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Harding, Rosie

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Making legal information accessible and supporting vulnerable clients

Professor Rosie Harding[1]

Introduction

In this article, I reflect on findings from five years of doing qualitative empirical socio-legal research with intellectually disabled people, their chosen supporters, and health and social care professionals, on their experiences of supporting everyday legally-relevant decisions.[2] I also share my experience of working with colleagues to translate legal information into accessible formats as part of a practical follow-on intervention.[3] I use these reflections to argue that greater access to legal information in easy read formats would help improve access to justice for intellectually disabled people. It would also help to support disabled people to "enjoy legal capacity on an equal basis to others" as required by Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD),[4] by shifting emphasis away from the disabled person's ability to understand legal information (their mental capacity) onto the importance of accessible legal communication.

Article 12 CRPD has been the focus of intense academic discussion over the last 15 years.[5] This is because the realisation of disabled people's rights to enjoy legal capacity on an equal basis with

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[1] Professor of Law and Society, Birmingham Law School, University of Birmingham. Email r.j.harding@bham.ac.uk. Earlier versions of the arguments set out here were presented at the World Congress on Adult Capacity, Edinburgh, 2022 and the Global Meeting on Law and Society, Lisbon 2022. The content of this paper draws on the following unpublished research reports: R Harding, E Taşcıoğlu and M Furgalska, *Supported Will-Making: A Socio-Legal Study of Experiences, Values and Potential in Supporting Testamentary Capacity* (University of Birmingham, 2019); R Harding, S O'Connell and P Bragman, *Making Legal Information Accessible: Lessons from the CLARiTY Project* (Unpublished Report: University of Birmingham, 2021).

[2] R Harding and E Taşcıoğlu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (University of Birmingham, 2017); R Harding and E Taşcıoğlu, 'Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity' (2018) 8 *Societies* 25; Harding, Taşcıoğlu and Furgalska (2019, op. cit.); R Harding, 'Doing research with intellectually disabled participants: reflections on the challenges of capacity and consent in socio-legal research' (2021) 48 *Journal of Law and Society* S28-S43.

[3] Harding, O'Connell and Bragman (2021, op. cit.).

[4] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[5] See, for example: A Dhanda, 'Legal capacity in the Disability Rights Convention: Stranglehold of the past or Lodestar for the future?' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 429-462; M Bach and L Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Advancing substantive equality for Persons with Disabilities through Law, Policy and Practice* (Law Commission of Ontario, 2010); E Flynn and A Arstein-Kerslake, 'The support model of legal capacity: Fact, fiction, or fantasy?' (2014) 32 *Berkeley Journal of International Law* 124-143; A Dhanda, 'Conversations between the proponents of the new paradigm of legal capacity' (2017) 13 *International Journal of Law in Context* 87-95; A Arstein-Kerslake and E Flynn, 'The right to legal agency: Domination, disability and the protections of Article 12 of the Convention on the Rights of Persons with Disabilities' (2017) 13 *International Journal of Law in Context* 22-38;

others is pivotal in catalysing the paradigm shift that was sought by proponents of the CRPD.[6] Yet the right to enjoy legal capacity has been (and in many jurisdictions continues to be) limited by perceived problems in the mental capacity or decision-making abilities of disabled people. Much of the academic discourse around Article 12 has focused on debates about the meaning of the right,[7] and the place of 'best interests' decision-making in disabled people's lives.[8] Some recent work has shifted the focus towards the creation of non-discriminatory safeguards to protect the right to enjoy legal capacity.[9] In this paper, I make an argument for the importance of accessible legal information as a key part of these non-discriminatory safeguards.

The article is structured as follows. Firstly, I share a story from my empirical research about the experience Gareth,[10] a person with a learning disability, had when making a will. Specifically, I will discuss how the current law on testamentary capacity and safeguards against undue influence failed him when he first made a will. Secondly, I explore current legal frameworks around accessible information in the UK, drawing out the implications of these for legal practice, and reflect on how legal services can be made more accessible to disabled people. I conclude by reflecting on some of the barriers to making legal services more accessible, and the importance of finding ways to overcome these.

M Donnelly, R Harding and E Taşcıoğlu (eds), *Supporting Legal Capacity in Socio-Legal Context* (Oxford: Hart Publishing, 2022).

[6] K Booth Glen, 'Changing paradigms: Mental capacity, legal capacity, guardianship, and beyond' (2012) 44 *Columbia Human Rights Law Review* 93-169.

[7] N Devi, J Bickenbach and G Stucki, 'Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities' (2011) 5 *ALTER - European Journal of Disability Research / Revue Européenne de Recherche sur le Handicap* 249-264; G Richardson, 'Mental Disabilities and the Law: From Substitute to Supported Decision-Making?' (2012) 65 *Current Legal Problems* 333-354; Committee on the Rights of Persons with Disabilities, *General Comment No. 1 on Article 12: Equal recognition before the law* (2014); W Martin and others, *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Article 12 in Capacity/Incapacity Legislation across the UK* (2016); C De Bhailis and E Flynn, 'Recognising legal capacity: commentary and analysis of Article 12 CRPD' (2017) 13 *International Journal of Law in Context* 6-21; M Scholten and J Gather, 'Adverse consequences of article 12 of the UN Convention on the Rights of Persons with Disabilities for persons with mental disabilities and an alternative way forward' (2018) 44 *Journal of Medical Ethics* 226-233

[8] M Donnelly, 'Best interests in the Mental Capacity Act: Time to say goodbye?' (2016) 24 *Medical Law Review* 318; L Series, 'The place of wishes and feelings in best interests decisions: *Wye Valley NHS Trust v Mr B*' (2016) 79(6) *Modern Law Review 1090-1115*; A Ruck-Keene and AD Ward, 'With and without 'Best Interests': the Mental Capacity Act 2005, the Adults With Incapacity (Scotland) Act 2000 and constructing decisions' (2016) 22 *International Journal of Mental Health and Capacity Law*; J Coggon and C Kong, 'From best interests to better interests? Values, unwisdom and objectivity in mental capacity law' (2021) 80 *The Cambridge Law Journal* 245-273.

[9] MI Hall, 'Putting the pieces together: Article 12, 'Safeguarding' and the right to legal capacity' in M Donnelly, R Harding and E Tascoglu (eds), *Supporting Legal Capacity in Socio-Legal Context* (2022 *op. cit*.), pp.273-290.

[10] To protect the confidentiality of research participants, all participant names used are pseudonyms.

How are everyday legal decisions supported in practice?

In the course of the 2016-2017 Everyday Decisions research project,[11] and the 2018-2019 Supported Will-Making follow-up study,[12] we interviewed a total of 50 individuals (19 disabled people, 6 informal supporters and 25 health and social care professionals) in England about their experiences of making and supporting everyday legal decisions.[13] A key finding to emerge from that research was that as the decisions people make became more complicated, paradoxically, the amount of support that disabled people received to help them to make the decision decreased.[14]

Health and social care professionals who participated in the research told us of many detailed support strategies that they used to ensure that intellectually disabled people, including those with profound and multiple learning disabilities, were facilitated to make their own choices about what to eat, what to wear or what to do that day. Strategies included using pictures or objects of reference,[15] which helped people to communicate their preferences. Disabled participants reflected on the ways that they used support, from family and friends, personal assistants and from health and social care professionals to help them to make choices about their lives. However, for more complicated decisions surrounding, for example, where to live or whether to engage in education or work, both disabled people and health and social care professionals reported that there was less targeted support available. Finally, when it came to making substantive legal decisions, including giving formal medical consents, creating lasting powers of attorney, or making a will, disabled people generally reported being very poorly supported, and many social care professionals reported being unable to provide the support that people need, in part through finding such decisions complex themselves.

In other words, a paradox of support emerged through this research: the more complex the decision, the less support is available to cognitively disabled people to make that kind of decision. There are many reasons why that might be. Take, for example, a decision about whether to consent to an elective surgical procedure. The law relating to medical consent requires that a patient gives consent to the surgery before it takes place, for that surgery to be lawful; without consent, it could

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[11] Funded by the British Academy Mid-Career Fellowship (MD150026).

[12] Funded by the University of Birmingham ESRC Impact Acceleration Account, and a Philip Leverhulme Prize from the Leverhulme Trust.

[13] See Harding, Taşcıoğlu and Furgalska (2019, op. cit) and Harding and Taşcıoğlu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (2017, *op. cit*.) for a detailed discussion of demographic characteristics of the research participants in these interlinked research studies. Whilst this research focused on England, similar issues arise across the UK jurisdictions.

[14] Harding and Taşcıoğlu, 'Supported decision-making from theory to practice: Implementing the right to enjoy legal capacity' (2018, *op. cit*.)

[15] F Jones, T Pring and N Grove, 'Developing communication in adults with profound and multiple learning difficulties using objects of reference' (2002) 37 *International Journal of Language & Communication Disorders* 173-184.

be assault or battery.[16] The law of negligence also tells us that the patient needs to be warned of the risks involved in any surgical procedure, and that medical professionals have a duty to warn the patient of the material risks.[17] Risk conversations can, of course, be complicated; medical terminology (like legal jargon) can be difficult to understand, and the people to whom a disabled person might ordinarily turn for support may not have much knowledge or understanding of the procedure in question. The Mental Capacity Act 2005 (MCA)[18] provides a legal framework through which a decision can be made in the disabled person's 'best interests' in these circumstances,[19] but only after 'all practicable steps' have been taken to help them to make their own decision, without success.[20]

Support frameworks that enable disabled people to make their own legally relevant decisions, including more complex legal and medical issues, are therefore essential but not always provided. To bring this issue to life, consider Gareth's story about making a will, which provides an important point of reflection for why better support frameworks are needed in legal practice.[21]

Gareth's Will

Gareth was a man in his 60s when I met him. He had learning difficulties and sensory disabilities. He had lived with his grandmother when he was younger but had no ongoing relationships with other members of his family. Gareth told me that:

> I was given some backdated money from the benefits agency, like an arrears-type thing. And it started me thinking about doing the will seriously. Thinking why squander something which I would never have had in the first place, but what do I put it to use of, and instantly I thought about a funeral plan and my will.

Gareth subsequently paid for a funeral plan and made a will with the support of his Personal Assistant. Time passed, and Gareth's relationship with the Personal Assistant who had previously helped him to make his will broke down, amid strong suspicions about financial abuse.[22]

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[16] A Mullock, 'Surgical harm, consent, and English criminal law: When should 'bad-apple' surgeons be prosecuted?' (2021) 21 *Medical Law International* 343-368.
[17] *Chester* v *Afshar* [2004] UKHL 41; *Montgomery v Lanarkshire Health Board* [2015] SC 11 [2015] 1 AC 1430.
[18] As this empirical research took place in England, my focus here is on the legal framework in England and Wales. Similar issues do, however, arise in other UK jurisdictions.
[19] Mental Capacity Act 2005, s. 4.
[20] Mental Capacity Act 2005, s. 1(3).
[21] Gareth's story, and the following discussion of testamentary capacity have been adapted from Harding, Taşcıoğlu and Furgalska (2019, *op. cit*.).
[22] See Harding and Taşcıoğlu, *Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment* (2017, *op. cit*.) for a more detailed discussion of this allegation.

Later, when he was moving house, Gareth and his new Personal Assistant, Catherine, found this will, which Gareth had forgotten he had made. In discussion, it emerged that Gareth had either misunderstood, or had been misled about, testamentary freedom and the law of wills. He thought that he had to name his 'next of kin' in his will, and that he had to leave everything to that next of kin. Gareth and Catherine described this in conversation during our interview:

> **Catherine**: At the time he went [to the solicitor] with support but the support worker was the person who was benefitting from this. …If easy read [information] had been there he would have then got the right information and have had time to have processed that information perhaps before. And then the mishap that was made because Gareth didn't truly understand what was going on, wouldn't have happened would it?
>
> **Gareth**: I also seem to remember, I asked the person to be my next of kin and yeah I think I was probably misguided in that thinking that was a [requirement]…. I have to say I did misunderstand … because I wouldn't have been--
>
> **Catherine**: It was really upsetting. When I tried to- when we found the will and we went over it he was really frustrated and got quite upset, because it was [upsetting].

More recently, Gareth made a new will, with support from Catherine, another support worker and a solicitor. He named both support workers as executors and left his estate to charity. Initially, he had wanted to name only Catherine as his executor, but she persuaded him to name another person as well, "not only to safeguard Gareth, but to safeguard me really" (Catherine). In his interview, Gareth told me: "I'm happier now that I've actually done it properly with the right advice. But it does make me wonder, you know, if that advice had been given to me correctly in the first place, as Catherine was saying, I'd probably have a better understanding."

Gareth was also advised by his solicitor to write a letter accompanying his new will explaining why he did not want to leave anything to his biological family. The reason for this was that Gareth was worried that his family, who he does not see, and who have not supported him during his lifetime, would try to "cash into" his estate. He was therefore supported by Catherine and by his solicitor to include details of his poor relationship with his family in a letter to be stored with his will, to protect his charitable bequests, even though this was upsetting to him, and difficult for him to do.

Gareth's story raises important questions about how best to safeguard vulnerable testators from abuse and highlights the need for greater levels of accessible information about making a will. Gareth's story also warns of the potential consequences when legal safeguards are not successful in protecting someone from abuse. Balancing the right to enjoy legal capacity with the importance of safeguards from abuse is one of the major challenges of introducing a legal framework that complies

with Article 12 CRPD. Gareth's story demonstrates how the current approach to supporting vulnerable testators does little to safeguard vulnerable testators at the time they make their will, focusing instead on protections against challenges to the will after death.

Gareth did not say precisely when his first will was made, so we do not know whether the MCA 2005 was in force at the time. He did note, however, that no easy read information about will-making was available to him to help him to make decisions about his will on either occasion. Gareth also suggested that, as well as having easy read information available, it would be helpful for solicitors to have training in how to communicate better with disabled clients, because solicitors cannot know in advance of meeting with a client what their needs might be.

As there was no easy read guide to making a will available to Gareth, during the interactions with his solicitor, Catherine acted as a kind of translator between the solicitor and Gareth. As Catherine put it: "I would say to [the solicitor], 'sorry can you simplify it?' And then I would, if Gareth was still struggling, I would simplify it to how I thought he would best understand it." Whilst this is an appropriate course of action where a support worker is acting properly, and not looking to benefit personally, it is clear to see how relying on a support worker in this way could create opportunities for those with less virtuous motives.

Support and safeguards when making a will

Whilst robust statistical data is scarce, intellectually disabled people are assumed to be at a higher risk of being victims of financial abuse than non-disabled people.[23] As Article 12(4) of the CRPD makes clear, there is a need for "appropriate and effective safeguards to prevent abuse" when disabled people are being supported to enjoy their legal capacity. This includes protection from financial abuse and harm, including when making a will. There are five legal safeguards in the law of wills that should have worked to ensure that when Gareth made a will with the assistance of his solicitor, it was indeed reflective of his wishes: testamentary capacity, knowledge and approval, undue influence, mistake, and fraud.

i. Testamentary capacity

The first and arguably most important safeguard is that of testamentary capacity. As in Northern Ireland, legal frameworks surrounding vulnerable testators in England and Wales continue to follow common law definitions of testamentary capacity. The common law test for testamentary capacity

[23] See, for example, O Hewitt, 'A survey of experiences of abuse' (2014) 19 *Tizard Learning Disability Review* 122-129; G Dalley and others, 'Researching the financial abuse of individuals lacking mental capacity' (2017) 19 *Journal of Adult Protection* 394-405; S Buhagiar and C Azzopardi Lane, 'Freedom from financial abuse: persons with intellectual disability discuss protective strategies aimed at empowerment and supported decision-making' (2022) 37 *Disability & Society* 361-385.

in *Banks* v *Goodfellow*[24] is considered to have survived the MCA.[25] It is thought that the *Banks* v *Goodfellow* test sets a relatively lower bar than the functional test in s.3 MCA, particularly in respect of the foreseeability of the consequences of a testamentary disposition.[26] There is also a difference in the level of understanding required in the two tests, with the MCA test requiring a person to understand all of the relevant information, whereas the *Banks* v *Goodfellow* test requires that the testator understands the function of a will, that it represents the testator's intentions, and that the testator "appreciates the claims to which he ought to give effect".[27] There are also minor differences between the common law and statutory tests in relation to the burden of proof in respect of capacity. Whereas under the MCA there is a presumption of capacity,[28] under the common law test for testamentary capacity , the burden of proof regarding capacity shifts between the parties, depending on the type of claim being brought.[29]

Solicitors are expected, where possible, to follow the 'golden rule' from *Kenward* v *Adams*[30] that medical assessment of capacity should be sought when preparing a will for an "an aged testator or a testator who has suffered a serious illness". This 'golden rule' is not a rule of law, rather an indicator of good practice. It pre-dates the MCA and is arguably out of step with the both the statutory presumption of capacity in s. 1 MCA, and the requirement in s. 2 MCA that a lack of capacity cannot be established on the basis of a person's age, appearance, condition or aspect of his behaviour. More recent formulations of the 'golden rule' note that a medical assessment of capacity may not always be possible or appropriate, in which case the Law Society suggest that contemporaneous notes relating to the client's understanding of the *Banks* v *Goodfellow* test and s. 3 MCA will assist in providing evidence of capacity, along with evidence that the client had been interviewed without potential beneficiaries present.[31]

Irrespective of the legal technicalities of the relevant test for testamentary capacity, or the evidence to that end recorded by his solicitor, there was no doubt that Gareth had testamentary capacity at

[24] *Banks* v *Goodfellow* (1870) LR 5 QB 549 at p565 per Cockburn, CJ: "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend end appreciate the claims to which he ought to give effect; and with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise."
[25] *Re Walker (deceased)* [2014] EWHC 71 (Ch).
[26] *ibid*.
[27] *ibid*, at [23]
[28] MCA 2005, s. 1
[29] *Re Key (deceased)* [2010] EWHC 408 (Ch) at [97]
[30] *Kenward* v *Adams* (1975) The Times, 29 November: "the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and findings." Per Templeman J.
[31] The Law Society, *Wills and Inheritance Protocol* (London: Law Society Publishing, 2013).

the time he made either of his wills: he knew what a will was, what it does, and he expressed his choice at the time of making each of his wills as to who he wanted to inherit his assets after his death. The letter explaining his poor relationship with his family, which accompanies the more recent will, further demonstrates his capacity and reasoning.

The limited scope of testamentary capacity beyond the *Banks* v *Goodfellow* test means that, on its own, it may provide an insufficient safeguard for people with learning disabilities or other cognitive impairments when making a will, because of their heightened possibility of harm. This means that additional safeguards need to be in place to protect vulnerable testators and, in line with Article 12(4) CRPD, these should be non-discriminatory, appropriate, and effective. As I will show, existing mechanisms for challenging a will (lack of knowledge and approval, undue influence, mistake, fraud) also may not fully protect intellectually disabled people like Gareth.

ii. Knowledge and Approval

The most important safeguard after testamentary capacity is, arguably, want of knowledge and approval. In English law, as set out in *Ark* v *Kaur,* knowledge and approval requires only that "the testator knows that he is making a will, knows what the terms of it are, and intends that those terms should be incorporated into and given effect by the will."[32] In *Perrins* v *Holland*, the Court of Appeal clarified that knowledge and approval "requires no more than the ability to understand and approve choices that have already been made."[33] Furthermore, it does not require understanding of the legal terminology used in the will,[34] nor understanding of the technical legal effects of the will.[35]

Whilst there is no formal presumption that proper execution of a will means that there is knowledge and approval, Lord Neuberger made clear in *Gill v Woodall* that*:*

> The fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testator's intentions at the relevant time.[36]

Notwithstanding this 'very strong presumption,' additional evidence may be required if the testator has sensory disabilities, is unable to talk, or unable to read.[37] Nevertheless, it is not disputed that Gareth knew and approved of the contents of his will on both occasions that he made one.

[32] *Ark v Kaur* [2010] EWHC 2314 (Ch) at [19].
[33] *Perrins v Holland* [2010] EWCA Civ 840 at [64].
[34] *Greaves v Stolkin* [2013] EWHC 1140 (Ch).
[35] *Morrell v Morrell* (1882) 7 PD 68 at 70 to 71.
[36] *Gill* v *Woodall* [2010] EWCA Civ 1430 at [14].
[37] Non-Contentious Probate Rules 1987, rule 13; *Re Geale's Goods* (1864) 3 Sw & Tr 431.

iii. Undue influence

The next potential safeguard to consider is that of undue influence. Here, we might expect there to be more chance that Gareth's first will could have been challenged in the event of his death, given the trust relationship between Gareth and his previous Personal Assistant. Yet whereas the general doctrine of undue influence includes a presumption in relationships of trust, [38] there is no such presumption in testamentary contexts.[39] Instead, to challenge a will on grounds of undue influence, the person challenging the will must prove (on the balance of probabilities) that undue influence was involved. This is made even more complicated by the relatively high bar for *undue* influence in testamentary contexts, given that merely persuading someone to leave you something in their will is entirely lawful. As set out by Lord Carnwarth in the early case of *Boyse v Rossborough*, "influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud."[40] The role that coercion plays in undue influence in the testamentary context was clarified more recently by Mr Justice Levinson as follows:

> Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion.[41]

Taken together, all this means that it can be very difficult to prove undue influence, even where a testator was clearly vulnerable at the time they made their will.[42] Certainly it would not have been straightforward for anyone seeking to challenge Gareth's first will to prove coercion or undue influence in these terms.

iv. Mistake and fraud

When Gareth spoke to me about his experiences of making a will, he noted that he had misunderstood testamentary freedom: he did not realise that he could leave his estate to charity, and thought he had to leave his assets to a person. This kind of mistake, however, would not be covered by the relevant doctrine relating to rectification of wills. In the context of wills, mistake refers to errors in drafting, rather than in the understanding of the testator. Examples of mistake

[38] *Royal Bank of Scotland* v *Etridge (No 2)* (2001) UKHL44; [2002] 2 AC 773.
[39] Law Commission, *Making a Will* (London: Law Commission of England and Wales, 2017)
[40] *Boyse v Rossborough* (1857) 6 HLC 2 at 49-49 per Lord Carnwarth.
[41] *Re Edwards* (deceased) 2007] EWHC 1119 (Ch) at [47] per Mr Justice Levinson.
[42] See *Edkins v Hopkins* [2016] EWHC 2542 (Ch) for a recent example.

from case law include erroneous wording,[43] omissions,[44] and signing the wrong will.[45] A mistaken belief is not enough to challenge a will; instead, instances of mistaken belief must result from a false representation.[46] As with undue influence, fraud can be difficult to prove, especially as the burden of proof falls on the party alleging the fraud.[47] Taken together this means that successful claims of fraud in a will are rare.[48]

v. Summary

Thinking through each of these ways to challenge a will shows how poorly the current law of wills protects people with learning disabilities from the kinds of financial abuse that Gareth experienced. Firstly, lack of knowledge and approval would not apply. The will was properly executed and Gareth was, by his own admission, aware of the contents of his will and approved of those contents at the time it was made. We do not know to what extent he was coerced by his personal assistant into leaving his assets to her, but at the time the will was made, it seems that Gareth was happy with the decision he made. There was no clear evidence of fraud, or of mistake in the drafting of his will. In summary, as the current approach to protecting vulnerable testators from financial abuse through their will focuses on challenges to wills after the testator's death, it was unable to protect Gareth when he was making his first will.

Without having been present at the appointment with the solicitor where Gareth nominated his previous personal assistant as his 'next of kin' and sole beneficiary, we cannot know to what extent his solicitor probed Gareth's understanding of wills, or his testamentary capacity more broadly. We also do not know whether Gareth was questioned about his wishes without his supporter present (as would be considered good practice where testamentary capacity is in doubt).[49] It seems, however, that whilst Gareth understood the nature and effect of a will (insofar as it is a disposition of his assets that takes effect after his death), and the extent of the property he was disposing of in that will, it appears that he misunderstood (or was misled about) testamentary freedom. It is possible, therefore, that his original will may have been vulnerable to challenge. The difficulties disappointed beneficiaries may face in challenging a will based on incapacity, lack of knowledge and approval, mistake, fraud or undue influence are well documented.[50] In respect of testamentary

[43] *In the Goods of Swords* [1952] P. 368.
[44] *Re Reynette-James* [1976] 1 WLR 161.
[45] *In the Goods of Hunt* (1875) LR 3 P&D 250.
[46] *Re Bellis* [1929] 141 LT 245.
[47] *Craig v. Lamoureux* [1920] AC 349.
[48] R Kerridge, 'Wills made in suspicious circumstances: the problem of the vulnerable testator' (2000) *Cambridge Law Journal* 310-333

[50] R Kerridge, *Parry and Kerridge: The Law of Succession* (13th ed., London: Sweet & Maxwell, 2016).

capacity, it seems clear that Gareth has capacity under the *Banks* v *Goodfellow* test, and under the MCA test in relation to his new will, which suggests he would also have had it at the time he executed his original will, even if not all the relevant information was given to him. Given that the will was prepared by a solicitor, it is likely that some contemporary evidence would be available that he had capacity at the time the will was executed. In any case, it seems wrong to argue that a challenge based on Gareth's impairments should be the only way to overturn a will that was made because of the influence of, or misinformation provided by, a supporter.

The question that would have been at the heart of any potential challenge to his previous will on the basis of capacity would be the extent to which he understood the concept of testamentary freedom, and that he could leave his assets to whomever he chose, bearing in mind that he had no dependents who might have a claim under the family provision legislation. The final grounds for challenge would be that of undue influence and/or fraud, but again these are difficult to prove, and in the absence of sufficient evidence, the challenger may be required to pay costs. As discussed above, undue influence requires coercion, rather than mere persuasion. Fraud requires that the testator was deceived. In both cases, the burden of proof rests on the challenger to evidence the deception or coercion, which would have been very difficult to do in this case.

Importantly, however, even if a person who would have been able to challenge Gareth's will had been successful in doing so, intestacy law would still have failed to give effect to Gareth's wishes. The only persons who would have standing to challenge his will would be those who would otherwise have benefited should Gareth die intestate. As is clear from Gareth's story, he did not want his birth family to inherit from him. Like several of the other Everyday Decisions interviewees, Gareth does not have a good relationship with his biological family. The only family member that Gareth spoke positively of was his grandmother, who died some years ago. Whilst the rules on intestate succession are designed to offer an appropriate backstop position for most people, and generally align quite well with generic public attitudes to inheritance,[51] they may not always be appropriate for intellectually disabled people. This is because the family relationships of intellectually disabled people, particularly those with lifelong learning disabilities, may not follow the same patterns as those of nondisabled people. For example, some intellectually disabled people (particularly older people) may have spent parts of their lives in residential care.[52] Intellectually

[51] G Douglas et al, 'Inheritance and the family: Public attitudes' (2010) *Family Law* 1308-1316; H Douglas and J Corrin, ''A tragedy of monumental proportions': Indigenous Australians and the sentencing process' (2010) 19 *Social & Legal Studies* 197-215; G Douglas and others, 'Enduring love? Attitudes to family and inheritance law in England and Wales' (2011) 38 *Journal of Law and Society* 245-271; A Humphrey and others, *Inheritance and the family: Attitudes to will-making and intestacy* (London: NatCen, 2010).

[52] C Hatton et al, *People with Learning Disabilities in England 2015* (London: Public Health England, 2016)

disabled people may also be less likely to have spouses or partners, because they are not well supported to develop positive intimate relationships,[53] may be at higher risk of sexual abuse,[54] and may not receive the sex education required to meet the threshold for capacity to engage in sexual relations under the MCA.[55] Intellectually disabled people may also not have children because they have been sterilised,[56] or if they do have children, their children may have grown up in foster care, or may have been adopted.[57] As a consequence, the standard patterns of inheritance, and the rules of intestate succession may not fit with disabled people's lives.

In summary, as we can see from Gareth's story and this brief analysis of how the contemporary common law safeguards operate in the area of testamentary capacity, the paradox of decreasing availability of support where decisional complexity increases creates real problems in ensuring that disabled people have appropriate support to ensure their access to justice. This, unfortunately, reflects the values that society places on supporting disabled people to enjoy their legal capacity, and highlights why proper implementation of the right to enjoy legal capacity on an equal basis with others (Article 12 CRPD) is such an important step in realising the paradigm shift of disability rights.

Accessible Information in the UK

The Legal Framework

Accessible information is extremely important in breaking down barriers to the full participation of disabled people in society, and access to information is already protected and encouraged by a range of national, international, and service specific legal frameworks. These include: the Disability Discrimination Act 1995 (DDA, the Equality Act 2010, the UN Convention on the Rights of Persons with Disabilities, the NHS Accessible Information Standard, and the Public Sector Bodies (websites and mobile applications) Accessibility Regulations 2018. In this part, I outline some of the main provisions of each of these legal frameworks, before moving on to discuss how these frameworks should inform the provision of legal services.

[53] R Harding and E Taşcıoğlu, '"That's a bit of a minefield": Supported decision-making in intellectually disabled people's intimate lives' in C Ashford and A Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Cheltenham: Edward Elgar, 2019), pp.256-270.
[54] J Lindsey, 'Developing vulnerability: A situational response to the abuse of women with mental disabilities' (2016) 24 *Feminist Legal Studies* 295-314
[55] *Re CH (by his Litigation Friend, the Official Solicitor) v. A Metropolitan Council* [2017] EWCOP 12.
[56] AJ Stansfield, AJ Holland and ICH Clare, 'The sterilisation of people with intellectual disabilities in England and Wales during the period 1988 to 1999' (2007) 51 *Journal of Intellectual Disability Research* 569-579.
[57] A Dimopoulous, 'Intellectually disabled parents before the European Court of Human Right and English Courts' (2009) *European Human Rights Law Review* 70-83.

The DDA applies in Northern Ireland, and requires service providers to make reasonable adjustments,[58] including a duty to take reasonable steps to provide auxiliary aids to enable disabled people to use their services.[59] The Equality Act 2010 consolidated discrimination law in England, Wales and Scotland. The Act sets out an explicit duty to provide information in an accessible format as part of its provisions on reasonable adjustments.[60] Failure to comply with the duty to make reasonable adjustments is a form of discrimination, which can give rise to a cause of action in law. Furthermore, a person who is subject to this duty to make reasonable adjustments is not entitled to require a disabled person to whom the duty is owed "to pay to any extent [the] costs of complying with the duty."[61] Like the DDA, the Equality Act applies in employment, education, the provision of goods, facilities and services, premises, the exercise of public functions, and in private clubs and associations.[62]

A particularly useful way to ensure that information is provided in an accessible format is to produce 'easy read' information. Easy read information uses pictures and symbols, often alongside highly simplified written language, to enable people with cognitive impairments (like learning difficulties/disabilities, acquired brain injuries, and neurodegenerative disorders) to read and understand written information, even if they have low literacy levels. There are already some excellent examples of easy read information about law and legal processes, like the Books Beyond Words series,[63] and information produced by and for charities like the Lasting Power of Attorney guide published by the Mencap Trust Company.[64]

The exact scope of the duty to make reasonable adjustments varies depending on the context that the duty arises in, but it is an important dimension of how equality law requires employers, educators and service providers prevent disability discrimination. The duty to make reasonable adjustments takes an objective approach to what is 'reasonable.' In relation to some providers, including services, public functions and associations, the duty to make reasonable adjustments is an 'anticipatory' duty. This means that it requires providers in those areas to consider, and act in relation to, the needs of disabled people *before* being faced with an individual disabled person who

[58] Disability Discrimination Act 1995, s. 21.
[59] *ibid*, s. 21(4).
[60] Equality Act 2010, s. 20.
[61] Ibid, s. 20(7).
[62] There are slight differences across these areas, and various exceptions that apply to some of them. See the *Equality Act 2010 Code of Practice: Services, Public Functions and Associations* available at: https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf and guides produced by the Disability Justice Project, available at: https://www.disabilityjustice.org.uk/learn-more-and-take-action/ for more information.
[63] Available at https://booksbeyondwords.co.uk/ accessed 28 September 2022.
[64] Available at https://www.mencaptrust.org.uk/guides-lasting-power-attorney accessed 28 September 2022.

requires reasonable adjustments to be able to access their services/functions/association. In employment, the duty only arises in response to substantial disadvantage faced by a particular disabled person.

The United Kingdom has been a signatory to the UN Convention on the Rights of Persons with Disabilities (CRPD) since 2007, and ratified the CRPD on 8 June 2009. Ratification of an international treaty means that the United Kingdom has agreed to be bound by its provisions. The development and provision of accessible information supports many of the rights in the CRPD, most specifically Article 9 on Accessibility, and Article 21, which includes rights to access to information. Article 9 CRPD includes duties on the State to ensure disabled people have access, on an equal basis with others, "to information and communications." It requires States that have ratified the Convention to "promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information" and "to promote the design, development, production and distribution of accessible information and communication technologies." Article 21 requires States to "take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice." Examples of how this right should be implemented includes providing information to the general public in accessible formats, by "urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats" and encouraging the mass media to "make their services accessible to persons with disabilities".

There are also accessible information rules and standards that apply to particular kinds of information. The two most important of these in the UK are the NHS Accessible Information Standard, and the Public Sector Website Accessibility Regulations.[65] The Accessible Information Standard is a legal duty that applies to all publicly funded health and social care services in England.[66] The legislative basis for the Standard is in the Health and Social Care Act 2012, s. 250. It was first introduced in 2016 and it applies across all NHS and adult social care services in England including GPs, dentists, hospitals, and other care providers. The Accessible Information Standard means that people who use a service and have information or communication needs because of a disability or an impairment, or some kind of sensory loss like visual or hearing impairment, are entitled to information in a form that is accessible to them. It is hard to see whether the Accessible Information Standard has been effective, as in a post-implementation review published in 2017,

[65] Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018
[66] The text of the Accessible Information Standard is available at: https://www.england.nhs.uk/ourwork/accessibleinfo/ accessed 28 September 2022.

while 65.5% of respondents from health and social care services reported that their organisation had implemented the standard 'to some extent' or 'mostly', nearly half (43%) of the patients, services users, carers and parents who responded had not heard of the Accessible Information Standard, and just 15.2% of those respondents felt that the impact of the Standard had been good or very good.[67]

The Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018[68] place a duty on all public sector website and apps to implement and maintain accessibility standards for disabled users. Websites are generally be considered compliant with the regulations if they adhere to the Web Content Accessibility Guidelines (WCAG) 2.1, published by the World Wide Web Consortium (W3C) in 2018.[69] Whilst these specific regulations and the duties they impose only apply to public sector bodies, all service providers should seek to make their online information as accessible as possible. Webpage accessibility can be checked relatively easily using online tools like the WAVE Web Accessibility Evaluation Tool,[70] to highlight areas of technical non-compliance with current WCAG specification. The WAVE tool also facilitates human evaluation of accessibility problems with websites, enabling reflection on how best to resolve accessibility issues that arise.

Making legal services more accessible

The CLARiTY Project was an online accessible legal information project that ran during the COVID-19 pandemic lockdowns in late 2020 and into 2021.[71] Our aim in that project was to make law more accessible to disabled people and family carers. It included six interactive Zoom sessions, the purpose of which was for the project team, supported by specialist guest speakers, to explain a wide range of legal frameworks associated with mental capacity law, care and medical treatment in accessible ways. We explained the ever-changing lockdown rules, the law about supported decision-making, lasting powers of attorney, deputyship, banking, accessible information, how to challenge Care Act decisions and where to access more legal help and support.

Each session was recorded, and after each session, we edited parts of the sessions into informational videos and created plain English and easyread guides to the information we had discussed.[72] This development of accessible legal information was key to what we were trying to achieve. We knew that there was a significant level of unmet legal need in this area, as well as a large gap between the

[67] NHS England (2017) Accessible Information Standard: Post Implementation Review available at: https://www.england.nhs.uk/publication/accessible-information-standard-post-implementation-review/ accessed 12 July 2021.
[68] These Regulations have their foundations in the EU Web Accessibility Directive (Directive 2016/2102).
[69] Available at: https://www.w3.org/TR/WCAG21/ accessed 28 September 2022.
[70] Available at: https://wave.webaim.org/ accessed 28 September 2022.
[71] Harding, O'Connell and Bragman (2021, *op. cit*.)
[72] These are freely available on the project website at: https://legalcapacity.org.uk/clarity-project/ accessed 28 September 2022.

right to support when making decisions[73] and people's everyday experiences of actually being supported to enjoy their legal capacity.[74] The CLARiTY project sought to find ways to bridge that gap by making clear that disabled people already have a right to accessible information, and experimented with ways to provide it. Explaining complex legal ideas in accessible ways requires intimate and accurate knowledge of the relevant law, as well as the ability to explain the same concept in multiple ways to ensure understanding. In the CLARiTY sessions, we found that using stories to put information in context was a useful way of helping to explain complex or abstract legal concepts.

As a consequence, providing accessible legal information is not easy, nor is it founded in skills that legal professionals have been routinely taught. Yet there are some straightforward techniques that can be used to build accessibility into legal information and services for disabled clients. The first stage involves recognising the power dynamics in solicitor-client interaction. Rather than being equal parties in an interaction, vulnerable clients rely on their solicitor to support them, and may feel extremely powerless in that interaction. Connecting with clients by finding things in common will help to build rapport, which will in turn help clients to feel at ease. It is hard to emphasise enough just how important a warm, friendly, and approachable demeanour can be to help break down barriers to inclusion.[75]

It is also important to remember that interactions with legal professionals can come with extremely high stakes for disabled people, particularly those with cognitive impairments. If the interaction is made more difficult than it needs to be, this can lead to profound consequences for the person's life. The functional approach to capacity in English law means that if a disabled person is considered "unable" to understand, use or weigh the information relevant to a decision,[76] they will be denied their legal agency. Many other jurisdictions have similar frameworks. In these functional capacity law frameworks, the onus is placed on the disabled person to understand, even when the people they are trying to understand make little effort to make reasonable adjustments to meet that disabled person's informational needs.

Making information more accessible includes a range of simple steps like using plain language, avoiding jargon, planning how to explain difficult concepts, providing easy read versions of written information, using high quality images in easy read materials, and testing easy read materials with people who would use them. If information is provided online, it can also be helpful to supplement

[73] Mental Capacity Act 2005, s. 1(3).
[74] Harding and Taşcıoğlu, 'Supported decision-making from theory to practice: Implementing the right to enjoy legal capacity' (2018, *op. cit*).
[75] Harding, O'Connell and Bragman (2021, *op. cit*.)
[76] Mental Capacity Act 2005, s. 3.

written information with video explainers or short films. If information is provided in person, then simply talking through a written or easy read document can help to support understanding. These are not difficult changes to make in practice, but they can have significant positive impacts on access to justice.

Concluding remarks

In this article, my focus has been on making the case for better availability of accessible legal information as a means to safeguard intellectually disabled clients. In the longer term, however, we also need to think more carefully about how the right to enjoy legal capacity should be supported, protected, and implemented. Rather than aligning legal capacity with decision-making ability or individual 'mental capacity's, and thinking of it as a skill that people either do or do not have it might help to think of all clients as potentially vulnerable, and of everyone as requiring some level of support to access legal services. Whilst particular impairments can mean that people need greater levels of support, recent research published by the Legal Services Board makes clear that vulnerability can also be created by other situational factors like poverty, low literacy, digital exclusion and domestic violence.[77] That report, in line with findings from my research and our experience on the CLARiTY project recommends designing legal services in ways that anticipate the support that clients need to have a positive experience. This might include creating a warm and welcoming environment, engaging with clients with empathy and compassion, providing clear information in lay language, and good case management approaches which manage clients' expectations. Taking steps to make legal services more accessible to all clients will also have the added benefit of ensuring that disabled clients are not singled out for special treatment, nor held to higher standards of rationality in their decision-making, whilst simultaneously having their rights to enjoy legal capacity protected and safeguarded in non-discriminatory ways.

There are many practical arguments that could be made against providing legal information in easy read and other accessible formats. Some are founded in costs: producing easy read information would mean that serving disabled clients would be more expensive and would raise questions as to who funds accessible information. It is not clear who would pay to keep easy read guides up to date, to test materials, or to commission bespoke images. Other barriers include the additional time that it would take to serve disabled clients, the need for extra training in providing accessible legal services, and the challenges of distilling complex information into clear, accessible communication. These barriers are far from insurmountable. Taking the duty to provide reasonable adjustments for

[77] Available at https://legalservicesboard.org.uk/wp-content/uploads/2022/06/Vulnerability-in-legal-services-research-FINAL-REPORT.pdf accessed 28 September 2022.

disabled clients seriously should offer many opportunities to overcome them. I hope that the reflections in this article might encourage legal professionals working with disabled clients to think about concrete steps that each legal service provider can take to make law and legal services more accessible to disabled clients.