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THE ASSISTED DECISION-MAKING (CAPACITY) ACT 2015 IN THE COURTS: HEARING THE VOICE OF THE RELEVANT PERSON

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Abstract: The Assisted Decision-Making (Capacity) Act 2015 (hereafter the 2015 Act) constitutes a decisive shift in legal responses to people whose capacity is in question, requiring greater support for decision-making, an amplification of the relevant person's voice, and increased respect for their will and preferences even if they are found to lack decision-making capacity. Although much of the operation of the 2015 Act happens outside of the courts, judicial proceedings also play a central role. This article is concerned with the role of the relevant person's voice in such proceedings. It identifies efforts being made by judges to ensure that the relevant person's voice is heard but also recognises some of the challenges that can arise in delivering on this. It identifies the need for further resourcing to support the voice requirements in the Act, including better access to independent advocacy, and for enhanced guidance for courts and legal practitioners.

Introduction

After a long gestation, the Assisted Decision-Making (Capacity) Act 2015, as amended[1] (hereafter the 2015 Act) finally came into force on 26 April 2023.[2] The 2015 Act is a central part of the State's response to its obligations under the United Nations Convention on the Rights of Persons with Disabilities (CRPD),[3] which Ireland signed in 2007 and ratified in March 2018. Accordingly, it is underpinned by human rights-derived guiding principles and by empowerment and participation values[4] and includes a range of legislative measures to ensure that the voice of the relevant person[5] is heard and respected.

The 2015 Act constitutes a decisive shift in legal responses to people whose capacity is in question, requiring an amplification of the relevant person's voice as well as increased respect for their will and preferences even if they are found to lack decision-making capacity. Inevitably, this will at times give rise to challenges, conflicts, and tensions which the courts will have to resolve. This article is concerned with the role of voice in judicial proceedings under the 2015 Act. This has both procedural and substantive dimensions. The 2015 Act imposes requirements regarding how any intervention concerning the relevant person, including court hearings, should proceed. This in turn has implications for the nature of evidence required for such interventions and the substantive decisions reached.

[1] Amended by the Assisted Decision-Making (Capacity) (Amendment) Act 2022.

[2] Assisted Decision-Making (Capacity) Act 2015 (Commencement) Order 2023, SI No 192 of 2023; Assisted Decision-Making (Capacity) Act 2015 (Commencement No 2) Order 2023, SI No 193 of 2023; Assisted Decision-Making (Capacity) (Amendment) Act 2022 (Commencement No 2) Order 2023, SI No 194 of 2023.

[3] A/RES/61/106 Annex 1.

[4] See generally, Anna Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities: Realizing the Equal Right to Equal Recognition before the Law* (Cambridge University Press, 2017).

[5] As defined in the 2015 Act, a 'relevant person' is (a) 'a person whose capacity is in question or may shortly be in question in respect of one or more than one matter'; (b) a person 'who lacks capacity in respect of one or more than one matter' or (c) a person who 'falls within paragraphs (a) and (b) at the same time but in respect of different matters': 2015 Act s 2.

The article begins by exploring different understandings of voice and establishing why the voice of the relevant person is so important in capacity-related matters. It then identifies the constitutional and human rights backdrop to the 2015 Act. The article then turns to examine what is required to establish the voice of the relevant person under the 2015 Act and considers how the Irish courts have been addressing the matter of voice pre and post commencement of the 2015 Act. The final part of the article explores how the courts might further amplify the relevant person's voice, looking to the extensive experience of the Court of Protection in England and Wales in this regard, and identifying the importance of judicial guidance in providing a structure within which the relevant person's voice can be heard. The article concludes by identifying the need for better resourcing of structures to support the 2015 Act's requirements regarding voice.

Why the Voice of the Relevant Person Matters

Before considering why voice matters, it is important to recognise the different meanings of voice.

What is Voice?

Voice is the right to be heard either through the telling of one's story or having one's story conveyed by another in judicial proceedings. The relevant person may represent their own views, in their own voice, without any intermediary, advocate or supporter. This may sometimes represent the truest and most authentic form of voice, allowing the relevant person to engage with the court in their own words or their preferred manner of communication. However, this is not always possible. For some relevant people, direct communication with the court may be intimidating and the formal court setting may be alienating. For these people, some forms of additional supports are needed. As we will see below, various supports and mechanisms are available to ensure that the person's authentic voice can be heard.

How is Voice Represented in a Legal Context?

Where the relevant person is unable to represent their own views in their own voice the relevant person's voice may be heard through some form of intermediary,[6] who in a court situation is most typically a lawyer. The lawyer presents the relevant person's views and also 'translates' these into a legal narrative which the court can understand. Legal representation can be a powerful force in communicating the relevant person's voice, but it is not without limitations. In the first instance, lawyers will vary in the level of their skills in, and commitment to, engaging with people whose capacity is in question.[7] Moreover, as Alex Ruck Keene and colleagues have noted (in an English context), lawyers owe duties not just to their clients but also to their opponent, to the Court, to themselves (as regulated entities) and to the State.[8] This means that they 'cannot necessarily advocate for what their clients pay them to advocate.'[9]

[6] We use the term 'intermediary' here in a generic sense, not as used in the criminal law context under the Criminal Evidence Act 1992/Criminal Justice (Victims of Crime) Act 2017.

[7] Camillia Kong, and others, 'The 'Human Element' in the Social Space of the Courtroom: Framing and Shaping the Deliberative Process in Mental Capacity Law' (2022) 42(4) Legal Studies 715.

[8] Alex Ruck Keene, Peter Bartlett, Neil Allen, 'Litigation Friends or Foes? Representation of 'P' Before the Court of Protection' (2016) 24(3) Med L Rev 333, 355.

[9] ibid.

Lawyers are not the only possible intermediaries in a court setting. Two alternative (or additional) forms of intermediary are Guardians ad Litem (GALs) and independent advocates.[10] The GAL system originally developed, and most commonly operates, in respect of children.[11] GALs serve a dual role. They present the views of the person for whom they act but they also offer their own views as to the person's best interests. This means that GALs do not necessarily always advance a position which accords with that of the person for whom they act. In contrast, the most common understanding of an independent advocate's function is that they present the voice of the relevant person and/or support them to express their views.[12] The Decision Support Service *Code of Practice for Independent Advocates* describes the role of advocacy as 'working to ensure that a relevant person's decision is articulated and respected.'[13] The relevant person might also be supported by family members or friends who present the person's views to the court and/or help the court develop an understanding of what matters to the relevant person.

The Importance of Voice

There are many reasons why voice is important, especially where a person's decision-making capacity is, or may be, in question. To begin, the right to be heard is a foundational element of procedural justice and as such it is protected under the common law, the Constitution of Ireland, and the European Convention on Human Rights (ECHR). The greater the impact of the decision on the person's human rights (eg a decision to remove the person's liberty), the more important it is that their voice be heard. In this respect, as we will see in the next section, both the Supreme Court and the European Court of Human Rights (ECtHR) have affirmed that the courts are obliged to ensure that the voice of the person is heard in capacity-related matters.

The importance of being allowed 'to tell one's story to the decision-maker'[14] has even greater significance where a person's capacity is in question and may be reliant on the supports of others as conduits of their message, or reliant on the testimony of expert advisers and reports. In this context, voice has an instrumental importance. It enhances the range of the evidence available to the court, thus increasing the possibility of a successful resolution. As we will see below, there are several cases where courts have acknowledged the impact on the decision reached of the direct evidence provided by the person who is the subject of the hearing. This reflects the power of judicial engagement with 'embodied legal subjects rather than abstract

[10] The term 'independent advocate' is not defined in the 2015 Act. However, s 103(1) authorises the Decision Support Services to publish a code of practice for *inter alia* advocates. The relevant Code: the Code of Practice for Independent Advocates defines independent advocacy as 'a professional support service provided by an organisation that is free from conflict of interest and is independent of family and services providers' <https://decisionsupportservice.ie/resources/codes-practice/code-practice-independent-advocates> para. 1.2.1.

[11] Ann McWilliams, Claire Hamilton, '"There isn't Anything like a GAL': The Guardian ad litem Service in Ireland' (2010) 10(1) Irish Journal of Applied Social Studies 31. Note reform of the GAL system in the Child Care (Amendment) Act 2022, s 7 (not commenced at time of writing).

[12] On the varied understandings of the advocate's function, see Eilionóir Flynn, 'A Socio-Legal Analysis of Advocacy for People with Disabilities – Competing Concepts of 'Best Interests' and Empowerment in Legislation and Policy on Statutory Advocacy Services' (2010) 32(1) Journal of Social Welfare and Family Law 23.

[13] Code of Practice for Independent Advocates, para 1.1.3 <https://decisionsupportservice.ie/sites/default/files/2023-04/9.%20COP_for_independent_advocates_0.pdf> accessed 18 November 2024.

[14] Paula Case, 'When the judge met P: The Rules of Engagement in the Court of Protection and the Parallel Universe of Children Meeting Judges in the Family Court' (2019) 39 *Legal Studies* 302, 304. Case applies the three V's framework (voice, validation and voluntariness) developed by Amy Ronner: see Amy Ronner, 'Songs of Voice, Validation and Voluntary Participation' (2002) 71 University of Cincinnati Law Review 89.

notions of expert experience'.[15] This is important because as Jaime Lindsey describes, writing about the England and Wales Court of Protection (COP):

> The people who navigate the CoP experience pain, pleasure, sadness, happiness or a range of other emotions; they have physicality and mental difference that may impact on their interpretation of the case and its procedures; they may understand differently from those designing the procedures or making the decision; and they live and experience the process of the CoP through their corporeal difference.[16]

Hearing the person's voice also recognises that the person is not simply someone to whom acts are done but rather that, as described by Camillia Kong and colleagues, they merit 'deliberative respect' and have 'epistemic and moral standing'.[17] In this way, hearing the person's voice recognises their personhood, a recognition which was long denied to people whose capacity was in question.[18] Thus, the right to be heard is an aspect of equal treatment; it recognises that 'everyone, irrespective of their position, financial means, education, background or any other variable, deserves a just procedure to be applied to the hearing of their legal dispute.'[19] Research also indicates that meaningful participation in a legal process increases the participant's satisfaction with the process even if the ultimate outcome is not the one they wanted.[20] As described by Alex Ruck Keene and colleagues (also writing in respect of the Court of Protection), participation allows the subject of the proceedings 'to feel 'connected' to the proceedings'.[21] They note '[m]any, even with relatively severe levels of cognitive impairment, have the concept of a "judge", and to see the judge who will be deciding the case can be extremely important for them'.[22] It is for these reasons that some commentators see voice as playing a crucial role in a therapeutic jurisprudence approach to capacity law.[23]

Human Rights Underpinnings

The 2015 Act requirements to hear the voice of the relevant person are underpinned by the Constitution of Ireland and by European/international human rights instruments. While each of these instruments focuses on a different element of voice, read together, they present a powerful legal argument for the importance of voice in capacity-related matters. The foundational constitutional precedent is *AC v Hickey, Cork University Hospital and Ors*.[24] Mrs C was 91 years old and had dementia symptoms. Having been admitted to Cork University Hospital, with a broken hip, she indicated a wish to be discharged into the care of her son.

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[15] Jaime Lindsey, *Reimagining the Court of Protection: Access to Justice in Mental Capacity Law* (Cambridge University Press, 2022) 48.
[16] ibid 49.
[17] Camilia Kong and others, 'Judging Values and Participation in Mental Health Law' (2019) 8(1) Laws 3, 8 < https://www.mdpi.com/2075-471X/8/1/3 > accessed 5 November 2024.
[18] Gerard Quinn and Abigail Rekas-Rosalbo, 'Civil Death: Rethinking the Foundations of Legal Personhood for Persons with a Disability' (2016) 56 Irish Jurist 286.
[19] Lindsey (n 15) 44.
[20] See Edgar Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988); Jill Peay, *Tribunals on Trial* (Oxford; Clarendon Press, 1989), 44–5; for verification of this in the CoP, see below text to (n 151).
[21] Alex Ruck Keene, and others *Court of Protection Handbook: A User's Guide* (4th Edn, London: *Legal Action Group*, 2022), para 16.47.
[22] ibid
[23] See Case (n 14) 303-305. Therapeutic jurisprudence, which developed in the United States in the 1990s, analyses the therapeutic (and anti-therapeutic) impacts of engagement with the legal system on participants; David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Durham: Carolina Academic Press, 1991); David Wexler and Bruce Winick, *Judging in a Therapeutic Key: Key Developments in Therapeutic Jurisprudence* (Durham: Carolina Academic Press, 1996).
[24] [2019] IESC 73.

The hospital declined to discharge her because of concerns about her welfare[25] and subsequently made an application for her admission to wardship. The medical visitor (appointed as part of the wardship process) concluded that Mrs C was of unsound mind and, following a wardship hearing at which she was not present or represented,[26] Mrs C was admitted to wardship, with the General Solicitor appointed as her Committee. On appeal, the Supreme Court found that Mrs C's right to fair procedures had been breached.[27] The Court identified several breaches, specifically that Mrs C had not been given sufficient notice of the hearing date; had not been furnished with relevant documentation (including the medical visitor's report); and had not been legally represented.[28] O'Malley J (giving judgment for the Court) emphasised that '[i]t is essential that the voice of the individual be heard in the process, and if she cannot speak for herself then some person must be found, who is not otherwise involved in any dispute, who can speak for her.'[29] The Court suggested that this might be achieved through the expansion of the roles of the medical visitor or General Solicitor or by the appointment of an independent Guardian ad Litem (GAL).[30] The appointment of a GAL subsequently became a routine element in the operation of the wardship jurisdiction. While this was undoubtedly an improvement, as we saw above, the GAL model is not necessarily best-suited to representing voice because of its additional focus on the GAL's own views as to the person's best interests.[31] In situations where the relevant person's views diverge from those of the GAL, the GAL's professional assessment may override the relevant person's voice.

While the constitutional focus has been primarily on the relevant person's voice as presented through intermediaries, the jurisprudence of the European Court of Human Rights (ECtHR) has emphasised the importance of 'personal presence'[32] i.e. the attendance of the person whose capacity is in question at any relevant court hearing. This requirement emerged initially in *Shtukaturov v Russia* where the ECtHR found that the applicant's Article 6 (right to a fair trial) and Article 8 (right to private and family life) rights had been breached by a legal determination that he lacked capacity at a hearing which he had not been informed about and at which he had not been present.[33] The ECtHR distinguished between the right to be legally represented (which had been recognised since *Winterwerp v the Netherlands*[34]) and the person's presence at the hearing, noting that in a case such as this, the applicant was both an interested party and the object of the proceedings.[35] His participation was seen as necessary 'not only to enable him to present his own case, but also to allow the judge to form her personal opinion about the applicant's mental capacity'.[36]

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[25] The relationship between Mrs C's son and daughter and the hospital had been difficult: [2019] IESC 73 [99].
[26] This was relatively routine practice in the exercise of the wardship jurisdiction not least because prospective wards had no entitlement to free legal aid and there was often a concern to preserve the ward's assets: The National Safeguarding Committee, Review of Current Practice in the Use of Wardship for Adults in Ireland (December 2017) 9733-34 <https://www.safeguardingireland.org/wp-content/uploads/2018/10/Wardship-Review-2017.pdf> accessed 5 November 2024.
[27] [2019] IESC 73 [377].
[28] ibid [396].
[29] ibid [397].
[30] ibid [368]. The Court did not, however, go so far as to find a constitutional right to legal aid in respect of wardship, noting that this issue had not been argued to the extent desirable for such a conclusion to be reached: ibid [368].
[31] See Mary Donnelly, 'Judging Values in the Time of Transition' in Camillia Kong and others *Capacity, Participation and Values in Comparative Legal Perspective* (Bristol: Bristol University Press, 2023) 74-75.
[32] As described by Lucy Series, 'Legal Capacity and Participation in Litigation: Recent Developments in the European Court of Human Rights' [2015] European Yearbook of Disability Law 132.
[33] App No 44009/05 [2008] ECHR 223.
[34] App No 6301/73 [1979] ECHR 4.
[35] App No 44009/05 [2008] ECHR 223 § 72.
[36] App No 44009/05 [2008] ECHR 223 § 72; *X and Y v Croatia* App. No. 5193/09 [2011] ECHR 1835 § 85.

While emphasising the contribution of personal presence, the ECtHR has also recognised that sometimes this will not be possible.[37] However, the Court has been clear that national courts should carefully interrogate the reasons offered as to why the person is not present. Thus, in *Lashin v Russia,* it was not sufficient for the District Court to simply assume, without medical evidence, that the applicant's personal presence would be detrimental to his health, simply because he had schizophrenia.[38] As summarised in *AN v Lithuania:*

> The Court … considers … that in many cases the fact that an individual has to be placed under guardianship because he lacks the ability to administer his affairs does not mean that he is incapable of expressing a view on his situation. In such cases, it is essential that the person concerned should have access to court and the opportunity to be heard either in person or, where necessary, through some form of representation.[39]

A further source of human rights obligations lies in the CRPD. Although the CRPD has not been incorporated into Irish law, it is increasingly referenced by the Irish courts as an indication of international norms in disability-related matters.[40] The CRPD extends the human rights obligations concerning voice, imposing positive requirements which go beyond simply hearing the person's voice (personally or through representation). Two articles of the CRPD are most relevant in this respect.[41] Article 12 recognises the equal right to legal capacity of persons with disabilities[42] and requires states parties to ensure that all safeguards relating to the exercise of capacity must respect the rights, will and preferences of the person, be free of conflict of interest and undue influence, be proportional and tailored to the person's circumstances, apply for the shortest time possible and be subject to regular review by a competent, independent and impartial authority or judicial body.[43]

Article 12 should be read together with Article 13 which requires states parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including a requirement to provide people with disabilities with 'procedural and age-appropriate accommodations in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings.'[44] Thus, under the CRPD, it is not sufficient that the person's voice be heard in a technical or procedural sense but rather accommodations must be put in place so that the person can participate in a meaningful way in capacity-related proceedings which concern them. Such accommodations might include

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[37] *Berková v Slovakia* App No 67149/01 [2009] ECHR 515; *Lashin v Russia* App No 33117/02 [2012] ECHR 63 § 82.
[38] *Lashin v Russia* Application no. 33117/02 [2012] ECHR 63 § 82; *Salontaji-Drobnjak v Serbia* App No 36500/05 [2009] ECHR 1526.
[39] *AN v Lithuania* App No 17280/08 [2016] ECHR 462 § 90; *N v Romania* App No 38048/18, 16 November 2022 § 74
[40] *Health Service Executive v X* [2011] IEHC 326; *Child and Family Agency v Adoption Authority of Ireland and Ors* [2022] IEHC 301; *DPP v VE* [2021] IECA 122; *Child and Family Agency v Adoption Authority of Ireland and Ors* [2022] IECA 196; *AB v Health Service Executive (Re HSE Standard Operating Procedure January 2020)* [2023] IECA 275.
[41] Note also the guiding principles of the CRPD as set out in Art 3 which include: respect for dignity and autonomy; non-discrimination; respect for difference; equality of opportunity; and accessibility and the specific obligation on states parties to provide reasonable accommodation in giving effect to the right to equality.
[42] Art 12(2).
[43] Art 12(4). The precise meaning of Art 12 has been widely debated. In General Comment No 1 *Article 12: Equal Recognition Before the Law*, 19 May 2014, CRPD/C/GC/1, the United Nations Committee on the Rights of Persons with Disabilities (the body charged with interpreting the CRPD) interpreted Art 12 to require the removal of capacity-based distinctions including the abolition of substitute decision-making. However, several states, including Ireland, have issued reservations/interpretative declarations retaining the possibility of substitute decision-making in some circumstances.
[44] Art 13(1). See generally Eilionóir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Surrey: Ashgate Publishing, 2015).

the use of alternative communication methods, including appropriate technologies; facilitating the giving of evidence in different ways, eg by video-link/CCTV; the employment of advocacy and personal assistance; and training for lawyers and judges in disability sensitivity.[45]

Voice Requirements under the 2015 Act

The requirement to hear the voice of the relevant person permeates the 2015 Act. The Guiding Principles, which underpin the 2015 Act, require that any 'intervener' (which includes the Court) must 'permit, encourage and facilitate, in so far as is practicable, the relevant person to participate, or to improve his or her ability to participate, as fully as possible in the intervention'.[46] Thus, there is a positive obligation to ensure that the relevant person's voice is heard in all interventions under the 2015 Act. The Guiding Principles also require that any intervention 'give effect, in so far as practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable'[47] and that account must be taken of the relevant person's beliefs and values in so far as these are reasonably ascertainable.[48]

These Guiding Principles must be applied in respect of the tiers of support for a relevant person. These tiers comprise the appointment of a contemporaneous decision-making supporter: a Decision-Making Assistant[49] or a Co-Decision Maker[50] by a relevant person who believes that their capacity is in question or may shortly be in question, as well as mechanisms for advance decision-making. The latter may involve the creation of an Enduring Power of Attorney[51] and/or the making of an Advance Healthcare Directive, which may include the appointment of a Designated Healthcare Representative.[52] Both of these arrangements only come into effect if the relevant person subsequently loses decision-making capacity. Maximising the relevant person's voice is a central tenet of the operation of each of these tiers of support which are then reinforced by the scaffolding of the Guiding Principles.

Another important role for voice in the 2015 Act relates to decisions made about the relevant person (sometimes described as substitute decision-making). This kind of decision-making requires court involvement. Most decisions are made in the Circuit Court,[53] with an appeal (on a point of law only) to the High Court.[54] However, the High Court has original

[45] See Robyn White, Ensa Johnson, Juan Bornman, 'Investigating Court Accommodations for Persons with Severe Communication Disabilities: Perspective of International Legal Experts' (2021) 23(1) Scandinavian Journal of Disability Research 224.
[46] 2015 Act, s 8(7)(a). An 'intervention' is any act taken, order made or direction given under the 2015 Act; 2015 Act, s 2(1).
[47] 2015 Act, s 8(7)(b).
[48] 2015 Act, s 8(7)(c).
[49] A Decision-Making Assistant assists the appointer in making decisions as specified in the Decision-Making Assistance Agreement (although the decisions remain those of the appointer): see generally 2015 Act, pt 3.
[50] A Co-Decision-Maker makes decisions as specified in the Co-Decision-Making Agreement jointly with the appointer: see generally 2015 Act, pt 4.
[51] Under an Enduring Power of Attorney, the appointer appoints a person to make specified decisions should the appointer lose capacity: see generally 2015 Act, pt 7.
[52] An Advance Healthcare Directive is an 'advance expression made by the person … of his or her will and preferences concerning treatment decisions that may arise in respect of him or her if he or she subsequently lacks capacity'; 2015 Act, s 82. A Designated Healthcare Representative is someone appointed in the Advance Healthcare Directive who can exercise certain decision-making powers on behalf of the directive-maker in accordance with the Advance Healthcare Directive; 2015 Act, pt 8.
[53] 2015 Act, s 4.
[54] ibid, s 141.

jurisdiction in respect of certain matters. These are: applications for detention;[55] review of detention orders;[56] review of capacity of wards;[57] applications relating to donation of an organ from a living donor; [58] and applications in connection with the withdrawal of life-sustaining treatment from a person lacking capacity.[59] In addition, the High Court continues to have jurisdiction in respect of wards[60] and the High Court's inherent jurisdiction continues to apply.[61]

The most common pathway to court involves a 'Capacity Application' to the Circuit Court under Pt. 5 of the 2015 Act.[62] This may be made by the relevant person or by anyone with a bona fide interest in the welfare of the relevant person[63] The Court may then make a declaration that the relevant person lacks capacity in respect of a decision/s unless they have the assistance of a Co-Decision-Maker (in which case, it must allow the relevant person time to appoint a Co-Decision-Maker unless it is clear that they are not going to do so)[64] or that they lack capacity even if they had such assistance.[65] Where there is no suitable Co-Decision-Maker or the person would lack capacity even with a Co-Decision-Maker, the Court may either make an order making the decisions/s for the relevant person or appoint a Decision-Making Representative (DMR) to make designated decisions for the relevant person.[66] The 2015 Act also allows for an interim order where the Court has reason to believe that the relevant person lacks capacity in relation to the matter/s and is of the opinion that it is in the interests of the relevant person to make the order without delay.[67]

Voice in the Legal Process under the 2015 Act

The voice of the relevant person is required at various stages of the legal process under the 2015 Act. First, as identified above, the Guiding Principles create a positive obligation to ensure the voice of the relevant person is heard. Thus, the obligation to give effect to the past will and preferences of the relevant person, in so far as they are ascertainable, is achievable only if the relevant person's will and preferences are known to the Court, which in turn requires that the person's voice is heard. Additionally, if a decision to appoint a DMR

[55] Applications for detention may be made under the inherent jurisdiction of the High Court.
[56] Under 2015 Act, s 107 (approved centres) and 108 (non-approved centres). Note the interpretation of the scope of s 108 in *Re MC* [2024] IEHC 47.
[57] Under 2015 Act, s 54. Applications for review of capacity in wardship may be taken at any time following the commencement of the 2015 Act and the capacity of all wards must be reviewed within 3 years from the commencement of the 2015 Act: s 54(2). Following review, wards are either discharged from wardship or transitioned to one or more of the arrangements under the 2015 Act: s 55.
[58] 2015 Act, s 4(3)(a).
[59] ibid s 4(3)(b).
[60] ibid, s 56(2).
[61] ibid, s 4(5) as inserted by Assisted Decision-Making (Capacity) Amendment Act 2022, s 5 affirms that the 2015 Act does not impact on the inherent jurisdiction; see further High Court Practice Direction 123, Inherent Jurisdiction (Capacity) Applications, 29 September 2023.
[62] As termed in the Circuit Court Rules 2001-2023, Ord 47B inserted by Circuit Court Rules (Assisted Decision-Making (Capacity) Act 2015) 2023, SI 201 of 2023: the relevant application form is Form 55A and statement of particulars is Form 55B.
[63] Anyone other than the Decision Support Service; the relevant person's spouse or civil partner; and, a person appointed under the 2015 Act must first make an *ex parte* application to the Court for permission to make the application: 2015 Act, s 36(1).
[64] 2015 Act, s 37(2). Form 55A includes a statement regarding the possibility of appointing a Co-Decision-Maker so it should be the case that only situations in which this is not a possibility come before the Court.
[65] ibid, s 37(1).
[66] ibid, s 38(2).
[67] ibid, s 48(1). Interim orders must be limited in time and operation, although the Court renew the order if it considers that it is in the interests of the relevant person to do so: 2015 Act, s 48(2).

is made, the Court must take account of the known will and preferences of the relevant person in determining whom to appoint.[68]

Secondly, the relevant person is entitled to legal aid in respect of any application under Pt. 5[69] and the review of wardship under Pt. 6 of the 2015 Act.[70] Thirdly, the Court may also approve 'another person' (which may include an independent advocate) who is suitable, willing and able to assist the relevant person during the hearing.[71] Fourthly, s 139 of the 2015 Act sets out the relevant person's right of personal presence, stating that any application under Pt. 5; Pt. 6 (review of wardship); Pt. 7 (enduring power of attorney); Pt. 8 (advance healthcare directive) and Pt. 10 (reviews of detention) must be heard in the relevant person's presence unless in the opinion of the Court, the fact that the relevant person is not present would not cause an injustice to the relevant person; such attendance may have an adverse effect on the relevant person's health; the relevant person is unable because of age, infirmity or any other good or substantial reason or is unwilling to attend.[72] Thus, the presumption is that the relevant person will attend unless one of the circumstances identified in s 139 applies.

Fifthly, the 2015 Act includes several provisions aimed at facilitating the relevant person's participation. Hearings must be 'conducted with the least amount of formality consistent with the proper administration of justice'[73] and wigs and gowns should not be worn.[74] Although the matter is not addressed in the 2015 Act, the matter of remote participation in the hearing is provided for in the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020. This legislation (which was introduced during COVID 19) states that the Court may, of its own motion or on application by any of the parties, direct that proceedings proceed by remote hearing.[75]

Meeting the 2015 Act Requirements

Although it is not possible to provide a definitive account of how the 2015 Act's voice requirements are being delivered in practice, we can piece together a partial account from reported decisions, primarily of the High Court, and from two written decision and some very helpful statistics from the Dublin Circuit Court. This account is also supplemented by data provided by the Legal Aid Board, the National Advocacy Service for People with Disabilities and Sage Advocacy with respect to legal representation and independent advocacy.

To begin, it is worth noting that even before the 2015 Act came into effect, the High Court, in the exercise of the wardship jurisdiction, had been making significant efforts to ensure that the voice of the relevant person was heard.[76] There are accounts of Kelly P holding a

[68] ibid, s 38(5)(a).
[69] Civil Legal Aid Act 1995, s 26(3) as amended by 2015 Act, s 52. Note that the entitlement to legal aid applies only to the relevant person and not to family members making an application under 2015 Act, Pt 5.
[70] Civil Legal Aid Act 1995, s 26(2) as amended by 2015 Act, s 57A as inserted by Assisted Decision-Making (Capacity) Amendment Act 2022, s 48.
[71] 2015 Act s 36(8). 2015 Act, s 36(8) provides also for the appointment of a 'court friend' to provide support; however, this aspect of the 2015 Act has not (yet) come into force.
[72] 2015 Act, s 139 as amended by Assisted Decision-Making (Capacity) Amendment Act 2022, s 92.
[73] ibid, s 100(1).
[74] ibid, s 36(11).
[75] Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, s 11(2). In such circumstances, the relevant person must be served with details enabling their participation: see Rules of the Superior Courts. Ord 67A, r 15; for rules of service, see Circuit Court Rules 2001-2023, Ord 47B, r 57.
[76] Donnelly (n 31) 75-80.

court sitting in a nursing home[77] and travelling to a hospital to observe communications with a man in a minimally conscious state (MCS).[78] Moreover, in several cases, the voice of the person had a substantive impact on the decisions reached by the Wardship Court. Perhaps the most significant example is *In the Matter of CF*.[79] This case concerned an above-the-knee amputation of the right leg of a 75-year-old man with severe peripheral vascular disease who lacked capacity to consent/refuse the operation due to dementia.[80] On evidence provided by a vascular surgeon, Mr F was at immediate risk of death from sepsis or haemorrhage if the amputation was not performed.[81] Mr F was strongly opposed to the amputation and consistently indicated that he would be prepared to die rather than have the amputation.[82] Mr F's family indicated that they wished the amputation to proceed.[83] A consultant geriatrician and a consultant psychiatrist both gave evidence that, while the amputation might prolong Mr F's life, it should not be performed because of Mr F's strongly felt views. Mr F gave evidence remotely from his hospital bed, accompanied by a HSE solicitor,[84] where he reiterated his opposition to amputation.[85] As described by Barniville P, '[w]hile understandably a little confused at what was going on, Mr F was a charming, engaging, and pleasant man.'[86] Setting out the legal position, Barniville P considered that 'the fact that Mr F lacks capacity does not mean that considerable weight should not be given to his repeatedly and consistently expressed wishes not to have his leg amputated'.[87] Following a detailed account of all the evidence, he found that it was in Mr F's best interests that the amputation should not proceed[88] and that Mr F should return to his family with palliative care support.[89]

The importance of voice and the potential of remote attendance has been reiterated by the High Court in applications under the 2015 Act. In *The Matter of KK*, Hyland J acknowledged the difference between legal representation and hearing the views of the person, recognising that a 'person whose capacity is in question is often already disadvantaged in their communications with the world and needs a clear pathway in the context of court proceedings to be heard in relation to their wishes and preferences'.[90] She noted:

> [O]ne of the few benefits of the pandemic was that it became commonplace for persons lacking capacity to address the Court from their hospital bed, or residential placement, or home, without having to face the additional challenges of physically coming to Court. This facilitated far greater participation by those persons, including those persons who might wish to observe the proceedings but not be seen or heard.[91]

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[77] Mary Carolan, 'Man pleads to be allowed to go home in first High Court sitting in nursing home' *The Irish Times* (2 August 2018) (https://www.irishtimes.com/news/crime-and-law/courts/high-court/man-pleads-to-be-allowed-go-home-in-first-high-court-sitting-in-nursing-home-1.3584350> accessed 18 November 2024.

[78] *HSE v JM: A Ward of Court* [2017] IEHC 399 [6].

[79] [2023] IEHC 321. Note also the emphasis which Irvine P placed on the ward's likely wishes in respect of withdrawal of artificial nutrition and hydration in *In re C: A Ward of Court* [2021] IEHC 318.

[80] Although the decision in the case was handed down after the commencement of the 2015 Act, orders had been issued in the case prior to commencement and Barniville P found [2023] IEHC 321 [149] that the existence of these were sufficient to invoke the court's wardship jurisdiction.

[81] [2023] IEHC 321 [13].

[82] ibid [14].

[83] ibid [21].

[84] ibid [113].

[85] ibid [114].

[86] ibid [113].

[87] ibid [148].

[88] While best interests' terminology no longer applies under the 2015 Act, this remains the applicable standard under the wardship jurisdiction (albeit with a strong focus on the ward's will and preferences).

[89] [2023] IEHC 321 [146].

[90] [2023] IEHC 565 [54].

[91] ibid [55].

In the case in question, KK had participated by video link in both hearings and given the Court her views.[92]

A review of current High Court cases (most of which concern reviews of wardship under Pt 6 by Heslin J) indicates that online attendance by the relevant person/ward has become a regular occurrence[93] and where this is not happening, the Court has confirmed that the option had been put to the relevant person/ward and they did not wish to attend[94] (or in exceptional cases where they were not consulted, that the reasons for this have been provided to the Court and are convincing).[95] The caselaw indicates not just clear adherence to the s 139 requirements but also appreciable judicial efforts being made to engage with the relevant person/ward, including by welcoming them to the hearing, addressing them directly, providing remote access facilities where required and recognising their achievements.

It is more difficult to ascertain what is happening in the Circuit Court. To date, there have only been two written judgments, both from O'Connor J in the Dublin Circuit Court. In *Joan Doe v HSE,*[96] the HSE sought a declaration that Ms Doe, who was in long term hospital care and had substantial assets, lacked capacity to make decisions about long-term accommodation, medical treatment, and financial matters and sought the appointment of a Decision-Making Representative from the Decision Support Service (DSS) panel.[97] Ms Doe's siblings argued that they should be appointed as Decision-Making Representatives and that Ms Doe should be cared for at home. O'Connor J recognised that Ms Doe's mental illness did not mean she was 'incapable of furnishing her will and preferences'.[98] Ms Doe was not in court and O'Connor J dispensed with the s 139 requirement on the basis that this would not cause an injustice to Ms Doe because her voice was represented by an experienced independent solicitor.[99] The solicitor recounted six visits to Ms Doe although she was only able to engage with Ms Doe on three of these and even then, engagement was relatively limited.[100] Although Ms Doe said that her brothers were 'excellent', there is no evidence of her views as to who should act as her Decision-Making Representative and no clear evidence as to where she wished to live. O'Connor J concluded that, whilst Ms Doe's siblings were devoted to her, too many issues had been raised in the Court which indicated a serious conflict of interest.[101] Accordingly, he appointed an independent Decision-Making Representative from the DSS panel, expressing the hope that this would not impact on Ms Doe's close relationship with her siblings.[102]

The second judgment, *In the Matter of AB*, concerned an application by AB's children, both of whom had previously been appointed as AB's DMRs.[103] The DMRs sought the Court's

[92] ibid [56].
[93] *In the Matter of BW* [2022] IEHC 738; *In re a Ward: General Solicitor (MC)* [2024] IEHC 152; *In re a Ward: General Solicitor (MW)* [2024] IEHC 158; *In re a Ward: General Solicitor (RL)* [2024] IEHC 177; *In re a Ward: General Solicitor (MS)* [2024] IEHC 239; *In re SD* [2024] IEHC 419; *In re SM* [2024] IEHC 449.
[94] *In re a Ward: General Solicitor (LM)* [2024] IEHC 151; *In the Matter of FK, a Ward of Court* [2024] IEHC 380.
[95] *HSE v PT* [2024] IEHC 397 [8].
[96] [2023] IECC 10.
[97] This arises where 'no suitable person [among the relevant person's family/friends] is willing' to act as Decision-Making Representative: 2015 Act, s 38(7).
[98] *Joan Doe v HSE* [2023] IECC 10 [5.5].
[99] ibid [6.7]. Although Judge O'Connor did not explicitly state this, the description of Ms Doe's situation suggests that a court appearance would have been very challenging for her: Ms Doe's social worker described her as a 'very pleasant but very anxious lady' (ibid [7.42]) and this is also clear from the independent solicitor's account of her meetings with Ms Doe: ibid [7.22]-[7.28].
[100] ibid [7.22]-[7.28].
[101] ibid [9.4].
[102] ibid [9.11].
[103] [2024] IECC 16.

approval for the transfer of AB's family home from AB's sole name into the joint names of AB and his wife.[104] The stated purpose of the transfer was to avoid the need to take out a grant of probate following AB's death. The applicants stated that AB's past will and preference had been to transfer the property, but that he had not been able to effect this before he had been declared to lack capacity.[105] One applicant also indicated that AB had bequeathed the property to his wife in his will. The applicants' evidence was not given under oath and was not the subject of cross-examination by AB's legal representative.[106] AB was not present in court and his legal representative did not make any submissions, indicating that they had not been able to obtain any instructions from AB.[107] AB had also been assisted by an independent advocate and had smiled and squeezed the advocate's hand. This was not enough to convince the Court that AB had indicated a wish to transfer the family home.[108]

In rejecting the application, O'Connor J noted that the Court's role was to safeguard the relevant person's property and 'not to gift it without very clear reasons and taking account of all of the circumstances'.[109] In the case in question, the applicants had not given substantive reasons for the order sought.[110] The judgment affirms both the procedural and substantive importance of the relevant person's voice. O'Connor J was clear that communication difficulties do not 'equate with reduced decision-making capacity' and noted that some relevant persons will benefit from specialists such as a speech and language therapist and from access to an independent advocate.[111] He also identified the duties of the relevant person's legal representative in situations where instructions cannot be obtained, including that the legal representative should investigate the application, and advise the Court as to whether the relevant person's rights are being protected.[112]

O'Connor J has also provided statistics as to how the relevant person's voice is being heard in the Dublin Circuit Court (which has the largest 2015 Act caseload in the country).[113] As of February 2024, there had been 148 cases before the Dublin Circuit Court and a Decision-Making Representation Order (DMRO) had been made in 74 of these.[114] Most cases (109 out of 148) had related to the Nursing Home Support Scheme[115] which is administered by the HSE. The applicant had legal representation in 60% of cases and, of the 74 cases where a DMRO was granted, the relevant person had legal representation in only 38% of cases. The relevant person appeared either remotely or in person in only 7% of cases, with the s 139 requirement being dispensed with by the Court in the remaining 93%. The voice of the person was most commonly (78% of the time) ascertained by an independent advocacy report, with some other means being used in the remaining 22% of cases.

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[104] ibid [1.3]. A court application was required because s 43 of the 2015 Act provides that a DMR may not dispose of property by way of a gift unless specific provision for this is made by the Court in the Decision-Making Representation Order.
[105] ibid [3.1].
[106] ibid [3.1].
[107] ibid [5.1].
[108] ibid [8.5].
[109] ibid [7.10].
[110] ibid [7.11].
[111] ibid [8.5].
[112] ibid [8.5].
[113] Judge John O'Connor 'Assisted Decision-Making (Capacity) Act 2015: An Insight into the Courtroom', 21 February 2024. <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-Act/updated-evening-with-judge-o-connor-presentation-final-.pdf> accessed 18 November 2024.
[114] In the other cases, one of the following occurred: the case was adjourned for further proofs; the case was withdrawn because the relevant person had died; *ex parte* consent was granted but the capacity application was not lodged; or, the case was withdrawn because the parties had determined that a co-decision-making agreement was a more appropriate route.
[115] Established under the Nursing Home Support Scheme Act 2009 as amended by the Assisted Decision-Making (Capacity) Act 2022, s 102.

While the data from the Dublin Circuit Court in February 2024 highlighted very limited take-up of legal aid by the relevant person, more recent available data from the Legal Aid Board indicates that use of legal aid for applications made under the 2015 Act is improving. Data from August 2024 indicates that 616 Legal Aid Certificates have been granted for Pt 5 applications (capacity applications) and 110 for Pt. 6 (review of wardship) applications.[116] The Legal Aid Board Solicitors are now physically present in the Dublin Circuit Court for DMRO hearings.[117]

The available data reporting very low participation rate of relevant persons in court hearings raises the question of whether applicants and, where there is one, their legal advisors, are aware of their obligations under s 139 of the 2015 Act. In this respect, it is noteworthy that, while the Circuit Court Rules set out a requirement that, on serving a capacity application the relevant person be informed that they are permitted and encouraged to participate in the hearing,[118] the relevant Circuit Court forms do not explicitly address these requirements or those arising under s 139.[119] This contrasts with the High Court Practice Direction on detention reviews which specifically outlines obligations on solicitors and committees with respect to s 139 of the 2015 Act.[120]

The importance of independent advocacy in ensuring that the relevant person's voice is heard is a clear trend from the court data and this is also supported by data from Sage Advocacy, a national advocacy organisation which has been supporting relevant persons in Pt 5 applications since the commencement of the 2015 Act. As of August 2024, Sage Advocacy have provided support to 491 DMR applications since the commencement of the 2015 Act.[121] The average waiting time to get access to a Sage Advocate is a minimum of 6 weeks which in turn raises the question as to whether advocacy services are sufficiently well resourced to meet needs in this respect. This is also the case for the National Advocacy Service for People with Disabilities who have seen an exponential rise in the numbers of referrals relating to 2015 Act since commencement resulting in a waiting list for such referrals.[122]

Amplifying the Relevant Person's Voice

In considering how the relevant person's voice might be amplified, we can turn in the first instance to the considerable experience of the England and Wales Court of Protection (CoP).

Lessons from the Court of Protection

The CoP is a specialist court which is established by the Mental Capacity Act 2005 (MCA)[123] and has been operational since 2007. It operates in three tiers: District (Tier 1), Circuit (Tier 2) and High Court (Tier 3). The CoP has the authority to determine whether a person (referred to in the MCA as 'P') lacks capacity and, if P does lack capacity, to make decisions

[116] Communication from Legal Aid Board (24 August 2024) (on file with authors).
[117] Communication from Legal Aid Board (1st November 2024) (on file with authors).
[118] Circuit Court Rules, Order 47B, Rule 5 (2) (a)-(c); Order 47 B, Rule 5 (3).
[119] There is no reference in Forms 55A and 55B and Form 55C (Reply to capacity application) simply states 'If you are attending the hearing and require special assistance or facilities, please list them'.
[120] Practice Direction HC 121 Wards of Court Review Pursuant to s 107 and s 108 2015 Act, para 8 requires that the affidavit of the independent solicitor or the Ward's Committee must include an averment as to the efforts undertaken to arrange for the ward of court to be present for the application in accordance with the provision of s 139.
[121] Sage Advocacy, 'Court Data', (August 2024) < https://sageadvocacy.ie/ > accessed 5 November 2024. Note not all applications resulted in the appointment of a DMR.
[122] National Advocacy Service for People with Disabilities (27August 2024). <www.advocacy.ie> accessed 5 November 2024.
[123] Mental Capacity Act, s 45.

for P, which may include appointing a deputy to make decisions for P (usually about finance and property). The CoP also makes decisions under the Deprivation of Liberty Safeguards.[124] While there are many similarities in the work of the CoP and that of the Irish courts under the 2015 Act, some differences between the MCA and the 2015 Act should be noted.[125] First, while both the MCA and the 2015 Act use a functional test to determine capacity to make a particular decision at a particular time, with the relevant abilities defined in identical terms,[126] the MCA includes an additional requirement, not present in the 2015 Act, that P's inability to make a decision must arise from 'an impairment of, or a disturbance in the functioning of, the mind or brain'.[127] Secondly, decisions under the MCA are based on P's best interests[128] while those under the 2015 Act are based on a set of guiding principles, which include giving effect insofar as is practicable to the person's will and preferences and taking account of their beliefs and values.[129] However, this difference is less substantial than first appears because the MCA definition of best interests incorporates P's past and present wishes and feeling and P's beliefs and values[130] and the 2015 Act requires that an intervener act at all times in good faith and for the benefit of the relevant person. Thirdly, the MCA does not make provision for the appointment of contemporaneous decision-making supporters in the way the 2015 Act does. This means that the question of whether a less invasive mechanism, such as the appointment of a Co-Decision Maker, is not relevant in CoP deliberations. Fourthly, the MCA includes a statutory defence for a person who does an act in connection with the care and treatment of P if, before doing the act, the person took reasonable steps to establish whether P lacked capacity in relation to the matter in question and when doing the act, the person reasonably believed that P lacked capacity in relation to the matter and that it was in P's best interests that the act be done.[131] The 2015 Act does not include an equivalent defence. For this reason, there is some uncertainty about non-emergency decisions made outside of the formal structures of the 2015 Act, although it is probable that the common law defence of necessity would be held to apply in many such circumstances.[132] Although it is too early to tell, the effect of this uncertainty may lead to increased use of the formal structures of the 2015 Act, including capacity applications and of the High Court's inherent jurisdiction.

The MCA includes a statutory requirement, phrased in identical terms to that in the 2015 Act, to permit and encourage P's participation in 'any act done for him and any decision affecting him.'[133] It does not, however, contain an equivalent to s 139 of the 2015 Act. Instead, this aspect of voice is addressed in the Court of Protection Rules 2017 (CoPR)[134] The original CoPR (2007) were amended in 2015 to enhance the role of P's voice in the CoP

[124] ibid sch 1A. Note that although an alternative framework, the Liberty Protection Safeguards, was introduced in the Mental Capacity (Amendment) Act 2019, this has not yet come into force and it is not clear that it will do so.
[125] For a more detailed comparison, see Shaun O'Keeffe and Mary Donnelly, 'Informed Consent for Capacity Assessment' (2024) 92 Int J Law Psychiatry: doi: 10.1016/j.ijlp.2023.101951.
[126] Mental Capacity Act, ss 2 and 3; 2015 Act, s 3.
[127] ibid s 2(1).
[128] ibid s 4.
[129] 2015 Act, s 8(7).
[130] Mental Capacity Act s 4(6). This aspect of the MCA best interests standard has become increasingly important: see Mary Donnelly, 'Best Interests in the Mental Capacity Act 2005: Time to Say Goodbye?' (2016) 24(3) Medical Law Review 318; John Coggon and Camillia Kong, 'From Best Interests to Better Interests? Values, Unwisdom and Objectivity in Mental Capacity Law' (2021) 80(2) Cambridge Law Journal 245.
[131] Mental Capacity Act s 5(1).
[132] The HSE National Consent Policy sets out a framework for decision-making based on this probability: National Consent Policy, V 12 section 6.8 < https://media.childrenshealthireland.ie/documents/consent-policy-national_unWu5yu.pdf> accessed 5 November 2024.
[133] Mental Capacity Act s 4(4).
[134] SI 2017 No. 1035 (L. 16).

process (which is referred to in the CoPR as P's 'participation') and this amendment is incorporated into the current CoPR.[135]

The CoPR require CoP judges to consider the matter of P's participation, having regard to the nature and extent of the information before the court; the issues raised in the case; whether a matter is contentious; and, whether P has been notified in advance and what P has said and done in response to this.[136] As part of this consideration, judges must consider whether P's participation should be achieved in one or more of the following ways: by P being joined as a party; through a legal representative; through a representative who provides information about P's wishes and feelings/beliefs and values; and/or by P addressing the judge (directly or indirectly).[137] The judge may also conclude that P's interests and position can be properly secured without making a direction as to participation or by making an alternative direction which meets the overriding objective.[138] The CoPR are supplemented by a CoP Practice Direction[139] which states that the CoP is 'both required and enabled to tailor the provision it directs for P's participation and representation to the circumstances of the case'[140] and by detailed CoP guidance on facilitating P's participation.[141] The CoPR also address the matter of P's competence to give evidence, permitting the CoP to

> [A]dmit, accept and act upon such information, whether oral or written, from P, any protected party or any person who lacks competence to give evidence, as the court considers sufficient, although not given on oath and whether or not it would be admissible in a court of law apart from this rule.[142]

There is now quite a substantial body of work on the delivery of participation in the CoP. This suggests mixed success. On the one hand, as we will see below, there are some striking examples of practitioner and judicial efforts to facilitate participation by P. On the other, several studies suggest that participation is by no means the norm.[143] Alex Ruck Keene and colleagues' study of 37 published judgments in capacity disputes (i.e. where the CoP has to determine P's capacity) which spanned the ten years between October 2007 and 2017 found that P spoke directly to the judge in 13 cases (11 before and 2 after the 2015 amendment to the CoPR) and wrote to the judge in one case.[144] Paula Case's review of a broader range of published CoP judgments from 2008 until July 2017 identified 143 cases in which it would have been feasible for P to have met with the judge and found that this happened in only 23 cases.[145] Jaime Lindsey conducted two observational studies of the CoP, one in 2016 (which involved 11 hearings) and one during the Covid-19 pandemic in 2020 (which involved 9

[135] Lindsey (n 15), 77.
[136] CoPR, r 1(2)(1).
[137] ibid r 1(2)(2).
[138] ibid r 1(2)(2).
[139] CoP Practice Direction 1A- Participation of P < https://www.judiciary.uk/guidance-and-resources/court-of-protection-prActice-directions/> accessed 5 November 2024.
[140] CoP Practice Direction 1A, para 6.
[141] Facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings, Guidance issued by Charles J, Vice President of the CoP, 3 November 2016: [2022] EWCOP 5.
[142] CoPR, r14(2).
[143] Note however that two of these studies draw primarily on caselaw from before the 2015 amendment to the CoPR (although note also Lindsey's scepticism (n 15) 77 regarding the potential impact of this 'relatively conservative change).
[144] Alex Ruck Keene, and others 'Taking Capacity Seriously? Ten Years of Mental Capacity Disputes before England's Court of Protection' (2019) 62 *International Journal of Law and Psychiatry* 56, 65. The study also found that P was typically represented by the Official Solicitor as litigation friend.
[145] Case (n 14) 311.

virtual hearings). P was present in court for 3 out of the 11 hearings in 2016 and 2 of the 9 hearings in 2020.[146]

While these studies suggest that the CoP still has some way to go in ensuring that P's voice is heard, there is also evidence of a strong commitment among legal professionals working in the CoP to keeping P at the centre of proceedings.[147] Camillia Kong and colleagues' study of legal professionals (44 legal practitioners and 12 retired judges) with significant experience in the CoP identifies how legal professionals emphasised that the legal process is '*for* and not just *about* P'.[148] For legal practitioners, this created an ethical obligation to present P 'not as a detached object of concern but as a *meaningful human subject* in proceedings'.[149] For these practitioners, this meant that participation had to be tailored to the individual rather than a tick-box exercise of tasks to fulfil.[150] This study provides an empirical verification of the instrumental benefits of participation which we discussed above. Both legal practitioners and retired judges identified that meeting P allowed for a much clearer picture of the situation than could be found from the paper-based evidence and that this sometimes made the judges more inclined to make a best interests decision which accorded with P's wishes and feelings.[151] They also reported that P found it easier to accept a decision which did not accord with their wishes and feeling when they had been involved in the process.[152] One retired judge explained that he always met with P and explained the reason for his decision and the feedback from P was often that while this was not what they had wanted, they understood why the judge had made the decision.[153]

Moving Outside the Court Room

One notable feature of CoP practice has been judicial preparedness to adopt alternative ways of meeting with P outside of the formal court room. One option is for the judge to meet with P in a less formal setting than the court room eg in chambers or in a conference room within the court building.[154] Another option is for the judge to travel to P's home, work or care centre[155] or even to their hospital bed. As we have already seen, in Ireland, Kelly P undertook several such trips in exercising the wardship jurisdiction. The impact, and practical operation, of an out-of-court meeting is powerfully conveyed in *Wye Valley NHS Trust v B.*[156] Mr B was 73 years old with a long history of mental illness, including auditory hallucinations, and poorly controlled Type II diabetes. His long-term partner had died in 2000 and he had lived alone since then in 'somewhat squalid' conditions.[157] In 2014, Mr B had developed a foot ulcer for which he had refused medication and this was now so infected that unless his leg was amputated, he was likely to die within a matter of days. Mr B refused the amputation and the Wye Valley Trust applied for a declaration that it was lawful to perform the amputation in Mr B's best interests.

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146 Lindsey (n 15) 72-76.
147 See Camillia Kong, and others, 'Justifying and Practicing Effective Participation in the Court of Protection: An Empirical Study' (2022) 49(4) Journal of Law and Society 703; Kong and others (n 7).
148 ibid 709 (original emphasis).
149 ibid 709 (original emphasis).
150 ibid.
151 ibid 710-711.
152 ibid 710.
153 ibid 710.
154 See Rebecca Stickler, 'Mental Capacity Law in England and Wales: A Value-Laden Jurisdiction' in Camillia Kong and others *Capacity, Participation and Values in Comparative Legal Perspective* (Bristol: Bristol University Press, 2023) 21.
155 ibid recounts CoP judges travelling to P's work and care placement and undertaking activities with P to get to know them in an environment in which they are comfortable.
156 [2015] EWCOP 60.
157 Ibid [21].

Peter Jackson J explained that 'given the momentous consequences of the decision either way', he did not feel able to reach a conclusion without meeting Mr B.[158] While recognising the two excellent reports provided in evidence, he considered that 'there is no substitute for a face-to-face meeting where the patient would like it to happen'.[159] The judge had a one-hour meeting with Mr B in his hospital room in the presence of the judge's clerk, who took a note, and Mr B's nurse who was 'invaluable in making sure that I understood everything that Mr B wanted to say'.[160] Peter Jackson J described the benefits of the meeting as follows:

> In the first place, I obtained a deeper understanding of Mr B's personality and view of the world, supplementing and illuminating the earlier reports. Secondly, Mr B seemed glad to have the opportunity to get his point of view across... Thirdly, the nurses were pleased that Mr B was going to have the fullest opportunity to get his point across. A case like this is difficult for the nursing staff in particular and I hope that the fact that Mr B has been as fully involved as possible will make it easier for them to care for him at what will undoubtedly be a difficult time.[161]

Peter Jackson J found that although Mr B lacked the capacity to make the decision about the amputation, it would not be in his best interests 'to take away his little remaining independence and dignity in order to replace it with a future for which he understandably has no appetite.[162] Accordingly, he declined to make the declaration.

Peter Jackson J's best interests decision was not entirely based on Mr B's wishes and feelings. The medical evidence was that it was a very fine balance as to whether Mr B should have the amputation (although the medical expert had ultimately concluded in favour of the amputation)[163] Nonetheless, it is clear that meeting Mr B was important in the judge's determination. In a poignant paragraph Peter Jackson J explained:

> Mr B … is a sociable man who has experienced repeated losses so that he has become isolated. He has no next of kin. No one has ever visited him in hospital and no one ever will. Yet he is a proud man who sees no reason to prefer the views of others to his own. His religious beliefs are deeply meaningful to him and do not deserve to be described as delusions: they are his faith and they are an intrinsic part of who he is. I would not define Mr B by reference to his mental illness or his religious beliefs. Rather, his core quality is his *'fierce independence'*, and it is this that is now, as he sees it, under attack.[164]

Since *Wye Valley,* the CoP has further developed its guidance for judicial visits to P.[165] This followed the decision of the Court of Appeal in *Re AH (Serious Medical Treatment).*[166] Here, the Court of Appeal set out a series of factors that needed to be considered in open court before a visit to P takes place in cases concerning serious medical treatment. These include: the purpose of the visit; when the visit is to take place and how it will be structured; and what

[158] ibid [18].
[159] ibid [18].
[160] ibid [26].
[161] ibid [26].
[162] ibid [45].
[163] ibid [38].
[164] ibid [43].
[165] Judicial Visits to P, Guidance issued by Hayden J Vice President of the CoP 10 February 2022, [2022] EWCOP 5. Original emphasis.
[166] [2021] EWCA Civ 1768.

is to happen after the visit.[167] This followed the Court of Appeal's decision that a determination of AH's best interests made by Hayden J was procedurally flawed.[168] This was because Hayden J had, in effect, gathered evidence about AH's wishes and feelings from his visit to her (which had happened after the court hearing and was attended by the Judge, a representative of the Official Solicitor and a nurse) and the parties had not been afforded an opportunity to make submissions on this evidence.[169]

In brief, the guidance provides that the judge's decision to meet P should be made following representations by the parties and that there should be a clear understanding of the scope and ambit of the visit.[170] However, it also recognises that the nature of such visits is that the parameters set may be changed by events. In this context, the guidance emphasises that a judge visiting P is not conducting a formal evidence-gathering exercise; that a visit may serve to further highlight evidence that the judge has already heard; and that observations made at the visit may lead the judge to make further inquiries of the parties. The guidance also indicates that family members should generally not be present at such visits; that the judge should always be accompanied by a representative of the Official Solicitor who must take a note of the visit which, after being approved by the judge, must be circulated to the parties who may make representations based on it. If the judge considers that the experience of visiting P may have impacted on the best interests evaluation, s/he should communicate this to the parties and invite submissions.[171]

This guidance, which was prepared by Hayden J (as Vice President of the CoP), recognises the 'human' element of visits and that a neat line cannot always be drawn between the decision made and the judge's personal values and emotional response to P. For this reason, it recognises that it is important that this aspect of judicial decision-making is transparent and open to representations by the parties.

Amplifying Voice in 2015 Act Proceedings

One of the key lessons to emerge from the considerable experience of the CoP is the importance of clear rules and guidance. There are several ways in which this lesson might be applied in respect of the 2015 Act.

First, as we saw above, s 139 of the 2015 Act establishes a statutory obligation that hearings will be in the presence of the relevant person unless there is a reason why this cannot be done. However, the legislation alone will not ensure compliance with this obligation. We suggest that there is a need for a Circuit Court Practice Direction analogous to that of the High Court in detention reviews[172] which makes explicit reference to the requirements of s. 139. We suggest also that this obligation needs to be incorporated into the Circuit Court forms in order to provide explicit guidance to applicants, legal practitioners and the judiciary.

[167] ibid [75].
[168] ibid [72].
[169] During the judicial visit, AH (who had suffered from severe neurological damage following COVID-19) was evidently distressed. According to the note of the representative of the Official Solicitor, Hayden J said to her that he did not know what she wanted and that it was very hard for her to tell him. He then said that 'I think it may be that you want some peace' and later, '[i]t is not easy for you to communicate, but I think I am getting the message': [2021] EWCA Civ 1768 [17]. Hayden J concluded that it was not in AH's best interests to continue ventilation beyond a period in which her family could come together to say goodbye: [2021] EWCOP 51 [108]. This finding was appealed by AH's family.
[170] [2022] EWCOP 5 [6].
[171] ibid [6].
[172] Practice Direction HC 121 Wards of Court Review Pursuant to s 107 and s 108 2015 Act.

Secondly, there is a need for better guidance to ensure that, when the relevant person does attend the court hearing, they are supported both in advance and during the hearing. While the Circuit Court rules do require that the applicant notify the court office of any special arrangements that may be required to facilitate the relevant person's participation in the hearing of a capacity application,[173] applicants need better guidance as to what special arrangements might look like. In this context, the decision not to commence the provisions of the 2015 Act relating to court friends[174] means that the provision of independent support to the relevant person during the hearing has fallen on independent advocates, who as we saw above are currently doing so with limited resources.

Thirdly, while the availability of remote hearings has created invaluable opportunities to involve relevant persons from within their own care setting, further guidance should be developed regarding the conduct of such hearings and the role of the relevant person within them. Factors which need to be addressed include ways of protecting the relevant person from undue influence or coercive control within the care setting during the hearing; as well as ways of ensuring that the relevant person is facilitated in understanding what is going on in the court and has a genuine opportunity to have their voice heard by the court. This requires more than the court simply asking the relevant person if there is anything they wish to say (although clearly judicial engagement with the relevant person is an essential element in remote hearings). One possibility is that (as happened in *In the Matter of CF*)[175] an intermediary, such as a legal representative or an independent advocate should accompany the relevant person during the hearing as a way of ensuring that the relevant person's voice is heard.

Fourthly, sometimes remote participation is simply not possible and it may be appropriate for the judge to move outside of the formal court setting to meet with the relevant person in their own environment. As we have seen above, in both the Irish and the EW courts, this can assume a particular significance in cases involving the refusal or withdrawal of life-saving/sustaining medical treatment. The Court of Appeal decision in *Re AH (Serious Medical Treatment)*[176] shows the need for clear guidance for judges in undertaking such visits. The guidance developed by the CoP following *Re AH* provides a helpful model in this respect.

Conclusion

In this article, we have argued that the 2015 Act (and the constitutional and human rights framework which underpins it) requires a new kind of judicial engagement, centred on the voice of the relevant person. This is something which will come easily for some judges and legal practitioners and perhaps less so for others.[177] Voice, in this respect, includes legal representation but crucially, it is not limited to this. Hearing the voice of the relevant person is an important indicator of respect for the human rights of people whose capacity is in question. However, voice also plays a humanising role. As we have seen from the research on the CoP, hearing the person's voice helps the court to see the relevant person as someone

[173] Circuit Court Rules, Order 47B, Rule 5 (3).
[174] 2015 Act, s 100.
[175] [2023] IEHC 321. See text to (n 84).
[176] [2021] EWCOP 51; [2021] EWCA Civ 1768.
[177] See the reflections on the changing nature of the judicial role in family and capacity law by Sir Mark Hedley (former CoP judge) in Mark Hedley, *The Modern Judge: Power, Responsibility and Society's Expectations* (Bristol: Lexis Nexis, 2016).

real, a 'meaningful human subject'[178] and it can also help the relevant person to feel part of a process that takes them seriously as valued members of the human community.

As we have seen above, requirements to hear the relevant person's voice are stitched through the 2015 Act and the available evidence indicates that these requirements are being taken seriously by the courts. However, this aspect of the 2015 Act requires more concerted resourcing. Although the extension of legal aid to the relevant person for Part 5 and Part 6 applications is undeniably a positive step, and the operation of the scheme in practice is showing improvement, it is essential that this scheme operates in a way that is accessible to people whose capacity may be in question. Moreover, even if the relevant person is able to access legal aid, it is clear that legal representation is not sufficient on its own to ensure the voice of the person is heard in practice.

Other elements of enhancing voice in judicial proceedings, in particular, independent advocacy, are not funded to specifically provide support for applications under the 2015 Act. This contrasts with the statutory grounding for Independent Mental Capacity Advocates (IMCAs) in England and Wales.[179] Notwithstanding the absence of resources to support advocacy for the relevant person under the 2015 Act, independent advocacy organisations have seen an exponential rise in the numbers of referrals to them since the commencement of the 2015 Act. This is set to continue as the general public become more familiar with the provisions of the 2015 Act and as courts seek to find mechanisms to support the relevant person throughout the process.

It is essential that we understand the practical, including resource-related, impediments to delivering on the 2015 Act requirements regarding voice. This is just one reason why it is important to collect, collate and publish data regarding the operation of the 2015 Act, especially in the Circuit Courts outside of Dublin.[180] These data should also assist in the development of guidance for judges and practitioners. One of the lessons from the CoP in England and Wales has been the need for iterative development of guidance as new challenges emerge. A similar process is needed in respect of the 2015 Act if we are to enable this aspect of the 2015 Act to be operationalised in a human-rights compliant manner.

[178] Kong and others (n 149).

[179] 'Independent mental capacity advocates'<https://www.gov.uk/government/publications/independent-mental-capacity-advocates> accessed 5 November 2024.

[180] Detailed data (as well as a body of written judgments) are also essential in meeting the basic procedural justice requirement of transparency: Donnelly (n 31). Note the efforts of the CoP in this respect (following the criticisms of the CoP as a 'secret' court): see Lucy Series and others, '*Transparency in the Court of Protection: Report on a Roundtable*' Cardiff University April 2015 8-9, < https://sites.cardiff.ac.uk/wccop/files/2015/04/Transparency-in-the-Court-of-Protection-Report.pdf > accessed 5 November 2024.