

CERTIFICATE: CAPACITY TO CONDUCT PROCEEDINGS

INTRODUCTION

To the assessor:

The attached certificate is a standard form of report for recording the outcome of an assessment of the mental capacity of an adult to conduct proceedings ('litigation capacity') where that adult is a party or intended party to proceedings in the Family Court, the High Court, a county court, the Court of Protection¹ or the Court of Appeal. 'Conducting proceedings' means both conducting the proceedings through solicitors and conducting them as a litigant in person ('LIP'). If the assessment is that the adult lacks litigation capacity then you are required to explain why that is by completing the full form.

This assessment of capacity is being requested because there is concern that the party or intended party to the proceedings lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct proceedings and is therefore a 'protected party'.

Part 15 of the Family Procedure Rules 2010, Part 21 of the Civil Procedure Rules 1998 and Part 17 of the Court of Protection Rules 2017 require that a protected party must have a litigation friend to conduct the proceedings on that party's behalf. It is the litigation friend, rather than the protected party, who is then responsible for making the decisions about the conduct of the proceedings in place of and on behalf of the protected party.

This certificate is not intended for and should not be used for any purpose other than to report on an assessment of whether the person lacks litigation capacity in the proceedings identified.

¹ But not if the adult is 'P'. Rule 2.1 Court of Protection Rules 2017 defines 'P' as (a) any person (**other than a protected party**) who lacks or, so far as consistent with the context, is alleged to lack capacity to make a decision or decisions in relation to any matter that is the subject of an application to the court; and (b) a relevant person as defined by paragraph 7 of Schedule A1 to the [Mental Capacity Act 2005],

Before you carry out your assessment and complete the certificate you should:

1. Read the **guidance notes** in full.
2. Read the **description of the proceedings** provided in Part 2 of the certificate and/or in your letter of instruction.
3. Consider the Mental Capacity Act 2005, **Code of Practice** ('the Code') (but see further below about the Code). The British Medical Association/Law Society publication: *Assessment of Mental Capacity - A Practical Guide for Doctors and Lawyers* (currently in its 5th edition) also contains useful guidance.
4. If it is your opinion that the person does lack litigation capacity please complete all parts of the certificate; in such cases the certificate must identify what the impairment of, or disturbance in the functioning of the person's mind or brain is *and* how it causes the person to be unable to make the decisions necessary to conduct the proceedings:
 - a. please note that the assessment of litigation capacity is by reference to the proceedings as a whole not by reference to each step in the conduct of the proceedings
 - b. when carrying out your assessment you should consider if there are practicable steps which could be taken to enable the person to develop or regain capacity to conduct the proceedings.
5. If it is your opinion that the person does have litigation capacity, there is no need for you to, and you should not, give grounds for that opinion.

Completing the certificate

Part 2 ("the information"):

6. The description of the proceedings given to you should include information about:
 - a. the person's role in the proceedings

- b. a summary of the issues involved (not simply the type of case)
 - c. whether the proceedings are especially complex
 - d. what the perceived difficulties are with the person concerned making their own decisions about the conduct of the proceedings.
7. If a person is represented by a solicitor, the solicitor will usually be the first to recognise or suspect that the person (their client) may lack litigation capacity. This is because a solicitor is in a unique position to make an assessment about their client's litigation capacity, as it is the solicitor who explains the information (including legal advice) relevant to the making of the decisions involved in conducting the proceedings and who takes the person's instructions about the course to take in the proceedings.
8. If a person is a litigant in person ('LIP') – that is a litigant without legal representation - that person will often be at a disadvantage in the conduct of the proceedings but that disadvantage does not of itself give rise to a lack of litigation capacity. There are a range of reasons why litigants act in person including the lack of free or affordable representation or simply that acting in person is the person's choice. An LIP may still have access to support and/or legal or procedural advice:
 - a. the legal representative for any other party is under a professional duty to ensure that an unrepresented party is aware of what is happening during any hearing;
 - b. the judge will generally assist an unrepresented party by explaining procedural issues;
 - c. generally, an LIP has the right to have reasonable assistance from a layperson of their choice (a 'McKenzie friend') who may:
 - provide moral support to the LIP;
 - take notes;
 - help with case papers;
 - quietly give advice on points of law or procedure, issues the litigant may wish to raise in court, and/or questions the litigant may wish to ask witnesses.

- d. the LIP may be assisted out of court by taking advice from a lawyer or from other professional advisors or from an advice organisation.

Part 8 (“the person’s views”)

9. A party or intended party is entitled to dispute any opinion that they lack litigation capacity. A protected party loses their autonomy to make decisions about the conduct of the proceedings, and the decisions made by the litigation friend about conduct of the proceedings may not always accord with the party’s own wishes and feelings about the issues before the court.

10. When completing Part 8 you should therefore include any views expressed by the person about their litigation capacity. It is important that if the person says they are able to conduct the proceedings, that the court is made aware of that.

Part 9 Any additional comments

11. Please include here:
 - a. information about any documentary evidence that informed your view;
 - b. information about whether and if so, how other persons’ views contributed to your assessment;
 - c. a description of how the relevant information was explained or presented to the person
 - d. any recommendations for improving and/or supporting the person’s ability to participate as fully as possible in the proceedings notwithstanding that your opinion is that they lack capacity to conduct the proceedings.

Please read these notes before completing the Certificate

GUIDANCE NOTES

The legal presumption is that an adult party or intended party to proceedings has the capacity to conduct those proceedings ('litigation capacity'). Evidence is, therefore, required to establish whether the person lacks litigation capacity.

A person who lacks litigation capacity is known as a 'protected party' within the proceedings.

A protected party's interests must be protected by the appointment of a 'litigation friend' who will conduct the proceedings on their behalf.

The Official Solicitor may be approached, as a last resort, in cases where there is no other suitable person who is able and willing to act as litigation friend.

When assessing capacity, practitioners must have regard to the statutory principles set out in **section 1(2), (3), and (4) of the Mental Capacity Act 2005** ('MCA') and to the MCA Code of Practice ('the Code') (see further below). The Code is available online at:

<https://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act>

The relevant MCA statutory principles are:

Section 1 The principles

...

- (2) *A person must be assumed to have capacity unless it is established that he lacks capacity.*
- (3) *A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
- (4) *A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*

Section 2 and 3 of the MCA explain what is meant by lack of capacity:

Section 2 People who lack capacity

- (1) *For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*
- (2) *It does not matter whether the impairment or disturbance is permanent or temporary.*
- (3) *A lack of capacity cannot be established merely by reference to—*
 - (a) *a person's age or appearance, or*
 - (b) *a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.*
- (4) *In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*

....

Section 3 Inability to make decisions

- (1) *For the purposes of section 2, a person is unable to make a decision for himself if he is unable—*
 - (a) *to understand the information relevant to the decision,*
 - (b) *to retain that information,*
 - (c) *to use or weigh that information as part of the process of making the decision, or*
 - (d) *to communicate his decision (whether by talking, using sign language or any other means).*
- (2) *A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).*

- (3) *The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.*
- (4) *The information relevant to a decision includes information about the reasonably foreseeable consequences of—*
 - (a) *deciding one way or another, or*
 - (b) *failing to make the decision.*

Having regard to section 1(3) it is important that you first consider before arriving at your opinion whether there are any practicable steps you know of, which may enable the person to have capacity to conduct the proceedings.

The Supreme Court² has made clear that when assessing capacity, the **first question** to be asked is whether the person is unable to make a decision for himself in relation to the matter. If so, the **second question** is whether that inability to make the decision is *'because of'* an impairment of, or a disturbance in the functioning of the mind or brain. The second question looks to whether there is a clear causative nexus between [the person's] inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of that person's mind or brain. The Supreme Court was clear that the two questions *'are to be approached in that sequence'* notwithstanding passages in the Code which suggest otherwise.

When carrying out your assessment:

- refer to your instructions and/or the first box in **Part 2** of the certificate for information about the proceedings and the circumstances of the person;
- have in mind that the Code emphasises that people must be given all practical and appropriate support to enable them to make a decision for themselves.

The assessment of capacity must be based on the party's or intended party's capacity to conduct the identified proceedings, not proceedings in general, or their capacity to make other decisions. It does not matter whether the impairment or disturbance is permanent or temporary but the fact that a person is able to retain the information

² In a case called [A Local Authority v JB](#) [2021] UKSC 52

relevant to a decision for a short period only does not prevent them from being regarded as able to make the decision.

To have litigation capacity the party or intended party must:

- be able to understand the information relevant to the decisions arising during the course of the proceedings (including legal advice); this means being able to understand with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which their consent or decision is likely to be necessary in the course of those proceedings.
- be able to retain that information for long enough to make a decision about it,
- be able to use or weigh that information as part of the process of making the decisions, and
- be able to communicate their decision (whether by talking, using sign language or any other means) – this is intended to apply to those who are unable to communicate at all, for example because they are unconscious or in a coma.

Please note:

- legal proceedings are not simply a question of providing instruction to a lawyer and then sitting back and observing the litigation, but rather a dynamic transactional process, both prior to and in court, with information to be recalled, instructions to be given, advice to be received and decisions to be taken, potentially on a number of occasions over the span of the proceedings as they develop;
- the information relevant to the conduct of the proceedings includes the reasonably foreseeable consequences of deciding one way or the other, or failing to decide at all;
- a person should not be held to be unable to understand if they can understand an explanation of the relevant information in broad terms and simple language;
- a lack of capacity cannot be established merely because of a person's age or appearance or their condition or an aspect of their behaviour.

The relevant information which a party or intended party would need to be able to

understand, retain and use or weigh may include:

- (a) how the proceedings are to be funded;
- (b) the chances of not succeeding and the risk of an adverse order as to costs;
- (c) the sorts of decisions that may arise in the litigation;

Capacity to conduct the proceedings would include the ability to give proper instructions for and to approve the particulars of claim, and to approve a compromise. To be able to approve a compromise, a party or intended would need insight into the compromise, an ability to instruct solicitors to advise them on it, and, if solicitors are instructed, an ability to understand and weigh their advice.

If it is your opinion that the person does have capacity to conduct the proceedings, there is no need for you to give grounds for that opinion. However, if you are of the opinion that the person lacks capacity to conduct the proceedings, the Official Solicitor's certificate requires you to state in Parts 2 and 3 the grounds for that opinion.

This certificate relates to the proceedings identified in the certificate or in your instructions. A separate certificate may be required if the person is a party or intended party to other proceedings.

Please note that if a party or intended party to proceedings is a patient subject to compulsory detention under the Mental Health Act 1983, that does not, of itself, mean that person lacks capacity to conduct proceedings.

Official Solicitor to the Senior Courts
2023

CERTIFICATE AS TO CAPACITY TO CONDUCT PROCEEDINGS

**You should read the preceding introduction and guidance notes and the whole of this certificate, before carrying out your assessment and giving your opinion by completing the certificate.*

Name of person concerned:

Date of birth:

The proceedings are (and see Part 2 below)

Part 1

Your full name and address (including postcode): Your professional qualifications:	I of Nature of your professional relationship with the person concerned: I have acted as practitioner for the person concerned since and last assessed him/her on The location of the assessment was or
For the definition of 'a person who lacks capacity' see guidance notes.	

	<p>I assessed the person concerned on following a referral from</p> <p>I assessed the person:</p> <p><input type="checkbox"/> In person</p> <p><input type="checkbox"/> Remotely</p> <p>AND in my professional opinion</p> <p>.....</p> <p>has capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings*</p> <p>or</p> <p>lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings*</p> <p>(*strike through as appropriate)</p> <p>If the person lacks capacity to conduct the proceedings, please complete Parts 2-9 below.</p>
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Part 2

The person concerned lacks capacity to conduct the proceedings described below and / or in the letter of instruction.

(please tick as many of the following boxes as apply)

The person is unable to understand the relevant information (please give details):

and / or

The person is unable to retain the relevant information (please give details):

and / or

The person is unable to use or weigh the relevant information as part of the process of making decisions in the conduct of the proceedings:

or

The person is unable to communicate their decisions (whether by talking, using sign language or any other means):

Part 3

What support was given to the person to help them understand the relevant information (including giving an explanation in a way that is appropriate to their circumstances)?

Part 4

The person lacks capacity to conduct the proceedings because of the following impairment of, or disturbance in the functioning of the mind or brain (see guidance notes – if the impairment or disturbance has been given a formal diagnosis please set out the diagnosis):

this has lasted since

Part 5

Do you consider that the person concerned might regain or develop capacity to conduct the proceedings in the future?

YES Please give your reasons below, an indication of when this might happen and any recommendations about practicable steps to enable the person to do so.

NO Please give your reasons below.

Part 6

If in your opinion the person lacks capacity to conduct the proceedings, Is the person nonetheless able to discuss the proceedings?

YES Please comment further below.

NO Please comment further below.

Part 7

If so, is such discussion likely to affect the person detrimentally and if so, in what way?

YES Please comment further below

NO Please comment further below

Part 8

Has the person concerned made you aware of any views in relation to the proceedings and / or in relation to their capacity to conduct the proceedings?

Part 9

Any additional comments:

Statement of Truth:

I confirm that insofar as the facts stated in this certificate are within my own knowledge I have made clear which they are and I believe them to be true and that the opinions I have expressed represent my true professional opinion.

Signed

Dated
