

Journal of Elder Law and Capacity

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Journal of Elder Law and Capacity

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The **Journal of Elder Law and Capacity** is a source of information for a range of practitioners dealing in all aspects of elder law and capacity. Published by the Law Society of Northern Ireland, it aims to have UK and international appeal with coverage on legal issues relevant to elder clients, clients with capacity issues, their families and carers.

Submission of content

We welcome the submission of articles for the consideration by the Editorial Panel with a view to publication.

Authors are asked to contact Elizabeth.Dowling@lawsoc-ni.org to obtain a style sheet.

Submission of an article will be held to imply that it contains original unpublished work and is not being submitted for publication elsewhere. All contributions are sent at the author's risk. Please note that where there are references to websites, links to these websites were live at the time of writing.

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In Memoriam Heather Semple 1968 - 2022

In March 2022 we lost Heather Semple, our founding editor and the inspiration behind this Journal. As Head of Library & Information Services at the Law Society of Northern Ireland, Heather was well-placed to appreciate the growth and far-reaching aspects of this area of the law.

She became convinced that it warranted a specialist Journal to address the ever-increasing information and research requests the Library was receiving. Thanks to her considerable editorial experience and well-placed confidence, she knew which enthusiasts she could cajole into action. She carried the day with the Society's Library & Publications Committee and the Journal was born.

Her thoughtful patience and encouragement were valued in equal measure as she managed submissions, rightly proud and delighted as each issue went to print.

Heather's skills, enthusiasm and good humour are all greatly missed. Each time we publish we do so with acknowledgement of her inspiration and thanks for her foresight.

The Role and Functions of the Official Solicitor for Northern Ireland

Mairead Holder, Official Solicitor

The Official Solicitor carries out a vital but sometimes not well understood function in proceedings at County Court level and above. In essence, the role enables the Official Solicitor to act on behalf of minors (those aged under 18) and persons 'under a disability' – those who suffer from a 'mental disorder' which results in a lack of capacity to provide instructions.¹ In these scenarios, the Official Solicitor may be invited to act by a Court to ensure effective representation for those who lack capacity.

As is clear from the above, the Official Solicitor's role is a broad one. Cases vary from family proceedings to civil, chancery and medical declaratory cases. The Official Solicitor represents the legal best interests of both adults 'under a disability' and minors, sometimes with different solicitors from the Official Solicitor's Office acting for different parties in the same case, for example, where both parties are either minors, or lack capacity. The Official Solicitor can act as 'Next Friend' or 'Guardian ad Litem' in proceedings. Next Friend (NF) is the term given to the role when the Official Solicitor acts in the legal best interests of the applicant/plaintiff in proceedings. Guardian ad Litem (GAL) is the term used to refer to the role when the Official Solicitor acts in the best legal interests of the respondent/defendant in proceedings.

Currently the Official Solicitor's Office has a staff of 10 experienced lawyers, including the Official Solicitor, to deal with legal cases. The Office has grown substantially in recent years due to its increased (and increasing) caseload. From around 190 live cases at the end of 2017, the legal caseload has grown to 520 live cases at the end of 2022. The increase is partly due to an overall rise in certain cases before the Courts and to an enhanced awareness among practitioners and the judiciary of the role of the Office.

There are 10 administrative staff in the Office. Some of the administrative staff work in legal support and others work exclusively on the 'full controller' cases, of which there are over 100. These are cases where

¹ Art 3 Mental Health (Northern Ireland) Order 1986.

the Official Solicitor acts as financial controller for persons who lack the capacity to manage their property and affairs.

The Office has been effectively fully paper based until now; however, it will soon have the benefit of a new case management system which will assist in allowing electronic files to be held and accessed, improving ease of working, recording and security.

Statutory Basis for the Role of Official Solicitor

1. The primary statutory provision in relation to the office of Official Solicitor is section 75 of the Judicature (Northern Ireland) Act 1978 (“the Judicature Act”). Section 75(1) of the Judicature Act permits the Department of Justice², having consulted the Lord Chief Justice, to appoint an Official Solicitor.
2. Section 75(2) makes provision for the powers and duties of the Official Solicitor as follows:

“The Official Solicitor shall have such powers and perform such duties as may be prescribed and as may be conferred or imposed on him —

- (a) by or under this or any other Act; or
- (b) by or in accordance with any direction given by the Lord Chief Justice.”

The Rules of the Court of Judicature (Northern Ireland) 1980, Order 110, rule 1 sets out the duties of the Official Solicitor as follows:

- “(1) The Official Solicitor shall conduct such investigations and render such assistance as may be authorised under these Rules or required by the Lord Chief Justice or a court for the purpose of assisting in the due administration of justice.
- (2) The Official Solicitor shall perform such duties as were formerly discharged by the General Solicitor for Northern Ireland.
- (3) Without prejudice to paragraph (1) the Official Solicitor may discharge any function analogous to those performed by

² The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010

the Official Solicitor in England and Wales, which are not the responsibility of some other officer or person in Northern Ireland.”

The appointment of the Official Solicitor as Next Friend (NF) or Guardian ad Litem (GAL) in civil proceedings is governed by:

1. The Rules of the Court of Judicature (Northern Ireland) 1980, Order 80; and
2. The County Court Rules (Northern Ireland) 1981, Order 3, Part II.

For ‘family proceedings’ the role of the Official Solicitor is set out in the Family Proceedings Rules (Northern Ireland) 1996 (“FPR 1996”), Part VI.

Given the above provisions the Official Solicitor is therefore able to act in cases at County Court level and above. She has no statutory or legal authority to act in any Tribunals or at Magistrates’ Court tier.³ The Official Solicitor is also unable to act in any criminal cases.⁴

By way of comparison, the role of the Official Solicitor in England and Wales is narrower in practice than in Northern Ireland. In England and Wales, the Official Solicitor will only act where her costs are secured, and she does not undertake work representing children, which is handled by the Children and Family Court Advisory and Support System (CAFCASS).

Relationship with OCP

The Official Solicitor’s Office (OSO) has a close working relationship with the Office of Care and Protection (OCP). OCP is however a distinct and separate office within the Family Division of the High Court. The general functions of OCP are to process the appointment of Controllers on behalf of the Court and to supervise those individuals in the management of the financial and property affairs of adults who lack capacity to do so themselves (as per Part VIII of the Mental Health (Northern Ireland) Order 1986). OCP also registers Enduring Powers of Attorney and investigates circumstances where the property or finances belonging to an incapable adult appear to be at risk.

³ There is an exception to this further to Statutory Direction under section 75(2)(b) of the Judicature (NI) Act 1978 (dated 06/01/2023) which permits the Official Solicitor to act in limited emergency circumstances at FPC.

⁴ Within criminal proceedings there are other mechanisms and processes to deal with the situation where a party in criminal proceedings lacks capacity, for example, where they are found “unfit to plead”.

The Official Solicitor is regularly involved in acting for 'Patients' who lack capacity involved in proceedings before the Master (Care and Protection).⁵ On occasions, the Official Solicitor is appointed to act in a Controller ad Interim role. Such an appointment would arise in the event that a specific issue has arisen around the proper management of the property and affairs of a Person under Disability or those of a Minor. It is the role of the Official Solicitor as Controller ad Interim to independently ensure the safeguarding and protection of the legal interests of any such vulnerable person, particularly in circumstances where a possible conflict has arisen.

The Official Solicitor is on occasions appointed by Direction/Order of the Court to undertake such investigations and enquiries as are necessary to ensure that the affairs of a person under disability or vulnerable young person are being properly protected. Enquiries can be historic in nature. The Official Solicitor will report her findings to the Court, usually in writing.

In addition, the Official Solicitor acts, at the request of OCP, as financial controller for a limited number of individuals. The appointment of the Official Solicitor as Full Controller tends to occur only in circumstances where no other willing/suitable person is available to act.

As stated above, OCP has an oversight role in relation to all controller cases. Controllers, including the Official Solicitor, are appointed under Article 101 of the Mental Health (Northern Ireland) Order 1986.

Establishing 'Incapacity'

For the Official Solicitor to act on behalf of someone, the person's lack of capacity in relation to the issue and/or to provide instruction in the proceedings must be established. A capacity report must be from a medical practitioner usually a psychiatrist (a report from a psychologist, no matter how detailed or helpful, is not sufficient under the Mental Health (Northern Ireland) Order 1986)). The report must indicate that the person is suffering from a 'mental disorder' as defined within the 1986 Order and that, because of that mental disorder, they lack the relevant capacity.

The test for incapacity requires the person to be unable to do one or more of the following:

- Understand information given to them;
- Retain that information long enough to be able to make the decision;

⁵ Article 97 of the Mental Health (Northern Ireland) Order 1986 defines a 'Patient' as someone that the Court, after considering medical evidence is "satisfied [] is incapable, by reason of mental disorder, of managing and administering his property and affairs."

- Weigh up the information available to make the decision;
- Communicate their decision.

How cases come to the Official Solicitor

Cases come to the Official Solicitor by way of invitation from a Court, usually by way of a Court Order. Early notice from the solicitors in the case is always welcome, as it can take some time for the Official Solicitor's Office to receive the Order and, until that time, the Official Solicitor's Office may be unaware that an invitation has issued. A copy of the relevant papers and, most importantly, any capacity assessment, is required to enable the Official Solicitor to accept and allocate a case to one of the lawyers in Official Solicitor's Office.

Once notification of an invitation and relevant papers have been received, the Official Solicitor will consider the case to assess whether it is one in which it is appropriate for the Official Solicitor to assist. As the Office is publicly funded it is important that the scarce resources are used appropriately and to best effect. The Office is one of last resort and where there is another person who can act other than the Official Solicitor, then they should do so.

In addition, in any case where the Official Solicitor is asked to act for an adult who lacks capacity, it is important that the person's incapacity in relation to the proceedings has been properly established or the Official Solicitor will be unable to act. As stated above, the Official Solicitor's Office is dependent upon the external solicitors providing any relevant capacity reports to the Office when they become aware that the Official Solicitor is likely to be invited into proceedings.

Official Solicitor Acting for Minors

The Official Solicitor is regularly asked to assist minors in a variety of cases before the Court. Often, but not always, a minor will have a parent or relative who can fulfil this role in civil litigation. Where no one else can do so, for example where a conflict arises, the Official Solicitor may be asked to assist.

In family proceedings, further to Rule 6.6 of FPR 1996, the Court may request the assistance of the Official Solicitor or some other person to represent the child. This occurs most often in private law proceedings under the Children (Northern Ireland) Order 1995. When proceedings concern a child the Family Care Centre or High Court may sometimes request that the Official Solicitor acts on behalf of the subject child or children in the proceedings.

The Official Solicitor may also be asked to assist where the child has no suitable adult available to assist the child. One example would be where a Looked After Child (LAC) requires bringing a Judicial Review against a Trust and has no parent who is able to assist as Next Friend.

The Official Solicitor is sometimes asked to assist minor applicants in non-molestation applications before the High Court. The minor must be capable of understanding the proceedings to obtain the leave of the Court to make an application in their own right⁶. Often a parent will have assisted the minor to bring the proceedings; however, due to a conflict (for example the parties being engaged in other related Non-molestation Order or family proceedings), the Court requires the assistance of an independent person to act as Next Friend for an applicant or Guardian ad Litem for a respondent. For younger children, their parent can secure their protection by inclusion in an Order applied for on behalf of the parent.

Official Solicitor acting for minors in private law proceedings under the Children (Northern Ireland) Order 1995

The involvement of the Official Solicitor in family proceedings on behalf of children arises from Rule 6.6⁷ of FPR 1996.

It is notable that:

- a. The Official Solicitor must consent to act.
- b. When appointed she acts as Guardian ad Litem for the child.
- c. The rules apply only to the Family Care Centre and High Court; there is no corresponding provision in the Magistrates' Courts (Children (Northern Ireland) Order 1995) Rules (Northern Ireland) 1996⁸ and thus the Family Proceedings Court is unable to avail of the assistance of the Official Solicitor.

Official Solicitor in public law proceedings under the Children (Northern Ireland) Order 1995

'Specified Proceedings'

It is important to note that the Official Solicitor does not act on behalf of subject children in public law proceedings for children. The Children's Court Guardian Agency for Northern Ireland (previously NIGALA) acts on behalf of subject children in public law proceedings – which are "specified proceedings" under Article 60(6) of the Order.⁹

The Official Solicitor can and does however act for *parents* who lack capacity in either private law or public law proceedings. As stated above,

⁶ *RH v IH* [2009] NI Fam 17.

⁷ <http://www.legislation.gov.uk/nisr/1996/322/article/6.6/made>

⁸ <https://www.legislation.gov.uk/nisr/1996/323/contents/made>

⁹ See *Re: James, A Child: Appointment and Discharge of Guardian ad Litem* [2020] NIFam 2 delivered on 7/2/20.

for the Official Solicitor to act, an assessment and report by a medical professional indicating that the person lacks capacity to instruct their legal team in the proceedings at hand, because of a ‘mental impairment’ under the Mental Health (Northern Ireland) Order 1986, is required.

The Official Solicitor is invited to represent the legal interests of minors involved in Chancery proceedings, or in King’s Bench proceedings, in circumstances where an independent Next Friend is required to ensure that the legal interests of a minor in any such proceedings are duly upheld and protected.

Difficult Situations

Fluctuating capacity

An issue which occasionally arises is that of ‘fluctuating capacity’. With certain medical conditions a person who previously lacked capacity may regain capacity, in which case it is no longer appropriate for the Official Solicitor to act. Where there is a reasonable belief that someone has regained capacity a further capacity assessment will be required to establish this. Should their condition deteriorate, the instructing solicitor should arrange for a further capacity assessment to establish whether their client now lacks capacity in order to enable the Official Solicitor to assist, if appropriate.

Personal Litigants and Incapacity

Occasionally a Court may harbour concerns about the capacity of a litigant in person. Where the litigant is not willing to submit to a psychiatric assessment this places the Court in a difficult position as it strives to ensure a fair hearing. Where there are serious concerns regarding the capacity of a litigant in person to conduct the litigation, the question of that capacity must be determined either by way of a medical assessment, or by the Court itself, before any substantive orders are made.¹⁰

The Official Solicitor of course cannot act on someone’s behalf in the absence of incapacity having been established; however, there are options available to the Court to progress matters. In some circumstances, it may be possible to obtain a medical assessment based on the litigant’s medical notes and records alone.

¹⁰ The principles summarised in paragraphs 42 and 43 of Chapter 5 of the Equal Treatment Bench Book (July 2022) are instructive on this issue.

Although the question of mental capacity to conduct litigation is ordinarily determined with expert medical evidence,¹¹ the requirement in the authorities that medical evidence is “ordinarily” required means that, in the absence of this, the Court is required to make a determination of capacity on the evidence which is before it.¹²

Vulnerable Adults

The inherent jurisdiction of the High Court has been extended to vulnerable adults by virtue of the *Re SA* decision¹³. However, the Official Solicitor can only act where the vulnerable adult lacks litigation capacity (as per the test for capacity above).

Capacity is a complicated matter. It is conceivable that an adult may have capacity to make an underlying decision, but not be capable of dealing with the complexities of the legal proceedings addressing that decision. In such circumstances, a capacity report would be required to establish the lack of capacity in relation to the proceedings in order for the Official Solicitor to be able to assist.

Personality Disorder

The Mental Health (Northern Ireland) Order 1986 has an express exemption for personality disorder under article 3(2).¹⁴ As a result, personality disorder is not classified as a 'mental disorder' under the 1986 Order. This meant that when the Official Solicitor received a request to act for someone whose incapacity was as result of their personality disorder the Office was unable to act. This situation arose on a number of occasions in family proceedings where the person was assessed as lacking the capacity to litigate. To rectify this anomaly and allow the office to act for people who lacked capacity as a result of a personality disorder the LCJ issued a direction to enable the Official Solicitor to do so in family proceedings.¹⁵

¹¹ See *Carmarthenshire County Council v Lewis* [2010] EWCA Civ 1567. See also paragraph 14 of Chapter 5 of the Equal Treatment Bench Book.

¹² See *Z v Kent County Council* [2018] EWFC B65 and *Baker Tilly v Makar* [2013] EWHC 759 (QB)/ [2013] COPLR 245.

¹³ *Re SA* [2005] EWHC 2942 (Fam).

¹⁴ Art 3(2) No person shall be treated under this Order as suffering from mental disorder, or from any form of mental disorder, by reason only of personality disorder, promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs.

¹⁵ See Practice Direction of 4th April 2019 relating to family proceedings which do not fall within the Family Proceedings Rules only by reason of the exclusion in the Mental Health (Northern Ireland) Order 1986 of “personality disorder”. Further to the Direction, Judges and Masters of the Court of Judicature and Judges in the Family Care Centre may invite the Official Solicitor under Rule 6.2.3 of the Family Proceedings Rules to be the guardian ad litem for the purposes of those proceedings if satisfied on the evidence (including any medical evidence) that the individual has a personality disorder.

Other proceedings in which the Official Solicitor may assist

The Official Solicitor can also act in other proceedings when invited to do so by the Court. This can span the full range of civil legal proceedings in the higher Courts. The Court can invite the Official Solicitor to act on behalf of someone lacking capacity in cases as diverse as Chancery, personal injury, judicial review and medical declaratory cases. The Official Solicitor is also appointed to act as GAL or NF in Divorce and Ancillary Relief proceedings before the Court. In all these roles the Official Solicitor is charged with representing the vulnerable person's best legal interests, effectively standing in his or her shoes and taking decisions on his or her behalf, with the approval of the Court.

The Official Solicitor may also have a role in considering the testamentary arrangements of a person under a disability and if deemed appropriate to challenge the making of a will which it is believed has, or may have been, made whilst a person was either lacking mental capacity to make a will or perhaps acting under the undue influence of others.

In a limited number of cases the Official Solicitor may be invited to act as Trustee, either for a Patient or for a young person. Such an appointment could relate to the acquisition and ownership of property. Where no other suitable person may be appointed, the Official Solicitor will, on occasion, act as Guardian of the Fortune in respect of the management of large personal injury settlements invested through the Court Funds Office, Court of Judicature. The Official Solicitor may also be appointed to act in the disposal or transfer of a property on behalf of a minor or Person under Disability.

On occasion, the Official Solicitor can be requested to assist the Court on a legal issue by undertaking the role of *amicus curiae*, meaning "friend of the Court". A Court may seek the assistance of an *amicus curiae* where there is a risk of a complex and difficult point of law being decided without the Court hearing relevant argument. It is important to bear in mind that an *amicus* to the Court represents no-one. Their function is to give to the Court such assistance and guidance as they are able on the relevant law and its application to the facts of the case. As such, they will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts. The Official Solicitor may be invited to take on this role where the issue is one in which their experience of representing children and adults under disability gives rise to special expertise which may be of assistance to the Court.

Examples of cases where the Official Solicitor has acted as *amicus* to the Court include cases involving complex or intractable issues regarding the capacity of one of the parties, or where a party is vulnerable, and incapacity is considered likely but has not been established.

Typical Cases and Scenarios

i. Children Cases – (Official Solicitor acting for the child)

In complex proceedings under the Children (Northern Ireland) Order 1995 before the Family Proceedings Court, the Judge may decide to transfer the case to the Family Care Centre to enable the involvement of the Official Solicitor on behalf of the child. This may occur in complex Article 8 disputes where the judge believes the child requires separate representation. The Official Solicitor also acts on behalf of the subject child or children in proceedings under the 1996 Hague Convention and in some relocation cases (where one parent wishes to move out of the jurisdiction with the child/children).

ii. Care Order proceedings – an example case scenario

In proceedings initiated by a Trust for a Care Order under the Children (Northern Ireland) Order 1995 the solicitor instructed on behalf of the respondent mother realised that their client was becoming incoherent and doubted that she could give instructions. A capacity assessment was obtained (or directed) and the psychiatrist established that the parent had a 'mental disorder' under the Mental Health (Northern Ireland) Order 1986, as a result of which she lacked capacity to give instructions. The Court then issued an invitation to the Official Solicitor to act on behalf of the mother. The solicitor acting for the mother alerted the Official Solicitor's Office to the incoming invitation and provided papers - most importantly - the capacity assessment, to enable the Official Solicitor to consider whether she could act.

In such circumstances the Official Solicitor will consider whether the report establishes a lack of capacity. The Official Solicitor's Office may require further clarification from the psychiatrist if either the 'mental disorder', lack of capacity or the link between the disorder and the incapacity is not clear from the report. Once satisfied, the Official Solicitor will allocate the case to a lawyer from the Official Solicitor's Office who will then provide the instructions to the legal team. It should be emphasised that, although the Official Solicitor lawyer will collaborate closely with the parent, the legal team take their instructions from the lawyer from the Official Solicitor's Office. Where the Official Solicitor and parent differ in their views over what the instructions should be, the legal team must take their instructions from the lawyer from the Official Solicitor's Office as their lay client lacks the capacity to give instructions.

iii. Patient - Restoral Application – an example case scenario

In this scenario an application was made to the OCP for restoral on behalf of a Patient who was deemed to lack capacity and had a controller in place. The Patient's daughter was keen to progress this as she said her father wished to change his will. It transpired that there were two other estranged siblings. The Patient appeared to be very well cared for by the daughter; however, the daughter seemed to be the main beneficiary of the proposed change to the will. The Master invited the Official Solicitor to act on behalf of the Patient to ensure his interests were protected and to avoid any potential conflict.

iv. Patient - Controllership Issue – an example case scenario

A 75-year-old woman had been residing in a care home since suffering a stroke a year before and previously had appointed three persons jointly as Power of Attorney in relation to her affairs. Following the stroke and a medical assessment carried out by a doctor, the woman was found to lack capacity in relation to managing her affairs. Only one of the Attorneys had been effectively acting as Attorney and administering the woman's affairs and property. A controllership application was made to the High Court. The application stated that the lady had no blood relatives. A Full Order was granted.

Since the granting of the Controller Order it came to light that the Patient did in fact have blood relatives albeit outside the jurisdiction. The relatives made an application to the Court to contest the Controller Order. As a result, the Master (OCP) invited the Official Solicitor to act on behalf of the Patient to ensure her interests were independently represented.

v. Medical Declaratory Cases

Medical declaratory cases arise when invasive medical treatment is deemed by medical professionals to be in the best interests of a Patient who lacks capacity. This will frequently involve lifesaving or life changing surgery which may be urgently required. In such cases, the Health Trust will seek relief from the High Court under its inherent jurisdiction to confirm the proposed treatment is in the Patient's best interests.

In such circumstances, the Official Solicitor is appointed to act on behalf of the Patient. Enquiries will be undertaken by the solicitor from the Official Solicitor's Office to include discussion with relevant medical personnel, and where relevant, family members, and a report will be provided to the Court to assist with the Court's analysis of the best interests test. These cases often need to be progressed by the Office urgently and in such circumstances are prioritised upon receipt.

vi. Cases involving elderly or vulnerable people giving gifts or making wills

The Official Solicitor's Office is finding a rising number of cases involving gifts or wills later challenged due to the suspected incapacity of the (often elderly) person. It is extremely important for solicitors to be alert to and abide by the useful concluding comments by Horner J in the case of *Connolly (Maura) as personal representative of the estate of John Joseph Connolly by the Official Solicitor, her next friend v Connolly (Patrick) and Others*¹⁶, which I reproduce in full below:

"42. I consider that a solicitor acting for elderly persons who that solicitor may perceive to be vulnerable because of mental or physical infirmity should always proceed cautiously. If the solicitor has any doubts about the capacity of the elderly person to give a gift or make a will then the solicitor should ensure that the donor is medically examined. If the solicitor has any doubts about the influence being exercised by any person he should ensure that the donor fully understands what he or she is doing and is not operating under the influence of another. Whether it will be proper to infer that this advice has the necessary "emancipating effect," will depend on all the circumstances.

43. Further, the prudent solicitor acting in the circumstances described above will keep a detailed written attendance note of all the steps he has taken to ensure that the donor has capacity and/or the gift is not tainted by undue influence. Memory can be slippery and unreliable. A prudent solicitor will appreciate that it is unwise, if not foolhardy, to have to rely on his or her memory alone should the circumstances of any transaction be challenged in court at a later date."

Costs

In relation to the costs of the Official Solicitor a number of provisions are instructive.

Section 75(4) of the Judicature (Northern Ireland) Act 1978 provides:

"The court may, in accordance with rules of court, order the costs of the Official Solicitor in respect of any business done by him to be paid out of any fund the subject of the proceedings or by any party to the proceedings and such costs shall be ascertained on taxation or measured."

In addition, there are also a number of provisions of the Rules of the Court of Judicature (Northern Ireland) 1980 (as amended), which are relevant.

¹⁶ [2017] NICH 8.

The foremost of these is RCJ Order 110, which makes general provision in relation to the Official Solicitor.

RCJ Order 110, rule 2, makes provision for the costs of the Official Solicitor as follows:

- (1) The costs of the Official Solicitor may be paid out of such fund to which the proceedings relate or by such parties as the court may by order direct.
- (2) All costs of the Official Solicitor shall be ascertained on taxation.

In relation to remuneration, when the Official Solicitor acts as controller the relevant provision is RCJ Order 109 which deals with patients' affairs. Rule 39(1), under the heading of 'remuneration of controller' says:

"Where a controller is appointed for a patient, the Court may, during the control, allow the controller remuneration for his services at such amount or at such rate as the Court considers reasonable and proper and any remuneration so allowed shall constitute a debt due to the controller from the patient and his estate."

In cases where the Official Solicitor acts as Next Friend or Guardian ad Litem where Legal Aid assistance is in place for the litigant, no costs will be sought by the Official Solicitor, with the costs of the private solicitor and counsel instructed borne by the Legal Aid certificate.

In cases such as chancery cases or inheritance disputes the Official Solicitor will claim reasonable costs to cover any outlay for counsel and hours worked. In cases where the Official Solicitor acts for a child in proceedings under the Children (Northern Ireland) Order 1995, or for someone who lacks capacity in medical declaratory cases, the Official Solicitor normally bears her own costs.

Conclusion

The role of Official Solicitor could accurately be described as extremely busy but equally rewarding. Although there is a high volume of work, this has a significant social value and is interesting and varied. The Official Solicitor's Office has an important and significant role in ensuring justice and effective representation for those who lack capacity, often in litigation on key decisions, central to their lives. The staff of the Office place a high value on the importance of protecting the rights of those who require the assistance of the Official Solicitor's Office, as evidenced on a daily basis by the extremely professional, talented and committed team of experienced lawyers and staff working within the Office.

Making legal information accessible and supporting vulnerable clients

Professor Rosie Harding¹

Introduction

In this article, I reflect on findings from five years of doing qualitative empirical socio-legal research with intellectually disabled people, their chosen supporters, and health and social care professionals, on their experiences of supporting everyday legally-relevant decisions.² I also share my experience of working with colleagues to translate legal information into accessible formats as part of a practical follow-on intervention.³ I use these reflections to argue that greater access to legal information in easy read formats would help improve access to justice for intellectually disabled people. It would also help to support disabled people to “enjoy legal capacity on an equal basis to others” as required by Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD),⁴ by shifting emphasis away from the disabled person’s ability to understand legal information (their mental capacity) onto the importance of accessible legal communication.

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² R. Harding and E. Taşcıoğlu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (University of Birmingham, 2017); R. Harding and E. Taşcıoğlu, ‘Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity’ (2018) 8 *Societies* 25; Harding, Taşcıoğlu and Furgalska (2019, *op. cit.*); R. Harding, ‘Doing research with intellectually disabled participants: Reflections on the challenges of capacity and consent in socio-legal research’ (2021) 48 *Journal of Law and Society* S28-S43.

³ Harding, O’Connell and Bragman (2021, *op. cit.*).

⁴ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3. Article 12 is reproduced in the Appendix to the article.

Article 12 CRPD has been the focus of intense academic discussion over the last 15 years.⁵ This is because the realisation of disabled people's rights to enjoy legal capacity on an equal basis with others is pivotal in catalysing the paradigm shift that was sought by proponents of the CRPD.⁶ Yet the right to enjoy legal capacity has been (and in many jurisdictions continues to be) limited by perceived problems in the mental capacity or decision-making abilities of disabled people. Much of the academic discourse around Article 12 has focused on debates about the meaning of the right,⁷ and the place of 'best interests' decision-making in disabled people's lives.⁸ Some recent work has shifted the focus towards the creation of non-discriminatory safeguards to protect the right to enjoy legal capacity.⁹ In this paper, I make an argument for the importance of accessible legal information as a key part of these non-discriminatory safeguards.

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- ⁵ See, for example: A. Dhanda, 'Legal capacity in the Disability Rights Convention: Stranglehold of the past or Lodestar for the future?' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 429-462; M. Bach and L. Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing substantive equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, 2010); E. Flynn and A. Arstein-Kerslake, 'The support model of legal capacity: Fact, fiction, or fantasy?' (2014) 32 *Berkeley Journal of International Law* 124-143; A Dhanda, 'Conversations between the proponents of the new paradigm of legal capacity' (2017) 13 *International Journal of Law in Context* 87-95; A. Arstein-Kerslake and E. Flynn, 'The right to legal agency: Domination, disability and the protections of Article 12 of the Convention on the Rights of Persons with Disabilities' (2017) 13 *International Journal of Law in Context* 22-38; M. Donnelly, R. Harding and E. Taşcıoğlu (eds), *Supporting Legal Capacity in Socio-Legal Context* (Oxford: Hart Publishing, 2022).
- ⁶ K. Booth Glen, 'Changing paradigms: Mental capacity, legal capacity, guardianship, and beyond' (2012) 44 *Columbia Human Rights Law Review* 93-169.
- ⁷ N. Devi, J. Bickenbach and G. Stucki, 'Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities' (2011) 5 *ALTER - European Journal of Disability Research / Revue Européenne de Recherche sur le Handicap* 249-264; G. Richardson, 'Mental Disabilities and the Law: From Substitute to Supported Decision-Making?' (2012) 65 *Current Legal Problems* 333-354; Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Article 12: Equal recognition before the law* (2014); W. Martin and others, *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Article 12 in Capacity/Incapacity Legislation across the UK* (2016); C. De Bhailis and E. Flynn, 'Recognising legal capacity: commentary and analysis of Article 12 CRPD' (2017) 13 *International Journal of Law in Context* 6-21; M. Scholten and J. Gather, 'Adverse consequences of article 12 of the UN Convention on the Rights of Persons with Disabilities for persons with mental disabilities and an alternative way forward' (2018) 44 *Journal of Medical Ethics* 226-233.
- ⁸ M. Donnelly, 'Best interests in the Mental Capacity Act: Time to say goodbye?' (2016) 24 *Medical Law Review* 318; L Series, 'The place of wishes and feelings in best interests decisions: *Wye Valley NHS Trust v Mr B*' (2016) 79(6) *Modern Law Review* 1090-1115; A. Ruck-Keene and A.D. Ward, 'With and without 'Best Interests': the Mental Capacity Act 2005, the Adults With Incapacity (Scotland) Act 2000 and constructing decisions' (2016) 22 *International Journal of Mental Health and Capacity Law* 1-70; J. Coggon and C. Kong, 'From best interests to better interests? Values, unwisdom and objectivity in mental capacity law' (2021) 80 *The Cambridge Law Journal* 245-273.
- ⁹ M.I. Hall, 'Putting the pieces together: Article 12, 'Safeguarding' and the right to legal capacity' in M. Donnelly, R. Harding and E. Tascoglu (eds), *Supporting Legal Capacity in Socio-Legal Context* (2022 *op. cit.*), pp.273-290.

The article is structured as follows. Firstly, I share a story from my empirical research about the experience Gareth,¹⁰ a person with a learning disability, had when making a will. Specifically, I will discuss how the current law on testamentary capacity and safeguards against undue influence failed him when he first made a will. Secondly, I explore current legal frameworks around accessible information in the UK, drawing out the implications of these for legal practice, and reflect on how legal services can be made more accessible to disabled people. I conclude by reflecting on some of the barriers to making legal services more accessible, and the importance of finding ways to overcome these.

How are everyday legal decisions supported in practice?

In the course of the 2016-2017 Everyday Decisions research project,¹¹ and the 2018-2019 Supported Will-Making follow-up study,¹² we interviewed a total of 50 individuals (19 disabled people, 6 informal supporters and 25 health and social care professionals) in England about their experiences of making and supporting everyday legal decisions.¹³ A key finding to emerge from that research was that as the decisions people make became more complicated, paradoxically, the amount of support that disabled people received to help them to make the decision decreased.¹⁴

Health and social care professionals who participated in the research told us of many detailed support strategies that they used to ensure that intellectually disabled people, including those with profound and multiple learning disabilities, were facilitated to make their own choices about what to eat, what to wear or what to do that day. Strategies included using pictures or objects of reference,¹⁵ which helped people to communicate their preferences. Disabled participants reflected on the ways that they used support, from family and friends, personal assistants and from health and social care professionals to help them to make choices about their

¹⁰ To protect the confidentiality of research participants, all participant names used are pseudonyms.

¹¹ Funded by the British Academy Mid-Career Fellowship (MD150026).

¹² Funded by the University of Birmingham ESRC Impact Acceleration Account, and a Philip Leverhulme Prize from the Leverhulme Trust.

¹³ See Harding, Taşcıoğlu and Furgalska (2019, *op. cit.*) and Harding and Taşcıoğlu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (2017, *op. cit.*) for a detailed discussion of demographic characteristics of the research participants in these interlinked research studies. Whilst this research focused on England, similar issues arise across the UK jurisdictions.

¹⁴ Harding and Taşcıoğlu, 'Supported decision-making from theory to practice: Implementing the right to enjoy legal capacity' (2018, *op. cit.*)

¹⁵ F. Jones, T. Pring and N. Grove, 'Developing communication in adults with profound and multiple learning difficulties using objects of reference' (2002) 37 *International Journal of Language & Communication Disorders* 173-184.

lives. However, for more complicated decisions surrounding, for example, where to live or whether to engage in education or work, both disabled people and health and social care professionals reported that there was less targeted support available. Finally, when it came to making substantive legal decisions, including giving formal medical consents, creating lasting powers of attorney, or making a will, disabled people generally reported being very poorly supported, and many social care professionals reported being unable to provide the support that people need, in part through finding such decisions complex themselves.

In other words, a paradox of support emerged through this research: the more complex the decision, the less support is available to cognitively disabled people to make that kind of decision. There are many reasons why that might be. Take, for example, a decision about whether to consent to an elective surgical procedure. The law relating to medical consent requires that a patient gives consent to the surgery before it takes place, for that surgery to be lawful; without consent, it could be assault or battery.¹⁶ The law of negligence also tells us that the patient needs to be warned of the risks involved in any surgical procedure, and that medical professionals have a duty to warn the patient of the material risks.¹⁷ Risk conversations can, of course, be complicated; medical terminology (like legal jargon) can be difficult to understand, and the people to whom a disabled person might ordinarily turn for support may not have much knowledge or understanding of the procedure in question. The Mental Capacity Act 2005 (MCA)¹⁸ provides a legal framework through which a decision can be made in the disabled person's 'best interests' in these circumstances,¹⁹ but only after 'all practicable steps' have been taken to help them to make their own decision, without success.²⁰

Support frameworks that enable disabled people to make their own legally relevant decisions, including more complex legal and medical issues, are therefore essential but not always provided. To bring this issue to life, consider Gareth's story about making a will, which provides an important point of reflection for why better support frameworks are needed in legal practice.²¹

¹⁶ A. Mullock, 'Surgical harm, consent, and English criminal law: When should 'bad-apple' surgeons be prosecuted?' (2021) 21 *Medical Law International* 343-368.

¹⁷ *Chester v Afshar* [2004] UKHL 41; *Montgomery v Lanarkshire Health Board* [2015] SC 11 [2015] 1 AC 1430.

¹⁸ As this empirical research took place in England, my focus here is on the legal framework in England and Wales. Similar issues do, however, arise in other UK jurisdictions.

¹⁹ Mental Capacity Act 2005, s. 4.

²⁰ Mental Capacity Act 2005, s. 1(3).

²¹ Gareth's story, and the following discussion of testamentary capacity have been adapted from Harding, Taşcıoğlu and Furgalska (2019, *op. cit.*).

Gareth's Will

Gareth was a man in his 60s when I met him. He had learning difficulties and sensory disabilities. He had lived with his grandmother when he was younger but had no ongoing relationships with other members of his family. Gareth told me that:

I was given some backdated money from the benefits agency, like an arrears-type thing. And it started me thinking about doing the will seriously. Thinking why squander something which I would never have had in the first place, but what do I put it to use of, and instantly I thought about a funeral plan and my will.

Gareth subsequently paid for a funeral plan and made a will with the support of his Personal Assistant. Time passed, and Gareth's relationship with the Personal Assistant who had previously helped him to make his will broke down, amid strong suspicions about financial abuse.²²

Later, when he was moving house, Gareth and his new Personal Assistant, Catherine, found this will, which Gareth had forgotten he had made. In discussion, it emerged that Gareth had either misunderstood, or had been misled about, testamentary freedom and the law of wills. He thought that he had to name his 'next of kin' in his will, and that he had to leave everything to that next of kin. Gareth and Catherine described this in conversation during our interview:

Catherine: *At the time he went [to the solicitor] with support but the support worker was the person who was benefitting from this. ...If easy read [information] had been there he would have then got the right information and have had time to have processed that information perhaps before. And then the mishap that was made because Gareth didn't truly understand what was going on, wouldn't have happened would it?*

Gareth: *I also seem to remember, I asked the person to be my next of kin and yeah I think I was probably misguided in that thinking that was a [requirement].... I have to say I did misunderstand ... because I wouldn't have been--*

Catherine: *It was really upsetting. When I tried to- when we found the will and we went over it he was really frustrated and got quite upset, because it was [upsetting].*

²² See Harding and Taşcıoğlu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (2017, *op. cit.*) for a more detailed discussion of this allegation.

More recently, Gareth made a new will, with support from Catherine, another support worker and a solicitor. He named both support workers as executors and left his estate to charity. Initially, he had wanted to name only Catherine as his executor, but she persuaded him to name another person as well, “not only to safeguard Gareth, but to safeguard me really” (Catherine). In his interview, Gareth told me: “I’m happier now that I’ve actually done it properly with the right advice. But it does make me wonder, you know, if that advice had been given to me correctly in the first place, as Catherine was saying, I’d probably have a better understanding.”

Gareth was also advised by his solicitor to write a letter accompanying his new will explaining why he did not want to leave anything to his biological family. The reason for this was that Gareth was worried that his family, who he does not see, and who have not supported him during his lifetime, would try to “cash into” his estate. He was therefore supported by Catherine and by his solicitor to include details of his poor relationship with his family in a letter to be stored with his will, to protect his charitable bequests, even though this was upsetting to him, and difficult for him to do.

Gareth’s story raises important questions about how best to safeguard vulnerable testators from abuse and highlights the need for greater levels of accessible information about making a will. Gareth’s story also warns of the potential consequences when legal safeguards are not successful in protecting someone from abuse. Balancing the right to enjoy legal capacity with the importance of safeguards from abuse is one of the major challenges of introducing a legal framework that complies with Article 12 CRPD. Gareth’s story demonstrates how the current approach to supporting vulnerable testators does little to safeguard vulnerable testators at the time they make their will, focusing instead on protections against challenges to the will after death.

Gareth did not say precisely when his first will was made, so we do not know whether the MCA 2005 was in force at the time. He did note, however, that no easy read information about will-making was available to him to help him to make decisions about his will on either occasion. Gareth also suggested that, as well as having easy read information available, it would be helpful for solicitors to have training in how to communicate better with disabled clients, because solicitors cannot know in advance of meeting with a client what their needs might be.

As there was no easy read guide to making a will available to Gareth, during the interactions with his solicitor, Catherine acted as a kind of translator between the solicitor and Gareth. As Catherine put it: “I would say to [the solicitor], ‘sorry can you simplify it?’ And then I would, if Gareth was still struggling, I would simplify it to how I thought he would best understand

it.” Whilst this is an appropriate course of action where a support worker is acting properly, and not looking to benefit personally, it is clear to see how relying on a support worker in this way could create opportunities for those with less virtuous motives.

Support and safeguards when making a will

Whilst robust statistical data is scarce, intellectually disabled people are assumed to be at a higher risk of being victims of financial abuse than non-disabled people.²³ As Article 12(4) of the CRPD makes clear, there is a need for “appropriate and effective safeguards to prevent abuse” when disabled people are being supported to enjoy their legal capacity. This includes protection from financial abuse and harm, including when making a will. There are five legal safeguards in the law of wills that should have worked to ensure that when Gareth made a will with the assistance of his solicitor, it was indeed reflective of his wishes: testamentary capacity, knowledge and approval, undue influence, mistake, and fraud.

i. Testamentary capacity

The first and arguably most important safeguard is that of testamentary capacity. As in Northern Ireland, legal frameworks surrounding vulnerable testators in England and Wales continue to follow common law definitions of testamentary capacity. The common law test for testamentary capacity in *Banks v Goodfellow*²⁴ is considered to have survived the MCA²⁵. It is thought that the *Banks v Goodfellow* test sets a relatively lower bar than the functional test in s.3 MCA, particularly in respect of the foreseeability of the consequences of a testamentary disposition.²⁶ There is also a difference in the level of understanding required in the two tests, with the MCA test requiring a person to understand all of the relevant

²³ See, for example, O. Hewitt, ‘A survey of experiences of abuse’ (2014) 19 *Tizard Learning Disability Review* 122-129; G. Dalley and others, ‘Researching the financial abuse of individuals lacking mental capacity’ (2017) 19 *Journal of Adult Protection* 394-405; S. Buhagiar and C. Azzopardi Lane, ‘Freedom from financial abuse: Persons with intellectual disability discuss protective strategies aimed at empowerment and supported decision-making’ (2022) 37 *Disability & Society* 361-385.

²⁴ *Banks v Goodfellow* (1870) LR 5 QB 549 at p565 per Cockburn, CJ: “It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise.”

²⁵ *Re Walker (deceased)* [2014] EWHC 71 (Ch).

²⁶ *ibid*, at [23].

information, whereas the *Banks v Goodfellow* test requires that the testator understands the function of a will, that it represents the testator's intentions, and that the testator "appreciates the claims to which he ought to give effect".²⁷ There are also minor differences between the common law and statutory tests in relation to the burden of proof in respect of capacity.²⁸ Whereas under the MCA there is a presumption of capacity, under the common law test for testamentary capacity, the burden of proof regarding capacity shifts between the parties, depending on the type of claim being brought.²⁹

Solicitors are expected, where possible, to follow the 'golden rule' from *Kenward v Adams*³⁰ that medical assessment of capacity should be sought when preparing a will for an "an aged testator or a testator who has suffered a serious illness". This 'golden rule' is not a rule of law, rather an indicator of good practice. It pre-dates the MCA and is arguably out of step with the both the statutory presumption of capacity in s. 1 MCA, and the requirement in s. 2 MCA that a lack of capacity cannot be established on the basis of a person's age, appearance, condition or aspect of his behaviour. More recent formulations of the 'golden rule' note that a medical assessment of capacity may not always be possible or appropriate, in which case the Law Society suggest that contemporaneous notes relating to the client's understanding of the *Banks v Goodfellow* test and s. 3 MCA will assist in providing evidence of capacity, along with evidence that the client had been interviewed without potential beneficiaries present.³¹

Irrespective of the legal technicalities of the relevant test for testamentary capacity, or the evidence to that end recorded by his solicitor, there was no doubt that Gareth had testamentary capacity at the time he made either of his wills: he knew what a will was, what it does, and he expressed his choice at the time of making each of his wills as to who he wanted to inherit his assets after his death. The letter explaining his poor relationship with his family, which accompanies the more recent will, further demonstrates his capacity and reasoning.

The limited scope of testamentary capacity beyond the *Banks v Goodfellow* test means that, on its own, it may provide an insufficient safeguard

²⁷ *ibid*, at [23].

²⁸ MCA 2005, s. 1

²⁹ *Re Key (deceased)* [2010] EWHC 408 (Ch) at [97].

³⁰ *Kenward v Adams* (1975) *The Times*, 29 November: "the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and findings." Per Templeman J.

³¹ The Law Society, *Wills and Inheritance Protocol* (London: Law Society Publishing, 2013).

for people with learning disabilities or other cognitive impairments when making a will, because of their heightened possibility of harm. This means that additional safeguards need to be in place to protect vulnerable testators and, in line with Article 12(4) CRPD, these should be non-discriminatory, appropriate, and effective. As I will show, existing mechanisms for challenging a will (lack of knowledge and approval, undue influence, mistake, fraud) also may not fully protect intellectually disabled people like Gareth.

ii. Knowledge and Approval

The most important safeguard after testamentary capacity is, arguably, want of knowledge and approval. In English law, as set out in *Ark v Kaur*, knowledge and approval requires only that “the testator knows that he is making a will, knows what the terms of it are, and intends that those terms should be incorporated into and given effect by the will.”³² In *Perrins v Holland*, the Court of Appeal clarified that knowledge and approval “requires no more than the ability to understand and approve choices that have already been made.”³³ Furthermore, it does not require understanding of the legal terminology used in the will,³⁴ nor understanding of the technical legal effects of the will.³⁵

Whilst there is no formal presumption that proper execution of a will means that there is knowledge and approval, Lord Neuberger made clear in *Gill v Woodall* that:

The fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testator’s intentions at the relevant time.³⁶

Notwithstanding this ‘very strong presumption,’ additional evidence may be required if the testator has sensory disabilities, is unable to talk, or unable to read.³⁷ Nevertheless, it is not disputed that Gareth knew and approved of the contents of his will on both occasions that he made one.

³² *Ark v Kaur* [2010] EWHC 2314 (Ch) at [19].

³³ *Perrins v Holland* [2010] EWCA Civ 840 at [64].

³⁴ *Greaves v Stolkin* [2013] EWHC 1140 (Ch).

³⁵ *Morrell v Morrell* (1882) 7 PD 68 at 70 to 71.

³⁶ *Gill v Woodall* [2010] EWCA Civ 1430 at [14].

³⁷ Non-Contentious Probate Rules 1987, rule 13; *Re Geale’s Goods* (1864) 3 Sw & Tr 431.

iii. Undue influence

The next potential safeguard to consider is that of undue influence. Here, we might expect there to be more chance that Gareth's first will could have been challenged in the event of his death, given the trust relationship between Gareth and his previous Personal Assistant. Yet whereas the general doctrine of undue influence includes a presumption in relationships of trust,³⁸ there is no such presumption in testamentary contexts.³⁹ Instead, to challenge a will on grounds of *undue* influence, the person challenging the will must prove (on the balance of probabilities) that undue influence was involved. This is made even more complicated by the relatively high bar for undue influence in testamentary contexts, given that merely persuading someone to leave you something in their will is entirely lawful. As set out by Lord Carnwarth in the early case of *Boyse v Rossborough*, "influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud."⁴⁰ The role that coercion plays in undue influence in the testamentary context was clarified more recently by Mr Justice Levinson as follows:

Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion.⁴¹

Taken together, all this means that it can be very difficult to prove undue influence, even where a testator was clearly vulnerable at the time they made their will.⁴² Certainly it would not have been straightforward for anyone seeking to challenge Gareth's first will to prove coercion or undue influence in these terms.

iv. Mistake and fraud

When Gareth spoke to me about his experiences of making a will, he noted that he had misunderstood testamentary freedom: he did not realise that

³⁸ *Royal Bank of Scotland v Etridge (No 2)* (2001) UKHL44; [2002] 2 AC 773.

³⁹ *Law Commission, Making a Will* (London: Law Commission of England and Wales, 2017).

⁴⁰ *Boyse v Rossborough* (1857) 6 HLC 2 at 49-49 per Lord Carnwarth.

⁴¹ *Re Edwards (deceased)* [2007] EWHC 1119 (Ch) at [47] per Mr Justice Levinson.

⁴² See *Edkins v Hopkins* [2016] EWHC 2542 (Ch) for a recent example.

he could leave his estate to charity, and thought he had to leave his assets to a person. This kind of mistake, however, would not be covered by the relevant doctrine relating to rectification of wills. In the context of wills, mistake refers to errors in drafting, rather than in the understanding of the testator. Examples of mistake from case law include erroneous wording,⁴³ omissions,⁴⁴ and signing the wrong will.⁴⁵ A mistaken belief is not enough to challenge a will; instead, instances of mistaken belief must result from a false representation.⁴⁶ As with undue influence, fraud can be difficult to prove, especially as the burden of proof falls on the party alleging the fraud.⁴⁷ Taken together this means that successful claims of fraud in a will are rare.⁴⁸

v. Summary

Thinking through each of these ways to challenge a will shows how poorly the current law of wills protects people with learning disabilities from the kinds of financial abuse that Gareth experienced. Firstly, lack of knowledge and approval would not apply. The will was properly executed and Gareth was, by his own admission, aware of the contents of his will and approved of those contents at the time it was made. We do not know to what extent he was coerced by his personal assistant into leaving his assets to her, but at the time the will was made, it seems that Gareth was happy with the decision he made. There was no clear evidence of fraud, or of mistake in the drafting of his will. In summary, as the current approach to protecting vulnerable testators from financial abuse through their will focuses on challenges to wills after the testator's death, it was unable to protect Gareth when he was making his first will.

Without having been present at the appointment with the solicitor where Gareth nominated his previous personal assistant as his 'next of kin' and sole beneficiary, we cannot know to what extent his solicitor probed Gareth's understanding of wills, or his testamentary capacity more broadly. We also do not know whether Gareth was questioned about his wishes without his supporter present (as would be considered good practice where testamentary capacity is in doubt). It seems, however, that whilst Gareth understood the nature and effect of a will (insofar as

⁴³ *In the Goods of Swords* [1952] P. 368.

⁴⁴ *Re Reynette-James* [1976] 1 WLR 161.

⁴⁵ *In the Goods of Hunt* (1875) LR 3 P&D 250.

⁴⁶ *Re Bellis* [1929] 141 LT 245.

⁴⁷ *Craig v Lamoureux* [1920] AC 349.

⁴⁸ R. Kerridge, 'Wills made in suspicious circumstances: the problem of the vulnerable testator' (2000) *Cambridge Law Journal* 310-333.

it is a disposition of his assets that takes effect after his death), and the extent of the property he was disposing of in that will, it appears that he misunderstood (or was misled about) testamentary freedom. It is possible, therefore, that his original will may have been vulnerable to challenge. The difficulties disappointed beneficiaries may face in challenging a will based on incapacity, lack of knowledge and approval, mistake, fraud or undue influence are well documented.⁴⁹ In respect of testamentary capacity, it seems clear that Gareth has capacity under the *Banks v Goodfellow* test, and under the MCA test in relation to his new will, which suggests he would also have had it at the time he executed his original will, even if not all the relevant information was given to him. Given that the will was prepared by a solicitor, it is likely that some contemporary evidence would be available that he had capacity at the time the will was executed. In any case, it seems wrong to argue that a challenge based on Gareth's impairments should be the only way to overturn a will that was made because of the influence of, or misinformation provided by, a supporter.

The question that would have been at the heart of any potential challenge to his previous will on the basis of capacity would be the extent to which he understood the concept of testamentary freedom, and that he could leave his assets to whomever he chose, bearing in mind that he had no dependents who might have a claim under the family provision legislation. The final grounds for challenge would be that of undue influence and/or fraud, but again these are difficult to prove, and in the absence of sufficient evidence, the challenger may be required to pay costs. As discussed above, undue influence requires coercion, rather than mere persuasion. Fraud requires that the testator was deceived. In both cases, the burden of proof rests on the challenger to evidence the deception or coercion, which would have been very difficult to do in this case.

Importantly, however, even if a person who would have been able to challenge Gareth's will had been successful in doing so, intestacy law would still have failed to give effect to Gareth's wishes. The only persons who would have standing to challenge his will would be those who would otherwise have benefited should Gareth die intestate. As is clear from Gareth's story, he did not want his birth family to inherit from him. Like several of the other Everyday Decisions interviewees, Gareth does not have a good relationship with his biological family. The only family member that Gareth spoke positively of was his grandmother, who died some years ago. Whilst the rules on intestate succession are designed to offer an appropriate backstop position for most people, and generally align

⁴⁹ R. Kerridge, *Parry and Kerridge: The Law of Succession* (13th ed., London: Sweet & Maxwell, 2016).

quite well with generic public attitudes to inheritance,⁵⁰ they may not always be appropriate for intellectually disabled people. This is because the family relationships of intellectually disabled people, particularly those with lifelong learning disabilities, may not follow the same patterns as those of nondisabled people. For example, some intellectually disabled people (particularly older people) may have spent parts of their lives in residential care.⁵¹ Intellectually disabled people may also be less likely to have spouses or partners, because they are not well supported to develop positive intimate relationships,⁵² may be at higher risk of sexual abuse,⁵³ and may not receive the sex education required to meet the threshold for capacity to engage in sexual relations under the MCA.⁵⁴ Intellectually disabled people may also not have children because they have been sterilised,⁵⁵ or if they do have children, their children may have grown up in foster care, or may have been adopted.⁵⁶ As a consequence, the standard patterns of inheritance, and the rules of intestate succession may not fit with disabled people's lives.

In summary, as we can see from Gareth's story and this brief analysis of how the contemporary common law safeguards operate in the area of testamentary capacity, the paradox of decreasing availability of support where decisional complexity increases creates real problems in ensuring that disabled people have appropriate support to ensure their access to justice. This, unfortunately, reflects the values that society places on supporting disabled people to enjoy their legal capacity, and highlights why proper implementation of the right to enjoy legal capacity on an equal basis with others (Article 12 CRPD) is such an important step in realising the paradigm shift of disability rights.

⁵⁰ G. Douglas et al, 'Inheritance and the family: Public attitudes' (2010) *Family Law* 1308-1316; H Douglas and J Corrin, 'A tragedy of monumental proportions: Indigenous Australians and the sentencing process' (2010) 19 *Social & Legal Studies* 197-215; G Douglas and others, 'Enduring love? Attitudes to family and inheritance law in England and Wales' (2011) 38 *Journal of Law and Society* 245-271; A Humphrey and others, *Inheritance and the family: Attitudes to will-making and intestacy* (London: NatCen, 2010).

⁵¹ C. Hatton et al, *People with Learning Disabilities in England 2015* (London: Public Health England, 2016).

⁵² R. Harding and E. Taşcıoğlu, "'That's a bit of a minefield": Supported decision-making in intellectually disabled people's intimate lives' in C Ashford and A Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Cheltenham: Edward Elgar, 2019), pp.256-270.

⁵³ J. Lindsey, 'Developing vulnerability: A situational response to the abuse of women with mental disabilities' (2016) 24 *Feminist Legal Studies* 295-314.

⁵⁴ *Re CH (by his Litigation Friend, the Official Solicitor) v. A Metropolitan Council* [2017] EWCOP 12.

⁵⁵ AJ. Stansfield, AJ. Holland and ICH. Clare, 'The sterilisation of people with intellectual disabilities in England and Wales during the period 1988 to 1999' (2007) 51 *Journal of Intellectual Disability Research* 569-579.

⁵⁶ A. Dimopoulos, 'Intellectually disabled parents before the European Court of Human Right and English Courts' (2009) *European Human Rights Law Review* 70-83.

Accessible Information in the UK

The Legal Framework

Accessible information is extremely important in breaking down barriers to the full participation of disabled people in society, and access to information is already protected and encouraged by a range of national, international, and service specific legal frameworks. These include: the Disability Discrimination Act 1995 (DDA), the Equality Act 2010, the UN Convention on the Rights of Persons with Disabilities, the NHS Accessible Information Standard, and the Public Sector Bodies (Websites and Mobile Applications) Accessibility Regulations 2018. In this part, I outline some of the main provisions of each of these legal frameworks, before moving on to discuss how these frameworks should inform the provision of legal services.

The DDA applies in Northern Ireland, and requires service providers to make reasonable adjustments,⁵⁷ including a duty to take reasonable steps to provide auxiliary aids to enable disabled people to use their services.⁵⁸ The Equality Act 2010 consolidated discrimination law in England, Wales and Scotland. The Act sets out an explicit duty to provide information in an accessible format as part of its provisions on reasonable adjustments.⁵⁹ Failure to comply with the duty to make reasonable adjustments is a form of discrimination, which can give rise to a cause of action in law. Furthermore, a person who is subject to this duty to make reasonable adjustments is not entitled to require a disabled person to whom the duty is owed “to pay to any extent [the] costs of complying with the duty.”⁶⁰ Like the DDA, the Equality Act applies in employment, education, the provision of goods, facilities and services, premises, the exercise of public functions, and in private clubs and associations.⁶¹

A particularly useful way to ensure that information is provided in an accessible format is to produce ‘easy read’ information. Easy read information uses pictures and symbols, often alongside highly simplified written language, to enable people with cognitive impairments (like learning difficulties/disabilities, acquired brain injuries, and

⁵⁷ Disability Discrimination Act 1995, s. 21.

⁵⁸ *ibid*, s. 21(4).

⁵⁹ Equality Act 2010, s. 20.

⁶⁰ *Ibid*, s. 20(7).

⁶¹ There are slight differences across these areas, and various exceptions that apply to some of them. See the *Equality Act 2010 Code of Practice: Services, Public Functions and Associations* available at: https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf and guides produced by the Disability Justice Project, available at: <https://www.disabilityjustice.org.uk/learn-more-and-take-action/> for more information.

neurodegenerative disorders) to read and understand written information, even if they have low literacy levels. There are already some excellent examples of easy read information about law and legal processes, like the Books Beyond Words series,⁶² and information produced by and for charities like the Lasting Power of Attorney guide published by the Mencap Trust Company.⁶³

The exact scope of the duty to make reasonable adjustments varies depending on the context that the duty arises in, but it is an important dimension of how equality law requires employers, educators and service providers prevent disability discrimination. The duty to make reasonable adjustments takes an objective approach to what is 'reasonable.' In relation to some providers, including services, public functions and associations, the duty to make reasonable adjustments is an 'anticipatory' duty. This means that it requires providers in those areas to consider, and act in relation to, the needs of disabled people *before* being faced with an individual disabled person who requires reasonable adjustments to be able to access their services/functions/association. In employment, the duty only arises in response to substantial disadvantage faced by a particular disabled person.

The United Kingdom has been a signatory to the UN Convention on the Rights of Persons with Disabilities (CRPD) since 2007, and ratified the CRPD on 8th June 2009. Ratification of an international treaty means that the United Kingdom has agreed to be bound by its provisions. The development and provision of accessible information supports many of the rights in the CRPD, most specifically Article 9 on Accessibility, and Article 21, which includes rights to access to information. Article 9 CRPD includes duties on the State to ensure disabled people have access, on an equal basis with others, "to information and communications." It requires States that have ratified the Convention to "promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information" and "to promote the design, development, production and distribution of accessible information and communication technologies." Article 21 requires States to "take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice." Examples of how this right should be implemented includes providing information to the general public in

⁶² Available at <https://booksbeyondwords.co.uk/> accessed 28 September 2022.

⁶³ Available at <https://www.mencaptrust.org.uk/guides-lasting-power-attorney> accessed 28 September 2022.

accessible formats, by “urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats” and encouraging the mass media to “make their services accessible to persons with disabilities”.

There are also accessible information rules and standards that apply to particular kinds of information. The two most important of these in the UK are the NHS Accessible Information Standard, and the Public Sector Website Accessibility Regulations.⁶⁴ The Accessible Information Standard is a legal duty that applies to all publicly funded health and social care services in England.⁶⁵ The legislative basis for the Standard is in the Health and Social Care Act 2012, s. 250. It was first introduced in 2016 and it applies across all NHS and adult social care services in England including GPs, dentists, hospitals, and other care providers. The Accessible Information Standard means that people who use a service and have information or communication needs because of a disability or an impairment, or some kind of sensory loss like visual or hearing impairment, are entitled to information in a form that is accessible to them. It is hard to see whether the Accessible Information Standard has been effective, as in a post-implementation review published in 2017, while 65.5% of respondents from health and social care services reported that their organisation had implemented the standard ‘to some extent’ or ‘mostly’, nearly half (43%) of the patients, services users, carers and parents who responded had not heard of the Accessible Information Standard, and just 15.2% of those respondents felt that the impact of the Standard had been good or very good.⁶⁶

The Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018⁶⁷ place a duty on all public sector websites and apps to implement and maintain accessibility standards for disabled users. Websites are generally considered compliant with the Regulations if they adhere to the Web Content Accessibility Guidelines (WCAG) 2.1, published by the World Wide Web Consortium (W3C) in 2018.⁶⁸ Whilst these specific regulations and the duties they impose only apply to public sector bodies, all service providers should seek to make their online information as accessible as possible. Webpage accessibility can be checked relatively

⁶⁴ Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018.

⁶⁵ The text of the Accessible Information Standard is available at: <https://www.england.nhs.uk/ourwork/accessibleinfo/> accessed 28 September 2022.

⁶⁶ NHS England (2017) Accessible Information Standard: Post Implementation Review available at: <https://www.england.nhs.uk/publication/accessible-information-standard-post-implementation-review/> accessed 12 July 2021.

⁶⁷ These Regulations have their foundations in the EU Web Accessibility Directive (Directive 2016/2102).

⁶⁸ Available at: <https://www.w3.org/TR/WCAG21/> accessed 28 September 2022.

easily using online tools like the WAVE Web Accessibility Evaluation Tool,⁶⁹ to highlight areas of technical non-compliance with current WCAG specification. The WAVE tool also facilitates human evaluation of accessibility problems with websites, enabling reflection on how best to resolve accessibility issues that arise.

Making legal services more accessible

The CLARiTY Project was an online accessible legal information project that ran during the COVID-19 pandemic lockdowns in late 2020 and into 2021.⁷⁰ Our aim in that project was to make law more accessible to disabled people and family carers. It included six interactive Zoom sessions, the purpose of which was for the project team, supported by specialist guest speakers, to explain a wide range of legal frameworks associated with mental capacity law, care and medical treatment in accessible ways. We explained the ever-changing lockdown rules, the law about supported decision-making, lasting powers of attorney, deputyship, banking, accessible information, how to challenge Care Act decisions and where to access more legal help and support.

Each session was recorded, and after each session, we edited parts of the sessions into informational videos and created plain English and easyread guides to the information we had discussed.⁷¹ This development of accessible legal information was key to what we were trying to achieve. We knew that there was a significant level of unmet legal need in this area, as well as a large gap between the right to support when making decisions⁷² and people's everyday experiences of actually being supported to enjoy their legal capacity.⁷³ The CLARiTY project sought to find ways to bridge that gap by making clear that disabled people already have a right to accessible information, and experimented with ways to provide it. Explaining complex legal ideas in accessible ways requires intimate and accurate knowledge of the relevant law, as well as the ability to explain the same concept in multiple ways to ensure understanding. In the CLARiTY sessions, we found that using stories to put information in context was a useful way of helping to explain complex or abstract legal concepts.

As a consequence, providing accessible legal information is not easy, nor is it founded in skills that legal professionals have been routinely taught.

⁶⁹ Available at: <https://wave.webaim.org/> accessed 28 September 2022.

⁷⁰ Harding, O'Connell and Bragman (2021, *op. cit.*)

⁷¹ These are freely available on the project website at: <https://legalcapacity.org.uk/clarity-project/> accessed 28 September 2022.

⁷² Mental Capacity Act 2005, s. 1(3).

⁷³ Harding and Taşcıoğlu, 'Supported decision-making from theory to practice: Implementing the right to enjoy legal capacity' (2018, *op. cit.*).

Yet there are some straightforward techniques that can be used to build accessibility into legal information and services for disabled clients. The first stage involves recognising the power dynamics in solicitor-client interaction. Rather than being equal parties in an interaction, vulnerable clients rely on their solicitor to support them, and may feel extremely powerless in that interaction. Connecting with clients by finding things in common will help to build rapport, which will in turn help clients to feel at ease. It is hard to emphasise enough just how important a warm, friendly, and approachable demeanour can be to help break down barriers to inclusion.⁷⁴

It is also important to remember that interactions with legal professionals can come with extremely high stakes for disabled people, particularly those with cognitive impairments. If the interaction is made more difficult than it needs to be, this can lead to profound consequences for the person's life. The functional approach to capacity in English law means that if a disabled person is considered "unable" to understand, use or weigh the information relevant to a decision,⁷⁵ they will be denied their legal agency. Many other jurisdictions have similar frameworks. In these functional capacity law frameworks, the onus is placed on the disabled person to understand, even when the people they are trying to understand make little effort to make reasonable adjustments to meet that disabled person's informational needs.

Making information more accessible includes a range of simple steps like using plain language, avoiding jargon, planning how to explain difficult concepts, providing easy read versions of written information, using high quality images in easy read materials, and testing easy read materials with people who would use them. If information is provided online, it can also be helpful to supplement written information with video explainers or short films. If information is provided in person, then simply talking through a written or easy read document can help to support understanding. These are not difficult changes to make in practice, but they can have significant positive impacts on access to justice.

Concluding remarks

In this article, my focus has been on making the case for better availability of accessible legal information as a means to safeguard intellectually disabled clients. In the longer term, however, we also need to think more carefully about how the right to enjoy legal capacity should be supported,

⁷⁴ Harding, O'Connell and Bragman (2021, *op. cit.*)

⁷⁵ Mental Capacity Act 2005, s. 3.

protected, and implemented. Rather than aligning legal capacity with decision-making ability or individual ‘mental capacity’, and thinking of it as a skill that people either do or do not have it might help to think of all clients as potentially vulnerable, and of everyone as requiring some level of support to access legal services. Whilst particular impairments can mean that people need greater levels of support, recent research published by the Legal Services Board makes clear that vulnerability can also be created by other situational factors like poverty, low literacy, digital exclusion and domestic violence.⁷⁶ That report, in line with findings from my research and our experience on the CLARiTY project recommends designing legal services in ways that anticipate the support that clients need to have a positive experience. This might include creating a warm and welcoming environment, engaging with clients with empathy and compassion, providing clear information in lay language, and good case management approaches which manage clients’ expectations. Taking steps to make legal services more accessible to all clients will also have the added benefit of ensuring that disabled clients are not singled out for special treatment, nor held to higher standards of rationality in their decision-making, whilst simultaneously having their rights to enjoy legal capacity protected and safeguarded in non-discriminatory ways.

There are many practical arguments that could be made against providing legal information in easy read and other accessible formats. Some are founded in costs: producing easy read information would mean that serving disabled clients would be more expensive and would raise questions as to who funds accessible information. It is not clear who would pay to keep easy read guides up to date, to test materials, or to commission bespoke images. Other barriers include the additional time that it would take to serve disabled clients, the need for extra training in providing accessible legal services, and the challenges of distilling complex information into clear, accessible communication. These barriers are far from insurmountable. Taking the duty to provide reasonable adjustments for disabled clients seriously should offer many opportunities to overcome them. I hope that the reflections in this article might encourage legal professionals working with disabled clients to think about concrete steps that each legal service provider can take to make law and legal services more accessible to disabled clients.

⁷⁶ Available at <https://legalservicesboard.org.uk/wp-content/uploads/2022/06/Vulnerability-in-legal-services-research-FINAL-REPORT.pdf> accessed 28 September 2022.

Appendix:**Convention on the Rights of People with Disabilities: Article 12 - Equal Recognition before the Law⁷⁷**

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

⁷⁷ The full text of the Convention can be accessed from the following link:
<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html>

Talking Mats: How visual images support capacity

Lois Cameron and Nicki Ewing

Introduction

Talking Mats is a visual communication framework developed through research at the University of Stirling, which supports people with cognitive and/or communication difficulties to express their views.

People have communication difficulties for a variety of reasons and research into the effectiveness of Talking Mats was carried out on a wide range of client groups including people with learning disability,¹ those living with dementia,² and those who have had a stroke.³ The findings from these different research projects indicate that using Talking Mats improves both the quality and quantity of communication in people with a range of communication difficulties. Talking Mats has also supported those with Motor Neurone Disease (MND) and Parkinson's.

There is a risk that some people with a communication difficulty are deemed to lack capacity when they struggle to express their will and preferences about, for example, where they want to live and who they want to help manage their affairs.

This paper will explore the potential of Talking Mats to support the capacity of an individual to make and participate in decisions about their lives. It will be illustrated by practical examples showing how Talking Mats helped people to make decisions about their care and support and to plan their funeral. It will also discuss the training required to use the framework and provide information about how solicitors can access Talking Mats support if they need it for their clients.

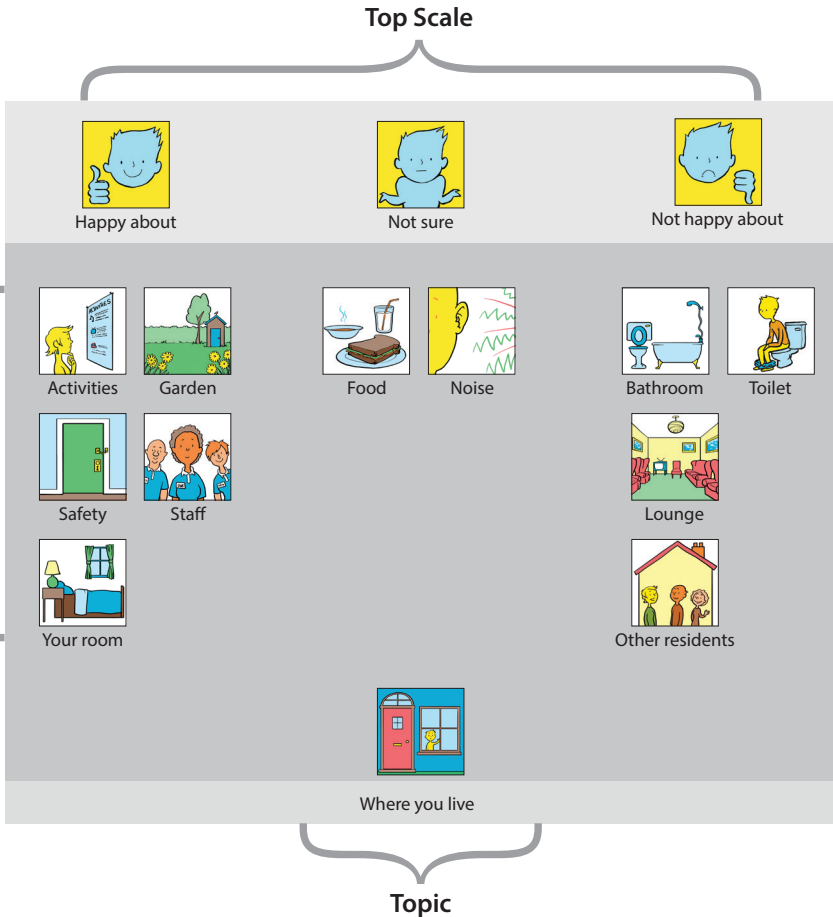
¹ J. Murphy and L. Cameron (2008), 'The effectiveness of talking mats for people with intellectual disability' 36 *British Journal of Learning Disability* 232-41.

² J. Murphy, J., & T.M. Oliver (2013), 'The use of Talking Mats to support people with dementia and their carers to make decisions together' 21 *Health and Social Care in the Community* 171-180.

³ J. Murphy (2000), 'Enabling people with aphasia to discuss quality of life' 7 *British Journal of Therapy and Rehabilitation* 454-457

How do Talking Mats work?

The Talking Mat can either be carried out using a physical Mat with a set of cards that are placed upon it, or by using digital Talking Mats available at www.talkingmats.com. Each Mat involves a topic to be discussed, a set of options to be placed on the Mat, and a top scale which frames the question. In the example below, the question concerns someone's feelings about the new care home they have moved to. So, the topic here is Where you Live; the top scale is Happy about / unsure / Not happy about; and the options relate to that topic.



A Talking Mats conversation involves two people. One person is the 'Thinker' (the person expressing the view), and the other the 'Listener' (the person facilitating the discussion).

Talking Mats supports the thinking and expression of the Thinker by:

- providing a structure whereby information is presented in small chunks supported by symbols,

- giving the Thinker time and space to think about and process information, and
- enabling them to say what they feel in a visual way that can be easily recorded.

The Talking Mats process encourages the Listener to:

- have a non- judgemental and non-leading approach,
- use open questions,
- facilitate and hand over control to the Thinker,
- be mindful of the complexity of the words and language they use,
- pay particular attention to additional non-verbal and verbal comments,
- record novel ideas that occur through the addition of blank cards, and
- recap and explore any issues in more detail at the time that is best for the Thinker.

The effectiveness of the Talking Mat will depend on the Listener's skills and requires training on their part so that the integrity of the model can be maintained. Training is open to all, including those in the legal profession. There are regular courses available both online and face to face. It is also possible to commission a professional trained in Talking Mats to work with the lawyer and client to determine the latter's level of capacity. An example of how this can be done is described in the first case example below.

A wide range of conversations can be facilitated using Talking Mats.⁴ The Health and Well-being resource is based on the World Health Organisation's framework of functioning and disability⁵ which covers the different domains that contribute to well-being including, domestic life, personal care, mobility, and communication.

Other symbol resources have been developed in partnership with experts in their fields. The Thinking Ahead resource that supports end of life planning for example, was developed with Strathcarron Hospice in Scotland. It includes conversations about putting your affairs in order, the type of treatment you would consider and the things you value.

Talking Mats and Mental Capacity

If the Thinker has a communication disability resulting from conditions such as stroke, motor neurone disease or dementia, or through a life-long

⁴ <https://www.talkingmats.com/shop/#tab-Resources>

⁵ <https://apps.who.int/iris/handle/10665/42407>

condition such as cerebral palsy, autism or learning disability, the Talking Mats process will maximise their ability to be able to express themselves and to be involved in decisions.

The Mental Capacity Act (NI) 2016⁶, at ss.1-2 (partially in force), identifies five key principles:

1. No-one should be treated as lacking capacity unless proven they do
2. No assumptions can be made
3. Help and support must be provided
4. No assumptions can be made because of unwise decisions
5. All acts and decisions must be made in the person's best interests

The following section will demonstrate how use of Talking Mats facilitates compliance with these principles.

Principle 1

Anyone carrying out a deprivation of liberty has the responsibility to properly establish a person's capacity. Being verbal is not the only way a person communicates. Other forms of communication such as signing or through symbols are equally valid. If given the right support such as Talking Mats, then individuals can be supported to understand and express their views in other ways.

Principle 2

The use of Talking Mats can support practitioners to be mindful of not making assumptions when people have a limited ability to express themselves verbally.

Principle 3

All practical help and support needs to be given to the individual. Talking Mats is one approach that provides that help and support. It is an evidenced based tool.

Principle 4

Talking Mats can support practitioners to explore risks from the perspective of the Thinker which helps gauge their level of understanding and whether they are making an unwise decision rather than lacking capacity.

Principle 5

If the person is deemed to lack capacity in a particular area of their life Talking Mats can ensure that the Thinker is still involved as far as possible in making choices, even when another person is acting on their behalf.

⁶ [2016] NI Ch. 18. For an overview of the principles see <https://www.health-ni.gov.uk/mca-principles>

In summary, when an individual is making a decision, they need to be able have the cognitive skills and capacity to:

1. understand the relevant information,
2. retain that information, and
3. consider the issues involved.

Lastly, they need to need to be able communicate their thoughts, wishes and preferences.

Talking Mats supports the various stages of making a decision and supports capacity in the following ways:

- The resources are structured. This helps the Thinker to focus and concentrate on the issue being discussed. Each topic is broken down into manageable chunks, which helps the Thinker understand the component parts of a decision.
- Use of visuals assists with memory and aids recall and supports an individual to focus and stay on track. The visual record can provide an easy-to-understand record of the conversation that can support recall and retention of information.
- The process of participating in a Talking Mat enables the Thinker to reflect and weigh up the different aspects of the decision in relation to each other. The Top Scale allows for both positive and negative views to be expressed and importantly the Top Scale mid- point supports people to communicate what they are not sure about. Ambivalence is an important aspect of coming to a decision and may indicate when people need either more information or more time to process.
- The ritual and rhythm to the process of the Mat gives the Thinker time and space without being flooded with language and pressure to speak. When the pressure of having to speak is reduced, communication can be enhanced.

Talking Mats in Practice

i. Who should support me to make decisions? David's story

David had a stroke which resulted in severe receptive and expressive aphasia, dyspraxia, and a right hemiplegia. He had no useful verbal speech and an unreliable yes / no response.

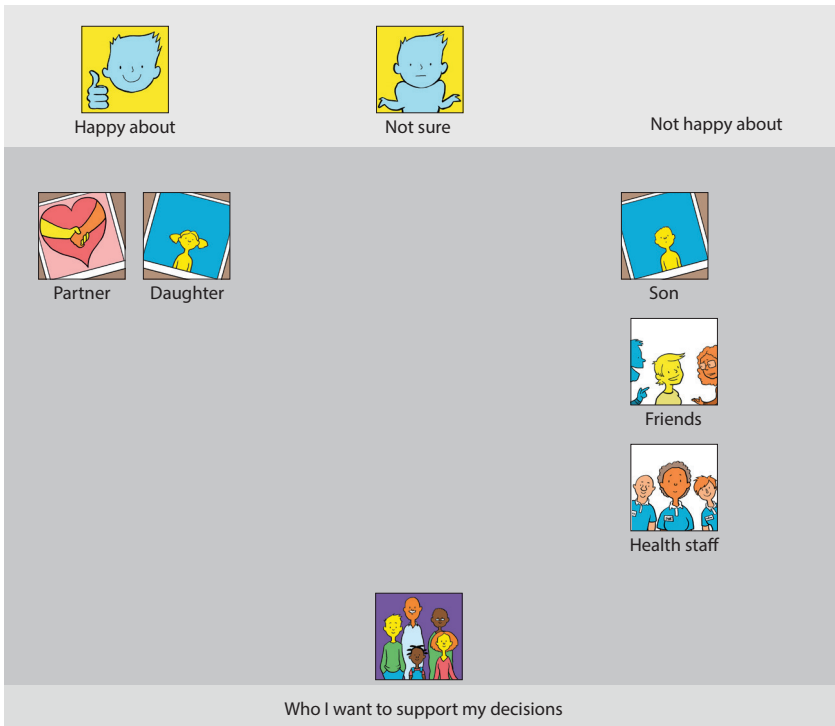
His wife had been advised by their lawyer to get Power of Attorney for David and the lawyer asked Talking Mats for support. The Talking Mats associate met the lawyer in his office to discuss what it was he wanted to find out and

then they both went to David’s home so that the lawyer could observe the Talking Mat in practice and be confident about David’s capacity to make decisions.

The first Mat they did was about how David felt he was managing in relation to his domestic life. David was able to express through Talking Mats that he was managing some things like making a snack and gardening, but he was not managing cooking or budgeting. The lawyer was confident that Talking Mats were a good way for David to express his views. This meant they moved on to do a Talking Mat about who David wanted to help him make decisions about his life and managing his affairs.

Top scale: Happy about / Not happy about

Topic: Who I want to support my decisions



David was clear that he wanted his wife and daughter to support him but not his son.

Talking Mats supported David's decision-making process by:

- giving him a way to articulate his views visually and allowing him to overcome his severe speech difficulties caused by his stroke,
- keeping him in control of his support, and
- giving the lawyer confidence that David had the capacity to give his view and kept David at the heart of decision making

ii. Where do I want to live? John's Story

John has Parkinson's. He had been living with his mother all his life, but she had recently died. He loved their home.

John's Parkinson's symptoms were increasing, and he had a couple of falls after his mother died. His sister thought it would be better if the house was sold and he went to live in a care home. After his second fall he was visited by a social worker. He struggled to communicate verbally as his speech was slow and he would often lose track of what he was saying. There was a concern that he no longer had the mental capacity to make the decision to continue living at home and a move to a care home would be in his best interest.

The Occupational Therapist used a Talking Mat to enable John to think about and communicate what he felt about his domestic life. He used the Talking Mat to identify that he was having difficulty carrying his meal into the lounge where he liked to eat looking out of the window. He explained that his last fall happened when he tried to wipe the spillage from the floor. He felt confident in his ability to make himself snacks and drinks and could look after his cat.

The information gained through this focused conversation helped the therapist to understand that John had a good understanding of his abilities and difficulties. Together, they were able to problem solve ways to promote his safety and independence. John used the Talking Mat to clearly express that despite the risk of falling, he wasn't ready to give up his home or his cat just yet.

Top scale: Going well / sometimes going well / not going well
Topic: Domestic Life

Going well Sometimes going well Not going well

Hot drinks Making a snack Washing up Cooking Shopping (food)

Money Locking up Routines Laundry Carrying things Shopping (other)

Pets Cleaning

Domestic Life

Talking Mats supported John’s decision-making process by:

- enabling John to stay focused on a conversation long enough to give his views,
- allowing him to be specific about his views by breaking down the different aspects of his domestic life, and
- giving his Listener insight into his thoughts and confirming to her that he had a good understanding of his abilities and difficulties.

iii. Can I go home? Ruby's story

Ruby, aged 92, has dementia and was admitted to hospital with a fractured hip following a fall. She lived at home with support from carers. The hospital team were concerned that Ruby would not manage at home on discharge and would not understand the risks if she chose to go home, especially during the night as she needed support.

The Speech and Language Therapist used the 'Self Care' and 'Domestic Life' topics from the Health and Well-being Resource to see how she felt about managing at home.

Using the 'Domestic Life' set with a Top Scale of easy, not sure, not easy, they were able to have a conversation that allowed Ruby to express her views.

Easy Not sure Not easy

Making a snack Shopping (food) Cooking

Laundry Cleaning Locking up

Falling over Somebody ringing the bell

Falls Someone ringing doorbell

Domestic Life

Ruby identified that cooking, cleaning, shopping, laundry and locking up were difficult. She felt unsure about being able to make a snack and there was nothing she thought she would manage easily. When she was asked if she wanted to add anything else to her Mat, she said that she was worried about "somebody ringing the bell" and "falling over". These were added to her Mat as blanks. It was felt, given the level of her care needs in hospital, that a nursing home might be the safest option and another Mat was created so that this option could be explored with her.

A second Mat was then carried out. The topic placed at the bottom of the Mat was 'Nursing home'. The symbol options on the previous mat that Ruby felt she struggled were used for this mat. The top scale was 'I would Like, so-so, I wouldn't Like.

She liked that her laundry would be done for her, and she liked the fact that she would not have to worry about the shopping, cleaning or cooking, as this would all be taken care of by the nursing home. She also identified that in a nursing home she would not be worried about people ringing the doorbell and that she felt safer knowing she would not be alone at night-time.

Ruby was given a copy of her Talking Mat so that she could think about what had been discussed. A few days later, Ruby called over the therapist and social worker on separate occasions when sitting in the ward dining room and said she was keen to "get going and look at nursing homes".

The social worker and therapist concluded that Ruby had capacity to make an informed decision regarding where she wanted to be discharged to from hospital.

Talking Mats supported Ruby's decision-making process by:

- supporting her thinking, memory and understanding,
- giving her 'thinking space' to add her concerns of 'someone ringing the bell', and 'being alone' at night, and
- enabling her to 'weigh up' the difficulties of being at home versus the benefits of a nursing home.

iv. What do I want my funeral arrangements to be? Don's story

Don is an older man with a mild learning disability who lives in a small residential home in the community. He had recently suffered the loss of several close friends. He decided that he wanted to plan for his funeral but found it difficult to articulate exactly what he wanted beyond being cremated and inviting his keyworker to the funeral.

Using the Talking Mats funeral resource, Don was very ready to have this conversation. The different aspects of planning a funeral, including music, people to be invited and what he wanted to happen with ashes, were discussed easily. He was also able to add in some personalised options using the blank cards including having his name added to his family's memorial plaque. The residential manager of Don's house was surprised by how much information was obtained through the Mat.

Talking Mats supported the decision-making process by:

- helping Don understand what was involved in organising a funeral and helping him focus on the conversation, and
- taking the emotion out of what can be a difficult subject to talk about and allowing him to fully express his views.

There was a sense of relief for all involved in Don's care that they knew his wishes and would be able to deliver them when the time came.

Summary

Principle 3 of the Mental Capacity Act (NI) 2016⁷ states that anyone who is considering whether someone lacks capacity must consider and provide all practicable help and support to allow the person to make their own decision. No determination of lack of capacity can be made until all practicable help and support has been provided.

This is crucial when people have communication difficulties. People who have a learning disability, those who have survived a stroke or have been diagnosed with motor neurone disease, Parkinson's disease, or dementia, need to be offered the opportunity to express their views and be listened to, especially if their communication is impaired.

⁷ Mental Capacity Act (Northern Ireland) 2016 Ch 18

Talking Mats is a key approach that can be used to enable people to retain as much autonomy as possible. It can help to redress the power imbalance that frequently exists within capacity conversations. It can be used to facilitate a range of conversations and help to assess whether someone is able to make decisions regarding POA, living arrangements, and end of life planning. The Mat can be individualised to meet the specific needs of the person, as illustrated in the practice examples in this article. Successful use of the Mats shows that, given the right support, many people with communication difficulties can demonstrate their capacity to make decisions about their lives.

The case examples have also shown how using the Talking Mats framework supports professionals in their capacity assessments. If legal professionals are interested in using Talking Mats they can either train to use the framework or can commission an existing Talking Mats practitioner to carry out a specific piece of work.

For more information about Talking Mats go to www.talkingmats.com

Pink Flags

Sandra McDonald

In this article Sandra McDonald, the former Public Guardian for Scotland, now working independently as an advisor on mental capacity matters, considers what she calls the 'pink flags' of financial abuse.

Introduction

We are all familiar with 'red flags', the blatantly obvious signs of financial abuse, albeit we may not truly know what to do about this (more of which later), but what of 'the pink flags', various signs that may indicate abuse, but which are not so obvious? Let me give some examples.

Pink Flags

Insidious misuse of money

The person who takes, say, £20 to go buy day to day shopping for a vulnerable neighbour but they omit to offer any change, nor tender any receipt. The vulnerable person may sense that the shopping comes to, say £15, but doesn't feel able to ask about change – which may be because they want, or need, the neighbour's continued support and worry that to challenge them for change will lose the neighbour's good will.

Or, the person who always rounds up, and often makes out they are doing the person a favour – "if we call it £25 that'll cover it" when the bill they are talking about only came to £23.

This behaviour is often explained by 'expediency', but this is no excuse.

Pocketing of money

The deliberate secreting of money: "Mum keeps money in a jar for when the electricity bill comes in. Mum puts £10 a week in the jar, enough to cover the bills, but when the bills come in the jar is much depleted" – we think someone is squirreling money from the jar".

Abuse of permission

In this scenario the individual has been given permission by the vulnerable person to take a specific sum of money from their purse/wallet - *"take £10 from my purse for your troubles"* - but the individual knows the person isn't going to check so they take a £20 note.

If the individual has power of attorney, then on any occasion when the attorney exploits their authority this may be said to be an abuse of permission. They had been given legal permission, by way of the power of attorney, to manage the affairs of the vulnerable, or incapable, person, as such any abuse of this authority is an abuse of the permission granted to them.

Trickery

Tickery is closely linked to these previous two. The individual who knows the vulnerable person can no longer discern money and plays on this to their own advantage - *"I'll need to take £10 to buy your shopping"*. In a cloak of honesty, they get the person's purse/wallet and show them they are taking £10 from it but they take £20 instead as they know the person doesn't know the difference.

Emotional abuse

The family member or friend who implies that unless the vulnerable person gives them £x they won't come to visit, or they will stop taking them to appointments, getting their shopping, etc. This scenario often involves the manipulation of grandchildren - *"I'm not going to bring Maisie with me unless you give me £x"*

Another common scenario under this heading is the demand of money for fuel costs - *"Unless you cover my petrol costs, I won't be able to afford to visit you"*.

This particular issue often gives rise to the question 'what level of fuel costs can an attorney legitimately take'? As Public Guardian my response was "Only when you are legitimately acting as attorney may you reimburse fuel costs". If you are attorney to your parent and you are visiting as a daughter, for example, then you should not take money. If, however, you have to visit that parent officially, to undertake attorney responsibilities, and assuming the power of attorney permits this, you may reimburse fuel costs, on current values at 45 pence per mile. For transparency, a record should be made of the reason for the visit and the costs reimbursed. In my own case, travelling a 500-mile round trip to visit my father for whom I was acting as PoA, I

reimbursed fuel costs only once in six years. Whilst I undertook attorney duties on various occasions they were arranged for when I was visiting anyway, as his daughter. There was only one visit which I specifically had to make, to undertake attorney duties, when I was not otherwise planning to go; to practise what I preached this was the journey I reimbursed.

Invented needs

Grandchildren are often used in this category too. *“Maisie needs £200 for a school skiing trip”*. There is no skiing trip. Or, *“Your car needs a service, I’ll take it for you. It’ll cost about £800”* – when the car doesn’t need servicing.

Overstated amounts

The car may well need a service but the cost may be closer to £500 than the stated £800. Or the skiing trip is real but the amount needed is overstated. *“Maisie needs £500 for a school skiing trip”* - when in fact only £200 is needed to fund it. In such scenarios, emotional leverage may also be applied, for example, *“Maisie won’t be able to go unless you can give us money to cover this”*. Even double leverage with a follow-up statement like, *“All her friends are going, she’ll miss out”*. Or triple emotional leverage is applied, by adding *“She’s going to be so upset”*. One can appreciate that resisting such leverage is very hard; even if you were inclined to say ‘no’ initially you can end up feeling compelled to say ‘yes’.

Removal of assets

Things of value disappear from the house, often small things, easy to secrete out, and whose absence is unlikely to be spotted for some time, such as infrequently worn jewellery, signed memorabilia, stamp collections, or first edition books.

These scenarios are not intended to be exhaustive but even from these you will see a range of underhand ways a person can ‘acquire’ monies from a vulnerable, or incapable person if they are so minded.

But how do you spot this abuse?

Well firstly let me say it absolutely is not easy, families who are kicking themselves that all the signs were there, but they didn’t recognise them should be reassured that there is no silver bullet. Like many things, it’s easy with hindsight to be wise after the event.

“Change” is the short answer to the question. Change in patterns, norms, characteristics and behaviours. That said, a change in any of these ways

doesn't in itself indicate abuse. Let me give some examples. All of them could have an innocent explanation but, then again, they may not, they could be pink flags that can easily go unnoticed.

- Agnes hasn't seen her son's wife for a long time, she has now started visiting regularly, she seems to be showing particular interest, even sometimes to a point of being almost overly helpful, bending over backwards. Agnes is delighted to have contact re-established, she does not see there may be an ulterior motive.
- This scenario is magnified if it is grandchildren that haven't been brought to visit for a long while. The unexpected reintroduction of grandchildren may indicate manipulation, or the intention to lead to this.
- Even if the person doesn't mention the changed situation, you may spot it in changed characteristics or behaviours, maybe an otherwise unaccounted for uplift in their mood, or their declining to come to see you when they would ordinarily do so – as they wish to stay home in case the grandchildren are coming.
- Agnes has been having a regular, privately funded, cleaner who comes in twice a week. You are Agnes's daughter. The cleaner contacts you to say Agnes really needs someone to come in every day, there is increased mess and laundry. You live a distance away so accept this, assuming a downturn in your Mum's condition, but when you visit you don't see any downturn in Mum and wonder why she needs a cleaner every day. Is the cleaner coming in every day? Or is she still only coming in twice a week and charging for every day?
- Agnes usually has flowers on her side table, yet of late this has stopped. Why?
- Agnes usually has her groceries delivered, and from an upmarket store. This has stopped of late; she tells you she is going herself but, actually, her fridge seems rather bare and what there is is from a saver range. Changes.
- You are the organiser of a lunch club. Agnes is a regular attendee, but with no explanation she suddenly stops coming – why? You contact her to find out if she is ok, she tells you the person that gives her the lift has stopped offering. For some people, it can be hard when they have been embezzling money from a vulnerable person to continue to face them. Has the person who has been offering her a lift, been 'lifting' and, recognising this, is removing temptation by no longer offering support to Agnes?

- You are Agnes's hairdresser, for years she's been coming each week for her set, but of late she has stopped coming regularly, when you see her you ask, as part of your chat, why she no longer comes each week – she brushes the question off, she says she doesn't need a set each week anymore. Why not? Is she short of the necessary funds to pay for this? Is she anxious that she will tell you something she is embarrassed to mention when she is off guard during your chat?
- Agnes has enjoyed treating herself to a couple of fancy holidays each year, and she always goes with the same long-standing friend. This year she says she's going with a different friend. Why?
- Agnes who is usually bright and cheery seems low in mood these days. Agnes who is usually willing to stop and chat now can't seem to get away quick enough. Is this changed mood indicative of anything?
- Agnes seems too quick to reply if you ask probing questions, like she is trying to shut you up, or she changes the subject; you're sensing she may be trying to avoid something - are you getting too close to a truth which she doesn't want to face?
- The person who visits Agnes regularly has a brand-new car, yet they told you they had lost their job.
- Agnes's family are excited as they are off to the Florida theme parks, yet they talk about being 'cash strapped' so you don't know how they can afford a Florida trip.
- Agnes's good friend says she has recently been to the 3* Michelin restaurant that's in the town. You know a meal there is 'an arm and a leg' yet she didn't say anything about saving up or it being a special occasion, rather it seemed a spur of the minute thing.
- Agnes's daughter seems to have gone upmarket in her clothes recently; if you're not mistaken she is wearing a designer dress and shoes and she's had highlights in her hair – and maybe even had her teeth whitened??

This list of examples is not exhaustive. It is worth reiterating that such changes may all have a perfectly natural and plausible explanation but, then again, they may not, so do not simply dismiss them as ok, any of them are potential pink flags.

It helps enormously if there is someone who can 'join the dots'. When a carer, a social worker, a hairdresser, a neighbour, a family friend, a relative, for example, each have one piece of information, they may not feel it sufficient to report but if they each knew of the concerns of the others then six people with concerns makes for a serious issue that ought to be reported.

Reporting Concerns

Let us assume that you have been approached by Joyce, a neighbour of Agnes, who is worried about her. Joyce tells you that Agnes and her son have reconciled recently but Agnes doesn't seem happy about it, indeed she is tearful a lot of the time, when she was typically a sunny personality. Joyce feels Agnes changes the subject when she tries to chat about the son. She tells you that two other things have bothered her, one is that the Agnes no longer wears her engagement ring, she always used to, and a nice picture on the wall has been taken down, she can see where it used to hang. When she asked Agnes about these things, casually not putting her on the spot, Agnes just blustered some non-sensical reply and quickly changed the subject. Since then, Agnes does not invite Joyce in, they chat for much less time and only on the doorstep.

Hard v soft evidence

Joyce wonders if she should tell someone about her concerns, but she is worried that she is putting 'two and two together and getting five'. After all, she only has a gut feeling, suspicions. Reporting anxiety is extremely common. Many people will hold off reporting early concerns because they don't have any proof; nothing to back up their allegations. They hold off reporting, awaiting something definitive that they can offer by way of evidence. But this can mean they don't ever report things, because they never get, or cannot ever get, any, what one may call, hard evidence to back up the concerns they have. You will need to reassure clients in Joyce's position that soft evidence is fine. Each of the changes she is seeing in Agnes and her situation are sufficient evidence to support her suspicions.

I frequently say to people at this point, ask yourself, 'how will I feel if this all turns out to be nothing?' Answer – maybe a bit silly. Now ask yourself, 'How would I feel if this turned out to be something serious and I had done nothing?' Answer – upset, mortified, kicking myself. Which is worse? Which would you lose sleep over? So, you've made the right decision to say something.

Joyce worries that she will be frowned upon for meddling in others' business. Should she just ignore things, after all, it's nothing to do with her? She is seeking your advice. She knows you; she trusts you. What do you tell her?

- Firstly, you should reassure Joyce that she has done the right thing in raising her concerns. Yes, of course they may all be perfectly innocent but, then again, they may not.
- Secondly, does Joyce happen to know if there is someone with power of attorney? If so, and assuming this is not the son, you should advise Joyce to make her concerns known to the attorney. The attorney can then decide how they proceed.
- If Joyce doesn't know whether there is a power of attorney, you can advise her to contact the Office of Care and Protection (in Northern Ireland¹), or the Offices of the Public Guardian in England and Wales² and Scotland³ respectively to enquire. If someone is so appointed and this is not the son, then advice is as the previous bullet.
- The Office of Care and Protection can investigate concerns of financial or property abuse where the person is incapable. In this scenario, however, on the information we have, it doesn't sound like Agnes is incapable.
- If the son is appointed as power of attorney, Joyce should be advised to raise her concerns with either the Office of Care and Protection, the local Health and Social Care (HSC) Trust, or the local Adult Protection Gateway Team. Reassuring Joyce that these agencies are happy to accept concerns based on 'pink flag' anxieties, she has the information that is needed.
- If there is no-one appointed with power of attorney again the point of contact is the local Health and Social Care (HSC) Trust, or the Adult Protection Gateway Team. These agencies have authority and can step in, if required, to offer protection to Agnes.
- I mentioned above 'joining the dots'. If Joyce feels she has nothing of real substance to report you can mention that for all we know her report is adding to something different that has already been reported, which will help to give a clearer picture on which the agency can determine how best to proceed.
- If Joyce is anxious about reporting things to a statutory agency, she may prefer to talk to a charity e.g. Hourglass Northern Ireland (formerly Action on Elder Abuse).

¹ ocp@courtsni.gov.uk

² customerservices@publicguardian.gov.uk

³ opg@scotcourts.gov.uk

- The See Something Say Something information leaflet offers a summary of abuse and what to report.
- If no-one has power of attorney you may wish to offer Joyce information about it, with leaflets she can take away with her if you have these, so that if she may get an opportunity to talk to Agnes, she can drop this into the conversation. The worry is, of course, that Agnes appoints the son as her attorney. However, if things are as Joyce suspects, that is, that Agnes is anxious about her son's influence, she may be attracted to appointing someone who can 'be the bad guy', who can be her voice with her son. You may wish to offer to support Agnes with more information if Agnes is minded to instruct you.
- It is worth talking to Joyce about confidentiality. There are two aspects; firstly, that her report of concerns (should she decide to do this) is confidential – so, for example, the agency won't go to Agnes and say, "Joyce has spoken to us...". However, agencies cannot guarantee absolute confidentiality. What this means is that should something be sufficiently serious that they need to go to court, or report the issue to the police, for example, then they may be required by law to say how they came about the information.
- The other aspect of confidentiality is that the outcome of any inquiry into reported concerns - if indeed there was an inquiry at all - is confidential. Many people are keen to know if their concerns were founded and if anything has been done as a result, so it helpful for them to know they cannot expect to learn of any outcomes.
- In closing your conversation with Joyce, I would stress that it is important that she reports her concerns, no matter how insignificant they may seem. She won't lose sleep if she reports something which turns out to be nothing, but she will lose sleep if she holds off reporting something which was of significance and Agnes is further abused in the interim. Better safe than sorry.

Casenotes

Variation of Will Trusts

In the Estate of Thomas Henry Egerton (Deceased) and in the matter of the Trustee Act (NI) 1958

Sonya Ann McConkey, Andrew McConkey and Sarah Margaret (Sally) Haire (both as executors of the estate of Thomas Henry Egerton (Deceased) and as the original trustees of the Thomas Henry Egerton (Deceased) will trusts) v Imelda Egerton, Rebecca Jane Egerton, Sally Haire on behalf of Emma Louise Egerton (a minor) and Sally Haire on behalf of George William Thomas Egerton (a minor)

[2022] NICH 11

Jurisdiction: Northern Ireland

The plaintiffs were the executors of the estate of Thomas Henry Egerton (Deceased) and were also the trustees of the Thomas Henry Egerton (Deceased) will trusts. The trustees had applied to the court to vary the will trusts created by the deceased's will dated 25th March 2013 and sought the court's approval on behalf of the third and fourth named defendants, both minors, pursuant to Section 57 of the Trustee Act (NI) 1958.

Sally Haire was a plaintiff in her capacity firstly as executrix and trustee and was also a defendant in her capacity as next friend to the minor children. She was not a beneficiary of the will or the trusts and McBride J was content for her to act in all capacities.

The deceased died on 17th April 2020 and the application was heard urgently by the Judge to ensure that any variation could be effected within the two year deadline for deeds of variation.

The deceased's will left his entire estate to his wife Imelda for life and remainder to his four children. Under the terms of the will, the trustees had no power to confer capital on Imelda and any advancement for the children required the consent of Imelda. It was therefore proposed that there was a variation to provide Imelda with a capital sum of £25,000 with one adult daughter receiving £75,000 and three trusts of £75,000 each being set up for the other three children who were still under the age of 25.

To comply with the provisions of Section 57 of the 1958 Act, the court must be satisfied that the trustees have locus standi, that the proposed variation

is a variation and not a resettlement and that the proposed variation is for the benefit of the minors.

HELD

McBride J held that the trustees did have standing to take the proceedings. She also stated that the proposed variation comprised only approximately 20% of the deceased's estate and the remainder of the estate will continue to be governed by the structure in the original will trust with the same trustees. It was therefore held that this was a variation and not a resettlement so as to fall within the scope of Section 57.

In respect of the third limb for the court as to whether the variation was for the benefit of the minors, McBride J considered various advantages and disadvantages.

The advantages were:

1. It gives the minor children a capital sum at the age of 25 in contrast to the position in the will in which the children only received capital upon Imelda's death.
2. The proposed variation removes uncertainty regarding the true construction of the will.
3. The proposed trusts have tax advantages as they come within Section 71(d) of the Inheritance Tax Act 1984.
4. By giving the mother a capital sum now there may be indirect benefits to the children as they still reside with her.
5. The proposed variation ensures that the minor children can look forward to a substantial inheritance on their mother's death together with the possibility of consensual partition of capital and income before that date.
6. The proposed variation allows the trustees to release funds for the minor children's education.

The disadvantages were:

1. If Imelda dies soon after the variation the children could lose the £25,000 which had been advanced to Imelda.
2. There are more administrative costs with the postponement of the interest to age 25.

On balance, McBride J held that the advantages outweighed the disadvantages and approved the variation.

Best interests from P's perspective

London Borough of X v MR, PD and AB [2022] EWCOP 1 Court of Protection – Eldergill, DJ – judgment delivered 13th January 2022

Jurisdiction: England and Wales

This was a case concerning whether it was in MR's best interests to remain at a care home. MR, who was 86 years old with a diagnosis of dementia, had been discharged from hospital to a secular care home in April 2020 during the first Covid lockdown. His wife was also residing at that care home, although by the time of the hearing she had sadly died.

Before he was admitted to hospital, MR had been "a devoted and committed Jew". No consideration was given to his religious or cultural needs at the time of his discharge, a fact which was deplored by the court. By the time of the hearing, he had settled at the secular care home and developed a rapport with staff who were now meeting some of his needs. However, the fundamental question for the court was: "what are MR's religious and cultural needs, and how important is Jewish religious and community life to him? Furthermore, how important were these things to him when he had capacity and what he would be likely to want now if he still had capacity?" (paragraph 83).

Finding this to be a finely-balanced case, the court held that it was in MR's best interests to move to a Jewish care home. The emphasis in this case on considering matters from P's perspective is an important reminder of the purpose of these decisions: to try and reach the decision P would have made for themselves if they had the capacity to make it. The court drew attention to the importance of taking proper account of what MR's own views about his best interests were likely to be, and how past expressions of wishes and feelings should be taken into account:

[86] One must also ask, as the Mental Capacity Act 2005 does, what the person's wishes would be in this situation if they still had capacity and what their wishes, beliefs and values were when they had capacity. Unless they now express contrary wishes, or there are other overriding considerations, where possible one must seek to enable them to live their remaining days in a way consistent with those wishes, beliefs and values. The Mental Capacity Act 2005 is an enabling Act designed to help, where practicable, those without capacity to live the life they wish or would wish to live if they still had capacity.

Declarations of Death

A Health and Social Care Trust v RL and anor [2022] NIFam 17 High Court of Justice in Northern Ireland – McFarland, J – judgment delivered 3rd May 2022 Jurisdiction: Northern Ireland

A case concerning brain stem death and removal of ventilation has come before the High Court in Northern Ireland. RL was 21 years old, and a foreign national who had been living in Northern Ireland. The judgment does not identify his country of origin (FC), but notes that his parents continue to live there.

RL suffered a severe anaphylactic shock to an unknown allergen and suffered cardiac arrest. Having failed to show any neurological improvement, an MRI was undertaken a week later which showed changes secondary to global hypoxic injury. The opinion of his treating team was that brain stem death had occurred, and this was confirmed in testing in accordance with the 2008 Code of Practice issued by the Academy of Medical Royal Colleges. This ruled out repatriation to a hospital in FC, but a hospice there was prepared to accept him, as was a facility run by an expert instructed by the parents. This expert, Professor EF, “does not accept the concept of brain-stem death” and gave evidence that he had “awakened about 1000 patients from cerebral coma, including patients considered to be dead” [paragraph 12].

The treating Trust applied to court for declarations that death had occurred and that it was lawful to cease ventilation.

Comment:

The tragic circumstances of this case recall those of *Re A*¹ and *Re M*². The court reiterated the approach in cases of this kind set out by the Court of Appeal in *Re M*: brain stem death is the established legal criteria in the United Kingdom, as represented by the 2008 Code and 2015 Guidance published by the UK Royal College of Paediatrics and Child Health. The case thus stands as a helpful restatement of those principles and includes an interesting discussion of the working of the civil standard of proof in cases where the court is faced with a binary decision about whether a person is dead.

¹ [2015] EWHC 443.

² [2020] EWCA Civ 164.

The judgment is extremely critical of Professor EF, noting that it is not the first time he has given evidence in the courts of Northern Ireland, and recalls the comments made by O'Hara J in the previous case of *Re M*³ to the effect that "his contribution has given a distressed, grieving family false hope where there really is none". In this case, the Judge's view was that "Professor EF has only added to their grief by potentially raising a totally unrealistic and false hope". The case is a reminder of the importance, and the potential human consequences, of the role played by experts.

Best interests from P's perspective

Reading Borough Council v P [2022] EWCOP 27 **Court of Protection - Owens HHJ – judgment delivered 19th May 2022** **Jurisdiction: England and Wales**

The court in this case was faced with a situation in which family members disagreed on where it was in P's best interests to reside, and ultimately found that the divisions in the family were such that only residing in a care home offered P "neutral ground" where she could have a relationship with all her children.

P was an 86-year-old woman who had moved to the UK in 2002 from Iran. She suffered from dementia, and in consequence of this had lost the ability to communicate in English (having grown up speaking Farsi). Until 2020, she lived with her daughter KS. In June 2020 she was admitted to hospital for a number of operations to her hip and developed an infection. There was a dispute over her discharge destination but she was discharged to a care home in February 2021.

Proceedings were issued in the Court of Protection, and upon all parties coming to agree it was in P's best interests to remain in the care home, an order was made by consent in May 2021.

Unfortunately, on 1st July 2021, the home served notice, alleging difficulties in their working relationship with KS. P moved to an alternative care home in September 2021 and the matter came back before the court. KS wished for her mother to return to live with her on a trial basis. P's two sons both considered that she should continue to live at the care home, but one of them (SS) considered that if P were to move to live with family on a trial basis it would be better for this to be with him than with KS.

³ [2014] NIFam 3.

The Judge noted the history of difficulties between KS and professionals, although noting it was neither necessary nor possible within the confines of the hearing to make any findings of fact. She found that KS was extremely protective of P and probably genuinely believed she was trying to get the best for P, but there was a high risk of difficulties arising with any care agency providing care in KS's flat. It was evident that any move would be very disruptive for P given her frailty, and this also told against any trial of living with KS.

The Judge also noted the evidence of a deep and permanent rift between P's children, and that P needed to be protected from the consequences of that acrimony. One of the key issues of P living with either KS or SS would be the risk that doing so prevented her from having as much contact with her family as possible.

Ultimately, the risks of fewer family visits for P meant that, unusually, the least restrictive option in this case was for P to continue living in the care home, which was "neutral ground" and would enable her to have frequent contact with all her family.

Appointment of a Controller

BC v Carmel McGilloway (as Controller of a patient) and CD and DE [2022] NIFam 29

High Court of Justice in Northern Ireland – McFarland J – Judgment delivered 28th September 2022

Jurisdiction: Northern Ireland

This case was an appeal by BC against an Order of Master Wells in the Office of Care and Protection whereby she appointed Carmel McGilloway, a solicitor, as controller of the affairs of a 77 year old woman. BC is the daughter of the patient and wished to be appointed controller. CD and DE are her siblings and they submitted arguments supporting the appointment of the solicitor controller. Another sibling supported the argument of BC.

The assets of the patient were relatively modest and there was also a potential amount in the region of £10,000 which may have been due to the patient from BC being money received by BC for her mother's benefit but not properly accounted for; however, these monies were in dispute.

BC's solicitors and counsel came off record prior to the hearing and BC proceeded to represent herself at the hearing. After hearing the evidence Master Wells rejected BC's application to be appointed as controller and appointed the solicitor instead. Her reasons for this were:

1. BC was holding social security benefit money for the patient which she has refused to refund or surrender to offset the patient's nursing charges, despite requests from the Health Trust and the controller.
2. There were credibility issues in respect of BC which fall outside the remit of the Office of Care and Protection and until those issues were determined by a suitable Court then it would not be appropriate to appoint BC as controller.
3. There was a related adult safeguarding issue to be investigated by the Health Trust in relation to financial matters.
4. To avoid further delay and costs, the solicitor controller was the more appropriate choice.

McFarland J in his judgment considered the usual order of preferred appointees as controllers, subject to an overriding discretion of the court. This started with a spouse or partner then moved to relatives and close friends before the court would normally seek to appoint a professional controller. He went on to note however that there are circumstances where it would be inappropriate to appoint a particular family member for a variety of reasons.

HELD

It was the Judge's view that BC's appeal was an attempt to clear her name rather than focussing on the appointment of a controller. There were a number of issues in relation to BC's credibility which required to be tested in court but which were beyond the scope of Master Wells in the Office of Care and Protection. McFarland J took the view that to appoint BC as controller before those credibility issues had been settled would be inappropriate as if BC were appointed controller, then she may need to take action against herself for repayment of the monies held and this was a clear conflict of interest.

The Judge noted that the patient did not have capacity to deal with her own affairs and a controller needed to be appointed. The patient could not wait for potentially protracted legal proceedings to be completed. McFarland J noted that was a discretionary decision and that whilst a family member would have been the preferred appointment, it would be inconceivable to permit BC to be appointed in the circumstances and confirmed the decision of Master Wells to appoint the solicitor controller. The family split with two siblings on either side also rendered none of the other siblings appropriate to be appointed in the circumstances. It was noted that the appointment of the controller would be reviewed annually by the Office of Care and Protection in any event.

BC's appeal was therefore dismissed.

Capacity to make a will and undue influence

In the Estate of Terence Benedict McQuaid (Deceased)

Conrad McQuaid v Briega McQuaid and Patrick Mallon as Executors of the Estate of Terence Benedict McQuaid (Deceased)

[2022] NICH 18

High Court of Justice in Northern Ireland – Humphreys J – Judgment delivered 23rd November 2022

Jurisdiction: Northern Ireland

The plaintiff was the eldest son of the deceased who died on 30th July 2018. The defendants were the executors named in the Will of the deceased dated 17th July 2018 which had been made less than a fortnight before his death. The first defendant was the deceased's wife and the second defendant was the solicitor who had prepared the Will.

The plaintiff sought a declaration from the Court that the Will dated 17th July 2018 was invalid on the basis that the deceased lacked the necessary capacity to make the Will and also that he was subject to undue influence to make it. The defendants sought an order admitting the disputed Will to proof in solemn form.

The disputed Will was signed by the deceased and witnessed by his accountant Jim Hughes and his solicitor Patrick Mallon (the second defendant). The Will left everything to the deceased's surviving spouse (the first defendant). At the time of execution of the disputed Will the deceased was a patient at Craigavon Area Hospital receiving treatment for urosepsis occurring as a result of advanced metastatic bladder carcinoma. As a result, the deceased had been recorded as being confused but no medical opinion had been sought in relation to his capacity and understanding.

The Judge heard evidence from two consultant psychiatrists both of whom had carried out a review of the medical notes and records, and other documentation, and furnished opinions on the issue of capacity. Neither doctor had met or assessed the deceased during his lifetime. One psychiatrist's evidence was that whilst there was no basis to say that the deceased lacked testamentary capacity, there was sufficient evidence in the notes to meet the threshold for a capacity assessment to have been carried out prior to execution of the Will. The second psychiatrist took the view that the deceased had experienced intermittent episodes of confusion as a result of the infection but that it is likely that he had recovered at the time that the Will was executed. The Judge placed particular emphasis on the fact that the second psychiatrist had sight of the solicitor's detailed attendance note

in coming to this conclusion whereas the first psychiatrist had not seen that note.

The Judge took evidence from various family members and found them mostly credible other than one family member to whom the Judge subjected scathing criticism for her evidence and her behaviour generally in the matter, having been in the Judge's opinion, only motivated by money. The Judge also took evidence from the accountant and the solicitor, both of whom had acted for the deceased for a long number of years. In the solicitor's case, he had known the deceased for over 40 years and acted for him for 20 years. They had previously discussed the terms of the deceased's Will and the instructions provided to the solicitor in the hospital were consistent with the previous thinking of the deceased.

It was the solicitor's view as an experienced practitioner that he had no reason to doubt the deceased's capacity and had no need to obtain a medical opinion.

HELD

Humphreys J held that the deceased did have capacity at the time of the execution of the Will and that absolutely no evidence of undue influence had been found. The Will was therefore admitted to proof in solemn form.

The evidence of the majority of the family members, the accountant, the solicitor and the second psychiatrist gave the Judge no reason to doubt the fact that the deceased did have capacity.

The Judge was complimentary of the conduct of the solicitor in the matter despite allegations to the contrary from the plaintiff. He held that the solicitor took all reasonable steps to satisfy himself that the deceased had the requisite testamentary capacity, particularly in light of the long and established relationship between the pair. The Judge took the view that whilst the deceased was clearly unwell and hospitalised, there were no other red flags. There was no requirement therefore for the solicitor to seek any medical opinion and no breach of the so-called 'golden rule.'

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