

Capacity in the Context of Litigation

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The Starting Point

- CPR 21.2
- A protected party must have a litigation friend.
- If the claimant is also a protected beneficiary, then PD21 section 10 applies
- A party or beneficiary is protected if he lacks capacity within the meaning of the MCA to conduct proceedings or manage his award.

Problems in Practice

- If a litigant lacks capacity but that is not noticed, any settlement is not binding and his advisers may leave themselves open to a negligence action
- Possible conflicts between litigation friend and deputy
- What happens if there are contentious proceedings in the COP as well as a civil claim?

Determination of Capacity in Practice

- As soon as possible
- What if the COP has already appointed a deputy on the basis that C lacks capacity?
- What is the status of COP's decision that C lacks capacity, can the civil court ignore it?

Can a D a PI claim intervene in the COP?

- Re SK (2012) EWHC 1990 (COP) says no.
- But that was in relation to a welfare decision
- Would the answer be the same if the issue was C's capacity?

The Role of Lasting Powers of Attorney

- Quite possible that C who is a protected party and beneficiary has capacity to grant and revoke a LPA.
- If so and one is granted, PD21 section 10.2 removes the automatic reference to COP and need to appoint a deputy.
- A way of cutting costs but would it necessarily be in C's best interests?

A Cautionary Tale

- Evesham & Pershore Housing v Werrett (2015) EWHC 1060 (QB)
- A court decides C has capacity where OS has indicated that C clearly does not.
- Any lessons?

Questions?

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