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DOI:
10.4324/9780429328015-12

Document Version
Peer reviewed version

Citation for published version (Harvard):
Harding, R 2021, “He got down on one knee”: intellectual disability, intimacy and family law. in B Clough & J Herring (eds), *Disability, Care and Family Law.* 1 edn, Routledge, London, pp. 156-181. https://doi.org/10.4324/9780429328015-12

Authors Pre-Publication Version. Published as:
R. Harding (2021) '"He got down on one knee": Intellectual disability, intimacy and family law' in B. Clough & J. Herring (eds) *Disability, Care and Family Law* pp. 156-181 (London: Routledge). Please cite published version.

"He got down on one knee": Intellectual Disability, Intimacy and Family Law

Rosie Harding[1]

Abstract

This chapter draws on interviews with intellectually disabled people about their experiences of everyday legally-relevant decision-making to explore the multiple socio-legal dimensions of decision-making around intimate relationships and marriage by intellectually disabled people (here understood to include people with learning disabilities, brain injuries and other cognitive impairments). After a brief introduction and methodological note, I contrast legal responses to sexual relations, marriage and divorce with disabled people's stories about how these things have influenced their lives. Through this analysis, I challenge the construction of disabled people as vulnerable subjects, to be protected by and through family law. Instead, I argue for accessible family law frameworks that allow disabled people to enjoy their legal rights, relationships and family lives.

Keywords: Disability; Divorce; Marriage; Sexual Relationships;

Introduction

Family law research and case law relating to aspects of intimacy and intellectual disability has, to date, primarily focused on protecting disabled people from abuse. Intellectually disabled people are often (though not always) considered in this literature and jurisprudence to be in need of paternalistic protection from abusive others who seek to manipulate or take advantage of them. Intimacy and relationships are often constructed in legal texts as catalysts for and sites of abuse and harm for intellectually disabled people. There are, of course, good reasons for this focus; intellectually disabled people, particularly women, have a higher risk of abuse, and prosecution and conviction rates for perpetrators of such abuse are low (see further Lindsey & Harding, under submission).

My aim in this chapter is to view family law through the stories and experiences of intellectually disabled people to expose the limitations of this 'abuse-first' perspective for family law, and to argue for a refocusing of family law towards enabling and supporting disabled people to enjoy their intimate, relational, and familial lives. The legal framework underpinning this disabled people first approach is the paradigm shift that the UN Convention on the Rights of Persons with Disabilities (CRPD) sought to achieve (see, for example, Bach & Kerzner, 2010; Booth Glen, 2012; Dhanda, 2017; Quinn, 2010; Series, 2015). Several of the substantive rights contained in the CRPD are engaged in the context of family law. Article 12 outlines the right to enjoy legal capacity on an equal basis with others, and has been the subject of intense academic and legal debate (see de Bhailís & Flynn, 2017 for an overview of the literature). The Committee's interpretation of Article 12 as requiring the replacement of all forms of substitute decision-making with supported decision-making has been particularly controversial (Committee on the Rights of Persons with Disabilities, 2014; Dhanda, 2006-2007). The right to enjoy legal capacity is, however, only one element of the CRPD that is engaged when considering intimacy and family law. Other Convention rights that are engaged include the right to

[1] Acknowledgments: this research has benefited from funding from the British Academy (MD150026) and the Leverhulme Trust (PLP-2017-184). With thanks to Ezgi Taşcıoğlu for her work as a research fellow on the Everyday Decisions project from which the data analysed here is drawn. All interviews included in this analysis were conducted by the author. Thanks also to Jonathan Herring and Beverley Clough for their helpful comments and editorial patience.

equal benefit of the law and non-discrimination (Article 5), effective access to justice (Article 13), freedom from exploitation, violence and abuse (Article 16), respect for privacy (Article 22), respect for home and family (Article 23) and rights to education (article 24) and health, including sexual health (Article 25). Realising these multiple rights for intellectually disabled people to enable them to develop, maintain and enjoy freely chosen intimate relationships, includes ensuring access to the right level of support to understand the responsibilities that attach to intimacy (e.g., intimate consent or financial support for cohabitants and spouses). As the United Kingdom has ratified the optional protocol of the CRPD, individuals have a right to petition the Committee over breaches of their CRPD rights. Several of these rights are also protected by the European Convention on Human Rights (ECHR), and may therefore be directly justiciable in UK law under the Human Rights Act 1998.[2]

The particular focus of this chapter is on intellectual disability in the context of laws relating to adult intimate relationships. These include regulatory frameworks surrounding marriage, divorce and sexual relationships. A significant literature has now developed surrounding capacity to consent to sex (e.g., Arstein-Kerslake & Flynn, 2016; Clough, 2014; Harding & Taşcıoğlu, 2019; Herring, 2012; Herring & Wall, 2014; R. Mackenzie & Watts, 2013, 2015; Sandland, 2013; Series, 2014), but much less has been written about capacity in relation to marriage and divorce (though see, e.g., Barker & Fox, 2010; Herring, 2010).[3]

One reason for this lack of attention to marriage and divorce in the capacity literature is the way that these issues are approached in the Mental Capacity Act 2005 (MCA). The MCA is the central legislative provision in England and Wales that engages with issues to do with capacity to make legally binding decisions. The scheme of the MCA is founded on a presumption of capacity (s. 1(2)), support for decision-making (s. 1(3)), respect for unwise decisions (s. 1(4)), a diagnostic threshold (s. 2), a functional test for decision-specific mental capacity (s. 3), and a general defence for best interests decision-making where a person lacks the mental capacity to make a decision (s. 4, s. 5).[4] The MCA explicitly excludes family law decisions from the scope of best interests decision-making under that Act (s. 27), such that nothing in the MCA permits a best interests decision to be made on behalf of a person on matters relating to: consenting to marriage or a civil partnership; consenting to have sexual relations; or consenting to divorce or dissolution of a civil partnership on the basis of two years' separation.[5]

The exclusion of family law decisions from the MCA was uncontroversial at the time the Act was debated in Parliament. Section 27 of the MCA was not discussed in any detail during the progress of the Bill,[6] and the explanatory notes on the MCA say of s.27:

[2] Particular ECHR rights that may be engaged in these circumstance would be Article 8 (right to respect for private and family life) and Article 12 (right to marry), especially in conjunction with Article 14 (prohibition of discrimination).

[3] Unless stated otherwise all references in this chapter to marriage include all forms of marriage and civil partnership, whatever the gender of the parties.

[4] There is not the space in this chapter to go into a detailed descriptive account of the framework of, and flaws with, the MCA. For such analysis, see further: (Alghrani, Case, & Fanning, 2016; Bartlett, 2008; Donnelly, 2009; Harding, 2015, 2018; Herring & Wall, 2015; House of Lords, 2014; Lindsey, 2018; C. Mackenzie & Rogers, 2013; Series, 2015)

[5] Other matters, including issues around consenting to adoption and to assisted reproduction, are also excluded from the MCA best interests approach by s 27 MCA, though the limits of this jurisdictional exclusion were pushed back in *Y* v *A* [2018] EWCOP 18, where a deputy was appointed by the court to sign consent forms relating to treatment under the Human Fertilisation and Embryology Act 2008 when the patient lacked capacity sign the necessary forms to consent to the collection, storage and use of his sperm following a catastrophic brain injury.

[6] Clause 27 of the bill passed through committee stages in both houses without amendment or discussion – see House of Commons Standing Committee A, Hansard 28 October 2004, Col 229; House of Lords Hansard 1 February 2005, Vol 669, Col 128.

> This lists certain decisions that can never be made under the Act on behalf of a person who lacks capacity. For example, in relation to adoption, if a birth parent lacks capacity to consent to an adoption order the rules as to dispensing with consent in the adoption legislation will apply. There will be no question of an attorney consenting or of the Court of Protection making an order or appointing a deputy to provide the requisite consent.[7]

The Law Commission excluded decisions of a personal nature from their proposed scheme from the first consultation paper on mentally incapacitated adults and decision-making (Law Commission, 1991). That consultation paper stated: "marriage (and to some extent divorce) belong to the class of acts which are personal to the individual concerned and cannot be carried out by anyone else on his behalf," (Law Commission, 1991 at [2.26]) before discussing the voidable nature of marriage where one party lacks capacity to consent. The same consultation paper noted that "[sexual intercourse] must be a matter for personal choice by the individual, so that if he or she is incapable of making the decision, no-one may make it for them" (at [2.27]), before discussing how mental incapacity was dealt with in the relevant criminal law of the time. The (1995) Law Commission report, which formed the basis of the MCA stated that "a number of matters are listed in the draft Bill as requiring a personal decision, and the court will have no power to deal with those matters" (Law Commission, 1995 at [8.15]). Pre-legislative scrutiny by the joint committee that preceded the Mental Capacity Act did not discuss these personal decisions in any detail, and discussion of consent to sexual relationships was discussed primarily in relation to the Sexual Offences Act 2003, which was before Parliament at that time, and in relation to protecting people who lack capacity from abuse (Joint Committee on the Draft Mental Incapacity Bill, 2003).

Despite these personal decisions being excluded from the scope of the MCA, family law issues are regularly considered by the Court of Protection, and declarations about capacity to consent to sex and to marriage are routinely made by the Court. As Section 27 MCA is drafted only to exclude best interests decision-making to *consent* in these areas, decisions that it would be in P's best interest to be prevented from engaging in sexual or intimate relationships are commonplace. Family law responses to mental capacity impairments have therefore tended to cohere around activities and decisions that would prevent individuals with impaired capacity from being in a position to make these decisions at all. So, whilst a court might find that a particular individual has the capacity to consent to sex, they might simultaneously find that the same person lacks the capacity to make decisions about contact with other people, therefore circumventing the potential for that person to use their capacity to consent to sex, in ways that have the potential to be both coercive and to infringe their rights to private and family life under Article 8 ECHR.[8]

In this chapter, I draw on findings from interviews with intellectually disabled people from the Everyday Decisions project (Harding & Taşcıoğlu, 2017, 2018) to explore three points where family law and mental capacity law intersect: sexual and intimate relationships, marriage, and divorce. Whilst there, of course, other areas of family law which may become relevant at different points in the lifecourse, particularly issues around children and parenting, there is not the space in this chapter to engage with these aspects.[9] I begin with a brief methodological note on the empirical research that underpins this analysis. I then move on to provide an analysis of the points of connection that have developed between family law and mental capacity law, in the courts and in academic analysis and juxtapose these with findings from the Everyday Decisions research where intellectually disabled people talked about their experiences of relationships, marriage and divorce. I begin each subsection with an overview of the legal issues, as they have emerged through case law, before turning to explore how these issues arose in the Everyday Decisions interviews. As will become apparent, there is a

[7] Explanatory notes on the Mental Capacity Act, available at: http://www.legislation.gov.uk/ukpga/2005/9/notes accessed on 28 January 2020.

[8] *A Local Authority v H (No. 2)* [2019] EWCOP 51

[9] For a discussion of the law and practice relating to care orders and disabled parents, see Higgins, this volume.

significant gap between the salient issues as discussed in the Court of Protection and the most important dimensions for these participants. In the final section, I argue that current intersections between family law and capacity law fail to provide the levels of support required to ensure access to justice for intellectually disabled people. I conclude with some brief normative suggestions for improving the accessibility of family law.

Methodological Note

Before I move on to discuss the methodology that underpins the analysis in this chapter, a brief note on terminology. Descriptions and labels are contested in disability and capacity law scholarship and activism. As a non-disabled academic, it is important to note my position in my scholarship on disability and capacity law; I seek to expose the ways that legal and regulatory frameworks (including social norms around legal institutions like marriage and divorce) contribute to disability inequality and injustice. In this chapter, I have chosen to use "intellectually disabled people" as a broad and generic descriptor for people who have a wide range of cognitive impairments, including learning disabilities/difficulties, autism spectrum disorders, acquired brain injuries and neurodegenerative conditions. My choice of language here is intended to be reflective of the diversity of experiences and impairments whilst also adopting the 'social model' language recommended and used by the UN Committee on the Convention on the Rights of Persons with Disabilities. I am attentive to critiques that the distinction between social model and medical model perspectives on disability remains contested (Shakespeare, 2006, 2012, 2013), and the continuing political and activist importance of 'people first' language. Yet in using disability first language like "intellectually disabled people", my aim is to highlight the ways that legal and regulatory frameworks construct, legitimate and reproduce the barriers that disabled people experience. Social model disability first language seeks to highlight that it is the inaccessibility of society that disables people, not (only) their impairments.

The analysis that follows draws on data from the Everyday Decisions qualitative interview study, conducted in 2017 (Harding & Taşcıoğlu, 2017, 2018). The overall project included interviews with 25 care and support professionals, 15 intellectually disabled people, and 6 supporters chosen by the disabled participants to help them with participation. A supporter was involved in 12 of the interviews with disabled participants; often supporters were involved in more than one interview. The data analysed in this chapter is drawn exclusively from the 15 interviews with disabled participants, all of which were undertaken personally by the author. The interviews were focused on understandings and experiences of decision-making and support when making everyday legally-relevant choices, including everything from leisure activities and food choices through to complex legal and financial decisions. Disabled participants had a range of intellectual impairments, often in combination with complex physical and/or sensory impairments. The age of intellectually disabled participants ranged from under 20 to over 70 years old; nine participants were women (60%), and participants lived in a range of different settings: five participants lived independently in the community; six lived in supported living environments; three with their families, and one in a residential care home. Of the 15 disabled participants in the Everyday Decisions project, ten spoke in depth about current or former serious relationships. Of those, four (Michelle, Colin, Julie, and Winnie)[10] were in relationships where they described their significant other as their girlfriend or boyfriend, four participants were engaged (Carrie, Tracy, Amanda and James), and three were divorced (Tracy, Suzanne and Alan).

All participants had capacity to consent to participate in the research, and consent processes were carefully constructed and carried out in ways that ensured participants were able to ask questions, clarify anything that was difficult for them to understand, and to provide informed consent. All participants were given a pseudonym, and any potentially identifying information (including geographical locations, occupations and names of third parties) has been changed to protect

[10] All names are pseudonyms; all locations and other potentially identifying information has been changed to protect participants' confidentiality.

participant confidentiality. Ethical approval was granted by the University of Birmingham Humanities and Social Sciences Research Ethics Committee. Most participants were recruited through gatekeeper organisations who supported the research; again, the names of these organisation are not disclosed in order to protect confidentiality of research participants.

Analysis of these data utilised standard qualitative techniques, including thematic coding to identify talk related to inductive and deductive themes (Braun & Clarke, 2006). For the purposes of this chapter, empirical data thematically coded as relating to family law issues (relationships, engagement, marriage, divorce) was extracted from the full dataset. The focus of this chapter is on attitudes to, engagement with and experiences of the formal frameworks of family law, particularly around marriage and divorce, rather than relationships and sexuality more generally.[11] Data were coded to these topics, and will be discussed here in the context of, and in contrast to, legal responses to these issues as they have developed through relevant case law.

Sexual Relations

Legal Responses to Capacity to Consent to Sex

Since the MCA came into force, decisions and disputes about whether a person has the capacity to consent to sexual relations have regularly come before the Court of Protection.[12] The MCA jurisprudence on this issue has developed into a test for capacity to consent to sex that has four limbs. First, the person must understand the mechanics of sex, second, they must understand that sexual activity carries risks of sexually transmitted infections (and to at least a rudimentary degree, how the risks can be reduced). Third, at least for those fertile individuals engaging in heterosexual sexual intercourse, they must understand that sexual intercourse may result in pregnancy, and the basics of contraception.[13] More recent case law, affirmed by the Court of Appeal, has added a fourth requirement that the person understands that sex is always a choice, and that they have a right to say no.[14]

The legal test for capacity to consent to sexual relations is understood to be both set at a low level, and to be malleable to the circumstances of the individual.[15] So, for example, there may not be a need for a person who is openly and exclusively gay to demonstrate that they understand the pregnancy risks of heterosexual sex and use or weigh these risks (to use the language of s. 3 of the MCA) in coming to their decision about sexual consent in a same sex relationship.[16] Similarly, in *London Borough of Tower Hamlets* v *NB and AU*, Hayden J said: "that there is no need to evaluate an understanding of pregnancy when assessing consent to sexual relations in same sex relationships or with women who are infertile or post-menopausal strikes me as redundant of any contrary argument."[17] Furthermore,

[11] For consideration of capacity to consent to sex in the Everyday Decisions project, see further (Harding & Taşcıoğlu, 2019); for discussion of the legal test and its application in the court of protection, see Lindsey & Harding (under submission).

[12] See, for example, *X City Council* v *MB, NB and MAB* [2006] EWHC 168; *Local Authority X v MM* [2007] EWHC 2003, *D Borough Council v AB* [2011] EWHC 101*, The London Borough of Tower Hamlets v TB and SA* [2014] EWCOP 53, *IM v (1) LM (2) AB (3) Liverpool City Council* [2014] EWCA Civ 37; *London Borough of Tower Hamlets v NB and AU* [2019] EWCOP 17 and [2019] EWCOP 27; and *Re B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3. For analysis, see, e.g., (Arstein-Kerslake & Flynn, 2016; Clough, 2014; Harding & Taşcıoğlu, 2019; Herring & Wall, 2014; R. Mackenzie & Watts, 2013; Sandland, 2013; Series, 2014)

[13] *Local Authority X v MM* [2007] EWHC 2003, *D Borough Council v AB* [2011] EWHC 101. In *A local Authority v TZ* [2013] EWCOP 2322, it was suggested that where it is clearly established that the person is exclusively non-heterosexual, the ability to understand this element of the test may not be necessary.

[14] *The London Borough of Tower Hamlets v TB and SA* [2014] EWCOP 53; *The London Borough of Southwark v KA* [2016] EWCOP 20; *B (by her litigation friend, the Official Solicitor) v A Local Authority* [2019] EWCA Civ 913.

[15] *London Borough of Tower Hamlets v NB and AU* [2019] EWCOP 27.

[16] *A Local Authority v TZ* [2013] EWCOP 2322.

[17] [2019] EWCOP 27 at [54].

judicial reasoning for the 'low bar' in capacity to consent to sexual relations cases has also recognised that "relationships are driven as much by instinct and emotion as by rational choice…regardless of whether an individual suffers from some impairment of the mind."[18]

One of the most recent decisions in this line of cases, *London Borough of Tower Hamlets v NB and AU,*[19] concerned the appropriate approach to capacity to consent to sex within a (presumably) monogamous marital relationship, therefore also drawing in issues relating to capacity to marry. Here, Hayden J noted that:

> It is not the objective of the MCA to pamper or to nursemaid the incapacitous, rather it is to provide the fullest experience of life and with all its vicissitudes. This must be kept in focus when identifying the appropriate criteria for assessing capacity, it is not to be regarded as applicable only to a consideration of best interests.[20]

Hayden J further noted, in that case, the importance of flexibility in assessing capacity to consent to sex, taking into consideration the actual relationship contexts in which sexuality and intimacy would take place. Yet in taking this more flexible approach, Hayden J seems to be moving the Court of Protection jurisprudence towards a variable test depending on the person's situation, which may yet prove to be incompatible with the act specific test, set at an intentionally accessible level, that guided previous decisions of the Court of Protection about sexual relationships. Whilst in this case, the flexibility is being used to help P get over the capacity threshold, theoretically, the same variable reasoning could be used to raise the bar, or prevent a particular sexual relationship (for example if there is a severe risk of abuse).

The general, prospective, act-specific approach to sexual consent that has developed in the Court of Protection case law is also somewhat at odds with the criminal law approach, which is determinedly person- and instance-specific (see further, Lindsey & Harding, under submission).[21] In the words of Baroness Hale (as she then was):

> It is difficult to think of an activity which is more person- and situation- specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.[22]

This tension between the criminal and civil law in relation to consent to sex has not yet been fully resolved, and there are some persuasive arguments that it cannot (and perhaps should not) be.[23] The divergence between the two tests is often argued to arise because they are asking different questions:[24] in criminal law the question of consent (or capacity to consent) is directed at a specific sexual encounter at a previous point in time; in the Court of Protection, the question is directed to whether the person has the necessary understanding of sexual relations to be able to consent to a sexual encounter in the future.[25]

It is now settled that understanding that sexual relationships must be consensual, and that the person being assessed for their capacity to consent to sex must understand that they have the right to say

[18] *A Local Authority* v *JB (Capacity: Consent to Sexual Relations and Contact with Others)* [2019] EWCOP 39 at [15(i)], citing Hayden J in *London Borough of Tower Hamlets* v *NB and AU* [2019] EWCOP 27.
[19] *London Borough of Tower Hamlets v NB and AU* [2019] EWCOP 27
[20] At [56].
[21] *R v Cooper (Gary Anthony)* [2009] UKHL 42; [2009] 1 WLR 1786.
[22] At [27]
[23] *IM* v *LM* [2014] EWCA Civ 37.
[24] See, e.g., *A Local Authority* v *H* [2012] EWCOP 49.
[25] See, e.g., *IM v LM* [2014] EWCA Civ 37 at [48]; *A Local Authority v H* [2012] EWHC 49 COP; *D Borough Council v B* [2011] EWHC 101 (Fam).

no.[26] Understanding that the other party also has a right to say no, and must also consent to any kind of sexual touching appears not, at present, to form part of the test for capacity to consent to sexual relations, despite the importance of this in the criminal law.[27] The reasoning in *JB* for excluding an understanding that the person with whom you are engaging in sexual relations must consent, cohered around the possibility that to raise the bar in this way would be to expand the test in ways that would be discriminatory against disabled people.[28]

Notwithstanding the voluminous body of case law that has developed around capacity to consent to sexual relations, cases about family law issues (particularly those about sexual relationships or marriage) that come before the court often seem to have the aim or outcome of restricting intellectually disabled people's relationships or activities. So, for example, in *B v A Local Authority,*[29] the case was concerned with preventing B from moving in with a much older man with a history of sexual offending; in *JB* the case was brought because JB was at risk of perpetrating sexual offences, due to his limited understanding of consent;[30] and in *NB and AU* whether a married couple (who had experienced a sexual relationship in the past) could continue to have a sexual relationship where there were questions over the wife's capacity to consent to sex.[31] Reported cases have also included decisions about whether the disabled person has the capacity to decide to have contact with specific others with whom they might be likely to enter into sexual relationships.[32] Other cases have explored circumstances where, notwithstanding that a disabled person has the capacity to consent to sex, they simultaneously lack the capacity to decide whether prospective sexual partners are 'safe' (see further, Harding, 2017).[33] There have also been cases aimed at preventing intellectually disabled people who are considered to be at risk of forced marriage from travelling overseas to marry.[34]

Everyday experiences of intimate relationships

In contrast to this focus on capacity and protection from abuse in the Court of Protection case law, other barriers to sexual and intimate relationships were more salient in the Everyday Decisions interviews. Participants were not asked about sex or intimacy in these interviews, though some participants noted that they sometimes stayed over at their significant other's homes. Winnie, for example, told me about her boyfriend:

> **Winnie:** I've got a boyfriend. He's all right. He's nice looking. I'm going to see him tonight and spend time with him. We had a cup of tea off [my boyfriend] so, and sometimes on a Tuesday I'll stop overnight with him. Yeah, and then he comes to see me on Saturday so, after my voluntary work finish so yeah.
> **RH:** And have you been boyfriend and girlfriend for a while or?
> **Winnie:** A while, a long time yeah. A long time so yeah.

The supporter who helped Winnie in her interview noted that she and her boyfriend had been given sex education "someone came to tell them about the birds and the bees, you know". This suggests that Winnie was relatively well supported to develop and maintain her intimate relationship. Other interviewees were not so able to continue their relationships, not because of a lack of capacity, but rather as a consequence of cuts to their support payments following reassessments, or changes in

[26] *The London Borough of Tower Hamlets v TB and SA* [2014] EWCOP 53; *The London Borough of Southwark v KA* [2016] EWCOP 20; *B (by her litigation friend, the Official Solicitor) v A Local Authority* [2019] EWCA Civ 913.
[27] *A Local Authority* v *JB (Capacity: Consent to Sexual Relations and Contact with Others)* [2019] EWCOP 39.
[28] Ibid, at [16].
[29] *B (by her litigation friend, the Official Solicitor) v A Local Authority* [2019] EWCA Civ 913.
[30] *A Local Authority* v *JB (Capacity: Consent to Sexual Relations and Contact with Others)* [2019] EWCOP 39.
[31] *London Borough of Tower Hamlets v NB and AU* [2019] EWCOP 27.
[32] *Derbyshire CC v AC, EC and LC* [2014] EWCOP 38.
[33] *A Local Authority* v *TZ (No 2)* [2014] EWCOP 973 *P*
[34] E.g., *SMBC, WMP, RC & GG v HSG, SK & SKG* [2011] EWHC B13.

staffing. Colin, for example, can no longer go out in the evenings as he doesn't have support to do so. Since those cuts, he only sees his girlfriend at a day centre they both attend.

Only being able to conduct relationships in the context of social care services can have drawbacks, however, because physical affection may not always be supported or permitted in care services. For example, another participant, Julie said, "[the carer has] told me I can't kiss [my boyfriend], and I already know that, [it is] against the rules." In response to Julie's comment about being unable to kiss her boyfriend, the support worker who was helping her with the interview said, "Don't mind the odd peck on the cheek […] otherwise, everybody else-". This care worker cut off before completing their sentence, though the implication, through body language and in the context of the rules against physical affection, is that if Julie and her boyfriend were to be intimate at the day centre, then this would encourage others to behave in a similar way, or provoke other kinds of negative reactions from other service users.

It seems that rules against physical intimacy, whilst likely appropriate in public spaces within a care service, are designed to prevent others (perhaps those who lack capacity) from seeking to develop or engage in intimate relationships. Yet rules of this nature place intellectually disabled people who do not have support to socialise outside of formal care environments at a disadvantage when it comes to developing intimate relationships. If they cannot engage in intimacy with chosen significant others in care contexts, but do not have access to the support that they would need to see their significant others outside of those care contexts, then they are essentially barred from physical expressions of affection and developing relationships. Arguably, blanket rules of this nature, particularly if applied in the context of state funded or arranged care services may constitute an infringement of individual rights either under the Human Rights Act or the CRPD.

Marriage

Defining Capacity to Consent to Marriage

The majority of cases that consider marriage in the context of intellectually disabled people have come up in the context of either potential abuse, or arranged marriages overseas. Particularly complex are the (many) cases where individuals who are found by the court to lack capacity to consent to marriage have, in fact, married under the law of another jurisdiction. Under the Matrimonial Causes Act 1973, s. 12(c) in conjunction with the Family Law Act 1986, s. 58(5), a marriage where one party does not (or cannot) consent is voidable, rather than void. The Court of Appeal made clear in *Westminster City Council v C*[35] that the Court of Protection does not, under the MCA, have the power to declare such marriages as void *ab initio*. Rather, where a marriage is voidable, a petition for nullity is required to enable to court to make a declaration that the marriage was void at its inception. In *XCC v AA & Others*[36] Parker J utilised the inherent jurisdiction of the high court (rather than the MCA) to issue a declaration that a marriage contracted in (and valid under the law of) Bangladesh was not recognised as valid in English law due to one party's incapacity. This case concerned the arranged marriage of a woman, DD, who had significant learning disabilities, to her cousin, AA, who lived in Bangladesh, but moved to the UK on a spousal visa after the marriage. There was some evidence of abuse and 'rough treatment' of DD by AA, and uncertainty about whether the marriage had been consummated, despite DD being assessed as lacking capacity to consent to sex. Parker J also made an order that the Official Solicitor should bring an application for nullity on behalf of DD and in her best interests.

The test for capacity to marry in English law was articulated most clearly in recent years by Munby J in *Sheffield City Council* v *E and S.*[37] That case concerned E, a 21 year old woman described in the judgment as having hydrocephalus and spina bifida and being "very vulnerable to exploitation." The catalyst for the case was that E had begun cohabiting with, and planned to marry, S, a convicted sex

[35] [2008] EWCA Civ 198; [2009] Fam. 11
[36] [2012] EWCOP 2183.
[37] [2004] EWHC 2808

offender with "a substantial history of sexually violent crimes." The local social services authority, who were concerned for E's welfare when they learned of the cohabitation and planned marriage, brought the case. Munby J held that capacity to marry rests on the ability to understand the marriage contract, including "the duties and responsibilities that normally attach to marriage" (at [68]), not "the implications of a particular marriage" (at [85]). This is because:

> Whether A marries B or marries C, the contract is the same, its nature is the same, and its legal consequences are the same. The emotional, social, financial and other implications for A may be very different but the nature of the contract is precisely the same in both cases. (*Sheffield City Council v E and S* at [85]).

Sheffield City Council v E and S was decided before the MCA 2005 came into force, but Munby J was clear that on the basis of the common law, that the court has no jurisdiction to embark on a determination of "whether it is in E's best interests to marry S" (at [92]). The exclusion of family law decisions from the general best interests approach in the MCA echoes this sentiment, notwithstanding the very many cases about sex, marriage and capacity that have been considered by the Court of Protection in recent years.

In terms of the duties and responsibilities of marriage, Munby J described these as follows:

> Marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance. (*Sheffield City Council v E & S* at [143]).

Subsequent case law has added capacity to consent to sex,[38] an appreciation that "mutuality, reciprocity and the capacity for compromise are indivisible components of marriage,"[39] and that marriage revokes any existing will and gifts made under that will become ineffective[40] to the list of information relevant to consent to marry. Whilst it may well be the case that "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend,"[41] this seemingly ever expanding list appears to set an increasingly high bar. It is also not clear that many people (irrespective of whether or not they are disabled) consider these issues, given the reasons for marrying and understandings of marriage that have been expressed by research participants (see, for example, Auchmuty, 2016; Eekelaar, 2007; Eekelaar & Maclean, 2004; Harding, 2011). Indeed, many of the legal effects of marriage do not become clear unless and until the relationship ends, either by death (in relation to wills and inheritance issues) (Monk, 2011), or divorce (in relation to property and future financial relief issues).

In *PC and NC v York City Council*, the question arose as to whether decisions about cohabitation should be approached in the same way as capacity to consent to marry.[42] Like capacity to consent to sexual relations, marriage is considered an 'act-specific' decision,[43] in which the information relevant to the decision does not vary depending on the prospective spouse, and where there is no scope for best interests decision-making in lieu of consent under the MCA.[44] Cohabitation, by contrast, falls under the standard 'decision-specific' approach of the MCA, as set out in the plain language of the statute, and must, therefore include information about the particular individual with whom the person with a

[38] *X City Council* v *MB* [2007] EWHC 2003; [2007] 3 FCR 371
[39] *Re RS (Capacity to Consent to Sexual Intercourse and Marriage)* [2015] EWHC 3534 (Fam)
[40] *Re DMM (Alzheimer's: power of attorney)* [2017] EWCOP 32 and 33
[41] *Durham v Durham* (1885) 10 PD 80 at 81, per Sir James Hannen P
[42] *PC and NC v York City Council* [2014] 1 Fam 10; [2013] EWCA Civ 478
[43] *Sheffield City Council* v *E and S* [2004] EWHC 2808; *D Borough Council v AB* [2011] EWHC 101 (Fam).
[44] Mental Capacity Act 2005, s. 27

capacity impairment proposes to cohabit.[45] In *PC*, the particular individual was a convicted sex offender, who had served a lengthy prison sentence for serious sexual offences against previous wives. It appears that the courts are more likely to be asked to intervene in case where capacity to make decisions about marriage and relationships where one partner is at risk of abuse or sexual assault. Yet as Lewison LJ in the Court of Appeal made clear: "I well understand that all the responsible professionals take the view that it would be extremely unwise for PC to cohabit with her husband. But adult autonomy is such that people are free to make unwise decisions, provided that they have the capacity to decide."[46]

Experiences of Formalising Relationships

Of the four participants in the Everyday Decisions project who were engaged, two were planning a long engagement. One of these participants, Tracy, a woman in her late 50s, had been previously married and divorced, had been in other long term relationships and was currently engaged to a new partner:

> I've been with him for about two years. Because I used to go out with another fellow, I went out with him for eight years, and then I found out he was doing the dirty on me so I left him. But I'm still friends with him. But this one he's got a car and he takes us on holiday and he takes us anywhere we want to go. He's a nice fellow.[…] It'll be a couple of years before we settle down. He's a decent man.

Similarly, Carrie, a younger woman in her 30s, had been in a relationship for 8 years, and her boyfriend proposed a few months before her interview. They were not planning to marry in the immediate future:

> **Carrie**: That's my ring…we got engaged in April time
> **RH**: Congratulations!
> **C:** Thank you.
> **RH:** Have you been going out with him for a long time?
> **C:** Eight years. […] We went down to the pub down the road for a few drinks to celebrate it but this year we're going to have a big party.
> […]
> **RH**: And have you started thinking about planning the wedding yet?
> **C**: Oh no, no, no, people were asking "when are you getting married?" you know, "have you set a date for it yet?" Like no, I'll get married in a couple of you know, years time. I'm not ready yet. I'm just, I'm still only young.
> […]
> **RH**: And what about after you get married? What's the plan then? Have you got a plan?
> **C**: Hopefully to get our own place one day I mean if I can have more help with like washing machine or dishwasher, cooking and stuff like that. I mean I want to get my own independence but with, you know, help.

Amanda and James, who were interviewed together with the help of a supporter, were in their late 20s /early 30s and had recently started living together in a house in a supported living complex. They had known each other for many years, and had been 'officially' together for around six years. They had been supported by their family to move in together, and had found a house in a supported living housing association complex that they could rent together. Before he proposed, James had asked his parents whether people with his particular kind of disability are allowed to get married, and with the support of his parents, and Amanda's parents, had proposed to her.

[45] *PC and NC v York City Council* [2014] 1 Fam 10; [2013] EWCA Civ 478
[46] Ibid, at [64]

At the time of their interview, Amanda and James were enthusiastically planning their wedding, complete with ballroom dance lessons for their 'first dance', a pig roast for the evening buffet, and choosing the theme for the decorations at their reception. They talked about their visit to the register office to give notice of their intention to marry:

> **James:** The register office. Actually, in the register office, we did listen to the lady in the register office. I think we both did listen to what she's saying and about, we did listen to the instructions about it and after we both signed the form. We both signed it.
> **RH:** Yeah.
> **Beth (supporter):** And were you both in the office all the time together?
> **J**: Yeah, that's right.
> **B**: Or was sometimes…? Amanda, can you remember what happened?
> **Amanda**: I think so.
> **B**: Were you, or did you have to go in the little room on your own for a while?
> **J**: Yeah, that's right. Yeah.
> **A**: We had to do it on our own.
> **RH**: Did they ask you questions in the little room on your own?
> **A**: Yeah, separately.
> **J**: She interviewed Amanda first. Then, after Amanda, it was me. I did an interview as well.

Beth reported that these individual interviews did not appear to be about whether James and Amanda had capacity, because "Well, I think she came to that pretty quickly that there obviously was - that's the thing. She was very skilled in the way she [did it],." Instead, the interviews were focused on whether each of them were freely choosing to marry.

In contrast to the legal response to capacity to consent to marry that has been considered through the case law, which is focused on marriage in the abstract, these participants were always focused on a particular marriage or engagement to a particular person. Importantly, for James, Amanda and Carrie, their partner was also intellectually disabled and they were well supported by their families in developing consensual, chosen relationships. For these participants, as with many people who choose to marry (Eekelaar, 2007), their decision was about love, not the contractual responsibilities attaching to marriage.

Divorce

Capacity, Consent and Divorce

In stark contrast to the significant developing jurisprudence from the Court of Protection relating to both sex and marriage, there has been a vanishingly small amount of judicial consideration of capacity to consent to divorce. This may be a consequence of longstanding policy nudges towards private ordering in family justice (Barlow, Hunter, Smithson, & Ewing, 2017). Equally, it may be a result of the extremely small proportion of divorce petitions (less than 1%) that are contested each year (Trinder & Sefton, 2018). The only reported case in which the capacity to consent to divorce has been discussed in any detail, *Mason v Mason*,[47] significantly pre-dates the MCA. In *Mason,* the petitioner was the wife, and the grounds were that the parties had lived apart for a continuous period of at least two year immediately prior to the petition. The husband, who had suffered with mental health problems for some thirty years, was at the time of the petition for divorce living in accommodation provided for him under the National Assistance Act 1948. He had signed a typed statement intimating that he consented to the divorce, which was accompanied by medical evidence as to his capacity at the time of signing. Sir George Baker P found that the burden of establishing consent fell on the petitioner, and that:

[47] *Mason v Mason* [1972] Fam 302.

> the test for the capacity of a man to give valid consent for the dissolution of his marriage is exactly the same as the test for the validity of the contract of marriage and that is the test propounded in *In the Estate of Park, decd.* 1954] P. 89[48]

The test in *Park* was reiterated in *Sheffield City Council* v *E and S* – and is that the person must understand "the responsibilities normally attaching to marriage." As discussed above, in the context of marriage we have a more finely-grained understanding of what those responsibilities are. No similar list has yet been produced which would help identify the information relevant to the decision to consent to divorce, nor the reasonably foreseeable consequences of deciding one way or another. Like marriage and sexual relationships, consent to divorce is also excluded from the best interests decision-making framework of the MCA. This raises a set of complex potential legal problems, which do not yet appear to have been tested in the courts.

Where the Court of Protection have been asked to adjudicate capacity issues in relation to divorce, these appear to have been in cases where divorce has been one element in a more complex set of hostile family relationships. Trinder and Sefton (2018), for example, reported stories from lawyers who participated in their empirical research about cases around inheritance and capacity. These, they say:

> Concerned old, or older, couples where the respondent argued that a vulnerable petitioner, allegedly lacking capacity, had been put under pressure, by the petitioner's children or extended family, to initiate the divorce, against the petitioner's real wishes. In each case, the motivation to force the divorce through was said to be to protect an inheritance. (Trinder & Sefton, 2018, p. 49)

One such reported case was that of *RGB v Cwm Taf Health Board,*[49] where a 70 year old woman with dementia (Mrs B) had issued divorce proceedings on the basis of unreasonable behaviour. Her husband (Mr B) contested the allegations, and instituted proceedings for 'conspiracy to end a marriage' against Mrs B's son, daughter and son-in-law, and a friend of Mrs B. Evidence was presented to the Court about Mrs B finding Mr B to be "over-controlling and that she did not have freedom to come and go as she wished." There were also reports of an antagonistic relationship between Mr B and Mrs B's children (from a previous relationship). In this case, the divorce was not finalised, as Mrs B lost litigation capacity before those proceedings could complete. Mr Justice Moor, in finding that it would not be in Mrs B's best interests to have contact with Mr B, nor for Mr B to be appointed her health and welfare deputy, nor for any of his (many) claims against the local authority to succeed, held:

> If it had not been for her lack of litigation capacity, I consider, on the balance of probabilities, that her divorce petition would have been concluded with a decree absolute dissolving her marriage to Mr B. I accept that Mr B filed an Answer but it has been said that there is not so much as one marriage in which at some point both spouses have not behaved unreasonably. Defended divorces are themselves extremely unusual. Successfully defended divorces are almost unheard of. If there had been a Decree Absolute, there would be no question of Mr B now having contact to his former wife.[50]

Ultimately, it appears that Mr and Mrs B remained married, though without any of the usual responsibilities associated with marriage.

[48] Ibid, at p 306.
[49] [2013] EWCOP B23
[50] Ibid, at 30.

Experiences of Divorce

Three of these participants had experienced divorce: Tracy, Suzanne and Alan. Tracy did not discuss her divorce in detail in her interview, because the reasons underlying the breakdown of her marriage related to her ex-husband's abuse of their son were, understandably, upsetting to her:

> I used to go to a club and play bingo and leave my son at home with his dad... I used to put him in bed and then when I got home at night he was still in bed but in between they got him up and done these things so … social said "either you husband or your son", and I said "my son" because he's more important.

Suzanne and Alan both divorced following their spouse's adultery. Suzanne experienced a traumatic brain injury in a car accident when she was 21. She got married around two years after her accident, and she and her husband had two children together, but in Suzanne's words: "The bugger left me. He left me for my best mate." Yet the way Suzanne described her experience of her divorce was somewhat paradoxical. She noted that, "after leaving me he went on to be a millionaire." Her ex-husband provides financially for their children, but Suzanne herself relies on disability benefits. Yet her view of the impact of her divorce on her life is generally positive: "so, you know, it's been tough, but excellent really, because it's, I don't think I would have been half as capable of looking after myself unless I had been forced to do it."

The third participant who spoke about his experience of divorce, Alan, who has epilepsy and autism, also has two children, but unlike Suzanne, he no longer sees them.

> **Alan**: Problem is me and my wife, my wife did adultery and she moved somebody else in and I had a nervous breakdown then. That's 2003, when I gave up work – because I couldn't work. I was working for her really, and the family. And she's poisoned the kids, see, against me. So I haven't seen my son for about seven years. […]
>
> **RH:** Can you tell me a little bit more about your divorce, if you'd like to?
>
> **Alan**: … I really loved her. But she took all my property away from me. I used to have a four-bedroom detached house and she had the kids so she had all the money. I only got my car, but it was about eight years old anyway. It didn't last very long. That's it really.
>
> **RH**: Yeah, did you speak to a solicitor?
>
> **Alan**: Yeah, I did. I went for just a free interview and they said she would have got the house anyway because she'd got the kids. But I should have stayed there and should have refused to move out. But her husband, not her husband, her boyfriend, tried to beat me up so I just stopped speaking to her and all the things like that.

Alan's disabilities mean that he is unable to work full time any more, though he enjoys volunteering. Like Suzanne, he now relies primarily on benefits for income, including Employment and Support Allowance and the Personal Independence Payment (PIP). Whilst neither Alan nor Suzanne expressed much regret over their limited financial circumstances, either in contrast to their ex-spouses current situation or their own previous financial position, it was clear that the outcome of their relationship breakdown had been particularly detrimental to them in financial terms, though not in personal terms.

Alan and Suzanne's experiences suggest that the current focus on private ordering and the relative rarity of contested divorce may (indirectly) operate to the disadvantage of intellectually disabled people. A lack of consideration of the impact of intellectual disability on bargaining power in divorce negotiation and settlement, for example, may leave intellectually disabled people without appropriate financial support from their former spouses. The mundanity of non-contested divorce proceedings, and the removal of legal aid for most routine family law matters means that people in Alan's or Suzanne's position may not be able to get the right kinds of advice, support or representation to help them to negotiate a fair settlement.

In this section, I have contrasted legal perspectives on capacity to consent to sex with everyday accounts of entering into and leaving intimate and formal relationships. Legal responses to entering into relationships foreground the protection of (vulnerable) intellectually disabled people from abuse when entering into relationships. In contrast, everyday experiences that do not engage the Court of Protection, but are nonetheless regulated by the exceptional decisions made there, are more concerned with the difficulties of accessing support to sustain relationships, and to live in(ter)dependently with partners in the community. When relationships end, divorce law is focused on the big money cases, with the commitment to the 'yardstick of equality'[51] guiding preferences for a clean break, and equal division of relationship assets (Barlow et al., 2017). In contrast, the everyday experiential accounts reported here suggest that it may be that intellectually disabled people need additional support at the end of relationships, which is not currently available to them. In the next section, I argue for a different approach to family law in the context of intellectual disability, once which foregrounds relational power dynamics and the levelling potential of effective support networks.

Towards a Supportive Family Law?

Despite family law decisions about consent to sexual relations, marriage, divorce and adoption matters being excluded from the best interests decision-making process under s. 27 of the MCA, the Court of Protection has dealt with a very great, and seemingly increasing, number of cases on these matters since the MCA came into force. In that jurisprudence, which is understandably mixed, there is a difficult tension emerging between a desire to set thresholds for capacity to consent to sexual relations and marriage low, and the imperative of protecting disabled people from potential abuse. There are, within the broad sweep of cases, some decisions which seek to facilitate consensual sexual relationships as much as possible,[52] and where the rigid boundaries of capacity to consent in these areas as set in previous case law are stretched to fit novel situations. Often these expansions take place in recognition of the potentially very restrictive response that would be required if a person who wishes to engage in a particular relationship is found to be unable to understand the information necessary to be able to consent to it. In other cases, there has been a recognition of the importance of sex education in assisting intellectually disabled people to develop the appropriate level of capacity to be able to meet the legal thresholds for consent.[53] In this chapter, I juxtaposed this (often) restrictive jurisprudence with the everyday, mundane concerns about, experiences of and reflections on relationships, marriage and divorce from interviews with intellectually disabled people.

Rather than seeking to insulate intellectually disabled people from developing intimate relationships, getting married, or from consenting to divorce, there is a need for a reorientation towards support where family law and capacity law intersect. In the context of sexual relationships, support might come in the form of targeted sex education,[54] or it might come through facilitating intellectually disabled people to develop loving relationships through peer networks, shared interests and activities (Harding & Taşcıoğlu, 2017). In contrast to the focus on sexual relationships that drive cases on intimate relationships that come before the Court of Protection, participants in the Everyday Decisions research were more interested in broader forms of intimacy, including enjoying the friendship and mutual support that comes through relationships. Supporting disabled people to be able to develop positive relationships does, however, require shifts in many aspects of the social welfare system. Changes are required that span from educating frontline care and support workers about disabled people's rights to intimate, private and family lives, through to local, regional and national strategic and policy decisions about the provision of social welfare, support and housing for disabled people.

[51] *White* v *White* [2001] 1 AC 596

[52] E.g. *IM v LM & Others* [2014] EWCA Civ 37; *Tower Hamlets v NB and AU* [2019] EWCOP 27

[53] *CH v A Metropolitan Council* [2017] EWCOP 12.

[54] *CH v A Metropolitan Council* [2017] EWCOP 12.

In the context of marriage, an accessible and supportive family law will facilitate and enable those intellectually disabled people who wish to get married to marry those whom they are in loving relationships with. Changes to how supported living environments are designed and constructed might be required to enable couples where one or both partners are intellectually disabled to cohabit with support in the community, as Amanda and James have been supported, and as Carrie has expressed a desire for in the future. Marriage and cohabitation do, however, come with financial consequences (particularly regarding benefit entitlements, but also in terms of running a household), and there is likely to also be a need for some educational support for disabled people around these issues, as well as to sex education, in order to facilitate equal access to marriage for intellectually disabled people.

In the context of divorce, the current focus on private ordering, consensual divorce proceedings (Trinder & Sefton, 2018) and alternative forms of dispute resolution and mediation (Barlow et al., 2017) may work to especially disadvantage intellectually disabled people. A supportive approach to divorce might require a return to public funding for legal advice on and representation for proceedings relating to relationship breakdown for intellectually disabled people. Alternatively, it might involve modifications to mediation and other alternative dispute resolution processes to ensure that these are both accessible and fair to intellectually disabled people, taking into account power relationships and financial and cognitive disparities between parties. Another approach might be to introduce an accessible information standard for legal services, to ensure that accurate legal information is easily available about family law matters in accessible formats to broaden access to justice (see further, Harding, Taşcıoğlu, & Furgalska, 2019).

Concluding Remarks

This chapter has shown that there is a significant gap between legal articulations of intellectually disabled people's rights to private and family life, and the ways that these are applied in welfare decision making in the Court of Protection. Rather than focusing on support to enjoy intimacy and family life, many Court of Protection decisions, perhaps as a consequence of the framing of intimacy in the MCA as being primarily concerned with sexual relations, perhaps because the cases most likely to come to court are those that are most complex, or where disabled people are most at risk of harm, have a restrictive orientation. The low bar that has been developed through case law to represent the legal test for capacity to consent to sexual relations is often, in these cases, intricately tied together with capacity determinations about questions of residence, care and contact. In them, disabled people might be found to have capacity to consent to sex, but to lack the capacity to decide where to live, or with whom to have contact, thus side-stepping issues of sexual attraction and physical intimacy. By focusing on more complex questions, the court creates a mechanism for protecting disabled people against the risk of harm. Yet there are other risks associated with re-shaping the complexities of human emotion and attraction in these ways. The test for capacity to marry appears to be becoming more complex, as the Court of Protection seeks to insulate intellectually disabled people from the effects of their (or others) decisions about intimate relationship, adding complexities to the list of relevant information that few non-disabled people have in their minds when deciding to marry.

This legally restrictive orientation towards intimacy and relationships has developed as a direct consequence of the limited way family law issues are engaged with in the MCA. Looking at these issues through the lens of intellectually disabled people's experience, and with an eye towards supporting their human rights, however, forces us to think about facilitation and support, rather than risk and restriction. Supporting intellectually disabled people to develop healthy, consensual, and chosen intimate relationships requires social, political and legal changes. Socially we need to stop thinking of intellectually disabled people are always in need of protection, and ensure that they are provided with the education and opportunities to develop their interpersonal relationships. Politically, there needs to be a shift from understanding disability benefits and welfare support as being sufficient if set at a minimalist, subsistence level of benefits. Legally, we need to ensure that despite the exclusion of

personal decisions around sexual relations, marriage and divorce from the best interests decision-making structures of the MCA that these decisions are not considered to exist outside of the MCA framework completely. The other underlying principles of the MCA (the presumption of capacity, the right to support with exercising and enjoying legal capacity, the need to respect decisions that other think are unwise, and the need for the least restrictive option) still apply, and must shape our legal responses to these complex interpersonal issues.

The argument presented here for changes to how intimate relationships, and rights to private and family life for intellectually disabled people, are provided for in law and society is not, of course, intended to detract from the importance of avoiding and challenging the very real increased risks of emotional, sexual and other kinds of abuse that intellectually disabled people experience. Rather, this argument seeks to demonstrate that an accessible and supportive family law needs to be part of our strategy for catalysing the transformative potential of the CRPD's paradigm shift in disability rights.

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