PUMP COURT
CHAMBERS

CAPACITY TO LITIGATE
A civil perspective

Introduction

1. The Mental Capacity Act 2005 ("MCA") is a statutory framework within which actions are taken or decisions made in the best interests of a person who lacks capacity.

2. S.1(3) provides that 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. A person is not to be treated as unable to make a decision merely because he makes an unwise decision - MCA S.1(4). Section 2(3) makes it clear that a lack of capacity cannot be established merely by reference to the age of the individual, or a condition of his or an aspect of behaviour.

3. In deciding whether a person lacks capacity (for the purpose of the MCA S.2) a person is unable to make a decision for himself under S.3 if he is unable:
   a) to understand the information relevant to the decision – S.3(1)(a).
   b) to retain that information - S.3(1)(b.
   c) to use or weigh that information as part of the process of making the decision S.3(1)(c).
   d) to communicate his decision (whether by talking, using sign language or any other means) – S.3(1)(d).

4. The fact that a person is able to retain the information relevant to a decision for only a short period only does not prevent him from being regarded as able to make the decision - S.3(3). The intention behind S.3(3) is to deal with people with fluctuating capacity so that a person may make a decision during a period of lucidity.

5. The use of the word '*or*' in S.3(1)(c) reveals that the individual incapacities set out in S.3(1) are not cumulative. A person lacks capacity if any one of the criteria within S.3(1)

sub-sections (a) to (d) applies - ***Re LT (vulnerable adult) (decision making: capacity) [2011] 1 FLR 594*** Sir Nicholas Wall P at [40].

6. A compulsive disorder or phobia may prevent the patient's decision from being a true one, particularly if some obsessional belief or feeling so distorts the judgment as to render the decision invalid - ***Re H (adult patient) (medical treatment) [2006] 2 FLR 958.***

7. Inability to communicate his decision (e.g. by talking or using sign language) under S.3(1)(d) is a residual category only affecting a small number of persons, in particular some of those with 'locked-in syndrome'. In ***Re AK (medical treatment: consent) [2001] 2 FLR 129,*** a patient, suffering with motor neurone disease, who could communicate by blinking an eye, was found to have capacity to refuse life sustaining treatment.

8. 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) – S.3(2).

9. The capacity to conduct proceedings does not depend on whether the party has received legal advice - ***Richardson-Ruhan v Ruhan [2011] EWFC 6.*** Mostyn J held at [32] that: "*the capacity to conduct proceedings cannot depend on whether the party receives no legal advice, or good legal advice or bad legal advice. If the party would be capable of making the necessary decisions with the benefit of advice then she has capacity whether or not she actually has the benefit of that advice.*"

Application to civil litigation

10. The Civil Procedure Rules ("*CPR*") Part 21 and its Practice Direction give effect to the MCA in respect of people who lack capacity to litigate. A *'protected party'* means a party, or an intended party, who lacks capacity to conduct the proceedings – CPR 21.1(2)(d). The MCA definition is applied by CPR 21.1(2)(c).

11. The MCA principles are thus introduced into civil litigation so that all practicable steps must be taken to assist the person to litigate - ***Saulle v Nouvet [2007] EWHC 2902 (QB).***

12. A "*protected beneficiary*" is defined as a protected party who lacks capacity to manage and control any money recovered by or on their behalf or for their benefit in the proceedings – CPR 21.1(2). A litigant might lack capacity to litigate, but have capacity to manage and control any money recovered on their behalf.

Capacity to Litigate

13. The test of mental capacity is issue specific - ***Bailey v Warren [2006] EWCA Civ 51***. It is the capacity of the party to conduct the particular proceedings that is relevant rather than capacity to manage and administer his property and affairs in general.

14. The same person may have capacity in relation to one decision but not another - ***C v V [2008] EWHC B16 (Fam)***. By way of illustration a person might be a protected party for complex personal injury proceedings yet not for a small claim. It is a binary question, either they have capacity to conduct the whole proceedings or they do not.

15. In ***Bailey v Warren*** Ward LJ also held at [153] that "*the proceedings do not begin until the claim has been issued (or perhaps until an application has been made in respect of a claim about to be issued). It follows that the earliest moment at which a person becomes a patient within the meaning of the rules is at the point of commencement of the proceedings*."

16. The classic test for capacity to conduct litigation is found in the Court of Appeal decision in ***Masterman-Lister v Brutton & Co [2003] 1 WLR 1511*** (decided before the MCA)**.** Chadwick LJ held at [75] that:

"…the test to be applied….is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors 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 procedure should require the imposition of a … litigation friend."

17. The Supreme Court in ***Dunhill v Burgin (Nos 1 and 2) [2014] UKSC 18,*** applied the test under CPR 21.1 and endorsed the approach adopted by the Court of Appeal in ***Masterman-Lister*****.**

18. The test must not be set too high - ***PH v A Local Authority [2011] EWHC 1704***. The more serious the decision the greater the level of capacity required: ***Re Beaney (deceased) [1978] 2 All ER 595; Re T (adult: refusal of medical treatment) [1992] 4 All ER 649.***

Investigation

19. The court must investigate the issue of capacity at the first convenient opportunity when it is suspected it may be absent - ***Saulle v Nouvet*** and ***Masterman-Lister.***

The Evidence

20. The burden of proof is on the person who asserts that capacity is lacking. If there is any doubt as to whether a person lacks capacity, this is to be decided on the balance of probabilities – S.2(4). The presumption of capacity will only be displaced on the basis of proper evidence. That evidence must address:
    i) the "diagnostic test" of impairment or disturbance of the functioning of the mind or brain; then
    ii) the "functional test" of whether the impairment renders the person unable to make the relevant decisions in litigation.

21. Generally the question should be determined by the party himself or those caring for him, perhaps with advice from a solicitor, without the need for enquiry by the court. In ***Masterman-Lister*** Chadwick LJ held at [66] that:
"If the rule were to work in practice, the test of mental capacity should be such that, in the ordinary case, the need for a next friend or guardian ad litem should be readily recognised by an experienced solicitor."

22. That is consistent with ***Hinduja (a protected party by his litigation friend) v Hinduja and others [2020] 1 WLR 93*** in which Falk J held "*That was not a case where a close family member was certifying lack of capacity*." Significant weight is likely to be attached to the evidence of those that know the protected party well.

Medical evidence

23. It had generally been understood that there was a need for medical evidence for the purposes of establishing a lack of capacity. In ***Masterman-Lister*** – Kennedy LJ held:
"[29] … The final decision as to capacity, it is agreed, rests with the court but, in almost every case, the court will need medical evidence to guide it."

24. The above passage from Kennedy LJ appears to be quoted with approval in ***Folks v Faizey [2006] EWCA Civ 381*** by Pill LJ at [16] – [18].

25. In ***Hinduja (a protected party by his litigation friend) v Hinduja and others [2020] 1 WLR 93***, Falk J identified that there is no requirement in the CPR to provide medical evidence, and ***Masterman-Lister*** and ***Folks v Faizey*** had not been "*intending to lay down any rigid principle under which medical evidence is required unless the circumstances are exceptional*" at [39].

26. The following are important passages from Falk J's judgment:

i) ***"[37]*** *There is no requirement in the rules to provide medical evidence. The absence of any such requirement was commented on by Chadwick LJ in Masterman-Lister at [66]. There is no reference to medical evidence in CPR r 21.6. The only reference to medical evidence is in para 2.2 of PD 21, which applies where CPR r 21.5(3) is being relied on. That requires the grounds of belief of lack of capacity to be stated and, 'if' that belief is based on medical opinion, for 'any relevant document' to be attached. So the Practice Direction provides that medical evidence of lack of capacity must be attached only if (a) it is the basis of the belief, and (b) exists in documentary form. It does not require a document to be created for the purpose."*

ii) ***"[39]*** *… I do not think the Court of Appeal was intending to lay down any rigid principle under which medical evidence is required unless the circumstances are exceptional. The question will always depend on what the circumstances are."*

iii) "***[50]*** *In summary, medical evidence is not required under the rules and I do not think that it is necessary, or that it would be in accordance with the overriding objective, to require it in this case."*

Appropriate medical evidence

27. Medical evidence is frequently sought from a psychiatrist. A psychologist, especially if of an appropriate speciality, may be better qualified in respect of a person with learning disabilities. Such opinion is merely part of the evidence and the factual evidence of a carer or social worker may also be relevant and even more persuasive. General medical practitioners sometimes have little knowledge of mental capacity and the applicable legal tests. It is good practice when instructing an expert to set out the appropriate test and it should be explained that different tests apply to different types of decision.

28. The medical expert will need to be informed of what decisions the individual will be called upon to make for the conduct of that litigation. That enables the medical expert to express an opinion whether the individual is capable of giving instructions.

29. A judge is not required to accept the evidence of psychiatrists as to a person's mental capacity - ***Masterman-Lister.*** The evidence on capacity must be '*credible*' and need not be that of a psychiatrist - ***G v E (by his litigation friend, the Official Solicitor) [2010] 4 All ER 579***. It is for the court to form its own view on capacity, which may differ from the views of experts - ***CC v KK and STCC [2012] EWHC 2136 (COP)***. Baker J held at [62] that:

"I acknowledge that there is consensus amongst the professionals who gave evidence that KK has lost the capacity to make decisions concerning her residence. These opinions are of course important evidence, but as stated above it is the court alone that is in the position to weigh up all the evidence as to the functional test and thus it is the court that must make the ultimate decision."

30. The court must make the decision, even when there is conflicting medical evidence.

31. In ***Lindsay v Wood [2006] EWHC 2895 (QB)*** a wife's evidence was preferred to medical evidence. Stanley Burnton J held that:

"[48] …I also bear in mind that he has expressed to doctors sensible attitudes to his finances, and was able to act reasonably in relation to a rent problem. But I find the evidence of Mrs Lindsay compelling.

[49] The discrepancy between the general picture given by Mrs Lindsay and that given by the medical evidence, and in particular that of Dr Neal and Dr Leng, is largely explained by the difference between "real life", as it is described, and the artificial conditions of a medical assessment."

32. The above passage illustrates the importance of carefully addressing evidence and the issues from a "real life" perspective.

Litigation Friend

33. The MCA is an act which has the aim of protecting and empowering those who lack capacity. A protected party must have a litigation friend to conduct proceedings on his behalf – CPR 21.2(1). Pending the appointment of a litigation friend, further steps in the proceedings may be taken with the permission of the court

Absence of Litigation Friend / Stalemate

34. A person may not, without the permission of the court, make an application against a protected person before proceedings have started or take any step in proceedings (except issuing and serving a claim form or applying for the appointment of a litigation friend) until the protected party has a litigation friend – CPR 21.3(2). A step taken before a child or protected party has a litigation friend shall be of no effect, unless the court otherwise orders – CPR 21.3(4). Thus the court can regulate the position retrospectively, although it will be fact specific.

35. If, during proceedings, a party lacks capacity to continue to conduct proceedings, no party may take any further step in the proceedings without the permission of the court until the protected party has a litigation friend – CPR 21.3(3).

36. Any step taken before a protected party has a litigation friend is of no effect unless the court otherwise orders – CPR 21.3(4) – addressed below.

37. Pending appointment of a litigation friend, further steps in the proceedings may be taken with the permission of the court. The court is likely to regularise the position if the parties have acted in good faith and there is no manifest disadvantage to the party subsequently found to be a protected party - ***Masterman-Lister***.

38. Once proceedings have been issued, the immediate problem is now to approach the claim and how to determine capacity. Costs immediately escalate and litigation becomes protracted.

39. The White Book 2022 opines at 21.3.1 that:
"*Rule 21.3(3) can have the effect of bringing proceedings to a halt if a litigation friend cannot be found.*"

40. There is clearly a dichotomy, because the CPR has "*the overriding objective of enabling the court to deal with cases justly*" (CPR 1.1(1)). That includes, under 1.1(2), saving expense, ensuring that a case is dealt with expeditiously and fairly, and having regard to the court's resources.

41. In ***Bradbury v Paterson [2014] EWHC 3992 (QB)*** Foskett J had to progress proceedings in the absence of a litigation friend for one of the defendants.

Appointment of a litigation friend

42. There are two mechanisms by which a person is appointed to act as a litigation friend under the CPR, namely:

    i) self-certification (CPR rule 21.4 and 21.5) or

    ii) court appointment (CPR rule 21.6, 21.7 and 21.8).

    A litigation friend is required to act for the benefit of the relevant individual and to safeguard his interests.

Without a court order

43. CPR 21.4(2) empowers a Deputy appointed by the Court of Protection to be a litigation friend without a court order. It provides that:

    "*A deputy appointed by the Court of Protection under the 2005 Act with power to conduct legal proceedings on the protected party's behalf is entitled to be the litigation friend in any proceedings to which his power extends*."

44. CPR 21.4(3) provides that "*If nobody has been appointed by the court or, in the case of a protected party, has been authorised as a deputy, a person may act as a litigation friend if he:*

    a) can fairly and competently conduct proceedings on behalf of the protected party;

    b) has no interest adverse to that of the protected party; and

    ci) where the protected party is a claimant, undertakes to pay any costs which the protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the protected party."

45. If the court has not appointed a litigation friend, a person who wishes to act as a litigation friend must follow the procedure under CPR 21.5(1).

46. A deputy appointed by the Court of Protection under the MCA must file an official copy of the Court of Protection order which confers his power to act either, i) where the deputy is to act as a litigation friend for a claimant, at the time the claim is made or, ii) where the deputy is to act as a litigation friend for a defendant, at the time when he first takes a step in the proceedings on behalf of the defendant – CPR 21.5(2).

47. Any other person must file a certificate of suitability stating that he satisfies the conditions specified above either, where the person is to act as a litigation friend for a claimant, at the time when the claim is made or, where the person is to act as a litigation friend for a defendant, at the time when he first takes a step in the proceedings on behalf of the defendant – CPR 21.5(3).

48. The litigation friend must serve the certificate of suitability on every person on whom the claim form should be served (i.e. in accordance with CPR 6.13) and also file a certificate of service when filing the certificate of suitability – CPR 21.5(4).

With a court order

49. A litigation friend may be appointed by order of the court and in some instances a court order is necessary – CPR 21.6. The court may exercise its powers under this rule of its own initiative – CPR 3.3(1).

50. The court should make the order where the proposed protected party and the litigation friend both consent to the appointment of the latter, where there is adequate evidence to support the application and where there is no evidence suggesting that the application is anything but a bona fides – ***Folks v Faizey [2006] EWCA Civ 381***.

51. An application for an order appointing a litigation friend must be supported by evidence – CPR 21.6(4). The evidence in support must satisfy the court that the proposed litigation friend: i) consents to act; ii) can fairly and competently conduct proceedings on behalf of the protected party; iii) has no interest adverse to that of the protected party, and iv) where the protected party is a claimant, undertakes to pay any costs which the protected party may be ordered to pay in relation to the proceedings, subject to any right they may have to be repaid from the assets of the protected party – Practice Direction 21 paragraph 3.3.

52. In ***Raqeeb v Barts Health NHS Trust*** **[2019] EWHC 2976** MacDonald J said in respect of CPR 21.4(3)(a),

"23. Within the foregoing context, two matters emerge with respect to the duty of the litigation friend to fairly and competently conduct proceedings. The first is the central role of legal advice in the discharge of the duties of the litigation friend has been emphasised by the courts. As noted above, in In Re Whitall Brightman J emphasised the need for the guardian ad litem to act "under proper legal advice". In OH v Craven Norris J also emphasised the central role played by the legal advice received by the litigation friend in the discharge of his or her duties.

24. The second is that whilst the litigation friend is required to act on legal advice, he or she must be able to exercise some independent judgment on the legal advice she receives (Nottinghamshire CC v Bottomley [2010] EWCA Civ 756). In doing this, the litigation friend must approach the litigation with objectivity.

25. Within this context, there is longstanding authority that a litigation friend who does not act on proper advice may (not must) be removed (see Re Birchall (1880) 16 ChD 41 at 42 per Sir George Jessel MR) The corollary of this latter position is articulated in the White Book at 21.7.1 which makes clear that:

"If a solicitor is acting for child or protected party, it is thought that they would be under an obligation to inform the court of any concern that the litigation friend was not acting properly."

Thus, to adopt the words of Brightman J in a further passage in In Re Whittall, the litigation friend is not "a mere cypher"."

53. *In* ***Shirazi (by his litigation friend) v Susa Holdings Establishment (an Anstalt organised under the laws of the Principality of Liechtenstein) and another company [2022] EWHC 477*** *(Ch) Chief Master Shuman held at [47] that:*
"The question of whether the litigation friend can fairly and competently conduct proceedings on behalf of a protected party (criteria 21.4(3)(a)) necessarily involves consideration of whether they are acting in the best interests of the protected party."

Compromise

54. CPR 21.10 provides that no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the protected party, without court approval.

55. This rule applies, not only where a claim is made by or on behalf of a protected party, but also where it is made against a protected party.

56. A compromise or settlement is not binding on the parties until it has been approved by order of the court – ***Drinkall v Whitwood [2003] 1 WLR 462.***

Effect of lack of capacity on settlements reached without court approval

57. In ***Dunhill v Burgin [2014] 1 WLR 933***, the claimant had suffered severe brain damage in an accident. In 2003 she settled her claim for damages for £12,500. The claim was in fact worth at least £800,000. At the time, no-one considered whether the claimant was a protected party. In 2009 the claimant, acting by a litigation friend, issued an application seeking a declaration she did not have capacity at the time of the settlement and applying for the settlement order to be set aside. It was held that CPR

21 invalidated a consent judgment involving a protected party reached without the appointment of a litigation friend and the approval of the court.

58. The Supreme Court dismissed the defendants appeals. The Supreme Court confirmed that capacity is to be judged in relation to the decision or activity in question and not globally. The compromise agreement was void because the claimant lacked capacity). Baroness Hale, with whom the other members agreed, held:
"[34] …On the test properly to be applied, Ms Dunhill lacked the capacity to commence and to conduct proceedings arising out of her claim against Mr Burgin. She should have had a litigation friend from the outset and any settlement should have been approved by the court under CPR r 21.10(1). We have not been invited to cure these defects nor would it be just to do so. The consent order must be set aside and the case go for trial."

Official Solicitor

59. The Official Solicitor is a litigation friend of last resort – he will only consider acting where no suitable and willing person can be identified to act.

60. Where it is sought to appoint the Official Solicitor as the litigation friend, provision must be made for payment of the charges - Practice Direction 21 paragraph 3.4.

61. The Official Solicitor will only accept an appointment to act subject to being given suitable security for the costs of his department or any external solicitors he instructs. If the Official Solicitor is not given this security he will not act, and if it emerges during the course of proceedings that his legal costs can no longer be met, he will stop acting – and cannot be compelled to continue to act.

62. *In* ***D (A Child)[2014] EWFC 39*** Sir James Munby P held at 20:
". . . The Official Solicitor cannot be compelled to act as anyone's litigation friend. His practice is to agree to act only if there is funding for the protected party's litigation costs, because his own budget – the monies voted to him by Parliament – is not

sufficient to enable him to fund the costs of litigation of the type the father is involved in....].”

Solutions to funding the Official Solicitor

63. In ***Bradbury and others v Patterson and other companies [2014] EWHC 3992 (QB), [2015] COPLR 425*** - Foskett J provided the following solutions:

*“**[46]** However, there seem to me to be at least three potential avenues for securing the funding of the Official Solicitor if Mr Paterson is considered still to be a protected party. They are as follows:*

(a) If Mr Paterson has capacity to manage his property and affairs (but not the litigation) then, if he wishes, he can ask the Official Solicitor to act for him if he puts the Official Solicitor in funds.

(b) If Mr Paterson lacks capacity to manage his property and affairs, the Court of Protection would have jurisdiction to intervene if invited to do so and, possibly with the co-operation of Mr Paterson's attorneys or on the basis of the appointment of a Deputy, power to ensure that the Official Solicitor is properly funded.

(c) If these avenues are not fruitful, the High Court would, in my view, have the power under its general case management provisions and/or the inherent jurisdiction of the court to direct that one or more of the parties to the litigation should fund the Official Solicitor's costs of instructing lawyers for Mr Paterson, the initial outlay to be recoverable as part of the costs of the litigation in due course.”

And

“[49] In order to kick start this process and break what would otherwise be a log jam in proceeding further, I propose to direct (under my general case management powers under CPR 3.1(2)(m) and/or under the court's inherent jurisdiction) that the Claimants, the Second and the Third Defendants each pay to the Official Solicitor within 14 days the sum of £2,500. Out of the sum of £7,500 thus provided the Official Solicitor is to be at liberty (i) to instruct a suitable expert or experts to examine Mr Paterson with a view to reporting on whether he possesses or lacks capacity (a) to conduct this litigation

and/or (b) to manage his property and affairs (in accordance with the approach to both issues set out in the Mental Capacity Act 2005) and (c) to take advice on the implications of such opinions."

And

"[51] The sums of £2,500 are small by comparison with the overall costs of this case and my estimate is that it should be sufficient for the Official Solicitor to take the steps I have indicated …. I cannot think that any party (including the Claimants who have CFA arrangements with insurers) can legitimately complain about finding such a sum for the limited purposes that dictate the need for funding of this nature. However, I make the order (i) without prejudice to the right of any of the parties to argue, if the position in para 46(c) above is reached, that it would be inappropriate to make such an order and (ii) on the basis that the present expenditure is an item of cost that will fall to be recovered or paid by a party at the end of the case."

64. Thus the parties could be ordered to contribute, at least initially to funding the Official Solicitor. Solicitors need to be mindful to advice clients of the options available to the court and to consider the funding implications - e.g. if acting under a CFA or for a client on limited means.

If Defendant does not cooperate, enabling a report to be prepared, how do you assess capacity?

65. In ***Baker Tilly v Mira Makar [2013] EWHC 759*** – a litigant refused to cooperate in an assessment of their capacity. That was not a case where a close family member was certifying lack of capacity. It was an extraordinary case in which Master Leonard had concluded that a litigant lacked capacity based on her behaviour in the course of the proceedings.

66. Sir Raymond Jack summarised the unusual facts as follows:

"[3] But the next day, following her complaint that Master Leonard had refused to accept documents by email, Miss Makar became tearful. The Master suggested a break so she could compose herself. She went into the corridor and became very much distressed. She lay rolling on the floor of the corridor screaming. After a little, she calmed down. Her conduct gave the Master concerns as to her capacity to conduct the assessment proceedings. He sought to involve the Official Solicitor but Miss Makar would not co-operate by allowing access to her medical records. He later made an unless order requiring her to do so or be barred from taking further part in the assessment which would then proceed on the basis of her written points of dispute. He subsequently became concerned that this stay was not a proper procedure and convened a further hearing on 3rd December to consider what should be done. His order providing for that attendance required the parties to attend and show cause why the unless order should not be revoked and replaced with an order that Baker Tilly be directed to nominate an independent litigation friend to be appointed to represent Miss Makar, or that an interim costs certificate be issued and directions be given for the relisting of the final assessment hearing. At that hearing on 3 December, Miss Makar confirmed that she was not prepared to co-operate in assessing her capacity.

[4] On 4th January 2013 Master Leonard delivered a judgment of 53 paragraphs in which he considered in detail the facts, the law and what he should do. He concluded that Miss Makar did not have capacity to manage the assessment and that the assessment must therefore be stayed pending the appointment of a litigation friend."

67. This authority suggests a court will have to make an assessment. However, Sir Raymond Jack concluded:

"[15] … It is apparent from Master Leonard's judgment, holding that lack of capacity was established, that he based his finding and that it arose "because of an impairment of or a disturbance in the functioning of the mind" on the incident of 18th July. That involved a serious loss of control but a brief loss of control from which Miss Makar quickly recovered enough to be asking a security officer for his name. That incident has to be considered against the background of Miss Makar's appearances before other

judges in the same period where no question as to capacity had arisen. The absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind. The Master recognised that. Such a finding is a serious step for both parties.

[16] I have concluded that the Master put more weight on the incident of 18th July than it could bear and that he should have taken into account Miss Makar's appearances before other judges."

68. This authority suggests a court will have to make an assessment. However, in doing so, a careful assessment is required of the available material. The legal test must be carefully considered. A momentary loss of temper or deep upset are likely to be insufficient to justify a finding of lack of capacity.

Scope

69. The court may prevent a person from being a litigation friend or replace a litigation friend during the course of proceedings, whether or not appointed by an order. The court must be satisfied that the person to be appointed is suitable for appointment in accordance with the criteria set out in CPR 21.4(3).

Suitability

70. The court may appoint the person proposed or any other person who complies with the conditions specified in CPR 21.4(3). Thus the criteria of suitability in CPR 21.4(3) must be satisfied even though CPR 21.4(1) expressly states that the rule does not apply if the court has appointed a person to be a litigation friend.

71. Useful guidance on the interpretation of CPR 21.4(3)(b), is found in ***Davila v Davila [2016] EWHC B14 (Ch),*** at [137]; ***Keays v Parkinson's Executors [2018] EWHC 1006 (Ch)*** and ***Hinduja v Hinduj [2020] 1 WLR 9***.

Termination of appointment

72. CPR rule 21.7 sets out the court's power to change a litigation friend or to prevent a person acting in that capacity. Under CPR 21.7 the court may make an order:
(a) directing that a person may not act as a litigation friend,
(b) terminating the appointment,
(c) appointing a new litigation friend in substitution for an existing one.

73. The court may exercise its powers under this rule of its own initiative – CPR 3.3(1). *In* ***Zarbafi v Zarbafi [2014] 1 WLR 4122*** *Briggs LJ* confirmed that a court may act of its own motion to terminate a litigation friend's appointment or to replace them. *Briggs LJ held at [52] that:*

"51. While rule 21.7(2) requires that a party who applies for an order to terminate a litigation friend's appointment or replace her must make an application supported by evidence, nothing in the rules prohibits, or should be understood even to discourage, the court doing so of its own motion, in particular where satisfied that an existing litigation friend has become disabled by conflict, or that a certificate of no conflict is, or always was, manifestly unsound.

52. The reason for this is not difficult to ascertain. The regime for the securing of proper representation for protected parties is designed for the benefit of those parties, rather than other parties. ..."

74. In ***Shirazi (by his litigation friend) v Susa Holdings Establishment (an Anstalt organised under the laws of the Principality of Liechtenstein) and another company [2022] EWHC 477*** (Ch) Chief Master Marsh at [56] held that:
"Moreover the court is under a positive duty to scrutinise matters where there is a question over whether the litigation friend can fairly and competently conduct proceedings on behalf of the protected person or that they are free from conflict."

75. The CPR expresses no limit on the power to terminate the appointment. If the litigation friend acts contrary to the protected party's best interests the court will remove him. If the court becomes aware of the person's unsuitability it may remove him under CPR 21.7 and substitute another person as litigation friend, but, there is no express duty to monitor the situation.

76. An application for an order under CPR 21.7 must be supported by evidence - CPR 21.7(2). Under CPR 21.**7**(3) "*The court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 21.4(3*)."An application for the appointment of a new litigation friend, must be supported by evidence that satisfies Practice Direction 21 para.3.3.

77. In ***R (on the application of Raqeeb) v Barts Health NHS Trust and others [2019] EWHC 2976 (Admin)*** the court refused an application to remove a litigation friend who held firm religious beliefs regarding the withdrawal of life-sustaining treatment for a five year old child where there was no evidence that she had failed to, or would not fairly and competently, conduct proceedings on the child's behalf on the basis of advice given to her by her highly experienced legal team.

78. The court's power to terminate the appointment is not restricted by any requirement to identify a substitute litigation friend. A litigation friend who is unwilling to continue to act is unlikely to satisfy the condition of being a person who can *'fairly and competently conduct the proceedings on behalf of … the protected party.'* A court may not revoke the appointment of a litigation friend retrospectively *ab initio* (***Davila v Davila and another [2016] EWHC B14 (Ch**))*.

79. ***Shirazi (by his litigation friend) v Susa Holdings Establishment (an Anstalt organised under the laws of the Principality of Liechtenstein) and another company [2022] EWHC 477*** (Ch) concerned an application by the defendants to remove the claimant's litigation friend.

80. Mrs Shirazi was appointed as curator for the claimant by the Justice of the Peace of the district of Nyon, Switzerland; the claimant having lost capacity. Mrs Shirazi has an express power to recover the claimant's assets within and outside Switzerland. It was unsurprising the application failed. Master Shuman at [72] summarised the difficulties: *"I cannot and should not abdicate that responsibility because of the decisions of the Swiss Courts. What I can say is that that evidence corroborates the evidence that is before me from Mrs Shirazi and her lawyers. Three doctors have provided medical certificates in the Swiss proceedings confirming her capacity. A notary, Mr Nicolas Rabbioso, has met Mrs Shirazi three times for her to sign notarial deeds before him. He has certified that he has no doubts about Mrs Shirazi's capacity for discernment. Mrs Shirazi was heard by the Attorney General of Switzerland, and nothing was reported to the protection authority."*

81. The same demonstrates the need to carefully consider the merits of the application and the evidential weaknesses an application may face.

82. Where a protected party regains or acquires capacity to conduct the proceedings, the litigation friend's appointment.

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