



## Losing capacity

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It is trite to say that the breakdown of a marriage can be one of life's most distressing challenges. This is particularly true when emotions of hurt and loss are compounded by intense litigation in the Family Courts. The costs of a divorce, both financially and emotionally, can rapidly accumulate and - despite the best efforts of professionals - issues of mental capacity regularly arise in the Family Courts. This article offers a brief summary of the legal position in cases where a client's capacity becomes an issue.

The starting point is that once a legal adviser reasonably entertains a doubt about a client's capacity to give proper instructions, it is that adviser's professional duty to satisfy him or herself that the client either has or does not have the capacity to give instructions (*P v Nottingham City Council & the Official Solicitor [2008] EWCA Civ 462*, para 99).

When making that assessment of capacity, the legal adviser must bear in mind:

- 1 The assumption of capacity** - a person must be assumed to have capacity unless it is established that he lacks capacity (Section 1 (2) of the Mental Capacity Act 2005);
- 2 The definition of lacking 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 (Section 2 (1) of the Mental Capacity Act 2005); and
- 3 The nuanced nature of capacity** - it can be issue and time specific: for example, a person may have capacity to litigate in a simple case whilst lacking the capacity to litigate in a highly complex case (*Sheffield City Council v E & S [2004] EWHC 2808 (Fam)*, para 39).

In relation to active proceedings, any issue as to the capacity of a party to conduct proceedings must be determined before the court gives any directions relevant to that party's role in the proceedings. Expert evidence as to whether a party lacks capacity is likely to be necessary for the court to make such a determination, although there are cases where evidence from a treating clinician is sufficient (see FPR 15B Rule 1.1).

If a party is found to lack litigation capacity, then he becomes a "protected party". His interests will need to be represented by a litigation friend or, failing that, the Official Solicitor.

If a suitable person is found to fill the role of litigation friend, they must file a certificate of suitability in Form FP9, which confirms that they (a) can fairly and competently conduct the proceedings on behalf of the protected party, (b) have no interest adverse to that of the protected party, and (c) undertake to

pay any costs which the protected party may be ordered to pay in relation to the proceedings (subject to any right that person may have to be repaid from the assets of the protected party). The Court will consider the prospective litigation friend's certificate and, if satisfied, will order that they be appointed as a litigation friend.

If no suitable candidate is found, then the Court will usually make a direction inviting the Official Solicitor to act as litigation friend. That invitation is accepted if (a) there is undisputed evidence as to the lack of capacity, (b) the Official Solicitor has confirmation that there is the security for the costs of legal representation of the protected party, and (c) confirmation that there is no one else able and willing to act as litigation friend and therefore that this is a case of last resort.

The practical consequences of a client losing capacity will depend on the specific circumstances of that case. Those circumstances may range from, on the one hand, a client who is in a medically induced coma and is unquestionably incapacitated - to, on the other hand, a client who has been found to lack litigation capacity in the specific litigation you are conducting - but who is otherwise able to live a relatively normal life. In terms of taking instructions, the incapacitated client may have the benefit of a close relative who is aware of the issues as a litigation friend, or you may have to resort to the Official Solicitor, with no knowledge of the incapacitated person beyond the papers.

Particularly in active litigation, practitioners have a difficult task in navigating their way through these legal complexities, whilst prioritising the incapacitated client's health. It is important that any solution is tailor made to the specific facts of the case, so as to bring about a sensible resolution of any litigation whilst also safeguarding the incapacitated client's medical needs.

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