

Resource for Independent Advocates
working with Parents with
Learning Disabilities:
A Roadmap for a Complex Journey



**The Baring
Foundation**

Contents

Introduction	p4
Section One: Initial Assessment and Long Term Support	p6
Section Two: Child Protection Conferences	p41
Section Three: Care Proceedings	p47
Section Four: Post Proceedings Options	p55

Welcome to 'A Roadmap for a Complex Journey'

Impetus is an award-winning Brighton charity. We help people who feel lonely or socially isolated because of age, disability or poor mental or physical health. Our team of staff and volunteers help people make connections in their community to improve health and wellbeing. We offer a range of community support including befriending, advocacy and social prescribing.

Our Interact Advocacy service has been providing independent advocacy for people with learning disabilities since 1999, and we have increasingly worked with parents. This guide was born of a desire to share our experiences of how to support parents with learning disabilities, to constructively challenge some of the misconceptions and barriers to parents with learning disabilities being supported to care for their child, especially where these are systems- or process-based.

We would like to thank the funders for this work, the Baring Foundation, who have an excellent track record in funding work to improve the quality of life of people experiencing disadvantage and discrimination. In particular we were delighted to be funded by Baring under the programme to embed the law and human rights based approaches within our work, using this to promote social change for our clients.

We are very grateful to the professionals, academics and practitioners who have given their time generously to contribute their expertise to this guide.

We also want to thank Brighton & Hove City Council for engaging positively in all the discussions around this work. We would like to commend Councillors for establishing a Fairness Commission in our city in 2016, and on accepting and implementing so many of the recommendations. Thanks also to the Fairness Commissioners for their support and encouragement.

We hope that this resource is helpful to you in your work.

A handwritten signature in black ink, appearing to read 'Jo Ivens', with a stylized, flowing script.

Jo Ivens
Impetus CEO

Introduction

Interact has been providing advocacy for parents with learning disabilities when the local authority make decisions about the care of their children since 1999, but the landscape of support and eligibility, laws and rights, is vast and little specialist training in this area exists. In a perfectly working system there would be little need for independent advocacy, but in case after case we have found a wide range of systems that are out of date, not set up to support the specific needs of people with learning disabilities, or sometimes even good systems that have just been applied incorrectly. Knowing how the system should work is essential for achieving the right outcomes for these parents, as well as their children and families. In this resource we aim to bring together the current best practice, most up to date legal advice, template letter, and more. This is to ensure that those already working in advocacy are able to fill gaps in their knowledge easily, and those new to the area can get the fastest start on understanding the many processes that go into providing the right support for a parent with a learning disability or, if necessary, removing a child from that parent's care. This is not a guide on how to work with people with learning disabilities, many resources for that already exist, but a roadmap for a complex journey, hopefully with all the shortcuts highlighted for you.

This guide has 4 sections: **Initial Assessment and Long Term Support, Child Protection Conferences, Care Proceedings, and Post Proceedings Options**. These are designed chronologically showing the parallel processes of adult and children's social care. In some authorities these are better coordinated than others, but it is vital that they are coordinated to ensure the best chance of a positive outcome. By showing these two timelines in parallel we aim to make it clear at what point an advocate may need to request something of one department or the other to ensure they remain synchronised.

Section 1 is by far the largest area, because we believe it's the most vital. Currently far too few parents are being offered the support they are entitled to, with too few services adapted for their learning disabilities, too many assumptions being made about their lack of capacity to learn in the right environment, and too many parents being rushed to court proceedings. This section lays out the way things should be done, but understands that many ingrained practices still deny people their legal rights, so it also covers the process of judicial review to ensure decisions by the local authority can be properly scrutinised and, if needed, overturned by the courts.

Naturally the processes involved throughout the timeline are in themselves often extremely complex. This resource does not aim to recreate existing explanations of these processes, instead bringing them together in a single reference. The timelines act as an overview and an index, directing you to in-depth resources on each stage, relevant case law examples, and template letters that will help advocates make requests for service in line with legislation.

A note on using this guidance

There are many links to other sources of information, useful websites, and legislation throughout this guide. Should you have this guide in a printed format we recommend accessing the PDF version, available here: www.bh-impetus.org/advocacy-resource

This will allow you to click and follow links directly. Both the law and the web are constantly changing, and whilst we have tried to ensure the accuracy of this document at the time of publishing there may now be updates available.

Authors

Rachel Butt

Senior Advocate, Brighton & Hove Impetus

Matt Day

Service Manager, Brighton & Hove Impetus

Contributors

Gemma Taylor

42 Bedford Row

Family Barrister specialising in care proceedings

Nadine Tilbury

Policy Officer

Working Together with Parents Network at the University of Bristol

Rachel Burley-Stower

Community Care Solicitor at Martin Searle Solicitors

Dr Hannah Russell

Human Rights Research and Policy specialist

Katy Watts

Solicitor at Public Law Project

Belinda Schwehr

Legal Trainer and Consultant

Jane Bell

CEO Shared Lives

Liberty (resources) - www.liberty-human-rights.org.uk

Family Rights Group (resources) - www.frg.org.uk

Section One:

Initial Assessment and Long Term Support

The basic legal test asks whether parents can safely look after their child with support. All too often we have seen cases where support is not offered, where we have been told it is not available, that someone is ineligible for the support that exists, or that there is simply no level of support possible to make the situation safe, so why even try?

This section aims to give an overview of all the processes that should go into assessing clients and making decisions that indicate whether or not there is an entitlement to support and whether support options can be safely explored and tested. It assumes a package of long term support to keep families together is the goal - as should always be assumed until it is shown otherwise - and aims to empower advocates to know what to ask for and when to ask for it, should this be their client's wish. As you can see in the timeline diagram on page 11, it is a complex web of processes, involving both Adult and Children's services. We have often seen professionals extremely adept in their own specialism who lack an understanding of how other parts of the process relate to them, how support can be drawn from other areas that would impact their part, and how drastically this could change the outcome for the client should all these areas work smoothly together.

Ideally there should be a Joint Protocol that governs how Children's and Adults' services work together - this has been a recommendation for more than a decade¹. We don't always find this to be the case, though, which can lead to confusion amongst professionals about when they should seek input from other services or about which budgets costs may be assigned to. Without the full understanding of the possibilities for support or the rights and entitlements clients have under the law, it can be easy to rush to a conclusion about their potential that does the client little justice.

Instinctively this will often feel wrong to you as an advocate, and this is a good test. This section should help you answer questions about the possibilities, rights, and entitlements, to allow you to discuss them with your clients and understand which processes you need to advocate for should your client want to reach the goal of long term support. In many cases it will turn out that the proper thing is not for a family to stay together, and we will cover that scenario in later sections, but we find most clients want to fight to be given the chance to remain as a family and be supported to do so, so this section will support you to advocate for that.

¹ www.bristol.ac.uk/media-library/sites/sps/documents/wtpn/2016%20WTPN%20UPDATE%20OF%20THE%20GPG%20-%20finalised%20with%20cover.pdf

Good Practice Guidance on Working with Parents with a Learning Disability

'Good practice guidance on working with parents with a learning disability' was first published in 2007 by the Department of Health and the Department for Education and Skills and updated in 2016 by the Working Together with Parents Network. Its underpinning premise is that people with learning disabilities have the right to be supported in their parenting role, just as their children have the right to live in a safe and supportive environment. It should be an essential reference for all professionals working with these parents, and was fundamental in the creation of this resource.

The guidance sets out five features of good practice in working with the parents:

- **Accessible information and communication**
- **Clear and coordinated referral and assessment processes and eligibility criteria**
- **Support designed to meet the needs of parents and children based on assessment of their needs and strengths**
- **Long-term support, if necessary**
- **Access to independent advocacy**

The guidance can be found here: www.bristol.ac.uk/media-library/sites/sps/documents/wtpn/2016%20WTPN%20UPDATE%20OF%20THE%20GPG%20-%20finalised%20with%20cover.pdf

The guidance has received wide ranging support. In 2008, the Joint Committee on Human Rights said in their Seventh Report, 'A Life Like Any Other? Human Rights of Adults with Learning Disabilities':

*"We consider that if the recommendations for good practice in each of these areas were implemented effectively, this could significantly reduce the risk that parents and children would be separated, in breach of the Convention."*²

Failure to apply the principles of the good practice guidance is detrimental to the children's welfare and amounts to a breach of their and their parents' rights, such as those under the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities, the European Convention on Human Rights, the Equality Act 2010 and the Human Rights Act 1998. As such, parents with learning disabilities must be given every opportunity to show that they can parent safely and be good enough parents, with appropriate support. Workers should be specialists, trained in the needs of

² www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/40/4009.htm

people with learning disabilities, and the good practice guidance should form the foundation of their approach.

“All social workers, and family support workers, working with children and families need to be trained to recognise and deal with parents with learning disabilities. The Guidance issued by central government needs to be followed.”³

By making the guidance the bedrock of your practice you will not only be providing the best possible support to your clients, and advocating for the best possible outcomes, but aligning yourself with a document recognised by courts across the country. This guidance will highlight many of the most important cases from across the country, and the important precedents they have set, which will be useful in the case you make to your local authority.

³ Mr Justice Baker in Kent CC v A Mother [2011] EWHC 402 (Fam) at para 135, www.bailii.org/ew/cases/EWHC/Fam/2011/402.html

Independent Advocacy

Most likely, if you're reading this, you are providing advocacy for someone already, but advocacy comes in a number of forms. Some of these can be mandatory, so it is useful to reflect on advocacy and an advocate's place in supporting their client.

Advocacy, at its core, is taking action to help people say what they want, secure their rights, represent their interests and obtain services they need. Advocates and advocacy providers work in partnership with the people they support and take their side.⁴

Sometimes this means advocates have to advocate for things they don't themselves believe are good outcomes but are simply the client's wishes. Good advocates present the information to a client about the possibilities that should be available to them, and allow them to make their own choices. It's important to remember as an advocate that everyone has the right to make a bad decision, as bad is entirely subjective, and what might be bad from your viewpoint might be perfect from theirs. The advocate is there to help the client understand the information that is being presented to them, and make sure that the client's wishes are heard by the people that need to hear them. This promotes social inclusion, equality and social justice, through empowerment, respect, and choice.

There are 3 important pieces of legislation that show a need for advocacy in these cases:

- **The Care Act 2014** imposes a duty on local authorities to provide an independent advocate where an individual would otherwise have substantial difficulties in being involved in processes such as their own assessment and care planning. (See 'Care and support statutory guidance' chapter 7 for full details.⁵)
- **The Equality Act 2010** imposes a duty on local authorities to make reasonable adjustments so as to eliminate discrimination and to advance equality of opportunity; the provision of an independent advocate may assist with this.
www.legislation.gov.uk/ukpga/2010/15/contents
- **The Human Rights Act 1998** entitles a parent to participate fully in decisions as part of their right to a fair trial; this includes being supported prior to any formal legal proceedings being initiated.
www.legislation.gov.uk/ukpga/1998/42/schedule/1

⁴ www.qualityadvocacy.org.uk/wp-content/uploads/2014/03/Code-of-Practice.pdf

⁵ www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance

Taken together these show that an advocate should be engaged in the process at the earliest possible stage to ensure their rights under the Human Rights Act are respected, that there **must** be an advocate available for assessment and care planning, and throughout their entire engagement with the local authority and the courts, reasonable adjustments should be made to take account of any needs their learning disability may cause. This need for adjustment is further strengthened by the **Accessible Information Standard**, which gives the local authority a duty to ensure that they are communicating with clients in a way that they can understand, which can involve significant rewriting of documents for individuals with a learning disability.

Together these pieces of legislation create an entitlement to advocacy that is so strong that, should it not be provided, there could be opportunity for Judicial Review to order an entire case to be re-started from the point advocacy was first needed. With some clients, where advocacy is a statutory right and a reasonable adjustment, there is a strong case that no meeting should be conducted without an advocate present. It is our experience that advocacy can be seen as a luxury; often the advocate is the last to be informed of a meeting date and not consulted on the viability of that date. Whilst professionals should understand the importance of the advocate, both in meeting their legal duty and in reaching the best outcomes for the client, it often falls to the advocate to help professionals understand their importance to the process. Impetus uses an Advocacy Engagement Protocol, provided to all professionals in a case as well as the client, to set the boundaries and importance of their involvement. You can download a copy of this here: www.bh-impetus.org/advocacy-engagement-protocol

Non-instructed advocacy

Non-instructed advocacy takes place when a person lacks the capacity to instruct an advocate.

The non-instructed advocate seeks to uphold the person's rights; ensure fair and equal treatment and access to services; and make certain that decisions are taken with due consideration for all relevant factors which must include the person's unique preferences and perspectives.

This definition is taken from the Advocacy Code of Practice which should be read alongside this resource:

www.qualityadvocacy.org.uk/wp-content/uploads/2014/03/Code-of-Practice.pdf

Non-instructed advocacy can be even more involved than instructed advocacy. The advocate must seek a full understanding of the client's situation, including wishes they may have expressed before they lost capacity, to fully understand the outcomes to advocate for.

This can involve extensive document review and speaking with those closest to the client to build a picture of what their wishes would most likely be.

In either instructed or non-instructed advocacy, one of the key principles is independence. Advocates should be free to act according to the wishes and needs of clients. They should not be compromised through requirements of funding agreements or contracts to act in a way that is not in line with advocacy principles or other guidance such as the Mental Health Act 1983 Code of Practice⁶; Mental Capacity Act 2005 Code of Practice⁷ or Advocacy Code of Practice, whilst carrying out their duties.

And, should further argument be needed for the importance of advocacy, effective advocacy can also be a cost-saving initiative. The Personal Social Services Research Unit highlight the potential cost savings to local authorities for providing advocacy in their discussion paper, 'The economic case for early and personalised support for parents with learning difficulties'.

A copy of this can be found in full here:

http://eprints.lse.ac.uk/64778/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_PSSRU_Discussion%20Papers_DP2907.pdf

Timeline

There are a large number of processes, often running concurrently, to consider when trying to access support. As an advocate you may have to request that particular processes happen at all, or happen at the relevant time. Children's and Adults' services are not always coordinated, particularly in areas where a Joint Protocol does not exist.

In the following pages you will find information about these processes, interventions you may need to make as an advocate, and the legal basis for arguing entitlement to proper assessment and support. The information is presented in an approximate chronology of ideal case progression, though we have found ourselves involved in cases that have already had many of these elements acted on, properly or otherwise, before advocacy has been involved.

You will find the section one timeline on the next page.

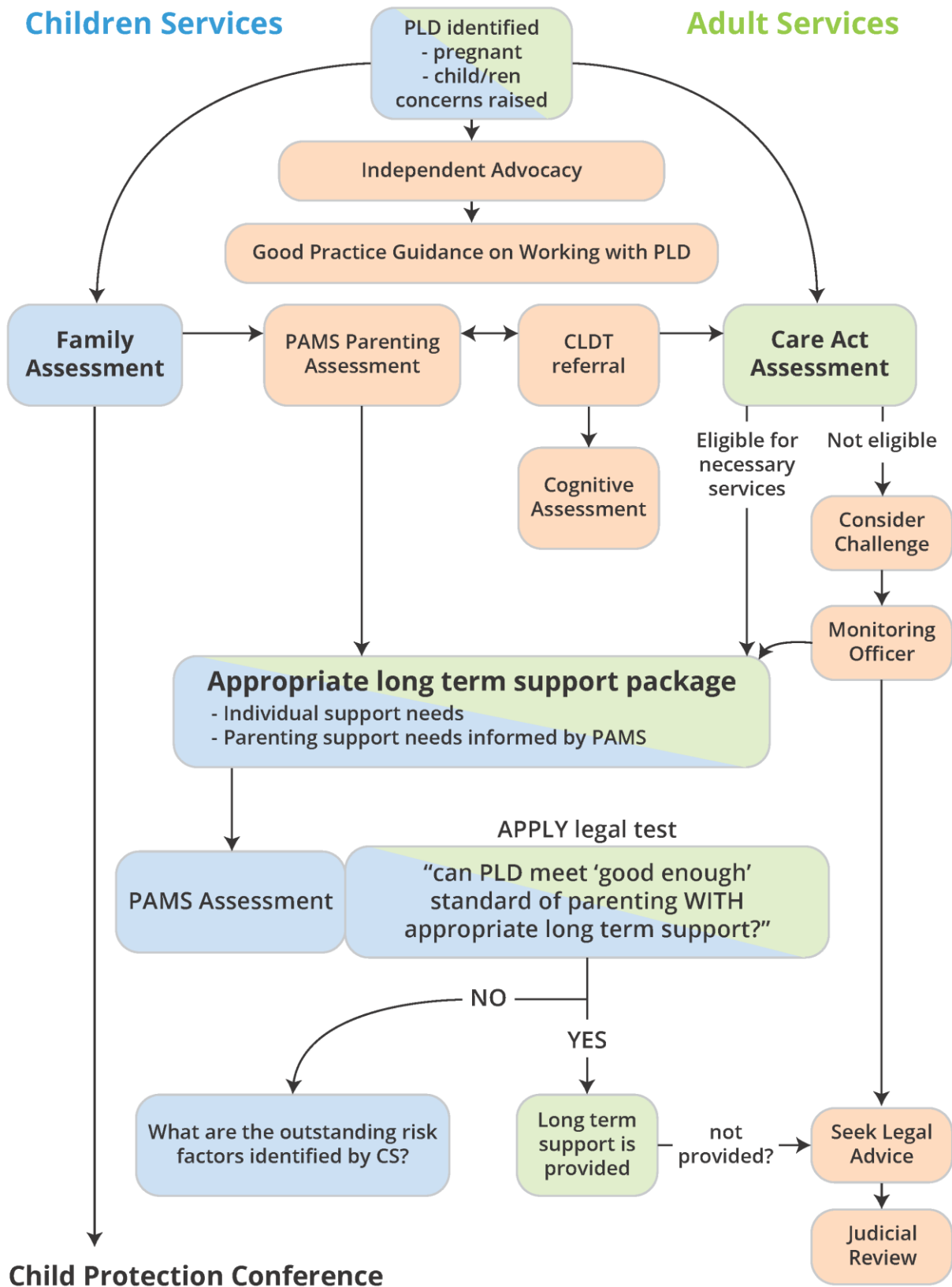
⁶ www.gov.uk/government/publications/code-of-practice-mental-health-act-1983

⁷ www.gov.uk/government/publications/mental-capacity-act-code-of-practice

Timeline Section 1

Children Services

Adult Services



Family Assessment

This is the initial assessment conducted by the early help department in children's services when concerns are raised. Any intervention must include proper consultation, support and assessment *from the start of this assessment* in order to be considered 'fair' under the 'Court Orders and pre-proceedings for local authorities' government guidance:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/306282/Statutory_guidance_on_court_orders_and_pre-proceedings.pdf

It is important that reasonable adjustments for disabilities be made from this first stage of the process, as outlined in the Equality Act.

Equality Act 2010

Parents with learning disabilities can rely on s29 of the Equality Act 2010 to ensure services are provided without discrimination and assessments are reasonably adjusted to meet their learning needs:

s29 Provision of services, etc.

(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

[...]

(7) A duty to make reasonable adjustments applies to—

(a) a service-provider (and see also section 55(7));

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.⁸

s149 sets out the public sector duty to advance equality of opportunity that parents with learning disabilities can rely on:

s149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;⁹

For more detailed information on the Equality Act and how it works, go to:

www.equalityhumanrights.com/en/equality-act-2010/what-equality-act

⁸ www.legislation.gov.uk/ukpga/2010/15/section/29

⁹ www.legislation.gov.uk/ukpga/2010/15/section/149

PAMS Assessment (Parenting Assessment Manual)

In addition to any reasonably adjusted assessments undertaken as part of the family assessment, advocates may rely on s29 of the Equality Act 2010 to request a PAMS assessment be undertaken by an appropriately qualified professional at the earliest opportunity.

This is a parenting capacity assessment, which has been designed for adults with limited cognitive comprehension and can be applied to parents with learning disabilities. Your client does not need a formal diagnosis and it can be initiated before the birth of their child.

The aim of a PAMS assessment is to highlight an individual's parenting *strengths* and outline gaps in parenting which may require specialist training and/or long term support to enable the parent to meet the 'good enough' standard of parenting.

Once the necessary training has been completed and long term support needs have been met, the PAMS assessment must be repeated to see if the parent can meet the 'good enough' standard of parenting with appropriate support.

Parent Assessment Manual by Sue McGaw, Kerry Keckley, Nicola Connolly and Katherine Ball:

www.pillcreekpublishing.com/sue_mcgaw.html

The Working Together with Parents Network has also produced guidance on appropriate parenting assessments for parents with learning disabilities, in line with the law, along with other useful resources found here:

www.bristol.ac.uk/sps/wtpn/resources/

Children Act 1989 and Children Act 2004

At this stage the child may not yet be considered a 'Child in Need' as the initial family assessment has not been concluded, but it is important to remember that Children's Services are governed by The Children Act 1989 and The Children Act 2004.

This act is based on the principle that, where consistent with the children's welfare, local authorities have a duty to promote the upbringing of the child by their families and provide appropriate support to do so.

A 'Child in Need' can rely on s17 (1) and Schedule 2 para 8 for the provision of services.

s17 Provision of services for children in need, their families and others.

(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

*by providing a range and level of services appropriate to those children's needs.*¹⁰

Provision for children living with their families

Para 8

Every local authority shall make such provision as they consider appropriate for the following services to be available with respect to children in need within their area while they are living with their families—

(a) advice, guidance and counselling;

(b) occupational, social, cultural or recreational activities;

(c) home help (which may include laundry facilities);

(d) facilities for, or assistance with, travelling to and from home for the purpose of taking advantage of any other service provided under this Act or of any similar service;

*(e) assistance to enable the child concerned and his family to have a holiday.*¹¹

Human Rights Act 1998

The Human Rights Act (1998) (HRA) provides that the majority of human rights contained in the European Convention on Human Rights (ECHR) form part of UK law in three ways:

- 1) All UK law must be interpreted, so far as it is possible to do so, in a way that is compatible with HRA rights.
- 2) If an Act of Parliament breaches these rights, the courts can declare the legislation to be incompatible with rights. This does not affect the validity of the law – the HRA maintains parliamentary sovereignty as it remains up to Parliament to decide whether or not to amend the law.
- 3) It is unlawful for any public authority to act incompatibly with human rights (unless under a statutory duty to act in that way), and anyone whose rights have been violated can bring court proceedings against the public authority.

¹⁰ www.legislation.gov.uk/ukpga/1989/41/section/17

¹¹ Mika Oldham, *Blackstone's Statutes on Family Law 2015-2016* (Oxford University Press, 2015), p278

Duty on Public Authorities

Section 6 of the HRA provides:

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.¹²

This means that local authorities must respect the rights of the convention in all actions they take, and parents with learning disabilities will see particular relevance to the rights in Article 8 of the European Convention on Human Rights:

Article 8

Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *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.¹³*

There are, however, limitations to this. Any intervention from children's services is likely to engage Article 8, but many local authorities believe it is justified, citing their actions as necessary for the child's safety in line with **'the protection of the rights and freedoms of others'**. This is because the rights within the HRA apply equally to the other family members, and the authority may see that there is a threat to the child's right to life, this overriding the parent's right to family life.

Although this is considered a 'legitimate aim', it is important to remember that *any* limitation must be:

- ❑ *in accordance with law;*
- ❑ *necessary, and*
- ❑ *proportionate.*

With each interference consider whether this action is necessary and proportionate to the issue at hand and, if you cannot see that it is, ask them to set out (in writing) how their interference with your client's article 8 rights meets the legal requirements of being lawful, necessary and proportionate. Proportionality can be the hardest of these tests to evidence -

¹² www.legislation.gov.uk/ukpga/1998/42/section/6

¹³ www.echr.coe.int/Documents/Convention_ENG.pdf p10

if interference is necessary, can they show that this is the *least* invasive interference possible? If not, they may be in breach of the client's ECHR rights.

It is also worth considering if the local authority is meeting the obligations of Article 14 of the EHCR:

Article 14

Prohibition of discrimination

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*¹⁴

Can the authority show that their interference is not disproportionately impacting the client because of their disability? Whether they are being treated the same or differently to other parents who do not have a protected characteristic, the authority could be breaching Article 14. For example, if a parent with a learning disability were asked to complete an assessment process without reasonable adjustments that took their learning needs into account this could be discriminatory even if they were treated the same as others. But if the parent was not allowed to participate because staff felt the parent wouldn't understand, they are being treated differently, and this could be discriminatory as well. It is important to examine all decisions and processes to decide if they, individually, are potentially discriminatory. This can happen when processes are simply applied to one client in the same way as the last - all cases must be treated individually on their merits, not simply as part of a routine process.

SCIE Briefing Paper

Parents with learning disabilities often need to overcome preconceived ideas held by other people about their ability to parent. For example, there may be a willingness to attribute potential difficulties they may have with parenting to their impairment rather than to disabling barriers or to other factors that affect the parenting of all parents. This has been described as the "presumption of incompetence": the "absence of explicit standards and the uncertain nature of the links between parental competence and child outcomes render parents with learning difficulties vulnerable to discrimination"

The HRA therefore governs the relationship between the state (social services) and the individual (your client).

Advocates should be mindful to ensure any interference is a necessary, proportionate and justified (Article 8 of the EHCR), and free from discrimination (Article 14 of the EHCR).

¹⁴ Ibid., p12

Advocates should also be mindful that their clients are entitled to challenge any decision by public authorities that they believe violate their ECHR rights. Under Article 6 of the ECHR:

Article 6

Right to a Fair Trial

*In the determination of his civil right and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*¹⁵

Furthermore, under section 8 of the HRA, clients are entitled to judicial remedies for the actions or inactions of public authorities that are incompatible with their ECHR rights. Section 8 of the HRA states:

*In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*¹⁶

This provision is reflective of Article 13 of the ECHR:

Article 13

Right to an Effective Remedy

*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*¹⁷

(See information on Monitoring Officer, page 29, and Judicial Review, page 32, if this cannot be resolved with the social worker.)

For more detailed information on how the Human Rights Act works go to:

www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act

¹⁵ Ibid., p9

¹⁶ www.legislation.gov.uk/ukpga/1998/42/section/8

¹⁷ www.echr.coe.int/Documents/Convention_ENG.pdf p12

Joint Working between Children's Services & Adult Social Care

'Good practice guidance on working with parents with a learning disability' (DoH and DfES 2007), laid out the importance of a joint protocol to govern the interactions between Children's Services and Adult Social Care, but the existence of such a protocol varies between local authorities. Where one exists it is a useful guideline for advocates to follow, aiding them to hold the authority to account where their protocol has not been followed. However, in areas where one does not exist, there can be confusion as to which department holds which responsibility, and in turn which holds the obligation to assess, or to fund support. In the long term, highlighting the lack of such a protocol locally, despite it being best practice, could lead to one being created - as we have seen in our own local authority. A lack of clarity about responsibility in the short term does not absolve the authority of its responsibilities, and should not cause undue delays in accessing services or a case may be made for breaches of rights.

1.2.1 Adult and children's services, and health and social care, should jointly agree local protocols for referrals, assessments and care pathways in order to respond appropriately and promptly to the needs of both parents and children.

These protocols should take into account the processes set out in Working Together to Safeguard Children (2015) (see charts on pages 30-51). The Social Care Institute for Excellence has published guidance and a resource for the development of joint protocols to meet the needs of disabled parents in general (www.scie.org.uk).¹⁸

Community Learning Disability Referral

Advocates should encourage liaison between children's services and adult social care and the creation of a joint protocol in line with the good practice guidance.

If a referral of the parent has not yet been made to the community learning disability team, request that the children's social worker make an urgent referral or complete the referral with your client if they wish to proceed.

If the learning disability team do not accept the referral due to 'lack of evidence of learning disability', either request evidence from the client's GP to support a diagnosis or contact

¹⁸ www.bristol.ac.uk/media-library/sites/sps/documents/wtpn/2016%20WTPN%20UPDATE%20OF%20THE%20GPG%20-%20finalised%20with%20cover.pdf p8

adult social care instead. With either route you will be requesting two things: a Cognitive Assessment and a Care Act assessment.

Cognitive Assessment

A cognitive assessment is an examination conducted to determine someone's level of cognitive function (www.wisegeek.org/what-is-cognitive-function.htm). It will evaluate an individual's IQ but more importantly it will highlight communication strengths and weaknesses and learning preferences, which will enable professionals to adapt their approach to suit the needs of your client.

To be effective, the recommendations set out in the final cognitive assessment report must be shared with all appropriate professionals working with your client and applied throughout any assessment, support and consultation process in both adult and children's services.

It must be used to inform any reasonable adjustments necessary to promote equality of opportunity under s29 of the Equality Act 2010 and to ensure your client is able to fully participate in the process (Articles 8 and 14 European Convention on Human Rights). The local authority has a duty to ensure this happens from the start of any intervention.

It is also worth noting that a cognitive assessment cannot be carried out in the period 6 weeks before or after birth, as it is felt the pregnancy and birth would impact the accuracy of the assessment. This can lead to a window of 12 (or more, if the baby is overdue) weeks where an assessment cannot happen, and questions of capacity to instruct legal representatives or advocates may not be able to be answered. It is therefore imperative that an assessment is carried out before this time. Whilst there may be occasions where a parent has come into contact with social services late in their pregnancy and a delay cannot be avoided, in normal circumstances the cognitive assessment (or access to an existing one) should be sought immediately.

More details can be found in the report, 'Good Practice Guidance for Clinical Psychologists when Assessing Parents with Learning Disabilities':

www.bps.org.uk/system/files/Public%20files/DCP/cat-690.pdf

Care Act Assessment

The Care Act has brought a very important new element to support for parents with learning disabilities, but the way it is understood and implemented by social care staff varies, so you may find significant differences from ideal practice in your area. The law relates to the parent, which can often leave those who have been specialising in children's

processes unsure how it relates to proceedings. But it can lead to significantly increased support for the parents.

Under the Care Act 2014, a parent with a learning disability may be entitled to a bespoke package of long-term support in relation to both their individual and their parenting support needs.

Care Act 2014:

www.legislation.gov.uk/ukpga/2014/23/contents

Care and Support (statutory guidance): www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance

A detailed 'self-study pack' for providing independent advocacy under The Care Act has been issued by the Department of Health and is available here:

www.local.gov.uk/sites/default/files/documents/self-study-pack-669.pdf

The threshold for a Care Act Assessment is low. The local authority is duty bound to provide an assessment if there is evidence to show an individual 'may' have care and support needs related to their disability.

If children's services are investigating concerns around parenting capacity, this will be enough to invoke the duty to assess.

Section 9 Care Act 2014:

s9 Assessment of an adult's needs for care and support

(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess –

- (a) whether the adult does have needs for care and support, and*
*(b) if the adult does, what those needs are.*¹⁹

The local authority must:

- Ensure that the person is able to be involved as far as possible/support the person to be involved
- Where appropriate, consider reasonable adjustments under the Equality Act 2010
- Consider whether the person would have 'substantial difficulty' in being involved in the assessment

¹⁹ www.legislation.gov.uk/ukpga/2014/23/section/9

- Provide access to independent advocacy for those who have substantial difficulty and have no appropriate individual who can support their involvement
- Seek to establish the total extent of needs through the assessment before considering the person's eligibility for care or support.

Please see Appendix 1 'Requesting a Care Act Assessment template letter' (page 68) which you can use to request an assessment from adult social services.

The duty to provide statutory advocacy

The Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014

www.legislation.gov.uk/ukxi/2014/2889/made and s67 Care Act 2014 provide that local authorities must arrange an independent advocate to facilitate the involvement of a person in their assessment, in the preparation of their care and support plan and in the review of their care plan, if two conditions are met:

- (1) That if an independent advocate were not provided the person would have substantial difficulty in being fully involved in these processes, and
- (2) There is no appropriate individual available to support and represent the person's wishes who is not paid or professionally engaged in providing care or treatment to the person or their carer.²⁰

It is worth noting that the prevalence of current and/or historic sexual violence and domestic violence amongst people with learning disabilities can often make family members or friends unsuitable as an "appropriate individual". Once the needs have been identified (which may relate to both parenting responsibilities and individual's needs) there will be a consideration for eligibility.

When determining eligibility, local authorities must consider the following three conditions:

Condition 1

The adult's needs for care and support arise from or are related to a physical or mental impairment or illness and are not caused by other circumstantial factors.

Condition 2

As a result of the adult's needs, the adult is unable to achieve two or more of the outcomes specified in the regulations and outlined in the section.²¹

²⁰ www.scie.org.uk/care-act-2014/advocacy-services/commissioning-independent-advocacy/duties/independent-advocacy-care-act.asp

²¹ www.scie.org.uk/care-act-2014/assessment-and-eligibility/eligibility/criteria-adults-care.asp

- *Managing and maintaining nutrition*
- *Maintaining personal hygiene*
- *Managing toilet needs*
- *Being appropriately clothed*
- *Being able to make use of the adult's home safely*
- *Maintaining a habitable home environment*
- ***Developing and maintaining family or other personal relationships***
- *Accessing and engaging in work, training, education or volunteering*
- *Making use of necessary facilities or services in the local community, including public transport, and recreational facilities or services*
- ***Carrying out any caring responsibilities the adult has for a child.***²²

(The highlighted outcomes are very likely to be easily demonstrated here, but others may be relevant as well.)

Condition 3

As a consequence of being unable to achieve these outcomes, there is, or there is likely to be, a significant impact on the adult's wellbeing²³, including the following:

- a) personal dignity (including treatment of the individual with respect)*
- b) physical and mental health and emotional wellbeing***
- c) protection from abuse and neglect*
- d) control by the individual over day-to-day life (including over care and support provided and the way it is provided)***
- e) participation in work, education, training or recreation*
- f) social and economic wellbeing*
- g) domestic, family and personal relationships***
- h) suitability of living accommodation*
- i) the individual's contribution to society²⁴*

(Note: Emphasis added where a factor tends to be particularly relevant for a parent with a learning disability.)

It is highly likely that if a parent is not given the support to meet the needs of their child, and that results in the removal of their child, there will be 'significant impact' on their 'wellbeing'.

²² www.scie.org.uk/care-act-2014/assessment-and-eligibility/eligibility/outcomes-care-support-needs.asp

²³ www.scie.org.uk/care-act-2014/assessment-and-eligibility/eligibility/criteria-adults-care.asp

²⁴ www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance

PAMS assessment

The outcome of a PAMS (Parent Assessment Manual Software) assessment can inform an appropriate care plan to meet the individual's parenting support needs relating to 'parenting responsibilities for a child'. Sometimes PAMS assessments can be used simply to demonstrate what a parent is not capable of, but in combination with a Care Act assessment these highlighted shortfalls can create a very clear map of individual needs to be met with support, and what they could be capable of with the appropriate support in place.

Eligible for support

As said in the introduction to this section, we are assuming in section 1 that once the assessment has been carried out the client is deemed eligible for support. Social workers should have a good understanding of possible support options, but with options of support varying so greatly across the country sometimes staff look at what is already available in their area, and not at new possibilities. Examples of good practice in other areas of the country can be used to demonstrate ways that parents in similar situations have been supported and that there are alternative options to those being used in a particular local authority.

So, next we present some examples of support options that have worked well, which you could use to present new options to your local authority about ways of working with parents with learning disabilities. In some cases it is vital to present the options to the authority before assessment is carried out, to ensure the right information is being sought in assessment to gauge the appropriateness of these services. It may also be worth approaching service providers locally to ask about the services they deliver. Information about a client, presented by someone who truly believes support is possible, can show them in a very different light and inspire service providers to adjust services to suit their needs. We have seen this locally, in the case of a Shared Lives provider who had never previously provided specialist support for parents. They opened their doors to parents needing specialist support after we, the independent advocacy provider, presented a case to them.

Once appropriate support has been in place for a minimum period of 3 months it will be necessary to determine if the parent is able to meet the 'good enough' standard of parenting with this support. This can be attained by requesting a second PAMS assessment. It's important to remember that should support not be enough to meet the standard, this shouldn't automatically be taken as the final outcome. If re-assessment still shows deficits in the parenting skills then the cycle should begin again, support options should be re-examined to see if the remaining deficit could possibly be met with support, and if so that should be provided and re-assessed after a further 3 months.

Case study: Valuing Parents Support Service (VPSS)

This information was taken from the case study by Tarleton et al.²⁵

The Valuing Parents Support Service (VPSS) team is located within the local authority's family assessment service. Workers are supported and supervised by the service manager of the assessment team. The VPSS maintains a focus on child protection and the well-being of the child through a 'Think Family Approach'. It also works in accordance with the 'Good practice guidance on working with parents with a learning disability' (DoH and DfES 2007). The VPSS provides personalised support to parents with learning difficulties and their children including help with everyday needs such as budgeting, shopping, household organisation routines, safety and cleanliness. They work to support parents to gain parenting skills and knowledge, provide advocacy and care coordination.

Shared Lives schemes

Shared Lives is an asset based approach in which *'carers and those they care for are matched for compatibility and then develop real relationships, with the carer acting as 'extended family'* (Shared Lives Plus Ltd. 2011). In a Shared Lives placement, an adult who needs support and accommodation becomes a regular visitor to, or moves in with, a registered Shared Lives carer. Shared Lives provide long-term support to parents and their children who become a part of the carer's supportive family. It can also be used as an interim solution before the parent and child move to a permanent placement or home of their own.

Schemes such as Shared Lives are often successful in providing the necessary safe surroundings for the child and support for a parent, whilst still allowing the parent to look after their child and retain their legal parental responsibility, thus respecting their Article 8 right to family life.

If there is a need for a specialist service such as VPSS and/or Shared Lives but it does not exist, consider highlighting the local authority market shaping duty to provide such a service.

²⁵ Tarleton B and Porter S (2012) Crossing no man's land: a specialist support service for parents with learning disabilities. *Child and Family Social Work*, Vol 17, Issue 2, p233-243

The provision of services – market shaping

In some instances, we have seen clients assessed and agreement that a particular kind of support would work for them, but is simply not available. This, however, is not the end of the road, due to one of the provisions of the Care Act.

Section 5 of the Care Act 2014 sets out the local authority's duties to provide services. This includes a duty to promote diversity and quality in the provision of services for meeting care and support needs, to ensure there are a variety of providers and high quality services from which to choose.²⁶

In practical terms what this means is that an authority should shape the market by asking for what it needs, if it is not going to provide for those needs itself. So, should a client need a very individual service that it is impractically expensive for the authority to provide directly, they could ask local providers if it is practical for them to provide it instead. In some authorities the mechanisms for doing this are already embedded, many micro-commissioning models have sprung up to meet the needs of the personalisation agenda, with some allowing a simple online specification to be published which providers then either bid for, or say they can provide within the budget allocated to the client.

Many parents with learning disabilities may benefit from similar models of support, so whilst a single case may not trigger the duty for the local authority, a number of them over time would build a very strong case for increasing the support options available locally.

Ineligible for support under the Care Act?

Whilst the client may be asking for support, and you as an advocate may be sure they are entitled to support, unfortunately that does not always mean that support is offered. So, what to do if support is not forthcoming or the local authority maintains that the client is ineligible?

If you are acting as an independent advocate appointed under the statutory provision of the Care Act, then you have a legal duty to assist the individual in challenging decisions made by the local authority, should the client request this:

Care Act Regulations 2014

Reg (no.2)

5.(5)(a)(v) of Care and Support (Independent Advocacy Support)

²⁶ www.legislation.gov.uk/ukpga/1989/42/section/5

Advocates must assist the individual in challenging the local authority's decisions if the individual so wishes²⁷

There are times when the local authority may find this frustrating, they may even be correct in asserting that the client has no eligibility, but as an advocate you are there to give voice to your client, so if you have made them aware of all the facts and they still wish to challenge you must assist them to do so and exhaust their legal options in seeking support. In many cases however, there will be entitlements for support that have either not been properly identified or are being improperly denied.

If your client is deemed ineligible for support under the Care Act, and your client wishes to challenge the decision, consider the evidence. If there is evidence to satisfy conditions 1-3 outlined on page 22 then you must appeal the decision by writing a letter to the appropriate team in the council and write a letter to the Monitoring Officer, highlighting the evidence that supports your client's right to long-term support under the Care Act. Every authority has a Monitoring Officer (*for detail of their role see page 29*), and they have a legal duty to ensure the council is acting within the law. Highlighting a case to the Monitoring Officer is often a very swift way to gain access to support or assessment, but you should wait until there has been a decision to deny the client what they are asking for before involving the Monitoring Officer. The more clearly you make your case to the officer, the more easily they can make their decision, so it is worth taking the time to construct a letter that highlights the areas in which your client qualifies, with any evidence to support this, rather than simply asking them to look again at the decision.

If the evidence suggests your client does not meet the threshold for support under the Care Act, in your letter to the Monitoring Officer, highlight the local authority's legal duty to provide preventative services under the Care Act as well as appropriate support to parents with learning disabilities, resulting from the following legislation:

- **The Human Rights Act 1998**

Article 8 Right to private and family life

www.legislation.gov.uk/ukpga/1998/42/schedule/1

- **Equality Act 2010**

s149 Duty- elimination of discrimination and promoting equality of opportunity

www.legislation.gov.uk/ukpga/2010/15/section/149

- **United Nations Convention on the Rights of the Child. Ratified by the UK in 1991.**

Article 18 (2)

²⁷ www.legislation.gov.uk/ukqi/2014/2889/made/data.html

“For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children”²⁸

- **United Nations Convention on the Rights of Persons with Disabilities. Ratified by the UK in 2009.**

Article 23 (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”²⁹

Article 23(4)

Article 23(4) protects the right of the child not to be removed on the basis of the disability of either the child or the parents.

“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”³⁰

- **Children Act 1989**

s17(1)

There is a duty on the local authority to promote the welfare of children in need in their area, and the upbringing of such children by their families so far as is consistent with that duty, by providing a range and level of services appropriate to those children’s needs³¹

Schedule 2 para 8

Provision for children living with their families

Every local authority shall make such provision as they consider appropriate for the following services to be available with respect to children in need within their area while they are living with their families—

(a) advice, guidance and counselling;

(b) occupational, social, cultural or recreational activities;

²⁸ downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf p6

²⁹ www.un.org/disabilities/documents/convention/convoptprot-e.pdf p15

³⁰ Ibid., p16

³¹ www.legislation.gov.uk/ukpga/1989/41/section/17

- (c) home help (which may include laundry facilities);*
- (d) facilities for, or assistance with, travelling to and from home for the purpose of taking advantage of any other service provided under this Act or of any similar service;*
- (e) assistance to enable the child concerned and his family to have a holiday.³²*

Using the Good Practice Guidance

It can be useful in your communications with the Monitoring Officer to highlight the five key features of good practice in working with parents with learning difficulties, supported by the legislation and case law in this section.

- *Accessible information and communication*
- *Clear and coordinated referral and assessment procedures and processes, eligibility criteria and care pathways*
- *Support is designed to meet the needs of parents and children based on assessments of their needs and strengths*
- *Long term support where necessary*
- *Access to independent advocacy (Note: regardless of statutory entitlement, advocacy is still good practice)*

Monitoring Officer

Every authority must have a Monitoring Officer, as laid out in the Local Government and Housing Act. Their role is wide ranging, but in relation to provision of assessment and support for clients they have a duty to ensure that people making decisions have an understanding of the law relating to those decisions. As laid out in s5(2) below, if they become aware of a decision or omission by any employee of the authority that can lead to a contravention of law they must report on this to the most senior levels of the council. Their reports must be considered within 21 days by the authority, and the authority must not take action in the matter under review until the review is completed. Practically what this means is that a well-constructed letter to the Monitoring Officer can force the legal team in the authority to consider the points of law relevant to a case, regardless of ingrained practice or decisions being made on the ground, to consider the merits of your argument and if so, highlight these to the highest levels of the authority.

³² www.legislation.gov.uk/ukpga/1989/41/schedule/2

Local Government and Housing Act 1989, s5(2)

(2) it shall be the duty of a relevant authority's monitoring officer, if it at any time appears to him that any proposal, decision or omission by the authority, by any committee, [or sub-committee of the authority, by any person holding any office or employment under the authority] or by any joint committee on which the authority are represented constitutes, has given rise to or is likely to or would give rise to—

(a) a contravention by the authority, by any committee, [or sub-committee of the authority, by any person holding any office or employment under the authority] or by any such joint committee of any enactment or rule of law [or of any code of practice made or approved by or under any enactment]

to prepare a report to the authority with respect to that proposal, decision or omission.

(3) It shall be the duty of a relevant authority's monitoring officer—

(a) in preparing a report under this section to consult so far as practicable with the [person who is for the time being designated as the head of the authority's paid service under section 4 above] and with their chief finance officer; and

(b) as soon as practicable after such a report has been prepared by him or his deputy, to arrange for a copy of it to be sent to each member of the authority [and, in a case where the relevant authority have a mayor and council manager executive, to the council manager of the authority].

(5) It shall be the duty of a relevant authority and of any such committee as is mentioned in subsection (4) above—

(a) to consider any report under this section by a monitoring officer or his deputy at a meeting held not more than twenty-one days after copies of the report are first sent to members of the authority or committee; and

(b) without prejudice to any duty imposed by virtue of section 115 of the M4Local Government Finance Act 1988 (duties in respect of conduct involving contraventions of financial obligations) or otherwise, to ensure that no step is taken for giving effect to any proposal or decision to which such a report relates at any time while the implementation of the proposal or decision is suspended in consequence of the report.³³

On what to expect once you have submitted your letter to the monitoring officer, **Legal Trainer and Consultant Belinda Schwehr** writes:

“All such actions and proposals are automatically suspended during the time when the report is being considered by the members.

³³ www.legislation.gov.uk/ukpga/1989/42/section/5

“This is a personal, non-delegable duty, for the named monitoring officer/their Deputy, although s/he can take advice from specialist lawyers if the matter is not clear to them, using their own expertise. The monitoring officer is protected from dismissal other than through special steps, thus guaranteeing independence.

“It is a high level form of governance and management of legal risk, designed to minimise the need for legal proceedings. The council is obliged to furnish the monitoring officer with the resources to do the job, so if s/he needs a barrister’s opinion, they have to pay for that. Independent advocates’ reports should be sent to this person as well as to the council, in my view.

“The elected members – when they get such a report - must consider an MO’s monitoring officer’s report within 21 days. That would be the Cabinet Lead for Adult Social Care, and the response would reassure the monitoring officer that the relevant issue had been sorted out.

“If you do not receive what you considered to be a reasonable response from the monitoring officer, seek legal advice from a legal aid lawyer specialising in community care law.

The solicitor may seek advice from a barrister to consider whether there is evidence to support a claim for judicial review.”

JUDICIAL REVIEW

Gemma Taylor, Family Barrister

The following is a brief overview. It is beyond the scope of this resource to have a detailed explanation of this process. A claim for judicial review is brought in the High Court as a claim to review the lawfulness of an enactment or decision, action or failure to act in relation to a public function by a local authority. It is a discretionary remedy concerned with the decision making process, not with reviewing the merits of a decision.

The Grounds for judicial review are:

- *Illegality - that the authority is guilty of an error of law in its action*
- *Irrationality - that a power has been exercised so unreasonably that it should be open to review*
- *Impropriety - the authority has acted contrary to the principles of natural justice*

The decision of a lower court or public body will be quashed by a quashing order or order of certiorari where the court or authority has acted illegally, irrationally or improperly. The High Court can also make an order of mandamus/mandatory order directing the court or public authority to reconsider the matter.

The application is a two stage process

First, the Claimant needs permission to make the application.

For permission to be granted, the following requirements must be satisfied;

- The claimant must have sufficient interest in the case
- There must be an arguable case
- There must not be undue delay in the application
- Usually alternative remedies should be used first
- The decision must be one capable of challenge by judicial review

A government guide to the judicial review process is available here:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/540607/administrative-court-judicial-review-guide.pdf

For more information about legal aid for judicial review, consider the following guidance.

Legal Aid for Judicial Review

Public Law Project

Legal aid is available for many judicial review cases. In order to obtain legal aid for a judicial review, certain criteria must first be met.

Firstly, the case must be ‘in scope’. Most judicial review cases are in scope for legal aid. In order to be in scope, the judicial review case must also “have the potential to produce a benefit for the individual, a member of the individual’s family or the environment”.

The individual must qualify financially for legal aid. The Ministry of Justice publishes an eligibility calculator on its website, which you can use to check whether someone qualifies for legal aid: <http://civil-eligibility-calculator.justice.gov.uk/>

The case must also satisfy the merits criteria, which are set out in regulations. The merits criteria require a judicial review case to have at least 50 percent prospects of success, and for the likely costs of the case to be proportionate to the likely benefits for the individual. It is also possible to obtain funding where the prospects of success are at least 45 percent, where the case is of “overwhelming importance to the individual” or its substance relates to a breach of the individual’s rights under the European Convention on Human Rights.

Only a legal aid provider with a public law contract with the Legal Aid Agency can apply for legal aid funding for judicial review; individuals cannot apply for funding themselves.

Legal Aid for Family Proceedings

Public Law Project

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’) removed many areas of law, including some areas of family law, from the scope of legal aid. It is not always straightforward to work out what is ‘in scope’ and what is ‘out of scope’. In scope proceedings are listed in Schedule 1: www.legislation.gov.uk/ukpga/2012/10/schedule/1

For cases that are out of scope for legal aid, it may be possible to apply for Exceptional Case Funding (‘ECF’). See below for more detail on ECF.

In scope funding

The civil legal services funded routinely within the scope of legal aid are those set out in Schedule 1 to LASPO. Part 1 of Schedule 1 provides for legal services to be provided in cases where a local authority is considering commencing, or has commenced proceedings relating to the care, supervision and protection of children. Legal aid is also available in cases *related*

to local authority proceedings, for example an application for contact in respect of a child under the care of a local authority, or an application for a special guardianship order where it is an alternative to a care order.

Also in scope for legal aid are cases involving the unlawful removal of a child from the United Kingdom, and cases involving occupation orders, non-molestation orders and injunctions following assault, battery or false imprisonment.

A full list of all in scope family proceedings is set out in Appendix 2 (page 69). In order to qualify for in scope funding an individual must be financially eligible for legal aid. The Ministry of Justice publishes an eligibility calculator for legal aid on its website which you can use to check whether someone qualifies for legal aid: <http://civil-eligibility-calculator.justice.gov.uk/>

The case must also satisfy the merits criteria, which are set out in The Civil Legal Aid (Merits Criteria) Regulations 2013/SI 104: www.legislation.gov.uk/uksi/2013/104/made

Please also see the 2016 amendments to the above regulations:

www.legislation.gov.uk/uksi/2016/781/contents/made

There are different criteria depending on the nature of the proceedings and on the stage the proceedings have reached. However, in order to work out whether someone qualifies for in scope legal aid, the key is to identify whether their case falls within Schedule 1 of LASPO, whether they qualify financially, and to refer them to a solicitor. A family law solicitor with a legal aid contract will be best placed to determine whether an individual's case meets the merits criteria.

Children

Legal aid is also available to children in family proceedings under paragraph 15 of Part 1 Schedule 1.

Domestic violence

Legal services are also provided to victims of domestic violence under paragraph 12 of Part 1 Schedule 1, and in cases where there is a risk of abuse to a child under paragraph 13.

Regulation 33 of The Civil Legal Aid (Procedure) Regulations 2012 specifies the types of evidence of domestic violence which must be provided in support of an application for legal aid: www.legislation.gov.uk/uksi/2012/3098/made

The evidential requirements specified by regulation 33 were the subject of a challenge in *Rights of Women v the Lord Chancellor* [2015] EWHC 35. The Court of Appeal found that the

exclusion of evidence older than 24 months, and the failure to make any provision for victims of financial abuse frustrated the purpose of LASPO and quashed regulation 33 insofar as it was unlawful.

The Lord Chancellor laid new regulations in May 2016 to reflect the Court's finding. To qualify for in scope legal aid under paragraph 12, applicants must be able to provide the following evidence:

- (a) a relevant unspent conviction for a domestic violence offence;
- (b) a relevant police caution for a domestic violence offence given within the sixty month period immediately preceding the date of the application for civil legal services;
- (c) evidence of relevant criminal proceedings for a domestic violence offence which have not concluded;
- (d) a relevant protective injunction which is in force or which was granted within the sixty month period immediately preceding the date of the application for civil legal services;
- (e) an undertaking given in England and Wales under section 46 or 63E of the Family Law Act 1996 2 (or given in Scotland or Northern Ireland in place of a protective injunction)—
 - (i) by the individual ("B") with whom the applicant for civil legal services ("A") was in a family relationship giving rise to the need for the civil legal services which are the subject of the application; and
 - (ii) within the sixty month period immediately preceding the date of the application for civil legal services, provided that a cross-undertaking was not given by A;
- (ea) evidence that B is on relevant police bail for a domestic violence offence;
- (eb) a relevant conviction for a domestic violence offence where B was convicted of that offence within the sixty month period immediately preceding the date of the application for civil legal services;
- (f) a letter from any person who is a member of a multi-agency risk assessment conference confirming that—
 - (i) A was referred to the conference as a victim of domestic violence; and
 - (ii) the conference has, within the sixty month period immediately preceding the date of the application for civil legal services, put in place a plan to protect A from a risk of harm by B;
- (g) a copy of a finding of fact, made in proceedings in the United Kingdom within the sixty month period immediately preceding the date of the application for civil legal services, that there has been domestic violence by B giving rise to a risk of harm to A;
- (h) a letter or report from a health professional who has access to the medical records of A confirming that that professional, or another health professional—
 - (i) has examined A in person within the sixty month period immediately preceding the date of the application for civil legal service; and
 - (ii) was satisfied following that examination that A had injuries or a condition consistent with those of a victim of domestic violence;

(i) a letter from a social services department in England or Wales (or its equivalent in Scotland or Northern Ireland) confirming that, within the sixty month period immediately preceding the date of the application, A was assessed as being, or at risk of being, a victim of domestic violence by B (or a copy of that assessment);

(j) a letter or report from a domestic violence support organisation in the United Kingdom confirming—

(i) that within the sixty month period immediately preceding the date of the application for civil legal services, A had been accommodated in a refuge;

(ii) the dates on which A was admitted to and, where relevant, left the refuge; and

(iii) that A was admitted to the refuge because of allegations by A of domestic violence;

(k) a letter or report from a domestic violence support organisation in the United Kingdom confirming—

(i) that A was, within the sixty month period immediately preceding the date of the application for civil legal services, refused admission to a refuge, on account of there being insufficient accommodation available in the refuge; and

(ii) the date on which A was refused admission to the refuge;

(l) a letter or report from—

(i) the person to whom the referral described below was made;

(ii) the health professional who made the referral described below; or

(iii) a health professional who has access to the medical records of A,

confirming that there was, within the sixty month period immediately preceding the date of the application for civil legal services, a referral by a health professional of A to a person who provides specialist support or assistance for victims of, or those at risk of, domestic violence;

(m) a relevant domestic violence protection notice issued under section 24 of the Crime and Security Act 2010, or a relevant domestic violence protection order made under section 28 of that Act, against B within the sixty month period immediately preceding the date of the application for civil legal services;

(n) evidence of a relevant court order binding over B in connection with a domestic violence offence, which is in force or which was granted within the sixty month period immediately preceding the date of application for civil legal services;

(o) evidence which the Director is satisfied demonstrates that A has been, or is at risk of being, the victim of domestic violence by B in the form of abuse which relates to financial matters, where that evidence dates within the sixty month period immediately preceding the date of, or is dated on the date of, the application for civil legal services.

Despite the changes to regulation 33, there will still be victims of domestic violence who cannot meet the evidential requirements for in scope funding. This may be one factor relevant to whether ECF is available, taking into account all the other facts of the case.

Exceptional Case Funding

Everything which is not within the scope of Schedule 1 LASPO is out of scope and may potentially be funded as an 'exceptional case'. Section 10 of LASPO provides that:

"Civil legal services, other than services described in part 1 of schedule 1, are to be available to an individual under this part if subsection (2) or (4) is satisfied."

Sub-section (4) is only relevant to inquests. Sub-section 10(2) states that this sub-section is satisfied where the Director has made an exceptional case determination in relation to the individual and the services, and has determined that the individual qualifies for the services in accordance with this Part and has not withdrawn either determination. The case must satisfy the same merits, means and any other regulations made under LASPO. But instead of being a type of case listed in Schedule 1, the other qualifying feature is being the subject of an exceptional case determination.

Sub-section 10(3)(a) states that an exceptional case determination is one that finds that it is necessary to make legal services available to an individual because a failure to do so would amount to a breach of his or her Convention rights within the meaning of the Human Rights Act 1998 or because he or she has an enforceable right to such services under EU law. In addition, sub-section 10(3)(b) states that an exceptional case determination will also be made if it is appropriate to do so in the particular circumstances of the individual case in order to avoid a *risk* of a breach of the ECHR or EU law.

When does a right to legal aid arise under the ECHR/EU law?

Since the decision in *Airey v Ireland* (1979) 2 EHRR 305, it has been accepted that some Convention rights may have an associated right to legal aid in some civil cases. A Convention right to civil legal aid is most likely to arise under Articles 6 and 8 ECHR. Article 6 is only engaged where there is a civil right and/or obligation to be determined. Most, if not all, family proceedings engage Article 6 ECHR. In family cases, a right to civil legal aid under Article 8 ECHR will often also arise.

The relevant provision of EU law is Article 47 of the Charter of Fundamental Rights of the European Union. Article 47 states that *"Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice"* and is engaged when the matter for which funding is required falls within the scope of EU law and is unlikely to apply in family cases.

The case of Gudanašviciene

The Lord Chancellor's published Exceptional Funding Guidance ("the Guidance") sets out the test to be applied by the LAA when determining whether a grant of ECF is required. The approach taken in the Guidance was challenged in *Gudanaviciene and Others v Director of Legal Aid Casework and Anor* [2014] EWCA Civ 1622.

The Court of Appeal judgment in *Gudanaviciene* is now a fairly definitive guide to the law concerning when the Convention and/or Charter require legal aid to be made available. The Court referred to a significant body of European and domestic case law in its judgment, but it is unlikely that any of this would now be required to make an application for ECF. The pertinent principles are largely summarised in the judgment, and are set out below.

The critical question under Article 6(1) ECHR is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness (paragraph 56). The test is essentially the same for Article 8 and Article 47 as it is for Article 6, although the Article 8 test is broader than the Article 6(1) test in that it does not require a hearing before a court or tribunal, but only involvement in the decision-making process.

An effective right is one which is *"practical and effective, not theoretical and illusory in relation to the right of access to the courts"* and *"the question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case satisfactorily"* (paragraph 46).

In relation to fairness, the court said *"it is relevant whether the proceedings taken as a whole were fair"*, *"the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through 'in the teeth of all the difficulties' does not necessarily mean that the procedure was fair"* and *"equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent"* (paragraph 46).

Factors relevant to whether ECF is required

Assessing whether Convention rights require funding is effectively a three-way balancing act. The factors to be considered are the legal, factual and procedural complexity of the matter, the importance of what is at stake, and the ability of the applicant to represent themselves without legal assistance. A matter of very great importance to a client (e.g. ceasing contact with a child) might in some cases require funding despite the matter being relatively straightforward and/or having a relatively capable client. Likewise, a really incapable client might need assistance with a relatively trivial and/or straightforward matter.

Applying the ECF criteria in family cases

Complexity:

Legal, factual and procedural complexity are all relevant to whether a grant of ECF is appropriate. An individual is unlikely to be able to conduct cross-examination, to make legal submissions during a final hearing, or be able to obtain expert evidence. In order to make a successful ECF application it is necessary to spell out all the procedural and other complexities to the LAA. The LAA seems to take the approach that the relatively straightforward legal issues in many family cases means that ECF is not required. This approach is incorrect, but it is essential to demonstrate that there are complex steps that must be taken, arguments to be made, or evidence to analyse, in order to show that the complexity requires a grant of funding.

For example, an individual client is also less likely to be able to understand the evidential requirements, or the criteria that their evidence (or their opponent's) must address. In cases in which there are allegations that an applicant represents a risk to a child, the applicant will have to analyse the evidence presented by the other side, to be aware of the test that they are required to meet, and present their own evidence to address that test. The Court of Appeal's comments in relation to the claimant in *Gudanaviciene* are useful in these cases; the Court found that although the issues in her case were essentially factual and this was *"the kind of factual question which the Tribunal would readily be able to determine if all the relevant evidence was placed before it...in order to ensure that all of the relevant evidence was placed before the Tribunal TG will have to be able to identify this key question; and to produce evidence, and make submissions as to present risk"* (paragraph 90).

The importance of the issues at stake:

It should be possible to show that any proceedings affecting a family relationship are of importance to an applicant, and in particular any proceedings which will alter or determine the nature of the relationship an applicant will have with their child will be of vital importance.

The ability of the applicant to present their case effectively:

In family cases, the highly emotive issues will often mean that an applicant for ECF would find it difficult to present their case with the objectivity required, especially where the proceedings concern an applicant's relationship with their children.

Other factors relevant to an applicant's ability to present their case effectively will include their physical and mental health, their level of education, and their ability to communicate

in English. However, an assessment of an applicant's ability to engage in the proceedings should not be limited to these obvious barriers. In the case of 'B', a claimant in *Gudanaviciene*, the Court said "B was wholly unable to represent herself or other family members. It was not simply that she was unable to speak English but that "[s]he did not have the first clue"". It is not necessary for an applicant for ECF to be prevented from engaging with their case by a language barrier or lack of capacity to litigate; it may simply be that they do not have the ability to understand or carry out the steps they need to take in their case.

Making an application:

Applications for ECF do not have to be made by solicitors, but can be made by advocates or by the individual themselves. The Public Law Project has published a guide to accessing ECF as an individual which can be accessed here:

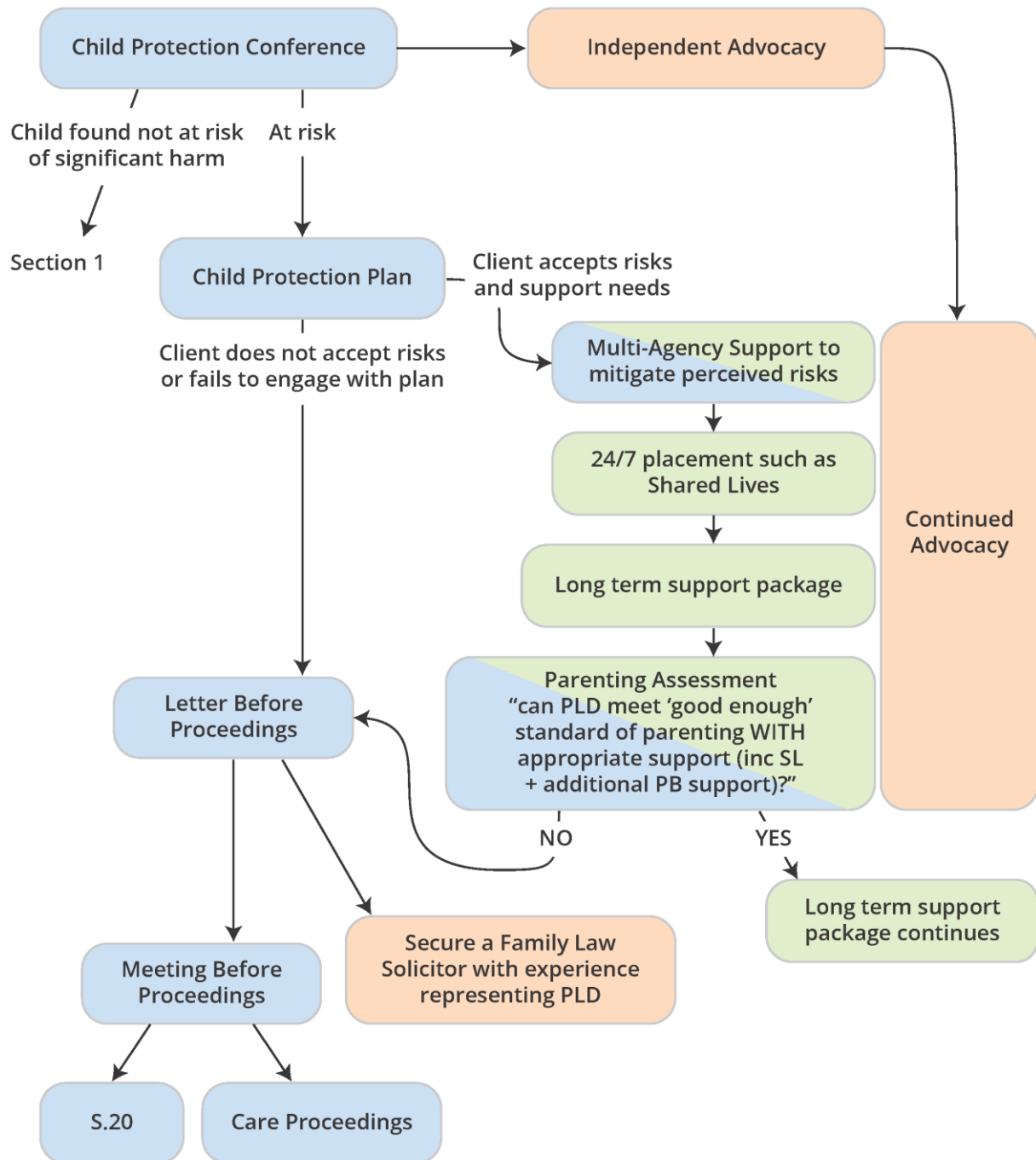
www.publiclawproject.org.uk/resources/254/legal-aid-exceptional-case-funding-ecf-applying-without-the-assistance-of-an-adviser-or-solicitor

Section Two: Child Protection Conferences

Timeline Section 2

Children Services

Adult Services



A child protection conference will be held if there is evidence to suggest a child is suffering or may be at risk of suffering significant harm.

There are four different types of harm highlighted by government guidance:

*Physical Abuse, Emotional Abuse, Sexual Abuse and Neglect.*³⁴

Harm can be caused by the actions of parents / carers, or inaction which results in failure to stop the child coming to harm.³⁵

Fact Sheet from the Family Rights Group on Child protection procedures:

www.frg.org.uk/images/Advice_Sheets/9-child-protection-procedures.pdf

It may be that in spite of appropriate assessment and long-term parenting support, your client is unable to meet the needs of their child and keep them safe from harm. This is likely to fall into the category of neglect by omission.

If there are other perceived risk factors, it may fall into a different category. These are often related to the learning disability itself. The white boxes below highlight extracts from Abigail Bond's Legal Handbook 'Care Proceedings and Learning Disabled Parents'.³⁶

Additional Risk Factors

Choice of Partner

The vulnerability of the learning disabled mother in her choice of a partner, as evidenced by the fact that women with learning disabilities are reported as being four to ten times more likely to experience sexual violence, physical violence and homicide from their partners than other parents without learning disability.³⁷

Parental Childhood History

The ability of all parents to respond to their children is often linked to their having had positive emotional experiences in their own childhoods.³⁸

79.6% of the sample of parents reported abuse or neglect of some form during their childhood, with 51% citing multiple abuse/neglect categories³⁹ ...

³⁴

www.gov.uk/government/uploads/system/uploads/attachment_data/file/592101/Working_Together_to_Safe_guard_Children_20170213.pdf p92-93

³⁵ www.frg.org.uk/images/Advice_Sheets/9-child-protection-procedures.pdf p7

³⁶ 'Care Proceedings and Learning Disabled Parents: A Handbook for Family Lawyers' (Bond) (2014)

³⁷ Ibid p43 with references to McGaw, Scully and Pritchard 'Predicting the Unpredictable? Identifying High-risk versus low risk Parents with Intellectual Learning Disabilities (2010) 34 *Child Abuse and Neglect* 699-710, at p707

³⁸ Ibid., p38

79% of those parents who had suffered childhood abuse had children who were or had been registered on the child protection register (CPR).⁴⁰

Developmental Delay

...it is not uncommon for the local authority to seek to use the child's developmental delay as a factor justifying the child's removal from home on the basis that the developmental delay has arisen as a consequence of learning disabled parenting.⁴¹

Whilst a local authority might seek to rely on any educational progress made by the child who has been placed in foster care, Hedley J warned against such an approach, commenting in *Re L* that it would be 'very surprising indeed' if a child who had been removed from the care of a learning disabled parent into the care of foster parents did not make some progress in the new environment...the point made in *Re L*⁴² ...is that this in itself does not prove that the standard of care provided by the parents was intolerable or inadequate.⁴³

Other risk factors include; Mental Health and Maternal stress.

Child Protection Plan

If the conference concludes the child is likely to be at risk of significant harm a Child Protection Plan will be put together.

What is a child protection plan? Family Rights Group fact sheet for individuals

If the conference has decided that your child needs a child protection plan, everyone at the conference will make recommendations about what is needed for your child to be kept safe in future. This might include, for example, that s/he must not come into contact with someone who is thought to have harmed him or her.

The recommendations of the conference will be set out in as much detail as possible in an outline inter-agency child protection plan, and they will be developed into a full child protection plan after the conference by the lead social worker and their manager and at regular core group meetings. The outline plan should:

³⁹ In a study by McGaw, Shaw and Beckley 'Prevalence of Psychopathology Across a Service Population of Parents With Intellectual Disabilities and Their Children' (2007) 4(1) 'Journal of Policy and Practice in Intellectual Disabilities' p17

⁴⁰ 'Care Proceedings and Learning Disabled Parents: A Handbook for Family Lawyers' (Bond) (2014) p38

⁴¹ Ibid., p43

⁴² *Re L (A Child) (Care: Threshold Criteria)* [2007] 1 FLR 2050

⁴³ 'Care Proceedings and Learning Disabled Parents: A Handbook for Family Lawyers' (Bond) (2014) p43

- identify the things that are likely to cause harm to your child and how s/he can be protected from them;
- ensure your child is kept safe, well cared for and is prevented from suffering further harm; and
- support you and your wider family to protect your child and ensure s/he is well cared for.⁴⁴

If your client accepts these risks and is willing to be supported to change their circumstances, advocate for multi-agency specialist support that is reasonably adjusted to meet your clients learning needs.

Protective Behaviours: www.safety-net.org.uk/protective-behaviours/

Respond: www.respond.org.uk

Survivors Network: www.survivorsnetwork.org.uk

Good practice example

Some clients will require long-term interventions. Some clients may not have a safe home environment and may require 24-hour support such as Shared Lives.

Shared Lives South West, by Jane Bell

Service for Parents with a Learning Disability

Shared Lives South West is able to offer a service to a parent with a learning disability and their child enabling the parent to retain parental responsibility and bring up their child with support.

Trained Shared Lives carers can offer parenting support and guidance to the person with a learning disability as well as meeting their other support needs, and give the person with a learning disability a settled home life with 24 hour family based support on hand. This service would normally be funded through adult social care and Children's Services, through the creation of a joint budget and joint service plan with Shared Lives South West.

If your client does not accept the risks, is unwilling to engage in the child protection plan, or despite appropriate intervention and support, the risk of significant harm remains, the local authority may issue a Letter Before Proceedings.

⁴⁴ www.frg.org.uk/images/Advice_Sheets/9-child-protection-procedures.pdf p17

Letter Before Proceedings

What is a 'letter before proceedings'? (FRG fact sheet for individuals)

If Children's Services decides you should be given a further period of support to improve your parenting, they should send you a letter before proceedings.

This letter should explain that court proceedings are likely but that you are being given a last chance to improve your parenting to avoid your child being removed. It will also:

- set out the concerns about your child's safety
- set out what you need to change or improve in your parenting to make sure your child is safe and to avoid your child being removed from your care
- set out what help you will continue to be given to keep your child safe.⁴⁵

If your client receives a letter before proceedings, secure a family lawyer **specialising in working with parents with learning disabilities** immediately. This letter triggers access to legal aid so your client will not need to pay for legal advice.

Arrange a meeting to help your client go through the letter before proceedings with their appointed solicitor.

Consider the risks identified and the action taken by the local authority to empower the parent to mitigate these risks.

Ahead of the meeting it may be helpful to send the solicitor a copy of the 'Information for Family Lawyers acting for a parent who has a learning disability' (see Appendix 3, page 73).

The information sheet includes a list of useful resources and sets out an overview of the Care Act and the duties and service provisions that may arise from it, covered in section one.

Go through the overview of the Care Act in detail with the family solicitor to ensure the Care Act duties have been met, in addition to the legislation and regulations set out in section one.

Any unmet duties can be raised in the meeting before proceedings.

Hedley J in LBH (A Local Authority) v KJ & Ors [2007] EWHC 2798 (Fam)

"It cannot be the case that...a local authority can fail to put in the support properly required to enable a child to be cared for at home (absent expert evidence that a child could never be

⁴⁵ www.frg.org.uk/images/Advice_Sheets/9-child-protection-procedures.pdf p26

cared for at home because of disability whatever reasonable support was provided) and then use that failure as a grounds for compulsory intervention under Part IV of the Act.”⁴⁶

s20 Agreement

s20 may be used in section one or two to accommodate your client in an appropriate placement such as Shared Lives.

s20 Provision of accommodation for children: general.

(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

- (a) there being no person who has parental responsibility for him;
- (b) his being lost or having been abandoned; or
- (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.⁴⁷

Use of s20 accommodation – Gemma Taylor, Family Barrister

Provision of accommodation of children provided that any person with parental responsibility does not object (s20 (7) Children Act 1989)

A local authority must exercise great care to ensure that their powers under s20 are not used improperly. A local authority must take care to ensure that they have informed consent from the parents at the outset. The parents must have capacity to consent. Care must be taken to ensure that the consent is validly given to the accommodation of the child.

Guidance is given about the accommodation of new born babies by Hedley J in Coventry City Council v C, B, CA and CH [2012] EWHC 2 2190 (Fam); and in Re N (Adoption Jurisdiction) [2015] EWCA Civ 1112

A helpful guide has also been put together by the Transparency project found here: www.transparencyproject.org.uk/press/wp-content/uploads/2016/02/s20guidancefeb16.pdf

This guidance must not be treated as legal advice but information to inform discussions with your client and their solicitor.

⁴⁶ www.familylawweek.co.uk/site.aspx?i=ed1078[21]

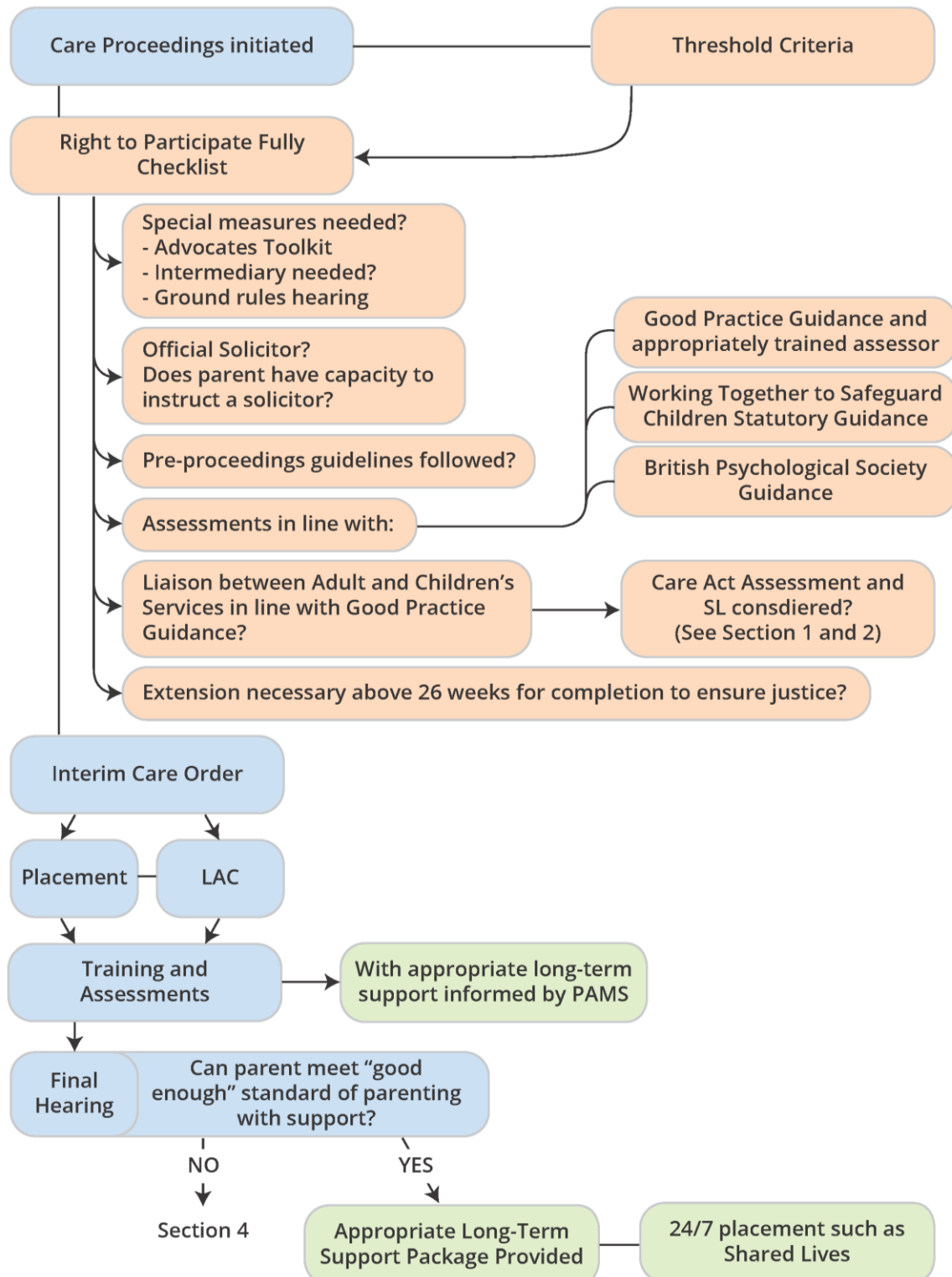
⁴⁷ www.legislation.gov.uk/ukpga/1989/41/section/20

Section Three: Care Proceedings

Timeline Section 3

Children Services

Adult Services



Capacity

This issue is considered at Part 15 – Representation of Protected parties in the Family Proceedings Rules 2010 (FPR)

www.justice.gov.uk/courts/procedure-rules/family/parts/part_15

Definition of a protected party

(FPR) r2.3- “Protected party” defined as a party, or intended party who lacks capacity (within the meaning of the 2005 Act) to conduct proceedings

R15.2

A protected party must have a litigation friend to conduct proceedings on their behalf.

R15(3)

A person may not without the permission of the court take any step in proceedings except (a) filing an application form or (b) applying for the appointment of a litigation friend under r15(6) , until the protected party has a litigation friend.

Mental Capacity Act 2005

There is an assumption that a person has capacity unless it is established that he lacks capacity⁴⁸

S2 (1) “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.”⁴⁹

S3 (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).”

S3 (2) “A person is not to be regarded as unable to retain 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).”

⁴⁸ www.legislation.gov.uk/ukpga/2005/9/section/1

⁴⁹ www.legislation.gov.uk/ukpga/2005/9/section/2

S3 (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.”⁵⁰

Appointment of Official Solicitor

If it is deemed your client lacks the capacity to instruct their solicitor, the Official Solicitor will be invited to act on their behalf. Please see Practice Note dated January 2017 “The Official Solicitor to the Senior Courts: Appointment in Family Proceedings and Proceedings under the inherent jurisdiction in Relation to Adults”.

Information on this service can be found at:

www.gov.uk/government/organisations/official-solicitor-and-public-trustee/about

Threshold Criteria

Gemma Taylor

The threshold criteria must be met to initiate care proceedings and will be considered before an interim care order or a final care order is issued.

Test for threshold criteria applies at the time that the proceedings are issued.

Re B (Care Proceedings: Appeal) [2013] 2FLR 1073

Risk of significant harm must be established on the basis of the evidence and not assumption or speculation about future behaviour. The LA must prove on a balance of probabilities the facts on which it relies by calling witnesses who can speak to the matter first hand but must link the facts upon which it relies with the assertion that the child is at risk, by demonstrating exactly why, on the given set of facts, the child is at risk of significant harm.

The LA must remember society’s willingness to tolerate very diverse standards of parenting.

Re A (Application for Care and Placement orders: Local Authority failings) [2016] 1 FLR 1.

Where the court has decided that the threshold is met according to S31 (2), it has jurisdiction to make care or placement orders and must decide whether to do so in accordance with the child’s best interests, evaluated in accordance with the welfare checklist in S(1)(3).

⁵⁰ www.legislation.gov.uk/ukpga/2005/9/section/3

If the threshold criteria is met and care proceedings are initiated, a number of adjustments may be required to ensure compliance with Article 6 of the European Convention on Human Rights (right to fair trial), as required by The Human Rights Act 1998⁵¹ during care proceedings that involve a parent with a learning disability. These include:

1. Special Measures

NEW- PRACTICE DIRECTION 3AA –Amended Part 3A Family Proceedings Rules coming into force from 27.11.17.

The court has a duty to consider whether the participation of a party is likely to be diminished by reason of vulnerability. If so, they can make a “participation direction” and direct that certain measures be introduced, including the use of intermediaries, live links and devices.

Re A (A Child) [2013] EWHC 3502 (Fam)

Judgment in retrial of a fact finding hearing. Guidance given for such hearings when one or other of the parents suffers from a learning disability.

Baker J referred to his comments in the Kent case and gave the following guidance when dealing with parents who suffer from a learning disability:

(a) There is duty on those acting for the parent(s) to identify their client's need for assistance in responding to questions and giving instructions, which must be considered by representatives at the outset of their instruction. Any need for support must be addressed at the earliest opportunity.

(b) When this is known prior to the outset of proceedings, on issuing, local authorities should draw the issue of competence and capacity to the court's attention. In turn, on the day following issue, the court will give directions for the appointment of a litigation friend. The new PLO envisages that in those circumstances the court should give directions for special measures at the case management hearing to take place by day 12 of the proceedings.

(c) When the issue of capacity and competence is not identified at the outset, it should be addressed fully at the case management hearing. At that hearing, those representing the parents should apply for special measures, where the case for such measures can be made out without any expert advice. Alternatively, where expert advice is necessary to identify the existence or extent of the learning difficulties, they should make an application in accordance with Part 25 of the FPR for an expert to carry out an immediate assessment of the capacity and competence of the party.

(d) The legal representatives should normally by the date of the case management hearing

⁵¹ www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/5

identify an agency to assist their client to give evidence through an intermediary or otherwise if the court concludes that such measures are required. If the court is satisfied that an expert report is necessary to determine whether the party lacks capacity or competence and/or as to the extent of any special measures required, it may direct a further case management hearing to take place once the expert has reported so that detailed directions can then be given for the instruction of an intermediary and/or such other assistance as may be necessary.

(e) So far as funding is concerned, there is a distinction between the cost of obtaining a report from an expert as to capacity and competence, and the cost of providing services from an intermediary. The former will, subject to the approval of the legal aid agency, whereas the latter, as a type of interpretation service, will be borne by the Court Service. Those representing the relevant party should address these funding issues at the earliest opportunity. They should obtain prior approval from the legal aid agency for the instruction of the expert and, as soon as possible, give notice to Her Majesty's Courts and Tribunal Service that the services of an intermediary are likely to be required.

Legal advocates must consider the advocates gateway toolkit for vulnerable witnesses:
www.theadvocatesgateway.org

2. Time Limits in Care Proceedings

s14 Children and Family Act 2014 introduced the 26 week time limit for completing care proceedings- by amending s32 Children Act 1989.

There are circumstances in which an extension to the 26 weeks is available. This is to ensure compliance with Article 6 European Convention on Human Rights, as required by The Human Rights Act 1998⁵² and should be explored with the legal representative of a parent with a learning disability.

Re S (A Child) [2014] EWCC B44 (Fam)

Judgment by President in care proceedings in which the mother applied for an assessment under s 38(6) of the Children Act 1989. Consideration of Children and Families Act 2014 s 38(7A) and (7B) and the scope for extending the 26 week time limit. Application dismissed.

This judgment provides useful guidance from the President concerning expert evidence and scope for extending the 26 week time limit in care proceedings in the light of the introduction of the Children and Families Act.

Interim Care Order – test for removal

Usual Interim placement options:

⁵² www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/5

- Placement parent and child together at home
- Placement parent and child in foster care
- Placement parent and child in residential unit
- Child in foster care alone

S38(1) Children Act 1989

Re G (Minors) (Interim Care Order) [1993] 2FLR 839

An ICO is an impartial step to preserve the status quo pending the final hearing

Re H (A child) (Interim Care Order) [2002] EWCA civ1932

The court should abstain from premature determination of the case unless the child's welfare demands it. Where the effect of an ICO is to remove a child from his lifelong parents, such a separation should only be contemplated if the child's safety demands immediate separation.

Support Options

Shared Lives UK network is a resource to help support parents with learning disabilities. The parent and child move into the home of a carer. It allows the parent to parent and retain their legal parental responsibility, thus respecting their Article 8 right to family life. Other support in our area includes Mencap and the Sussex organisation who tend to work in the parent's home. Recently in Brighton, The Grace Eyre Foundation provided a Foster Carer who moved in to a house close to the parents, to support them as and when required.

If appropriate, explore whether suitable support options exist in your local area that can be put forward for your client and their child as an interim placement while assessments into parenting capacity (with support) are undertaken.

Assessments

Care Act assessment:

See Section 1 and 2 of this resource

Good practice:

“Good Practice Guidance for Clinical Psychologists when Assessing Parents with Learning Disabilities 2011”⁵³

S38(6) Children Act- test for further assessment (including residential unit)

See separate summary of the law (s38(6)) dated January 2017.

Good Practice Guidance on Working with Parents with a Learning Disability

All assessments must be in line with Good Practice Guidance.

This highlights the necessary liaison required between children’s services and adult social care, appropriate assessments and long-term support (examples set out in Section 1 and 2 of this resource).

Assessments should consider if a parent with a learning disability can meet the ‘good enough’ standard of parenting with support.

1.4.1 A need for long-term support does not mean that parents cannot look after their children. Some parents with learning disabilities will only need short-term support, such as help with looking after a new baby or learning about child development and childcare tasks. Others, however, will need on-going support.⁵⁴

If the local authority fails to follow good practice and meet its legal duties, help your client to discuss the legal challenges available to them with their legal representative.

⁵³ www.bailii.org/uk/cases/UKSC/2013/33.html

⁵⁴ www.bristol.ac.uk/media-library/sites/sps/documents/wtpn/2016%20WTPN%20UPDATE%20OF%20THE%20GPG%20-%20finalised%20with%20cover.pdf p20

Human Rights Issues and Judicial Review and Care Proceedings

Gemma Taylor

Re L (Care Proceedings: Human Rights Claims) [2003] 2 FLR 160 and Re V (A Child) (Care Proceedings : Human Rights Claims) [2004] 1 FLR 944

Recently endorsed by the Court of Appeal in Re G (a child) 2017- decision made on 8.11.17

A human rights complaint under HRA 1998 s7 can be dealt with in the proceedings themselves.

Where there is a complaint about the local authority care plan, judicial review is probably not appropriate because, although it may be possible for the court to quash the plan, it may not be possible to re-write it.

A challenge to the plan within care proceedings, supported by an appropriate Human Rights Act claim, is more appropriate.

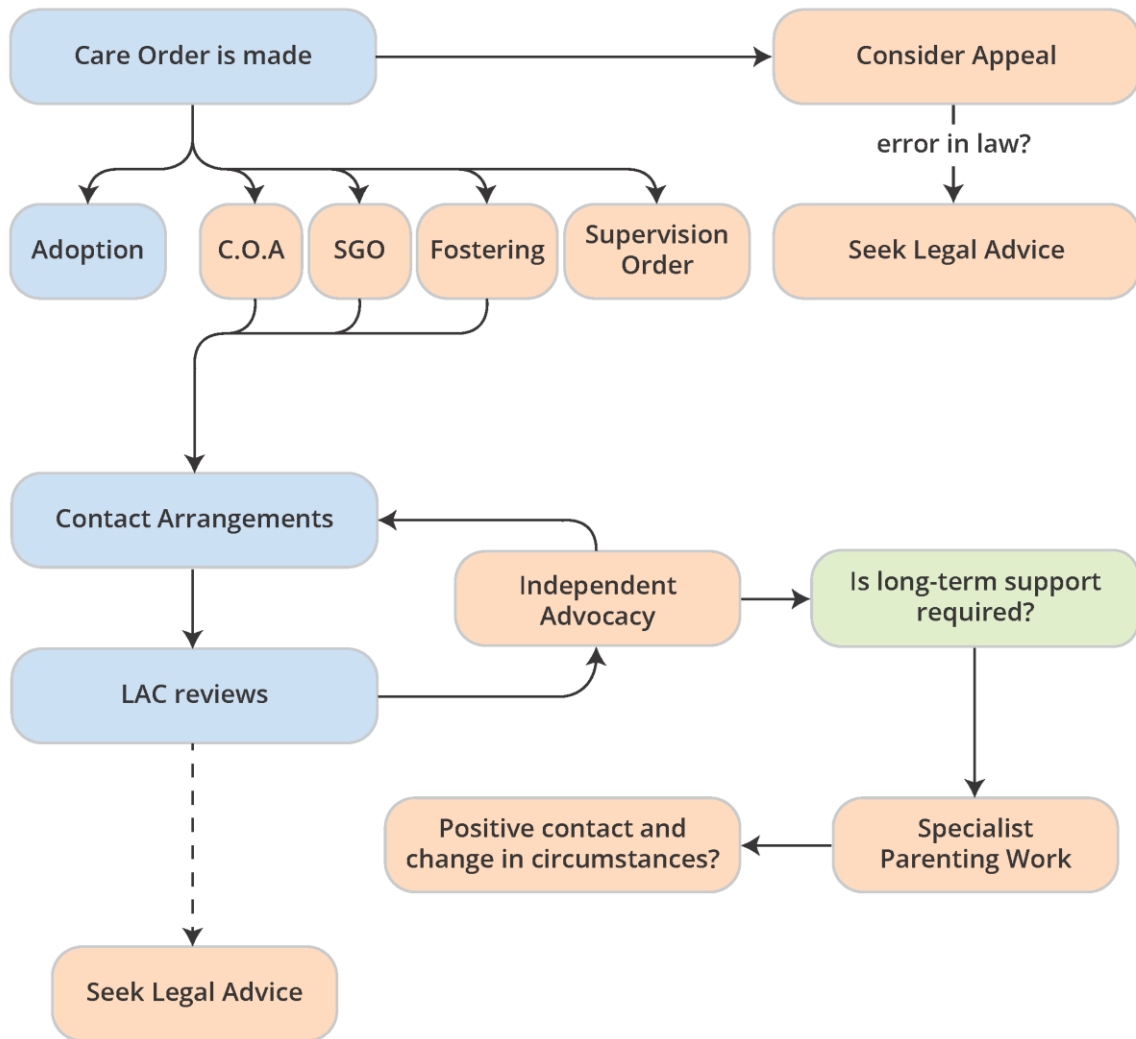
If a parent with a learning disability can meet the good enough standard of parenting with support this should be provided.

Section Four: Post Proceedings Options

Timeline Section 4

Children Services

Adult Services



Final Care Order

After appropriate assessments have been conducted during the interim care order period, the court will be asked to make a final decision.

Final Order Test

s31 Children Act 1989

www.legislation.gov.uk/ukpga/1989/41/section/31

s31 Care and Supervision

(1) On the application of any local authority or authorised person, the court may make an order—

- (a) placing the child with respect to whom the application is made in the care of a designated local authority; or
- (b) putting him under the supervision of a designated local authority

(2) A court may only make a care order or supervision order if it is satisfied—

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) that the harm, or likelihood of harm, is attributable to—
 - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
 - (ii) the child's being beyond parental control.⁵⁵

Where the court has decided that the threshold is met according to S31 (2), it has jurisdiction to make care or placement orders and must decide whether to do so in accordance with the child's best interests, evaluated in accordance with the welfare checklist in S(1)(3) shown in the box below.

Welfare checklist

Children Act S1(3)

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;

⁵⁵ www.legislation.gov.uk/ukpga/1989/41/section/31

- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.⁵⁶

Adoption and Children Act 2002 S1(4)

s1 Considerations applying to the exercise of powers

(4) The court or adoption agency must have regard to the following matters (among others)—

- (a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
- (b) the child's particular needs,
- (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
- (d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
- (e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,
- (f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—
 - (i) the likelihood of any such relationship continuing and the value to the child of its doing so,
 - (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
 - (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.⁵⁷

RE B (A child) (Care proceedings: Threshold criteria) [2013] UKSC 33;

The Supreme Court reiterated that adoption can only occur if the parents are unwilling, or deemed by judicial process to be unable to discharge their responsibilities towards the child and that, accordingly, the making of a care order with a care plan for adoption is an order of the last resort requiring a high degree of justification to be made only in exceptional

⁵⁶ www.legislation.gov.uk/ukpga/1989/41/section/1

⁵⁷ www.legislation.gov.uk/ukpga/2002/38/section/1

circumstances where nothing else will do. The order should only be made if it is proportionate⁵⁸ and no other course is possible in the child's interests. See paragraphs 74, 76, 77, 82, 104, 130, 135, 145, and 198.

The care order: the correct legal test

73. I turn to consider the first question, which involves first identifying the correct test. The effect of section 1(1) of the 1989 Act is that, when considering whether to make a care order, the court must treat the welfare of the child as the paramount consideration, and this involves taking into account in particular the factors identified in section 1(3), which includes, in para (g), the range of powers available to the court. As Lady Hale (who knows more about this than anybody) says in para 194, the 1989 Act was drafted with the Convention in mind; in any event, with the coming into force of the Human Rights Act 1998 ("the 1998 Act"), the 1989 Act must now, if possible, be construed and applied so as to comply with the Convention. So too the Adoption and Children Act 2002 ("the 2002 Act") must, if possible, be construed and applied so as to comply with the Convention. It also appears to me that the 2002 Act must be construed and applied bearing in mind the provisions of the UN Convention on the Rights of the Child 1989 ("UNCRC").
74. A care order in a case such as this is a very extreme thing, a last resort, as it would be very likely to result in Amelia being adopted against the wishes of both her parents.
75. As already mentioned, it is clear that a judge cannot properly decide that a care order should be made in such circumstances, unless the order is proportionate bearing in mind the requirements of article 8.
76. It appears to me that, given that the Judge concluded that the section 31(2) threshold was crossed, he should only have made a care order if he had been satisfied that it was necessary to do so in order to protect the interests of the child. By "necessary", I mean, to use Lady Hale's phrase in para 198, "where nothing else will do". I consider that this conclusion is clear under the 1989 Act, interpreted in the absence of the Convention, but it is put beyond doubt by article 8. The conclusion is also consistent with UNCRC.
77. It seems to me to be inherent in section 1(1) that a care order should be a last resort, because the interests of a child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests. That is reinforced by the requirement in section 1(3)(g) that the court must consider all options, which carries with it the clear implication that the most extreme option should only be adopted if others would not be in her interests. As to article 8, the Strasbourg court decisions cited by Lady Hale in paras 195-198 make it clear that such an order can only be made in "exceptional circumstances", and that it could only be justified by "overriding requirements pertaining to the child's welfare", or, putting the same point in slightly different words, "by the overriding necessity of the interests of the child". I consider that this is the same as the domestic test (as is

⁵⁸ www.bailii.org/uk/cases/UKSC/2013/33.html

evidenced by the remarks of Hale LJ in *Re C and B* [2001] 1 FLR 611, para 34 quoted by Lady Hale in para 198 above), but it is unnecessary to explore that point further.

78. The high threshold to be crossed before a court should make an adoption order against the natural parents' wishes is also clear from UNCRC. Thus, *Hodgkin and Newell, Implementation Handbook for the Convention on the Rights of the Child*, Unicef, 3rd ed (2007), p 296, state that "there is a presumption within the Convention that children's best interests are served by being with their parents wherever possible". This is reflected in UNCRC, which provides in article 7 that a child has "as far as possible, the right to know and be cared for by his or her parents", and in article 9, which requires states to 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".
79. Having identified the test, the other aspect of the first question is whether the Judge purported to apply that test in this case. In my view, he did, or, to put it at its lowest, his conclusions were expressed in a way which makes it clear that he considered that the test was satisfied. In the passage to which I have already referred, quoted by Lord Wilson in para 22, the Judge said that he could not see "any sufficiently reliable way that [he could] fulfil [his] duty to [Amelia] to protect her from harm and still place her with her parents", and he immediately went on to explain that this was despite the fact that "this court strives to promote" her relationship with her parents and their family life together. He also described adoption as "the only viable option" for Amelia's future care. As a matter of ordinary language, it seems to me clear that the Judge was there applying the test laid down by the Strasbourg court, and concluding that it was satisfied.

Re BS (Children) [2013] EWCA Civ 1146

Munby P considered *Re B* and stated as follows;

25. Implicit in all this are three important points emphasised by Lord Neuberger in *Re B*.
26. First (*Re B* paras 77, 104), although the child's interests in an adoption case are paramount, the court must never lose sight of the fact that those interests include being brought up by the natural family, ideally by the natural parents, or at least one of them, unless the overriding requirements of the child's welfare make that not possible.
27. Second (*Re B* para 77), as required by section 1(3)(g) of the 1989 Act and section 1(6) of the 2002 Act, the court "must" consider all the options before coming to a decision. As Lady Hale said (para 198) it is "necessary to explore and attempt alternative solutions". What are these options? That will depend upon the circumstances of the particular cases. They range, in principle, from the making of no

order at one end of the spectrum to the making of an adoption order at the other. In between, there may be orders providing for the return of the child to the parent's care with the support of a family assistance order or subject to a supervision order or a care order; or the child may be placed with relatives under a residence order or a special guardianship order or in a foster placement under a care order; or the child may be placed with someone else, again under a residence order or a special guardianship order or in a foster placement under a care order. This is not an exhaustive list of the possibilities; wardship for example is another, as are placements in specialist residential or healthcare settings. Yet it can be seen that the possible list of options is long. We return to the implications of this below.

28. Third (*Re B* para 105), the court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer. So "before making an adoption order ... the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support." In this connection it is worth remembering what Hale LJ had said in *Re O (Supervision Order)* [\[2001\] EWCA Civ 16](#), [\[2001\] 1 FLR 923](#), para 28:

"It will be the duty of everyone to ensure that, in those cases where a supervision order is proportionate as a response to the risk presented, a supervision order can be made to work, as indeed the framers of the Children Act 1989 always hoped that it would be made to work. The local authorities must deliver the services that are needed and must secure that other agencies, including the health service, also play their part, and the parents must co-operate fully."

That was said in the context of supervision orders but the point is of wider application.

29. It is the obligation of the local authority to make the order which the court has determined is proportionate work. The local authority cannot press for a more drastic form of order, least of all press for adoption, because it is unable or unwilling to support a less interventionist form of order. Judges must be alert to the point and must be rigorous in exploring and probing local authority thinking in cases where there is any reason to suspect that resource issues may be affecting the local authority's thinking.

If your client is unable to meet the 'good enough' standard of parenting with support, a care order will be sought.

Help your client to explore what options are available in the circumstances with their legal representative.

The cases of *Re B* (UKSC 2013) and *Re BS* {2013} EWCA Civ 1146 established that the court must consider all the options before coming to a decision. And the Local Authority evidence

must contain an evaluation of all of the options that are realistically possible and must contain an analysis of the arguments for and against each option

A care order other than adoption may facilitate contact so the family can retain links going into the future.

Contact

Children's Act 1989

s34 Parental contact etc. with children in care

(1) Where a child is in the care of a local authority, the authority shall (subject to the provisions of this section) [and their duty under section 22(3)(a)] [or, where the local authority is in Wales, under section 78(1)(a) of the Social Services and Well-being (Wales) Act 2014] allow the child reasonable contact with—

- (a) his parents;
- (b) any guardian [or special guardian] of his;
[(ba) any person who by virtue of section 4A has parental responsibility for him;]
- (c) where there was a [child arrangements] order in force with respect to the child immediately before the care order was made, [any person named in the child arrangements order as a person with whom the child was to live]; and
- (d) where, immediately before the care order was made, a person had care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person.⁵⁹

The LA shall allow reasonable contact between a child in care and their parents. A court may make an order authorising the LA to refuse to allow contact, pursuant to s34 (4)

s34 (4) On an application made by the authority or the child, the court may make an order authorising the authority to refuse to allow contact between the child and any person who is mentioned in paragraphs (a) to (d) of subsection (1) and named in the order.⁶⁰

⁵⁹ www.legislation.gov.uk/ukpga/1989/41/section/34

⁶⁰ Ibid

Grounds for Appeal?

Where an appeal court is asked to review a discretionary determination based on the facts, the question is simply whether or not the trial judge was “wrong” (Re B (A Child) [2013] 2 FLR 1075)

From Lay Bench and District Judge- appeal to Circuit Judge

From Circuit Judge appeal to High Court Judge

From High Court Judge, appeal to Court of Appeal

From Court of Appeal, appeal to Supreme Court

Contact Following Court Order

2.1.6 Local authorities should promote contact with family members for children who are the subject of care orders, unless the court has given them permission to refuse contact. Children’s wishes and feelings about contact with their family should be taken into account, including the venue and timing of contact. In the majority of cases, it will be in a child’s best interests for them to maintain links with their family, however occasional this contact may be and even where there is no prospect of the child returning to their family. It is in children’s best interests if their parents are supported to avoid conveying negative and/or contradictory messages about substitute carers. Continuing contact with siblings, grandparents and other family members is usually in a child’s best interests, and should be promoted whenever it is in the child’s best interests.⁶¹

LAC Reviews

If your client retains parental responsibility they will be invited to LAC reviews.

Independent advocacy is a legal requirement (see section one) and is likely to be essential in assisting your client to engage fully in this process where contact will be reviewed.

Contact for Children in Care - Family Rights Group Advice Sheet

‘Contact’ means visits, overnight stays, letters, phone calls, the exchange of photos, and any other ways that children and their families can keep in touch, including electronically, for example skype, email, messaging or texts.

Parental responsibility means the legal right to make decisions about how a child is raised. Those who have parental responsibility (PR) include: mothers; fathers who have been married to the mother at any time since the birth of the child or are jointly registered on the birth certificate as the father (after 1.12.03) or have acquired PR by formal agreement with the mother or by court order; anyone who has a residence order, child arrangements order (saying who the child should live with), a special guardianship order or

⁶¹ Good Practice Guidance on Working with parents with a learning disability (WTPN update) (2016) p25

adoption order in their favour on the child; guardians; step-parents who have acquired PR by formal agreement or court order.⁶²

For more information about parental responsibility, see FRG advice sheet

Parental Responsibility: www.frg.org.uk/need-help-or-advice/advice-sheets

Care Act Assessment

Request a Care Act assessment (see section one) on behalf of your client if they consent to seeking support. This will assess any continuing individual support needs as well as their parental responsibilities where support may be required to facilitate contact sessions in line with their wishes.

Specialist Parenting Support

If your client is open to further support and specialist parenting training, advocate for this under the Care Act duties (see section one).

Specialist intervention and long term support may result in a change in circumstances that open up the opportunity to apply for additional contact.

Additional Contact

Advocate for additional contact on behalf of your client if requested. Collate any evidence of a change in circumstances and request the notes from contact sessions to support your claim if positive.

It may be possible to agree this within the LAC process, depending on the court order.

Request a formal contact review with a decision in writing.

If your client is unhappy with the decision or their treatment during this process you can support them to make a complaint, highlighting their requests for consideration.

Highlight Care Act duties and Good Practice Guidance.

www.frg.org.uk/images/Advice_Sheets/25-challenging-decisions-and-making-complaints.pdf

Legal Aid

Legal aid may be available to your client so they can seek advice and representation at this stage.

Discharge of Care Order (test)

S39(1) Children Act 1989

www.legislation.gov.uk/ukpga/1989/41/section/39

A care order may be discharged on the application of any person with parental responsibility for the child, the child themselves or the designated local authority. In

⁶² www.frg.org.uk/images/Advice_Sheets/14-contact-for-children-in-care.pdf p2

deciding the application, the court must apply the principle of the paramountcy of the child's welfare and have regard to the matters on the welfare checklist. The person seeking to have the care order discharged has the burden of proving that the welfare of the child requires the revocation of the order.

Re S (Discharge of care order) 1995 2 FLR 639

Re MD and TD (Minors) (No 2) [1994] Fam Law 489

Revocation of Placement Order (test)

Adoption and Children Act s24(2) and (3)

www.legislation.gov.uk/ukpga/2002/38/section/24

s24 Revoking placement orders

- (1) The court may revoke a placement order on the application of any person.
- (2) But an application may not be made by a person other than the child or the local authority authorised by the order to place the child for adoption unless—
 - (a) the court has given leave to apply, and
 - (b) the child is not placed for adoption by the authority.
- (3) The court cannot give leave under subsection (2)(a) unless satisfied that there has been a change in circumstances since the order was made.
- (4) If the court determines, on an application for an adoption order, not to make the order, it may revoke any placement order in respect of the child.⁶³

If a parent applies to revoke a placement order, leave is required. This is a two stage process; the court must first determine whether there has been a change of circumstances sufficient to justify reopening the issue, and if so it must then exercise its discretion to determine whether leave to apply should be granted.

The test for whether there has been a change of circumstances is the same under s24 and s47.

The Court of Appeal considered this in the case of *Re B-S* and endorsed the comments of Wall LJ in the case of *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616

31. Furthermore, in our judgment, the importation of the word "significant" puts the test too high. Self-evidently, a change in circumstances can embrace a wide range of different factual situations. Section 47(7) does not relate the change to the circumstances of the parents. The only limiting factor is that it must be a change in circumstances "since the placement order was made". Against this background, we do not think that any further definition of the change in circumstances involved is either possible or sensible.
32. We do, however, take the view that the test should not be set too high, because, as this case demonstrates, parents in the position of S's parents should not be

⁶³ www.legislation.gov.uk/ukpga/2002/38/section/24

discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable. We therefore take the view that whether or not there has been a relevant change in circumstances must be a matter of fact to be decided by the good sense and sound judgment of the tribunal hearing the application.

See also Re W(a child), Re H (A child) [2013] EWCA Civ 1177 at paragraphs [20]-[23]

s47 Adoption Children Act 2001 Leave to oppose an Adoption order

The relevant statute is the Adoption and Children Act 2002 section 47;

(5) A parent or guardian may not oppose the making of an adoption order under the second condition without the court's leave.

...

(7) The court cannot give leave under subsection (3) or (5) unless satisfied that there has been a change in circumstances since the consent of the parent or guardian was given or, as the case may be, the placement order was made."

In Re B – S [2013] EWCA 1146; [2014] 1 WLR 563, the Court of Appeal determined:

"11. the crucial effect of a parent being given leave to oppose under section 47(5): not merely is the parent able to oppose the making of an adoption order, but the parent, notwithstanding the making of the earlier placement order, is entitled to have the question of whether parental consent should be dispensed with considered afresh and, crucially, considered in the light of current circumstances (which may, as in the present case, be astonishingly different from those when the placement order was made).

"12. ... on an application under section 47(5) the child's welfare *is* paramount: *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 2 FLR 1069, *M v Warwickshire County Council* [2007] EWCA Civ 1084, [2008] 1 FLR 1093.

Unlike leave to apply to revoke a placement order, leave to oppose the adoption of a child comes under Adoption Children Act 2001 s1(7), and the paramountcy principle at s1(2) applies.

Stay Connected with other professionals and Good Practice

The **Working Together with Parents Network** supports professionals who work with parents who have learning disabilities/difficulties. Members include parents and carers with learning disabilities/difficulties and professionals from the social care, health, independent advocacy and legal sectors. The Network aims to spread positive practice and to promote policy change, so that parents with learning disabilities/difficulties and their children are treated fairly and can get better support. www.wtpn.co.uk⁶⁴

Exceptional case funding

If at any point during this process your client is without legal advice and representation you may be able to assist them in applying for exceptional case funding.

Public Law Project

Exceptional case funding (ECF) can be provided for cases which are out of scope for legal aid, where a failure to provide legal aid would breach, or would risk breaching, an individual's rights under the European Convention of Human Rights (ECHR).

It is possible to apply for ECF either through a legal aid provider, or as an individual.

ECF cases must meet the same financial eligibility and merits requirements as in scope legal aid cases. In addition, the applicant must be able to show that failure to grant funding would be a breach of their rights under the European Convention of Human Rights.

ECF criteria

A right to civil legal aid under the ECHR is most likely to arise under Articles 6 and 8 ECHR. Article 6 is only engaged where there is a civil right and/or obligation to be determined. Most, if not all, family proceedings engage Article 6 ECHR.

The critical factors relevant to whether ECF is required are the importance of the issues at stake, the complexity of the procedural, legal and evidential issues, and the ability of the individual to represent themselves without legal assistance.

⁶⁴ Good Practice Guidance on Working with parents with a learning disability (WTPN update) (2016) p70

Practicalities in applying for ECF

The Legal Aid Agency (LAA) publishes guidance on how to apply for ECF on its website: www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding

Applicants should normally fill out form ECF1, although the LAA's guidance states that this is not strictly required. The form has been designed to be filled out by a legal aid provider, and it is worth bearing in mind the following:

- At the top of the first page, there is a box marked 'Urgent Application'. Tick this whenever you want the application to be considered in less than 20 working days.
- On the first page, if you do not have a legal aid contract, or if you are not proposing to represent the client in the matter for which you are applying for funding, do not fill in the section headed 'Provider Details'.
- On the lower half of the page two, the form requests reasons why the 'effective administration of justice test' is met – this is only necessary if you are applying for an individual case contract so that you can handle this case yourself, and will not be relevant if you are assisting someone to make an individual application.
- Page three is only relevant if you are a legal aid provider applying for Legal Help in order to investigate the merits of making an ECF application, i.e. you cannot determine without further investigative work whether or not your client meets the ECF criteria. Unless this is the case, do not fill in this section.

Applicants should also try to fill out the relevant 'normal' legal aid forms if possible. For work where there are no proceedings (for instance, advising upon and making an application for a child arrangements order) this is form CW1. For representation in court proceedings, form CIV APP 1 and the relevant means forms (either CIV MEANS1 or CIV MEANS2).

Appendix 1: Requesting a Care Act Assessment template letter

(Address of adult social services)

(Date)

Dear Sir / Madam

Re (add name, DOB and address of the person needing assessment)

I am an independent advocate for **(name)**, a person with a learning disability. It has come to our attention that s/he has needs that fall within the eligibility criteria for care and support provided by social services.

Background

Details relating to the person needing care. Information to include:

- Learning disability (specific)
- Physical disabilities
- Are they known to social services
- History of vulnerability
- Current situation

Please would you arrange an URGENT assessment under the Care Act 2014.

We are of the view that due to **(name)**'s impairment s/he is unable to achieve two or more of the following :

(Please select two from the list below and delete those that are irrelevant. Also add a little blurb about why they are relevant.)

- (a) managing and maintaining nutrition;
- (b) maintaining personal hygiene;
- (c) managing toilet needs;
- (d) being appropriately clothed;
- (e) being able to make use of the adult's home safely;
- (f) maintaining a habitable home environment;
- (g) developing and maintaining family or other personal relationships;
- (h) accessing and engaging in work, training, education or volunteering;
- (i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and
- (j) carrying out any caring responsibilities the adult has for a child.

This is having significant impact on her/his life.

We would appreciate your urgent attention and ask that the assessment be carried out within two weeks of this request.

Please liaise with me when arranging appointments, as the nature of **(name)**'s disability can cause her/him not to engage.

Yours faithfully

(Your name and organisation)

Appendix 2: Family proceedings in scope for legal aid

LASPO Provision	Nature of legal issue in-scope	Annex C: Detailed explanatory note for Part 1 of Schedule 1,
Sched 1 Part 1 Para 1(1) Civil legal services provided in relation to—	s25 Children Act 1989 secure accommodation orders	<p><i>Paragraph 1</i> brings within scope civil legal services in relation to certain orders and proceedings relating to the intervention of a local authority in the care, supervision and protection of a child.</p> <p><i>Paragraph 1(1)</i> lists the types of cases involving care, supervision and protection of children that are to be within scope. These include where the local authority is considering commencing, or has commenced, care or supervision proceedings under Part IV of the Children Act 1989 in respect of a child, proceedings for a child assessment order or proceedings for an emergency protection order under Part V of the Children Act 1989, and adoption cases under the Adoption and Children Act 2002. So, for example, legal aid will be available for parents where a local authority is seeking to take their child into care.</p>
	s31 Children Act 1989 Care and supervision orders	
	s34 Children Act 1989 Contact with child in care	
	s39 Children Act 1989 Discharge and variation of care and supervision orders	
	s43 Children Act 1989 Child Assessment Orders	
	s44 Children Act 1989 Emergency Protection Orders	
	Sched 2 para 19 Children Act 1989 Arrangement to assist children to live abroad	
	s8 Crime and Disorder Act 1998 Parenting orders	
	s11 Crime and Disorder Act 1998 Child safety orders	
	s21 Adoption and Children Act 2002 Placement orders	
	s26 Adoption and Children Act 2002 Contact with child where agency authorised to place for adoption/under 6 weeks and agency places for adoption	
	s36 Adoption and Children Act 2002 Application for leave to remove child from a person's custody	
	s46 Adoption and Children Act 2002 Adoption orders	
	s84 Adoption and Children Act 2002 Order giving parental responsibility to people intending to adopt under law of country/territory outside British Isles	
Sched 1 Part 1 Para 1(2) Civil legal services provided in relation to an order under an enactment made— <ul style="list-style-type: none"> a) as an alternative to an order mentioned in sub-paragraph (1), or b) in proceedings heard together with proceedings relating to such an order. 	N/A	<p><i>Paragraph 1(2)</i> brings within the scope of civil legal aid services for cases related to those set out at paragraph 1(1); that is, where an order is sought as an alternative to one of those orders, or for proceedings heard together with proceedings relating to such an order. So, for example, an application for a special guardianship order in respect of a child who is the subject of a care order application by a local authority will be in scope, if the two proceedings are to be heard together <u>or the special guardianship order is an alternative to the care order.</u></p>
Sched 1 Part 1 Para 10 (1) Civil legal services	s8(1) Children Act 1989 Prohibited Steps Order	<p><i>Paragraph 10(1)</i> brings within the scope of civil legal aid</p>

<p>provided to an individual in relation to the following orders and requirements where the individual is seeking to prevent the unlawful removal of a related child from the United Kingdom or to secure the return of a related child who has been unlawfully removed from the United Kingdom—</p> <p>For the purposes of this paragraph, a child is related to an individual if the individual is the child's parent or has parental responsibility for the child.</p>	s33 Family Law Act 1986 Disclosure of the child's whereabouts	<p>services provided for an individual in relation to any of a list of specified orders and requirements where the individual is seeking to prevent the unlawful removal from the United Kingdom of a child to whom the individual is related. It also provides that civil legal services may be made available to an individual who is seeking the return of a related child who has been unlawfully removed to a place within the United Kingdom.</p> <p>A typical situation would be where a child resides with one parent pursuant to a residence order and there are settled arrangements for staying contact with the 'non-resident' parent, the child is collected by the 'non-resident' parent but is not returned and there is concern they may remove the child from the United Kingdom. Legal aid may be made available for the resident parent in relation to the orders or requirements to prevent the removal which are listed in sub-paragraph (1)(a) to (c). A similar situation within the UK would be where the non-resident parent does not return the child to the resident parent after a period of otherwise agreed contact has ended.</p>
	s34 Family Law Act 1986 Order for child's return	
	s37 Family Law Act 1986 Requirement to surrender passport issued to or containing particulars of child	
<p>Sched 1 Part 1 Para 10 (2) Civil legal services provided to an individual in relation to the following orders and applications where the individual is seeking to secure the return of a related child who has been unlawfully removed to a place in the United Kingdom—</p> <p>For the purposes of this paragraph, a child is related to an individual if the individual is the child's parent or has parental responsibility for the child.</p>	s8(1) Children Act 1989 Prohibited Steps Order	<p><i>Paragraph 10(2)</i> brings within the scope of civil legal aid certain services provided to an individual seeking to secure the return of a related child who has been unlawfully removed to a place in the United Kingdom.</p>
	s27 Family Law Act 1986 Application for registration of order relating to the child	
	s33 Family Law Act 1986 Disclosure of the child's whereabouts	
	s34 Family Law Act 1986 Order for child's return	
<p>Sched 1 Part 1 Para 11 (1) Civil legal services provided in relation to home rights, occupation orders and non-molestation orders under Part 4 of the Family Law Act 1996.</p> <p>(2) Civil legal services provided in relation to the following circumstances arising out of a family relationship: (a) an injunction following</p>	s30 Family Law Act 1996 Rights concerning home where one spouse or civil partner has no estate or interest	<p><i>Paragraph 11</i> refers to civil legal services for cases where a person is seeking protection from domestic violence. 851. <i>Sub-paragraphs (1) and (2)</i> list the types of cases that are to be within scope. They cover cases where a person is seeking a civil remedy specifically to provide protection from domestic violence, in the form of an order under Part 4 of the Family Law</p>
	s33 Family Law Act 1996 Occupation orders where applicant has no estate or interest	
	s42 Family Law Act 1996 Non-molestation orders	

assault, battery or imprisonment (b)the inherent jurisdiction of the High Court to protect an adult		Act 1996 (sub-paragraph (1)) or an injunction following assault, battery or false imprisonment or an injunction or other order under the inherent jurisdiction of the High Court (sub-paragraph (2)).
Sched 1 Part 1 Para 12 (1)Civil legal services provided to an adult ("A") in relation to a matter arising out of a family relationship between A and another individual ("B") where – (a)there has been, or is a risk of domestic violence between A and B, and (b)A was, or is at risk of being, the victim of that domestic violence.	N/A	<i>Paragraph 12</i> refers to civil legal aid for victims of domestic violence in private law family cases arising out of the abusive family relationship. Only services in relation to those private law family matters will be in scope and not services for a claim in tort. For example, financial disputes or disputes about children arising from the breakdown of an abusive relationship will be in scope for victims of domestic violence, but a claim by the victim against the abuser for damages will not. ... It is intended that the regulations made under section 11 will be used to ensure that funding under this paragraph is limited to cases where there is appropriately clear evidence of the need for protection. The circumstances that will be accepted as evidence have been described by the Government in Parliament.
Sched 1 Part 1 Para 13 Civil legal services provided to an adult ("A") in relation to the following orders and procedures where the child who is or would be the subject of the order is at risk of abuse from an individual other than A	s4(2A) Children Act 1989 Orders removing acquired parental responsibility s6(7) Children Act 1989 Application to end appointment of Guardian s8(1) Children Act 1989 Residence, contact, Prohibited Steps Orders, Specific Issue Orders Special Guardianship Orders s33 Family Law Act 1986 Disclosure of child's whereabouts s34 Family Law Act 1986 Return of child	<i>Paragraph 13</i> refers to civil legal services where a person is seeking in a private law family case to protect a child from abuse by applying for any of the list of orders and procedures set out in <i>sub-paragraph (1)</i> . So, for example, civil legal aid may be made available to a person who is seeking an order under section 8 of the Children Act 1989 to prevent a person who has abused a child from having contact with that child. ... It is intended that the regulations made under section 11 will be used to ensure that funding for services described in this paragraph is limited to cases where there is appropriately clear evidence of the need for protection in a similar way to those services described in paragraph 12.
Sched 1 Part 1 Para 14 (1)Mediation provided in relation to family disputes (2)Civil legal services provided		<i>Paragraph 14</i> refers to civil legal aid for mediation in relation to family disputes. Under <i>paragraph 14(1) and (2)</i> legal

in connection with the mediation of family disputes		aid will be in scope both for mediation and for civil legal services provided in connection with the mediation. It is intended that the regulations made under section 11 will be used to determine what legal services in connection with mediation will be provided as part of legal aid. The type of legal advice to be available is described in the response to the consultation paper Proposals for the Reform of Legal Aid in England and Wales.
Sched 1 Part 1 Para 16 (1) Civil legal services provided in relation to forced marriage protection orders	Part 4A Family Law Act 1996	<i>Paragraph 16</i> refers to civil legal services in relation to forced marriage protection orders, which are made under Part 4A of the Family Law Act 1996. In conjunction with paragraph 11 of the Schedule, this paragraph ensures that cases where an injunction or other order is sought to protect an individual from forced marriage or domestic violence will be within the scope of civil legal aid.

Appendix 3: Information for Family Lawyers acting for a parent who has a learning disability

Useful resources:

- Good Practice Guidance on working with parents with a learning disability (2016) www.bristol.ac.uk/sps/wtpn/resources/
- Care Proceedings and Learning Disabled Parents - A Handbook for Family Lawyers. Abigail Bond
- Law Society Practice Note www.lawsociety.org.uk/support-services/advice/practice-notes/meeting-the-needs-of-vulnerable-clients-july-2015/
- Resource for Independent Advocates working with Parents with Learning Disabilities www.bh-impetus.org/advocacy-resource
- The Working Together with Parents Network www.wtpn.co.uk

This note contains:

- The Care Act
 - Duty to assess
 - Duty to provide statutory advocacy
 - Eligibility decision process
 - The provision of services – market shaping
- Parenting with support
- Good Practice Guidance
- PAMS assessment
- Shared Lives

The Care Act 2014

Under the Care Act 2014, a parent with a learning disability may be entitled to a bespoke package of long-term support in relation to both their individual and their parenting support needs.

Care Act 2014 www.legislation.gov.uk/ukpga/2014/23/contents/enacted/data.htm

Care and Support (statutory guidance) www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance

It is essential therefore, that the parent is appropriately assessed, given the assistance of an independent advocate to enable them to participate fully in that process, and is given every opportunity to show, where possible, that they can parent successfully, with that support.

(PTO)

Care Act Assessment – duty to assess

The Local authority (LA) must assess if the adult “may” have need for care and support.

Section 9 Care Act 2014:

s9 Assessment of an adult’s needs for care and support

(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess –

- (a) whether the adult does have needs for care and support, and
- (b) if the adult does, what those needs are.

The duty to provide statutory advocacy

The Care and Support (Independent Advocacy Support)(No. 2) Regulations 2014 www.legislation.gov.uk/uksi/2014/2889/made and s67 Care Act 2014 provide that LA’s must arrange an independent advocate to facilitate the involvement of a person in their assessment, in the preparation of their care and support plan and in the review of their care plan, if two conditions are met:

- (1) That if an independent advocate were not provided the person would have substantial difficulty in being fully involved in these processes, and
- (2) There is no appropriate individual available to support and represent the person’s wishes who is not paid or professionally engaged in providing care or treatment to the person or their carer.

The independent lay advocate also has a legal duty to assist the individual in challenging decisions made by the local authority, if the individual wishes.

Eligibility decision process

Regulations and the statutory guidance set out the 3-part process:

1. Needs - The adult’s needs arise from or are related to a physical or mental impairment or illness.

2. Outcomes - As a result of the needs, the adult is unable to achieve 2 or more of the following:

- a) managing and maintaining nutrition
- b) maintaining personal hygiene
- c) managing toilet needs
- d) being appropriately clothed
- e) **maintaining a habitable home environment**
- f) **being able to make use of the home safely**
- g) **developing and maintaining family or other personal relationships**
- h) accessing and engaging in work, training, education or volunteering
- i) **making use of necessary facilities or services in the local community including public transport** and recreational facilities or services
- j) **carrying out any caring responsibilities the adult has for a child**

(PTO)

3. Wellbeing - As a consequence, there is or is likely to be a significant impact on the adult's wellbeing, including the following:

- a) personal dignity (including treatment of the individual with respect)
- b) **physical and mental health and emotional wellbeing**
- c) protection from abuse and neglect
- d) **control by the individual over day-to-day life (including over care and support provided and the way it is provided)**
- e) participation in work, education, training or recreation
- f) social and economic wellbeing
- g) **domestic, family and personal relationships**
- h) suitability of living accommodation
- i) the individual's contribution to society

(Note: emphasis added where a factor tends to be particularly relevant for a parent with a learning disability.)

When someone is found not to be eligible for services under the Care Act, the LA simply has a duty to provide information and advice about what can be done to prevent, delay or reduce development of their needs.

The provision of services – market shaping

Section 5 of the Care Act 2014 sets out the LA's duties to provide services. This includes a duty to promote diversity and quality in the provision of services for meeting care and support needs, to ensure there is a variety of providers and high quality services from which to choose.

Parenting with support

Parents with a learning disability may require intensive and/or long-term support to acquire the necessary parenting skills.

Hedley J in H (Local Authority) v KJ⁶⁵

*'It cannot be the case that...a local authority can fail to put in the support properly required to enable a child to be cared for at home (absent expert advice that a child could never be cared for at home because of disability whatever reasonable support was provided) and then use that failure as a grounds for compulsory intervention under Part IV of the Act.'*⁶⁶

Good Practice Guidance

The 'Good Practice Guidance on Working with Parents with a Learning Disability' was first published in 2007 by the Department of Health and the Department for Education and Skills. It set out how children's and adult services can and should work together to improve support to parents with a learning disability.

The Guidance was updated in 2016 (see link under Useful Resources, above).

(PTO)

⁶⁵ [2007] EWHC 2798 (Fam)

⁶⁶ Ibid at [21]

Appendix B sets out the legal context for supporting parents with a learning disability and provides examples of recent relevant case law.

Baker J in Kent CC v A Mother⁶⁷.

*“All social workers, and family support workers, working with children and families need to be trained to recognise and deal with parents with learning disabilities. The Guidance issued by central government needs to be followed.”*⁶⁸

PAMS assessment

A PAMS assessment (Parent Assessment Manual Software) should be undertaken to inform an appropriate care plan to meet the individual’s parenting support needs. This assessment is specifically designed for parents with a learning disability.

www.pillcreekpublishing.com/pams_more.html

Shared Lives

Schemes such as Shared Lives are often successful in providing the necessary safe surroundings for the child and support for a parent, whilst still allowing the parent to parent and retain their legal parental responsibility, thus respecting their Article 8 right to family life.

⁶⁷ [2011] EWHC 402 (Fam).

⁶⁸ Ibid at [135]