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THE VOICE OF THE VULNERABLE: ACHIEVING FAIRNESS FOR CLIENTS WITH LEARNING DISABILITIES, COGNITIVE IMPAIRMENTS OR MENTAL HEALTH DIFFICULTIES

Hannah Gomersall's notes:

The voice of the vulnerable: achieving fairness for clients with learning disabilities, cognitive impairments or mental health difficulties

Part I: Fairness for parents with learning disabilities and involvement of intermediaries.

Hannah Gomersall

1. 1. Establishing the vulnerability: Cognitive assessment?
2. 2. The professional approach: best practice, the concept of parenting with support, use of an advocate;
3. 3. The parenting assessment;
4. 4. Consistency of representation, trust-building;
5. 5. Intermediary assessment/appointment;

Key Case Law & Practice Guidance

1. 1. The court's duty to identify any party or witness who is a vulnerable person

Re S (Vulnerable Party: Fairness of Proceedings) [2022] EWCA Civ 8
(Baker and Whipple LJJ and Francis J)

An intervenor sought to appeal findings of fact made against her in care proceedings, asserting that her cognitive difficulties, unidentified at the time of the hearing, meant that the judge's findings were unsafe. The court of appeal allowed the appeal -

- Paragraph 1.3 PD3AA FPR 2010 and overriding objective provisions Pt 1 meant there was a duty to identify a party or witness who was a vulnerable person 'at the earliest possible stage';
- PD12A requires the court to consider the need for directions as to special measures and intermediaries at the initial case management hearing (and throughout proceedings);
- All parties and representatives have a duty to identify ANY part or witness who was a vulnerable person and assist the court in ensuring they could participate without quality of their evidence being diminished;
- Failure to comply with ground rules/participation directions would not invariably lead to a successful appeal. The question on appeal in each case would be (i) whether there had been a serious procedural or other irregularity and (ii) whether as a result the decision had been unjust;
- The failure to identify the intervener's cognitive difficulties and make appropriate participation directions to ensure the quality of her evidence was not diminished as a result of vulnerability amounted to a serious procedural irregularity and the outcome of the hearing had been unjust. In this case, the judge's assessment of the intervener's character and plausibility had been central to her ultimate findings. There was a significant possibility that the judge's evaluation of the evidence she had heard would have been refined if not revised by the knowledge had difficulties of comprehension.

2. 2. The professional approach:

1. *(a) "The Guidance" : The Working Together with Parents Network (WTPN) 2021 update of the 2016 Good practice guidance on working with parents with a learning disability*
https://www.bristol.ac.uk/medialibrary/sites/sps/documents/wtpn/FINAL%202021%20WTPN%20UPDATE%20OF%20THE%20GPG.pdf

Five key features of good practice:

i. Accessible information and communication;
ii. Clear and co-ordinated referral and assessment procedures and processes, eligibility criteria and care pathways;
iii. Support designed to meet the needs of parents and children based on assessments of their needs and strengths;
iv. Long-term support where necessary;
v. Access to independent advocacy.

2. ***(b) Nottinghamshire v XX, YY, Child H*** **[2022] EWFC 10** (Knowles J)

- Cases before the court involving a parent with learning disabilities should be capable of demonstrating that The Guidance has been taken into account in LA care planning/proposals;
- Timely referrals to adult social care& meaningful work;
- Priority for parents to have their own advocates;
- Support available to parents to be distilled into a simple document.

"106. It is clear to me that learning about the Good Practice Guidance on Working with Parents with a Learning Disability, first published in 2007 and then amended in 2016, and then again in 2021, should be more widely disseminated to both children and family social workers and adult social care workers. It must be an essential part of continuation training for such social workers and their managers. It was not in this case. That guidance should also be at the forefront of local authority planning. That would give intellectual focus and rigour to the evaluation of parental strengths and weaknesses in cases, whether before the courts or not. Cases which come before the courts involving a parent with learning disabilities should, as a matter of good practice, be capable of

demonstrating that the guidance has been taken into account in any care planning or proposals put forward by a local authority.

107. There must be timely referrals to adult social care for a parent with learning difficulties in their own right and, when I say a timely referral, that means a referral accompanied by meaningful social work, not a referral followed by a very lengthy gap. That is blindingly obvious. It did not happen in this case.

108. Parents with learning difficulties involved with children's social care where a child is on a child protection plan should have their own advocate as a priority. A referral should be made for that service as soon as practicable. Further, the support available to a parent with learning disabilities in their own right should be distilled into a simple document identifying what is available, how often it is available, the timescales for its availability, and who is responsible for its delivery. Pending assessments should be noted and followed up on a regular basis. That document should be shared with children's social care if they are involved and, ideally, it should be discussed with a parent in the presence of their advocate. Likewise, support with the care of a child which is available and which is being delivered should also be distilled into a simple document: what; how often; the timescales; and who is responsible. That document should be shared with adult social care. Again, it should be discussed with the parent in the presence of their advocate. All of this amounts to the joined up thinking and planning advocated by the Guidance."

3. ***(c) Re G and A (Care Order: Freeing order: parents with a learning disability) [2006- NIFam 8*** (Gillan J)

- A detailed and important judgment endorsed by Munby P in Re D (A Child) (No 3) [2016] EWFC1;
- Made clear that the concept of "parenting with support" must underpin the court and professional approach wherever possible to parents with learning difficulties.

"(2) People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Government policy emphasises the importance of people with a learning disability being supported to be fully engaged playing a role in civic society and their ability to exercise their rights and responsibilities needs to be strengthened. They are valued citizens …

(4) This court fully accepts that parents with learning difficulties can often be "good enough" parents when provided with the ongoing emotional and practical support they need. The concept of "parenting with support" must underpin the way in which the courts and professionals approach wherever possible parents with learning difficulties … judges must make absolutely certain that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against normal parents. Their competences must not be judged against stricter criteria or harsher standards than other parents."

In Re D, Munby P commended every family judge, local authority and family justice professional to have regard to the eight matters set out by Gillen J -

(1) An increasing number of adults with learning difficulties are becoming parents. The Baring Foundation report records that whilst there are no precise figures on the number of parents with learning difficulties in the population, the most recent statistics come from the First National Survey of Adults with Learning Difficulties in England, where one in fifteen of the adults interviewed had children. Whatever the figure it is generally recognised that their number is steadily rising and that they represent a sizable

population whose special needs require to be adequately addressed. The Baring Foundation report refers to national policy in England and Scotland committing government to "supporting parents with learning disabilities in order to help them, wherever possible, to ensure their children gain maximum life chance benefits." Nonetheless the courts must be aware that surveys show that parents with learning disabilities are apparently more likely than other parents to have their children removed them and permanently placed outside the family home. In multidisciplinary jurisdiction such as the Family Division, it is important that the court is aware of such reports at least for the purposes of comment. It is important to appreciate these currents because the Children Order (Northern Ireland) 1995 places an emphasis on supporting the family so that children can remain with them and obligations under disability discrimination legislation make public services accessible to disabled people (including parents with learning difficulties). Moreover the advent of the Human Rights Act 1998 plays an important role in highlighting the need to ensure the rights of such parents under Articles 6 and 8 of the European Convention of Human Rights and Fundamental Freedoms ("the Convention").

(2) People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Government policy emphasises the importance of people with a learning disability being supported to be fully engaged playing a role in civic society and their ability to exercise their rights and responsibilities needs to be strengthened. They are valued citizens and must be enabled to use mainstream services and be fully included in the life of the community as far as possible. The courts must reflect this and recognise their need for individual support and the necessity to remove barriers to inclusion that create disadvantage and discrimination. To that extent courts must take all steps possible to ensure that people with a learning disability are able to actively participate in decisions affecting their lives. They must be supported in ways that take account of their individual needs and to help them to be as independent as possible.

(3) It is important that a court approaches these cases with a recognition of the possible barriers to the provision of appropriate support to parents including negative or stereotypical attitudes about parents with learning difficulties possibly on the part of staff in some Trusts or services. An extract from the Baring Foundation report provides a cautionary warning:

> *"For example, it was felt that some staff in services whose primary focus was not learning difficulties (eg in children and family teams) did not fully understand the impact of having learning difficulties on individual parents' lives; had fixed ideas about what would happen to the children of parents with learning difficulties and wanted an outcome that did not involve any risks (which might mean them being placed away from their family); expected parents with learning difficulties to be `perfect parents' and had extremely high expectations of them. Different professionals often had different concepts of parenting against which parents were assessed. Parents' disengagement with services, because they felt that staff had a negative view of them and `wanted to take their children away' was also an issue, as were referrals to support services which were too late to be of optimum use to the family - often because workers lacked awareness of parents' learning difficulties or because parents had not previously been known to services".*

(4) This court fully accepts that parents with learning difficulties can often be "good enough" parents when provided with the ongoing emotional and practical support they need. The concept of "parenting with support" must underpin the way in which the courts and professionals approach wherever possible parents with learning difficulties. The extended family can be a valuable source of support to parents and their children and the courts must anxiously scrutinize the possibilities of assistance from the extended family. Moreover the court must also view multi-agency working as critical if parents are to be supported effectively. Courts should carefully examine the approach of Trusts to ensure this is being done in appropriate cases. In particular judges must make absolutely certain that parents with learning difficulties are not at risk of having their

parental responsibilities terminated on the basis of evidence that would not hold up against normal parents. Their competences must not be judged against stricter criteria or harsher standards than other parents. Courts must be acutely aware of the distinction between direct and indirect discrimination and how this might be relevant to the treatment of parents with learning difficulties in care proceedings. In particular careful consideration must be given to the assessment phase by a Trust and in the application of the threshold test.

(5) Parents must be advised by social workers about their legal rights, where to obtain advice, how to find a solicitor and what help might be available to them once a decision has been taken to pursue a care application. Too narrow a focus must not be placed exclusively on the child's welfare with an accompanying failure to address parents' needs arising from their disability which might impact adversely on their parenting capacity. Parents with learning disabilities should be advised of the possibility of using an advocate during their case eg from the Trust itself or from Mencap and clear explanations and easy to understand information about the process and the roles of the different professionals involved must be disclosed to them periodically. Written information should be provided to such parents to enable them to consider these matters at leisure and with their advocate or advisers. Moreover Trusts should give careful consideration to providing child protection training to staff working in services for adults with learning disabilities. Similarly those in children's services need training about adults with learning disabilities. In other words there is a strong case to be made for new guidelines to be drawn up for such services working together with a joint training programme. I endorse entirely the views of the Guardian ad Litem in this case when she responded to the "Finding the Right Support" paper by stating:

> *"As far as I am aware there are no `family teams' in the Trusts designated to support parents with a learning disability. In my opinion this would be a positive development. The research also suggests that a learning disability specialist could be designated to work within family and childcare teams and a child protection specialist could be designated*

to work within learning disability teams. If such professionals were to be placed in the Trusts in Northern Ireland they could be involved in drawing up a protocol for joint working, developing guidelines, developing expertise in research, awareness of resources and stimulating positive practice. They could also assist in developing a province-wide forum that could build links between the Trusts, the voluntary sector and the national and international learning disability community."

(6) The court must also take steps to ensure there are no barriers to justice within the process itself. Judges and magistrates must recognise that parents with learning disabilities need extra time with solicitors so that everything can be carefully explained to them. Advocates can play a vital role in supporting parents with learning difficulties particularly when they are involved in child protection or judicial processes. In the current case, the court periodically stopped (approximately after each hour), to allow the Mencap representative to explain to the parents what was happening and to ensure that an appropriate attention span was not being exceeded. The process necessarily has to be slowed down to give such parents a better chance to understand and participate. This approach should be echoed throughout the whole system including LAC reviews. All parts of the Family justice system should take care as to the language and vocabulary that is utilised. In this case I was concerned that some of the letters written by the Trust may not have been understood by these parents although it was clear to me that exhortations had been given to the parents to obtain the assistance of their solicitors (which in fact was done). In terms therefore the courts must be careful to ensure that the supposed inability of parents to change might itself be an artefact of professionals ineffectiveness in engaging with the parents in appropriate terms. Courts must not rush to judge, but must gather all the evidence within a reasonable time before making a determination. Steps must be taken to ensure that parents have a meaningful and informed access to reports, time to discuss the reports and an opportunity to put forward their own views. Not only should the hearing involve special measures, including a break in sessions, but it

might also include permission that parents need not enter the court until they are required if they so wish. Moreover the judges should be scrupulous to ensure that an opportunity is given to parents with learning disabilities to indicate to the court that something is occurring which is beyond their comprehension and that measures must be taken to deal with that. Steps should also be taken throughout the process to ensure that parents with learning disabilities are not overwhelmed by unnecessarily large numbers of persons being present at meetings or hearings .

(7) Children of parents with learning difficulties often do not enter the child protection system as the result of abuse by their parents. More regularly the prevailing concerns centre on a perceived risk of neglect, both as the result of the parents' intellectual impairments, and the impact of the social and economic deprivation commonly faced by adults with learning difficulties. It is in this context that a shift must be made from the old assumption that adults with learning difficulties could not parent to a process of questioning why appropriate levels of support are not provided to them so that they can parent successfully and why their children should often be taken into care. At its simplest, this means a court carefully inquiring as to what support is needed to enable parents to show whether or not they can become good enough parents rather than automatically assuming that they are destined to fail. The concept of "parenting with support" must move from the margins to the mainstream in court determinations.

(8) Courts must ensure that careful consideration is given to ensuring that any decision or judgment is fully explained to such parents .In this case I caused a copy of the judgment to be provided to the parties at least one day before I handed it down to facilitate it being explained in detail before the attendance at court where confusion and consternation could be caused by a lengthy judgment being read which the parents could not follow at the time .

4. 3. The parenting assessment

(a) **Re Z (A Child: independent social work assessment) [2014] EWHC 729.**

(HHJ Bellamy)

- Parenting assessments are critical evidence. They must be fair, robust and thorough:

  [130]: "*In any case in which a local authority applies to the court for a care order, the assessment of a parent is of critical importance. That assessment will be a key piece of the evidential jigsaw which informs the local authority's decision-making, in particular with respect to the formulation of its final care plan. If the assessment is deficient then that is likely to undermine the reliability of the decision-making process. It follows, therefore, that any assessment of a parent must be, and must be seen to be, fair, robust and thorough.*"

- HHJ Bellamy noted the distinction between a "social work assessment" as had initially been conducted in that case and a "parenting assessment". He also specifically criticises the lack of consideration "*to the support the father would need in order to care for Z or what support and assistance the local authority is able to offer*".

(b) The Guidance:

1.3.2 Specialist assessments should be commissioned and undertaken at the earliest point, and not be delayed until proceedings are anticipated or initiated, if they are to have any positive impact on the identification, provision and timely uptake of appropriate support.

Multiple specialist assessments may be needed to identify how best to address the impact of the parent's learning disability on their parenting capacity. This may include, for example, input from Speech and Language Therapists, Occupational Therapists and Clinical Psychologists, but should include, at least, both a specialist parenting assessment and a cognitive/psychological assessment.

It is important to note that specialist parenting assessments such as PAMS (Parent Assessment Manual) and ParentAssess (see Appendix C Resources) are designed for the early stages of intervention to identify appropriate support and to assess the success or otherwise of that support, not simply to demonstrate shortcomings or to assess whether a child should be removed from its family.

Time will be needed to allow the parent to receive and act on the support/training and then be re-assessed. If the initial specialist parenting assessment is delayed until court proceedings are under way, this is likely to mean that the parent will have no/insufficient time to absorb new knowledge and apply new skills.

PAMS is one example of a specialist parenting assessment that can be used at the pregnancy stage. Parents can be more likely to engage successfully before safeguarding or child protection issues are in process and their increasing fear levels hinder their learning.

5. 5. Intermediary Assessment/Appointment

(a) Re S (vulnerable parent: intermediary) [2020] 3 FCR 478

Peter Jackson and Males LJJ -

- A psychological assessment of the mother made a number of recommendations in respect of how best to provide information

to her, and noted her working memory and processing speed to be extremely low. The psychologist later confirmed the mother would benefit from and require the assistance of an intermediary. HHJ Caroline Wright agreed with practical recommendations proposed by the psychologist but refused the application for an intermediary assessment (in the context of arrangements being made for a hybrid hearing during the pandemic).

- The court of appeal allowed the appeal, noting the interim report of the Equality and Human Rights Commission on 22 April 2020 considered that: "'video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as a learning disability, autism spectrum disorders and mental health conditions."

  "[29] The judge's conclusion that participation measures did not require the involvement of an intermediary is one that might or might not have been sustainable ahead of a conventional face-to-face hearing, but I do not consider that she sufficiently addressed the additional factors to which a hybrid hearing will give rise. Her decision does not take any account of this factor and on that basis I consider she fell into error. It was, I think, necessary to step back from the detail of the rules and look carefully at the likely experience of this vulnerable parent, attending a hearing in what is for her a complex format with the prospect of the removal of her baby hanging over her. An intermediary can help her to negotiate the process of being questioned remotely and to participate in the hearing to the fullest possible extent. This is support with communication, and not just emotional support, but if it also gives emotional support, all well and good.

[30]…By refusing the application for an intermediary assessment, the judge deprived herself of the advice of the intermediary about any issues that may need to be addressed. She might have deferred a decision about the intermediary's attendance at the trial until she had seen the assessment, but she was I think wrong to have refused to allow the assessment in the light of all the circumstances, including the advice of Dr Hale. I would therefore set aside her decision."

(b) N (a child) [2019] EWCA Civ 1997

King LJ

- HHJ Raeside made findings at an 'unweildy' fact-finding hearing that either the mother or an intervenor had caused injuries to the child non-accidentally. The Judge commented on the mother's evidence raising a concern that "she may have issues with cognitive functioning….even making allowance for those matters, I found her evidence very unsatisfactory".

- In making directions for the welfare hearing that followed, the court directed a psychological which then identified that the mother's verbal intelligence was in the "extremely low range of intellectual ability". An intermediary assessment was carried out and recommended that the mother have the assistance of an Intermediary, noting that without adaptations, the mother was unlikely to understand the court proceedings and this would impact significantly on her ability to provide her own evidence. HHJ Raeside refused to order a rehearing of the fact-finding hearing.

- The court of appeal allowed the mother's appeal, highlighting McFarlane LJ's (as he then was) comments in *Re C* (A child)

[2014] EWCA Civ 128: *"The court as an organ of state, the local authority and CAFCASS must all function now within the terms of the Equality Act 2010. It is simply not an option to fail to afford the right level of regard to an individual who has all these unfortunate disabilities."*

"[53] Given that the mother's (then) legal team did not identify the mother's difficulties, no participation directions were given, and there was no ground rules hearing in relation to her. The mother was therefore deprived of the protection due to her as a vulnerable witness. A ground rules hearing would have put in place special measures which would have allowed her to give her best evidence in a carefully considered and bespoke form, the structure of which would have been facilitated by the reports of Dr Parsons and the Intermediary assessments.

…

[60] In my judgment, it would go too far to say that a rehearing is inevitable in all cases where there has been a failure to identify a party as vulnerable, with the consequence that no ground rules have been put in place in preparation for their giving evidence and no Intermediary or other special measures provided for their assistance, but the necessity for there to be a fair trial must be at the forefront of the judge's mind. In such a case, whether there should be a retrial must depend upon all the circumstances of the case, not only, or principally, upon the likely outcome of a rehearing. I set out again for convenience, the observation of the ECHR in P,C and S v UK:

> *"There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, inter alia, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Art 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy."*

6. 6. Ground Rules Hearings

'Advocates must adapt to the witness, not the other way round.' Lady Justice Hallett in **R v Lubemba; R v JP [2014] EWCA Crim 2064, para 45.**

The Adovcate's Gateway

Toolkit 1: Ground rules hearings and the fair treatment of vulnerable people in court
https://www.theadvocatesgateway.org/_files/ugd/1074f0_846f9ab1f1e94dd7bd58bcc62f76ddb8.pdf

Toolkit 4: Planning to Question someone with a Learning Disability
https://www.theadvocatesgateway.org/_files/ugd/1074f0_f2452243bb7c419b9e5e0b47edce378e.pdf

Toolkit 13: Vulnerable witnesses in the family courts
https://www.theadvocatesgateway.org/_files/ugd/1074f0_48a0c6b6fca942fc819255e4104ac9de.pdf

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Sarah Branson's notes:

The voice of the vulnerable: achieving fairness for clients with learning disabilities, cognitive impairments or mental health difficulties

Part 2: Obtaining and challenging capacity assessments and the role of the Official Solicitor

Sarah Branson and Julie Hine

Key Case Law & Practice Guidance

1. Capacity law

Mental Capacity Act 2005

https://www.legislation.gov.uk/ukpga/2005/9/section/1

Section 1

Basic Principals

(2) Presumption of capacity

(3) A person not to be treated as unable to make a decision unless all practical steps taken to do so have been taken, without success
(4) No protection against making unwise decisions
(5) Decisions made in best interests of protected party

Section 2
people who lack capacity

(1) 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
(2) Can be temporary or permanent
(3) Cannot be by virtue of someone's age or appearance, or a condition of his or aspect of his behaviour which might lead others to make unjustified assumptions about his capacity
(4) Capacity determined on the balance of probabilities
(5) Only relates to people over 16 years of age

Section 3
Inability to make decisions

(1) A person is unable to make a decision for himself if he is unable
a. To understand the information relevant to the decision
b. Retain that information
c. To use or weight the information as part of the process of making the decision, or
d. To communicate his decision (whether by talking, using sign language or by any other means)
(2) A person has capacity if he can understand in a way that is appropriate to him (sign language, visual aids etc)
(3) Even if he can only retain for a short period of time the information needed to make that decision, still has capacity.
(4) The information relevant to a decision includes;
a. Deciding one way or the other
b. Failing to make a decision.

Litigation capacity is fact specific
Dunhill v Burgin [2014] UKSC 18, Lady Hale said at paragraph 13

The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in Masterman-Lister that capacity for this purpose meant capacity to conduct the proceedings.

Practice Direction 15B – ADULTS WHO MAY BE PROTECTED PARTIES AND CHILDREN WHO MAY BECOME PROTECTED PARTIES IN FAMILY PROCEEEDINGS
https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-15b-adults-who-may-be-protected-parties-and-children-who-may-become-protected-parties-in-family-proceedings#IDA5BAT

KEY POINTS

(a) Court must investigate as soon as possible any issue about capacity
(b) The Official solicitor will only be invited to act if there is no other person suitable or willing to act – they are the litigation friend of last resort
(c) Any issue about capacity of an adult to conduct the proceedings must be determined before the court gives any directions relevant to the adults role in the proceedings
(d) Expert evidence likely to be required (although sometimes treating psychiatrists evidence will suffice)
(e) Starting point is whether the solicitor has concerns about capacity.

This is also confirmed in caselaw
See RP v Nottingham CC and Another [2008] EWCA Civ 462: "once either Counsel or the solicitor has 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"

TB v KB and another [2019] EWCOP 14 provides a helpful recent overview of the authorities.

What to do as a solicitor who has concerns

1. Raise it at the earliest opportunity
2. Inform the client about worries about capacity and process
3. Seek early and urgent capacity assessment
4. Have regard throughout to special measures
5. Bear in mind capacity is fact specific

6. Ensure LOI to expert covers all that is required in the report (see below)

2. Capacity Assessments – what all that means for assessments?

1. A capacity certificate which simply states the person lacks capacity will never suffice. A properly reasoned capacity assessment must contain the following:

(a) Firstly, the proper Identification of the impairment of, or disturbance in the functioning of, the mind or brain.

(b) A reasoned explanation of why that impairment or disturbance prevents that person from retaining, using or weighing up that information as part of the decision making process.

(c) A thorough consideration of what special measures might be employed to assist that person to make a decision.

(d) A thorough consideration of what practical steps have been taken, without success to assist that person in reaching a decision.

3.Challenging Capacity Assessments

1. An assessment that a client lacks capacity is not a finding they lack capacity. This can only be a judicial decision. Like any expert assessment, it can be open to challenge.

Dunhill v Burgin [2014] UKSC 18 Lady Hale "people are assumed to have capacity to make their own decisions and should only be deprived of the right to do so **in clear cases**….."

2. Once a capacity assessment is received, it should be explained to the client (not always easy). They must be advised that they are entitled to dispute any conclusion that they lack capacity. If they wish to argue they do have capacity the following applies:
    a) List of urgent hearing
    b) Expert lined up to attend
    c) Check the report covers all relevant matters, otherwise raise part 25 questions
    d) Consider whether to seek to file evidence on behalf of parent
    e) Hearing likely to be evidence from expert and parent
    f) Again, consider the question of special measures.

3. If a client refuses a capacity assessment and the issue of capacity arises, court will determine issue on the evidence it has (usually of the parent if willing to give evidence or the evidence of the professionals working with the clients as to their conduct and presentation).

4. Fluctuating capacity

1. Remitting relapsing conditions such as bi polar disorder and Schizophrenia can lead to fluctuating capacity. This is not something specifically addressed in the MCA 2005. The Act's code of practice addresses fluctuating capacity very briefly at 4.26 and 4.27 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf)
2. In short, if you consider the client to have regained capacity, an updated assessment and/or fresh judicial findings is required.

5. Litigation Friend

1. If the court finds a client lacks capacity of the parent does not seek to challenge a capacity assessment which concludes they lack capacity, they are to be treated as a protected party and require a litigation friend.

2. The appointment of a litigation friend is governed by FPR Part 15

https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_15

15.6
(1) The court may, if the person to be appointed so consents, make an order appointing –
(a) a person other than the Official Solicitor; or
(b) the Official Solicitor,
as a litigation friend.
(2) An order appointing a litigation friend may be made by the court of its own initiative or on the application of –
(a) a person who wishes to be a litigation friend; or
(b) a party to the proceedings.
(3) The court may at any time direct that a party make an application for an order under paragraph (2).
(4) An application for an order appointing a litigation friend must be supported by evidence.
(5) Unless the court directs otherwise, a person appointed under this rule to be a litigation friend for a protected party will be treated as a party for the purpose of any provision in these rules requiring a document to be served on, or sent to, or notice to be given to, a party to the proceedings.
(6) Subject to rule 15.4(4), the court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed complies with the conditions specified in rule 15.4(3).

15.4

(1) This rule does not apply if the court has appointed a person to be a litigation friend.

(2) A person with authority as a deputy to conduct the proceedings in the name of a protected party or on that party's behalf is entitled to be the litigation friend of the protected party in any proceedings to which that person's authority extends.

(3) If there is no person with authority as a deputy to conduct the proceedings in the name of a protected party or on that party's behalf, a person may act as a litigation friend if that person -

(a) can fairly and competently conduct proceedings on behalf of the protected party;

(b) has no interest adverse to that of the protected party; and

(c) subject to paragraph (4), undertakes to pay any costs which the protected party may be ordered to pay in relation to the proceedings, subject to any right that person may have to be repaid from the assets of the protected party.

(4) Paragraph (3)(c) does not apply to the Official Solicitor.

15.7

(1) The court may -

(a) direct that a person may not act as a litigation friend;

(b) terminate a litigation friend's appointment; or

(c) appoint a new litigation friend in substitution for an existing one.

(2) An application for an order or direction under paragraph (1) must be supported by evidence.

(3) Subject to rule 15.4(4), the court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed complies with the conditions specified in rule15.4(3).

Key points

3. A litigation friend can only be appointed if they can:

   a) fairly and competently conduct proceedings on behalf of the protected party and

   b) has no interest adverse to that of the protected party.

c) Undertakes to pay any costs the protected party may be ordered to pay (relevant in finance and private law matters, doesn't apply to the OS)
d) A certificate of suitability must be filed
e) An application to appoint a litigation friend must be supported on evidence.

4. The court can order a litigation friend
   a) On application or of own initiative or on application of a party or the person who wants to be the litigation friend.
   b) Application must be supported by evidence
   c) Same rules as to suitability apply as above.
5. If and only if there is nobody who meets the above requirements will the Court appoints the Official Solicitor.

6. Helpful resources

Mental capacity Act Code of Practice
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf

Family Justice Council Capacity to Litigate in Proceedings
https://www.judiciary.uk/wp-content/uploads/2018/04/capacity-to-litigate-in-proceedings-involving-children-april-2018.pdf

Appointing a litigation friend checklist
https://www.gov.uk/government/publications/appointing-a-litigation-friend-checklist