



## BEING MINDFUL: THE IMPACT OF POOR MENTAL HEALTH IN FAMILY PROCEEDINGS

The recent focus on mental health and wellbeing has been widely publicised and we are all being encouraged to take better care of ourselves and those around us.

The difficulties faced in managing mental wellbeing are reflected in the increasing number of family cases where a parties' mental health is an issue. Whether capacity issues stem from a mental illness, difficulties triggered by the breakdown of a marriage or addiction issues, they can all have a huge impact on the progress of a divorce and its associated issues.

Whilst solicitors must always be mindful of capacity issues when taking instructions from their own clients, what happens when faced with capacity issues with the other party? A proper understanding of the process for a protected party can be critical to minimise delay and wasted hearings (and associated costs), whilst the issues of capacity are resolved and a litigation friend appointed.

### ESTABLISHED CAPACITY

There is an automatic assumption in favour of capacity. Under Section 3 of the Mental Capacity Act 2005, a person lacks capacity and is unable to make a decision for themselves if they are unable:

- To understand the information relevant to the decision
- To retain that information
- To use or weigh that information as part of the process of making the decision
- To communicate their decision (whether by talking, using sign language or any other means)

If the court has concerns about a party's ability to engage in litigation, the proceedings are likely to be stayed pending further investigation and potentially the formal instruction of an expert to give evidence as to a person's capacity to litigate.

Poor decision-making does not mean that a person lacks capacity, but the court will want to be satisfied that in coming to its decision, the party was able to understand and assess the relevant information. An ability to retain information in the short term and for the duration of the decision making process is sufficient, even if it is later forgotten.

Capacity is decision-specific and whilst a party may not have the capacity to make a decision in one set of proceedings, it does not automatically follow that they are unable to make

decisions in other proceedings (for example, a party may have the capacity to understand and respond to a divorce petition, but may lack the capacity to understand, process and weigh the financial information required to progress or settle financial remedy proceedings). Capacity can also fluctuate depending on the person's health. This is a particularly important consideration in cases of addiction (for example alcoholism) and where substance intake may impact decision-making.

### **IF A LITIGANT LACKS CAPACITY – WHAT NEXT?**

If a party is found not to have capacity then they are considered to be a protected party. No steps can be taken in the litigation until the protected party has a litigation friend.

The rules provide for an exception where steps can be taken with the permission of the court, and you may persuade a judge to make urgent orders, particularly if the matter concerns safeguarding the needs of minor children. Without the express permission of the court, steps taken before a litigation friend is appointed shall have no effect.

### **WHO SHOULD BE APPOINTED AS A LITIGATION FRIEND AND HOW ARE THEY BROUGHT INTO THE PROCEEDINGS?**

Anyone can be appointed as a litigation friend for the protected party, e.g. a friend, parent or family member as long as they do not have a conflicting interest to that of the protected party and they can make decisions about the case in a fair and competent way.

A litigation friend can apply to the court to be appointed, or they can be appointed by the court within the existing proceedings.

### **THE ALTERNATIVE IF NO-ONE IS WILLING OR ABLE TO ACT: THE OFFICIAL SOLICITOR**

Where there are no candidates for appointment as a litigation friend, the court can request the Official Solicitor's (OS) involvement. The OS's appointment as a litigation friend is always subject to their consent, provided three criteria are met:

- The court must make a finding of no capacity and that the adult is a protected party
- The OS must be appointed as a last resort (i.e. all other possible litigation friends must have been considered)
- The OS requires security for their costs

The last of the three requirements is usually the trickiest. Whilst other litigation friends will be required to give an undertaking to meet any costs orders made against the protected party in the proceedings (and although such orders are rare this can often be a disincentive to being appointed), it is the litigation friend's decision whether or not to instruct solicitors to act for the protected party and to consider how those costs might be funded.

Where the OS is appointed, they will instruct a solicitor and before consenting to their appointment will require evidence that any costs incurred can be met. The security for their costs will need to either come from the liquid resources (i.e. cash assets) of the protected party, or by an undertaking from the other party to fund their costs as the proceedings progress.

Whilst funding an ex-spouse's litigation fees may be an unattractive proposition, the alternative is finding yourself in a position where without the OS's appointment, the case cannot progress and no financial orders can be made.

### **THE COURT OF PROTECTION**

If there are no funds available, the Court of Protection is the last resort. A deputy will be appointed who can make decisions and progress litigation on behalf of the protected party. However, this route will be beset by delay and additional hearings, all of which will increase the overall costs.

## CONCLUSION

Capacity issues cannot be ignored and must be addressed at the outset of the proceedings to avoid later difficulties with the validity of any steps taken in the litigation. It is important to take professional advice at an early stage so that all options can be properly considered.

If you require advice on the above issues please do not hesitate to contact a member of our family team who would be happy to discuss matters further. Our contentious trusts team offer expertise in making applications to the Court of Protection if that is required.

For further information about your options please contact us using the details below.

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