

# Parents who lack litigation capacity and care proceedings

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# The research

- \* Research sponsored by a Nuffield Foundation Law in Society grant to Penelope Welbourne and Philip Bates, Plymouth Law School
- \* An area of practice that has not been researched previously
- \* Three elements to the study: a file study, observations of care proceedings and interviews with legal professionals

# Capacity 1

- \* Significant number of parents involved in care proceedings have a learning difficulty or mental health problem
- \* Some have difficulties that mean they are not in a position to instruct their own legal representative: they lack litigation capacity
- \* For those parents who are judged to lack litigation capacity, the Official Solicitor as 'litigation friend of last resort' instructs their legal representative, usually the same solicitor who was appointed to represent them at the beginning of proceedings.
- \* Capacity is as defined in the Mental Capacity Act 2005 The parent then becomes a 'protected party'

# Capacity 2

- \* Capacity is issue specific, so parents may be able to give instructions on some issues but not others. It depends on the complexity of the issues
- \* Capacity may fluctuate, so someone may have capacity at the beginning of proceedings and lose it, or vice versa, or move in and out of having capacity

# Capacity 3

- \* Decisions about legal capacity start based on the solicitor's experience of taking instructions from their client
- \* An assessment by a suitably qualified professional
- \* The final decision on litigation capacity is made by the judge in the case based on evidence (e.g. reports)
- \* If no-one else is able to act as litigation friend for the party, and there is funding through legal aid, the OS acts as LF

# The Office of the Official Solicitor

- \* The OS Office is an arm's length body within the Ministry of Justice
- \* Practice Direction 15A – the OS must:
  - \* • Fairly and competently conduct the proceedings and
  - \* • have no interest in the proceedings adverse to the protected party
  - \* • all steps and decisions taken must be taken for the benefit of the protected party

# The Office of the Official Solicitor

- \* Based in Kingsway, London: Alastair Pitblado is the OS
- \* Caseworkers – point of contact in London
- \* OS presents ‘arguable’ case in child care proceedings, but has duty to consider all the evidence and the child’s best interests as well as the wishes of the protected party

# MCA 2005 s2 – people who lack capacity

- \* 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.
- \* May be permanent or temporary impairment / disturbance.
- \* Cannot be established merely by reference to age or appearance, or a condition the person has, or an aspect of his behaviour, which might lead others to make unjustified assumptions about capacity.
- \* Any question whether a person lacks capacity within the meaning of the 2005 Act must be decided on the balance of probabilities.



# MCA 2005

## **S3 - Inability to make decisions**

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

# MCA 2005 s3 cont'd

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of (a) deciding one way or another, or (b) failing to make the decision

# Equality Act 2010

## PSED

- \* The public sector Equality Duty (PSED) requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities.
- \* Reasonable adjustments for people with disabilities include: removing or minimising disadvantages suffered by people due to their disability; meeting the needs of people with disabilities, and encouraging them to participate in public life or in other activities where their participation is low

# Advocates and intermediaries

- \* Very important roles to enable participation in discussion with the solicitor, and for speaking to the court, if the parent wishes to do so
- \* Some parents want to be in court to hear the process, sometimes to talk to the judge, to address the court, other do not
- \* Intermediaries have very important role in court – participation only possible with adequate support
- \* Advocates also very important for participation , e.g. supporting meetings with solicitors, getting to court, helping with the interface with other services

# File study

- \* Characteristics of parents who become represented by the OS over one year
- \* Gathered information on age, gender, child characteristics, nature of difficulty leading to lack of capacity, frequency of fluctuations in capacity, final submission and recommendations by the OS and other parties, case outcome

# Court observations

- \* Participation by parents in proceedings
- \* Issues identified by solicitor
- \* Court process and representation of parents' perspectives and wishes

# Interviews with justice system professionals

- \* Cafcass Children's Guardians
- \* Judges
- \* Solicitors
- \* Local Authority lawyers
- \* This stage of the study is in progress- some last interviews still to be carried out.

# overview

- \* Positives and areas of stress for parents who lack litigation capacity
- \* Implications for parents - legal and personal
- \* Contextual factors affecting parents with mental health or learning disability issues when they are involved in care proceedings



# Different scenarios

- \* OS becomes involved in cases in which:
- \* There is a crisis and lack of capacity is associated with an acute event
- \* There is a long standing condition which affects capacity
- \* Sometimes fluctuating capacity can mean people move in and out of being users of support services, and in and out of having litigation capacity

# the research context

- \* Depending on their personal history, parents who lack litigation capacity may have a long history of service involvement (health, social care, special educational support) but many do not
- \* Ensuring parents get the best support they can have is important if they are to have the best chance of coping during proceedings, and maybe retaining the care of their children, or a role in their lives

# Planning for after the end of proceedings

- \* While care proceedings are about how a child is to be looked after when the proceedings end, an application for a care order is not the start of an 'all or nothing' process: parents may still have involvement with the child after the order is made
- \* Graduation of outcomes in terms of limitations on ability to fulfil a parental role: adoption / care order with foster care / care order family carers / SGO / CAO / supervision order
- \* Support to make a contribution after the case ends if adoption is not the plan – starting during court process

# Supporting parental involvement

- \* Proceedings must consider the potential role of the parent in the child's life even if they cannot be the child's main carer
- \* The protected person's legal team, including the OS, must consider contact
- \* What are the resource implications– support needs of parent and child, child's carers?
- \* Can courts, legal representatives, Office of the OS and service providers co-ordinate over this?

# S20, capacity and consent

- \* S20 Children Act 1989 – allows LA accommodation of children with parental consent – avoids going to court for a care order under s31 Children Act 1989
- \* children can be in care for an unspecified period of time (in the Act)
- \* 1989 Act does not specify that there has to be consent, only the absence of an objection
- \* Rights issues – Art 6 and 8 1989 Act

# Need evidence the parent did consent

- \* N (Children) (Adoption: Jurisdiction) [2015] EWCA Civ 1112, Munby P : Although there is no legal requirement for the agreement to be evidenced in writing, a prudent local authority will surely always wish to ensure that an alleged parental consent in such a case is properly recorded in writing and evidenced by the parent's signature. (November 2015)

# Capacity and consent– Coventry City Council v C, B, CA and CH [2013]

- \* "i) every social worker obtaining consent to accommodation of a child from a parent (with PR) is under a personal duty to be satisfied that the person giving consent does not lack the required capacity;
- \* ii) the social worker must actively address the issue of capacity, take into account all the prevailing circumstances... in particular the mother's capacity to use and weigh all the relevant information;
- \* iii) if the social worker has doubts about capacity, no further attempt should be made to obtain consent on that occasion. Advice should be sought from the social work team leader or management.“

# S20 a short term measure

- \* "Section 20 may, in an appropriate case, have a proper role to play as a short-term measure pending the commencement of care proceedings, but the use of section 20 as a prelude to care proceedings for a period as long as here is wholly unacceptable. It is, in my judgment, and I use the phrase advisedly and deliberately, a misuse by the local authority of its statutory powers." Munby, P in N (children) (Adoption: Jurisdiction) [para 157]
- \* Advisable to use s20 only days for a baby, a few weeks for an older child before issuing s20 proceedings (if the child is to stay in care)



Cannot be asked to make any other ‘  
contractual’ arrangements

“I am exceedingly sceptical as to whether a parent can lawfully contract out of section 20(8) in advance, as by agreeing with the local authority to give a specified period of notice before exercising their section 20(8) right.”

Munby, P in N (Children) 2015

# Not under duress

- \* “[M]... was made to understand that if her agreement was not forthcoming, public law proceedings would have been instigated. I cannot believe that section 20 was enacted in order to permit a local authority to assume control over the lives of the mother and her children in this way.” Re W (Children) [2014] EWCA Civ 1065
- \* Re P (a child: use of s20) [2014] “...in these situations the LA holds all the power” – positive consent, not based on duress or consent by omission

# Newcastle

- \* Newcastle City Council v WM & Others [2015] – M had severe learning difficulties – represented by OS in care proceedings –
- \* question whether she ever had capacity to consent –
- \* LA did not follow ‘Coventry’ guidance –
- \* accommodation unlawful, payment of damages to mother

# Medway

- \* "it is quite clear that there was never a lawful accommodation of T in the first place to object to. And therefore these concessions fall short of acknowledging the initial and fundamental failing of Medway Council to respect the mother and T's rights to family life, by respecting the need to obtain her consent, and/or assess her capacity to do so, and issue proceedings if consent could not be properly obtained from the outset." *Medway Council v M & T* [2015] [para 55]

# Questions

- \* What might be helpful?
- \* What are the strengths of the current system?
- \* What further research is needed to understand the issues better?