

This Practice Direction is made by the President of the Family Division under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and is approved by Lord McNally, Minister of State, by authority of the Lord Chancellor and comes into force on 31st January 2013

PRACTICE DIRECTION 15B – ADULTS WHO MAY BE PROTECTED PARTIES AND CHILDREN WHO MAY BECOME PROTECTED PARTIES IN FAMILY PROCEEDINGS

This Practice Direction supplements FPR Part 15

What the court will do where an adult may be a protected party

Litigation Capacity

1.1 The court will investigate as soon as possible any issue as to whether an adult party or intended party to family proceedings lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings. An adult who lacks capacity to conduct the proceedings is a protected party and must have a litigation friend to conduct the proceedings on his or her behalf. The expectation of the Official Solicitor is that the Official Solicitor will only be invited to act for the protected party as litigation friend if there is no other person suitable or willing to act.

1.2 Any issue as to the capacity of an adult to conduct the proceedings must be determined before the court gives any directions relevant to that adult's role in the proceedings. Where a party has a solicitor, it is the solicitor who is likely to first identify that the party may lack litigation capacity. Expert evidence as to whether a party lacks such capacity is likely to be necessary for the court to make a determination relating to the party's capacity to conduct proceedings. However, there are some cases where the court may consider that evidence from a treating clinician such as a treating psychiatrist is all the evidence of lack of litigation capacity which may be necessary. There may also be cases where it will be clear that a party does not have litigation capacity such as where the party is in a coma, minimally conscious or in a persistent vegetative state. In those cases the court may well consider that a letter from a treating doctor confirming the party's condition is sufficient evidence of lack of litigation capacity and not need a report from an expert.

1.3 If at any time during the proceedings there is reason to believe that a party may lack capacity to conduct the proceedings, then the court must be notified and directions sought to ensure that this issue is investigated without delay. The presumption of capacity should not be forgotten. For example, where a person has an identified difficulty such as a learning disability or a mental illness, that difficulty should not automatically lead to an investigation about that party's capacity to litigate.

Where a party has a solicitor, the starting point is whether that solicitor has concerns about the party's capacity to litigate.

Ability to give evidence as a witness

1.4 Where the court determines that a party does not have capacity to conduct the proceedings, the court may well also have to determine whether that party is able to give evidence and if so whether "special measures" are required. Expert evidence is also likely to be necessary for the court to make such determinations. However, as in relation to the question of litigation capacity, the court may consider that evidence from a treating clinician who has a good understanding of the party's difficulties may be sufficient. If the treating clinician is provided with information about the legal framework, the clinician may be able to provide that evidence more readily and more quickly than an expert instructed to give an opinion as to the party's ability to give evidence.

1.5 Where the protected party is able to give evidence, the representative will wish to consider (and ask the expert to consider) the impact on that party of giving evidence. When making a determination as to whether that protected party should give evidence, the court may need to consider whether the impact of giving evidence would be so adverse to their condition that it would not be in that party's best interests to do so. The representative may put forward an argument on behalf of the protected party that the protected party should not give evidence.

Instruction of an expert where an adult is a protected party

2.1 Where there is concern that a party or intended party may lack capacity to conduct the proceedings, that party's representative must take the lead in any instruction of an expert for the purpose of assessment of the party's capacity to conduct the proceedings. In the event that the assessment is that the party does lack capacity to conduct the proceedings, it may be appropriate to ask that the expert advise about a party's ability to give evidence as a witness. Such expert evidence would relate to the party's particular difficulties and vulnerabilities (in particular in the context of cross-examination) including the techniques or measures which could be used to assist the party to give his or her evidence to the best of his or her ability and to ensure that the party's support needs are identified and addressed in advance of any final hearing.

Factors to be considered when the court is deciding whether to give permission as mentioned in FPR 25.4(1) or (2)

3.1 FPR 25.5 lists factors to which the court is to have particular regard when deciding whether to give permission in all family proceedings for expert evidence to be put before the court, and in children proceedings also for an expert to be instructed or for a child to be medically or psychiatrically examined or assessed for the purposes of obtaining expert evidence. In relation to children proceedings, one factor to be

considered by the court is whether evidence could be given by another person on matters on which the expert would give evidence. For the avoidance of doubt this factor is not intended to suggest that evidence of another party to the proceedings is a substitute for expert evidence relating to a party's capacity to conduct the proceedings, ability to give evidence or special measures as mentioned in paragraphs 1.2, 1.4 and 2.1 above.

3.2 In addition, in children proceedings, it should be noted that expert evidence or other evidence from a treating clinician about a party's litigation capacity in previous proceedings is no substitute for such evidence in current proceedings. Litigation capacity has to be considered in relation to the proceedings before the court. For example, a parent may have been found to lack litigation capacity in care proceedings about child A three years before the current proceedings. That finding about litigation capacity in previous proceedings is not evidence that the parent lacks litigation capacity in subsequent proceedings about child B. It may be that the subsequent proceedings are simpler in terms of the issues and evidence before the court or that the parent's previous difficulty leading to lack of litigation capacity has improved.

Fluctuation in a party's capacity to conduct litigation

4.1 A party's capacity to conduct the litigation may fluctuate over the course of the proceedings. Litigation capacity may be lost or regained during the proceedings as a result of deterioration or improvement in the impairment of, or disturbance in the functioning of, the party's mind or brain. The necessity for expert evidence or evidence of a treating clinician as to a party's capacity can therefore arise at any time during the proceedings.

4.2 Fluctuation in a party's capacity to conduct litigation means that a litigation friend may not represent that party throughout the proceedings. It is expected that where the litigation friend has been appointed or reappointed, the court will be likely to make a direction in accordance with FPR 25.10(2) permitting such a litigation friend to put written questions to the expert after the 10 day period referred to in FPR 25.10(2)(c) where the 10 days referred to in that rule would be insufficient time for the litigation friend to become familiar with the case or latest developments in the case while assimilating the expert's report and formulating any questions.

Single joint experts

5.1 FPR 25.11 and 25.12 and paragraphs 2.1 to 2.7 of Practice Direction 25C and of Practice Direction 25D make provision for two or more parties to put expert evidence before the court from a single joint expert. "Single joint expert" ("SJE") is defined by FPR 25.2(1) as a person who provides expert evidence for use in proceedings on behalf of two or more parties (including the applicant) to the proceedings. No provision of the FPR nor the Practice Directions compel the use of an SJE. Paragraph 2.1 of Practice Direction 25C and of Practice Direction 25D provide

that a SJE should be used “wherever possible”. The expectation is that expert evidence as mentioned in paragraphs 1.2, 1.4 and 2.1 above, including on whether a party lacks capacity to conduct the proceedings, would not be evidence which is likely to be appropriately given by a SJE. However, there may be circumstances where expert evidence is needed by two or more parties relating to, for example, the capacity of a party when he or she gave consent to the making of a consent order made by the court in financial remedy proceedings and such evidence may be considered by the court to be appropriately given by a SJE. But these are circumstances where the expert evidence relates to an issue in the proceedings.

Child aged 16-17 who is the subject of the proceedings likely to lack relevant decision making capacity at age 18

6.1 Where the child who is the subject of the proceedings is aged 16 to 17 consideration should be given as to whether it is necessary to obtain expert evidence on whether that child will lack capacity (within the meaning of the Mental Capacity Act 2005) to make one or more of the decisions relevant to the proceedings (for example, in relation to residence, contact with family or about care arrangements) when that child reaches 18.

6.2 Attention is drawn to the fact that the Mental Capacity Act 2005 provides for a framework for decision making in respect of persons over 16 who lack capacity to makes decisions about their own finances, health and welfare. The Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 (SI 2007/1899) includes provision for the transfer of proceedings from a court having jurisdiction under the Children Act 1989 to the Court of Protection.

Child who is not the subject of proceedings likely to lack capacity to conduct the proceedings when he or she reaches 18

7.1 Where it appears that a child is—

- (a) a party to the proceedings and not the subject of them;
- (b) nearing age 18; and
- (c) considered likely to lack capacity to conduct the proceedings when 18,

the court will consider giving directions for the child’s capacity in this respect to be investigated.

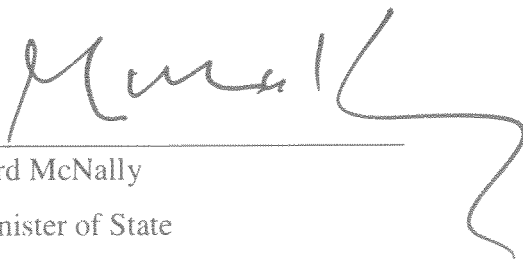
Definition of “expert” and “children proceedings”

8.1 The definitions of “expert” and “children proceedings” in FPR 25.2 (1) apply to this Practice Direction and the explanation of an expert team in paragraph 2.2 of Practice Direction 25B also applies.



The Right Honourable Sir James Munby
The President of the Family Division

Signed by authority of the Lord Chancellor:



Lord McNally
Minister of State
Ministry of Justice

