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## Dealing with vulnerable tenants

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# Overview



## Practical issues and the courts

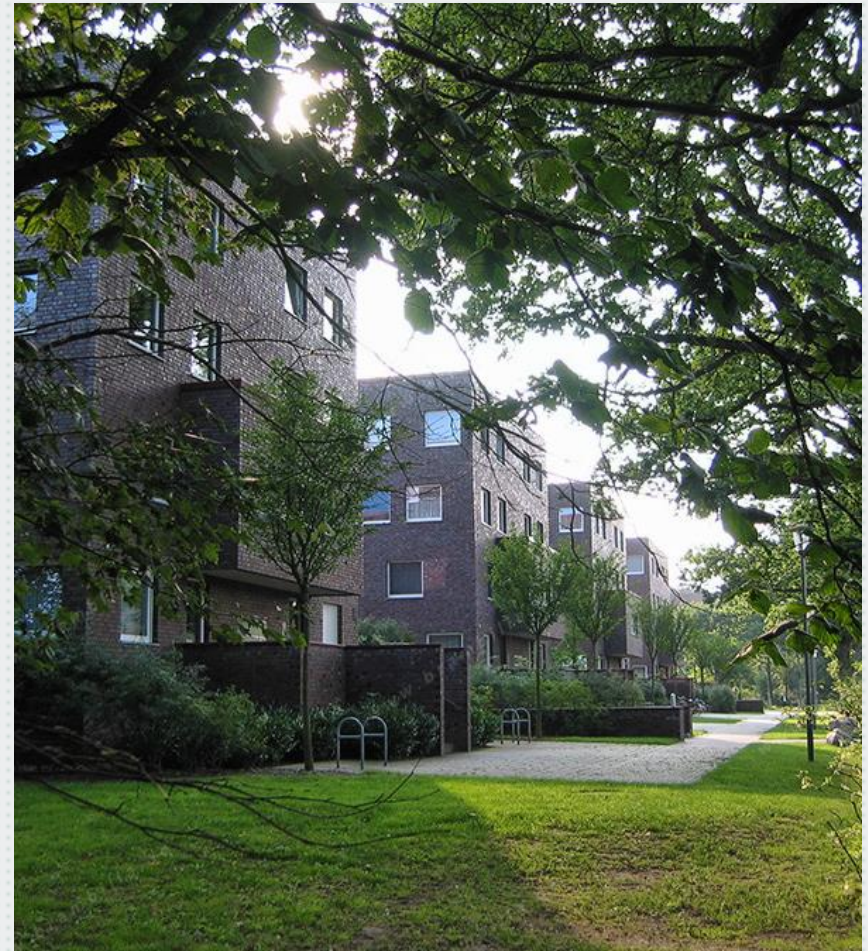
- What do we mean by vulnerability – overview, recent developments and tricky issues under the CPR.

## Litigation friends ('LFs'), experts and funding

- Explanation of definitions, role and utility of LFs and experts alongside some funding issues.

## Case management

- Case examples drawing on experience of litigation involving vulnerable tenants.



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# Vulnerability: an overview

# What do we mean by vulnerability?



- Article 6 of the European Convention on Human Rights (ECHR).
- Article 14 of the ECHR prohibits discrimination in the enjoyment of convention rights.
- Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with ECHR rights.
- Article 13 of the UN Convention on the Rights of Persons with Disabilities (UNCPRD), adopted 2007, provides:

“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”

# What do we mean by vulnerability?



“Vulnerability may be endogenous or arise as a reaction to some step or factor within the litigation process; it may be general or situational, permanent or temporary (or a mixture). Some people have mental and/or physical conditions which render them vulnerable and hamper their access to justice and some are vulnerable by reason of the subject matter of the proceedings before the court...”

**July 2020, Anti-Social Behaviour and the Civil Courts (Civil Justice Council) at para. 217**

# What are the primary issues?



- Mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties) (and including any issues as to capacity).
- Age, immaturity or lack of understanding.
- Communication or language difficulties (including literacy).
- Physical disability or impairment, or health condition.
- The impact on them of the subject matter of, or facts relevant to, the case
- Their relationship with a party or witness (including fear, intimidation and giving the best evidence).\*
- Social, domestic or cultural circumstances.

\*There are a range of special measures that can be applied for and used in relation to any vulnerable witnesses: screens, live link, removal of gowns and wigs, pre-recorded evidence, court rooms aids to communication and examination of a witness through an intermediary.





# Equality Act 2010

- Does the person have a protected characteristic?
  - Age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation: s.4, Equality Act 2010.
  - A person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities: s.6, Equality Act 2010.
- Main duties:
  - a duty not to discriminate on grounds of disability (sections 13, 14, 15 and 19);
  - a duty to make reasonable adjustments (section 20); and,
  - the public sector equality duty (section 149).
- How will this impact on:
  - managing the tenancy;
  - access to justice;
  - attending court;
  - giving evidence; and/or
  - the case generally (does it give rise to a defence?).



# “Vulnerability” Housing Act 1996



- Under Part 7, Housing Act 1996 considering **priority need**:
  - a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside: s.189 (1)(c); and,
  - a pregnant woman, a person with whom dependent children reside, a person who is homeless as a result of an emergency such as flood, fire or other disaster: for full wording see ss.189 (1)(a)-(b), (d); and,
  - a person who is homeless as a result of that person being a victim of domestic abuse: s.189(1)(e).



# “Vulnerability” Housing Act 1996



- Homelessness (Priority Need for Accommodation) (England) Order 2002 provides that the following have a priority need for accommodation:
  - Repeats the categories found within section 189(1)(a)-(e);
  - a person aged 16 or 17 who is not a ‘relevant child’ or a child in need to whom a local authority owes a duty under section 20 of the Children Act 1989;
  - a person under 21 who was (but is no longer) looked after, accommodated or fostered between the ages of 16 and 18 (except a person who is a ‘relevant student’);
  - a person aged 21 or more who is vulnerable as a result of having been looked after, accommodated or fostered (except a person who is a ‘relevant student’);
  - a person who is vulnerable as a result of having been a member of Her Majesty’s regular naval, military or air forces;
  - a person who is vulnerable as a result of: having served a custodial sentence; having been committed for contempt of court or any other kindred offence; or, having been remanded in custody; and,
  - a person who is vulnerable as a result of ceasing to occupy accommodation because of violence from another person or threats of violence from another person which are likely to be carried out.

# “Vulnerability” Housing Act 1996



- ‘Disability’ and ‘vulnerability’ are separate concepts:  
*McMahon v Watford Borough Council and Kiefer v Hertsmere Borough Council* [2020] EWCA Civ 497; [2020] H.L.R. 29
- The Court of Appeal observed that there is a substantial overlap between the test for vulnerability and the requirements of the PSED – so much so, that  
“[i]t is difficult to see how that task can be performed without a sharp focus on the extent of the illness, handicap or physical disability; and its effect on the person's ability to deal with the consequences of homelessness” [68].

# “Priority need” and Covid-19



- Amended Homelessness Code of Guidance for Local Authorities with revised paragraph 8.45 as at 12 October 2021:

**8.45 COVID-19:** Housing authorities should carefully consider the vulnerability of applicants from COVID-19. The vulnerability of applicants who have an underlying health condition which increases the risk of morbidity or mortality from COVID-19, as recognised by the JCVI, should be considered in the context of the COVID-19 pandemic.

# Domestic abuse



“Domestic abuse is an abhorrent crime perpetrated on victims and their families by those who should love and care for them...”

Victoria Atkins MP, Minister for Safeguarding

- The police recorded 844,955 offences (excluding fraud) flagged as domestic abuse - related in the year ending March 2021.
- The Crime Survey for England and Wales 2020 showed that 1.6m women and 757,000 men had experienced domestic abuse between March 2019 and March 2020.
- Domestic Abuse Act 2021, section 1(2):

“Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if -

  - (a) A and B are each aged 16 or over and are personally connected to each other, and
  - (b) the behaviour is **abusive**”.

# Domestic abuse



- Behaviour is “**abusive**” if it consists of any of the following:
  - physical or sexual abuse;
  - violent or threatening behaviour;
  - controlling or coercive behaviour;
  - economic abuse;
  - psychological, emotional or other abuse; AND
- It does not matter whether the behaviour consists of a single incident or a course of conduct: s.1(3), DAA 2021.
- “**Economic abuse**” means any behaviour that has a substantial adverse effect on B's ability to acquire, use or maintain money or other property, or obtain goods or services: s.1(4), DAA 2021.
- A's behaviour may be behaviour “**towards**” B despite the fact that it consists of conduct directed at another person (for example, B's child).



# Tricky issues and the Civil Procedure Rules



# Recent development: CPR PD 1A



## PARTICIPATION OF VULNERABLE PARTIES OR WITNESSES

- The court should ensure, so far as practicable, that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence.
- The parties are required to help the court to further the overriding objective at all stages of civil proceedings.
- Vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take all proportionate measures to address these issues in every case.
- A person should be considered as vulnerable when a factor – which could be personal or situational, permanent or temporary – may adversely affect their participation in proceedings or the giving of evidence.
- The court should identify the vulnerability of parties or witnesses at the earliest possible stage of proceedings and to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result.
- The court should consider ordering “ground rules” before a vulnerable witness is to give evidence.

# CPR Practice Direction 1A



## Paragraph 5. CPR PD1A

- When considering whether a factor may adversely affect the ability of a party or witness to participate in proceedings and/or give evidence, the court should consider their ability to –
  - understand the proceedings and their role in them;
  - express themselves throughout the proceedings;
  - put their evidence before the court;
  - respond to or comply with any request of the court, or do so in a timely manner;
  - instruct their representative/s (if any) before, during and after the hearing; and
  - attend any hearing.

# Capacity to conduct litigation



- A finding that a party lacks litigation capacity is a serious step for both parties: *Islington v QR* [2014] EWHC 26 (COP). The threshold is high. It takes away a protected party's right to conduct their litigation.
- Capacity is to be judged in relation to the decision or activity in question and not globally: *Dunhill v Burgin* [2014] UKSC 18.
- A lack of capacity cannot be established merely by reference to a person's condition: s.2, Mental Capacity Act 2005. A person is unable to make a decision for himself if he is unable to understand information relevant to the decision: s.3, Mental Capacity Act 2005.
- E.g. In a case for an anti-social behaviour injunction, the issues are likely to be: did the behaviour take place and will the behaviour continue to take place unless R is restrained by injunctive relief. It may also be the case that R might be asked whether she wants to give a promise to the court in relation to her behaviour.
- The question is does D have the capacity to conduct a defence in that context.

# Capacity to conduct litigation



- It is good practice for the assessor to list the information the person requires to make a decision and the issues on which the person's consent or decision may be required. **It is not necessary that the person being assessed understands every element of what is being explained to him.** What is important is that can the person understand the 'salient factors' (*LBJ v RYJ* [2010] EWHC 2664 (Fam)): the information relevant to the decision.
- The level of understanding required must not be set too high: *PH and A Local Authority v Z Limited & R* [2011] EWHC 1704 (Fam).
- What would the required information be for an injunction case?
  - (a) that the anti-social behaviour happened;
  - (b) that A is seeking an order as a result of the behaviour;
  - (c) whether R wants to defend the case;
  - (d) whether R accepts the allegations of the anti-social behaviour are true;
  - (e) whether R is able to understand the terms of an injunction; and,
  - (f) whether R will choose and (is able to do so) to stop committing the behaviour and either agree an order or give an undertaking to the court.

# Capacity and terms of an order



- Capacity to understand terms and comply with orders: *Wookey v Wookey* [1991] Fam 121 & P v P [1999] 2 FLR 897, CA.
- An injunction ought not to be granted against a person who is incapable of understanding what they are doing or that what they are doing is wrong.
- *P v P (Contempt of Court: Mental Capacity)* [1999] 2 FLR 897, CA per Butler-Sloss LJ at page 902:

“a degree of understanding, which is not total, may in a case be sufficient. It is not necessary for members of the public to have a clear understanding of the finer points of procedure of the law in the case in which they are parties. It depends upon the facts. **It is however crucial that a litigant against whom an order is to be made understands what he must not do, that the order on a piece of paper tells him he must not do A or B or C and that he understands that if he disobeys the order he will be in trouble and he may go to prison**”.



## **Litigation friends, experts and funding**



# Litigation friends



- Who? A person who can conduct proceedings on behalf of a child (a person under 18 (per r.21.1(2)(b))) or a ‘protected party.’
- Purpose: to safeguard the protected party/child by ensuring that the correct substantive and procedural steps are taken in the litigation with a view to securing their best interests.
- Litigation friends (‘**LFs**’) are officers of the court (**Rhodes v Swithenbank** (1889) 22 Q.B.D. 577 at [p. 579]) not to be confused with McKenzie Friends (see the [Practice Guidance: McKenzie Friends \(Civil and Family Courts\)](#))

# Litigation friends (2)



- Where LF needed, party may not make an application against a protected party or take any step save for applying for appointment of an LF (r.21.3(2)).
- If during proceedings, party lacks capacity to continue to conduct, no further steps without court's permission until the protected party has LF (r.21.3(3)).
- Any step taken before the protected party has a LF will have no effect unless court directs otherwise (r.21.3(4)).

# Litigation friends (3): What is a **protected party**?



- “a party or an intended party, who lacks capacity to conduct the proceedings” (r.21.1(2)(d))
- that means to lack capacity within the meaning of the Mental Capacity Act 2005 (r.21.2(2)(b)).
- Means the capacity to conduct the claim that the person in fact has, rather than the capacity to conduct the claim as formulated by their lawyers (**Dunhill v Burgin (Nos 1 and 2)** [2014] 1 WLR 933 at [18])
- “the key question is whether the party is capable of understanding, with the assistance of proper explanation from legal advisers and other experts as the case may require, the issues on which his consent or decision is likely to be necessary: **does he have the ‘capacity to understand that which he needs to understand in order to pursue or defend a claim’**” (see **Hinduja v Hinduja** [2020] EWHC 1533 (Ch) at [32])

# Litigation Friends (4): what do they do and who are they?



- “conduct proceedings on [...] behalf” of the protected party (r.21.2(1)), which “doubtless would include doing anything which in the ordinary conduct of any proceedings is required or authorised by a provision of the CPR to be done by a party to the proceedings” (r.21.2.1)
- Must **fairly and competently conduct proceedings** on behalf of the protected party (r.21.4(3)(a)) meaning the LF must have the “skill, ability and experience to be able properly to conduct litigation of the sort in question” (**Davila v Davila** at [2016] 4 WLUK 347, at [137(10)], and see **Hinduja** at [62]).
- Should have no interest adverse to that of the protected party (r.21.4(3)(b)), and where the protected party is the claimant, must undertake to pay any costs that the protected party may be ordered to pay in relation to the proceedings, subject to any right to be repaid from the assets of the protected party (r.21.4(3)(c), and see the right of recovery under r.21.12(1) and 21PD.11)

# Litigation Friends (5): Appointment



- **Upon the court's order**, either on receiving an application or of the court's initiative (r.21.6.1, r.3.3(1)).
  - If application made, must be supported by evidence (r.21.6(4)), recall the criteria at r.21.4(3)(a)-(c))
  - Court can direct person may not act as LF, terminate appointment and appoint new LF (r.21.7(2))
  - **NOTE:** the Official Solicitor will act on behalf of the protected party if there is no-one else able and willing to do so (r.21.5.1)
- **Without a court order**, follow the procedure at r.21.5(1) which involves filing a certificate of suitability (**form N235**), stating person satisfies the conditions within r.21.4(3)(a)-(c). Certificate should also state the grounds of belief that the relevant person is a protected party and if that belief is based on medical opinion, must attach any relevant documents (r.21.5.1)
- Deputies appointed by COP need only file official copy of COP order (r.21.5(2))

# Experts: Always required?



- Medical evidence not necessarily required to establish lack of capacity.
- Chadwick LJ in **Masterman-Lister v Jewell** [2002] EWCA Civ 1889 at [66] “whether a party was required to act through a next friend or guardian ad litem (as the case might be) should, in the ordinary sense, **be determined by the party himself or by those caring for him perhaps with the advice of a solicitor but without the need for inquiry by the court.**”
- Nevertheless see **Masterman-Lister** at [29] and **Folks v Faizey** [2006] EWCA Civ 381 at [16]-[18]: in practice in almost every case medical evidence will be required (see s.2(3) Mental Capacity Act 2005).
- Although note that the courts’ guidance on this point should not be seen as “intending to lay down any rigid principle under which medical evidence is required, unless the circumstances are exceptional. **The question will always depend on what the circumstances are**” (**Hinduja** at [39]).



# Experts (2): What is their role?



- Duty is to the court to assist on matters within their expertise (r. 35.3(1)).
- **Independent, objective, and unbiased opinion.** Clear where question falls outside expertise. Should state view is provisional if based on insufficient evidence (see National Justice Campania Naviera Sa v Prudential Assurance Co Ltd [1993] 2 Lloyd's Rep. 68 (Comm Ct) at [81]-[82]).
- MAY provide evidence on 'ultimate issue' but may not determine as doing so is for the judge (Armstrong v First York [2005] EWCA Civ 227).
- **NOTE:** Court has a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings (r.35.1).

# Funding issues



- OS will act on behalf of LF if no one else able and willing (r.21.5.1).
- Relevant guidance on OS acting as LF summarised at r.21.5.1.
- In **all** cases, the OS will need to be satisfied that:
  - (1) Satisfactory evidence or a finding by a court that the party lacks capacity to conduct the proceedings (and is therefore a protected party);
  - (2) Confirmation that there is security for the costs of legal representation; and
  - (3) That there is no other person who is suitable and willing to act as a litigation friend
- Regarding item (2), note also that 21PD.3.4 confirms “where it is sought to appoint the Official Solicitor as the litigation friend, provision must be made for payment of his charges.”

# Funding issues (2): Who pays?



- See [Practice Note on the Appointment of the Official Solicitor in Property and Affairs](#) which confirms that in relation to funding, it is a pre-requisite of the OS acting as a LF that (para 13(b)):

“There is security for the costs of legal representation of P which the Official Solicitor considers satisfactory. The Official Solicitor will need to be satisfied that her costs can be settled as and when they fall due, taking into account that there may be other calls on P’s funds. This requirement can normally be satisfied by either:

- Evidence that P owns liquid funds that the Official Solicitor considers adequate in all the circumstances;
- A professional undertaking to settle the Official Solicitor’s costs as and when they fall due, in a form which the Official Solicitor considers satisfactory and covering an amount of costs that the Official Solicitor considers adequate; or
- The Official Solicitor receiving from the applicant (or another appropriate party) a sum of money on account of her costs which the Official Solicitor considers adequate.”



## **Case examples: vulnerable tenants**

# (1) Vulnerable D: engaging other services



- D = secure tenant, diagnosis of paranoid schizophrenia + substance misuse
- C = District Council (so no social services functions)
- Complaints of ASB from outset of tenancy (noise, police calls outs incl. drug raids, drug use, firing a rifle in property, threatening behaviour to neighbours both verbally & physically).
- Possession claim issued on ASB grounds (1 and 2, sch 2 HA 1985)
- Capacity assessment obtained:
  - D lacked capacity to litigate
  - OS appointed as LF

# (1) Vulnerable D: engaging other services



- Despite D's assertions, OS did not adduce any evidence to contradict the allegations
- Instead argued that:
  - The issues in dispute arose from the impact of D's mental health
  - Any eviction would be unreasonable and/or disproportionate for the purposes of the EA 2010; and
  - Other options should be tried before eviction was ordered
- Expert psychiatric evidence confirmed D's mental health condition was the cause of his ASB
- C and OS agreed that D needed supported living placement



# (1) Vulnerable D: engaging other services



- Problem:
  - C (as DC) only had general housing stock, moving him would just move problem
  - ASC input required but as he still had housing and care package initially not forthcoming with options
- Engagement on the issues in proceedings from ASC limited & attempts made to get evidence from ASC/MHT unsuccessful
- Ultimately required witness summons for Head of ASC to attend – at which point engagement and matter settled.
- Not always as drastic measures required!
- Duty to cooperate - use correspondence, recitals in orders etc.
- If unitary authority, speak to colleagues in ASC (lawyers too!)

## (2) Vulnerable D: record keeping



- C = a housing association
- D = assured tenant for 17 years
- 13 years into tenancy, issues with hoarding started to become evident
- No access given – injunction obtained to get access to inspect, attempts to gain access following injunction failed
- D appeared to have mental health issues but precise diagnosis unclear
- In light of vulnerabilities Instead of committal, NoSP served and possession claim issued on grounds 12 and 13 HA 1988

## (2) Vulnerable D: record keeping



- Number of adjournments on terms for D to comply with clearing certain rooms and giving access for inspection with liberty to restore
- Each time a little progress then would cease and C would restore
- Judge (reserving to self) was very sympathetic to D and wanted a 'collaborative' approach
- Necessary on each restoration to show (with records!):
  - attempts made to assist D to comply (e.g. appointment reminders, following up/rearranging missed appointments)
  - referrals to other agencies for support (tenancy support, ASC)
  - EA 2010 consideration

### (3) Vulnerable D: which court decides?



- C = housing association
- D = assured tenant for over 25 years, schizophrenia diagnosis, frequent relapses with hospital admissions under MHA (revolving door patient)
- Huge rent arrears (incurred due to bedroom tax & long period in hospital when HB stopped) & some ASB when unwell – possession proceedings issued
- D's MHT considered in D's best interests to move to supported living but D refusing to do so
- Concurrent proceedings (issued by LA) in the COP (complicated by fact she kept being re-detained under MHA)
- Information from the possession claim was required to be disclosed into COP proceedings to inform what available options before COP

### (3) Vulnerable D: which court decides?



- County Court on notice of COP proceedings, therefore obtained capacity evidence and then appointed OS as LF
- Initially County Court adjourned due to COP proceedings – awaiting outcome (OS in COP initially supported this as wanted D's flat to remain an available option)
- **BUT** as became clear that so long as D's flat was available to her she would not engage with S/L
- D had OS as LF in each set of proceedings and lawyers instructed by each cooperated
- Ultimately OS in possession proceedings could take view not in D's best interests to defend (increasing arrears & unable to manage tenancy). County Court made possession order

### (3) Vulnerable D: which court decides?



- Sometimes each court waiting for the other
- County Court judges can be (too?) cautious and reluctant to make a PO where know COP proceedings
- Needs robust approach
- Co-operation with COP legal team – sharing information so far as appropriate

## (4) Vulnerable D: prosecution?



- P = LA (Environmental Protection).
- D = diagnoses of paranoid schizophrenia, longstanding history of substance/alcohol misuse. Open to CMHT with care co-ordinator.
- D played amplified music very loud over a long time.
- Neighbours very distressed.
- Abatement Notice served, breached and summons served to prosecute.



## (4) Vulnerable D: prosecution?



- LA received note from care co-ordinator that D uses music to manage symptoms (it has a therapeutic use), doesn't appear to have capacity to know she is playing music loudly, cognitive issues, unable to retain information, doesn't understand she is being prosecuted.
- Immediate issues:
  - Capacity to make a decision to obey abatement notice?
  - If lack of capacity in that domain is in the public interest to prosecute?
  - If capacity in that domain is she fit to plead? As a first stage in that assessment does she have capacity to conduct a defence?

## (4) Vulnerable D: prosecution?



- Real issue: how to stop the ASB?
  - If lacks capacity (around playing music loudly) may make a best interests decision.
  - If has fluctuating capacity (i.e. loses it when symptoms particularly acute) or capacity then looking at negotiation, persuasion, working with and support D to keep the music down.
- Issues relevant to both to consider include:
  - Remove amplifiers and speakers?
  - Install volume control on equipment?
  - CC to do behavioral work around volume control/time she can play music?
  - Refer to psychiatrist for medication review?
  - Refer to therapy for other ways of managing symptoms?
  - Buy D good headphones so she can play music as loud as she wants?



## Dealing with vulnerable tenants

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