Anti-Social Behaviour and Mental Capacity Assessments – Practical Questions Answered

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considered. strong.

1. A significant proportion of anti-social behavior cases have a mental health dimension. A smaller but troubling number of cases raise questions of whether the alleged perpetrator lacks capacity within the meaning of the Mental Capacity Act 2005. What is a local authority to do when these types of cases arise?

Whose responsibility is it to raise an issue of a potential lack of capacity?

2. Everyones.

3. It is for the Court, the local authority and the tenant's representatives to raise the potential issue of a potential lack of capacity. In *Masterman-Lister v Brutton* [2003] 1 WLR 1511 the Court of Appeal found that the court is required to investigate capacity whenever there is reason to suspect it is absent. There is no need for the court to rely on either party to raise or pursue it.

4. Additionally in *McFaddens v Platford* [2009] EWHC 126 (TCC) the Court found that where the party's legal representatives were concerned about his mental capacity they were under an obligation to put that concern before the court. They owed an independent duty to assist in the administration of justice and not to mislead the court.

When should the matter be raised?

5. As soon as possible. This is for the following reasons.

6. First, the Court of Appeal in *Masterman* (a pre CPR case) held that it should be raised at the first convenient opportunity.

7. In *Baker Tilly v Makar* [2013] EWHC 759 (QB) the defendant during the hearing became very distressed and rolled around on the floor screaming and crying. Her conduct gave the Master concern about her capacity to conduct the assessment. He

stayed the proceedings and sought to involve the Official Solicitor. Ms Makar would not co-operate in a capacity assessment. At a later hearing the Master concluded Ms Makar did not have capacity and stayed the proceedings pending the appointment of a litigation friend. The Master pointed out that it was open to the claimant to apply for the appointment of a litigation friend (although it might be necessary for them to indemnify the litigation friend and meet his charges). The case turned on whether the judge, in the absence of medical evidence, could properly find that Ms Makar had an impairment or disturbance in the functioning of the mind or the brain to bring her within section 2 of the Mental Capacity Act. The appeal court found he could not but the relevant point is that the Master was not faulted for dealing with the issue immediately.

8. Secondly, the parties run the risk that if it is raised at a later stage of the proceedings the entire proceedings would be rendered invalid: (i) CPR 21.3(2) provides that where it is known that a person is a protected party, nothing, save the issuing and serving of the claim form or applying for a litigation friend may take place without the permission of the court until the protected party has a litigation friend; (ii) CPR 21.3(3) provides that if during proceedings a party lacks capacity to continue to conduct proceedings, no party may take any further step in the proceedings without the permission of the court until the protected party has a litigation friend; (iii) CPR 21.3(4) provides that any step taken before a protected party has a litigation friend will have no effect unless the court orders otherwise and CPR 21.10 provides that where a claim is made on behalf or against a protected party no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

9. In *Dunhill v Burgin* [2014] UKSC 18 the Supreme Court invalidated a consent order on a claim brought almost six years after the consent order was made. It was a

personal injury case. The claimant settled her claim, without the benefit of a litigation friend, at a gross undervalue. Almost six years later she sought the advice of new solicitors and with the assistance of a litigation friend sought a declaration that she did not have capacity at the time of the purported settlement and that the consent order be set aside and direction given for further conduct of the claim.

10. The Supreme Court found that CPR 21.10 invalidated a consent judgment involving a protected party where it had been reached without the appointment of a litigation friend and court approval, even where the individual's lack of capacity had been unknown at the time of the compromise.

What Does The Tenant Have To Have Capacity For?

11. The tenant needs to have capacity to conduct her defence to possession proceedings brought on the basis of anti-social behavior.

12. The court in *Dunhill and Burgin* (re)stated that capacity is to be judged in relation to the decision or activity in question and not globally. For example, a person may have capacity to bring or defend a small relatively trivial claim in court where the nature of the dispute and the issues are simple to understand and weigh, but lack capacity to litigate in a case where the nature of the dispute or the issues are more significant or complex. As a result the type of proceedings must be borne in mind when assessing capacity.

13. The Court of Protection in *A County Council v MS* 2014 WL 1219394 (2014) 17 C.C.L. Rep. 229 stated, "*The substantive and procedural issues in this case are not complex*". The issue in this case was whether MS had the capacity to make a tithe to his church and conduct the litigation as to his capacity in the Court of Protection.

14. I consider that the same observation can be made of a possession case for anti-social behavior (that the substantive and procedural issues are not complex). The issues in a possession case are essentially did the ASB behaviour take place, will the ASB continue to take place, are expert reports on the cause and prognosis of the ASB needed, do you want to give a promise to the court that the ASB will stop?

15. The court in *Dunhill and Burgin* found that the party has to have the capacity to conduct the whole proceedings and not just individual decisions within the proceedings. It held that the scope of capacity to conduct proceedings for the purpose of CPR Part 21 is the capacity to conduct the claim or cause of action which the claimant in fact has, rather than to conduct the claim as formulated by her legal advisors.

16. In that case the legal representatives had sought a settlement in her personal injury case. The claimant had capacity to accept or reject the settlement. However, her advisors should have brought a larger and much more complicated claim which she did not have the capacity to conduct.

17. Thus in anti-social behavior cases the question is does the defendant have the capacity to conduct a defence – not, for example, does the defendant have the capacity to agree to a suspended possession order after the legal adviseor has decided that is the best course of action.

<u>What is the test for Capacity to Conduct Proceedings?</u>

18. CPR 21.1(2) provides that a protected party is a party (or intended party) who lacks capacity to conduct the proceedings, within the meaning of the Mental Capacity Act 2005.

19. The Court in *Sualle v Nouvet* [2007] EWHC 2902 (QB) found that in determining whether a claimant had capacity to manage his own property and affairs and to conduct the litigation, the court was required by the CPR r.21.1(2)(d), as amended by the Civil Procedure (Amendment) Rules 2007, to apply the definition of capacity within the Mental Capacity Act 2005 s.2(1) in deciding whether he was a protected party.

20. The principals and test an assessor is to apply when assessing capacity are set out at sections 1-3 of the Mental Capacity Act 2005.

21. The first principle is that a person must be assumed to have capacity unless it is established that he lacks capacity (section 1(2)).

22. The courts are generally reluctant to find that party lacks capacity to conduct the proceedings. In *Islington v QR* [2014] EWHC 26 (COP) the judge stated, "*a finding (of lack of litigation capacity) is a serious step for both parties. It takes away the protected party's right to conduct their litigation. It may constitute… a serious disadvantage to the other party."*

23. The second principle that an assessor has to apply is that 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 (section 1(3)).

24. This means that the process of evidence gathering may be onerous. For example an assessor should attend when it is known the person is most likely to engage - whether this is in or out of hours. For example the person's mental health may be affected by the abuse of alcohol and drugs which takes place in the evening at night. A visit first thing in the morning is unlikely to be productive.

25. Alternatively, a person may mistrust the assessor (perhaps because of previous dealings with them) and so another one has to be used. The person may need support of a friend, family member or her legal representative. Simple language or even pictures should be used.

26. In *Wandsworth Clinical Commissioning Group v IA* [2014] EWHC 990 (COP) the protected party had been assessed repetitively over a number of years but had failed to co-operate with the majority of the assessments. During the hearing the judge ordered that a further capacity assessment take place and allowed the protected party to choose the assessor in order that he have trust and confidence in the assessor and so co-operate.

27. The third principle (as relevant) is that a person is not to be treated as unable to make a decision merely because he makes an unwise decision (section 1(4)). When considering this the assessor must bear in mind that "*we must be careful not to set the test of capacity to marry too high lest it operate as an unfair unnecessary and indeed discriminatory bar against the mentally disabled*" *Sheffield City Council v (1) E (2) S* [2004] EWHC 2808 at paragraph 144. People are able to make silly, foolish decisions or decisions the assessor may not agree with but it does not render them incapable.

28. Section 2(1) of the Mental Capacity Act provides that:

    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.

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 ..."

29. Section 3 of the Mental Capacity Act lays out the functional aspect of the test:

3.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.

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."

30. When assessing capacity to conduct litigation the common law test remains relevant as a guide (*London Borough of Islington v QR* [2014] EWCOP 26 at paragraph 117).

31. The common law test is "*whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers 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. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a (litigation friend)" (Masterman).*

32. It is good practice for the assessor to list the information the tenant requires to make a decision and the issues on which the tenant's consent or decision may be required. This enables the judge to be sure that the assessor had the right information in mind and communicated that to the tenant (mental capacity interviews are recorded verbatim).

33. In an anti-social behaviour case the information required would include: (a) that ASB has happened; (b) that the local authroity is seeking possession as a result of the ASB; (c) whether the tenant wants to defend the case; (d) whether she accepts the allegations of ASB are true; (e) that the tenant may loose her home if the court accepts the ASB happened and that it is likely to continue or inevitably will continue to happen in the future; and (f) whether she will choose and (is able to do so) to stop committing the ASB and so seek a suspended order or give an undertaking to the court.

What Evidence Does the Court Need For Capacity?

34. First, medical evidence to establish a disturbance or impairment of the mind or brain is generally required.

35. However, the court in *Baker-Tilley*, where the defendant would not co-operate to provide medical evidence, found, "*the absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind*."

36. Secondly, evidence as to capacity, normally in the form of capacity assessments, which the court can use to make up its own mind as to capacity.

37. A capacity assessment can be undertaken by for example a social worker or mental health worker. However, a local authority should strongly consider instructing a consultant psychiatrist (or similar) where the case turns on whether the tenant's is unable to make a decision because of her mental illness (and thus the impairment of or disturbance in the function of the mind or brain).

38. In my experience reports by consultant psychiatrist or similar are more robust and judges more likely to accept their views.

39. The judge can ask the tenant questions during the hearing so as to assist his determination on capacity. This is particularly useful if the tenant refuses to co-operate with an assessment and the local authority should invite the judge to do so.

40. Sometimes parties offer themselves up for cross examination. However, this normally happens where the party is keen to assert they have capacity in the face of the local authority's assertion they do not.

41. Other relevant evidence as to capacity to conduct proceedings may include evidence from other professionals, conduct observed by the court itself and the individual's correspondence and emails.

42. Once the issue of capacity is before the court the assessment of capacity is matter for the judgment of the court. He judge may differ from the views of the experts.

What Happens if the Defendant Refuses to Co-operate with a Capacity Assessment?

43. The Mental Capacity Act Code of Practice at paragraph 4.59 states that a person cannot be compelled to undertake a capacity assessment.

44. The local authority should try and determine why there is a lack of co-operation.

45. If it is because the assessors attend at the wrong time (the tenant is high, in the grip of a hallucination, sleepy) or there is a lack of trust or similar then the local authority will need to try again and again.

46. If it appears the tenant is not co-operating (so as to try and stymie proceedings or in any event) then the local authority should explain to the tenant refusing an assessment why it is needed and what the consequences of refusal are. This is in accordance with the Code of Practice at paragraph 4.57.

47. The likely consequences are that the court will not have sufficient evidence to establish a lack of capacity so the tenant runs the risk of not accessing the help she may need to save her home.

48. The local authority can also make an assessment of whether the tenant has the capacity to refuse to undertake an assessment. This is useful as the information will feed into the assessment of capacity to conduct proceedings the court makes.

49. The courts are well aware that parties may try to use a possible lack of capacity as a way of stymieing proceedings. In *Baker Tilley* the judge stated, "*counsel have not found any case where the court has had to resolve a situation as has arisen here where the litigant has refused to co-operate in an assessment of their capacity. One reason why it may be particularly difficult for a court to determine the capacity of a litigant who is appearing in person before the court and is the kind of litigant who attracts a civil restraint order is this, when the litigant wants something from the court, that is the claimant, or is making an application, the litigant may conduct themselves in one way, but where they are in the position of a defendant or an equivalent position they may see it as in their interest to conduct themselves quite differently with the object, put bluntly, of obstructing the proceedings."*

50. If the tenant continues to refuse to co-operate then the local authority should obtain a capacity assessment on the papers without an interview.

51. The Court of Protection has taken into account capacity assessments that did not include an interview. In *Wandsworth Clinical Commissioning Group v IA* [2014] EWHC 990 (COP) the judge noted that some of the capacity assessments had taken place without the benefit of a meeting with IA due to his lack of co-operation.

52. However, the judge noted that: (a) those assessors would have undoubtedly been seriously hampered in their ability to advise confidently; (b) quoted a neuro-psychiatrist who stated that "*an assessment of capacity based on case notes is of necessity a relatively inadequate substitution for the complex assessments that occurs in a clinical interview*"; and (c) observed that clinical notes will contain an intrinsic bias – a concern about a patient is more likely to be recorded than a lack of concern.

53. It is clear that an assessment on the papers is a last resort.

54. An assessment on the papers is likely to include the following information: (a) the assessors knowledge of working with the tenant (e.g. if she is her treating doctor); (b) all the tenant's relevant medical records; (c) information from other mental health workers or specialist agencies that have worked with the tenant; (d) evidence that the tenant has previously conducted litigation of any type; and (e) evidence that the tenant can manage matters of similar complexity (e.g. welfare or housing benefit issues/Mental Health Act sectioning/police cautions/a job).

55. It may be that the assessor will not feel able to give a concluded view on the whether the tenant has capacity to conduct possession proceedings on a paper assessment. However, there is no reason why the assessor cannot confirm whether the tenant does have an impairment of or a disturbance in the functioning of her mind or brain to establish that she is within the ambit of section 2 of the 2005 Act as well as recording in the body of her report the information that will assist the court to make a determination pursuant to section 3 of the 2005 Act.

56. For example a treating doctor is likely to have examples of where Ms Fernley has understood information relevant to decisions about treatment for her health, retained it, used it as part of the process of making a decision and communicated that decision.

57. Capacity is issue specific but the court can take into account, when assessing a specific issue of capacity, evidence of transferable skills and abilities when making other decisions.

What is the Effect of a Delusional Illness on Capacity?

58. A person might have a delusional illness but still have capacity for the issue under consideration if she has a range of rational reasons for her decision regarding that issue.

59. It is important for the assessor to determine what the delusional beliefs are and whether and if so how they affect the decision under assessment. This is because a link must be established between the impairment or disturbance of their mind or brain and their inability to understand, retain or weigh the information relevant to the decision, or communicate their decision.

60. In the case of *Re SB (A Patient) (Capacity to Consent to Termination)* [2013] EWHC 1417 (COP) the court found that a woman with bipolar disorder did not lack the relevant capacity to decide to have a termination as, even though she had some paranoid and delusional thoughts, she had given additional reasons for wanting a termination (she didn't want a child in detention, she did not see the point in having a child to give it up for adoption, she felt suicidal and without a termination would kill herself).

61. Holman J found that, when assessing a person who suffers from a delusional disorder, *"what weighs most significantly with me is that even if the patient has some skewed thoughts and paranoid or delusional views with regard to her husband and his*

attitude toward her and his behaviour, she gives many other reasons for desiring a termination.

...

it seems to me therefore that even if aspects of the decision making are influenced by paranoid thoughts in relation to her husband and her mother, she is nevertheless able to describe, and genuinely holds, a range of rational reasons for her decision. When I say rational, I do not necessarily say they are good reasons nor do I indicate whether I agree with her decision, for section 1(4) of the Act expressly provides that someone is not be treated as unable to make a decision simply because it is an unwise decision".

62. In the case of *Islington v QR* the defendant was suffering from paranoid schizophrenia. The court was determining, as relevant, her capacity to decide where she should live and whether she could conduct litigation proceedings.

63. The defendant held long standing delusional beliefs on sexual themes and persecutory and grandiose delusions which focused on fears about men entering her home and about the poisoning of her water supply. She also lacked insight into her condition and did not accept that she had a mental illness or needed to take medication to stay well.

64. The court found that she lacked capacity to decide where she wanted to live. This was because her lack of insight into her condition and her delusional beliefs relating to the home meant she could not make a capacitious decision as to her care and accommodation.

65. However, in relation to her capacity to litigate the court found, "*She is in a stable state as regards her mental illness and recognises many of the realities of her situation. Her delusional illness affects her core understanding so as to prevent her making decisions*

for herself about the issues in this case, but does not prevent her from being able to manage her life and make most of her decisions for herself. She is able to understand the court process. Removing a person's capacity to litigate is a significant interference with her rights. I am not satisfied on a balance of probabilities that QR lacks the capacity to litigate."

66. In *A County Council v MS* 2014 WL 1219394 the defendant suffered from bipolar affective disorder, schizophrenia and schizoaffective disorder. The issues were whether he had capacity to litigate and give a tithe to his church.

67. The judge accepted that the defendant's belief that he was a prophet was a delusional belief but found that that not all of his religious beliefs were delusional or compromised by the presence of mental illness. He stated that, "*The fact that a person has a grandiose belief with a religious content does not demonstrate that the whole of their religion is delusionally-based and caused by mental illness. It may simply be that the content of their belief-system when they become ill reflects and accentuates pre-existing interests, concerns and pre-occupations, in this case a concern with religious and moral themes."*

68. The judge found that MS had the capacity to tithe and to conduct litigation. His belief that he was a prophet did not impinge on his capacity to argue and present his case and he had prepared and presented his case very ably. He was capable of understanding, with the assistance of expert advice, the issues on which his consent or decision was necessary in the course of the proceedings. Because M had capacity to make the substantive decision for himself, there was no inherent contradiction in finding that he also had litigation capacity.

Is There A Link Between Capacity To Conduct Litigation and Whether Acts of Anti-Social Behaviour are Deliberate?

69. It depends!

70. In *Sheffield City Council v (1) E (2) S* EWHC 2808 (Fam) Munby J stated, "*The question, as we have seen, is always issue specific. There may be different answers to the questions, Does this person have litigation capacity? and Does this person have subject-matter capacity? As Bracewell J said, it all depends on the circumstances, There is no principle, either of law or of medical science, which necessarily makes it impossible for someone who has litigation capacity at the same time to lack subject-matter capacity. That said, however, it is much more difficult to imagine a case where someone has litigation capacity whilst lacking subject-matter capacity than it is to imagine a case where someone has subject-matter capacity whilst lacking litigation capacity. Whilst it is not difficult to think of situations where someone has subject-matter capacity whilst lacking litigation capacity, and such cases may not be that rare, I suspect that cases where someone has litigation capacity whilst lacking subject-matter capacity are likely to be very much more infrequent, indeed pretty rare. Indeed, I would go so far as to say that only in unusual circumstances will it be possible to conclude that someone who lacks subject matter capacity can nonetheless have litigation capacity".*

71. In *Islington v QR* the protected party was found to lack subject capacity but have litigation capacity. This was because her paranoid schizophrenia and the delusions related to it affected only decisions about her care and where she was to live (she did not accept she had paranoid schizophrenia so she could not weigh up issues that involved consideration of her care) not general decisions about her life and the court process.

72. It is therefore possible for a tenant to have capacity to deliberately commit acts of ASB but lack capacity to conduct the proceedings or vice versa.

Capacity and Deliberate Acts of ASB

73. Section 191(1) of the Housing Act 1996 provides, "*a person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy*".

74. Paragraph 11.7 of the Homelessness Code of Guidance for Local Authorities 2006 provides: *Generally, an act or omission should not be considered deliberate where: …(ii) the housing authority has reason to believe the applicant is incapable of managing his or her affairs, for example, by reason of age, mental illness or disability; (iii) the act or omission was the result of limited mental capacity; or a temporary aberration or aberrations caused by mental illness, frailty, or an assessed substance abuse problem".*

75. In *R v Wirral Ex p Bell* (1995) 27 HLR 234 Ms Bell had mental health issues (suicidal ideation and anti-social personality disorder). She committed ASB at her property. The local authority obtained possession. At the homelessness stage they accepted she was vulnerable but intentionally homeless. Ms Bell claimed it was perverse to find her in priority need but intentionally homeless.

76. The court found that there is a distinct difference between a finding of priority need, based on vulnerability and a finding of intentionality. Having regard to the Code of Guidance, it is one thing to be less able to fend for yourself and another thing to be incapable of managing your own affairs. As such there was no inconsistency between the findings of the council.

77. Further, the court found that there was plenty of evidence upon which the council were entitled to come to the view that the applicant was capable of managing her own affairs and that what had happened had rendered her homeless intentionally. This evidence included the judge's comments in his judgment of the possession hearing that Ms Bell was '*bloody minded, awkward and had no intention of behaving'*.

78. It is clear that the judge in Bell was assessing whether Ms Bell had the capacity to manage her affairs so as to be able to make the decision not to commit ASB. The phrase '*incapable of managing affairs'* was one used frequently to refer to capacity before the Mental Health Act 2005.

79. Therefore, in an anti-social behaviour case, where it appears there might be a link between the ASB and the tenant's mental illness the local authority should seek an expert report on the issue of *'does the tenant lack the capacity to decide whether to commit the ASB as at the material time he is unable to make a decision for himself because of an impairment of, or a disturbance in the functioning of the mind or brain.*'

80. This will ensure that, assuming the expert finds that the tenant does have capacity, should the possession order be successful a finding of intentional homelessness can be upheld on this basis.

81. The fact that the ASB arises from mental illness is not a bar to obtaining possession (*Accent Peerless Ltd (formerly Surrey Heath Housing Association Ltd) v Kingsdon* [2007] EWCA Civ 1314 although bear in mind a local authority's obligation to assist the tenant to maintain her tenancy with committing ASB and to provide alternative accommodation where appropriate in ASB mental health cases before a court would find it was reasonable to make a possession order.

82. It is likely to be important in this respect to look at the individual types of ASB. For example a tenant who lacks the capacity not to scream and shout in response to a hallucination may have the capacity not to play loud music or dump rubbish. There needs to be a link between the behaviour and the impairment.

83. The expert should also be asked to give a view on whether the acts of ASB were a temporary aberration or aberrations caused by mental illness, frailty, or an assessed substance abuse problem.

84. The duration and regularity of the ASB linked to the mental illness is likely to be important here. If the ASB has lasted for a number of years it is unlikely to be a temporary aberration.

85. It is also important to note that (i) the local authority's duty is to have regard to the Homelessness Guidance and (ii) paragraph 11.7 starts off with 'generally'. A local authority can depart from the guidance where they have good reason to do so.

86. A good reason might be that although there is a link between the ASB and the impairment it was open to the tenant to engage in treatment (which the expert evidence would show would render the tenant capacitious and/or not commit the ASB) but the tenant (with capacity) refused to do so.

87. Alternatively the local authority can look at the (capacitious) failure to engage in treatment as the deliberate act that led to the loss of the property (where the tenant was aware of the consequences of failing to do so).

When Does Capacity Cease to be an Issue?

88. CPR 21.9 provides, as relevant:

(2) Where a protected party regains or acquires capacity to conduct the proceedings, the litigation friend's appointment continues until it is ended by court order.

(3) An application for an order under paragraph (2) may be made by –

(a) the former protected party;

(b) the litigation friend; or

(c) a party.

(4) The child or protected party in respect of whom the appointment to act has ceased must serve notice on the other parties –

(a) stating that the appointment of his litigation friend to act has ceased;

(b) giving his address for service; and

(c) stating whether or not he intends to carry on the proceedings.

(5) If the child or protected party does not serve the notice required by paragraph (4) within 28 days after the day on which the appointment of the litigation friend ceases the court may, on application, strike out any claim brought by or defence raised by the child or protected party.

89. It is important to note that a person can go in and out of capacity and the court can be asked to look at the matter again at a letter date in any event. Therefore even if the court finds a defendant has capacity it is still open to the defendant and/or the court to raise it again (or seek to do so) should circumstances change or new evidence be obtained.

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