GETTING IT RIGHT IN TIME:
parents who lack litigation capacity in care proceedings

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EXECUTIVE SUMMARY

What the research set out to do, and the legal context for the research

This exploratory study looked at an under-researched area of care proceedings: those in which a parent lacks litigation capacity. Litigation capacity is the ability to conduct one's own legal proceedings. In care proceedings, this is usually achieved through instructing a solicitor. A person lacking litigation capacity has been assessed, usually by a psychologist or psychiatrist, who has concluded that because of an impairment in their ability to understand the proceedings, or give coherent and reasonably consistent instructions, they lack the ability to conduct proceedings themselves, and on this basis a court has determined that they lack litigation capacity. This may be due to mental health problems, intellectual disability, some other cause, or a combination of factors. Capacity is issue specific, so some people may have capacity to make some decisions but not others within one set of proceedings. It can also fluctuate, especially when the underlying issue is a mental health problem.

We set out to:

- find out how many parents are found to lack litigation in care proceedings, and construct a profile of their key characteristics, such as age, gender, the issues that led to them lacking litigation capacity, and the number of children involved in proceedings where a parent lacks litigation capacity
- explore and increase understanding of the way the courts and Office of the Official Solicitor respond to the Public Sector Equality Duty under the Equality Act 2010 in cases involving parents who lack litigation capacity

A parent lacking litigation capacity becomes a protected party in law. They lose the right to choose or instruct their own solicitor. There are therefore significant rights implications attendant on a decision a person lacks litigation capacity, as well as protective ones. They must have another person appointed to instruct a solicitor on their behalf, known as their litigation friend. The Official Solicitor is the 'litigation friend of last resort.' Parents in care proceedings rarely have another person able to act as litigation friend for them, so the role is usually taken on by the Official Solicitor, supported by his team of caseworkers.

The legal context

Substituting another person's instructions for those of a party in legal proceedings engages rights under Article 6 of the European Convention on Human Rights, which was incorporated into UK law by the Human Rights Act 1998. Article 6 guarantees the right to a fair trial: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The mechanism for substituting another person's instructions for those of the parent must be done in a way that is fair to them, and the instructions given on the parent's behalf must be fair to them too. The range of realistic outcomes of the proceedings, taking into account the welfare interests of the child who is the subject of proceedings, may be different from any outcome the protected party would seek for themselves if they had litigation capacity. This research set out to find out how the Official Solicitor, as litigation friend for parents lacking litigation capacity, seeks to ensure his appointment follows an assessment process that is lawful and fair, and that the duty of being litigation friend of a protected party is carried out in such a way that Article 6 rights are respected.

Having a litigation friend has potentially both positive and negative aspects for a protected party. There is a significant loss of autonomy in relation to the court proceedings, as noted above, but there is also a significant gain in terms of safeguards against negative consequences which might flow from attempts at managing a process for which the person is ill equipped.

Failure to provide support for a person who lacks capacity to instruct their solicitor would have Article 6 implications, since without assistance, that person is unable to conduct their own case effectively. Their solicitor would be without capacitous instructions and unable to identify how they should act on their client's behalf. There would no protection for a party who made unwise decisions, possibly against their own interests, without realising the implications of their own choices. While we were not able within this study to conduct a comparison with parents in care proceedings who had litigation capacity, we aimed to find out how the appointment of the Official Solicitor protected the interests of protected party parents, and any other issues, positive or negative, arising from his appointment.

Article 6 rights include a right to be heard in legal proceedings. A protected party retains the right to be heard and to have their views and wishes taken into consideration by the court. The Public Sector Equality Duty (PSED) under the Equality Act 2010 requires courts, local authorities, the Children and Families Court Advisory and Support Service (Cafcass) as public bodies, and any other public bodies that may be involved, to have regard for any disadvantages or needs caused by any party having a protected characteristic, and address those needs. Family courts hearing care cases and those who support parents in care proceedings have a duty to minimise the impact of disability, which is a protected characteristic under the Equality Act 2010. The 2010 Act places an obligation on public authorities to positively promote equality, not merely avoid discrimination[4]. This research set out to find out how PSED / Article 6 rights to participation and non-discrimination are addressed in care proceedings with parents who lack litigation capacity.

The right to family life under Article 8 of the ECHR / Human Rights Act 1998 is a relevant provision for parents involved in care proceedings. Unless care proceedings are fair, it is not possible to have confidence that the right to family life of parents or children has been upheld. In this study we observed a sample of hearings which were part of care proceedings, and we discussed with practitioners with different roles in the family justice system how the specific needs of parents who lack litigation capacity are accommodated by the family justice system.

4 https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty

How we carried out the research

We obtained ethical approval for the study from the University of Plymouth Ethics Committee, and agreement from the Ministry of Justice and the President of the Family Division to observe court hearings and speak to members of the judiciary, and agreement from the Official Solicitor and Cafcass / Cafcass Cymru to review files held by the Office of the Official Solicitor and speak with staff employed by them.

In order to find out more about the parents involved and the outcomes of care cases in which a parent lacks litigation capacity, we carried out a retrospective file study incorporating cases all the cases in which the Official Solicitor agreed to act during a twelve month period (May 2014 to May 2015, a total of 37 cases). We explored the reasons for the incapacity decision, what happened to the children at the end of proceedings (the judgment about where and with whom they should live, and under which court order). Our sample period was selected with the intention of including only cases that began and ended after the introduction of the current 26 week limit on care proceedings. We also looked for any indicators that the 26 week limit might have specific implications for parents lacking litigation capacity, who might have more difficulty than many other parents responding to a last chance to improve their parenting skills within a shorter timescale because of the nature of their own difficulties.

We spoke to a sample of professionals in the family justice system who had experience of working with parents who lack litigation capacity. This included judges, solicitors, caseworkers at the Office of the Official Solicitor, barristers and Cafcass Children's Guardians in a range of local authority and Family Court areas across England and Wales. Interviews with court welfare professionals took place between August 2015 and December 2016. The interviews with family justice professionals were carried out in a range of Family Justice areas in southern England and Wales. We explored their knowledge and views on the way the needs of parents who lack litigation capacity are met in care proceedings.

We observed eighteen care hearings in court, and (with permission) associated discussions about the case outside the court to observe how issues relating to litigation capacity, participation and the rights of parents who were protected parties are addressed by the court and the wider family justice system. Sampling of hearings was opportunistic. The researchers attended all hearings notified to them by the Office of the Official Solicitor where all parties and the court gave consent and the researchers were available to attend, sometimes at short notice until eighteen hearings had been observed. These took place between August 2015 and December 2016.

We would have liked to hear the views of the parents themselves, but unfortunately ethical issues linked to obtaining valid consent to participate in research, and the highly sensitive material involved, mean this is difficult to do. As a result, we are only able to present the views of professionals, but are aware that the voices we heard do not include those of parents.

Key findings

Identifying some key characteristics of parents lacking litigation capacity

We identified the kinds of issues that cause parents to lack litigation capacity. Approximately four fifths of all protected party parents were mothers, half of whom were in their twenties, the rest being family evenly distributed between older and younger women, while the fathers were significantly older.

The largest group of parents who lacked litigation capacity was made up of parents, mostly mothers, with a learning disability. They made up almost two thirds of the total number of parents in our sample. The boundary between having litigation capacity and not having it is not determined by IQ, but with specific reference to the ability to instruct a solicitor, however in this context IQ is likely to be highly relevant. When IQ was specifically assessed and recorded, scores between 50 and 60 were common in parents who lack litigation capacity.

The other main reason parents were assessed as lacking litigation capacity related to mental health problems. Parents with mental health problems as the main cause of difficulty made up a smaller proportion of the total, just one third parents, but there is substantial overlap between mental health problems and learning difficulty. Half the parents with mental health problems as their main reason for lacking capacity also had some degree of learning difficulty.

The study highlighted that litigation capacity often fluctuates, especially for parents with mental health difficulties. Parents could start care proceedings having capacity and lose it, or vice versa, and some parents move in and out of capacity throughout proceedings. An instability in capacity might be exacerbated by the stress of proceedings for some parents, but some parents recovered capacity as their mental state improved during proceedings. Retesting when capacity appears to change presents an issue for the court: it is in the interests of justice that the parent is enabled to resume instructing their solicitor if they regain capacity, but assessing litigation capacity can take time and prolong proceedings, which may be in tension with the interests of the children to have a timely outcome to the proceedings. This is especially the case when capacity fluctuates repeatedly.

We noted that s20 'voluntary' accommodation had been used for the children of some parents in our sample (named after s20 Children Act 1989, this involves a parent agreeing to a child coming in to care based on parental consent, not a court order). Given the subsequent finding that these parents lacked capacity, this raises questions about how rigorously local authorities assess capacity and how they seek consent to accommodation.

Some study interviewees raised concern about support for parents who fall just above the boundary between having and lacking capacity since they have no special support. This group largely fell outside our study, except when parents whose capacity as borderline fell below the threshold at some point in proceedings, and were therefore included in our sample for part of their case.

Two thirds of the children of the parents in our study were the subject of concern because of neglect, or risk of neglect: the most common problem was concern about parental ability to manage the upbringing of a child. Deliberate harm through emotional, physical or sexual abuse was relatively infrequent, although in a small minority of cases a history of serious physical abuse or risk of abuse was identified.

Two thirds of the children involved in our sample of cases were placed on care orders with placement orders at the end of proceedings. Most of the rest remained within their birth family on Special Guardianship Orders. A very small minority of children, three out of fifty, remained in the care of a parent.

For three quarters of parents, these proceedings were their first experience of care proceedings. Some parents had more than one child when proceedings started. There were some parents for whom 'repeat removal' of children through proceedings was happening, but for the majority, this was not the case. We found that most of our sample of parents who lack litigation capacity lost care of their child, most on a permanent or long term basis. For some, a Special Guardianship Order made to a relative means they may retain contact with their child, but for two thirds of parents, care arrangements after the case ends do not involve parent-child contact other than the arguably tenuous link of 'letterbox contact'.

The 26 week limit for proceedings, and other issues relating to time

This study sought to explore the impact of the time limit of 26 weeks on proceedings following the introduction of the revised Public Law Outline[5] and Children and Families Act 2014. It was hypothesised that shorter care proceedings might be more challenging for parents with learning disabilities and mental health problems, who are likely to have less time than previously in which to show positive change in parenting ability. It appears from our data that it is difficult for parents who lack litigation capacity to 'turn things around' within the duration of care proceedings. Very few parents ended proceedings with the care of their children, and although there were challenges to local authority care plans, it appears it is rare for this to lead to the child returning to the parent. Challenges to the making of orders by the solicitor for the parent based on argument that the threshold for making a care order had not been met were uncommon, but there were a few significant exceptions in which local authority assessments were challenged, with the support of the Office of the Official Solicitor.

A view was expressed by some professionals that the time taken to assess parents and set up the involvement of the Official Solicitor means they actually have less time than parents with capacity in which to demonstrate change. Our findings indicate that, on average, courts do not take longer to complete cases in which a parent lacks capacity than cases that do not involve a protected party, and, if anything, they appear to be settled faster than non-protected party cases. This may present a risk for parents with conditions that may respond to treatment or improve with the passage of time. For those with a learning disability, on the other hand, the longer time they may need to learn to improve their parenting skills may reduce their chance of using the period of the court case to work successfully to keep their children.

We explored whether the involvement of the Official Solicitor in care proceedings is a source of delay. Concern about a parent's litigation capacity requires the court to take steps to address this, and these steps take days or weeks to complete, depending on the speed of carrying out the necessary assessments. Once this was done, there was an indication that the instruction of the Official Solicitor as litigation friend could potentially speed up a problematic case. Time that might have been spent by the parent's solicitor addressing confusing or contradictory instructions could be used to focus on issues helpful for moving the case towards a resolution, and on average, such cases appear to take slightly less time than non-protected party cases, suggesting that any initial delay is offset by faster progress towards completion thereafter.

5 Practice Direction 12A – Care, Supervision and Other Part 4 Proceedings: Guide to Case Management, available at: https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12a

Communication between protected parties, their solicitors, and the Official Solicitor

Solicitors generally reported a positive and helpful relationship with the caseworkers at the Office of the Official Solicitor who instructed them. Most were positive about and role of the Official Solicitor and the caseworkers, especially when there was an issue they wished to raise with the court relating to fair process or parental rights. There is a delay for solicitors between asking for directions and receiving them, but we also heard of solicitors needing instruction quickly over the phone, for example when in court, and receiving them in a timely way.

Solicitors for parents were responsible, or frequently took on responsibility, for a range of tasks beyond representing the parents' legal interests. These included managing the anxieties and disappointments of parents, with varying levels of support available to the parent for communication through lay advocates. When such advocates (not legal professional advocates) were available for meetings related to the parent's children and the court case outside court they were highly valued, but as there is no entitlement to them, provision was variable and largely dependent on local authority generosity in funding them.

Some people interviewed expressed concerns about the absence of direct contact between parents and caseworkers, which could make the relationship with the Official Solicitor and his Office seem impersonal and alienating. The absence of any expectation that parents would have direct contact with their caseworker was noted. This was contrasted with the expectation that the Children's Guardian would have personal knowledge of the child in the proceedings.

Communication of parents' views to the court

Court hearings are stressful for parents who have capacity: they are likely to be no less stressful for parents lacking litigation capacity who, by definition, struggle to understand the process. In our observations of court hearings, and discussions with family justice system professionals, we sought information about steps taken to support parents in court, especially those who wish to give evidence or otherwise address the court directly. We observed some parents giving evidence in court. We also learned that in some court areas it is not usual for a parent to speak to the court, give evidence, or be cross-examined, while in others, solicitors and judges appear to be supportive of parties who lack litigation capacity being heard directly by the court, and this happens more frequently. The local variation we identified appears to be significant, but further research is needed to verify this.

Barriers to participation included technology that needed updating in court buildings, professionals who did not take account of parents' communication needs, and lack of recognition by the court or other parties' representatives of the amount of time needed for intermediaries, who were generally highly valued when present, to do their job. Enabling factors were courts where technology worked, intermediaries present to assist with communication and help plan the giving of evidence from the first time it was raised as a possibility, and a culture among the local court personnel (especially the Designated Family Judge) of enabling participation. Some courts were ready to adapt to the needs of protected parties, some individual judges were described as demonstrating good practice, but others appeared less ready or equipped to adapt to the needs of protected parties as vulnerable witnesses.

Intermediaries are particularly important when parents are planning to give evidence in court. They have a key role at any ground rules hearing when the giving of evidence is planned and a further role ensuring the 'rules' decided on for the relevant hearing are followed and used to good effect in the interests of participation by the parent.

The difference between what parents said they wanted to say to the court (most often they did not agree to the child being removed from their care) and the views expressed by the Official Solicitor in his final statement to the court (which seldom challenged the local authority plan for removal of the child), was noted in our qualitative interviews. This was reported to be a cause of disappointment or anger for some protected party parents. The wishes and views of the parents are included in the Official Solicitor's statements, but if his submission to the court does not object to the local authority's plan, frequently a plan for permanent removal of the child, the parent may question why 'their' legal representative is not fighting for their preferred outcome. The reason for this difference is that the Official Solicitor takes the whole of the evidence before the court and the welfare of the child into consideration when formulating his final statement, whereas a solicitor instructed directly by a parent may place more emphasis on the parent's instructions. On the other hand, a responsible solicitor for a capacitous parent will discuss realistic options with their client, which should impact on the parent's final submission to the court. Despite this, some parents felt that they were let down by the absence of challenge to the care plan (especially when this was a plan for adoption) in the Official Solicitor's final statement.

Parents who were willing and able to address the court directly had an opportunity to offset this sense of lacking a voice, but not all parents lacking litigation capacity appear able to do so, and some do not choose to attend hearings, much less speak. Support for giving evidence varies according to the solicitor's ability to prepare and support them beforehand, and contextual factors such as the technology available and layout of the court, skills and availability of interpreters and intermediaries, and the attitude of other family justice system professionals present.

Support services outside the family justice system

A contextual factor that was raised repeatedly in our study was a perceived lack of fit or consistency of threshold between services for children and families, and services for vulnerable adults. Many parents who lose their children in care proceedings face a sudden loss of services. Children's social care services withdraw once they cease to have a child in their care. It was perceived by a number of our respondents that the parents who make up this group struggle to obtain adults' services, and are often assessed as falling below the threshold for service provision. Given their vulnerability and the trauma many experience through the loss of their children, and the extent of their difficulties with comprehension, this is a troubling situation.

Where contact, direct or indirect, was ordered by the court as being in the best interests of the child, support to enable that to happen is important to uphold the rights of the child, as well as the parent. Our study suggests that support for contact post-adoption is variable and vulnerable to other service demands. If indirect contact is a long-term commitment intended to last the length of the child's childhood, early investment in supporting parents to establish a sustainable pattern of contact and ongoing support for the parent to maintain it are important. We see this as a child rights issue as well as a parental rights issue, since the contact is intended to be for the benefit primarily of the child. Further research is needed to ascertain how durable and beneficial indirect contact arrangements are for children, especially when their parents face additional challenges such as learning difficulties or mental health problems.

Limitations of the study

Since this was a retrospective study, we identified issues in the file study that were current at the time covered by the sample. Since that time, practice has developed in some respects, most notably increased awareness of the importance of careful assessment of parental capacity prior to agreeing a s20 accommodation, and agreement there will be legal aid funding on a 'non means non merit' basis for parents wishing to be parties when local authorities make applications for a placement order after care proceedings have ended. These are major advances. The timescale for allocation of caseworkers by the Official Solicitor has reduced to a standard time of two weeks, addressing to a large extent the anxiety about delay in caseworker allocation expressed by some interviewees.

There is increasing awareness of the moral duty, if not yet a statutory one, on local authorities to support parents who lose their children through care proceedings. In some areas, services are being developed to help mothers who have lost children in care proceedings to avoid a repetition of this experience, in the interests of parent, any future child and the state. These developments are very welcome, and it is hoped that future research will be able to report on the contribution they make to the experience of parents who have been assessed to lack litigation capacity in care proceedings. There is also a need for more general awareness of the specialist skills needed to support people with particular psychological challenges through grief and loss linked to loss of their children.

Conclusion and recommendations

This study identified for the first time the characteristics of parents lacking litigation capacity in care proceedings, and key aspects of provision made to enable them to be fairly represented in court and participate in hearings. We also identified outcomes for children and parents over a twelve month sample of all parents represented by the Official Solicitor in care proceedings.

Key recommendations based on the findings of the study include:

- The physical resources available to support parents who lack litigation capacity as participants in the legal process varies between courts and regions. A review is needed of the ability of courts to provide the technology and space needed to give all parents who have specialist communication and participation needs the opportunity to observe, understand and participate in hearings to the best of their ability.
- Without an intermediary to support the parent in understanding what is being asked or said in court, resources spent on interpreters may be under-used. While intermediaries were universally seen as very useful, and lay advocates were valued in supporting parents, some interpreters need the support of an intermediary to help them communicate with a parent who lacks litigation capacity.
- There appears to be variation in the extent to which local authorities fund advocates to help parents attend meetings, including with their solicitor, child protection conferences, and other key decision making meetings. Article 6 of the European Convention on Human Rights / Human Rights Act 1998 and the Public Sector Equality Duty protect the right to procedural justice. Article 20 of the Equality Act 2010 relates to the duty to make adjustments to avoid disadvantage, among other things through the provision of auxiliary aid. It is recommended that local authorities, and solicitors representing protected parties, consider the implications of this duty for meetings outside the court setting as well as in the court process itself.

- Contact after removal into care or adoption, including 'letter box' indirect contact between a parent and their child, is a right of the child, once it has been decided by the court that this should happen in the interests of the child, unless further developments lead to a re-evaluation of that decision. Supporting contact unless there are reasons to end it safeguards the child's Article 8 right to family life under the European Convention on Human Rights / Human Rights Act 1998. It is also the right of the parent to have contact with child as determined by the court, unless the child's welfare contraindicates this. Support for letterbox and other indirect contact should be universally available for parents who lose the care of their children to adoption, and that support should take account of their specific needs.

Contents

1. Introduction

This research is an exploratory study to examine care proceedings involving parents who become protected parties in court, with the Official Solicitor as their litigation friend. These are parents who lack litigation capacity. It considers the effect of lack of litigation capacity on parents and the responses of professionals working with the parents. The parents in this category are affected by mental health problems and / or learning disabilities. Some are subject to rapidly fluctuating conditions; others have stable long lasting conditions. Some need more time than most people to learn and consolidate new skills and knowledge. All are, for a time at least, experiencing impaired ability to absorb information, consider it and make a coherent and reasonably stable judgment based on that information, to a degree that renders them unable (lacking capacity) to instruct a solicitor. If they are involved in care proceedings because of concerns about significant harm to their children, it is imperative in the interests of justice and fairness that they receive impartial assistance. They need to be represented in court, despite their capacity issues, and matters relating to their child's welfare must be resolved in a way that is fair to parent and child. This must happen within a reasonable time frame, (unless there are exceptional circumstances), and within within the twenty six week time limit that is specified in law for care proceedings in the Children and Families Act 2014.

There has been little research to date that sheds any light on how courts and professionals respond to the needs of parents who lack litigation capacity in care cases, nor on the impact their lack of capacity has on them or on the Family Justice System as it responds to the care and welfare needs of their children. This research is timely, in the still relatively new legal landscape of more time-focused care cases following the 2013 Public Law Outline[6] (PLO) and s14 Children and Families Act 2014. It also coincides with a call for increased transparency in relation to decision making in care cases generally (Sir James Munby, 2014[7]).

The Official Solicitor is the litigation friend of last resort, who can only act where there is no one else suitable and willing to act for those lacking litigation capacity. To qualify for this protection, the protected party must lack capacity as defined in s3 Mental Capacity Act 2005: "...a person is unable to make a decision for himself if he is unable (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means)". The first stage in the research, the case profiling part of the study, explored the feasibility of gathering file data to provide new knowledge about the profile of parents represented by the Official Solicitor.

This research looks at the protective role of the Official Solicitor. It explores challenges to equality for protected parties and the role of the Official Solicitor in protecting their rights, including rights under the Human Rights Act 1998, the European Convention on Human Rights, and the Equality Act 2010. It addresses the way the courts accommodate the needs of parents who are subject to the protection of the Official Solicitor. There is a strong common interest shared by parents and children in having "...a fair and thorough investigation and court process" (Hoyano, 2014: 599[8]). It adds knowledge about court outcomes for children having a parent who is a protected party.

'Equality of arms' is an important principle in law, without which there cannot be a fair and effective system of justice within the English and Welsh paradigm (Hoyano, 2014).

6 Practice Direction 12A – Care, Supervision and Other Part 4 Proceedings: Guide to Case Management, available at: https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12a

7 Sir James Munby (2014) *Transparency in the Family Courts: Guidance* available at: https://www.judiciary.gov.uk/publications/transparency-in-the-family-courts/

8 Hoyano, L. (2014) "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] *Criminal Law Review 4-29 Oxford Legal Studies Research Paper No. 01/2014*

This research explores how the Office of the Official Solicitor supports procedural fairness through representation in court, provides for 'equality of arms' for people who would otherwise not have it, and looks at some challenges in making this provision. The principle that inflexible court processes must not 'railroad' justice is well established[9]: this research seeks to provide the basis for a better understanding of what accommodations are made, and what further adjustment might be needed.

The Public Sector Equality Duty (PSED)[10] is owed by public authorities, including courts and local authorities, to vulnerable parents by reason of their support needs. In addition, the procedural protection offered by Article 6 of the Human Rights Act 1998 (the HRA)[11] is not confined to the trial process but "...extends to all stages of the decision-making process in child protection proceedings"[12]. Knowing more about the decision-making process and mechanisms for the promotion and protection of the rights of parents who lack litigation capacity during the court process is vital for knowing how the PSED is operationalised in the family courts, and how Article 6 rights are protected in the process.

Case law has reinforced the importance of this research. *Re C (A Child)*[13] concerned deaf parents who did not receive adequate support for their communication needs in court, nor to help them to understand what they were being asked to agree to prior to the start of proceedings. Although these parents did not lack litigation capacity, the case highlights that challenges to participation issues must not impair the fairness of legal or quasi-legal processes. The processes must be adapted to meet the needs of the individuals concerned. In *Re C,* McFarlane LJ stated that courts should not adhere to the 26 week timeline in cases in which the parents' circumstances indicated they needed a longer period in order to have a fair assessment. Munby, J (as he then was) stated in *Re L* "...a parent's right to a fair trial under Art 6 is absolute. It cannot be qualified by reference to, or balanced against, the child's or anyone else's rights under Article 8 of the HRA[14]. The right to a fair trial under Art 6 cannot be compromised or watered down."[15]

When parents have the benefit of a litigation friend and the Official Solicitor to support them their right to representation by a properly instructed lawyer is safeguarded, but little is known about how this works in practice, outside the group of people who work in this field. This research explores this field, with a view to opening it up to wider understanding and critical examination of the contribution it makes to justice for parents who lack litigation capacity and, consequently, their children too.

9 *P, C and S v UK* [2002] ECHR 16 July 2002

10 For a definition of the PSED, see p. 4

11 Article 6 HRA protects the right to procedural fairness as set out in Article 6 European Convention on Human Rights

12 *Re G* [2003] EWHC 551

13 *Re* C (*A Child*) [2014] EWCA Civ 128

14 The right to private and family life under Article 8 HRA.

15 *Re L (Care: Assessment: Fair Trial)* [2002] 2 FLR 730

2. The aims of the study

The study set out to explore an area that has not been the subject of research before, and has been a neglected area. Children of parents with learning disabilities and mental health problems are more likely than other children to be the subject of supportive and coercive state intervention through the provision of services under s20 of the Children Act 1989, and through child protective interventions. In the most concerning cases this can lead to admission to care, adoption, or some other long-term care arrangement apart from their parents. The overall aim of the study was to carry out an analysis of the way courts and key professionals (case workers at the Office of the Official Solicitor, judges, lawyers, Cafcass guardians, parent advocates) perceive and manage issues arising related to a lack of parental litigation capacity in care proceedings, identify challenges and best practice, and consider how they may be best supported through care proceedings, consistent with meeting other pressures and priorities, including child welfare priorities.

The study was designed as an exploratory and scoping study: exploring the potential for research in this previously unresearched area and obtaining an initial picture of the process of supporting parents who lack litigation capacity through care proceedings, and any issues arising from this endeavour.

The detailed aims of the study were:

- To profile the parents who are identified as lacking litigation capacity
- to explore the experience of parents lacking litigation capacity in care proceedings: how they are supported and represented, and how their interests are balanced with those of their children when they appear to be in tension
- to explore how the introduction of a 26 week timescale for public law cases impacts on care cases involving parents with complex or severe needs that impair their litigation capacity

Subsidiary research questions included:

- What are the factors that make some parents lack legal capacity?
- How and when are legal capacity issues identified?
- How does the protective role of the Office of the Official Solicitor operate in care proceedings?
- How are the views of parents lacking capacity elicited and represented in court proceedings?
- What can we find out about the outcomes of care cases when a parent lacks litigation capacity?

3. The context for the study

While there has been considerable focus on the needs of children with parents who have severe difficulties, there has been less research into the needs of the parents themselves.

It has been established for some time that local authorities are more likely to initiate care proceedings in respect of children when a parent has a learning disability (Booth and Booth, 2004[16]; Booth et al, 2005[17]; Booth and Booth, 2006[18]). Parents with mental health problems also face challenges in parenting their children. This research has taken place in the context of significant research already carried out into care proceedings, the pre-proceedings process, use of expert witnesses, representation of parents and partnership with parents (e.g. Brophy, 2009[19]; Broadhurst et al, 2011[20]; 2013[21], Masson et al 2008[22]). The substantial body of work by the Norah Fry Centre (Tarleton, 2006[23]; 2007[24]; Tarleton et al, 2006[25]; Ward and Tarleton, 2010)[26] and at the Cornwall Special Parenting Centre (McGaw et al, 2010[27]) into the assessment and support needs of parents with learning disabilities were also important underpinnings informing our study.

16 Booth, W. and Booth, T. (2004) "A family at risk: multiple perspectives on parenting and child protection," *British Journal of Learning Disabilities* 32 9 - 15

17 Booth, T., Booth, W. and Mc Connell, D. (2005) *Journal of Applied Research in Intellectual Disabilities* 18 7 - 17

18 Booth, T. and Booth, W. (2006) The uncelebrated parent: stories of mothers with learning difficulties caught in the child protection net British *Journal of Learning Disabilities*

19 Brophy, J. (2009) *Early Process Evaluation of the Public Law Outline in the Family Courts*; Ministry of Justice: London, UK. Available online: http://www.justice.gov.uk/publications/evaluation-public-law-outline.html.

20 Broadhurst, K., Holt, K. and Doherty, P. (2011) "Accomplishing parental engagement in child protection practice? A qualitative analysis of parent-professional interaction in pre-proceedings work under the Public Law Outline," *Qualitative Social Work*. Available online: http://qsw.sagepub.com/content/early/recent.

21 Broadhurst, K., Doherty, P., and Yeend, E. (2013) *Coventry and Warwickshire Pre-Proceedings Pilot, Final Research Report*, Lancaster University and University of Bradford. Available at: https://www.cafcass.gov.uk/media/167143/coventry_and_warwickshire_pre-proceedings_pilot_final_report_july_4_2013.pdf.

22 Masson, J., Pearce, J., and Bader, K. with Joyner, O., Marsden, J. and Westlake, D. (2008) *Care Profiling Study*, Ministry of Justice Research Series 4/08. Available at: http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/docs/care-profiling-study.pdf.

23 Tarleton, B. (2006) *Finding the Right Support*, Baring Foundation, available at: http://www.baringfoundation.org.uk/Findingrightsupport.pdf.

24 Tarleton, B. (2007) "Specialist advocacy services for parents with learning disabilities," *British Journal of Learning Disabilities,* 36:134–139

25 Tarleton, B., Ward, L. and Howarth, J. (2006), *Finding the right support: a review of issues and positive practice in supporting parents with learning difficulties and their children*, Bristol: Baring Foundation.

26 Ward, L. and Tarleton, B. (2010) 'Advocacy for change: 'the final tool in the toolbox'' pp. 225-240 in *Parents with Intellectual Disabilities and their Children: Living and Learning in the Community*, Gwynnyth Llewewllyn, Rannveig Traustadottir, David McConnell and Hanna Björg Sigurnonsdottir (Eds), Oxford: John Wiley.

27 McGaw, S., Scully, T. and Pritchard, C. (2010) "Predicting the Unpredictable? Identifying High Risk versus Low Risk Parents with Intellectual Disabilities," *Child Abuse and Neglect* 34 699-710.

3.1 Parents with a learning disability or mental health problem and the family courts

Despite the research noted above, there appears to be a dearth of precise information about the prevalence of mental health problems and learning disabilities among parents of children who become the subject of care proceedings. There has been little research into the support needs of parents involved in care proceedings and the pre-proceedings process, with some notable exceptions[28] [29] [30] [31], but they offer no specific information about the impact of disability or illness on parental involvement in care proceedings. Neither disability nor illness are determinative of the ability to parent a child[32], but they are highly relevant in assessing parenting capacity and parental support needs, both for parenting itself, and for enabling participation in decision making processes concerning their children.

High profile cases such as *Re P (A Child)*[33] and *RP v United Kingdom*[34], highlight some of the complex human rights issues engaged when parents lacking litigation capacity become involved with the courts. Black LJ in *Re P (A Child)* reinforced the duty of the courts to comply with Article 8 rights to private and family life under the ECHR in their own operation, as well as making sure the orders they make are 'Article 8 compliant'. The same applies to Article 6 of the ECHR: court processes must be consistent with the Article 6 requirement that parents as parties have a 'fair trial'. When a parent has a condition (an illness or disability) that makes them unable to instruct a solicitor themselves, courts, like all public bodies, have a duty under the PSED to make sure they are not disadvantaged by this condition. This places a significant responsibility on courts to be 'PSED compliant', and makes the Official Solicitor a key participant in safeguarding the rights of parties who lack the capacity to conduct their own litigation.

Care proceedings must resolve a binary decision: whether or not the child who is the subject of proceedings has been subject to or is likely to suffer significant harm, and the threshold conditions for making a care order (or other order under the Children Act 1989) are met. They also must engage with a range of dynamic issues relating to child welfare, parental capacity to parent, and placement options for the child, which will have different implications in terms of future contact with parents, allocation of parental responsibility, and permanence[35].

28 Hunt, J. (2010) *Parental Perspectives on the Family Justice System in England and Wales: a review of research*. London: Family Justice Council: London. Available online: http://www.judiciary.gov.uk/JCO%2FDocuments%2FFJC%2FPublications%2FParental_Perspectives_final.pdf.

29 Broadhurst, K. and Holt, K. (2010) 'Partnership and the limits of procedure: prospects for relationships between parents and professionals under the new Public Law Outline', *Child and Family Social Work* 15 97-106.

30 Dickens, J., Masson, J., Bader, K., Young, J. (2013) "The paradox of parental participation and legal representation in 'edge of care' meetings: the limits of negotiation," *Child and Family Social Work*, available at: http://onlinelibrary.wiley.com/doi/10.1111/cfs.12075/abstract;jsessionid=81FFA3A11823365B4190DD3326FBD635.f02t01.

31 Masson, J., Dickens, J., Bader, K. and Young, J. (2013) *Partnership by Law? The pre-proceedings process for families on the edge of care proceedings*, School of Law, Bristol University and Centre for Research on Children and Families, Bristol, UK and University of East Anglia, Norwich, UK, 2013.

32 Tarleton, B., Ward, L. and Howarth, J. (2006) *Finding the Right Support? A review of issues and positive practice in supporting parents with learning difficulties and their children*, London: The Baring Foundation

33 *Re P* (A Child) ([2013] EWCA Civ. 963

34 *RP v United Kingdom* (2012) ECHR 1796, (2012) MHLO 102

35 See for example Bond, A. (2014) *Care Proceedings and Learning Disabled Parents: A handbook for family lawyers*, Bristol: Family Law / Jordans

3.2 Learning disability and parenting

It is established that local authorities are more likely to initiate care proceedings in respect of children whose parents have a learning disability[36] [37]. Removal may take place because of a belief that children will be harmed in the future: sometimes, it has been argued, when supporting evidence for this is slender[38].

The level of intellectual capacity below which parenting capacity is negatively affected is not clear-cut, because contextual factors have a large part to play in determining the quality of the child's parenting experience. As an approximate marker, IQ levels below 55 to 60 appear likely to be predictive of difficulty in parenting without substantial support[39]. Above this level, while support for parenting is important[40], other specific risk factors may be more predictive of the ability to parent than IQ alone. Parents with a learning disability are unlikely to harm their children intentionally, but deficits in the ability to protect them from others who might be a risk to their children and unintentional neglect are risks for the child[41]. For mothers, it is the combination of low IQ and other risks that seem particularly problematic. These include:

- Parental childhood trauma
- Other needs the parent may have in addition to their intellectual disability, e.g. a physical disability
- Raising a child with special needs
- Characteristics of male partners: risk factors include higher IQ, history of violent or antisocial behaviour, or criminal activity such as sexual offences, domestic violence or substance misuse[42].

Parents with learning disabilities are more likely to live in poverty, be socially isolated, have experienced poor parenting themselves and to have had difficult relationship histories. Even in the absence of the specific risk factors listed above, parents with learning disabilities are more likely than non-learning disabled parents to be starting parenting from a position of difficulty[43]. This study looked for, and found ample evidence of, the prevalence of additional risk factors in our sample of parents with a learning disability. We also found indications that levels of service provision to support parenting by parents with a learning disability were variable, but overall in our sample it appeared that low levels of support service provision were common. Since this was not a primary focus of our study, further research is needed to confirm this observation. Tarleton et al (2006)[44] observed an increase in availability of services for parents with learning difficulties, but two specific points are relevant for our sample: the parents in our study had already been identified as unable to parent to a satisfactory standard, and many of them had their children removed from their care at an early age.

36 Booth, T., Booth, W. and McConnell, D. (2005) Care proceedings an parents with learning difficulties: Comparative prevalence and outcomes in an English and Australian court sample," *Child and Family Social Work* 10 353 - 360

37 Booth, T. and Booth, W. (2006) "The Uncelebrated Parents: stories of mothers with learning disabilities caught in the child protection net," *British Journal of Learning Disabilities* 34 94 - 102

38 Tarleton et al. (2006) op cit

39 Tymchuk, A., Adron, L., and Unger, O. (1987), "Parents with mental handicaps and adequate childcare – a review," Mental Handicap 15 49-53, cited in Baum, S. (2016) *Parents with Intellectual Disabilities* University of Hertfordshire, available at: http://www.intellectualdisability.info/family/articles/parents-with-intellectual-disabilities p.3.

40 Tarleton et al (2006) op cit

41 McGaw, S. and Newman, T. (2005) *What Works for Parents with Learning Disabilities?* Barkingside, Essex: Barnardos

42 McGaw, S., Scully, T. and Pritchard, C. (2010) "Predicting the Unpredictable? Identifying high risk versus low risk parents with intellectual disabilities," *Child Abuse and Neglect* 34 699- 710.

43 Baum, S. and Alexander, N. (2010) "Pregnancy, contraception and women choosing to have a child," ch. in McCarthy, M. Thompson, D. (Eds) (2010) *Sexuality and Learning Disabilities: A Handbook*, Pavilion Publishing, cited in Baum, S. (2013) *Parents with Intellectual Disabilities*, Hertfordshire University, available at: http://www.intellectualdisability.info/family/articles/parents-with-intellectual-disabilities

44 Tarleton et al (2006) op cit

The 2015 *Working Together to Safeguard Children* guidance states that,

> "Children may be at greater risk of harm or be in need of additional help in families where the adults have mental health problems, misuse substances or alcohol, are in a violent relationship, have complex needs or have learning difficulties"[45].

Adults with parental responsibilities for disabled children have the right to a parent carer's needs assessment under section 17ZD of the Children Act 1989. When it is the parent who has the disability, there is no corresponding duty on adult social care to carry out an assessment with a view to supporting parents in the interests of the welfare of the child. We found that thresholds for support for parents as adults in their own right appear so high that many parents with a learning disability in care proceedings do not meet the criteria for service provision in their own right. A study of Serious Case Reviews and neglect noted:

> "Parental learning disabilities are rarely highlighted in serious case reviews although our analysis of these reviews has shown that there are often indications that parents had learning problems which were not assessed or addressed.[46]"

This was sometimes the case even when the children had complex health care needs of their own.

The picture that emerges is one in which it seems that some parents with learning disabilities experience high levels of compulsory state intervention into their family life, including losing care of their children, while others are left to cope without support, even when the children also have additional needs.

3.3 Mental health problems and parenting

Approximately a quarter of patients in acute psychiatric settings are thought to be parents, possibly more among young women patients, although statistics relating to this may not be reliable and the proportion may be much higher[47] [48]. Parents with mental health problems face additional obstacles to parenting their children, and may find that services become concerned for the welfare of their children, especially if the problem is of long duration[49]. It is not possible at present to know how many parents with mental health problems are involved in care proceedings or lose care of their children for reasons primarily associated with their mental health status, but was identified as a factor in more than half of a sample of serious case reviews[50].

In 2013, Ofsted[51] called for mental health services to collect data on children whose parents have mental health difficulties. This would add considerably to knowledge about this group of children and their parents, but is not yet in place. The absence of systems for collation of accurate information about the number of children involved in child protection processes or care proceedings whose parents have mental health problems is surprising. It mirrors a similar lack of information concerning parents with learning disabilities. There are no national requirements to gather information and report on the

45 Department of Health (2015) *Working Together to Safeguard Children*, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592101/Working_Together_to_Safeguard_Children_20170213.pdf p. 58

46 Brandon, M. (2013) *Neglect and Serious Case Reviews* University of East Anglia / NSPCC p. 53

47 Parker, G., Beresford, B., Clarke, S., Gridley, K., Pitman, R., Spiers, G. and Light, K. (2008) *Research review on prevalence, detection and interventions in parental mental health and child welfare: Summary report*, Social Policy Research Unit, York University, available at: http://php.york.ac.uk/inst/spru/pubs/1125/

48 Osted (2013) op cit p. 9

49 Ofsted (2013) *What about the children?* Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419128/What_about_the_children.pdf

50 Brandon, M. et al. (2011) *A study of recommendations arising from serious case reviews 2009-2010* London: Department for Education.

51 Ofsted (2013) op cit

number of parents or carers who have serious mental health difficulties[52]. The same report also found that mental health services do not consistently consider the impact of parental mental health on children, so under-referral of concerns to children's services seems likely.

> "No data are collected either nationally or locally about how many adults receiving specialised mental health services are parents or carers. Local areas visited had difficulty in identifying the numbers of children who were receiving support or intervention because of the impact on them of their parents' or carers' mental health difficulties."[53]

The same review concluded that most Local Safeguarding Children Boards did not have a clear grasp of the quality of joint working between adult and children's services because evaluation and auditing was not well established[54].

There is no capacity to cross-reference adult mental health with children's social care databases at local or national level, which means measuring prevalence of mental health problems among parents, developing indicators of good practice and reviewing service progress against any indicators that might be developed in future is not possible[55]. Information about support services as well as use of care proceedings in cases of parental mental health is poor or non-existent.

When parents have a long-term metal health problem, there is often some involvement by Children's Social Care, but it was not always well planned or positively evaluated:

> "In most of the long-term cases [of parental mental illness] there was a history of involvement by children's social care. These cases were complex and challenging. Parents' and carers' difficulties were not easily, and sometimes never, resolved and progress was often not sustained. Cases were opened and closed, and families were supported for a time, sometimes over substantial periods and sometimes intermittently. This raised questions about the sustainability of change, and the timeliness and robustness of previous decision-making and planning."[56]

Parental mental illness is characterised as one aspect of the so-called 'toxic trio' of parental drug abuse, domestic violence and mental health problems. A recent study of SCRs and neglect states:

> "Serious case reviews are not a reflection of typical child protection practice. The constellation of neglect-related events and characteristics that came together in these cases to produce an outcome of fatality or grave injury cannot be distilled into a checklist of risk factors that predict such an outcome. In most cases with similar characteristics, a child will not come to such catastrophic harm."[57]

However rare, the incidence of catastrophic events in some families where parents experience mental ill-health, and the unpredictable and potentially frightening nature of some mental illness (especially for a child), makes accurate identification of 'high risk' parents problematic.[58]

Parental mental illness is frequently associated in the literature with harmful behaviour, but research has found that families that need services because of parental mental ill health often, "...struggle to get accessible and effective support that addresses children's needs and recognises the parental responsibilities of many adults with mental health problems."[59]

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52 Ofsted, 2013 op cit. p. 5

53 Ofsted, 2013 op cit at p. 4

54 Ofsted, 2013 op cit at p. 5

55 Roscoe, H., Constant, H. and Ewart-Boyle, S. (2012) *Think Child, Think Parent, Think Family: Final evaluation report*, SCIE publications, available at: http://www.scie.org.uk/publications/reports/report56.pdf

56 Ofsted, 2013 op cit at p. 6

57 Brandon, M. (2013) *Neglect and Serious Case Reviews*, NSPCC / University of East Anglia available at: https://www.nspcc.org.uk/globalassets/documents/research-reports/neglect-serious-case-reviews-report.pdf p. 5

58 Monds-Watson, A., Manktelow, R. and McColgan, M. (2010) "Social work with children when parents have mental health difficulties: acknowledging vulnerability and maintaining the "Rights of the Child", *Child Care In Practice* Vol. 16, Iss. 1,

59 Roscoe et al (2012) op cit at p. 9

As with services for parents with a learning disability, parents with a mental health problem suffer from a lack of co-ordination and consistency of thresholds for intervention and support:

> "The gaps between children's and adults' services have been a consistent theme of this review and some specific proposals for developing more integrated services for parents with mental health problems and their children were identified. The gaps to be addressed are not just those between children's services and adult mental health services but also those between child and adolescent mental health services (CAMHS) and adults' mental health services."[60]

3.4 Equality, discrimination and the courts

This research focuses specifically on parents who have protected characteristics as defined in the Equality Act 2010[61]: a disability, possibly in conjunction with other characteristics that require measures to accommodate to the person's needs in court, such as having English as a second language[62]. All protected parties qualify for protection of their rights under the PSED created by the Equality Act 2010 s149. This requires public bodies (including courts and local authorities) to advance equality of opportunity between people who share a protected characteristic and those who do not, and to remove or minimise disadvantages suffered by people due to their protected characteristics. They are required to take steps to meet the needs of people from protected groups where these are different from the needs of other people. The process by which a court reaches its decision concerning the child or children who are the subject of proceedings has to be fair to all parties. A court process that is fair to a capacitous parent or a parent without a disability may be unfair to one that is not capacitous or disabled. Special measures may be needed to enable fairness of participation.

The PSED requires public bodies to consider the extent to which their processes are fair to all people using them. It requires public bodies to eliminate unlawful discrimination, harassment and victimisation, advance equality of opportunity between people who share a protected characteristic and those who do not and foster good relations between people who share a protected characteristic and those who do not.

Rights engaged in public law proceedings where a parent has a disability include rights under the United Nations Convention on the Rights of Persons with Disabilities (CRPD)[63]. Article 23, ss 2, 4 and 5 states:

> "2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.
>
> 4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

60 Stanley, N. and Cox. P. (2008) Parental mental health and child welfare: reviews of policy and professional education, SCIE / UCLAN, available at http://www.scie.org.uk/publications/guides/guide30/files/FullResearchReview.pdf p. 38

61 S4 of the Equality Act 2010 identifies nine protected characteristics. These are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion and belief; sex and sexual orientation.

62 In Civil and family Proceedings, Her Majesty's Courts and Tribunals service (HMCTS) will meet the 'reasonable' costs of interpreters for deaf and hearing-impaired litigants, and the court will make these arrangements if they are needed. Court staff will also arrange for language interpreters needed for civil and family hearings involving children. See https://www.justice.gov.uk/newsite/courts/interpreter-guidance.

63 *United Nations Convention on the Rights of Persons with Disabilities*, available at: https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

> 5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting."

Article 13(1) and (2) of the same Convention address access to justice:

> "1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
>
> 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

The parents' rights, and those of the children, are also protected under Article 6 of the European Convention on Human Rights (ECHR) / Human Rights Act 1998 (HRA), which states that,

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[64]

Other relevant provisions are the rights of parents to private and family life, and of children not to be separated from their parents unless this is necessary and in accordance with the law (Article 8 HRA):

> "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Children also have the right to have their best interests paramount in decision making under (inter alia) s1 Children Act 1989[65] .

The *Overriding Objective*[66] requires family courts in England and Wales to deal with cases justly and fairly, as well as at proportionate cost. The Family Procedure Rules 1.1(2) a require them, so far as is practicable, to ensure that the parties are on an equal footing. The Official Solicitor enables parents who would be unable to instruct a solicitor to take part in proceedings with this additional support, although the appointment of the Official Solicitor entails a curtailment of the autonomy of the protected party to make decisions themselves in relation to their case.

In 2009, the UK ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD). On March 17 2017, a review of the UK's compliance with the CRPD commences. Ratification means the UK is committed to promoting and protecting the full enjoyment of human rights by disabled people and ensuring they have full equality under the law, including in relation to access to justice[67]. In 2016, an inquiry of more limited scope specifically looking at the impact of legislation and policy on people with disabilities in relation to social security schemes, work and employment under article 6 of the Optional Protocol to the Convention raised several issues concerning the UK's compliance, and included among its recommendations that the UK must:

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64 Human Rights Act 1998 Article 6 available at: http://www.legislation.gov.uk/ukpga/1998/42/schedule/1

65 S1 Children Act 1989 available at: http://www.legislation.gov.uk/ukpga/1989/41/section/1

66 Civil, Criminal and Family procedure rules and their related practice directions: Part 1 – Overriding Objective available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01

67 See CRPD website at: https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/un-convention-rights-persons-disabilities

> "Ensure access to justice, by providing appropriate legal advice and support, including through reasonable and procedural accommodation for persons with disabilities seeking redress and reparation for the alleged violation of their rights, as covered in the present report..."[68]

The 2017 Inquiry is likely to be particularly concerned to examine access to justice by people with disabilities.

3.5 Mental capacity and litigation capacity

A person lacking litigation capacity is, "...a party or an intended party, who lacks capacity within the meaning of the Mental Capacity Act 2005 to conduct the proceedings."[69] The process for the appointment of the Official Solicitor in family proceedings is set out in the *January 2017 Practice Note Official Solicitor Appointment in Family Proceedings*[70]. The cases in our study were all public law family proceedings: cases in which a local authority had applied for a care order, and sometimes also a placement order under the Adoption and Children Act 2002 with a view to the child being adopted.

Section 3 of the Mental Capacity Act 2005 states that an individual is considered incapable of making a decision for him/herself if she or he,

> "...is unable to (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means)."

Litigation capacity is a distinct aspect of capacity: a person may have capacity in other areas but still lack it in terms of their capacity to conduct litigation through a solicitor. Lacking litigation capacity does not mean that a person is necessarily lacking capacity to parent. Litigation capacity, or the absence of it, is determined by the court hearing the case, but the judge is advised by an assessment of the person by a professional who is suitably qualified and experienced. There must be undisputed evidence the party or intended party lacks capacity to conduct the proceedings. They are entitled to dispute an opinion they lack litigation capacity, but the determinative factor is a finding by the court that they have or lack litigation capacity. The evidence relating to their capacity and the consequences of a finding that they lack capacity should have been disclosed to the party, and carefully explained to them[71]. The court makes a formal finding of capacity under the *Family Procedure Rules 2010* rule 2.3[72].

Capacity is as defined in the Mental Capacity Act 2005 s2, which states that a person,

> "...lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."

This may be a permanent or temporary impairment or disturbance. Any question whether a person lacks capacity within the meaning of the 2005 Act must be decided on the balance of probabilities. In making any decision about capacity, assessors must ensure they do not make decisions based on age, appearance, any condition the person has, or an aspect of his behaviour, which might lead others to make unjustified assumptions about capacity. If the assessment of capacity is negative, and the court judges the person to lack litigation capacity, they become a 'protected party'.

68 UNCRPD (2016) *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention: Report of the Committee*, UN CRPD/C/15/R.2/Rev.1 para VIII 114 (f)

69 *Parents who lack capacity to conduct public law proceedings* p. 1, available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Parents_who_Lack_Capacity_with_appendices.pdf

70 Available at http://www.familylawweek.co.uk/site.aspx?i=ed175444

71 *January 2017 Practice Note Official Solicitor Appointment in Family Proceedings* as above, p.2

72 Family Procedure Rules 2010 available at: https://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu

S3 of the same Act provides that, for the purposes of s2, a person is unable to make a decision for himself if he is unable:

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand it when given in a way that is appropriate to his circumstances, for example, using simpler language, or visual aids.

The common law test for capacity to litigate is defined as:

> "...whether the party to the legal proceedings is capable of understanding, with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law, whether substantive or procedural, should require the interposition of a ...litigation friend."[73]

The test has two components: the diagnostic part concerns the presence or not of impairment or disturbance of the mind, and is usually a matter for expert assessment, and a factual component, whether at the material time the person is unable to make a decision for him or herself in relation to the matter.

Legal capacity can only be identified with reference to a particular individual difficulty, a particular situation and a specific issue. While the test of litigation capacity is the same for everyone, it must be applied having regard to contextual factors. It cannot be a 'tick box exercise':

> "What... does seem to me to be of some importance is the issue-specific nature of the test; that is to say, the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made."[74]

The ability to make competent decisions is determined by a range of factors, including the complexity of the material to be understood, the sensitivity to the person's communication needs with which the relevant material or advice is presented by others, the individual characteristics of the person being assessed. The conduciveness or otherwise of the wider situation within which the person is being assessed may also affect capacity, for example, the level of stress they are being placed under by their situation at the time of assessment. The final arbiter of legal capacity is the court, which must make its decision based on an assessment of the person in context.

Masterman-Lister v Brutton & Co[75] established that a person is not to be regarded as incapable of managing his affairs because, in order to do so, they will need to take advice, or because they may not follow the advice they have been given, or because they are vulnerable to exploitation, or at risk of making rash or irresponsible decisions.

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73 Chadwick, LJ in Martin Masterman-Lister v Brutton & Co. [2002] EWCA Civ 1889 at 1539D, available at http://www.bailii.org/ew/cases/EWCA/Civ/2002/1889.html

74 Kennedy, LJ in Masterman-Lister v Brutton and Co, Jewell and Home Counties Dairies (no. 1) CA 19 Dec 2002, 3 All ER 162, (2004) 7 CCL Rep 5.

75 Op cit, as 76

There are limits to the extent to which contextual matters should be taken into account: the quality of advice given should not influence whether a person has or lacks litigation capacity. Lady Hale stated in *Dunhill v Burgin*[76] that earlier cases could be read to indicate that, "having identified a problem and gone to a lawyer, all that is needed is the capacity to understand and make decisions based upon the actual advice given by that lawyer." This could not be correct, according to Lady Hale in this case, because that would mean that the quality of advice given by the lawyer could affect whether or not the person had legal capacity or not: whether they receive good advice, bad advice or no advice at all.

It is important that suspected lack of capacity be assessed in a timely manner, since all actions taken prior to the assessment may be deemed invalid[77]. "(T)he policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers."[78] The Official Solicitor is a safeguard for the protected party from lack of decision making through incapacity, and from inability to make competent decisions about the quality of advice given to them or the conduct of their case by the protected party's legal adviser. In practice, it is usually the solicitor for the parent who first identifies and raises with the court issues of legal capacity, although this may be informed by prior assessment by the local authority. The local solicitor (as opposed to the Official Solicitor, who has a distinct role as described above) is the primary source of information for the caseworker about the protected party's wishes and feelings; the progress of the case in court, and the interim positions of the other parties as they develop through negotiation and discussion, as well as through formal decisions made by the court.

Legal capacity as constructed by the English courts is 'all or nothing', either you have it or you do not. This is arguably a disadvantage for those on the borderline between having litigation capacity and lacking it: every individual must fall one side or other of this line at any given time. There are litigants whose capacity fluctuates over time, so that there may be times when they need a litigation friend and other times when they do not[79]. The Civil Procedure Rules r 21.9(2) provide that when a party ceases to be a protected person, the litigation friend's appointment continues until it is ended by a court order.

Capacity is issue-specific, so within one set of proceedings parents may be found to lack capacity to make some decisions but able to make others. The most notable examples in our case file study were cases, of which we encountered a few, in which a parent is assessed to be unable to act capacitously to instruct a solicitor during proceedings addressing the need for a care order to be made, but deemed able to understand and capacitously agree to an adoption order being made. The absence of legal aid and therefore access to the support of a litigation friend in proceedings relating to certain applications relating to children in public care, particularly when prospective adopters apply for an adoption order in respect of a child placed with them by a local authority under a Placement Order, is a significant gap in provision that is arguably not compliant with Equality Act 2010 provisions relating to fairness and justice. This situation is under review at the time of writing[80].

76 Dunhill v Burgin (Nos 1 and 2) [2014] UKSC 18

77 *Civil Procedure Rules* r21.3 (4): "Any step taken before a child or patient has a litigation friend, shall be of no effect, unless the court orders otherwise." https://www.justice.gov.uk/courts/procedure-rules/civil

78 Hale, LJ, *Dunhill v Burgin* (Nos 1 and 2) [2014] UKSC 18 para 33

79 *Dunhill v Burgin* (Nos 1 and 2) [2014] UKSC 18 para 33

80 McNicholl, A. (2017) "Government to tackle legal aid gap for parents challenging adoptions," *Community Care online* March 1st 2017, available at: http://www.communitycare.co.uk/2017/03/01/government-tackle-legal-aid-gap-parents-challenging-adoptions/

A factor that may negatively affect capacity assessments is the stress the parent is under because of being involved in care proceedings[81]. Other relevant factors include the stress of being assessed; the parent's attitude to being assessed; the ability of the person carrying out the assessment to communicate with and relate to the parent and the availability of help with communication if needed. This raises the possibility of how to achieve a fair assessment. Repeated reassessment is arguably unfair because of the stress it may cause, and it is also impractical to repeatedly reassess someone during a court process that is now required to be completed within 26 weeks unless there are exceptional circumstances to warrant an extension. Cost, and the validity of repeated assessments, are other factors that militate against repeated reassessment, so it important that the first assessment is fair and accurate. Despite this, it is important that parents with fluctuating conditions have access to re-assessment as appropriate.

Lady Hale's statements in *Dunhill* (see above) reinforce that a person is not to be regarded as unable to understand something if they are able to understand it when it is presented in the most appropriate way for that individual: capacity is not a function of the effectiveness of the adviser as a communicator. This must arguably apply to assessment of capacity also. Assessments of capacity must be made on the premise that all reasonable steps will be taken to ensure that the person will be supported to understand as much as possible of the proceedings, and participate in decision making in those aspects of the legal process that they are able understand. Further, once assessed as lacking legal capacity, a parent does not lose the right that all reasonable steps be taken to enable their participation in decisions on which they are able to form a capacitous view.

3.6 Parents who lack litigation capacity and the role of the Official Solicitor

Parents who lack litigation capacity are legally 'at risk' in that, without the support of their litigation friend (usually the Official Solicitor), it would be impossible for them to have a fair hearing in care proceedings. A parent who lacks litigation capacity will have their legal representative designated by the Official Solicitor, although it is usually the case that the parent's solicitor of their own choosing continues to act for them. The parent becomes a 'protected party'. Every protected party requires a litigation friend[82]. The litigation friend takes over the role of instructing the protected party's solicitor. The litigation friend has a duty to conduct the proceedings fairly and competently in the best interests of the protected party[83]. The Official Solicitor is the litigation friend of last resort, since he will only take up the role if there is no one else able or suitable to perform it[84].

Although a protected party no longer has the right to instruct their solicitor, they still have the right to be informed, consulted and involved in the court process: they still have rights under Article 6 and Article 8 HRA. Any process interfering lawfully with their rights under Article 8 should involve them as far as possible. Munby, J (as he then was) said in *Re G*,

81 Hunt, J. (2010) *Parental Perspectives on the Family Justice System in England and Wales: a review of research,* available at: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Parental_Perspectives_final.pdf

82 Part 15 *Family Procedure Rules* 2010 as above.

83 *January 2017 Practice Note Official Solicitor Appointment in Family Proceedings* as above, para 16

84 In our sample of one year of cases in which a parent lacked litigation capacity in public law proceedings, we came across just one case in which the Official Solicitor was contacted about becoming the litigation friend but a professional known to the parent took on the role of litigation friend. This appears to be relatively unusual. The case was not included in our study sample.

> "...Article 8 requires that parents are properly involved in the decision making process not merely before the care proceedings are launched, and during the period when the care proceedings are on foot... but also – and this is what is important for present purposes – after the care proceedings have come to an end and whilst the local authority is implementing the care order."[85]

Once the Official Solicitor has agreed to be the litigation friend of a protected party, a case manager is allocated within 2 working days of his criteria being met[86]. The criteria include assuring himself that funding is available for the legal costs of representation[87]. The Official Solicitor is able to act in cases where parents lacking litigation capacity are involved in care proceedings because legal aid is available to fund his role as litigation friend. 'Non means, non merit' legal aid provides the financial support needed, reflecting the weight of the matters to be decided, and their implications for the rights of parents and children. The Legal Aid Agency '*Scope of Family proceedings under LASPO*'[88] regulations make such legal aid available to all parents and any party with parental responsibility for a child involved in applications for an order under Parts 4 and 5 of the Children Act 1989, which includes Care Orders, Supervision Orders, Child Assessment Orders and Emergency Protection Orders.

The protected party's views and feelings may at times be in contention with the view of the Official Solicitor. Parents very often want their child to be returned to their care, and would, if capacitous, give instructions that this is what they wish their solicitor to pursue, although solicitors may advise their clients of this if they think this is unrealistic. The Official Solicitor considers the interests and wishes of the protected party while bearing in mind the likelihood of this being an attainable goal, given the court's duty to have the child's welfare as its paramount consideration. The instructions to the protected party's solicitor will reflect appreciation of this tension, as will the final statement of the Official Solicitor to the court. The final statement by the Official Solicitor to the court takes into consideration an analysis of the child's welfare. The wishes of the parents and implications of the court's decision for their welfare are necessarily subsidiary to this. This means that parents who lack litigation capacity may find the instructions given to their solicitor do not accord with their own wishes, or the instructions they believe they would have given themselves had they had capacity.

The availability of legal aid in future related proceedings (particularly Placement Order applications) is relevant because it is not uncommon for proceedings which end with a Care Order or Special Guardianship Order *not* to be the end of the child's 'legal journey'. A Placement Order, made with a view to the child becoming adopted, may not lead to later adoption taking place. Special Guardianship and other wider family placement arrangements may not work out, or fall through. Parents at the end of care proceedings are notified of the making of a 'final order', but it may not in fact be final, but a step on a longer legal journey for the child. However, this point currently marks the end of their entitlement to 'non means non merit' legal aid[89].

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85 *Re G* [2003] 2 FLR 42 para 36

86 This provision is in the 2017 *Practice Note* referenced above. At the time of our study, allocation took longer, and some of the research data reflects a process that was lengthier still. It is worth noting that the situation that applies in terms of case allocation has changed somewhat over recent years.

87 *January 2017 Practice Note Official Solicitor Appointment in Family Proceedings* as above, paras 17 – 20

88 *Scope of Family Proceedings Under LASPO* available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444189/scope-family-proceedings-laspo.pdf

89 As noted above, there has been an undertaking in March 2017 that this situation will be remedied through provision in the forthcoming Children and Social work Act, currently the Children and Families Bill, see https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-02-28/HCWS506/

The Office of the Official Solicitor is an arm's length body within the Ministry of Justice. Under *Practice Direction 15A – Protected Parties*,[90] the Official Solicitor must:

- fairly and competently conduct the proceedings on behalf of the protected party
- have no interest in the proceedings adverse to the protected party
- all steps and decisions taken must be taken for the benefit of the protected party.

The Official Solicitor employs caseworkers who give the solicitor for the parent their instructions. They are based in Kingsway, in Central London[91]. The caseworkers do this with support from specialist legal advisers as well as the Official Solicitor himself, on whose behalf they carry out the work. The Official Solicitor makes a final statement to the court.

Communication with protected parties' solicitors is by phone, email and fax. As in all public sector services, pressure of work is high, and there is no scope within the present arrangements to cover travelling to meet the protected party or their solicitor in person, or attend court hearings. Instructions are based on communication with the protected party's legal representative; the statements of other parties (primarily the local authority, the child by their Cafcass Guardian, and the other parent, if there is another parent involved); expert witness testimony, and all information supplied to the parties by the local authority, which includes assessments undertaken by or commissioned by them, information from their own records, and information from any previous care proceedings involving this parent.

A lack of legal capacity does not negate the value of the views and wishes of the person who lacks litigation capacity, rather, it provides a structure within which those views can be sought and presented to the court in a form the court can understand and weigh. The court's decision must be based on the best interests of the child (Children Act 1989 s1), but the wishes and feelings of the parents will be relevant, especially in considering issues such as placement within the wider family, and contact arrangements if an order is made that will lead to the separation of parent and child. If the court does not follow the wishes of the parent, as is frequently the case, acknowledging the parents' views is important both for the parent personally, and for the achievement of a just outcome that has taken all matters relevant to the future wellbeing of the child into consideration.

Many parents involved in care proceedings are experiencing some factors that impact on their ability to make decisions that are reasonable and in their best interests. While people are free to make decisions which others might not consider wise, making unwise decisions when there is the possibility that one's children may be removed from one's care has potentially enormous consequences for both child and parent. Those parents who are identified as falling below the threshold of litigation capacity are protected from the impact of their own unwise decision-making, but with a price, in that they no longer have the right to instruct their own solicitor to determine how their case will be conducted in the courts.

90 Ministry of Justice Practice Direction 15A – Protected Parties available at: https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_15a

91 The website for the Official Solicitor and Public Trustee is at https://www.gov.uk/government/organisations/official-solicitor-and-public-trustee

4. Methodology

4.1 Ethical Approval

Ethical approval was approved from the University of Plymouth Human Ethics Committee. Consent for carrying out the study was also obtained from the Office of the Official Solicitor, the President of the Family Division, the Ministry of Justice and Cafcass and Cafcass Cymru Ethics Committee.

The study had three components: a case file study, observation of court hearings, and interviews with a range of professionals involved in the Family Justice System.

4.2 The case file study

We examined case files held by the Office of the Official solicitor covering one year of cases referred to and accepted by him. Each file was studied to extract information according a pro forma to be found in the Appendix. The information captured in the file part of the study was designed to answer the following questions:

- What can we learn about 'protected parties' in terms of their needs and characteristics?
- How and when is the need for an assessment of capacity identified?
- How do professionals respond to legal capacity issues in care proceedings?
- How is the relationship between the parent and the Official Solicitor / caseworker structured and managed?
- How are decisions made about the interests of the parent in proceedings?
- What accommodation does the court make in view of the parent's protected party status, or to fulfil duties under the PSED, and what impact does this have, if any, on court timescales?
- Identification of the outcomes of cases, where known, including plans for future support services.

Our sample of cases comprised all the care proceedings cases in which the Official Solicitor had agreed to act for a parent because the parent lacked litigation capacity which were completed over the course of one year commencing May1st 2014. This period was chosen to capture the process of cases that had begun and ended in the period after the implementation of the 26 week case duration rule. We wanted to look at cases that had completed, so that we could see the outcome of the cases. A limitation on our data is that as a result of this sampling strategy, there may have been some cases that took significantly longer than 26 weeks that begun after the implementation of the 26 week period but had not finished in time to be included in our sample, and some cases that began before the implementation of 26 week care proceedings completed within our window for the sample, so we captured some 'outliers' in terms of case duration.

Every case within this window was included, so that a complete set of cases relating to that one-year period was examined, a total of 38 cases. The files had a paper component and an electronic component, the former containing copies of all paper documents, including case histories, court reports, statements, and court documents. The electronic record sometimes contained additional material, such as records of email exchanges between caseworker and solicitor. The information taken from the files mainly related to the parent who lacked litigation capacity, with some basic information about the family and the context for the case, such as the number and ages of children, and whether there were other significant family members such as another parent involved in the proceedings.

We also recorded any indications that there had been discussion about special measures to support the parent lacking litigation capacity, such as advocates, intermediaries, interpreters, or special measures to enable them to give evidence to or address the court, instruction of independent experts, and the outcome of the case.

Data collected relating to parents who lacked litigation capacity included: the relationship of the protected party to the child who was the subject of proceedings (usually mother or father, although some other relationships were represented); their year of birth (giving us their age at start of proceedings); the reason the person was assessed as lacking litigation capacity (e.g. learning disability, diagnosed mental illness, or a combination of factors); and whether they were single, married or cohabiting at the time of the court process. We also noted the parents' expressed wishes regarding the outcome of the case, when this was recorded. We also looked for any indication about attitude to being a protected party if there was information about this. We also recorded whether or not another parent was involved in the proceedings, and whether or not they had litigation capacity. Parents who lacked litigation capacity with partners who had litigation capacity were always represented separately from the capacitous partner.

Limited information was gathered relating to the children who were subject of proceedings, and any other children of the protected person. Our main focus was on the parents, not the children, but it was of relevance to know something about the children who were the subject of the proceedings, such as their age when proceedings began, as an indicator of the length of time the parent managed to care for the child before a lack of parenting capacity triggered care proceedings. Information extracted about children was limited to the gender and age of children subject of the proceedings, whether they were part of a sibling group and the legal status of any other children of the protected party, where this was recorded.

No information was recorded that could lead to identification of any individual, such as names, the date or the location of any court hearings, dates of birth except by month and year, or any other detail that could lead to identification of child or parent.

We recorded the status of the child at the start of proceedings (e.g. living at home with a parent with no other legal status; s20 accommodation; Emergency Protection Order; under police protection) and whether or not they were subject to a Child Protection Plan. We also recorded whether the family had been involved in a formal pre-proceedings process or the case had been initiated by an emergency, which pre-empted use of the pre-proceedings process.

We looked for evidence of the use of the 'Good Practice Guidance' for working with parents with a learning difficulty[92] [93], and noted any issues recorded in the case files relating to the presence or absence of specialist resources to support the parent in parenting their child before, during, or after proceedings.

The length of time taken by proceedings was recorded in our study, this being a particularly relevant issue given the 26 week time limit for care proceedings introduced by the Public Law Outline and the Children and Families Act 2014, and the possibility that parents who lack litigation capacity may qualify as having 'exceptional' circumstances that could necessitate a longer period to complete the case. As well as looking at the duration of proceedings, we also noted the number and type of hearings that took place in each case. In some cases in which parents had fluctuating capacity the outcome of the case was not known, as the Official Solicitor was discharged from his duty to represent the parent before the end of the case.

92 Department of Health and Department for Education and Skills (2010) *Good Practice Guidance on Working with Parents with a Learning Disability*, London: Department of Health

93 Working Together with Parents Network (2016) *Good Practice Guidance on Working with Parents with a Learning Disability* (updated version) available at: http://www.bristol.ac.uk/media-library/sites/sps/documents/wtpn/2016%20WTPN%20UPDATE%20OF%20THE%20GPG%20-%20finalised%20with%20cover.pdf

We looked at the frequency and type of contact between the protected party and their representative. It is usual for there to be no direct contact between the protected party and the Office of the Official Solicitor. The caseworkers at the Office of the Official Solicitor instruct the protected party's solicitor and have contact with their legal representative, but rarely have direct contact with the protected party. There were no instances in which there was such direct contact in our sample.

We recorded any information that suggested the court had used special measures to facilitate the direct involvement of the protected party in the court process. 'Special measures' are arrangements that may be put in place at the discretion of the court to enable those who would otherwise be disadvantaged in participating in the court process to have fuller engagement and understanding of the court process. Lay people who do not lack litigation capacity can find the court process difficult to understand: those who lack litigation capacity are particularly disadvantaged when it comes to participating in it. They have, as discussed, a right under the PSED / Equality Act 2010 to have reasonable adjustment made to facilitate their participation, which should be set up through case planning at an early Case Management Hearing. Some parents were also in receipt of support outside the court process to facilitate their participation in the legal process, for example, advocates to help them communicate in their meetings with their legal representative and local authority outside court. When this was apparent in the file record, it was recorded.

Lastly, we recorded the court outcome: whether a care order, supervision order, special guardianship order, child arrangements order or s8 order was made. In some cases, a care order was sought together with a placement order under the Adoption and Children Act 2004, and when this was the case, this was also noted in the research record.

For two sets of children, both parents lacked litigation capacity. The parents were represented independently by separate solicitors and had different Official Solicitor caseworkers, so they were treated as two cases by the Official Solicitor. Two cases involved the same parent who was involved at the same time in separate proceedings relating to different children in two local authority areas.

Not every piece of data in every data set is included in every statistic: for example, cases in which a parent regained litigation capacity are not included in the measure of case duration, although they are included when looking at the reason for lack of capacity, or numbers and ages of children. Because of this, sample sizes vary between the different sets of summary statistics presented below.

4.3 The court observations

We observed eighteen court hearings, including different court areas across England and Wales. We only observed cases in which all relevant permissions were given. Previous studies have found refusals to be rare (Pearce and Masson, 2011[94]). In our study, we had three refusals where protected parties were not happy for us to be present, or it was not possible to obtain all the necessary agreements in time.

Court hearings were identified through the Office of the Official Solicitor, which has advance notice of forthcoming hearings. Agreement in every case was sought from the presiding judge, as well as the caseworker and protected party's legal representative, and the protected party if they could be contacted. The observer took comprehensive anonymised research notes, which were transcribed into fuller notes following the observation. Court case recording focused on the way the views and wishes of the

94 Pearce, J., Masson, J. with Bader, K. (2011) *The Representation of Parents in Care Proceedings* Bristol University / ESRC available at: http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/justfollowinginstructions.pdf

protected party were presented to and received by the court; any discussion of the protected party's support needs to enable them to participate in the court process or related to assessment of their parenting ability, and any other accommodation for their litigation capacity status. We observed how the case was managed outside the courtroom as well inside it, as many aspects of the case were conducted through meetings held in the court building but not in the courtroom. Parents were sometimes present at such meetings. The cases we observed included a Case Management Hearing, Issues Resolution Hearings (some used as Final Hearings) and Final Hearings.

4.4 Interviews with Family Justice System professionals

We carried out qualitative interviews with members of the professions listed below about their experience and reflections on working with parents who lacked litigation capacity and the Official Solicitor through a series of qualitative semi-structured interviews. In addition to the interviews, we also had many conversations with judges, solicitors for children and parents, local authority legal advisers, Children's Guardians, barristers and intermediaries as part of our observations of court hearings. We interviewed:

- Caseworkers and legal advisers at the Office of the Official Solicitor (12)
- Judges in the Family Court (7)
- Cafcass Children's Guardians in England and Wales (16)
- Local authority legal representatives (4)
- Solicitors and barristers who have experience of working with parents who lack litigation capacity (12)

Observing the process of the hearing involved observing what happened outside the courtroom (in the court building, in advocates' meeting rooms) in order to understand the process from the perspective of all key participants in the hearing. We have included the information they shared with us in that setting (advised, consenting and aware that we were collecting data for the research study) with the qualitative interview data, since the issues discussed were identical in scope and focus.

We did not seek to interview any parents because of the complexity of obtaining valid consent and, more importantly, because of concern over the welfare issues that would arise from attempting to do while parents were involved in care proceedings. The pro forma for the semi-structured interviews is in the Appendices.

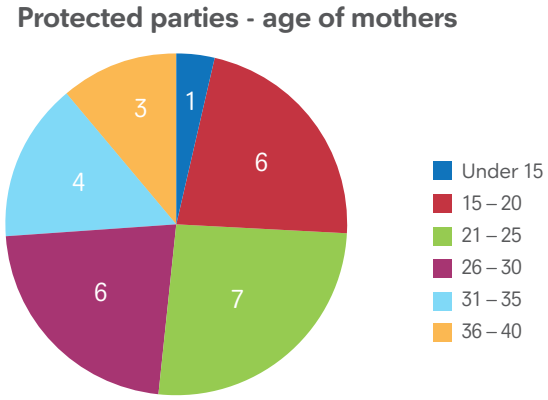
5 The case file study

Our study generated a substantial body of quantitative information, all of which is new since this is the first study undertaken of this group of parents and their children. The data was analysed to extract information about the people involved in the relevant proceedings: age and gender of parent, nature of problem leading to a finding of lack of litigation capacity, reason for concern about the children and age and number of children, including siblings. The other main set of data presented here relates to the proceedings: route into proceedings, duration and outcome. We also include data about the existence of any previous proceedings and use of s20 accommodation.

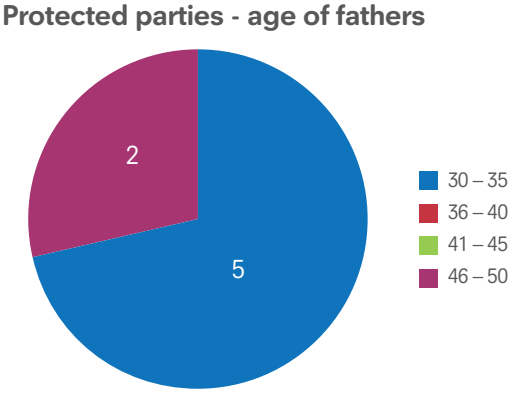
Qualitative data from the files added detail on how the process worked for individual parents, including highlighting the causes of various aspects of vulnerability for many parents and the role of solicitors and caseworkers.

5.1 Protected parties by gender and age

Many more women than men were assessed as lacking litigation capacity in care proceedings, by a ratio of more than four to one. This may reflect that in some cases, only the mother was involved in the proceedings, and in others the father did not lack litigation capacity. Five fathers lacking litigation capacity were involved in proceedings where the child's mother had litigation capacity. The mothers in our sample were distributed across a wide age range from fourteen to fifty years. Only one was under eighteen: one girl of fourteen years. A quarter of mothers were under twenty, half in their twenties, and a quarter over thirty. Fathers were much older on average, with none in our sample under thirty years. Five fathers were in their early thirties, and two in their late forties / early fifties.



Protected parties, mothers, n = 31



Protected parties, fathers, n = 7

5.2 The difficulties leading to an assessment that the parent lacked litigation capacity – the mothers

We looked at the different kinds of problems that caused mothers to lack litigation capacity. The most common reason was learning disability: 21 of 31 mothers had a learning disability, approximately two thirds of the total. The other ten mothers lacked litigation capacity primarily because of a mental health problem.

Some mothers suffered from more than one problem that had the potential to impact on their litigation capacity. The largest area of overlap was between mental health and learning disability issues: nine mothers were affected by both issues. Six mothers for whom learning disability was the primary problem were also suffering from mental health problems, depression being the most significant issue. Three mothers for whom the primary problem was mental ill-health also had some degree of learning disability or (in one case) brain damage.

Four mothers for whom mental health problems were the primary problem also had problems with drugs and / or alcohol. Only one mother with a learning disability was identified as suffering from an alcohol problem and none with a drug problem.

5.3 The nature of the difficulties leading to an assessment that the parent lacked litigation capacity – the fathers

Our much smaller sample of seven fathers included four who had a learning difficulty as their primary problem. Three fathers had mental health problems as their primary issue. One father with a mental health problem also had a drug / alcohol problem, and one with a learning difficulty also had an identified mental health problem (depression).

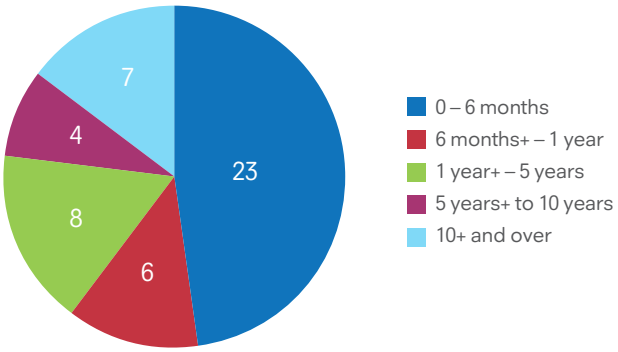
5.4 The protected parties and their children

The 38 parents who made up the sample in this study had 50 children between them involved in 37 sets of family proceedings. Since there were two couples where both parents were represented by the Official Solicitor, and two sets of proceedings involving the same parent, a total of 35 families was included in our study. There were on average 1.4 children per family and 1.35 children per set of proceedings. This is a smaller number of children per case than the current average for all care proceedings, currently 1.7 children per set of proceedings[95].

By far the largest group of children in our file study were those who were the subject of a court application within the first few days or months of life. Twenty-three of the total of fifty children were the subject of an application to the court by the age of six months, almost half of all children, and for twenty of these the application was made within days of their birth.

95 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/556715/family-court-statistics-quarterly-apr-june-2016.pdf at p. 8

Age of children at commencement of proceedings (n = 50)



Three quarters of all children were aged five or under at the start of proceedings. Brophy (2006)[96] found that 60 to 63 per cent of all children involved in care proceedings were under six years old at the time proceedings begin: in our sample, there appears to be a weighting towards early statutory intervention. The number of children involved in proceedings per parent was not only slightly smaller in our sample than for all families involved in care proceedings, the children appear to have been younger, on average. In our sample, when older children were involved in proceedings (the 23 per cent of children over 5 years of age), nearly all were in proceedings together with younger siblings. The single exception was one case involving two children aged twelve and sixteen with no younger siblings.

5.5 Duration of proceedings

We were interested to find out whether the involvement of the Official Solicitor affected the timescale for completion of proceedings. It is not possible to say for any individual case whether the timescale was lengthened or shortened by the time taken to assess the litigation capacity of the protected party, to appoint a caseworker or any additional time taken because the instructions to the protected person's solicitor must come from the caseworker in London, rather than directly from the parent themselves. Nor is it possible to say whether the involvement of the Official Solicitor and caseworker made proceedings take longer (because of more robust challenges to equality issues such as fair assessment processes or court procedures, for example), or speeded them up because unhelpful delay that might otherwise have been caused by the parent's capacity issues was avoided. Cases may have been affected in the direction of being lengthened or shortened by a combination of interacting factors. However, we are able to comment on the average length of proceedings compared with national figures.

We looked at the range of court duration by number of weeks for all cases in which the Official Solicitor continued to be involved until the end of the court case, i.e. excluding cases in which the protected party gained capacity, since in those cases there was no record of the length of time taken by the case overall. Average duration for all cases in our sample was 28.66 weeks.

Some of the cases in our sample were of very long duration, some having begun before the introduction of the 26-week rule, and continuing into the period of our study sample. We chose the study period based on the date of completion of the case (or ending of the involvement of the Official Solicitor, when the parent regained capacity) intending to capture cases that had started after the 26 week rule began to apply. Some exceptionally long cases that had started before the 26 week rule was applied were included in our sample, simply because they had taken so long to complete.

If 'outlier' cases that began before the 26 week rule was introduced were excluded from the sample (four cases which ran for 52, 52, 67 and 74 weeks, respectively), the average

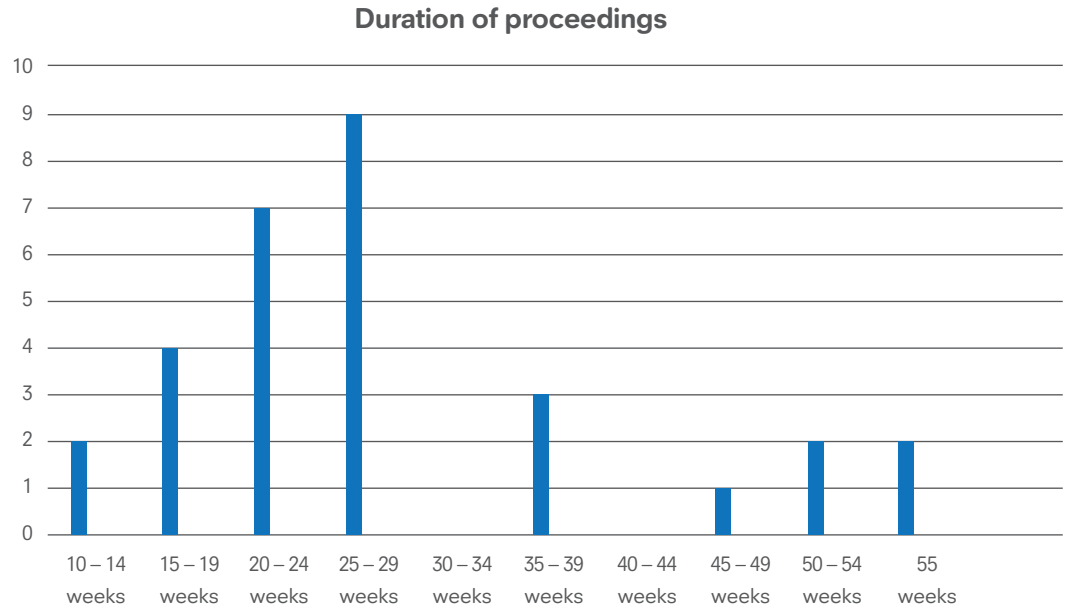
96 Brophy, J (2006) *Care proceedings under the Children Act 1989: A Research Review* Research Series /06, London: DCA

completion time for cases in our sample was 23.65 weeks. This is less than the average for all care cases, currently 29 weeks[97], dropping to reach 27.5 weeks in the last quarter of 2015, but which in 2014 stood at a little over 30 weeks[98].

The current median duration (as opposed to average) for all care and supervision proceedings (calculated excluding exceptionally long proceedings) is currently 24.5 weeks. This means that completion times for cases when a party lacks litigation capacity were concluded on average as fast as those that do not involve protected parties.

The view that we heard from some of those interviewed in our qualitative study (see following chapter), that the involvement of the Official Solicitor can create delay in cases, is not borne out by our case file study, despite the fact that assessment of the person who lacks litigation capacity, allocating a caseworker once the Official Solicitor has accepted the case, and the court giving consideration to any special measures that may be required to accommodate the protected party's needs, all take time.

The chart below shows the duration of care proceedings in our sample by the number of weeks taken. Note that the number of cases in this summary statistic is smaller than the total number of cases or protected parties in the sample because two couples were involved in the same proceedings, a case in which the protected party died was excluded from this data set, and proceedings where the protected party regained capacity (six cases) were also not included.



Our data show 21 out of 30 sets of proceedings, just over two thirds, completed in 26 weeks or less. This may be compared with current statistics indicating that 63% of care or supervision proceedings are completed within 26 weeks[99]. This suggests that once the matter of capacity is settled, cases involving parents who lack litigation capacity take less time to resolve than other types of case, on average. Even the inevitable delay occasioned by the administrative processes required to protect the interests of protected parties do not outweigh this faster (on average) resolution time. It should be noted, however, that our sample of cases is relatively small and within a specific window of time. The factors affecting case completion time in any individual case are complex, and these data do not predict faster or slower completion time for any individual case.

97 https://www.cafcass.gov.uk/leaflets-resources/organisational-material/care-and-private-law-demand-statistics/how-long-do-care-applications-take.aspx

98 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577502/family-court-statistics-quarterly.pdf

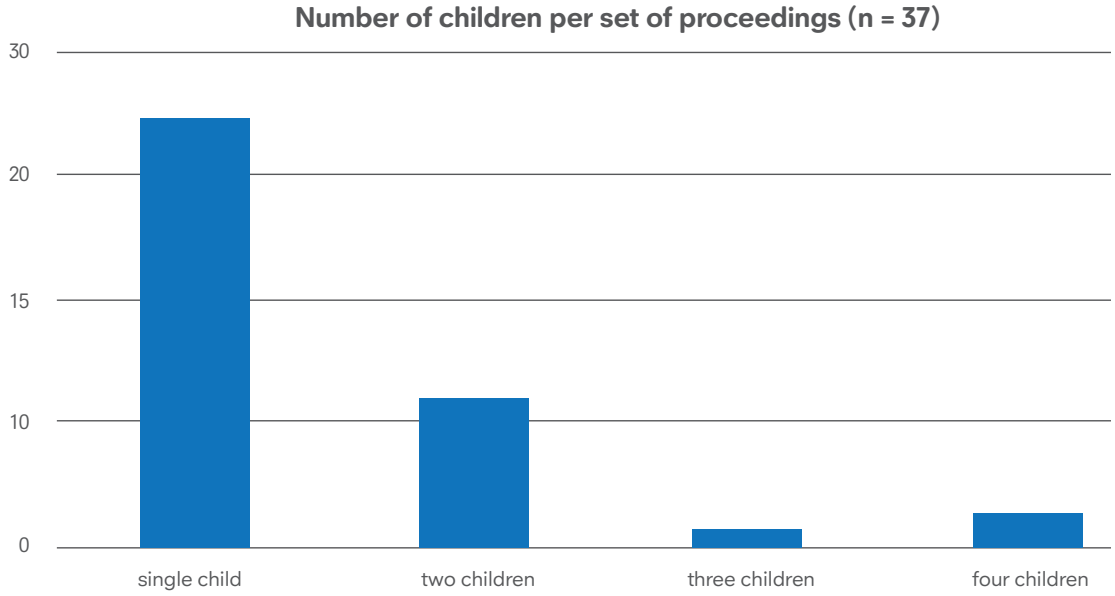
99 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577502/family-court-statistics-quarterly.pdf

5.6 Repeated loss of children

We looked to see how many parents were the subject of repeated loss of children, parent of a child who was no longer in their care. Over two thirds of all proceedings in our sample, 26 out of 37, concerned the parent's first child or all the parent's children. For these parents, the file record indicated this was the first set of care proceedings experienced by the parent who was a protected party. They were not 'repeat proceedings'.

The other eleven sets of proceedings concerned the children of parents who were protected parties and who had other children who were not subject of those proceedings. None of those children were living with the relevant parent. They were either in local authority care or had been adopted or were living with another relative.

Twenty six sets of proceedings concerned a single child, but in eleven cases, more than one child was the subject of proceedings.



5.8 Routes into proceedings, and outcomes of the proceedings

5.8a S20 accommodation prior to and during proceedings

Twelve sets of proceedings where a parent was a protected party involved the prior use of s20 accommodation[100] by the local authority. In two of those cases both parents lacked litigation capacity. Many parents who lacked litigation capacity who were in a relationship were in a relationship with another person who had a learning difficulty or mental health problem. In some cases, both parents had been assessed because of concerns over litigation capacity although only one was assessed to lack it. All the parents in our sample were disadvantaged because they lacked the capacity to make informed decisions on complex legal issues, and when they had a partner, that partner was likely to be someone who would also struggle to make informed and competent decisions. Considering recent issues raised by the family court in relation to use of s20 with parents who lack capacity , this is a concerning finding.[101]

100 S20 accommodation' refers to children who enter local authority care by parental agreement under s20 Children Act 1989. The court is not involved in this process, and parents have no entitlement to non means, non merit legal advice.

101 Gilliatt, J and Slingo, A (2015) "Section 20 Children Act 1989: Consent, Not Coercion – Issue or be Damned" *Family Law Week* at http://www.familylawweek.co.uk/site.aspx?i=ed151539

It should be noted that the assessment of litigation capacity is a specific assessment relating to ability to instruct a solicitor, it is not an assessment as to whether parents are able to make capacitous choices relating to other matters, such as agreeing to accommodation of their child under s20 Children Act 1989. One might debate which decision requires the greater ability to retain and weigh information, given that parents in care proceedings have the safeguard of receiving legal advice, whereas a parent agreeing to s20 accommodation rarely does, as there is currently no legal aid funding for parents in this situation.

Four children made subject to s20 accommodation were newborn babies whose mothers lacked litigation capacity. The babies in these cases were no more than a few days old at the time of accommodation, which raises further questions about the conditions under which consent was sought, and parents' capacity to consent. Eleven other children accommodated under s20 prior to care proceedings started were aged between six months and seven years of age. It should be noted that some of those periods of accommodation may have been very brief, and that another parent with capacity may have consented to accommodation. The parent may have had capacity at the time they consented, or been assessed as able to consent to s20. However, the prevalence of use of s20 with parents who lack litigation capacity prior to proceedings, including in cases where both parents lack litigation capacity, raises some concerns about safeguards for parents consenting to s20 accommodation. Recent guidance may have led to improved practice in this area[102].

5.8b Other routes into proceedings

Only two cases started with an Emergency Protection Order[103] (EPO), both involving newborn children. Both children had been subject of a Child Protection Plan prior to the making of the Emergency Protection Order, so were already known to children's social care, and both were followed by the making of an Interim Care Order[104] (ICO). Thirty of the thirty-seven cases in our sample were cases in which the child or children were subject of an Interim Care Order at some stage in the proceedings. In the remaining cases, the children either remained on s20 accommodation throughout proceedings (five cases) or remained with parents during a period of assessment under no order (two cases).

In most cases, local authorities were aware of the difficulties experienced by the parents prior to issuing care proceedings, and responded initially using their supportive powers under Part II of the Children Act 1989 (s20), or through planned commencement of proceedings (through an Interim Care Order). In a minority of cases, partnership working through placement with parents using s20 continued after the court process began and lasted to the making of the final order. The fact that only two cases began with an Emergency Protection Order suggests that only rarely were parents viewed as presenting imminent danger to their children, and rarely so uncooperative as to require resort to emergency compulsory measures. The use of s20 accommodation prior to issue of proceedings suggests that many parents were not failing to co-operate with the local authority at the time of issue of proceedings.

102 "*Practice Guidance for the use of section 20 provision in the Children Act 1989*" available at: https://www.cafcass.gov.uk/media/277498/s20_guidance.pdf

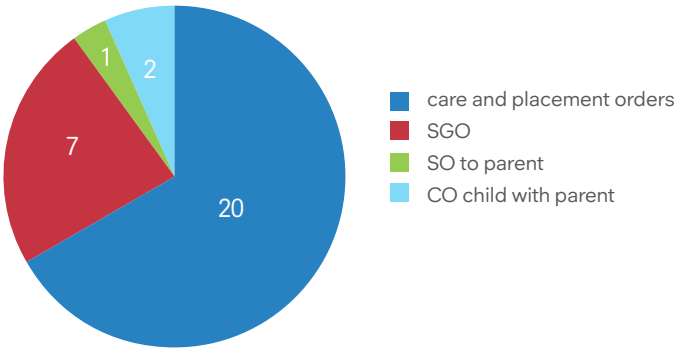
103 An order made by a court under s44 of the Children Act 1989 giving the local authority parental responsibility and the power to remove a child to suitable accommodation without parental consent, or keep the child in a safe place such as a hospital, for a maximum of eight days (renewable for a further seven days). Only available where a risk of significant harm is established.

104 An Interim Care Order is an order made under s38 of the Children Act 1989, giving time limited parental responsibility to the applicant local authority pending a final hearing of the case. The local authority acquires the power to determine where and with whom the child shall live for the duration of the order, although if other directions are made by the court, additional conditions may apply.

5.8c Outcomes of Proceedings

The most statistically likely outcome for any parent who lacks litigation capacity who becomes involved in proceedings is therefore that their children will be adopted by people not known to them. However, there were other outcomes: in a third of cases the children remained within their birth family, either with other relatives or with parents. Only one mother in our sample retained care of her child.

Orders made at the end of proceedings (n = 30)



Excluding the parents who regained capacity and the case in which the parent died, there were thirty children in our sample for whom the outcome of proceedings was known. In two thirds of those cases – twenty cases –children were made subject of both Care[105] and Placement Orders[106] at the end of proceedings.

In seven cases, the children were placed under Special Guardianship (SGO) arrangements with a relative: uncle, aunts and grandparents. One child was placed with the other parent (the father) under a Supervision Order; another with their other parent, again a father, under a Care Order. One child was placed with the parent who lacked litigation capacity (mother) under a Care Order. In the case of the child placed with the father under a Supervision Order, the local authority plan had originally been for adoption, but due to delay in the court process, the father was able to show that he could parent with support from his family, and the plan changed to care by the father.

When children were made subject of both Care and Placement Orders (i.e. the plan for them was adoption) the Official Solicitor often asked the court to consider the value to the child of a meaningful relationship with the mother. His final statements sometimes highlighted the effect the loss of the child would have on the mother and the need for support once the Placement Order was made. Typically, between one and three 'goodbye' visits were agreed, after which the contact arrangement made was usually once or twice yearly letterbox contact without photographs.

5.9 The primary reason the child was identified as being at risk of significant harm

The reasons professionals were concerned about the parenting ability of the parents who lacked litigation capacity included concerns about risk of or actual neglect; emotional abuse; physical abuse (including a history of prior injuries thought or proved to be non-accidental injuries to other children) and sexual abuse: the full range of possibilities for a child being placed on a child protection plan, in other words. The main reasons are represented in the table below.

105 Care Orders are made under s31 Children Act 1989. The local authority acquits parental responsibility for the child, shared with parents. The child becomes a 'child in care'.

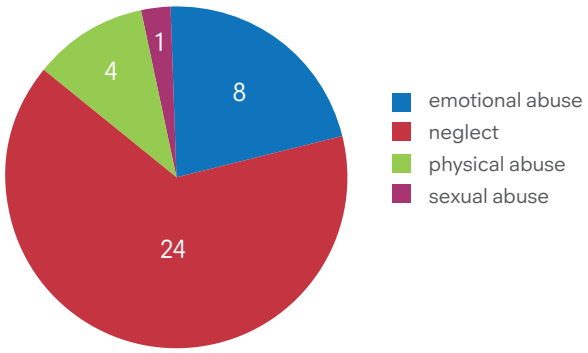
106 Placement Orders are made under s21 Children and Adoption Act 2002. They give the local authority the power to place a child with prospective adopters, and are a step towards the adoption.

The table indicates that the main reason that local authority children's social care become concerned about the children of parents who lack litigation capacity is concern about neglect. This reflects the prevalence of neglect in both child protection plans and care proceedings[107].

Concerns about neglect were typically linked to parental inability to understand their children's needs for physical care, maintain a sufficiently hygienic environment, or learn other practical and emotional parenting skills within a timescale that would be adequate for the upbringing of the child. Many parents had themselves been subjected to poor childhood experiences, reflected in the case files. Difficult and sometimes abusive relationships within the wider family meant that many parents had little in the way of a support network to rely on. This also was an issue when parents were considering whether any family or friends might be suitable carers for their children.

Of the alternative carers who were suggested by parents, many were quickly eliminated as unsuitable. However, as noted, some protected parties did have relatives who were able to take on care of their children, offering the opportunity for parents to maintain involvement in their children's lives where a safe family alternative was available.

Main cause of concern - actual or risk of emotional, physical or sexual abuse and neglect (n = 37)



In some cases, parents' partners exposed their children to risk, since some partners had substantial difficulties of their own, and were sometimes abusive to the mother or obstructive of attempts to offer support to mother and child. The high level of support needed for themselves by some mothers with severe learning disabilities was apparent. Two such parents described the other parent as both 'partners' and 'carers', illustrating the ambiguousness of intimate relationships for some very dependent women. Other issues identified in the case files as presenting risks to the emotional wellbeing of children included parental self-harm, drug or alcohol abuse, and violent victimisation by partners. Some parents were openly threatening to others, including social workers and other professionals, when mentally unwell. Inability to understand the emotional needs of developing children because of parental mental health difficulties or learning disability was an indicator that some children were at risk of emotional harm.

Physical abuse of children was a reason for concern in a small number of cases, and when it was identified, it was in all but one case linked to serious incidents involving children of the current family, or harm to children who had been removed from the family or who had died.

The single case of concern about sexual abuse related to concerns about sexually abusive behaviour by an older sibling of the child who was the subject of proceedings.

107 Department of Health (2014) In the Child's Time: professional responses to neglect, Department of Health Research report 140059

5.10 Qualitative data from the files

5.10a Protected parties' views of being assessed as lacking litigation capacity and relationships between solicitors and protected parties

Being assessed as lacking the capacity to instruct one's own solicitor is a highly significant event in terms of its impact on the rights of individuals under Article 6 Human Rights Act 1989: the right to a fair trial. Being left without proper representation because one cannot give coherent or reasonable instructions to a solicitor is a contravention of Article 6 rights, but replacing the person's own instructions with those of a third party would be a violation of Article 6 rights if done inappropriately, when the person did have litigation capacity. For this reason, the Official Solicitor will only become involved if there is undisputed capacity evidence or a finding of the court that the person is a protected party.

When the person has a learning disability, decisions by the court are usually based on an assessment by a psychologist with relevant knowledge and expertise in carrying out assessments of capacity. When the problem is a psychiatric one, the assessment is usually, but not always, carried out by a psychiatrist. The doctor who knows the patient best and takes care of their mental health needs may or may not have expertise in assessing litigation capacity. People with different types of diagnoses present different kinds of assessment issues.

The agreement of the person to be assessed is a significant issue. Some people do not wish to be assessed as they resist the idea they lack litigation capacity, and may avoid attending assessment sessions. Others were encouraged not to co-operate or possibly prevented from co-operating by partners who exercised a degree of control over them, although in no case in our sample did it prove impossible to obtain enough information for the court to decide that the person lacked capacity, or had regained it. On the other hand, there may be cases in which people resist assessment successfully, avoiding the loss of litigation capacity that could have accompanied such an assessment. We would have no way of knowing, since the cases would never reach the Official Solicitor's Office. There was evidence of difficulty obtaining access to people who lacked capacity in our sample, however. Sometimes this was because of the choices made by the protected party, sometimes because of obstruction by others.

In one example, a young man who was protected party was the subject of concern because of his partner, the baby's mother's, controlling behavior. She was found to be keeping him locked up in her flat. He was helped to leave because of action taken by his solicitor because of her inability to contact him to discuss the case. In another case, resistance by the protected party's family of origin to assessment of the mother or her parenting skills was a barrier to representing her wishes and feelings to the court or explaining the court process to her, as well as detrimental to her chances of caring for her child[108].

In several cases solicitors found it difficult to make contact with their clients. This is not surprising given that protected parties are likely to have more difficulty than most people with appointments, getting to specified places for specific times, and may find the stress of the court case even more difficult to tolerate than most parents. Some protected parties were in hospital at some distance from their homes, and the solicitor had to travel some distance to see them. Limits on the amount solicitors can charge for representing clients in family law proceedings is relevant here, as the profitability of taking on a case

108 One interviewee in the qualitative study made the point that in some cases, what appears to an observer to be 'controlling behaviour' may be a well-intentioned attempt to protect the person with capacity issues from unwise or impulsive behaviour, or outside interference that is viewed with suspicion. It may require careful assessment to understand the dynamics of some relationships involving potentially highly dependent people, where apparent care and concern may mask coercive control, or controlling behaviour be an over-zealous attempt at protection.

depends to a large extent on how time-consuming it is going to be, and taking time to communicate carefully with people who have a learning disability or mental health issue places professional duty to the client in tension with running a viable business.

This can place ethical demands on solicitors. In one case, the caseworker at the Office of the Official Solicitor asked if the solicitor can give an assurance that she would be present in court with the protected party even when counsel is instructed. The solicitor said yes, as far as possible, but there are no extra funds to cover attendance when counsel is present. She said she would do this 'pro bono' as the firm prides itself on 'going the extra mile' for clients, but only 'provided resources allow'. For a solicitor, it seems that taking on a case involving a protected party potentially involves absorbing some hidden costs associated with managing the support and communication needs of the client, especially if no advocate or intermediary is available to support the client in meeting their solicitor. Protected parties sometimes had the support of an advocate in their meeting with their solicitors, but as this is not funded by the Legal Aid Authority this is only possible if the local authority is prepared to pay for it, or there is a funded organisation able to provide this service without charge to the client. In some areas, the lack of organisations providing advocacy was an issue. In one case, the solicitor tried to find and advocate for her client but was unable to do so as the local organisation that provided them had stopped business.

There was evidence that in some cases the support of relatives was very important in enabling communication with the solicitor. In one case a mother who was the protected party and her solicitor had ample contact: discussions of an hour or more are recorded. Her attendance was facilitated by her grandfather. References to this kind of support from family and friends are rare. Case files suggest that many parents who lack litigation capacity have had extended periods of difficulty in their lives, often going back to a childhood, and such positive support appears to be exceptional. It was rarely noted in the files.

Parents had different views about being protected parties: positive or hostile. People had different reasons for not want to be assessed. In one case, the protected party had been reluctant to engage with assessment as he was worried that the involvement of another solicitor might upset the solicitor he had instructed. His opposition was resolved by explaining the respective roles of the protected party's solicitor and the Official Solicitor.

Most cases in which parents lack litigation capacity end with an order of some kind made in respect of their child or children, and, as seen above, the outcome is often a care order and a placement order being made. It is the job of the protected party's solicitor to explain the Official Solicitor's position on the local authority's application. In cases in which the protected party does not have any reasonable prospect of being able to parent their child, and it is in the child's best interests to be adopted, this is stated in the Official Solicitor's final statement to the court. A parent who has litigation capacity can continue to instruct their solicitor that they do not agree to a care or placement order being made, but one who is a protected party is unable to do this. In some cases in our sample, the protected party did not accept their solicitor's advice they were likely to lose care of their child and could not oppose it. One parent said he wanted to discharge his solicitor, telling him he was "not happy with my representation of him". Another said, "I will call [the solicitor] all the names under the sun" because she had "instructed the solicitor to get her baby back". The feeling of betrayal when people thought their solicitor would 'fight their corner' is evident, when ultimately the instructions their solicitor received from the Official Solicitor's Office was that arguing for the return of the child to the parent was not appropriate in all the circumstances.

One protected party, on hearing that the assessment of her parenting ability was not positive, said she did not agree, and did not need anyone to represent her. She attended the court, addressing the judge several times to give factual information but not, it appears actually presenting in a confrontational manner. The record on the case file states, "HHJ X was very understanding and patient with her."

5.10b Assessment issues

Assessment of capacity presents a range of issues linked to the nature of the challenge to capacity, parental co-operation, and the skill of the assessor. Under the Mental Capacity Act, capacity to make decisions must be assessed with respect to a specific decision, and the person's capability to understand retain and weigh up information relevant to that decision. One psychologist carrying out an assessment of capacity noted:

> "In care proceedings, the decisions are often multiple and ill-defined and, at this stage, it may not yet be clear what future decisions will need to be made. What constitutes the 'relevant information' to enable the person to make those decisions will also be unclear; some of the information will be comprehensible: some of it most probably will not be. For these reasons it can be difficult to make definitive global judgments as to the person's 'overall capacity' to litigate."

Even in cases in which parties agree to be assessed, assessment can be complex. Cases in which parents have borderline capacity present particular challenges, especially when capacity fluctuates. Assessment is stressful, and court cases extremely stressful for parents. Assessments should take account of this, but it is the actual capacity of the person, whatever level of stress they are experiencing, that determines whether they have litigation capacity. In one case, a psychiatrist was finding it difficult to assess capacity due to fluctuating capacity at the time of assessment, and had concerns that the stress of the final hearing might cause a relapse.

In one case in which the mother did not accept she lacked litigation capacity, she instructed two different firms of solicitors then decided to dispense with representation altogether and self-represent. The same consultant forensic psychiatrist assessed her twice. The first assessment was that she did have litigation capacity, and the second found she did not. In another case in which the protected party strenuously resisted assessment, believing she had capacity and wanting to instruct 'her' solicitor, the assessment was that she lacked capacity because of a combination of a mild learning difficulty and the effect of a twenty-year alcohol problem. The psychologists' assessment was that she could regain capacity if she abstained from alcohol for a sustained period, and she di succeeded in presenting as having litigation capacity on re-assessment, and the Official Solicitor was discharged.

In some cases, it takes care and time to ascertain whether an individual has capacity to understand complex processes such as a court case or a court hearing. One parent had been assessed twice by a psychiatrist who found no evidence of mental illness: the reverse of the situation in the case above. Following this, a paediatrician and other doctors in contact with her about her child found her unable to understand even common words. It was not initially apparent she had a serious verbal comprehension difficulty, which apparently only became apparent when she was placed in a 'real life' situation that made demands on her understanding. She was then found to lack litigation capacity.

5.10c Parents' views of the expected or planned outcome of proceedings

Parents who lack litigation capacity have to face the prospect that they may lose their children, often to adoption, and may not see them again after the child is placed with prospective adopters. Some parents found this very hard accept but others, while not wishing to lose their child to adoption, were more understanding of the limitations of their own parenting capacity and what they could offer the child. The prevalence of familial abuse and neglect among the parents in our sample was striking. One young parent with a first child in care and placement order proceedings said she did not oppose adoption outside her family because she "...did not want (the baby) to have a childhood like her own."

In another case, the mother was a young woman of nineteen, in a relationship with a man who was a few years older. Both parents had faced difficult early lives: both had been removed from their own parents on care orders. Both parents had a learning disability, but only the mother lacked litigation capacity. Proceedings began shortly after the child's birth. The mother continued to have contact with her child in foster care and developed a 'good bond' with the baby. The parents wanted to bring up the child themselves but mother ultimately did agree with the plan for adoption rather than oppose it.

Some parents who had lost a child before in care proceedings appeared to feel little hope for the outcome of this one being any different. One mother said the local authority, "...do not think we are clever enough to look after our baby... We have been written off without support. I do not think it is fair for us to be written off without support in this way." Another parent thought that "...nothing she could do or say that would make any difference to what would happen" to her daughter. She wanted her to be happy and safe but did not want her adopted. However, she also knew her child could not live with her so would not oppose the adoption. She wanted a chance to say goodbye. Parents appear to have responded most often with a sense of resignation: some more focused on the needs of their child than others, and some more aware than others of their own parenting difficulties.

5.10d Parents and multiple vulnerabilities

The extreme vulnerability of some parents is reflected in their intimate relationships, some appearing controlling in a negative way, while some appear to have had relationships that had some of the characteristics of a relationship between a carer and cared for person with their partner. Several of the partners were described as 'borderline' in terms of litigation capacity themselves, having mental health or learning disability issues of their own. Two couples where both parents lacked litigation capacity were in our sample. They were allocated different case workers who were supported by different legal advice teams in the Office of the Official Solicitor. Two examples of cases in which one parent has and the other does not have litigation capacity follow, illustrating the problems faced by parents who are not only facing substantial difficulties themselves, but are also in relationships that increase rather than reduce their vulnerability and ability to parent.

The mother in this case was pregnant at nineteen. The baby's father joined her family initially as her stepfather. She had been abused by her previous stepfather, and had one previous pregnancy terminated. She denied that she was the subject of any abusive behaviour by the baby's father, but there were professional concerns about his controlling behaviour. She sometimes referred to him as her 'carer'. She spent a few days with the baby in a Parent and Child unit, but chose to leave without the baby after a few days. Both parents had a learning disability, the father also had mental health and alcohol problems, but did have litigation capacity, by a 'narrow margin'. His early history was seemingly no less difficult than the mother's, having spent time in care and been physically and sexually abused. The mother was assessed for adult services at 18, but did not meet the threshold for services.

A father who lacked litigation capacity had a child with a mother who was thought to have learning disabilities, and was partially deaf. The father had been in receipt of services from adult social care, but was re-assessed as not having a learning disability, and services were being withdrawn at the time of the court case. The mother responded to questions about control and violence by saying the parents engaged in 'play fighting' but later acknowledged that there were issues of violence and anger in the parental relationship. There were issues of child sexual abuse in both families of origin.

For some parents, lacking litigation capacity may be another aspect of loss of control in a life in which choice is restricted: other people exercise a high degree of control over them, and the boundary between support and control may be less clear to them than for people who have had more experience of having the opportunity and capacity to make their own choices.

5.10e S20 accommodation

Several parents in our case file sample had been asked to consent to s20 accommodation prior to the commencement of proceedings, and done so. In one case, s20 consent was relied upon throughout proceedings. The examples below show that local authorities may have difficulty in establishing the level of capacity of parents, and may make assumptions about capacity in the absence of translation and interpreting services which might have revealed the extent of parents' comprehension difficulties. The challenge of explaining s20 accommodation may in be more complex when explaining it to someone not familiar with English or Welsh child protection processes and social care services for children.

In one case, both parents of two children were assessed as lacking litigation capacity. The mother had agreed to s20 accommodation prior to proceedings for one child, the father agreed to s20 accommodation for the other. The mother had intermittent mental health and alcohol problems; the father had mental health problems too. Both parents became protected parties.

In another case in which both parents lacked litigation capacity because of learning disabilities, the family of parents and three children had lived without support from any agency until the first child protection inquiries took place, shortly before initiation of care proceedings. Neither parent could read or write or communicate in English. There were no adult or children's services in place, the parents having been assessed as having only

moderate learning difficulties by adult community services. The mother later said she remembered being asked to sign a s20 form but it was the end of the day, she was tired, and did not know what she was signing. It was only when the mother said she wanted the children back that an application to court was precipitated. When full assessment of the parents' cognitive ability was discussed in court, the local authority expressed the view this was not necessary and would not pay towards it. Neither parent had litigation capacity.

In a third case, a mother had mild learning difficulties and mental health problems and had had several admissions to a psychiatric hospital, both as an informal patient and compulsorily under a 'section' of the Mental Health Act 1983[109]. She had attempted suicide shortly after the baby was born. The court said that no court order relating to the accommodation of the child was needed, since both parents were agreeing to placement with foster carers throughout proceedings. The local authority asked the court to make an interim care order to enable parallel planning for adoption or rehabilitation with mother. The court did not accept this. One difference between this case and the other two is that the mother had legal advice about her rights under s20 once the case began, and court oversight of the arrangement.

In a different case addressing a similar issue, a mother agreed to s20 accommodation of her baby. The position of the local authority, supporting its use of s20, was that the Official Solicitor cannot become involved in the mother's consent to s20 as he does not have parental responsibility and agreeing to s20 accommodation is an exercise of parental responsibility. An anomaly exposed here is that the Official Solicitor is able to instruct a protected party's solicitor relating to care proceedings, but when a parent exercises their parental responsibility under s20, this appears to fall outside the remit of the Official Solicitor.

The mother had been assessed as able to give capacitous consent to adoption, even though she did not have capacity to instruct her solicitor during the care proceedings. The local authority argued if the mother could consent to adoption, she could also consent to s20. The situation was resolved when the mother withdrew her consent to s20 accommodation and the local authority sought an order for interim separation of parent and child during proceedings.

Use of s20 with parents who have a learning difficulty or other issue that affects their capacity to give valid consent is a practice that should be used with great caution (ADCS /Cafcass guidance 2016[110]; Welbourne 2017[111]). The evidence from this sample of parents indicates that lack of capacity has not always been a deterrent to its use by local authorities with some parents who lack capacity and their children; indeed, such use appears to have been common.

5.10f Support after the case ends

As noted, most cases in our sample ended with children placed on care orders, or care and placement orders. By the closing stage of cases, instructions from the Official Solicitor to the solicitor representing the parent in court were often to not oppose a local authority's plan for adoption. The decision not to oppose was sometimes made following negotiation about the detailed content of the plan: non-opposition by the Official Solicitor to a plan for permanence outside the parents' care was not given readily in every case, even when there was ultimately no opposition to the plan that adoption was the only realistic option for the child and in their best interests.

109 A 'section' is a commonly used term for compulsory admission to hospital under ss 2 or 3 of the Mental Health Act 1983.

110 ADCS / Cafcass (2016) Practice Guidance for the use of S20 provision in th4 Children Act 1989 in England and the equivalent S76 of the Social Services and Well-Being (Wales) Act 2014 in Wales, available at: http://adcs.org.uk/assets/documentation/S20_Practice_Guidance_final.pdf

111 Welbourne, P. (2017) "Parents' and children's rights and good practice: Section 20" *Family Law* January 2017 80 - 88

Issues that were raised by the Official Solicitor included specificity about the plan for termination of contact, and planning for parental contact after adoption. In general, it was not evident from the local authority's final care plan how support would be made available to the parent for their own welfare, or to enable them to make use of such contact arrangements as were offered (usually letterbox once or contact twice a year).

The importance of contact as being for the benefit of the for the child was highlighted. In one case involving a sibling group of four children aged between two and fourteen years, the final statement by the Official Solicitor states:

> "The children have great love and affection for their parents, and I believe it to be important for them to always retain links with their birth family in order to maintain a strong and positive identity. However, such contact needs to be balanced with what is appropriate in order for each child to feel secure in their permanent placements and build positive attachments to their future care providers."

In this case, in the event, no permanent alternative family was identified and the placement order was later revoked.

Plans for contact after placement for adoption and adoption, whether direct contact or by letterbox, should be primarily for the benefit of the child, not the parent, since their welfare is paramount. It should be noted that plans for contact are rarely the subject of any specific court order, and not enforceable, which undermines their value for child and parent, other than as aspirational statements.

If one works on the premise that plans for contact in final care plans are intended to be acted upon, and reflect assessment as to what is in the best interests of the child, it seems reasonable that any such plans would be supported by the local authority after adoption. We saw no evidence that plans were in place to assist parents to make positive use of such arrangements, and evidence from one of our interviewees indicated that support for maintaining positive contact through means of letterbox arrangements was scarce. The situation may be improving as post-adoption support continues to evolve, but the availability of suitably tailored support for parents is a matter which requires further consideration. If letterbox contact is in the interests of the child, and is likely to be very difficult to achieve where parents have substantial barriers such as problems with literacy, then in the interests of the child, there should be planned long term strategies for supporting parents so that such arrangements do not wither for lack of suitable assistance.

Final statements by the Official Solicitor also highlighted parental need for more parental support after the case ended. High thresholds for adult social care mean that some parents who were unable to parent their children and might also have difficulty caring for themselves were assessed by the local authority social care teams as ineligible for support. In one case, the parent's solicitor had made repeated efforts to secure support for her client but still no assessment or support had been arranged by the end of the court case. There were several instances where the final statement by the Official Solicitor drew attention to the vulnerability and need for support for the parent who lacked litigation capacity after proceedings ended, but the impact of these expressions of concern for the parents after the court process ends is impossible to gauge.

In some cases where a Special Guardianship Order was made at the end of the case, the court also made a Supervision Order. The use of Supervision Orders in cases where children live with special guardians is the subject of concern and current research[112], but they may have value for parents and children when the arrangements for contact include direct contact. In one case in which the children were placed with an uncle under a special guardianship arrangement, the local authority said it saw no need for a supervision order: they would remain involved with the family for a period, but did not specify for how long, so the duration of support was uncertain.

112 Harwin, J., Alrough, B., Palmer, M., Broadhurst, K. and Swift, S. (2015) *A national study of the usage of supervision orders and special guardianship over time (2007-2016) Briefing paper no 1: Special guardianship orders:* Brunel University / Lancaster University

In another case, the Official Solicitor asked the local authority to support contact, to 'promote and enhance emotional bond between the [parent] and child'. Both the Official Solicitor and the Children's Guardian expressed concern about the lack of clarity about family support in the local authority plan, but it was not clear from the record that any more specific commitment was made regarding future support for contact. Given the high level of support that parents are likely to need in cases where children live with someone else but some form of ongoing contact is in the best interests of the child, the absence of evidence of planning for support for such contact in cases involving people who lack litigation capacity is notable. That is not to say it does not happen, but clarity about the level of commitment being made to support contact would be helpful in many cases when parents are likely to need significant support to make contact meaningful, or even for it to survive.

In one case the Official Solicitor questioned whether the plan for adoption of the child was 'B-S compliant[113]', in other words, whether every option had been explored to be sure that nothing except care outside the child's family was realistic. The argument was put to the court that if the local authority does not have due regard for the parent's learning difficulties, and put in place appropriate support that paid due regard to these learning difficulties, then it could not be said that all possible options for the child remaining within their birth family had been explored. The questions of how much should be invested in terms of resources to enable the parent to parents, and how far it is possible to support a parent and still say it is the parent and not the paid carers that is looking after the child, are complex issues. One concerns resources, the other the dynamic practical and psychological needs of a developing child. The cost of provision and questions about the quality of care and secure attachment that can be provided through intensive family support have to be balanced against the right of the parent and child to maintain family life together unless it is clearly against the child's interests, and, in the case of adoption, that 'nothing else will do' but adoption. The roles of the Official Solicitor included remaining vigilant about the need to be satisfied that assessments were adapted to the individual circumstances of the parent, and considered support that could be put in place to enable a parent to parent their child before pursuing removal. There does not appear to be a transparent framework for assessing which cases cross the boundary for being sustainable with a family support package, or how the developing needs of the child could impact on viability of a family support arrangement. It may be that assessments were based on considerations of different levels of support but this was not apparent in the documents available to us in our sample.

In our sample of cases there was evidence of numerous requests by solicitors and caseworkers and sometimes children's social workers to the local authority adult services to carry out an assessment of parents' needs with a view to providing services. There was evidence of frustration that services were not being provided, but we did not observe evidence that adult social care services were stepping in to assess and support parents during or after proceedings, despite the evident high level of need in many cases, especially cases of learning disability.

Those protected parties who were in hospital because of their mental health needs were receiving a service, but those parents who were in the community appeared to have very little support from community services. This is concerning, given the level of distress likely to be caused by the termination of the parent-child relationship, which happened in a high proportion of cases. If the apparent absence of accessible support by professionals trained and experienced in supporting people with learning disabilities through grief and loss is as it appears in our study, this suggests that a very vulnerable group of people are experiencing significant negative events caused by state intervention without the kind of support one would expect for them. However appropriate and necessary the intervention of removing a child might be, it is arguable it needs to be balanced by intervention to support the parent as well as possible after the event. Support through

113 After the test for making an adoption order set out in Re B-S (Children) [2013] EWCA Civ 1146

the proceedings themselves meets the requirements of justice, narrowly defined, but a wider perspective on justice in the context of removal of children from parents without consent might indicate that the state should take all possible steps to help the parent cope with the loss. Input modelled on the intensive 'Pause' model, with workers with competence in working with people with learning difficulties, might be considered. As noted above, post-adoption support for parents is a developing area of practice, and it is to be hoped that support from both adults' and children's services is better than it appeared from our study sample[114].

5.10g The right to privacy: medical information

Article 8 of the Human Rights Act 1998 provides for a qualified right to privacy, including the right to privacy about medical matters, except in so far as disclosure is justified for a legitimate aim in accordance with the law. In some cases, requests for information about protected parties were so broadly framed that it appeared that their right to privacy was at risk of being breached. The role of the Official Solicitor in such cases was to request a more focused request for only that information that was relevant to the case.

5.10h Fluctuating capacity

Some parents with mental health problems had capacity that varied through the period of the case. Cases with issues of fluctuating capacity may involve several assessments and reassessments, with implications for cost and duration of proceedings. In two cases in our sample, mothers had been taking medication for a psychiatric condition prior to becoming pregnant but stopped taking medication because they worried about the effect it could have on their unborn child. In cases in which mental health problems are exacerbated by not taking medication, re-establishing treatment may resolve the issue of litigation capacity.

The effect of stress associated with care proceedings can be considerable, so the proceedings themselves may negatively affect capacity, causing fluctuation. If parents are admitted to hospital, treating clinicians may be unfamiliar with assessment of litigation capacity, which can cause delay, as a suitably experienced doctor will need to be found. In one case, the psychologist who assessed a parent expressed the view that a parent lacked litigation capacity under the approach currently taken by the court (adhering to a 26 week timetable, but if it had been possible to take more time to let her recover from an acute episode of illness, and take more time to explain the process to her, she might have had capacity. Another parent was able to express her wishes consistently, so might have been assessed to have litigation capacity, but the stressful nature of the court process was too difficult for her, and she refused to engage with it.

The requirement that court proceedings are completed in 26 weeks may mean that some parents who could have recovered enough to instruct their own solicitor are not able to do so. Longer proceedings mean there is a higher chance of recovery for patients with fluctuating mental health conditions. On the other hand, this would mean subjecting parents who may be relatively sensitive to stress to a more extended period of stress and uncertainty, possibly causing deterioration in their wellbeing.

For some parents, the skill of learning how to think through issues may affect capacity: the effect of a childhood lacking in opportunities to learn how to make decisions. One parent was described as having been brought up in a way that meant she never had to think for herself, and this lack of opportunity affected her ability to make decisions as a young adult. A third parent was described as having very limited verbal comprehension and reasoning and therefore unlikely to be able to understand much of the evidence

114 'Pause' is a project that works with women who have lost children through care proceedings, and are at risk of a repeat removal of a child from their care. See also http://www.pause.org.uk

and arguments in the proceedings. The complexity of language and arguments used made it unlikely, in the view of the assessing psychologist, that she could understand the proceedings: "There is a high risk that (mother) will not be able to weigh up much of the information due to her limited understanding and that she may acquiesce to the perceived expectations or demands of others."

For all three of these individuals, their capacity was strongly influenced by the experiences they had had in the past and the situation they found themselves in: they might potentially have managed to make capacitous decisions, but their circumstances at the time of the court process and lack of opportunities to develop skills needed to make capacitous decisions made it impossible.

5.10i Engagement with the legal process

The parents in our sample varied widely in their level of engagement with their solicitor, as discussed above. The files contained evidence of detailed discussion and time being taken by solicitors to make sure their clients had every opportunity to meet with them and participate in the case as far as they were able to do so. Some parents were much more difficult to engage, because they were physically at some distance: some parents who were in hospital could only be seen in person when the solicitor went to the hospital. Some parents appeared to despair of the process, even becoming self-neglecting and distressed. One mother who had recently lost care of her first child and was in court in relation to her second was described as angry and tearful, saying she 'does not like life any more'.

Once it has become apparent that the weight of opinion is that they cannot parent their child, some parents who lack litigation capacity disengage from the proceedings. Many parents who attended some early hearings did not attend the final hearing, and we saw little evidence of parents attending final hearings when the final order was likely to be a Care Order with a Placement Order.

Despite some parents' choice not to attend court, or only to attend some hearings, it is important that they are able to do so if they wish. In one case, the court hearings were rearranged to take place on full days, not drawn out over half days, as was at first proposed. The protracted arrangement did not give the mother a fair opportunity to participate.

Advocates, expert assessors, and the Official Solicitor treated the idea of parents giving evidence in court with some caution. This is in part due to concerns over the impact a lack of capacity may have on the quality or usefulness of evidence given. One psychologist said, "...she may acquiesce to the perceived expectations or demands of others. There is a risk that if she were to give evidence in court her evidence may be unreliable." One caseworker noted in correspondence with a solicitor for a parent, that if she were to give evidence, it was important to, "...ensure she understands the questions put to her and that the answers she gives are the answers she intends to give."

In one case, the protected party did not want to give evidence, when it was suggested by another party that she might do so. The Official Solicitor said he would want to seek an assessment of her capacity to give evidence before agreeing to such a course of action. In another case, it was noted that it was agreed by the advocates for the various parties that the protected party should not give evidence. On the other hand, some parents clearly expressed wishes to speak to the judge in their child's case, even though they may not be cross-examined in court. In such cases, action by the Official Solicitor to support this without exposing the protected party to cross-examination is recorded: "If (mother) wishes to tell the judge how she feels (about the care and placement orders likely to be made) she should be allowed to do so, on the basis that she will not be cross-examined. Please contact me urgently if this is not the case and (mother) will be cross-examined."

The balance between enabling protected parties to participate and exercise their rights under Article 6 ECHR to take part in the legal process and protecting them from harm is a delicate one, involving consideration of the possible negative consequences of taking part in a stressful process, versus the risk of denial of their rights if they are not adequately supported to participate.

5.10j Issues over which the Official Solicitor challenged the evidence or plan for the child and issues of presenting statements

In one case in which a parent had already had two children adopted, the Official Solicitor challenged the local authority's reliance on the assessments carried out in the previous proceedings. There had been some evidence of positive change, and a new assessment was required. There could be no firm conclusion on the mother's ability to parent nor had all options been explored until a new 'PAMS[115] assessment had been completed.

In one case, the local authority sought a care order with the intention of trying rehabilitation of the baby with her mother. The Official Solicitor was concerned about the open-ended nature of the plan, as it left the mother and child open to the possibility that the local authority would decide to end the attempt at rehabilitation and bring the case back to court after only limited opportunity given to the mother to show she could parent. In that scenario, the mother would possibly have no legal aid to fund any legal representation, including the appointment of the Official Solicitor if she still lacked capacity. The Official Solicitor argued that there should be time for a fuller assessment so the case could end with a firmer plan: a short adjournment would not disadvantage the mother. The open-ended plan put forward by the local authority was not, it was argued, complete; it was premature. Much depended on the quality of support available to the mother. In this case, the local authority succeeded in persuading the court that they would follow the plan scrupulously and the care order with rehabilitation to mother as the plan was the outcome.

There were cases in which both parents were protected parties. In these cases, to avoid a conflict of interest, the parents had caseworks from different teams and they were advised by independent lawyer to make sure there were no possibilities for conflicting interests affecting the parents' representation.

The timing of the final statement to be submitted by the Official Solicitor was subject of discussion involving the parties and the court in one case. The Official Solicitor asked for eleven days from the submission of the Children's Guardian's final statement to submit his position statement (which we observed to be quite common practice), because he "needs to be informed of all the evidence including that of the CG before forming any view on behalf of a client without capacity. If the final evidence of the Official Solicitor has to be filed beforehand then it is likely that a final view will not be formed and a further statement will need to be filed at a later date."

This does not represent the usual order of submission of final evidence in cases in which there are no protected parties. Submission of final statements usually concludes with the statement of the Children's Guardian on behalf of the child. The position of the Official Solicitor with regard to considering the protected party's interests and the welfare interests of the child is that section 1(1) of the Children Act 1989 provides that "when

115 PAMS stands for Parent Assessment Manual Software. It accompanies the Parenting Assessment Manual, a guide for use by PAMS trained assessors undertaking assessments of parenting. Initially developed for use with parents with a learning disability by Dr Sue McGaw at the Special Parenting Service in Cornwall, it is widely used when parents present with a wide range of parenting issues. It is widely used for assessments of parenting for court cases concerning children's care. The assessment process covers a wide range of parenting skills and usually takes several weeks to complete. PAMS is available from http://www.pillcreekpublishing.com/pams_more.html

a court determines any question with respect to the upbringing of a child the child's welfare shall be the court's paramount consideration". The welfare of the child, per se, is a matter for the Children's Guardian and the court. When reaching his final position on behalf of the parent, the Official Solicitor cannot ignore and must take account of the fact that the court is bound by section 1(1) of the 1989 Act. The formulation of his position statements is drafted to reflect this.

The question of the sequence of submission of the final statements is of some significance in that it reflects the manner in which the consideration of the best interests of the child is integrated into the Official Solicitor's final position statement to the court view, and its importance in forming that final position. This appears to differ from the way in which a parent who is instructing their own solicitor approaches the formulation of their position at the end of care proceedings, although it is to be noted that a responsible solicitor is likely to draw the attention of their client to the range of likely and realistic outcomes of the case. The extent to which the sequence of submission of statements or focus on child welfare in a final position statement might affect case outcome is not known, but given the volume of evidence before the court at the end of most care proceedings, it is probable that the effect is slight, at most. The psychological impact on the parent of 'ownership' or not of the final submission made on their behalf may be more significant, judging from the submissions to this study (bearing in mind this was an exploratory study with none of the evidence coming directly from protected parties). The 'conventional' change in the order of submission of final statements was not accepted by the judge in all cases, as discussed in the following section on court observations.

5.11 Summary of main points from the case file study

- The largest group of parents in care cases who lack litigation capacity was mothers
- The most frequent reason for lacking litigation capacity was a learning disability, followed by a mental health problem, in a ratio of approximately two to one. The largest group of cases involve parents with stable long term conditions impacting on their ability to parent.
- The average number of children involved in each case per parent was 1.35 children, less than the average for all care proceedings (1.7 children). Most children were very young at the outset of proceedings: almost half under six months old, and three quarters aged under five.
- The majority of parents had not been involved in care proceedings before. Some parents had experienced removal of children previously, but they were less than half of all parents.
- S20 accommodation was used with this group of parents, mostly by local authorities but exceptionally, in one instance, during proceedings. This raises issues about what parents with capacity issues are assessed as having capacity to consent to, and the complexities, and arguably anomalies, that can arise when a parent is assessed as having capacity to consent to accommodation - or adoption - of their child, but not capacity to instruct a solicitor. This situation also raises questions about the interaction between the role of the Official Solicitor as the litigation friend of the parent, and the parent's continuing right to exercise parental responsibility for their child, over which the Official Solicitor has no right to intervene.
- The most likely outcome by a wide margin for a parent in care proceedings who lacks litigation capacity is adoption of their child, unless a family member can offer an alternative home for the child. Few parents in this position in care proceedings retain parental responsibility for their children, unless a relative or other connected person takes on the care of their child.

- While the cases in our sample included the full range of types of child abuse, the most frequent reason for commencing care proceedings was concern about neglect. For parents with a learning disability, key issues were inability to provide good enough physical care, or learn practical and emotional parenting skills within a timescale adequate for the child's upbringing. Lack of good quality family or partner support was an issue in many cases, and many parents had prior histories of poor care and troubled personal relationships themselves.
- Maintaining good communication with a parent with a mental health problem or learning disability can be time-consuming and demanding for solicitors for protected parties, sometimes well above the usual level of demand in terms of time and interpersonal skills.
- Fluctuating capacity presents specific issues in terms of both justice (ensuring the person has the 'right' assessment in place) and in practical terms, since re-assessments are costly in terms of professional charges, and may increase case duration. The wide legal disjunction between having and lacking litigation capacity frequently exists in the context of much subtle variation in a person's capacity dependent upon the nature of the issues they are engaging with, the person's mood, environment and state of health.
- Some parents remain engaged in the court process throughout proceedings, though others progressively withdraw from involvement, possibly as the probable outcome of the case becomes clearer. Some chose to address the court, either as a witness or informally. It was not uncommon for parents to disengage from the process, either periodically or for the duration of proceedings. The stress of proceedings may influence parental capacity.

6. The court observations: representation of parents who are protected parties in court

This part of the study had the aim of observing how courts (the physical environment of the court, and personnel such as solicitors, barristers, judges, court staff, intermediaries and interpreters, among others) accommodate the needs of parties who lack litigation capacity.

Our study observed court hearings on eighteen occasions. These took place over a geographically wide area and included courts in the north, northeast, east, south and southwest of England and two courts in Wales. No hearing was observed without the consent of the judge and the parties and the agreement of the protected party, if they could be contacted. On one occasion, a protected party said at court that she was not happy for the hearing to be observed by a researcher, and another protected party preferred that we not observe prior to the hearing. In neither case did the observation go ahead. We were able to observe the hearings through the support of the Office of the Official Solicitor, since no other database includes information about forthcoming hearings involving protected parties. Once we were aware that a hearing in care proceedings involving a protected party was taking place, we contacted the solicitor representing the protected party to ask if they would ask their client if they would agree to the observation taking place. The solicitor for the protected party also asked other parties' representatives if they objected to the observation. The researchers requested the permission of the judge presiding in the hearing for their agreement to observe. If all these permissions were given, the observation went ahead, with the proviso that permission might be withdrawn at any time by any party, or by the judge if they considered it was against any person's interests for us to observe the hearing.

When a protected party was present, the researcher made sure they were fully informed about the aims of the research, their right to refuse the observation, and to change their mind about the observation taking place at any point. This was done verbally, and their solicitor had our contact details to share with them or use to relay feedback if they had any issues they wished to raise at any time. Protected parties were given advance notice of the researcher's wish to observe their hearing, unless this was impossible because the protected party was avoiding communication from their solicitor. Solicitors were extremely helpful in making sure that the protected party was fully informed and had every opportunity to understand the research and the reason they were being asked for their agreement, and to refuse if they wished to do so. Protected parties were not interviewed even when present at court, and no information was sought from them other than establishing their willingness to have the hearing observed. We would have liked to have included their perspectives, but in the context of the stressful nature of care proceedings and having regard to possible difficulties around issues of informed consent to participate actively in research, we did not seek ethical approval to ask them their views. We did however ask to be assured they were content that we observe the hearing concerning them and their children.

Observation involved observation of professionals' discussions outside court if all parties agreed to have the discussion observed, as this was an important part of the court process. Some court hearings included more observation of out of court discussion than others, and they differed in the extent to which issues were discussed outside the courtroom. Most judges also spoke to the researcher after the hearing to explain their perspective on what had been observed. Contemporaneous handwritten notes were made, which did not include information capable of identifying any of the individuals involved. The notes were typed and subsequently analysed to identify themes and key issues.

6.1 The parents, court attendance and engagement

In most cases we observed, one parent lacked litigation capacity. For three observations, both parents were parties and both lacked litigation capacity. For four observations, as well as a parent lacking litigation capacity, the other (non-protected party) parent was a party and did have legal capacity, but in each of those cases the other parent had identified mental health or learning difficulty issues. Violence from a former partner towards the protected party necessitating protective measures in court was identified in two cases, although in neither case did the former partner attend.

In our sample of eighteen court hearings, parents who were protected parties were present at court on eleven occasions but not present on seven. Some of the parents who were not present when we observed a hearing had been present on other occasions. Some had been out of contact with their legal representative for some time. Known reasons for not being present included: having lost touch with their legal representative, apparently intentionally and for an extended period; being in prison and choosing not to come; and not accepting that they lacked capacity and choosing not to cooperate with their legal representative for that reason[116]. One case was the final hearing in a case ending with care and placement orders being made: the likely outcome was known and not being opposed by the protected party so the mother's attendance was not expected. One parent had not been in contact for several months, whereabouts not known.

Information from solicitors indicated that most protected parties attended court for at least some part of their case, although they did not all attend every hearing. Most also engaged with their solicitors. Some had extensive contact, discussed below, but some others chose not to engage because they did not accept that they were not capable of instructing their own solicitor, as noted above, or because they believed the Official Solicitor not opposing the local authority plan for removal of their children to be wrong, and thought their solicitor should be presenting the arguments the parent wanted to be presented.

6.2 The solicitors for protected parties

One of the things noted in our sample of hearings was the extent to which many solicitors for protected parties took pains to support their clients. This included doing things for which they would receive little, or sometimes no, payment. Examples include a solicitor who travelled on several occasions to visit a client who was undergoing mental health treatment hundreds of miles away, visits for which she said she would not be paid. One protected party had been left by her partner during proceedings. The solicitor for the parent described sorting out utilities, accessing money, helping with basic things that her former partner had managed, without any expectation of being paid. Another solicitor had contacted her client up to sixty times, including numerous home visits, and one estimated thirty to forty contacts. Many protected parties appeared to be receiving a conscientious service from professionals prepared to take pains to support their clients.

Solicitors also had the difficult job of managing the expectations of parents who, in most cases, were likely to see the case end without regaining care of their children. They had to manage issues of unrealistic hopes and expectations, and the incomprehension of parents who were sometimes clinging to the last to the hope that they might have their children returned to them. This is emotionally demanding work, done against a

116 For imprisoned parents, it appears that leaving prison to come to court can have negative consequences. Given the pressure on prisons, they may be returned to a different cell or even a different prison at the end of the hearing, so there is a potential cost to the parent coming to court.

background of clients' mental health issues and / or learning disability. We observed that they often had to break 'bad news' about the likelihood of parents keeping their children, sometimes repeatedly as parents retained hopes that things might change in their favour (in one case, quite literally, that 'Divine intervention' would mean her children would be returned to her). Solicitors had to be able to manage distress and anger and other difficult emotions raised by the proceedings.

In a few cases, the solicitor and Official Solicitor were taking an approach that the parents approved, but the evidence from our exploratory study is that in many cases the protected party does not agree with the instructions given to their solicitor by the Official Solicitor. In these cases, the solicitor must manage their clients' disappointment. Some parents appear to 'disconnect' from the process altogether. In some of the cases whose hearings we observed, protected parties were not attending meetings with solicitors or answering their phones, and did not come to court. Some protected parties appear not able to understand why their solicitor is not saying in court the things they want them to say.

Working with people who lack litigation capacity involves a set of communication skills that are arguably outside the usual skills needed by lawyers. Some solicitors said they had learned how to work with people who had capacity issues through experience. Some solicitors and barristers expressed a specific commitment to this specific client group, saying they took a number of cases of this type as a special area of interest and competence.

6.3 Challenging the local authority evidence

We wanted to see if there was evidence of effective challenge being offered to the local authority evidence in cases where the protected party had a prospect of rebutting the argument that threshold for making a care order was met. In the absence of capacitous instructions from the protected party to do so, we wanted to find out if the parent's solicitor and the caseworker would offer a robust challenge when this appeared to be possible.

We observed three cases involving solicitors who were engaged in exploring the possibility of challenging the local authority evidence relating to threshold. In one case, the parents had been married for many years and had a teenage child they had brought up together before having another two children who were the subject of these proceedings. The solicitor for the parent / protected party was arguing that the local authority's case did not constitute sufficiently good evidence of significant harm.

In the second case, the solicitor was challenging what she saw as an assumption by the local authority that once a child had been removed in prior proceedings, the court would readily remove subsequent children. She thought based on prior experience that 'nothing would have happened' to challenge this assumption had she personally not picked up the case and the Official Solicitor become involved. She considered that the involvement of a dedicated caseworker at the Office of the Official Solicitor "changed everything" in a positive way in terms of protection of the rights of the parent in court. It appears that the protected party's lack of litigation capacity had not been recognised in the earlier removal cases.

Without someone like her to support her cause, the solicitor felt previous applications in respect of the parents' older children may not have had the level of judicial scrutiny being applied to this one, for example to the appropriateness of the form of assessment of parenting. The solicitor was arguing that the assessment of parenting had not been 'PAMS' or equivalent therefore was not a fair assessment of the parents' abilities. Solicitors and caseworkers were generally alert to the possibility that local authorities might rely on out of date assessments or use assessors who were not qualified to make

judgments about the parenting abilities of parents with specific difficulties. Challenging unfair assessment practices and assumptions that being unable to look after a child at one time was clear indication the parent would not be able to parent in the future were areas in which we saw the solicitor / caseworker relationship working to provide a defence of protected parties' Article 6 and Article 8 HRA rights.

The third case in which we observed a challenge by the protected party's solicitor to evidence of 'threshold' concerned fluctuating parental wellbeing. The local authority was seeking care and placement orders. An older child had previously been removed from the mother's care. Mother's solicitor was arguing that the parent was now taking medication and getting better, and the evidence from the earlier case should be reviewed in light of current progress. Fluctuating conditions present a challenge to courts and representatives, especially within shorter care proceedings. It is more difficult to show that a parent's condition has stabilised, since it could be months before it could be said with confidence that a parent who has improved is in a settled state, while evidence of deterioration appears not to need an extended period of observation to confirm it. In this respect, there may be an inherent bias in shorter care proceedings away from evidence of recovery and towards a more pessimistic view of parents' likelihood of being able to parent their children, with fluctuating conditions most likely to be adversely affected.

Parents with learning disabilities but not mental health problems present less difficulty to decision makers in the sense that there is more stability and predictability of functioning. Making plans for children intended to last a lifetime in the context of dynamic parental recovery and relapse presents different challenges compared with planning for children of parents with more stable conditions or impairments. In one final hearing at which an SGO was being made, the judge commented: "If I am asked to make a supervision order, it would be foolish of me to try to deal with contact for seventeen years. The care plan is to deal with that." The child's mother had a fluctuating mental health problem, which was improving at the time of the final hearing, but it could be "years" before she reached a stable condition. The local authority had to be entrusted to respond appropriately to changes in the state of health of the parent, and the supervision order might expire before her condition became stable.

Two solicitors in two cases commented on parenting assessments when children had complex medical needs. The parents in both cases might have been able to provide good enough care for a child without such needs. This draws attention to the ethical complexity of decision making when children need better than 'good enough' parenting. A 'reasonable' standard of parenting may need to be of a higher standard in terms of physical care for some children than for most other children. This raises the question how far health and social care provision should be available to support parents when it is the specialist needs of the child, rather than their own challenges, that mean that the child requires specialist parenting which the parent may find it difficult to provide because of their own additional needs. In other words, if the parent could provide adequate care for a child without additional health needs, is it fair that they should lose care of their child because the child requires more of a certain kind of care than most children do? This situation raises legal and ethical issues related to the best interests of the child, availability of resources, the right to family life and the interpretation of the requirement that the parent be able to provide a 'reasonable' standard of parenting that may require further consideration.

Summary

The varied cases discussed here highlight some key areas in the work of solicitors and caseworkers that challenge evidence or care plans on behalf of their clients. Challenge focused on:

- The appropriateness of the type of assessment, and its compliance with guidance on assessment of parents with learning difficulties[117] when relevant;
- Ensuring that assessment of parenting capacity is carried out in a way that is fair, taking into account protected parties' vulnerability to environmental factors that could influence assessment, including stress, health issues and medication;
- Addressing stereotypical beliefs and 'post hoc' reasoning that parents who have learning difficulties or mental health problems are unlikely to change, or change will take too long to happen, especially when parents have lost care of children in the past, and,
- The level of support it is reasonable to expect health care providers and local authorities to offer. Parents with additional needs may have children who need 'better than average' care, and this should be reflected in the support packages offered to the parents.

6.4 Other sources of support for protected parties during proceedings

Protected parties, in common with most other parents involved in care proceedings, often do not have their children living with them, although some do: for example, those living in supported settings such as parent and baby placements. In our sample of hearings, only one parent was living with their child, and this hearing related to a successful application to discharge care proceedings brought by a parent who had litigation capacity (the mother did not).

Adult social care thresholds for service provision are such that the parents seemed very rarely to be assessed as eligible for support in their own right. Solicitors commented on the difficulty they had in getting any adult social care services for their clients, although some had tried. One said she had not even been able to get acknowledgment of her referral of her learning disabled client, despite making several attempts.

Many, if not most, parents in care proceedings appeared to be in receipt of no support from children's social care services, although there were notable exceptions[118]. One example was that of a mother whose child was adopted by the child's former foster carer, with contact to continue between mother and child, to be facilitated by the now adoptive parent. The mother's solicitor described the local authority as having done 'very good work' with the mother, and was hopeful that this would continue, as she thought contact was only going to work if there was adequate support for it.
In one case, the judge expressed concern about the level of support likely to be available to the mother of a child returning to his father at the age of ten. The court considered it important for the child that the mother, who had mental health problems and learning difficulties, should engage with life story work and have the chance to have letterbox contact for the boy, but recognised that courts cannot impose a requirement on local authorities to support this, however desirable it might appear. The local authority said

117 Working Together with Parents Network (2016) *Good Practice Guidance on Working with Parents with a Learning Disability* (updated version) available at: http://www.bristol.ac.uk/media- library/sites/sps/documents/wtpn/2016%20WTPN%20UPDATE%20OF%20THE%20GPG%20-%20finalised%20with%20cover.pdf

118 In one case in which the solicitor for the protected party and caseworker were disputing the necessity of removal, the local authority was discussing a residential assessment of mother and child, but no authority had presented rehabilitation as their plan. Support given was not therefore associated with plans to return the child to the parent's care.

they could make no undertaking about future provision: it would be a matter for senior management approval. The judge reiterated that this was 'required' for the child's emotional welfare, but courts have no way of ensuring this happens, and no oversight of provision offered once the court case ends.

Letterbox contact (in which the child may receive letters from the birth parent through a third party, usually the local authority or adoption agency, subject to adoptive parental discretion and within specified limits), is a case in point. Protected parties are arguably particularly ill equipped to manage the difficult emotional task of writing to a child they no longer see. Many will have low literacy skills, some speak little English and may not be likely to learn more, and they may be emotionally fragile. In the absence of support, it would be of interest to know how long letterbox contact arrangements last, especially when parents have learning disabilities or mental health issues, and whether the value they offer to the child and the parent could be increased with more support. Letterbox contact is primarily for the child's welfare. If it is not adequately supported or meaningful for the parent it may be difficult to sustain.

The issue of funding for advocates and intermediaries inside and outside the court setting was raised by some solicitors. Lay advocates and intermediaries were viewed as important in all contexts where important decisions are made that are relevant to planning for the child, and parents have a right to participate. While there is now better support of this kind for parents in court, outside it they were still vulnerable and there appeared to be no entitlement to help with communication nor funds to support their engagement in other settings linked to the protection of their children, such as child protection conferences. Some LAs were generous in their funding of intermediaries and advocates outside court, others far less so. There seems to be considerable variation in the support parents can expect depending on the local authority area they live in.

6.5 Delay and 26 week proceedings

It was said by several study participants that the involvement of the Official Solicitor leads to delay. In a limited sense, this is clearly the case: the person who may lack capacity must be assessed, usually by a specialist psychologist or psychiatrist, and the availability of legal aid confirmed, before the Official Solicitor can be invited to act as litigation friend for a protected party. He must then confirm it is appropriate for him to be the litigation friend of last resort and the caseworker must be appointed to manage the case on his behalf and give instructions to the protected party's solicitor. This is purposeful and necessary delay. However, as discussed further below, this delay at the point that an issue of litigation capacity is identified may not lead to delay overall or increase the length of proceedings.

Participants in the study suggested several reasons the involvement of the Official Solicitor caused delay. The most commonly expressed views were:

- It takes time for the of assessment of capacity to be carried out, the appointment of the Official Solicitor confirmed and a caseworker identified. This last is usually done within two weeks of appointment of the Official Solicitor, much faster than it was in the past, and there was agreement the situation has improved. This seems in part a historical issue, partly a matter of purposeful delay.
- It usually takes ten working days to get a response from the Official Solicitor to questions about instructions during the court case because of an expectation that the caseworker will have time to consider and reply to questions from the protected party's local solicitor. We were informed ten days was the normal time for a response, but it could be much quicker.

- The final statement of the Official Solicitor is usually filed after the final statements by the other parties, adding extra time in the final stages of the case.
- There is a shortage of people qualified to assess litigation capacity in some areas (but not all, and probably not most, areas), leading to a period of waiting for the assessment to be completed.
- Some protected parties issue challenges to the finding they lack capacity, necessitating a further assessment. Protected parties who challenge the finding they lack capacity, and attempt to replace or displace their solicitor or self-represent present a particular challenge to court timetables.
- Protected parties who fail to engage with the court process or their legal representative can prolong a case, especially when courts wait to give them an opportunity to express their views, possibly vacating or rearranging hearings to try to accommodate them. Non-co-operation with assessment presents a particular problem.
- When a protected party has fluctuating capacity, this is likely to cause 'delay' since they should have a new assessment carried out if their status change appears to have moved them in or out of having litigation capacity. The time this takes depends on the availability of a suitably qualified assessor, and the protected party's co-operation with the assessment.

One advocate we spoke with who had many years of experience of advocacy commented that parents who are close to being able to instruct their own solicitor but fall just below the threshold of litigation capacity are those most likely to understand the implications for them of being a protected party. Having more insight into the loss of autonomy this represents, they may be unhappier about the loss of the right to instruct their own solicitor than less capable others, and are therefore more likely to challenge the appointment of the Official Solicitor.

The timing of the Official Solicitor's final statement is an issue already discussed above. In one case we observed this issue was raised in court, and the court was clear on this occasion that submission of the Official Solicitor's final position statement after other final statements have been submitted was not accepted. In cases not involving the Official Solicitor, the Children's Guardian is usually the last person to submit their final statement, but the Official Solicitor has usually sought to submit his statement after the Guardian. This is based on the argument that the Official Solicitor must take account of the needs of the child in the case as well as the position of the parent who lacks capacity. In this case, the court was clear that the usual sequence for submission of final statements should apply, both to avoid delay and because the sequence for submission of final statements should be the same, whether parents had litigation capacity or not. Practice appears to vary between courts.

One question that arises from the above is whether any of the delay associated with the involvement of the Official Solicitor in a case is not purposeful delay. We did not in our small sample observe any cases where difficulty communicating with the Official Solicitor was identified as a cause of delay. We observed that the involvement of the Official Solicitor does entail time for specific tasks to be completed, such as establishing litigation capacity and allocating a key worker. Some other sources of delay stem from to the parents' difficulties which led to the capacity assessment being carried out in the first place. Some interviewees suggested that local authorities sometimes do not take the extent of parents' difficulties into account enough in the pre-proceedings stage, necessitating more assessments after court proceedings start. Practice appears to vary between areas in terms of the extent of specialist assessment work carried out pre-proceedings. It should be noted that there are financial considerations for local

authorities deciding which assessments to pay for before proceedings, because they will pay for them and cost of assessment will not be shared between the parties. On the other hand, there may be financial gains if proceedings are resolved more rapidly because the case is well-prepared.

Courts must deal with tension between the timetable for the court (not more than 26 weeks), the timetable for the child (also not more than 26 weeks, and possibly less, especially for a very young child) and a timetable which would allow the parents an opportunity to have one last try at demonstrating their parenting capacity can improve. This was summarised by one interviewee thus:

> "There has to be a line, I think, the court has to draw, between the parents' needs and the needs of the children. I think that's a huge challenge for the court, because they want to treat parents quite rightly, fairly, and I don't think it is always possible to be... doing that because you have young children... who need permanent plans and a great deal of assistance moving on."

6.6 The role of the Official Solicitor / caseworkers and its relationship to the role of the client's local solicitors

Each protected party has a local solicitor who represents them in court and manages their case on a day-to-day basis. Solicitors' instructions usually come from the parent they are representing, but when the parent lacks litigation capacity, the Official Solicitor as litigation friend of last report instructs the solicitor on behalf of the parent. We were interested in how this arrangement works from the perspective of solicitors.

Most solicitors were satisfied with the experience of working with caseworkers, and positively appreciated the working relationship they had with the caseworker. One solicitor commented that she believed the involvement of the Official Solicitor together with herself had enabled her to make a more robust defence of her client's rights in court.

There were however some negative comments. Two solicitors said they thought the physical distance between the Office of the Official Solicitor and the client, and the absence of direct contact between protected parties and caseworkers, meant that some clients thought of the Official Solicitor as an "ethereal presence" who 'controlled' their case but did not know them. One commented on the contrast between the role of the Children's Guardian instructing the child's solicitor and the role of the caseworker for the Official Solicitor. Having been the solicitor for the child in the past as well as acting for parents, she noted the contrast between the resources invested in children's representation (on the basis that owing to their young age most lack capacity to instruct a legal representative), and those available to non-capacitous parents. While this may in part be explained by the fact the child is the subject of proceedings, and it is the child's future the court is considering, the contrast between the level of resources available including for direct contact is notable.

One solicitor employed by a local authority suggested that caseworkers, "...just do what the solicitor says". They are based in Central London, they do not meet their clients and they could not, in her view, fulfil a useful role. She also suggested the lack of caseworkers' training in law or child protection was an issue (although this was not raised as an issue by any solicitor who worked with the caseworkers, and solicitors are usually instructed by people who do not have legal or child protection training, such as parents). It was more important in her view to invest in advocacy for parents, including supporting them in meetings such as child protection conferences as well as in court.

One solicitor who was representing a protected party said her 'heart sank' when she found the Official Solicitor was involved, because of the delay: "Communication adds on two weeks, but it is still a 26 week schedule." She thought it would be better if more decision-making were delegated to the solicitors on the ground, in contrast with the view that solicitors make the decisions, quoted above.. She also queried the threshold for the involvement of the Official Solicitor. In her view, experienced solicitors know what to do with their cases and can manage the situation unless the parents' problems are very severe: as when they are "...almost comatose".

Against these comments, other solicitors who acted for parents said that without the Official Solicitor they would be in difficulty in situations in which their client was unavailable, incoherent or otherwise unable to give them any useful instructions, sometimes for months at a time. Some scheme would be needed to ensure that parents in this situation had their Article 6 rights met, or solicitors would be unable to protect their clients' interests, as they cannot proceed without instructions.

These criticisms echo concern expressed elsewhere in this research report that the Office of the Official Solicitor is not resourced to permit direct contact between parents and caseworkers, who are reliant on the protected party's solicitor for information about the client and the case as it unfolds.

6.7 Arrangements to enable participation by protected parties: technology in the courtroom

We observed several court hearings in which a separate room (a witness room or suite) within the court building was used to permit the protected party to observe and participate in proceedings without the stress of being in the courtroom itself. These rooms are set up with the purpose of permitting vulnerable witnesses and parties to be able to observe and participate in proceedings under safer and less stressful circumstances than being in open court. They are equipped with a video link and microphones or sometimes a telephone to connect with the courtroom. Some protected parties are very anxious, and would find the experience of being on open court too daunting. Some needed the support of both an interpreter and intermediary, and the use of such spaces allowed for conversation between the protected party and those supporting them, without disrupting the hearing.

The use made of such facilities included:

- observation, to facilitate parents' awareness of what was going on in a relatively safe space
- offering the parent an opportunity to express their views to their solicitor while the proceedings were in progress, and to have better support to understand the process
- speaking to the court to express their views directly via the link
- protection from intimidation. Two protected parties were at risk of intimidation by the other parent and needed the room for safety, as well as because of their capacity issues[119]. In one case, the protected party was expected to give evidence using a screen to ensure they could not see or be seen by the other parent, who had seriously assaulted them in the past.

119 One protected party did not attend the hearing we observed, although the room and an interpreter had been arranged. Non-attendance at court by protected parties was a common occurrence even though all protected parties had attended for some part of the case.

The effectiveness of these arrangements varied, partly owing to variation in the quality of the technical setting up of the room, but perhaps more importantly by variation in how the technology was used. Factors that undermined effective communication, and sometimes made the technology almost irrelevant, included:

- Microphones placed too far from the speakers in court, or speakers sitting too far away from the microphones, meaning the microphones were unable to pick up speech clearly enough, or did so intermittently as the judge or other speaker in the courtroom moved in their seat or leaned forward and back
- Placement of microphones and other noise: a court official sitting next to the microphone typing meant that in one courtroom noise interference from the typing made speech in the courtroom difficult to follow in the video room
- Despite saying they were aware of the presence of an intermediary and would speak slowly, some professionals in the courtroom seemed unaware how much they needed to slow their speech or allow time for an intermediary to do their job effectively. Intermediaries are only able to assist vulnerable parties if there are gaps in the flow of speech to give them an opportunity to do so
- Interpreters also need time to do their job: we observed one interpreter appearing to find the task very difficult and interpreting only a small proportion of what was said for the protected party, there being no gap in the flow of speech for them to use for interpretation.
- When procedural matters were being discussed, sometimes no allowance was made for explaining this to the protected party. This may have been a reasonable thing to do, from the perspective of the court, as the protected party would not be expected to make an input, but without explanation as to what was happening and why they were not included, it could appear to the protected party that they were being excluded from the court process.
- Breaks were not always offered.
- In one court, the video link was not used for the second half of the hearing as the heating was not working in the room with video, and moving to a warmer courtroom meant that communication was only by speakerphone. Comfort of the wider group was prioritised over participation by the protected party parent.

Despite these issues, the availability of a witness suite and communication technology was very valuable to some of the parents whose children's hearings we observed. When the arrangements for using a witness suite worked well, they provided a useful space in which the protected party could receive useful and skilled support that was visibly welcomed by them. In one case, the video facilities were not available on one day of the hearing because they were needed for the psychologist who had assessed the parents to give evidence. The protected party had to sit in the courtroom on that day. Observing proceedings the next day, the intermediary noted how exhausting it had been for the mother sitting in the courtroom, how much harder it had been for her to hear what was happening or understand anything, and how much better it was to be back in the witness suite.

Rooms such as witness suites provide an important sheltered space in which vulnerable parties can observe proceedings while having far more effective support than is possible in the open courtroom. Funding for intermediaries and interpreters is only as useful as the supporting person's opportunity to use their skills: in a courtroom, it is difficult to talk and explain things. Their involvement in planning the presentation of evidence and giving of evidence if relevant is important, as is carrying out the planned adjustments to help the protected party understand and participate. Their value is reduced when proceedings in the courtroom continue without putting these adjustments in place. Much of the benefit that can come from the use of a witness suite may be lost. While

they may have first been envisaged as providing facilitation for giving evidence and protection from intimidation, the value of such a space when used well goes beyond those functions to support understanding and participation in its widest sense. It was suggested by one interviewee where resources in the court were out of date that problems with audio and video technology may occur in other courts.

6.8 Intermediaries and interpreters in court

Several hearings we observed involved intermediaries. Four hearings also involved the employment of interpreters: languages included Hebrew, Slovakian, Farsi and support with lip reading for a parent with hearing problems. Good intermediaries and interpreters who could engage with protected parties and help them feel more relaxed had a visible positive effect on protected parties' mood and confidence and ability to engage.

We observed different issues relating to intermediaries and interpreters. Intermediaries that we saw generally presented as professional, assured, and well equipped for the task. In one exception, an intermediary appeared unclear about the limits of her role, so the protected party's solicitor explained this to her. Most appeared to understand clearly the court process and what was required of them. One intermediary described the role as requiring 'pleasant assertiveness', about the client's needs, for breaks, for example. This they generally achieved in the cases we observed, although practical issues could undermine their efforts, as discussed above.

Our observations suggested that while intermediaries generally appeared well trained, interpreters might benefit from more training in court procedure and how to participate in it effectively. This includes keeping the client informed outside court, when decisions affecting them are being made outside the court room. One interpreter we observed was repeatedly prompted to provide interpretation to the protected party in discussions outside the courtroom. In another case, interpretation in the witness suite was rapid to match the professionals' speed of talking, which did not take account of the need of the protected party (who had a learning disability) to have clear and well-paced information. In the same case, the protected party's barrister had difficulty communicating with the protected party using the same interpreter, in what appeared a frustrating process for all involved. What he said was interpreted, but the mother still seemed unable to understand what he had said. Simply interpreting the words was not having the anticipated effect of making the court process understandable to her. Providing an interpreter without meeting the apparent need for an intermediary was ineffective in aiding communication, and may not represent a good use of resources.

There were occasions when 'pleasant assertiveness' might arguably have made some interpreters more effective. There may be barriers to effectiveness that training might address, such as cultural expectations about being assertive in a formal courtroom setting, or lack of confidence in asking for more time to interpret if needed. Our study did not examine training for interpreting in court, or the need to consider cultural responses to authority and their implications for effective support of vulnerable parties, but this might be an area for future consideration.

In one case, discussion took place in court but outside the court room involving the protected party directly. This centred on whether she would be prepared to separate from her husband of several years to be assessed with her child on her own. Decisions may occur with potentially very serious consequences for the parent, which involve balancing possible outcomes and contingencies. Undertakings may be agreed, and be very difficult to justify unless it is clear there was full parental comprehension. The role of the lay advocate, intermediary and interpreter must extend to all significant discussions held in court, especially where there is an expectation any matters agreed by the parties may be included in the court's final disposal.

One judge commented that it should not be incumbent on the solicitor for the protected party to be aware of the needs of protected parties and the arrangements that should be considered to support their participation in the court process. All participants in the court process should be aware of and support any arrangements needed by the protected party: all should share the onus of making the court a place where they could participate. Use of speech and preparedness to allow time to the protected party to understand the court process are key.

6.9 The 26-week court process

One question which provided the motivation for undertaking this study was whether the court process could be both timely in terms of the 26 week timescale, and fair to parents who might need a longer period to acquire additional parenting skills, or recover from a period of mental illness, for example. Based on our evidence, which we note was a small-scale exploratory study, the timescale does present challenges, but these may be overcome by proactive pre-case assessment (which has cost implications for local authorities). Early identification of issues and comprehensive assessment of parenting ability using an appropriate framework such as PAMS and using the *Good Practice Guidance for Working with Parents with a Learning Difficulty* (DFES 2010, WTWP Network 2016) from an early stage are important to reduce delay. However, once care proceedings have been issued, non-capacitous parents' chances of engaging in and successfully completing positive changes and demonstrating sufficiently improved parenting skills appear slim. One solicitor commented, "They won't win. There has been local authority involvement for a long time. The parents cannot change within the timescale, but they should have their day in court." This suggestion that court is almost a token process is in contrast with expression of a far more assertive approach to the protection of rights by most solicitors we spoke with.

One case in which unintended delay led to an outcome that was more favourable to the parent than the original plan for the child raises questions about the impact of speed on outcome for some parents.[120] The solicitor for the parent in this case expressed the view that the Family Justice system as it currently operates gives parents with intellectual disabilities very little opportunity to improve parenting, contrasting it with the FDAC approach, which is more "collaborative". In this solicitor's view, the current approach bordered on 'social engineering', especially in 'borderline' cases, in which the parent's standard of care did not fall very far below the threshold for making a care order. The judge in this case also expressed concern over the lack of positive early intervention services to support parents: "The problem with the current system is that there is no therapy, and it is too late for the parent by the time the [parenting] assessment is completed."

This suggests a situation in which courts are often aware of resource shortages or service gaps, but must decide which order to make based on the best interests of the child as indicated by the assessments before it, although these may sometimes appear to fall short for some parents who need more help. Assessments carried out after harm has happened to a child cannot identify what the full range of realistic options might have been if more and better early intervention had been available.

120 In one final hearing, a young child was placed with grandparents on a SGO. The grandparents were assessed to be unsuitable to care for the child on a first assessment but were reassessed following a period of 'drift' and found suitable the second time. This echoes a case in our file sample in which a plan for adoption outside the birth family changed to placement with a birth parent on a care order following a period of unintended delay.

6.10 Parents as vulnerable witnesses, and parents saying what they wish to say in court

Issues that arose in relation to parents giving evidence in court were:

- Who decides whether the protected party should give evidence, and by what criteria?
- If the protected party were to give evidence, should this be in a formal legal sense, or would it be better for them to speak to the judge, but not be sworn in and not cross-examined?
- If they were to be cross-examined, how should this be managed, given their lack of capacity, and should the questions they are to be asked be agreed in advance?

In some of the cases we observed, protected parties wanted to speak to the judge. In others, they did not: some did not attend court, some chose not to speak. One parent wrote a letter to give to the judge. Solicitors for the parents expressed the wishes of their clients verbally to the court, even when the parents' wishes did not accord with their instructions from the Official Solicitor (as in most cases they did not).

Some parents wanted to give evidence and were supported in doing so if they wanted: solicitors usually made it clear that the choice was theirs, and they would be supported if they wanted to do so. Giving evidence was however contraindicated in two cases. A psychologist who assessed one parent said he thought the stress of giving evidence would be too great for him, but if he did want to give evidence, he should have breaks. For another parent, the Official Solicitor and solicitor's position was that it would not be in the interests of the parent to give evidence.

In five cases, the protected party either gave evidence or it was envisaged that they would do so at some later stage in proceedings. Planning for giving evidence involved ensuring practical support arrangements would be in place and considering the way the giving of evidence would be managed. This included agreeing the questions to be asked in advance (generating relatively complex debate among the professionals involved), deciding whether or not the parent would be sworn in as a witness, considering where they would sit while speaking to the judge or addressing the court, and deciding who would sit with them.

One parent was involved in proceedings in which threshold was not conceded. She wanted to give evidence. Her solicitor was concerned that she should not be exposed to an experience that could distress her, or damage her case. The legal representatives of all parties considered together how she might be sworn in under oath and cross-examined, and enabled her to give evidence with support. When a parent lacks capacity, the court must consider whether the parent is capable of taking an oath, or of giving evidence. Their lawyer may take the view that it would be against their interests to give evidence because of the pressure to which they would be subjected, or they may not be capable of giving evidence. Advocates and intermediaries sometimes have to devise strategies for managing cross-examination to minimise harm to the protected party, while still being meaningful giving of evidence if this is required in the interests of a fair process.

It was agreed in this case that questions were to be decided in advance, and the wording of them discussed with the intermediary to ensure they were suitably expressed. They needed to be clear, short, concrete questions. The solicitor for the protected party suggested all questions should be agreed in advance, but this was resisted by other parties' representatives, who argued that cross-examination was an 'organic process' in which a 'tree' of linked lines of potential questions develops dependent on the

answer given to the first question and so on. It was argued this would be laborious and not feasible. It was agreed that themes for questioning would be agreed, but specific questions could not be. When protected parties are cross-examined, it must be clear whether this is to consist of predetermined questions only, or through a more conversational style of questioning, shaped by the (unpredictable) responses of the protected party.

Four protected parties spoke to the judge in our sample of hearings. Two parents (a married couple, both of whom were protected parties) spoke to the judge from the witness box but not under oath. They were given the choice whether they would like to speak from a seat in the court or use the witness box, and they both chose to use the witness box. One parent addressed the judge from the video suite with the support of their intermediary, having been given an opportunity to rehearse what they wanted to say and role-play it with their intermediary and solicitor. One parent spoke to the court from his seat in the court with his intermediary and barrister both beside him. None were sworn in as witnesses, and none were cross-examined, although in the case of one parent, there had as noted above been discussion about her being cross examined. All took the opportunity to explain how much they loved their children.

The researchers noted that judges were patient and listened to parents respectfully, thanking them and valuing their contribution. This respect can be misunderstood, however, by an anxious parent and in one case even though the judge was very clear with the parent that she had to read numerous documents and take account of everything that was said before making her decision, the parent left the court thinking she might have made a difference to the final outcome of the case, thig this appeared unlikely.

Although they managed to speak to the court, it appeared difficult for the parents in this small sample to understand how the court would weigh their contribution. However, they did, with support, manage to say how they felt, and were listened to respectfully.

6.11 Summary of main points from the court observations study

- Many parents who lack litigation capacity find attending court very difficult. In some cases, solicitors find keeping in contact with them at all difficult. This may reflect the unsettled lives of some of the parents concerned. It also underlines the key importance of the role of the Official Solicitor. He is not only able to give instructions when parents are unable to give capacitous instructions, but also give instructions when parents choose not to take part in the court process, for whatever reason, including situations in which they 'disappear' altogether from contact with their solicitor.
- Representing protected parties is a demanding process for solicitors, who sometimes must take on emotionally demanding work or additional tasks to support their clients through the distressing and often confusing (for the parent) process of care proceedings. Given the low probability of the child remaining with the parent, this is emotionally demanding work which requires skill in communicating with people significant communication or comprehension issues about sensitive and emotive issues.
- The Official Solicitor and solicitors for protected parties challenge local authority evidence. This is often related to rights-based issues around assessments being compliant with Equality Act 2010 expectations, information sharing, and ensuring the court considers each case on its own merits, not placing reliance on assumptions by the local authority, for example, that prior removal of a child from a parent means the current proceedings should lead to removal of the present child.

- The idea of 'good enough' parenting is complex, as children of parents who lack litigation capacity may themselves have additional needs, and both child and parent have an entitlement to an assessment of their support needs. Such assessments should recognise the parent's prima facie right and duty to care for their child, and assess their needs taking this into account. There is also a balance that has to be struck by the court between giving parents a fair opportunity to demonstrate capacity to change, and the child's legitimate need for timely stability and security. This tension has to be managed on a case by case basis by courts.
- There is almost always a need for support for parents after a care case ends, as most lead to removal of the child from the parent's care. There are instances of good support being offered to parents after care cases end, but also evidence of great anxiety on the part of many of those who work with parents with capacity issues in care proceedings that the quality of support may be inconsistent and insufficient. We heard repeatedly that solicitors were trying to get assessments or services for clients they considered very vulnerable, with little success. This includes support to enable parents to use and sustain long term contact opportunities such as letterbox contact.
- Most solicitors said they found working with the Official Solicitor helpful, or very helpful. The time required to get instructions (up to two weeks) was an issue for a minority of solicitors, and some solicitors appeared to be confident they could manage a case involving a party without litigation capacity without receiving instructions from the Official Solicitor, unless the capacity of the parent was very compromised ("almost comatose'). While this may be true in practical terms, in some cases, we note that it does not meet the legal need to have somebody giving capacitous instruction to the solicitor.
- Court technology is of variable standard. Professionals who work within the court setting have varying levels of sensitivity to and willingness to accommodate the needs of parties who lack litigation capacity / vulnerable witnesses. Intermediaries were generally viewed as providing a very valuable service to parents and the court. They have a particularly important role when planning the giving of evidence by a parent who lacks litigation capacity, since there are issues around the phrasing of questions and organisation of cross examination / parents addressing the court on which they can give valuable advice. The parents who addressed the court in our sample were listened to respectfully by the court. The main thing the parents in our sample who did address the court wanted to communicate was their love for their children.

7. Interviews with Family Justice System professionals

In this exploratory study, we carried out a range of individual and focus group interviews with a range of professionals from across the Family Justice System across England and Wales. These included:

- Cafcass / Cafcass Cymru Children's Guardians
- Barristers
- Caseworkers and solicitors in the Office of the Official Solicitor
- Judges
- Solicitors for parents
- Solicitors for local authorities

7.1 Timescale, the 26 weeks, and delay

Some respondents thought that the involvement of the Official Solicitor caused significant delay:

> "I think the first factor that suddenly hits you is that you've got to be aware that there could be considerable delay, or you become more aware of the potential for delay, and I think sometimes to the point where you'll actually short circuit other things that you could perhaps be doing because there's a great desire of courts to conclude within 26 weeks, regardless of whether you've waited 4 weeks for the official solicitor." (Cafcass Children's Guardian)

It appeared that some people who were concerned about delay were basing this largely on historical problems with delay, and on further inquiry it seems that the wider consensus is that although there had been substantial delays going back several years, case allocation now happens within a reasonable time frame. The knowledge that there would be some delay was concerning to some professionals, since all professionals involved in the family justice system felt the pressure of the 26-week completion time. There were examples given of more recent cases when delay was due to delay in the Official Solicitor becoming involved in a case, but these seemed to be more delays associated with enabling the Official Solicitor to be appointed rather than allocation of caseworker once this point had been settled[121]. Parents not co-operating with assessment can also cause delay. One parent was described as 'so chaotic' it was not possible to 'pin her down' for an assessment.

There was concern about delay associated with getting an assessment of capacity carried out, but the wider consensus was that while delays had been a problem in the past, a recent decrease in court ordered assessments meant there is generally greater availability of people to do assessments following (experts are less busy than they used to be) so an assessment can now usually be done within two or three weeks, although there are areas of the country where we were told that there is a shortage of suitably qualified people to do such assessments. The level of payments that can be made under legal aid rules is perceived as low, which is causing a problem in some areas, where few psychologists were prepared to work for the money.

One person we interviewed commented that a capacity assessment "...does not require a very long document" and once a psychologist is identified to carry out the assessment, they do not take long to do.

121 The process of the Official Solicitor becoming engaged in a case depends on a number of factors, including the assessment of capacity, legal aid and agreement that he should act as the litigation friend for the protected party. There appears to be a distinction being made here between delay associated with the Official Solicitor becoming involved, which can have any one of a number of causes, and delay in allocation of a caseworker.

A general improvement in capacity assessment practice was noted, associated with more professional time available by less busy assessors. A more robust assessment standard was emerging, in contrast with former practice, when assessments could be, "...two sheets with little tick boxes and that was it." Children's Guardians in one area noted the commitment of the psychologists to see an assessment through. Understanding the challenges faced by the clients meant if the client were late, they would wait. This was important because if the assessment was abandoned because the client did not turn up, "...they do not often get a second chance, and you think. 'Oh God'." It not clear how courts manage the non-compliant unassessed litigant who may lack litigation capacity since no such cases were mentioned by any other people we spoke with, but ultimately the decision lies with the court as how to manage this situation in the interests of the child and fair process, and having regard to the timetable for case completion.

The two week response time for a caseworker seems concerning to some people, but to be accepted as standard practice by others. One respondent who found it troublesome said:

> "...you have to build in to the timetable time for the official solicitor to look at everything then make their response. I don't know why the timetable has to have added - because the person's a professional, so I don't know why they then need an extra two weeks on top of everyone else's time."

There are different causes of delay associated with having and not having the Official Solicitor involved: the causes of 'delay' are complex. There was general agreement that getting the Official Solicitor involved in proceedings took time, sometimes several weeks, and since the timescales for the hearing were not extended beyond 26 weeks, this placed pressure on professionals to move faster once the Official Solicitor was 'on board' (this phrase was commonly used to describe agreement the Official Solicitor was to be a protected party's litigation friend). Once the Official Solicitor was 'on board', his involvement speeded things up, because there were clear directions given to the solicitor, and the Official Solicitor understood that there needed to be a timely determination of the child's best interests.

Conversely, arrangements needed to support parents in court could make hearings take much longer, for example, a two-day hearing could become a four day one because of the need to take things at a pace the protected party could manage, take breaks, and so forth. This support arguably is something that should be available to the parent whether or not the Official Solicitor is involved, if they need it, but making arrangements for support in court appears to be associated for many with an assessment of lack of litigation capacity.

Parents who needed help to instruct their solicitor but who were not getting it could cause delays too, which could be far longer than the delay required to assess capacity and engage the Official Solicitor's support. One parent was described as having been assessed three times and eventually found to have capacity, but was a 'borderline' case. The lack of clarity and direction had impacted on the children's case:

> "Three years on I am sorry to say we are still in the same position and I think had she not been deemed to have capacity, and had the Official Solicitor [been involved] much earlier on, this whole process would have been expedited. And it's not just about the [Article] 6 rights of the parents, is it? It's about the children as well, isn't it, in terms of their fair trial, around the length of time, the delay around coming to a decision about their permanency."

One judge expressed the view that much initial delay could be avoided if courts and local authorities had their pre-proceedings practice better coordinated. Local authorities who funded capacity assessments before proceedings began had to pay for them, but there might be savings too because better pre-proceedings processes generally lead to higher rates of diversion from court. This rests on the assumption that a local authority that understands the parent's needs and limitations well can find a non-litigation based route for keeping children safe and promoting their welfare, which requires availability

of support services and / or relatives prepared to care for the child under e.g. a s20 arrangement. A potential problem with this pre-proceedings approach is that once a local authority thinks a parent lacks litigation capacity, they may not be capacitous to consent to a range of things, including assessments and s20, so referring the case to court becomes the safest legal option. However if the assessment ids done first, he psychologist's or psychiatrist's assessment can then be fed into the court decision making process concerning litigation capacity, avoiding delay at the beginning of the case.

In one case discussed with the researchers, a mother had serious and long lasting mental health issues, but was deemed to have litigation capacity. Her child's case was delayed for 'months on end' when she was in hospital. The mother could be very lucid, but under the stress of proceedings she had become unwell, "...when we came to court the stress had caught up with her...", and two years on the case is still ongoing. In a case presented for contrast, the mother was in a compulsory patient in hospital under a 'section' of the Mental Health Act 1983. The Official Solicitor was involved with this parent:

> "...the Official Solicitor just kept going because he was a fourteen-year-old and was in foster care but the Official Solicitor was giving instructions, I don't know how, so it concluded in the time frame because the Official Solicitor kept saying yes, my client's not got the capacity to give instructions, and I understand that this child has to be placed somewhere, so he was very good."

The timing of submission of the Official Solicitor's final statement was an issue raised by a few respondents in the interviews as well as noted in the court observations. One court area dealt with the issue of any potential delay in the final statement from the Official Solicitor by applying the same timetable as would have applied in any other case: setting a date for submission of final statements, without making special allowance for the fact a parent lacked litigation capacity and the Official Solicitor was therefore involved, and asserting that the case would conclude on the allocated day, whether all statements had been submitted or not. Most court areas appeared willing to add approximately two weeks to the court timetable to permit the Official Solicitor needed time to consider the statements of other parties, particularly the Children's Guardian's statement, before submitting his statement.

When parents need special support, whether they have litigation capacity or not, arranging for special measures for them, such as intermediaries, and agreeing payment for them, was sometimes a source of delay. This affected a larger group of parents than just those who lacked litigation capacity. This was particularly problematic when parents needed an intermediary outside court for meetings, and could cause substantial delay because of issues over funding and sourcing them[122].

122 The absence of a clear and consistent framework for provision of support to parents involved in court proceedings outside court was an issue raised in the interviews and also our court observations

7.2 The effect of parental lack of ligation capacity and the involvement of the Official Solicitor

One interviewee at the Office of the Official Solicitor summed up what they thought the most important aspect of their role was:

"I think our role is finding out exactly what difficulties the parent has and then trying to ensure they have the appropriate safeguards, support, put in place when assessments are carried out and throughout the court process so that they can get their voice heard and the message can actually come across. And it's trying to protect their Article 6 rights so they have a fair trial because we don't want it to be either rushed through nor go at a pace that is inappropriate... we try to ensure, within, you know, as far as we can, given obviously, the time constraints and funding issues and pressures we are under, that it is a fair process and we try to bring them up to where it is a level playing field."

Staff at the Office of the Official Solicitor felt that they helped the solicitors they worked with to understand their role in cases where a client lacked litigation capacity. They directed them to useful materials, such as the Advocate's Gateway[123] materials and the Good Practice Guidance[124]. They ensured that local authority plans were based on adequate assessments, and that plans for removal of a child were not made until every other possibility had been exhausted: "...all avenues have been explored". Some of their role was helping solicitors for parents to develop awareness of parents' rights in terms of assessment:

"[If] we have got a solicitor who is not that up on things and we're saying, well, "Was this an appropriate assessment, did they get a fair crack of the whip, effectively, was it tailored to them?" And if you have a solicitor who says, "They are a good social worker," no, that's not what I'm asking you – they may be a good social worker for the average parent, but was this aimed at the parent with this particular difficulty?"

Staff at the Office of the Official Solicitor thought their role included policing quality of service and developmental work with solicitors who need help to give a good enough service:

> "Some of them are not bad solicitors, but they don't have the experience of working with learning disabled parents or working with a litigation friend. We have to explain to them, it's different, you know, the things they need to take into account."
>
> "Solicitors perhaps learn from us skills that they would then take and may use in all of their other cases, 'cos not all parents with learning disabilities need a litigation friend, but how you communicate with them will be incredibly important."

Several respondents (none of them employed by the Official Solicitor) expressed strong feelings about the remoteness of the Official Solicitor from the protected parties. Some expressed quite strong views about this, including the idea that he seemed to parents like a 'remote' 'fictitious figure'. There was unease that someone who never meets the parents was making decisions of such weight: "Who is this person taking away what rights they have ...and they never meet them?"

Some (Children's Guardians particularly) would have liked to talk to caseworkers directly and discuss cases with them, as solicitors might do. They felt, as fellow professionals concerned with the same case, it would be appropriate for them to discuss the care plan directly with caseworkers. Communication is channelled through the parent's solicitor as their legal representative, but the involvement of a decision maker (in the sense of giving instructions) who was not accessible to them caused some concern among

123 *The Advocate's Gateway* is available at: http://www.theadvocatesgateway.org/

124 Working Together with Parents Network (2016) Good Practice Guidance on Working with Parents with a Learning Disability (updated version) available at: http://www.bristol.ac.uk/media-library/sites/sps/documents/wtpn/2016%20WTPN%20UPDATE%20OF%20THE%20GPG%20-%20finalised%20with%20cover.pdf

non-solicitors. When a solicitor needed instructions quickly, for example if an urgent issue arose in court, the solicitor might phone the caseworker then come back with an answer. It was suggested this could be 'alienating' for parents, and apparently for other professionals, since it was commented on by several respondents.

There appear to be two issues: some lack of professional clarity about the role of the caseworker and their responsibility to engage with other parties directly, and concern about the alienation that parents might be feeling because they never met the caseworker. It is unfortunate that we were unable to ask parents for their thoughts directly in this study. Professionals thought the situation as it is might be confusing for parents: "There's no face-to-face interaction, so [protected parties] actually think their solicitor is two things sometimes: which I suppose they are to a certain extent."

This sense of parental 'bemusement' about the involvement of a 'disembodied' decision maker was commented on by several interviewees. There was a query by one respondent as to how someone could carry out the caseworker role without meeting the parent in person. Other people suggested phone contact between parent and caseworker, or videoconference contact.

> "It's a faceless person on the phone making decisions for them; a faceless person is making decisions."

There were suggestions as to how this situation might be improved. Some people thought it was important, even a matter of respect, that the person who was making the important decisions in someone's life should meet them. The issue was about process rather than outcomes: it was not suggested the decisions made by the caseworkers were flawed.

This remoteness was recognised by some staff within the Official Solicitor's office, where one interviewee said, "It must be very difficult when you have, you know, the statement from the Official Solicitor, from someone you have never met, being filed and it has been discussed with you but it's not even read out in court in front of you…and then everyone says, oh, the Official Solicitor has filed a statement."

The caseworkers are prevented by their location and way of working from observing directly the way decisions taken by them impact on parents. This includes decisions about process, such as whether a parent should be supported to give evidence or speak to the judge. One caseworker commented, "It would be interesting to know actually, does it [protected parties speaking to judges] happen quite frequently or not?' Caseworkers were involved if the issue of giving evidence was raised, as there had to be a determination whether the person was competent to give evidence and whether it was in their interests to do so, in cases in which they were not a compellable witness[125]. Decisions about parents speaking to judges not under oath seemed to be left to the discretion of solicitors, unless there had been a specific contraindication from a psychiatrist or psychologist.

One question raised by an interviewee was whether the effect of a focus on parental capacity and the involvement of the Official Solicitor could weight decision making towards protection of the parents' rights and away from a focus on the best interests of the child. One respondent said a case she had been involved in concerned a baby a few weeks old who was placed in a residential assessment with his parent because it was the view of the Official Solicitor that the parent should be "given a chance for a residential assessment". The court agreed, against the views of the local authority and the solicitor for the parent. The speaker's view was that this would probably not have happened had a parent with capacity requested the assessment for himself. "It's not about the baby to a certain extent, it's more about: let's exhaust all possibilities." This does not of course answer the question whether the further assessment was warranted, even if the prospects for success were not strong.

125 We heard about a few cases, which appear to be rare, in which the protected party is also a defendant in a criminal case, and where the Family Court was considering cross-examination to establish facts relating to an injury or assault.

It is not possible to say based on our evidence why some cases lead to parents having a last chance at rehabilitation while others do not, or whether the involvement of the Official Solicitor affects this. Views expressed by the Official Solicitor's staff about helping solicitors advocate more effectively for their clients suggests that some parents may be more proactively represented if the Official Solicitor is involved, but this is anecdotal and would need to be explored by further research.

Cases in which Official Solicitor, guardian and local authority all had the same view of the best outcome for the case were described as 'simple' and smooth running', so challenge may be perceived as disturbing the flow of the legal process. This disturbance of the expected order of things was seen positively by one solicitor for a parent, who described how a third set of proceedings concerning the same parent were conducted "...very differently from the first two... we had an actual contested final hearing." `The Official Solicitor had backed the parents' solicitor in contesting the care order "every step of the way."

There were other views on the robustness of challenge, though. Some interview participants described concern at how they thought the Official Solicitor "rolled over" concerning establishing threshold for removal, and wondered if parents had a fair opportunity to challenge evidence of threshold. At the same time, we heard a view across all professional groups that most cases involving parents who lack litigation capacity are cases in which the parents have little realistic hope of parenting their children. One interviewee, expressing a more extreme view of the utility of hearing 'hopeless cases' at length, thought the court process sometimes was a drawing out of a painful process, almost cruel, and serving little useful purpose, since so many of cases involving parents with serious intellectual impairment or mental health problems are without any prospect of any outcome other than long term removal of the children. Faster resolution is, in her view, ultimately kinder to the parent whose hopes for the return of her child may continue until the very end of the case.

This may not be unique to parents lacking litigation capacity. There was a view that it was very difficult for any parent to challenge a professional assessment, whether they had legal capacity or not, and it was probably "scary" for any parent, with or without legal capacity, to realise that by the time they were in court proceedings, there was almost no "window for change" any more. The very high level of difficulty many parents who lack litigation capacity have in parenting their children means the outcome of many cases was a "foregone conclusion". The pre-proceedings stage was their "window to do it", and at that point there is no input from the Official Solicitor, since he cannot be appointed until the case goes to court, by which time it is "...all a bit late, really".

It was said that parents need to know that someone had "fought their corner", even when the case for keeping their children was hopeless. This could be difficult, since there was a view among many professionals we spoke to that cases were often (but not always) so "bad" by the time they got to court the evidence was "overwhelming". In such cases, challenging evidence or care plans might be unrealistic and pointless as there are few options for presenting a plausible alternative analysis to that put forward by the local authority. It could be hard to make a case for the parent keeping their child, which was what most parents seem to want from their solicitor.

Judges thought courts had become more cognisant of issues relating to litigation capacity. Devolving the Court of Protection from London had helped with this as more judges outside London were trained in and aware of issues around capacity. The positive effect of decentralisation in one area of legal practice seems to have positively affected another.

There was general agreement that the culture of work with people who lack litigation capacity was changing in a positive direction, and that courts and solicitors were more

open to and understanding about the position of parents who lack litigation capacity. Whereas such parents might in the past have been 'sidelined' by the court and excluded once they lost the right to instruct their own solicitor, one interviewee said,

> "I think we've changed that now, completely and quite rightly, to say that [lacking litigation capacity] does not have to exclude then from having a role to play in the proceedings, particularly if they may want to give some evidence," and,
>
> "More and more we are saying, well, we'll allow a statement to be filed and we may well allow them to give some short evidence if they are competent to give evidence."
>
> Some solicitors for parents support their clients to write their own statements, and sometimes parents give evidence or speak to the court. The difference between litigation capacity and capacity (and confidence) to give evidence is an important distinction, "...they are not the same thing."

Responsible solicitors make sure the questions they asked of their client in court (often not sworn in as a witness) enabled the parent to cover all the points they wanted to make. In that situation, we were told that it was customary for the other lawyers to decline to ask questions. One interviewee was less positive about such statements, and commented that they can sound unlike what they thought the parent would have said for themselves. Assisting the protected party to produce a statement that is acceptable as a legal document may conflict with assisting a parent to communicate their thoughts in their authentic voice. The role of an intermediary may be of value here.

7.3 The boundary between legal capacity and incapacity as a rights issue

Several of the people we interviewed raised issues about determination of litigation capacity. The importance of the decision was stressed by interviewees:

> "...capacity to litigate: to remove that from a party is a huge infringement of their rights and therefore that should only happen if you are absolutely satisfied that they don't have that capacity."

However, to fail to identify someone who lacks litigation capacity and support them appropriately is also a breach of their rights. We were informed that many more assessments are carried out than ultimately lead to a decision that a person does not have litigation capacity, so courts are inclined to assess someone who might lack litigation capacity rather than risk continuing with a non-capacitous parent attempting to give instructions to their solicitor. The outcome of assessments of capacity were sometimes said to be surprising to people who knew the parents concerned. Correspondence, or lack of it, between the way people present verbally and their assessed level of understanding of complex processes is one possible factor. Parents who seemed to respondents to have very little understanding of the court process were sometimes found to have capacity. Some people we spoke to thought the threshold for being found to lack litigation capacity was very high. Comments relevant to this included:

> "I haven't got any Official Solicitor cases but I have got one that really should be 'cos mum has great difficulty processing and handling the whole thing. It's a combination of her mental health and cognitive factors."
>
> "There are lots of borderline cases where they are being treated as an equal in the court room but actually they've got huge issues. They're putting them at a disadvantage."
>
> "I had one [case] last year where I believe both [parents] lacked capacity to consent to adoption and we had a psychological assessment and it said that they did but they quite clearly hadn't got a clue what it actually meant for their children to be lost to their family forever."
>
> "Often we have had people who have had PAMS assessments ...that said they failed to understand about 80% of their child's needs, plus they need an advocate and all those things and they tick all those boxes and they still don't have the Official Solicitor."

There was another theme in our data relating to professionals' concern for people who were just at the borderline of having litigation capacity. They were widely seen as very vulnerable: "...they're not necessarily getting the recognition of the issues they've got." One interviewee thought that good quality advocacy services, available in the area she worked, were more useful to people on the borderline between capacity and incapacity than becoming a protected party, but good quality advocacy services appear to be unevenly available. Access to advocacy may be influenced by capacity assessment, but this is an issue that was beyond the remit of this exploratory study.

Loss of autonomy by protected parties was a concern for some interviewees. Some did not consider the advantages of being a protected party outweighed the loss of the right to instruct one's own solicitor. An alternative solution to the problem of a solicitor without capacitous instructions was not proposed. This does however highlight the anxiety felt by some people involved in the family justice system about the balance between autonomy rights and the right to protection from the effect of compromised decision making ability.

7.4 Assessment issues

Assessment of litigation capacity, is a complex matter, going beyond readily measurable factors such as IQ. It is not just a matter of using the right test, "...a lot rides on the relationship that develops between the assessor and the parent, and I think that could be said for any other parenting assessment, whether or not a PAMS assessment." Assessment of litigation capacity is affected by the skill of the assessor in relating to the person being assessed and other contextual factors.

Some people we spoke with had experience of 'repeat' care cases involving the same parent where there had not been a finding of lack of capacity in the earlier cases but by the second or third set of proceedings they were found not to have it. There were also cases described where someone who had lacked capacity in an earlier assessment was assessed to have it on a later occasion. It was speculated that there might be a test-retest effect: the mother had, "...learned the roles and responses before, because I don't think there was any change in her capacity."

Stress and depression impact on parents undergoing the removal of their children through care proceedings, potentially affecting processing capacity. Parents are assessed on the basis of their functioning at the time of the court case: "The fact that she might ...process things better a couple of years down the line when she's less depressed is kind of irrelevant really because this is where she is at the moment."

Some parents may present differently to different professionals, either because their condition fluctuates, or the stress of certain situations aggravates an underlying condition:

> "The difficulty was, although her mental health issues were serious, she would present with these issues only with certain professionals, or it just so happened that certain professionals would interview her during the time when she was suffering from an episode [of mental ill-health]. So, for instance, maybe due to anxiety or stress, this mother became very anxious about me visiting and every time... she would be displaying very serious mental health difficulties, and then she could be assessed and could present very well, actually, and nobody would pick up on those issues."

One assessment issue that recurred in the qualitative data as in other data we gathered was the issue of the perception the threshold for services was higher for adult social care than the threshold for child and family services. This meant that parents who might have been in receipt of services when they were children themselves sometimes lost them at eighteen, so had none when they first became parents, and parents who received children's services when they had care of their children lost them when they

lost the care of the children. Support offered to parents to improve their parenting was lost and usually it was thought not to be replaced by any other form of support, despite parents' evident ongoing support needs.

> "It's a real struggle getting adult services involved, and we have to get that capacity assessment et cetera disclosed to the adult services because they don't want to know either. They can say no, no, no, no, no, it isn't a criterion for our services and here we are with vulnerable adults that need support."

Support post-care case was important for the parents as individuals, and considered to be important for successful maintenance of contact afterwards, whether the child was with relatives with direct contact, or placed with strangers with letterbox contact. In the first scenario, "getting a pattern established" in contact was seen as important. If the child had been adopted by strangers, a different kind of long-term support was likely to be needed. A Supervision Order was considered by some interviewees to be potentially helpful in making it a duty on the local authority to ensure that contact was managed, supported and facilitated during the important early stage of a family care arrangement.

What emerged from our data was a broad picture that a significant number of parents in care proceedings are close to the boundary between having and lacking litigation capacity, and matters such as their state of mind on the day they are assessed, the level of stress they are under generally, the exact form of the test applied, their rapport with the person carrying out the test, their motivation to be assessed to have capacity, and their familiarity with the test process could all affect the test results. Many parents struggled to understand the court process, and perhaps many more needed help through advocacy or intermediaries than lacked litigation capacity. It was suggested that some 'borderline' parents who were assessed as lacking litigation capacity might be able to instruct a solicitor with the right support, and might feel that the process had been fairer if they did so. Conversely, it was also suggested that the threshold for the involvement of the Official Solicitor was too high, and that some parents who had very little understanding of what was going on in care proceedings were left to struggle to instruct their solicitor.

7.5 Helping protected parties understand and participate

There were some very positive comments about the steps courts took to make the courtroom 'user friendly' for adults who lacked litigation capacity, especially when they wanted to speak to a judge, but professionals we spoke with also highlighted some ingrained unhelpful practices that were slow to change. There was an indication of wide variation in practice between areas.

We were told that many parents who were protected parties would give evidence in the court, and be cross-examined in one area, while in other areas practice was varied. In the area where it was common for a protected party to give evidence in court, advice would be sought in advance from a psychologist or psychiatrist about cross-examination, assistance would be tailored to the needs of the individual, and an advocate would be there to help them. In other areas covered by our study, it seems it is not common for parents to address the judge, and cross-examination rarely happens. The reason for this disparity is not currently known, nor is it possible to say from the evidence in this study which approach benefitted the parents more. A study involving speaking to parents would help clarify this.

Some judges were described as taking great pains to support parents:

> "I have just finished [a case] with parents with learning difficulties and I would say that Judge X was very good with them. He spoke directly to them and he kind of made sure they understood to the point where… 'cos they were going, oh yes, yes, we know the difference between and SGO and… and so he said, you tell me what it is then? And they have gone, oh… so they clearly didn't, and he then gave the solicitor time to go back outside and explain it again and then bring them back in again so he was quite good."

A fact finding hearing was described in which the witnesses, who had learning disabilities, were in the witness suite with chocolate, popcorn and fizzy drinks, and a 'very helpful' intermediary. The barrister was "not very good at asking questions in a way that perhaps people with learning disabilities understand" so the intermediary would intervene to help with communication, and sometimes the judge did so too. Examples of helpful interventions were described thus:

> "[The judge said] 'I know what you are trying to say, I suggest you ask it in a different way', and she was very good about doing that… and even the judge himself was saying 'I think what they are trying to ask you is…' or, 'Let me put it this way…' He was really good at talking at a level they understood."

It seems that in court at least, it may not matter so much to the parent which of the people present have the skills to make sure a vulnerable party has the opportunity to understand what is being said to them or asked of them, as long as someone is present and able to do this. Good practice however would be for this person to be an intermediary, if possible.

Intermediaries were widely viewed as having a very positive impact on courtroom communication with protected parties. It was suggested that some solicitors have particular skills in this area. It might be beneficial for solicitors who do this type of work to have additional training and membership of a local panel, similar to the arrangements for solicitors for children.

Use of barristers in court in the absence of the familiar solicitor can be problematic for parents. This practice was described as increasingly common. Communication can be adversely affected, and in the worst cases no-one takes responsibility for ensuring communication is appropriate to the parents' needs. One participant described parents having the outcome of a very significant hearing explained to them on the steps of the court. The speaker was sceptical about how much information parents with capacity issues can take in or retain in that situation, apart from issues of professionalism and confidentiality.

It was reported by our interviewees that there is a widespread tendency to continue to use the same technical language when parents with comprehension issues are present as when they are not. When the focus was on the parents 'giving evidence', simplified language was usually used, but one interviewee pointed out, "I don't know why they don't do that generally, because a lot of parents struggle to understand." One judge was singled out as very good at helping protected parties when there was a lot of technical discussion going on, offering reassurance and explanations: "Don't worry, we are just trying to sort out…" These relatively small courtesies and accommodation to parents' comprehension issues made a positive impression on interviewees.

The contrast between the treatment of child witnesses and vulnerable adult witnesses was highlighted. Children are often taken to see the courtroom and meet the judge. It was suggested there would be value in doing so with parents who lack litigation capacity, instead of a culture where, "They just turn up and get carried along. There are no special measures really. They just get thrown in the deep end." Our research indicates that being 'thrown in the deep end' is not typical of the way all courts respond to vulnerable parent witnesses, but does indicate that some vulnerable adult witnesses may still be receiving support that requires improvement.

There were positive comments about the general quality of input from trained intermediaries and advocates. Intermediaries could help people to understand the role of the Official Solicitor as well as the court, they could 'go through the process' and explain things in a way parents understood: "It just reduces anxiety really for the parents".

Some of the issues raised in this section: the remoteness of the Official Solicitor and his perceived 'impersonality', are an inevitable consequence of having a centralised service not funded to engage directly with protected parties. Some other issues raised seemed to be the effect of some people not having the time or skills to explain processes and aspects of the case adequately to the parents, with examples of good practice which demonstrate the potential for a much better experience for the parents. Interview discussions about participation focused largely on learning disability issues more than mental illness, but similar problems and issues arise for all parents, whether the reason for the parents' capacity issue is mental illness or a learning problem.

Summary of main points from the interviews with Family Justice System professionals

- Allocation of cases by the Office of the Official Solicitor is not currently causing significant delay. There is a period between referral and the acceptance of a case, but is not a current issue. Some people we spoke with were unhappy about the period of up to two weeks between asking for and receiving directions, but others noted other potentially significant causes of delay that impact on the case, such as non-availability and non-co-operation of parties, that are ameliorated by the involvement of the Official Solicitor. The involvement of the Official Solicitor led to effective instruction and progress in cases that could otherwise 'stall', to the detriment of any children who had longer to wait for an outcome to their case.
- Getting an appropriate assessment of capacity carried out is not a problem in most areas, since the smaller number of assessments being carried out within proceedings means there are often people who can do one at short notice. However, in some areas a dearth of suitably qualified assessors is a problem for the courts.
- While the input of intermediaries and lay advocates was very useful in supporting parents who lack litigation capacity, availability is far from consistent across the country. This raises a question about participation rights in relation to a range of important decision–making meetings (such as Child Protection Conferences) that take place concerning children when care proceedings are in prospect or in progress.
- The role of the staff at the Office of the Official Solicitor goes beyond 'giving instructions' to solicitors, to include developmental and awareness raising advice about rights, resources and fair assessment. They provide practical and moral support to solicitors when there are reasonable grounds for challenging local authority evidence. Some people we spoke to indicated that they had some concerns about the level of challenge to local authority plans for permanent removal of children of parents who lack litigation capacity, but we also heard of cases in which the Official Solicitor had robustly backed a solicitor in a contested hearing.
- Solicitors generally found communication with the Office of the Official Solicitor positive, but there were some concerns about the absence of direct contact between caseworkers and parents. It was indicated by some interviewees that if were possible to find a way of making the Official Solicitor and caseworker less 'remote', that might be helpful for parents who feel alienated by the instruction of 'their' solicitor by someone they never meet.
- Caseworkers have specific knowledge and skills in the areas of specialist assessment, and ensuring solicitors do what that is needed to make the proceedings fair for the parent. They see their role as developmental as well as giving instructions, especially when working with solicitors who have not worked with a parent lacking litigation capacity before.

- Litigation capacity and 'borderline' capacity are complex terms. The binary nature of the assessment outcome, with dramatically different consequences for those who have and those who lack litigation capacity, is troubling for some professionals. There is concern for some parents who appear to fall just below the threshold for the involvement of the Official Solicitor.
- Capacity decisions raise complex issues for local authorities. Beside use of s20 (considered above), there are issues about assessment of parents in the period prior to proceedings, which local authorities have to pay for. If they believe a parent lacks capacity, it raises wider questions about what the parent can give valid consent to – including the assessment of capacity itself.
- Supervision orders can be useful in ensuring that support for parental contact was provided through the early months or years of a Special Guardianship Order.

8. Conclusion and recommendations

'Getting it right in time' for children reflects the imperative that decisions made in court about children need to be timely for the child, in accordance with the child's and the court's timetable for proceedings. However, reaching a good decision for a child in care proceedings is also contingent on the court being informed as fully as possible about parental capacity to care for the child, which may change over time. It may change during the proceedings: improving in response to efforts to improve, or service input, or deteriorating under the pressure of the case, for example. Parents who lack litigation capacity may be particularly affected by time constraints on care proceedings. This may affect them in different ways:

- For parents who have fluctuating capacity, the trajectory of their mental condition (stable, improving or deteriorating) during proceedings may have a significant impact on the final decision of the court. The end of the court process is unlikely to be delayed beyond 26 weeks so the window of time within which the parent can demonstrate improvement and make a difference to the outcome of the case is relatively inflexible, compared with the more flexible situation before the Children and Families Act 2014 fixed a statutory time limit of 26 weeks on care proceedings.
- For parents who have a stable condition that makes it difficult for them to parent their child, such as a learning disability, the issue is not one of recovery, but their ability to learn to provide adequate parenting within a short period. Some parents may never be able to parent a baby because they lack the capacity to learn to do so, but some parents with learning disabilities are able to learn the necessary skills. Once the court process begins, they have a finite period within which to do this. If they have not been able to show they can learn to parent before proceedings are initiated, they have little time after this happens. For a parent with a learning disability, the shorter the proceedings, the more challenging the task.

The issue of time was also significant in relation to the impact the involvement of the Official Solicitor has on the length of proceedings. Some interviewees indicated they thought the involvement of the Official Solicitor caused delay, but comparing the length of care cases involving the Official Solicitor with other care cases did not support the idea that this is the situation in most cases. A range of procedures and processes affected length, including: assessment of litigation capacity; reaching agreement that the Official Solicitor would be the litigation friend; allocation of the case to a caseworker; solicitors waiting for responses from the caseworker (two weeks being a typical interval); courts addressing issues raised by the caseworker in relation to e.g. the adequacy of the assessment of parenting ability (which might in exceptional cases necessitate additional assessment of parents), and the submission of the Official Solicitor's final statement, often two weeks after the submission of other final statements, unlike the usual order of submission of final statements.

The case file study indicated that cases involving the Official Solicitor do not take longer, on average, than other types of care case, once some very long cases that began before the 26 week ruling are excluded. Some cases may be longer because there are specific issues that arise only in cases with a litigation capacity element, such as a parent not accepting that they need to be assessed or that they lack litigation capacity, or when they have fluctuating capacity. There was general agreement among our interviewees that much concern over delay related to the period before 2014, and that current practice was much timelier.

This disparity of perception about whether having the Official Solicitor involved in a case leads to delay may be understood in terms of conflation of different types of delay. The involvement of the Official Solicitor will always, necessarily, involve some delay since it adds an extra process to those the court must complete during proceedings. This is purposeful delay, which cannot and should not be avoided since it is essential for the protection of the Article 6 rights of the parent. Some delay is occasioned by waiting for an assessment of capacity to be completed, which is purposeful, unless it is delayed by non-availability of suitably qualified assessors, as it happens in some areas, but not all. Delay relating to resolving issues concerning legal aid and payment of the Official Solicitor appeared in some of the case files. In some cases, delay appears to be the result of the Official Solicitor not having all the information he needs to enable him to act, including ensuring funding is available from the Legal Aid Agency.

Some proceedings are made longer by the absence of adequate assessments of parents, for example failure by local authorities to have PAMS or 'PAMS – comparable' assessments completed or under way at the outset of proceedings. Some areas are struggling to find suitably qualified assessors for PAMS assessments.

Involvement of the Official Solicitor could lead to proceedings being extended because challenges were offered to assessments that were not suitable or adequate or fair, which raises an issue as to what happens when there are similar issues and the Official Solicitor is not involved, in the worrying[126] 'borderline' cases. It is to be hoped that the parent's solicitor and / or the Children's Guardian would be aware of such problems and raise them with the court, but the level of safeguard is lower.

It has been suggested that "...four to six months is needed to assess capacity to change adequately, including offering an appropriate intervention and gathering evidence of change following that intervention," (Harnett, 2017)[127]. This is barely feasible within care proceedings, but it is possible within 26 weeks. It is not however likely to be possible if assessment of litigation capacity and administrative steps associated with this have taken time out of the already tight 26 weeks allowed for the proceedings. All local authorities should build in awareness of capacity issues in assessing families and, if entering the pre-proceedings phase, consider how this might affect preparation for court proceedings. However, they also need to be mindful that a parent who lacks capacity cannot lawfully consent to a range of things including accommodation under s20 Children Act 1989, or possibly an assessment of capacity. Local authorities may find it helpful to liaise with the family court in their area to develop strategies for managing this tension.

126 'Borderline' cases were the subject of quite a high level of concern among many of our interviewees. These are parents who have a high level of need for support and poor understanding of the proceedings and their part in them, but fall just above the level of litigation incapacity. While they have the freedom to exercise their legal right to instruct their solicitor as they wish, the value to them of this right is arguably limited.

127 Harnett P. (2007) A Procedure for Assessing Parents' Capacity for Change in Child Protection Cases. *Children and Youth Services Review* 2007; 29:1179-88, cited in Platt, D. and Riches, K (2016) *C-Change, Capacity to Change Assessment Manual*, Bristol University

While a lack of litigation capacity, or belief a person may lack litigation capacity, does cause 'delay' in the sense that additional processes are required at the beginning of proceedings, this is necessary in the interests of justice. Once the Official Solicitor is involved in a case, there was a view shared by some participants that the completion of care proceedings might be sooner than it would otherwise have been, because unhelpful delay linked to parental incapacity can be avoided.

There is a legal expectation is that cases will be concluded in 26 weeks unless there are exceptional reasons for taking longer. It is arguable that any case in which a parent lacks litigation capacity presents a court with an exceptional situation. Reasons for taking more than 26 weeks may relate to procedural issues, or a need to allow longer to see if a parent has the capacity to change and it would be unfair under all the circumstances to disallow this. This might include situations in which a parent is recovering from illness, and showing capacity to change but more slowly than if they were a parent without a mental health issue, or a learning disability. Sometimes it is found that assessments of parenting have not taken enough account of the parents' needs. These situations would appear even more exceptional.

It is not at present known at what proportion of assessments of capacity lead to a determination that a parent lacks litigation capacity. It would be of interest to know how many assessments are done. Research might show whether there is any scope for improving accuracy and consistency of identification of parents who may lack litigation capacity, and consistency of threshold applied.

The solicitors with whom we spoke were positive about the involvement of the Official Solicitor in their cases. They valued clear instructions and someone to discuss the case with, and appeared to find that most of the time the Official Solicitor agreed with their analysis of what was in the interests of their client. The Official Solicitor's caseworkers and legal advisers saw solicitors as having variable levels of awareness of the needs of a non-capacitous parent, and prepared to develop their working practice with support from their office. They provided a 'quality control' function in a situation in which, without their input, it is possible that no-one other than the non-capacitous parent would have a perspective on the quality of work done on behalf of the client.

The solicitor 'on the ground' is the 'eyes and ears' of the caseworker, and both work from the same set of documents from all parties, so it is not perhaps surprising that the level of agreement about the best course of action is generally high. When assessing issues such as whether it would be desirable or advisable for a parent to speak to the court, give evidence, or be cross examined, the decision seems to rest on a combination of the local solicitor's direct experience of the parent, and the caseworker's experience of considering the rights and welfare issues involved. Caseworkers regularly raised issues of non-capacitous parents' rights, especially in the areas of assessment and participation, and ensured solicitors had clear instructions. The solicitors managed the day-to-day running of the case, saw parents and pursued contact with those who were not easily available. They accommodated the extra time needed to talk things over with parents, and with caseworkers. They had to address parental unrealistic expectations and deal with family members who might be obstructive or controlling, with protective intentions or less benign ones.

The infrequency with which the Official Solicitor opposed the local authority plan for the child was noted by several interviewees, although we also heard of a very small number of cases in which the Official Solicitor and parent's solicitor, or the Official Solicitor, parent's solicitor and Children's Guardian, opposed a local authority plan for adoption. Despite this, most parents lacking capacity were in the position of hearing their legal representative not opposing a planned course of action which they themselves did not

agree with: long term or permanent removal of their children from their care. This alone makes it seem important that parents have an independent means of saying what they think, directly, through speaking to the judge, or through planned cross-examination, or submission of a statement, possibly only a short one, but their own, that is separate from the statement of the Official Solicitor.

The apparent remoteness of the Official Solicitor was mentioned, sometimes in quite strongly worded terms. The contrast with the level of involvement with child and family of the Cafcass children's guardian was noted by two interviewees. There are some similarities in the roles of caseworkers and guardians: both gather information about a person who lacks litigation capacity on their behalf and uses it to instruct their solicitor. Both make submissions to the court about the best interests of that party which may or may not accord with their own wishes. It was suggested that protected parties would benefit from an opportunity to have some contact at with their caseworker at the Office of the Official Solicitor, possibly at the beginning of the case, possibly by phone or video link. It was not envisaged that this would be face to face. The lack of direct contact did not seem to be an issue for caseworkers (who it appears are not resourced to do this at present) or solicitors. The means of communicating the role of the Official Solicitor to protected parties may be something that could be reviewed, since the informative leaflet supplied in easy – to – read format for solicitors to use with their clients seems not to be seen as effective, if indeed it is being used by solicitors as envisaged. However, there is a caveat in that this research is based on interviews with professionals, not parents, who might have a different view if asked directly what they think.

Courts were seen to regularly take steps to accommodate the needs of parents who lack capacity. Some were singled out for praise for their patience, skill in talking with the parents, and making them welcome. None were unwilling to take steps to accommodate them as vulnerable parties and vulnerable witnesses if they chose to give evidence. Unfortunately, there were still barriers to participation:

- Technology in witness suites in some courts needs to be reviewed, including the quality of audiovisual equipment and details like placement of microphones
- Provision of intermediaries or advocates: sometimes both were needed, and the presence of one in the absence of the other partly negated the value of the one who was present, which was not effective use of a valuable resource. Interpreters sometimes (possibly often) need an intermediary to help them break down complex ideas for the protected party.
- Sometimes getting an advocate or an intermediary was difficult, because of 'supply shortages'. While most are very well prepared for the role, others are less well prepared. Clarifying and enforcing expectations around minimum training for those providing advocacy services in court would be beneficial.
- People present in court from the judge to the administration staff were often but not always aware of what they needed to do to enable the protected party to participate. This includes speech rate, vocabulary, considering the seating plan and appreciating the time needed for intermediaries to perform their role effectively. Training and a review of practice for all court personnel would be helpful. Examples of good practice stood out and were viewed as having a positive impact on the accessibility of the court process.

All parents who lack capacity in care proceedings are at very high risk of losing the care of their children. Many children were made subject of a placement order, while many more were placed within the family on some type of court order. Contact arrangements were defined in court in many of the cases in our study. Whether contact after proceedings was direct or 'letterbox' the parents were ill-equipped in many cases to negotiate that contact. In the case of direct contact, where a supervision was in place after proceedings, the parent had a reasonable prospect of being supported to use any contact agreed. A contact order / child arrangements order gives some protection, but without support to enforce the contact rights parents and children have, there is a risk that carers could ignore the order or use it selectively. Letterbox contact seems particularly vulnerable to attrition. It is not known how many children adopted from parents lacking litigation capacity have parents who are literate, or have a real understanding of what letterbox contact is, and how to use it. Contact is primarily for the child's benefit, rather than the parent. On this basis, if letterbox contact is included in a court's final order, there should be adequate support to enable it happen.

Recommendations

This study identified for the first time the characteristics of parents lacking litigation capacity in care proceedings, key aspects of the arrangements and provisions made to enable them to be fairly represented in court and participate in hearings. We also identified the outcomes for children and parents of such cases for a one year sample of cases.

Specific recommendations that follow from research are:

- The physical resources available to support parents who lack litigation capacity as participants in the legal process varies between courts and regions. A review is needed of the ability of courts to provide technical resources and physical space for parents to observe, understand and participate to the best of their ability.
- Without an intermediary to support the parent in understanding what is being asked or said in court, resources spent on interpreters may be under-used. Some parents need the support of an intermediary to help them understand what is said in court, even when it has been translated into their first language.
- Some local authorities are more prepared than others to fund advocates to help parents attend meetings with their solicitor, and in child protection conferences, and other key decision making meetings. Article 6 of the European Convention on Human Rights / Human Rights Act 1998 and the Public Sector Equality Duty protect the right to procedural justice. Article 20 of the Equality Act 2010 relates to the duty to make adjustments to avoid disadvantage, among other things through the provision of auxiliary aid. It is recommended that local authorities, and solicitors representing protected parties, consider the implications of this duty for meetings outside the court setting as well as in the court process itself.
- Contact after removal into care or adoption, including 'letter box' indirect contact between a parent and their child, is a right of the child, once it has been decided by the court that this should happen in the interests of the child, unless further developments lead to a re-evaluation of that decision. Supporting contact unless there are reasons to end it safeguards the child's Article 8 right to family life under the European Convention on Human Rights / Human Rights Act 1998. It is also the right of the parent to have contact with child as determined by the court, unless the child's welfare contraindicates this. Support for letterbox and other indirect contact should be universally available for parents who lose the care of their children to adoption, and that support should take account of their specific needs.

The authors would like to note that this was an exploratory study in an area which has not been the subject of research before. As a consequence, we have assembled a breadth of information, with the most generous support of our research participants. We are mindful that this was an exploratory study: it highlights potential areas for further examination, which we hope will build on the findings of this research.

Glossary

Advocate – a term often used to refer to professional legal representatives such as barristers, but here used to refer to people supporting those who require support to participate in processes such as court hearings, meetings, and tribunals

Article 6 – Article 6 of the European Convention on Human Rights, which addresses the right to a fair trial

Article 8 - Article 6 of the European Convention on Human Rights, which addresses the right to private and family life

Children's Guardian – employed by Cafcass, person who instructs the solicitor for the child in care proceedings (and other public law proceedings concerning children) whose focus is on the wishes and feelings and best interests of the child who is the subject of the proceedings

Caseworker – employee of the Official Solicitor, person who instructs the solicitor for qualifying parties to care proceedings who lack litigation capacity. Based in Kingsway, London.

GRH – Ground Rules Hearing, a court hearing aimed at discussing and determining how a vulnerable witness may best give evidence or otherwise participate in the court process

Intermediary – a person who acts as an expert enabler to communication between the protected party and others who may have less familiarity with the communication needs of people who have a mental health problem of a learning disability. Their function is to enable complete, coherent and accurate communication between a witness who requires special measures and the court, but they also support parties Intermediaries in court should be registered on the national Intermediary Register in accordance with the Registered Intermediary Procedural Guidance Manual 2015[128].

Lay advocate – a person who accompanies the protected party to support them in court or other settings where they may wish or need help to understand what is happening, or take part, or simply be present

Letterbox contact – indirect contact between two people, usually a parent and child, usually through a third party (the adoption agency) in writing after a child has been adopted

Litigation capacity - a person who lacks capacity to conduct legal proceedings, for a duller definite see Dunhill v Burgin (Nos 1 and 2) [2014] UKSC 18. A person who is in this situation is known as a protected party. They must have a litigation friend (Court of Protection Rule 21)

Masterman-Lister test – after Masterman-Lister v Brutton & Co [2002] EWCA Civ 1889: 'capacity' means capacity to conduct the relevant legal proceedings, and this is tested in determining whether a person has or lacks litigation capacity

McKenzie Friend – a person assists a litigant in person in a court of law in England and Wales. They are not required to be legally qualified.

Official Solicitor – Alastair Pitblado, the Official Solicitor to the Senior Courts: his duties mainly relate to protecting the vulnerable in the justice system, in particular litigants who are children or young persons and those unable to conduct their own litigation due to lack of mental capacity[129]

128 http://www.theadvocatesgateway.org/images/procedures/registered-intermediary-procedural-guidance-manual.pdf

129 https://www.gov.uk/government/people/alastair-pitblado

Pause – a project that works with women who have had children removed thorough care proceedings, and works to prevent repeat removal[130]

Protected party – see Litigation capacity

Public Law Outline – Practice Direction 12A – *Care Supervision and other Part 4 Proceedings: Guide to Case Management*[131] , sets out the key stages of the court process, documents to be produced to the court by parties, the timetable for the child and the timetable for proceedings, among other matters

Public Sector Equality Duty – a duty set out in the Equality Act 2010 which obliges public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities, and protects people from discrimination at work and in wider society

Special measures – adjustments made by the court to ensure that proceedings are fair for those who are vulnerable by virtue of their age or incapacity or by virtue of fear or distress. This may include use of a witness suite (see below), screens in the courtroom, provision of people to assist with communication in court

Threshold – the level of harm or likely harm which must be demonstrated to be met by any authority seeking to obtain a care order or supervision order, among other orders, with respect to a child. The harm must be significant or likely to be significant; the definition of significant harm can be found at s31 Children Act 1989

Vulnerable witness – any witness aged under 17, or who is a victim of a sexual offence, or a person whose evidence or ability to give evidence is likely to be diminished by reason of mental disorder, significant impairment of intelligence or social functioning or physical disability or disorder. There is also a group of witnesses defined as 'intimidated'. This includes, among others, people whose quality of evidence would be diminished by reasons of fear of distress in connection with testifying in the proceedings if they did not have special measures applied for their protection from intimidation.

Witness suite – a room or area in a court building or, occasionally, in a place nearby that is equipped to enable communication between the court and a person who needs such protection as a vulnerable witness.

130 http://www.pause.org.uk/

131 http://www.pause.org.uk/

Cases referred to in the Report, in alphabetical order and with summary notes

Re B-S (Children) [2013] EWCA Civ 1146

In this landmark case, Munby P reinforces the position set out in the earlier case of *Re B (Re B (A Child)* [2013] UKSC 33) that the severance of family ties through adoption without parental consent is a draconian one that requires the highest level of evidence, also consistent with the court taking the least interventionist approach when intervening on a statutory basis in family life. The court must consider all available options, and carry out a holistic analysis in which judges must make an adequately reasoned judgment which includes a proper balancing exercise looking at all the realistic options as well as a proportionality analysis. Courts should also consider the support local authorities are able to offer the parents in making their decision. Reports by social workers and guardians should also be of a quality to support this type of analysis. Adoption is only the right option for a child when it is the only realistic option.

Re C (A Child) [2014] EWCA Civ 128

In this case, parents successfully appealed against the making of care and placement orders relating to their child on the grounds that inadequate provision had been made for them by the local authority and the court making the care and placement orders to take account of their communication needs. One parent communicated using British Sign Language and the other had a low level of cognitive functioning and speech and hearing impediments. A s20 arrangement made without special arrangements to enable informed understanding and parental consent to s20 accommodation and an 'ordinary' parenting assessment were among the issues identified by the court. The judgment reminded all agencies involved with parents in the context of child care cases that the provisions of the 2010 Equality Act apply to them.

Re G (Care; Challenge to the Local Authority's Decision) [2003] EWHC 551, [2003] 2 FLR 42

Munby, J held that the protection offered to parents under Article 8 Human Rights Act 1998 extends to all stages of the decision-making process concerning their children. Parents must be treated fairly, and to comply with the provisions of Article 8, that includes informing the parents of their plans, sharing documents openly, informing parents of the reasons for their decisions and the facts on which they are based, and giving parents the opportunity to respond to any allegations and attend and address relevant decision making meetings.

Dunhill v Burgin (Nos 1 and 2) [2014] UKSC 18

In this case, Lady Hale held that capacity is to be judged in relation to the decision or activity in question and not globally. capacity for the purpose of assessing litigation capacity means capacity to conduct the proceedings, not anything more. There may be times in any proceedings where they need a litigation friend and other times when they do not, but once it is decided that a person lacks litigation capacity, one does not have to asses whether they have capacity in relation to every individual decision. Nor is it the case that whether a person has or lacks litigation capacity depends upon the quality of advice the lawyer is able to offer the client. Rather "the test of capacity to conduct proceedings for the purpose of CPR Part 21 is the capacity to conduct the claim or cause of action which the claimant in fact has, rather than to conduct the claim as formulated by her lawyers".

Re L (Care: Assessment: Fair Trial) [2002] 2 FLR 730

In this case, Munby J made the point (reinforced in Re G above), that, "The local authority should at an early stage of the proceedings make full and frank disclosure to the other parties of all key documents in its possession or available to it . . Early provision should then be afforded for inspection of any of these documents. Any objection to the disclosure or inspection of any document should be notified to the parties at the earliest possible stage in the proceedings and raised with the court by the local authority without delay."

Masterman-Lister v Brutton & Co. [2002] EWCA Civ 1889

In this case it was held that there is no definition of mental capacity of universal application: the issue of capacity must be looked at in the context of each decision to be made. A person may be capable in law of making one sort of decision, but not another. Capacity should be judged in a 'common sense' way, bearing in mind the need to allow people the right to manage their own affairs. To be capacitous, the party needs to be able to understand the issues, with such professional assistance as is appropriate. A person is not to be regarded as incapable of managing his affairs because, in order to do so, he will need to take advice, or because he may not take the advice given, or because he is vulnerable to exploitation, or at risk of taking rash or irresponsible decisions.

Re P (A Child) ([2013] EWCA Civ. 963

This case was a successful appeal to the Court of Appeal in relation to care and placement orders (a plan for adoption) made by the judge hearing the case at first instance. The trial judge had erred by failing to carry out a proper balancing exercise when deciding to approve the care plan of adoption. It was unclear from the judgment how the judge was approaching the historical facts in the case concerning the father's approach to adults rather than focusing on his parenting capacity.

Black LJ reinforced the need for consideration by the court at the start of the case about the factual and evidential basis of a local authority's arguments. It was not apparent the judge had given due weight to the positive aspects of the father's care of L, and may have given too much weight to historical information concerning other aspects of his behaviour.

RP v United Kingdom (2012) ECHR 1796, (2012) MHLO 102

This case concerned an application to the European Court of Human Rights by a mother whose child had been made subject of an adoption order. She claimed that her human rights had been breached when the care and adoption orders were made. The mother had been found to lack litigation capacity and the Official Solicitor had been appointed to act in the proceedings. She had made her objection to adoption clear, but the Official Solicitor did not oppose the making of care and placement orders. The appeal was rejected, and the court noted in particular that the appointment of the Official Solicitor was made after a thorough assessment, the mother had had means to challenge his appointment, it was not practicable to have regular reviews of capacity within proceedings as this causes undue delay, and the Official Solicitor was free to advance any argument he saw fit and appropriate. He should have made her views known to the court, which he did.

Abbreviations used

Cafcass - Children and Family Court Advisory and Support Service for England

Cafcass Cymru - as above, for Wales

CG – Children's Guardian

CMH – Case management hearing

CRPD - United Nations Convention on the Rights of Persons with Disabilities

ECHR – European Convention on Human Rights

FJS – family Justice System

LA – Local Authority

LAA – Legal Aid Agency

LASPO - Legal Aid, Sentencing and Punishment of Offenders Act 2012

LD – Learning difficulty or learning disability

OS – Official Solicitor

P – Protected party (person lacking litigation capacity in legal proceedings)

PAMS – Parents Assessment Manual System

PLO – Public Law Outline

PSED – Public Sector Equality Duty

SCR – Serious Case Review

SGO – Special Guardianship Order

Appendices

i) Data collection pro forma: case files

Basic Information

1. Date, type of hearing and type of order
2. Parties and representatives involved
3. Sex of parent and age of parent
4. Reason for being PP (LD, Mental illness etc.)
5. Special comment on status (e.g. parent a child in care, under 18, in hospital, etc.)
6. Number and age of children
7. Were children in the care of a parent at the outset of proceedings?
8. Was another parent involved in the proceedings, and if so, is there any indication as to whether they did or did not lack capacity? What happens when another parent is a party does not lack capacity?
9. If both parents lack capacity, how was this managed?
10. Were any other relatives involved, were they also parties, and, if so, how was this managed?
11. Contact between P and legal representative - number of contacts; type of contact (face to face, phone, written, other)
12. Duration of proceedings, number and type of hearings
13. Recommendation of Cafcass Family Court Advisor (FCA), position of OS on final order (supporting care order / placement order / care by parent / other arrangement for the care of the child)
14. Outcome of case (no order, care order, supervision order, placement order, Special Guardian Order to relative, other).

Assessments

1. At what point was the protected person (P) identified as possibly lacking capacity? (Pre-proceedings, LA concern P may lack capacity or by legal adviser in pre-proceedings stage/ before the first CMH / later in proceedings)
2. At what point in the pre- proceedings or proceedings was P's litigation capacity raised as an issue? (Pre-proceedings, before the CMH, between the CMH and fact finding hearing, other)
3. How many weeks into the case was the issue of capacity a) identified and b) confirmed?
4. How was P assessed, e.g. Psychologist, Masterman-Lister v Brutton test, other?
5. How long did it take to identify the need for an assessment? Detail of any assessments carried out before or during proceedings; number of experts instructed in proceedings, and purpose (particularly any assessments or expert opinions sought in relation to P and their parenting or other capacity).

The court process

1. Did P attend court?
2. Was a statement made by P presented to the court?
3. Did P want to make a statement, and if so, how was this supported?
4. How long did the case take from issue of proceedings to final outcome?
5. Were there any particular reasons why the case was resolved relatively fast / slowly?
6. Any reasons for delay or issues about the case needing to be resolved to a timeline?
7. Was there any specific discussion of the timeline for the court or for the child in the case record?
8. Did P give evidence in court? If so, how was this supported?
9. How were P's wishes and views obtained and conveyed to the court?
10. What special measures were taken by the court in response to the finding that P lacked litigation capacity? Type of support - support in giving evidence, advocate present, breaks given, mode of asking questions adapted, etc.)
11. Were any issues raised during the court hearings in relation to parental participation in the legal process, or tension between the parents' rights and needs and those of the child/ren concerned, related to the parents' lack of legal capacity?
12. Did the OS agree or oppose the LA plan for child / Cafcass recommendations (comments)?

Additional information

1. What was the response of P to being identified as possibly lacking capacity – any indication of positive or negative response?
2. Was there any challenge to or any objection by P to the finding that they lack capacity?

ii) Pro forma for observations of court hearings

Recording should focus on the way the views and wishes of P are presented to and received by the court, any discussion of the support needs of P, either to participate in the court process or to establish their ability to parent their child (or to parent the child after the end of the proceedings, if relevant), and any accommodation to their needs as persons lacking litigation capacity. Since this is an exploratory piece of work, we would be observing and recording any aspect of the court's work that took account of P's status as a protected party and any implications of that status.

Basic data

Date, type of hearing, type of court, order applied for. Who was present, including parties and representatives (identified by role, not name), family composition (also anonymised: number and ages of children, basic info only).

Notes should specifically focus on (but not be limited to):

The subjects discussed and subject matter of conversations, time taken on different aspects of discussion, and the observer's reflections and impressions of the court process.

Was P present? Interaction between P and their legal representative? Did P speak to the court? Note the way the wishes and feelings of P were conveyed to the court and the court's response.

Any discussion of P's protected party status.

Any accommodation made for P's particular needs.

Involvement of other relatives or friends of P in court.

Any discussion of assessments carried out or the resources available / needed for further assessment or support for P as a parent.

Any discussion of the time needed by P to participate in the court process, to be fully and fairly assessed, or to complete any programme of training or other behavioural change.

Any discussions focusing on the timeline for the child, the timetable for the court, or any other matters pertinent to the 26 week PLO requirement.

The views of the Cafcass Guardian, the LA and the OS as to the optimal outcome of the case / hearing; the outcome of the hearing.

Any reflection on the court process that reflected on the way the court adapted to accommodate P's protected party status / lack of litigation capacity, any other issues associated P's litigation capacity.

iii) Questions for professionals in the Family Justice System

- What is your role, and how much experience of working with parents who lack litigation capacity in public law proceedings do you have in a typical year – how much approximately over the last three or four years?
- What would you identify as the main issues for courts / FJS professionals working with parents who lack litigation capacity in public law proceedings?
- What is your view of the level of support available for parents who lack litigation capacity who become involved in public law proceedings?
- How easy is it for the court to gain an adequate understanding of the parents' perspective? (Giving evidence, use of assistive technology, intermediaries, any other issues)
- Does having a parent who lacks litigation capacity as a party in a public law case impact on the timeline for the child, judicial case management?
- How do you think being represented by the OS affects parents' experience of the court process compared with other parents with learning difficulties, mental health issues, who do have legal capacity?
- In cases where threshold is not clear-cut (if you have had experience of any), do you consider that parents represented by the OS have a similar opportunity to challenge LA evidence to those with legal capacity?
- Do such cases raise any issues relating to fairness, Public Sector Equality Duty?
- Is there anything else I have not asked about that you think it is important we consider?

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