



**Challenging Capacity Assessments:  
Case Law and Procedure**

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**What today will cover**

Capacity assessments in Family Proceedings and what to do if you disagree with an expert assessment.

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**Mental Capacity Act 2005 (MCA)**

1. Principles

(1) The following principles apply for the purposes of this Act

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) 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.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the 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.

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### S.2 (1) MCA provides

- 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.

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### S.2 (2) MCA provides

- It does not matter whether the impairment or disturbance is permanent or temporary.

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### S.2 (3) MCA provides

- 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.

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## S.2 (4) MCA provides

- 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**.

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## Burden of Proof

- In Masterman-Lister, Kennedy LJ at paragraph 17;
- “It is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved, and that the burden of proof rests on those asserting incapacity”.

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## S.3 MCA provides

- (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).

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## Two-part Test

- The Act therefore contains a two-part test of capacity with diagnostic and functional elements:
- a. Is there an impairment of, or disturbance in the functioning of, the person's mind or brain? The disturbance may be permanent or temporary and no reference is made to the degree of impairment or disturbance; and
- b. Is the person 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.

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## The test of capacity is decision-specific

- ".....the test to be applied, as it seems to me, 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" para 75, Chadwick LJ
- **Masterman-Lister v Brutton & Co and Jewell & Home Counties Dairies [2003] 1WLR 1511 CA**
- Endorsed by the Supreme Court in **Dunhill (A Protected Party By Her Litigation Friend Tasker) v Burgin (Nos 1 and 2) [2014] COPLR 199, SC**

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## Is our client able to

- (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).
- An inability to undertake any one of these four aspects of the decision making process set out in s 3(1) of the 2005 Act will be sufficient for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of, the mind or brain.

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**FPR 2010 PD15B**

- 1.1 The court will investigate as soon as possible any issue as to whether an adult party or intended party to family proceedings lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings. An adult who lacks capacity to conduct the proceedings is a protected party and must have a litigation friend to conduct the proceedings on his or her behalf.....

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**FPR 2010 PD15B**

- 1.2 Any issue as to the capacity of an adult to conduct the proceedings must be determined before the court gives any directions relevant to that adult's role in the proceedings. Where a party has a solicitor, it is the solicitor who is likely to first identify that the party may lack litigation capacity. Expert evidence as to whether a party lacks such capacity is likely to be necessary for the court to make a determination relating to the party's capacity to conduct proceedings. ....

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**FPR 2010 PD15B**

- 1.3 If at any time during the proceedings there is reason to believe that a party may lack capacity to conduct the proceedings, then the court must be notified and directions sought to ensure that this issue is investigated without delay. The presumption of capacity should not be forgotten.....

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## FPR 2010 PD15B

- 1.3 continued ..... Where a party has a solicitor, the starting point is whether that solicitor has concerns about the party's capacity to litigate.

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## RP v Nottingham City Council & The Official Solicitor [2008] EWCA Civ 462

Obiter Wall LJ at Para 47;

"There is, however, a further point which needs to be understood and emphasised. Both the relevant rules of court and the leading case of Masterman-Lister make it clear that once either counsel or SC had formed the view that RP 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.....For present purposes, it is sufficient to state that in my judgment it would have been a serious breach of her professional and ethical code were SC to have continued to take instructions from a person whom she had reason to believe did not have the capacity to instruct her. She was, accordingly, duty bound to seek a professional opinion on RP's capacity to do so."

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## Notes to the Certificate as to Capacity to Conduct Proceedings

"If a person is represented by a solicitor, the solicitor will usually be the first to recognise or suspect that the person (their client) may lack litigation capacity. This is because the solicitor is in a unique position to make an assessment about their client's litigation capacity, as it is the solicitor who explains the information (including legal advice) relevant to the making of the decisions involved in conducting the proceedings."

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### Case Law

- In **WBC (Local Authority) v Z and others [2016] EWCOP 4**, Cobb J adopted the summary of the law relevant to capacity as summarised by McDonald J in **Kings College Hospital NHS Foundation Trust v C and V [2015] EWCOP 80** at paragraphs [25]-[39]

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### The decision is a matter for the Court

- Usually, the Court will have the benefit of medical evidence “but the expert’s opinion, however authoritative, is not conclusive” (**Bailey v Warren [2006] EWCA Civ 51**, para 87)

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### Steps to take

- Alert the Court and other parties as soon as is practicable.
- Can a second opinion be obtained?
- Set out concerns
- **Re Cs v FB [2020] EWHC 1474**

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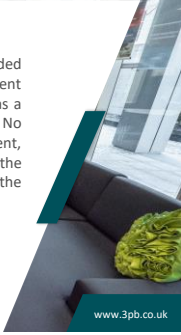
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