



## **GUIDANCE ON ASSESSING CHILDS COMPETENCE TO INSTRUCT A SOLICITOR**

The aim of this guidance is to provide some consistency of approach while recognising that each child is unique and each case fact specific.

An assessment of whether a child has capacity, is competent or has sufficient understanding to conduct proceedings has to be undertaken by the solicitor before taking instructions from the child and the conclusion of that assessment will have significant consequences for how an application to the court is managed.

The guidance is not intended as a blue print for how a solicitor should take instructions once the decision that the child is competent is made: the Law Society has guidance on this and the Association of Lawyers for Children has run a number of training sessions on this subject for its membership.

### **INTRODUCTION**

1. In family proceedings when a child is a party and a children's guardian has been appointed by the court the guardians first role is to instruct a solicitor to act for the child. In some circumstance the solicitor may conclude that the child is of sufficient understanding to instruct their solicitor directly and the child and guardian "separate". In some circumstances the child may approach the solicitor directly.
2. In specified proceedings, including care and placement applications, the guardian will remain appointed but take such part in the proceedings as the court directs and may ask permission from the court to be represented separately from the child (although this is subject to approval from Cafcass).
3. In private law proceedings, when the child directly instructs their solicitor the children's guardian does not continue in that role but can be asked to provide reports to the court on the welfare of the child under section 7 of the Children Act 1989. The role of the children's guardian in private law proceedings: to conduct the proceedings on behalf of the child, no longer applies.

### **DEFINITIONS**

4. It is important to distinguish between a capacity assessment under the Mental Capacity Act 2005 (MCA) which requires a determination of whether someone over the age of 16 years suffers from a mental disorder such that they lack capacity to make decisions and the assessment of whether a child who for the purpose of the family proceedings under the age of 18 years, is competent to directly instruct their solicitor without a guardian. A decision under the MCA is entirely separate from a decision about competence in the Family Court and care should be taken in ensuring they are not confused. It is also important to remember that capacity is issue specific and an assessment of capacity in one area will not necessarily extend to all others. There may be evidence from medical experts about the capacity of a young person to consent to medical treatment which will not

necessarily mean that the child has or does not have sufficient maturity and understanding to instruct a lawyer.

5. The terms capacity and competence are frequently used interchangeably by practitioners, for the reasons stated above that is incorrect.

## INSTRUCTIONS

6. The appointment of a solicitor to represent a child in family proceedings will arise either
  - i) When a child approaches a solicitor directly for advice and representation which may be with their parent, another adult or on their own  
or
  - ii) Once the court makes a decision to appoint a guardian, either in response to an application which is defined in section 41 of the Children Act 1989 as specified proceedings (including care or placement applications ) or when joining the child under Rule 16.2 Family Procedure Rules 2010 (FPR), one of the duties of the children's guardian, whether in public or private law proceedings, is to appoint a solicitor to represent the child in the proceedings ( PD 16A FPR)
7. In the first scenario, and on occasion in the second, the solicitor has to undertake an assessment and reach a conclusion about whether the child is capable of providing instructions without a guardian and it is important that they apply a test that is consistent, accessible and reliable and are able to evidence the factors taken into account. The significance of the factors to consider in the assessment will depend in part on which of the scenarios applies. For example, the solicitor should be alert to the potential influence of the parent or person who has brought the child to see them, both before proceedings have been initiated, and once they have started. If a guardian has already been appointed, they, or the child's solicitor or the child themselves, may raise the need for the child to independently instruct.
8. Rule 16.6 (1) of the FPR sets out the circumstances in which a child does not need a children's guardian or litigation friend. The circumstances are *limited to* proceedings under the Children Act 1989, applications to which Part 11 and Part 14 of the FPR apply, proceedings in relation to children under the inherent jurisdiction and proceedings under section 55A of the 1986 Family Law Act. In addition, one of the conditions set out in Rule 16.6 (3) must be satisfied and these are either that the court has given permission or that the solicitor considers that the child is able, having regard to the child's understanding, to give instructions and has accepted instructions from that child.
9. Where the child is the subject of and party to the proceedings which are specified proceedings (which includes care and placement applications) or proceedings to which Part 14 of the FPR applies then Rule 16.6(1) does not apply. In these circumstances the child may still instruct their solicitor directly, if deemed to be competent to do so, but the guardian will remain appointed and perform such duties as the court may direct (Rule 16.21 FPR).
10. If an application is made to the court for the child to conduct proceedings without a guardian or litigation friend, the court will grant an application if it considers that the child has sufficient understanding to do so (Rule 16.6 (6)).
11. In practice it is more common for the child's solicitor to make the decision that the child is competent to give instructions without making a formal application to the court, but if there is a dispute about whether a child is competent the final decision rests with the court. In circumstances where the court is making the decision it is likely that expert evidence will be required.

12. There is increasing emphasis on the need to ensure that a child has the opportunity to participate in proceedings concerning them and the decisions that are made. There is case law which refers to the need to reflect the times and recognises the potential harm to the child of being refused the ability to participate in a way that they want and to instruct their solicitor directly. The decision in *CS v SBH & Ors* [2019] EWHC 634 (Fam) [ [CS v SBH & Ors \(Appeal FPR 16.5: Sufficiency of Child's Understanding\) \[2019\] EWHC 634 \(Fam\) \(18 March 2019\) \(bailii.org\)](#) ] provides helpful guidance and notes that the case of *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7 is the “cornerstone of our current approach to questions relating to the capacity or competence of a child or young person to take decisions for themselves” That House of Lords judgment considered the question of whether a child is “Gillick competent” and can:

- Understand the nature purpose, benefits risks and consequences of proceedings
- Retain the information discussed
- Use and weigh this information and
- Communicate their decision to others

13. This guidance is intended to assist solicitors in reaching a conclusion on whether a child has sufficient understanding and intelligence to be assessed as competent to instruct their solicitor directly without a guardian.

#### **PRINCIPLES**

14. There are some fundamental principles when considering whether to take instructions from a child, but it is important that the decision is not made in isolation without communicating with the child and with the guardian, if one has been appointed:

- To accept instructions the solicitor should have met or at least spoken to the child about the proceedings and gained some insight into their level of understanding. The child must be seen alone and a pre meeting with the guardian to agree an approach may be appropriate.
- Pursuant to Rule 16.29 (3) (a) FPR the solicitor MUST take into account the view of the children’s guardian in their assessment of competence
- The child’s wishes will always be conveyed to the court by the guardian whether or not the child is directly instructing their solicitor
- The child and guardian having different views will not automatically mean that the solicitor should conclude they should take instructions from the child rather than the guardian, as it remains the duty of the guardian to report the child’s wishes and feelings to the court, as well as their assessment of what is in their best interests
- The child may be considered competent to instruct by the solicitor but prefer to be represented by a guardian and it is not compulsory for the guardian to step aside. Such a decision needs to be kept under review throughout the proceedings

#### **FACTORS FOR THE ASSESSMENT**

15. It is important to acknowledge that the assessment is not an age-related decision and the case law makes clear that it is the level of understanding that is key. Each child is unique, but the following is a checklist extracted from the small number of judgments dealing with this topic, of matters to consider when making the assessment:

- Level of intelligence: intellectual impairment may have an impact on competence, and it may be relevant to consider any expert evidence of neuro disability, but it may not be determinative of understanding the issues
- Emotional maturity of the child, which may be informed by any school reports. Consider any independence or agency they exhibit in other areas of their life

- Factors which might undermine understanding such as issues arising from emotional, psychological, psychiatric or emotional states which may be identified in any expert evidence from social workers or mental health professionals
- Reasons for wanting to directly instruct without a guardian and the strength of feeling accompanying that wish (have they been calling or sending emails to the guardian or solicitor?)
- Assessing the understanding of the issues by the child and the extent to which their wishes are their own or reflecting that of the parent
- Understanding the process of litigation, the meaning of evidence, the role of the judge etc
- Assessment of risk of harm of direct participation weighed against harm of being excluded and the child's understanding of that potential harm
- The risk associated with the child having access to all the documents relating to the proceedings. In considering that risk it is important to assess whether the amount of documentation that is going to be withheld from the child is such that you would not be able to take proper instructions. In that event, you may conclude that direct representation is not appropriate.

16. Each of the factors above will inform the decision to accept instructions directly from a child and it is important to consider both the positive and negative impacts. It may be necessary to have more than one meeting with the child, but a decision should be made in a timely way to provide certainty for the child. A second meeting can be particularly helpful where you feel competence is borderline. Asking the child to explain back to you some of the key concepts described at the initial meeting and seeing how they have reflected on the initial meeting is often invaluable.
17. There may be several factors that might give a solicitor cause to question the competence of a young person regardless of their age, although as in other assessments, this is often a major indicator. These will include their cognitive functioning/ intellectual ability, their communication/language level, psychological / mental health functioning or the impact of any influence they may be under from another, e.g. parent or sibling. The child/young person needs to be able to demonstrate that they can comprehend enough of the case to be able to give coherent and consistent instructions that are authentically their own.
18. Information about neurodevelopmental disorders (e.g. autism) or concerns about cognitive and communication functioning may be highlighted in education reports and medical reports, concern about influence may be highlighted in social work reports or parent statements. However, allegations of influence are not uncommon, nor are concerns about emotional difficulties or education difficulties – it is the extent to which these impact on their competence to instruct that needs to be determined.
19. If the solicitor feels unable to reach a conclusion, or the decision of the solicitor is disputed either by the court, the guardian or another party, it may be necessary to obtain expert assistance to complete an assessment of the child's competence. If so, an application will need to be made to the court for permission under Part 25 of the FPR in the usual way. The decision to instruct an expert should be discussed with the child and highlighted with the court as soon as possible. The appropriate expert will usually be an HCPC Registered Practitioner Psychologist who should be asked to offer an opinion. Suitable questions may include:
- *Does the child/young person present with any cognitive, neurodevelopmental, communicative or psychological difficulty that would impair their competence to directly instruct their solicitor?*

- *Does the child/young person have sufficient understanding of the pertinent issues and the process of litigation to conduct proceedings and can they weigh the consequences of their instructions?*
- *Please comment on any risk to the child/young person that may arise from direct instruction.*

20. The decision for the solicitor is not only whether to take instructions directly from the child but also:

- What access should the young person have to the documents in the case? If the child is competent to instruct, they will be treated in the same way as any other party. What experience/training/expertise does the solicitor have to judge what documents should be disclosed and what is withheld, if anything
- Whether/ how the young person can be supported to participate in the court process
- Whether the young person will file a written statement and /or give evidence and does a Re W assessment need to take place beforehand.
- What will be the circumstances should the child give evidence or be the subject of cross examination? The solicitor has a duty to consider the need for any special measures as for a vulnerable witness, a duty that extends to the guardian and the court

#### **PROCEDURE WHEN THERE IS A DISPUTE ABOUT THE CHILD'S COMPETENCE**

21. If the solicitor is approached by the child independently, it is a decision for the solicitor whether to accept the instructions. The court may raise a query about whether the child has sufficient understanding to provide direct instructions, alternatively if a Cafcass/Cafcass Cymru officer is directed by the court to advise in their role as children's guardian in public law, or welfare officer in private law proceedings, the Cafcass/Cafcass Cymru officer may raise a similar concern.
22. If there is a dispute over whether the child is competent to directly instruct, the child's solicitor currently taking instructions from the child's guardian, or the solicitor who has been approached by the child directly will alert the court to the issue and ask for a hearing to resolve the matter.
23. The court may authorise the instruction of a court appointed expert to advise (see above) and the ultimate decision as to whether a child or young person can act without a guardian remains with the court if a dispute arises. It should be rare for the court to be asked to adjudicate on the issue if there has been proper consultation with the guardian and if the solicitor undertakes a thorough assessment taking into account the factors above.

#### **RECORDING OF THE ASSESSMENT**

24. The decision to accept direct instructions from a child MUST be recorded in writing and the assessment set out in some detail. A decision that a child is not competent should also be recorded. The court can direct that the assessment is filed with the court and served on the parties in the event that there is a dispute about the child's competence to instruct, while being mindful of the confidentiality and privilege attached to client/solicitor communication. The solicitor should make it clear to the child that the assessment, whether or not undertaken by the solicitor or an expert, may be shared with the child's parents and other parties to the proceedings.
25. Similarly, if the decision is reviewed and the solicitor concludes that the child is no longer competent a record of the decision-making process should be kept. The court should be informed immediately if the solicitor concludes that the child is no longer competent (R 16.6 (9) FPR)

## CHECKLIST FOR THE ASSESSMENT

<input type="checkbox"/>	Does the child want to directly instruct?
<input type="checkbox"/>	Do you have an appropriate communication channel with the child ?
<input type="checkbox"/>	Have you met with the child alone in a neutral venue?
<input type="checkbox"/>	Have you consulted the guardian if there is one appointed?
<input type="checkbox"/>	Is the child aware of the nature of the application?
<input type="checkbox"/>	Have you considered whether there are any external influences?
<input type="checkbox"/>	Have you assessed the child as understanding the issues in dispute?
<input type="checkbox"/>	Have you assessed the child as understanding the allegations made?
<input type="checkbox"/>	Have you assessed the child as being aware of the harm alleged ?
<input type="checkbox"/>	Have you considered information from school re cognitive understanding?
<input type="checkbox"/>	Have you considered the impact on the child of having access to the evidence?
<input type="checkbox"/>	Have you considered any communication difficulties eg in terms of language or disability?
<input type="checkbox"/>	Have you considered the impact of any psychological or emotional issues for the child?
<input type="checkbox"/>	Have you considered the quality of evidence the child is likely to give and the need for special measures?
<input type="checkbox"/>	Have you considered diversity and any cultural and religious issues ?
<input type="checkbox"/>	Have you assessed whether to share documents/experts reports?
<input type="checkbox"/>	Have you explained rules and limits of rules around confidentiality ?
<input type="checkbox"/>	Have you considered the impact on the child of giving evidence ?
<input type="checkbox"/>	Has the child expressed an understanding of the adults position ?

Family Justice Council

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