



PUMP COURT

CHAMBERS

Capacity issues in family proceedings - the overview from England & Wales

Jenna Lucas



www.pumpcourtchambers.com

1



PUMP COURT
CHAMBERS

What is capacity?

- ❖ Mental Capacity Act 2005 ('MCA') – adults aged 16 and over
- ❖ Mental Capacity Act Code of Practice
- ❖ Section 1 MCA:
 - *S.1(2) – A person must be assumed to have capacity unless it is established that they lack capacity*
 - *S.1(3) – A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success*
 - *S.1(3) – A person is not to be treated as unable to make a decision merely because they would make an unwise decision*
 - *S.1(5) – An act done or decision made under the act for or on behalf of a person who lacks capacity must be done, or made, in their best interests*
 - *S.1(6) – Before the act is done or decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action*

2

What is capacity?

Re P (Abortion) [2013] EWHC 50 COP, Hedley J:

(The intention of MCA) is “...not to dress an incapacitous person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do”.

3

Who decides?

Masterman-Lister v Brutton & Co (Nos.1 and 2)
[2002] EWCA Civ 1889

- It is for the court to determine if a litigant has capacity, or not, taking account of all of the available evidence.

Capacity assessments – an expert report?

- Type of expert
- Part 25 FPR 2010 – “necessary”

4

How is capacity assessed?

Test for capacity:

- Is there an impairment of, or disturbance to, the functioning of the mind or brain?
And if so;
- Is the impairment or disturbance sufficient that the person is unable to make *that particular decision*?

5

How is capacity assessed?

The MCA provides that a person is unable to make a decision if they are unable to:

- *Understand* the information relevant to the decision;
- *Retain* the information;
- *Use or weigh* the information;
- *Communicate* his or her decision (by any means).

6

General or issue specific?

Dunhill v Burgin [2014] UKSC 18, Lady Hale approved the approach that capacity is determined in relation to a discrete issue and not in general:

“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.”

Richardson-Ruhan v Ruhan & Ors [2021] EWFC 6, Mr Justice Mostyn – litigation capacity cannot depend on having legal advice:

“The capacity to conduct proceedings cannot depend on whether the party receives no legal advice, or good legal advice or bad legal advice. If the party would be capable of making the necessary decisions with the benefit of advice then she has capacity whether or not she actually has the benefit of that advice.”

Implications

- ❖ Litigation friends
- ❖ Capacity to litigate doesn't mean a person lacks capacity to give evidence
- ❖ Participation directions
- ❖ Ground rules hearings
- ❖ ND v LD (Financial Remedy: Needs) [2022] EWFC B15