
GARDEN COURT
CHAMBERS

Representing incapacitous clients in housing cases

Part 1: litigation capacity, practice and procedure

Angharad Monk, 5 December 2023

Litigation capacity sources and guidance

- Mental Capacity Act 2005 – defines mental capacity and the approach to assessment
- Civil Procedure Rules 1998 Part 21 – contains civil procedure in respect of protected parties (including those without litigation capacity)
- The Law Society's "*Working with clients who may lack mental capacity*" (27 June 2023)
- The Bar Council Ethics Committee document "*Client Incapacity*" (last reviewed 1 October 2023)
- Chapter 5 of the Equal Treatment Bench Book (revised April 2023) – very helpful facing difficult judicial approaches

Meaning of litigation capacity

Section 2 MCA 2005:

"People who lack capacity

(1) 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.

(2) It does not matter whether the impairment or disturbance is permanent or temporary. […]"

- Decision specific
- Can fluctuate
- Causes can be broad-ranging

Meaning of litigation capacity (continued)

Section 3 MCA 2005:

"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)."

Backdrop is the first principle under section 1 MCA 2005:

"A person must be assumed to have capacity unless it is established that he lacks capacity." (the presumption of capacity)

Meaning of litigation capacity (continued)

Masterman-Lister v Brutton & Co [2002] EWCA Civ 1889 [2003] 1 WLR 1511

"the test to be applied [...] 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. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a [...] litigation friend."

It was accepted by the Court that *"the mental abilities required include the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision."*

How doubts as to litigation capacity can arise

- The need to investigate litigation capacity will most likely be identified by the person's solicitor, who will then seek medical opinion.

- Where an opponent of a litigant in person suspects a lack of capacity on the part of the litigant in person it may be appropriate to bring the issue before the court (***Masterman-Lister v Brutton & Co,*** para 30)

- The court itself may raise the issue:

"*courts should always, as a matter of practice, at the first convenient moment, investigate the question of capacity whenever there is any reason to suspect that it may be absent. That means that even where the issue does not seem contentious a district judge who is responsible for case management will almost certainly require assistance of a medical report before being able to be satisfied that incapacity exists*" (***Masterman-Lister v Brutton & Co, para*** 17)

What happens when there are doubts as to litigation capacity?

- No step to be taken in proceedings until the protected party has a litigation friend, or without the permission of the court (save for issuing and serving a claim form or applying to appoint a litigation friend). Any step that is taken without a litigation friend is of no effect unless otherwise ordered - **CPR 21.3.**

- Part 21 assumes the court knows that the litigant lacks capacity. No provisions at present in relation to the assessment of capacity. Unhelpful lacuna.

- Equal Treatment Bench Book:

"Courts should always investigate the question of capacity at any stage of the proceedings when there is any reason to suspect that it may be absent. This is important because, if lack of capacity is not recognised, any proceedings may be of no effect" **(para 42)**

What happens when there are doubts as to litigation capacity?

- *Equal Treatment Bench Book:*

"The presumption of capacity is important and ensures proper respect for personal autonomy, Courts should not allow arguments about litigation capacity to be used unscrupulously. However, when there is good reason for cause for concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity." (para 43)

See comments of HHJ Lazarus in ***Z v Kent County Council*** [2018] EWFC B65:

"[The presumption of capacity] is emphatically not there to obviate an examination of such an issue. Nor can it have been Parliament's intention to place a vulnerable person in danger of their lack of capacity being overlooked at the expense of their rights by a slack reliance on this Presumption[…]"

- *Unfortunately it still happens!*

What happens when there are doubts as to litigation capacity?

- A legal representative informing the court of their concerns that their client lacks capacity ought to be enough to give rise to legitimate doubt. Must be wary of breaching confidence of client in giving information to the court as to reasons for doubts, tricky when judges push or threaten to proceed notwithstanding your concerns.

- Matter should be adjourned for capacity evidence to be obtained – helpful to have approached experts and have dates available.

- No other orders, including costs orders, should be made.

Getting evidence

- Capacity generally to be determined with reference to expert evidence, likely a psychiatrist or in the case of learning disability, a psychologist.

- Expert will need to complete the Certificate as to capacity to conduct proceedings form. May also be asked to write a more detailed report. Careful letter of instruction advisable.

- May want to consider having the report look at additional aspects of capacity / disability in the meaning of section 6 Equality Act 2010, looking ahead to case progression following resolution of litigation capacity issues, but: **ask for aspects of report not directly addressing litigation capacity to be kept separate!**

What to do with expert capacity evidence

- The Certificate as to capacity to conduct proceedings form will need to be provided to the court. If there is an additional expert report often appropriate to file this also as court will need to assess capacity based on evidence.

- Should the report and certificate be served? Tricky issue and some disagreement. Will look at ***Folks v Faizey*** [2006] EWCA Civ 381, [2006] CP Rep 30 as to the degree to which capacity is an *interpartes* issue.

- This author's view: it is inappropriate to serve capacity evidence (which contains confidential information) at the very least until there is a litigation friend to provide instructions. This is consistent with the Law Society guidance in respect of the automatic termination of retainer following loss of capacity.

- Opponents often demand to see it, Judges may order it be disclosed. No easy solutions in those circumstances. If serving, minimise impact of disclosure by limiting to matters directly relevant to litigation capacity. Hence separate report – otherwise consider redaction.

Where impossible to obtain medical evidence

Where medical evidence cannot be obtained:

"*The absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind.*" Sir Raymond Jack, ***Baker Tilley (A Firm) v Makar*** [2013] EWHC 759 (QB); 3 Costs LR 444.

Medical evidence not always necessary – relevance of overriding objective

In ***Hinduja v Hinduja*** [2020] EWHC 1533 (Ch), [2020] 4 WLR 93 the daughter and carer of the proposed protected party filed a certificate of suitability stating her father lacked capacity to conduct the litigation because of "age-related disease". The other parties opposed the appointment of a litigation friend.
Falk J held "*medical evidence is not required under the rules and I do not think that it is necessary, or that it would be in accordance with the overriding objective, to require it in this case. I am sufficiently satisfied by the evidence before me that SP lacks capacity to conduct these proceedings*".

Where impossible to obtain medical evidence

Masterman-Lister emphasises need for medical evidence.

"*The absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind.*" Sir Raymond Jack, ***Baker Tilley (A Firm) v Makar*** [2013] EWHC 759 (QB); 3 Costs LR 444.

HHJ Lazarus reviewed Court of Appeal authority on this issue in a detailed and persuasive judgment in ***Z v Kent*** and draws the following conclusions:

"s) This may enable courts faced with this challenge where there is no expert or medical assessment evidence to meet the absolute requirement that capacity issues must be fully addressed and determined, and to do so by reaching appropriate pragmatic evidence-based decisions, while ensuring that both the overriding objective and the protected party's rights are fully in mind.

[…]

Where impossible to obtain medical evidence (Cont.)

[…]

t) Such a determination could be based on a careful review of the other relevant material that may be available, such as a report from a clinician who knows the party's condition well enough to report without interviewing the party (if available and appropriate), other medical records, accounts of family members, accounts of the social worker or other agency workers who may be supporting the parent, and occasionally direct evidence from a parent.

u) Any such finding made without expert assessment evidence that leads to a declaration of protected party status due to lack of litigation capacity could always be reviewed upon expert evidence being obtained to suggest that the finding was incorrect, and by ensuring that the question of assessment is regularly revisited with the protected party by their litigation friend, their solicitor and the court. Such a review and correction is anyway the case where a party has regained capacity and the issue is addressed with the benefit of an updating expert opinion."

Where impossible to obtain medical evidence (Cont.)

- Where asking the court to determine capacity without expert medical evidence, may often be a good idea to seek an *ex parte* hearing with the potential protected party and legal representatives present (but not other parties), in order that the judge can test capacity.

- Another option?

Equal Treatment Bench Book at para 49:

"Where there are practical difficulties in obtaining medical evidence, the Official Solicitor may be contacted, although doing so should be a measure of last resort and all other options should be explored as the Official Solicitor is overburdened and has limited resources. Because of this, involving the Official Solicitor will also result in delay to the process."

- Unclear what this will achieve, or how the Official Solicitor might respond to contact.

Disputes about whether a party lacks litigation capacity

When can one party contest the other party's incapacity to litigate?

Folks v Faizey [2006] EWCA Civ 381, [2006] CP Rep 30

The Claimant claimed damages arising out of a road traffic accident. It was accepted that he was incapable of managing his affairs. An application was made supported by medical evidence for the appointment of a litigation friend. The Defendant opposed the application. The judge ordered a trial of the matter as a preliminary issue. The Claimant appealed.

Held:

- The Defendant had not put forward any good reason why he was opposing the appointment. The court suspected that it was because he thought the court would be more generous where a party had a litigation friend, but that was difficult to contemplate given it was already accepted that the Claimant was incapable of managing his own affairs
- The rules as to capacity are not designed to create additional litigation, the result of which will have minimal effect on the main action

Disputes about whether a party lacks litigation capacity

(***Folks v Faizey*** continued)

- There is no entitlement for the other party to put in its own evidence to dispute the evidence filed in support of an application to appoint a litigation friend

- There may be cases where the proposed protected party disputes the need for a litigation friend and there could be cases where the other party to the litigation may have a legitimate interest

- However in a situation where the proposed protected party and the litigation friend both consent to the appointment, there is adequate evidence to support the appointment, and no evidence to suggest the application is not bona fides, the court should make the order sought.

Disputes about whether a party lacks litigation capacity

(***Folks v Faizey*** continued)

"In this case, those advising the respondent, without any plausible reason in terms of protecting the respondent's own position, have sought to interfere in a procedure with which they were only minimally concerned. Indeed, the appointment of a litigation friend would give them protection to them as well as to the appellant and his advisors. I should not wish to describe the opposition as an abuse of the process of the court but in my judgment it is an intermeddling, for no sound reason, which the judge, on the evidence available, ought not to have tolerated."

(para 19)

- In summary, there may be situations in which litigation capacity raises issues which are of relevance to *interpartes* issues, but absent any particular relevance to the other parties their involvement is "intermeddling" and ought not to be permitted! Still happens a lot in housing cases.

Selecting a litigation friend

- As a first step a legal representative should try to identify a suitable person.
- Must have no interest do not conflicting with the protected party and be able to make decisions about the case in a fair and competent way (**CPR 21.4(3)**)
- Should advise carefully on the nature of the role and the case.
- Should advise litigation friend on costs liability. Claimant litigation friends must sign an undertaking in respect of liability for costs, and not impossible for Defendant litigation friends to be held liable, though this will not be the usual approach absent bad faith, improper or unreasonable behaviour and prospect of personal benefit (***Glover v Barker*** [2020] EWCA Civ 1112)
- Seek undertakings from the other side not to seek costs against the litigation friend. In their interests if they are Claimant and want proceedings to progress.

Selecting a litigation friend (Cont.)

- If no suitable person, the Official Solicitor will need to be approached. Can be a slow process and may need adjournment to await response. Court should usually be accommodating as long as legal representatives have done all they can.

Appointment of a litigation friend (Cont.)

Appointment without court order by way of filing a Certificate of Suitability pursuant to **CPR 21.4-5.**

- Must also serve the certificate of suitability on every person on whom, in accordance with rule 6.13 (service on a parent, guardian etc.), the claim form should be served (note does not include the other side). Must also file a certificate of service when filing the certificate of suitability. **(CPR 21.5(5) and 6.13)**

- Where the grounds for believing that a protected party lacks capacity to conduct the litigation are based on expert opinion, a copy of such opinion must be served, either with the certificate of suitability or separately. **(CPR 21.5(6))**

Court can also order appointment of litigation friend under **CR 21.6,** may be on application.

Removing the litigation friend

CPR 21 procedure for seeking to remove a litigation friend:

- under **CPR 21.7** the court may terminate a litigation friend's appointment on an application supported by evidence

- the court may also exercise its powers of its own initiative: **CPR r 3.3(1).**

- Cautionary tale for judges planning to refuse a litigation friend's application to be removed… ***Major v Kirishana*** [2023] EWHC 1593 (KB). Court held that where the conditions were no longer satisfied or the litigation friend no longer consented to act, exceptional circumstances would be required for the appointment to continue.

Thank you

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Representing incapacitous client's in housing cases: 2

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5 December 2023

What we are going to look at

- Possession proceedings
  - Capacity and risk of intentional homelessness?
  - Capacity and pre-action protocol
  - Anti-social behaviour cases
  - Injunctions – enforcement/alternative accommodation
  - Hoarding – AC and GC (Capacity: Hoarding: Best Interests) [2022] EWCOP 39 (15 August 2022) (bailii.org)
  - Succession cases:
    - Children
    - Adults and human rights?
  - How can the Court of Protection help with accessing specialist forms of alternative accommodation – supported living/residential care: Interaction with the Care Act 2014
- Sharing of evidence – County Court and COP what steps do you have to take.
- Outline and application of discrimination cases.

Mental Capacity: tenancy/licence

- If someone, notably a landlord, has evidence that a person lacks mental capacity when it comes to a tenancy, they cannot enter into a tenancy agreement, assign/vary a tenancy, or end the tenancy. Voidable? Nullity? Knowledge of the landlord
- Tenant may become lacking in capacity in terms of management of the tenancy and compliance with its terms
- Ability to contract *Chitty* – common law ability to contract and tenancies in Equity – held on Trust?
- If lacks capacity – may need someone to act on Tenants behalf
  - Court appointed deputy – entering into a tenancy, terminating or managing rent.
  - Someone with lasting powers of attorney – similar power
  - An order of the Court which makes provision to enter, assign or vary, or end a tenancy.
  - Litigation Friend in possession proceedings Part 21 CPR.
- Applications for Welfare Benefits, s 7 MCA 2005: Appointees.
- ***Wychaven District Council v EM [2012] UKUT*** 12 (AAC). The tribunal held that a purported tenancy agreement was a nullity as the occupant was so severely disabled as not to be capable of indicating any assent thereto but went on to hold that she was entitled to housing benefit because the supply of the accommodation had been necessary.

Possession: Capacity and intentional homelessness

- Intentional homelessness s 191 HA 1996 (1) and (1A), (2) and (3).
- 9.17 (E) Code of Guidance: Does not easily match s 1 – 4 MCA 2005.

> (b) the housing authority has reason to believe the applicant is incapable of managing their affairs, for example, by reason of age, mental illness or disability;
> (c) the act or omission was the result of limited mental capacity; or a temporary aberration or aberrations caused by mental illness, frailty, or an assessed substance misuse problem;

- Concerns around loss of accommodation due to rent arrears, anti-social behaviour and hoarding
- How can tenancy issues be resolved when tenancy no longer viable?
- An application for homelessness assistance cannot be accepted by a local authority from a person who lacks the mental capacity to make it ***R v Tower Hamlets LBC ex parte Ferdous Begum*** (1993) 25 HLR 3019 (Pre MCA 2005 Authority and pre- HA 1996 authority) also ***Re Garlick.***
- ***Ferdous Begum*** good law after MCA 2005 and the Care Act 2014 as considered s 21 NAA 1948 as the route and was also in context of child in linked case?
- ***WB (by her litigation friend, the Official Solicitor) v W District Council*** [2018] EWCA Civ 928 confirmed ***Ferdous Begum*** good law and identified a deputy could be appointed.

Capacity and the pre-action protocol (not just rent)

- Local Authority officers as professionals must have regard to MCA 2005 Code of Practice s 42 MCA 2005 in particular 42(4)(c). Capacity issue. Safeguarding issue.
- Pre-action protocol: Social housing

Paragraph 1.5 Pre-Action Protocol for Possession Claims by Social Landlords (justice.gov.uk)

Courts should take into account whether this protocol has been followed when considering what orders to make. Social landlords should also comply with guidance issued from time to time by the Regulator of Social Housing, the Ministry for Housing, Communities and Local Government and, in Wales, the Welsh Ministers.

(a) If the landlord is aware that the tenant has difficulty in reading or understanding information given, the landlord should take reasonable steps to ensure that the tenant understands any information given. The landlord should be able to demonstrate that reasonable steps have been taken to ensure that the information has been appropriately communicated in ways that the tenant can understand.

(b) If the landlord is aware that the tenant is particularly vulnerable, the landlord should consider at an early stage–

i. whether or not the tenant has the mental capacity to defend possession proceedings and the extent to which CPR 21 applies;

ii. whether or not any issues arise under the Equality Act 2010; and

iii. in the case of a local authority landlord, whether or not there is a need for a community care assessment in accordance with the Care Act 2014.

- Private Landlords s 35, 15, 13, 114 and 119 EA 2010 may apply: Part 21 of the CPR

Possession basics

- Halt to proceedings: Pragmatic approach (*Bradbury v Paterson* [2014] EWHC 3339 (QB))
- Steps no effect unless court orders otherwise (*Hinduja v Hinduja* [2020] EWHC 2533 (Ch); *Dunhill v Burgin* [2014] UKSC 18)
- The Litigation Friend – Capacity to litigate *P, Re [2021]* EWCOP 27 Para 23 – 41 Comprehensive review of Capacity to litigate, applies *Masterman – Lister* [2003] 1 WLR 1511:
- Court appointed deputy – LF
- To discharge that duty requires the LF to acquaint themselves with the nature of the action and under proper legal advice take all due steps to further the interests of the child or protected party (*Re Whitehall* [1973] 1 WLR 1027 [1030]; *OH v Craven* [2017] 1 WLR 25).
- *Folks v Faizey* [2006] EWCA Civ 381 consent of proposed protected party and litigation friend.
- Applies s 1 – 4, esp s 3 (inability to make decisions) MCA 2005 as a result of disorder of mind or brain, distinct test from under the MHA 1983.
- Distinctions Children under 18 per se lack capacity to litigate. Adults over 16 subject to MCA 2005.
- May also have children who fall under ambit of MCA 2005.
- CPR Part 21 requires court authorisation of settlement. May require appointment of a deputy.

Anti-social behaviour

- Who is causing it? Tenant or family member
- May concern separate matters and issues from that of LF
- Require specialist evidence as to causes of behaviour, mental disorder or disorder of mind or brain. Link to s 15 of Equality Act 2010 and can it be treated or otherwise remedied.
- Anti-social behaviour: *Wookey* competence (*Wookey v Wookey*: Re S (A Minor) [1991] EWCA Civ J0327-14) ability to understand and comply with terms of injunction (Equitable remedy);
- On possession: ability to understand and comply with the terms of a tenancy (specific issues for determination Discretionary and/or mandatory grounds.
- How do you look to resolve issues as does not prevent a possession order being made?
- Assessment of capacity and need s 9 and s 11 Care Act 2014
- Is there an argument that s 19(3) of Care Act 2014 could be used to get around s 23 Care Act 2014 problem as often need a Care and Support Assessment under s 9 Care Act 2014.
- Detention or treatment under the MHA 1983?
- Application to the Court of Protection in parallel proceedings
- Role of the Court of Protection in respect of specialist accommodation supported living or residential care – best interest decision and care needs assessments.

Hoarding

- Difficulty as to whether it is a mental disorder? Does the person lack capacity primarily an issue about decisions about items and belongings
- General issues of capacity by reference to *A Local Authority v JB* [2021] UKSC 52;
  a. Conduct proceedings;
  b. Make decisions as to residence; and
  c. Make decisions as to care and support.

  AND

  (1) Manage own property and affairs;
  (2) Manage other persons property and affairs;
  (3) Make decisions regarding his items and belongings;
  (4) Make decisions regarding other items and belongings.

  Whether should return or remain at home for a trial period receiving a package of care there.

  Whether to appoint a deputy for property and affairs.

Hoarding 2

- What might be the nature of the mental disorder? *Diogenes* syndrome –damage to the frontal lobe and very difficult to manage MacAnespie, H (1975). *"Diogenes Syndrome".* The Lancet. 305 (7909): 750; Historically managed by s 47 of the National Assistance Act 1948. O'Mahony, D; Evans, JG (1994). *"Diogenes syndrome by proxy".* The British Journal of Psychiatry. 164 (5): 705–6.
- Will require specialist medical evidence
- Will generally consider
  - Volume of belongings and impact on room use
  - Safe access and use
  - Creation of hazards
  - Safety of building
  - Removal/disposal of hazardous levels of belongings.
- Participation of the person
- Parallel possession claim and Court of Protection application – same judge
- Effectiveness of Court of Protection orders (a) at care home or (b) rehousing
- What happens if person has capacity?

Succession cases

Dudley Metropolitan Council v Mailley [2023] EWCA Civ 1246

- S 87(b) Housing Act 1985 was not of discriminatory effect in respect of the daughter of a secure tenant by preventing the daughter succeeding to the tenancy on the secure tenant dying while permanently residing at a care home. The daughter could not rely on her status as the daughter of a secure tenant who was removed permanently from her secure tenancy resulting from her ill-health, and also who did not have mental capacity to assign her tenancy to her potential successor, as a protected "other status" within Article 14 of the ECHR. Capacity was determined not to be sound foundation for such a status, as it could change from time to time. Query assignment by a deputy before notice even when lacking capacity?

Succession cases: lessons from Children

A minor can succeed to a secure tenancy: *Kingston upon Thames RLBC v Prince (1998) 31 H.L.R. 794*. The tenant died leaving his 13-year-old granddaughter in occupation. It was held that a minor was capable of being a person in housing law; could hold an equitable tenancy of any property (including under a local authority letting), and could succeed to the tenancy held by a deceased secure tenant. In such circumstances, the property was held on trust for the child until she reached the age of majority.

Where the successor is a minor, and the deceased tenant's will makes provision for the tenancy to be held on trust by an executor, the legal estate will pass to the executor to hold the tenancy on trust until the minor reaches 18, even though the executor is not himself a qualifying successor: *Newham LBC v Ria [2004] EWCA Civ 41, [2004] JHL D37*.

Succession cases: conceptual problems

Mark Pawlowski *Secure tenancies, succession rights and minors* L&T Review 2019. 23(3), 86 – 89

Problem with legal estate does not vest in minor (only until reaches majority) (para 2 sched 1 to TOLATA 1996.

If intestate vest in Public Trustee pending letters of administration or under will legal estate pass to executor.

In both cases legal estate does not vest in person qualified to succeed? S 87 of 85 Act does this preclude a child from succeeding given 85 Act itself presupposes they would

Also cases like *Alexander- David v Hammersmith and Fulham LBC* [2010] 2 WLR 1126 in discharging a statutory duty to accommodate a 16/17 year old not granting a legal estate.

Also possible for a child to succeed to Rent Act 1977 tenancy as not create an estate in land and minor having sufficient capacity to contract for necessities (similar to s 7 of the MCA 2005). , *Portman Registrars and Nominees v Mohammed Latiff* [1987] C.L.Y. 2239; [1988] 18 E.G. 61.

What does this mean for adult successors who lack legal capacity to enter into tenancies and possession? Human Rights and discrimination arguments?

Has anyone seen any such cases or arguments based on lack of capacity similar to *Ferdous Begum*?

Invoking the jurisdiction of the Court of Protection

- Section 48 of the MCA 2005 power to make interim orders – "some reason to believe" – making interim orders, evidence client may lack capacity on particular issue of decision making
- S 50(2) MCA 2005 permission to bring an application "personal welfare"
- Section 47 of the MCA 2005 powers of the High Court – injunctions – could be of value in preventing eviction when disputes over certain types of accommodation cases
- S 15 of the MCA 2005 – power to make declarations – as to capacity and lawfulness of an Act
- S 16 of the MCA2005 – powers to appoint deputies for personal welfare or property and affairs. Powers of the court to make orders.
- S17 on 16 powers MCA 2005– personal welfare – (1)(a) where someone to live. Can also deal with care and contact.
- S 18 on 16 powers MCA 2005: property and affairs
- S 7 MCA 2005 payment for necessary goods and services
- S 20 MCA 2005 appointment of Lasting Powers of Attorney

Making the application to COP

- An application by a local authority or another member of the household but what if no family member via litigation friend
- Appointment of a deputy – interim or final.
- Court of Protection can identify this as an issue.
- Can appoint the deputy and authorise them to make an application, decide on the offer and sign a tenancy (see ***WB***) or terminate a tenancy
- Is this ideal and can it be done urgently – can a tenancy in equity be granted pending a resolution?
- See order appended to ***WB*** WB v W District Council [2018] EWCA Civ 928 (26 April 2018) (bailii.org).
- Is there an argument that s 19(3) of Care Act 2014 could be used to get around s 23 Care Act 2014 problem as often need a Care and Support Assessment under s 9 Care Act 2014.
- Application under Part 6 and 7 Housing Act 1996.
- Role of the Court of Protection in respect of specialist accommodation supported living or residential care – best interest decision and care needs assessments.
- Will require orders from each jurisdiction to admit evidence into the court in the other jurisdictions. Within COP often covered by Transparency Order
- Within County Court and High Court receiving evidence from COP r 39.2(4) orders covering identify and access to documents in those jurisdictions.
- COP can only make decisions on best interests and authorise alternative accommodation as tow what is available and cannot compel LA to make a specific provision

Briefly on discrimination claims

- In possession matters in injunction matters take note of Rosebery Housing Association Ltd v Williams & Anor [2021] EW Misc 22 (CC) (10 December 2021) (bailii.org)
- Pleadings and counterclaim when relying on defences such as s 15, 26, 35, 136 (can also include direct and indirect discrimination) and 149 Equality Act 2010 by use of remedies under s 114 and 119 Equality Act 2010, note s 119 permits declarations, quashing order and mandatory orders in addition to damages.
- On bringing a counterclaim (a claim) will have to notify EHRC.
- Appointment of an assessor
- Damages: be sure to follow updates of *Vento* guidelines.
- Also do not forget that under s 35 EA 2010 this applied also to Private Landlords.

THE END AND TIME FOR QUESTIONS AND DISCUSSION

Thank you

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