ see note 2 attached	<p>1. Nature of your professional relationship with the person concerned:</p> <ul style="list-style-type: none"> ▪ I have acted as practitioner for the person concerned since and last assessed him/her on <p style="text-align: center;">or</p> <ul style="list-style-type: none"> ▪ I assessed the person concerned on following a referral from <p>AND in my opinion.....</p> <ul style="list-style-type: none"> ▪ is capable (within the meaning of the Mental Capacity Act 2005) of conducting the proceedings*

	<p>or</p> <ul style="list-style-type: none"> ▪ lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings* <p><i>(*strike through as appropriate)</i></p> <p>If in your opinion is a person who lacks capacity to conduct the proceedings please answer questions 2-8 below</p>
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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)

- he or she is unable to understand the following relevant information (please give details):

and/or

- he or she is unable to retain that information (please give details)

and/or

- he or she 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 he or she is unable to communicate his or her decisions by any means at all (please give details):

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 capable of discussing 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 him/her detrimentally and if so, in what way?

YES NO

Please comment

7. Has the person concerned made you aware of any views that he / she has in relation to 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 _____

Please read these notes before completing the Certificate

GUIDANCE NOTES

1. Where a person who is involved in legal proceedings lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings, their interests must be protected by the appointment of a 'litigation friend' who will conduct the proceedings on their behalf. In some proceedings the litigation friend is known as a 'next friend' or 'guardian ad litem'. The Official Solicitor is usually approached in cases where there is no other suitable person who is willing to act. Evidence is required to establish whether the person lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings. A person who lacks capacity to conduct proceedings is referred to as the 'protected party' within the proceedings.

Capacity to conduct proceedings

2. The Mental Capacity Act 2005 (section 2 (1)) provides that a person lacks capacity if, at the time a decision needs to be made, he or she is unable to make or communicate the decision because of an 'impairment of, or a disturbance in the functioning of, the mind or brain' .

The Act contains a two-stage test of capacity which has diagnostic and functional elements:

1. Is there an impairment of, or disturbance in the functioning of, the person's mind or brain?
2. If so, is the impairment or disturbance such that the person lacks the capacity to make decisions in relation to the proceedings.

Please refer to the information set out in your instructions 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 person's ability to conduct the proceedings and not on his/her ability to make decisions in general. It does not matter therefore if the lack of capacity is temporary, or the person retains the capacity to make other decisions, or if the person's capacity fluctuates.

To have capacity to conduct the proceedings the person must have capacity to understand, absorb and retain information (including advice) relevant to the issues on which his consent or decisions are likely to be necessary in the course of the proceedings, sufficiently to enable him or her to make decisions based upon such information. This includes the ability to weigh information (and advice) in the balance as part of the process of making decisions within the proceedings and the ability to communicate his decision (whether by talking, using sign language or any other means).

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. Similarly a person is not to be treated as being unable to make a decision merely because he or she has made an unwise decision.

Practitioners are required to have regard to the statutory principles set out in section 1 of the Mental Capacity Act 2005 and to the Code of Practice, in particular Chapters 2, 3 and 4, when assessing capacity.

The statutory principles provide 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'*
- (5) *An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests*
- (6) *Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action'.*
3. The Code of Practice is available on line at www.publicguardian.gov.uk.
4. 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.
5. It may assist you to know that particularly in cases of periodic remission, the Official Solicitor will ensure that the protected party's condition is regularly reassessed for the purpose of the legal proceedings. In an appropriate case the Official Solicitor will take immediate steps for his removal as guardian ad litem, next friend or litigation friend to enable the protected party to resume personal conduct of the proceedings.
6. This certificate relates only to the proceedings in which the protected party is currently involved. A separate certificate may be required if any application is made to the Court of Protection. Similarly, separate considerations apply to any question 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 capacity to conduct proceedings, and in many other cases the person concerned lacks capacity to conduct proceedings but is not liable to compulsory detention.

LETTER TO INDEPENDENT EXPERT

Dear ...

[name of person concerned] (DOB....)

[name of person concerned] is a party to court proceedings concerning his/her 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:

T:

F:

Email:

2. The mother, is represented by

Address:

T:

F:

Email:

3. The father, is represented by

Address:

T:

F:

Email:

4. The child, is represented by

Address:

T:

F:

Email:

The child's guardian is

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 [**he/she**] lacks capacity, within the meaning of the Mental Capacity Act 2005 ('the MCA'), to conduct the proceedings and is therefore a 'protected party' in the proceedings.

Where a person is a 'protected party' the law provides that [**he/she**] may defend family proceedings only by a litigation friend.

The role of the litigation friend is to supplement the protected party's lack of capacity and to take necessary action in the proceedings in their best interests. It is, therefore, the litigation friend, rather than the protected party, who is responsible for making the decisions about the conduct of the proceedings and who instructs 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 this is a case in which a litigation friend should be appointed for [*name of person concerned*].

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

Whilst the principles in section 1 of the MCA are expressed to apply only for the purposes of the MCA I would nonetheless invite you have to regard to those principles when carrying out your assessment. They include the following: 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 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?

Please note that the Code also expressly confirms (at paragraph 4.32) that common law tests of capacity have survived the enactment of the MCA.

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

“..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 as follows (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

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.

You should be aware that a range of other possible orders may come up for consideration during the course of care proceedings including:

- i) a special guardianship order
(an order appointing one or more individuals 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 residence order
(an order settling the arrangements to be made as to the person with whom the child is to live)
- iii) a supervision order
(an order which puts the supervisor 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).
- iv) a contact order
(an order requiring the person with whom a child lives or is to live to allow the child to visit or stay with the person named in the order or for that person and the child otherwise to have contact with each other).

You should also be aware that pursuant to section 22(2) of the Adoption and Children Act 2002 if an application has been made (and has not been disposed of) on which a care order might be made in respect of a child, or a child is subject to a care order and the appropriate local authority are not authorised to place the child for adoption the appropriate local authority must apply to the court for a placement order if they are satisfied that the child ought to be placed for adoption.

This means that during the course of the care proceedings an application may (although not necessarily will) also be issued for a placement order. In such event the placement

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

A placement order authorises a local authority to place a child for adoption with any prospective adopters who may be chosen by the local authority.

The facts of this case

[insert:

- *brief summary of the proceedings;*
- *if it appears to you or you are being told that the proceedings are particularly complex, then you should say so and set out the reasons;*
- *if it is the view of the solicitors for the person concerned, or the view of others involved in the proceedings that the person concerned is unable to make decisions about the conduct of the proceedings, you should say so and give their reasons;*
- *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.
2. Practice Direction: Experts in Family Proceedings Relating to Children, 13 February 2008;
3. Certificate of capacity to conduct the proceedings;
4. [Medical notes of the person concerned];
5. [Any other 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.

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.

I am under a duty to disclose your report to the court and to the other parties and we will circulate your report on receipt. If you believe, as a rare exception to the general rule, that it should not be disclosed to any party (including [*name of person concerned*]), please let me know and I will seek the court's directions.

Your report may be subject to challenge including by [*name of person concerned*]. It is possible that one or more of the parties may put written questions to you following receipt of your report or that you may be asked to make an addendum report addressed to other issues during the course of this case.

8 Your instructions

1. Does [*name of person concerned*] lack capacity within the meaning of the Mental Capacity Act 2005 to conduct the proceedings?
2. If so, I shall be grateful if, in addition to your report, you would complete the enclosed certificate of capacity to conduct the proceedings and return it to me.

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, assistance or other practicable steps which could be offered to that end.

I also refer you to the guidance notes attached to the certificate which you should read before completing the certificate.

3. Please include within your report a record of any views expressed by [*name of person concerned*] regarding:
 - i) his/her capacity to conduct the proceedings.
 - ii) support, assistance or other practicable steps which would be helpful in enhancing his/her involvement in 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) impact on, or restrict [*name of person concerned*]'s his/her ability to conduct the proceedings; and on
- ii) whether any support, assistance or other practicable steps should be offered to [*name of person concerned*] in order to assist in overcoming the difficulties identified at (i) above.

5. Please include in your report a full cognitive assessment of [*name of person concerned*] and comment on [*name of person concerned*]'s 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 paragraphs 3.1-3.3 of the Practice Direction in particular which set 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 the fact that delay in the progression of these proceedings is likely to prejudice the welfare of the child/ren.

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 his/her child[ren] which are continuing in the court.

I am the solicitor for.....

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 [**he/she**] lacks capacity, within the meaning of the Mental Capacity Act 2005 ('the MCA'), to conduct the proceedings and is therefore a 'protected party' in the proceedings.

Where a person is a 'protected party' the law provides that [**he/she**] may defend family proceedings only by a litigation friend.

The role of the litigation friend is to supplement the protected party's lack of capacity and to take necessary action in the proceedings in their best interests. It is, therefore, the litigation friend, rather than the protected party, who is responsible for making the decisions about the conduct of the proceedings and who instructs 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).

To assist the court in deciding whether this is a case in which a litigation friend should be appointed for [***name of person concerned***], I shall be grateful if you would complete the enclosed certificate and return it to me.

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 to that end.

I also refer you to the guidance notes attached to the certificate which you should read before completing the certificate.

It may assist you when considering the information relevant to [*name of person concerned*]'s capacity to conduct the proceedings to also refer to 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 which I have set out below:

1 Legal framework

Whilst the principles in section 1 of the MCA are expressed to apply only for the purposes of the MCA I would nonetheless invite you have to regard to those principles when carrying out your assessment. They include the following: 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 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.*
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- (1) *For the purposes of section 2, a person is unable to make a decision for himself if he is unable—*
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or
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(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...

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2 These proceedings

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You should be aware that a range of other possible orders may come up for consideration during the course of care proceedings including:

- i) a special guardianship order
(an order appointing one or more individuals 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 residence order
(an order settling the arrangements to be made as to the person with whom the child is to live)
- iii) a supervision order
(an order which puts the supervisor 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).
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(an order requiring the person with whom a child lives or is to live to allow the child to visit or stay with the person named in the order or for that person and the child otherwise to have contact with each other).

You should also be aware that pursuant to section 22(2) of the Adoption and Children Act 2002 if an application has been made (and has not been disposed of) on which a care order might be made in respect of a child, or a child is subject to a care order and the appropriate local authority are not authorised to place the child for adoption the appropriate local authority must apply to the court for a placement order if they are satisfied that the child ought to be placed for adoption.

This means that during the course of the care proceedings an application may (although not necessarily will) also be issued for a placement order. In such event the placement application will run concurrently with the care application and the hearing may follow immediately after the hearing on the care order (if a care order is made).

A placement order authorises a local authority to place a child for adoption with any prospective adopters who may be chosen by the local authority.

The facts of this case

[insert:

- ***brief summary of the proceedings;***
- ***if it appears to you or you are being told that the proceedings are particularly complex, then you should say so and set out the reasons;***
- ***if it is the view of the solicitors for the person concerned, or the view of others involved in the proceedings that the person concerned is unable to make decisions about the conduct of the proceedings, you should say so and give their***

reasons.]

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.

[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 faithfully

X, Y, Z & Co