Guide to representing children in the Family Division of the Children’s Court

Assessing capacity and taking instructions from very young, traumatised and/or intellectually disabled clients

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# Introduction

The first thing that all lawyers who represent children in Children’s Court proceedings in either division should do is read the [Guidelines for lawyers acting for Children and Young People in the Children’s Court draft second edition 2012](http://intranet.vla.vic.gov.au/xwf/vlanet/youth.2.4.1_Guidelines_for_Lawyers_Acting_for_Ch_and_YP_FINAL.doc) available on the ‘[Acting for children in the Children’s Court](https://viclegalaid.sharepoint.com/sites/intranet/practiceresources/youth-law-resources/Pages/acting-for-children-in-the-childrens-court.aspx)’ youth law and practice intranet page and in the ‘Representing Children’ folder of the Youth Law Resources DropBox folder (both VLA access only). Contact Suzanne Bettink in person, by email [Suzanne.Bettink@vla.vic.gov.au](mailto:Suzanne.Bettink@vla.vic.gov.au) or by phone on (03) 9269 0650 to arrange access to the document or this folder if you do not already have it.

This paper goes beyond those guidelines and covers the basics of how to assess capacity and take instructions from very young children (under 14), children who suffer from trauma (particularly developmental trauma and trauma associated with child abuse) and children with learning or intellectual disabilities, in the context of being the subject of child protection proceedings in the Family Division of the Children’s Court of Victoria.

## Capacity in the family division

It is important to recognise that the issue of children’s capacity to give instructions in the family division is very different to the capacity assessment process in the Criminal Division of the Children’s Court.

In relation to the family division the key issues set out in s. 524(1B) of the *Children, Youth and Families Act 2005* (CYFA) are:

* the child’s ability to form and communicate their own views
* the child’s ability to give instructions in relation to the primary issues in dispute
* any other matters the court considers relevant.

In contrast, children in the Criminal Division of the Children’s Court need to be able to completely understand and follow the proceedings in a way that ensures their ability to mount a defence, including understanding the evidence.

Since a child is required to understand less of the technicalities in a family division matter, rather than in a criminal case, correspondingly less is required of them in terms of their instructions to their representative.

Essentially, while the whole defence of a criminal case turns on the accused’s ability to understand the case and to instruct, in the Family Division of the Children’s Court the child’s instructions are simply a factor to be considered by the court. They are not determinative.

This totally different context means that the criteria for assessing the capacity to give instructions in the Family Division of the Children’s Court are very different to that in criminal division cases.

## Take your time

One of the most common problems faced by inexperienced lawyers in taking instructions from children is to assume that an interview with a child, even who has been traumatised or who has a learning or intellectual disability, can follow the same lines as that with an adult.

Many assume that if a client looks at them blankly that this means that there is a problem with capacity to give instructions and therefore fitness to plead will be an issue, then automatically seek an expert opinion.

However, with a careful approach to explaining roles and processes, experienced lawyers are able to get meaningful instructions from a substantial number of young clients without any need for psychological or psychiatric assessment.

This paper sets out suggestions for a careful approach, including two checklists at the end: one relating to assessing capacity which should be used in all cases where the child is under 14 or there is an issue about developmental delay, intellectual disability or impact of trauma and the other more generally relating to taking instructions from all children in the family division.

## Overview

The basics:

* The child is your client – always interview the child on their own (this includes separate from their siblings, even if there is no conflict of interest and you are acting for more than one)
* Explain roles, confidentiality and processes with discussion of these to ensure the client’s comprehension of your explanations before moving into detailed instructions
* No leading questions – avoid questions leading to a ‘yes’ or ‘no’ answer
* Ask questions in logical sequence
* Use plain/simple language
* Be prepared to re-frame questions
* Avoid repetitive questioning (the child may think that a different answer is required potentially leading to contradictory or false responses)
* When asking for instructions, have the client explain the impact of varying instructions to be sure that they have a clear understanding of the consequences
* Remind them that they can choose not to say anything at all. For example, they can say that they do not want to talk about it, or that they want the grown ups to decide.
* Use the checklists linked in this guide.

# At the beginning

## Who you are

Start by giving them a business card so that they can see your name in writing (if they can read). Ask them if they have a special place where they can put it because there might be a time between now and when they grow up that they might like to ring you (or if you’re not there, someone in your office who could help them).

## Your role

Explain that you are there to:

* make sure they understand why they are going to court
* help them understand the court process
* do the talking for them in court (or arrange for someone else to do the talking).

Explain that this means that you need to find out from them what they want you to say (or not say) in court.

Make sure that they understand that while the appointment might have been arranged by their parent/carer/social worker, you do not work for the parent/carer/social worker – you work for the kids. Explain that kids don't need to feel that they should tell us what they think anyone else wants to hear.

After the explanation of your role ask:

So, now I’d like you to tell me what my job is as your lawyer…

then fill in any gaps they may have forgotten or misunderstood.

Each time you meet or talk to them after this first time, start by asking them to again tell you what your job is to be sure that they remember and still understand.

## Confidentiality

Explain that they are our boss and we have to keep their secrets. This means that we won’t tell anybody else what they have said without their permission.

If what they really want is something that they want to keep secret then we have to keep their secrets – but we can’t really do much to get what they want if we have to keep the secret. Explain that you can talk more about that later if it comes up.

Tell them that most other people they talk to do not have to keep their secrets including their parent/carer/social worker – so they should be careful what they say to them. If in doubt, suggest that they talk to you before saying anything about court to anyone else.

# Tools for assessment and instruction taking

## Discuss the players in the court process

Ask them to tell you about their understanding of the court process.

If there are problems getting them to talk, or repeat back in their own words your explanations of the process, then consider having them draw pictures. If they draw the pictures themselves then they are more likely to absorb and retain memories of the discussion than if pictures are drawn for them.

Subject matter for pictures (on separate pieces of paper where possible) at an initial interview, where you explain the role while they draw, can include:

* them
* you
* their mum
* their dad
* their siblings (and maybe any pets)
* their carers/other significant family members, especially anybody they might like to spend time with
* their social worker/s
* the judge/magistrate (do they know what a judge is – have they seen any on TV? and use this as a discussion point to consider what might apply to their case – for example, very little of what Judge Judy does – and what might not)
* the court room, including where all the above sit, the court clerk and the witness box.

It can be useful to keep these drawings in an envelope on file in cases where there are doubts about capacity. On subsequent interviews they can be used as a way of establishing how much advice about your role and the system has been retained through asking the client to remind you who the people pictured are and how the system works.

## No leading questions

In order to be sure that the client is understanding our role and advice, and that they comprehend the court process, it is vital that they explain it all back in their own words without any leading and minimal prompting.

It is even more vital that they give their instructions with as little interference as possible – allowing free narrative is the best way to get the client to tell you what they really want to say.

Leading questions should also be avoided when taking instructions because they can be a form of covert pressure – for example:

* **Use:** if it were up to you, who would you like to live with while the social workers are checking things out?
* **Don’t use:** do you want to stay with mum for the next few weeks? (This may be perceived as suggesting that this is what they should do).

We need to be as sure as possible that they are telling us what they want us to know, not what they think the social worker/carer/parent wants us to know (although they might be the same thing).

# Assessing capacity to instruct and gauging general comprehension levels

## Why are they going to court?

### Please tell me why the social workers have brought you to court

Note that there is no need for the client to have an intricate understanding of the grounds of the application, just a general understanding of:

* the fact that the social workers are worried about whether or not home is safe
* why the social workers think that home might not be safe
* what the social workers want to do to keep them safe
* the role of the social workers and the court
* the impact of court decisions.

Children in the family division are often the victims of abuse and/or neglect and their cognitive ability may be affected by trauma. Older children may have a lower intellectual capacity than expected because of the impact of social, emotional and psychological factors.

At lower ages or where there has been trauma or there is an intellectual disability, their understanding of the reason for being at court and time periods etc may be limited. Ask them to tell you what the social workers say has been happening and take your lead from them. Fill in gaps with just a few words (and what happened then?) to encourage them to continue in their own words. Their explanations will help to give you a sense of their level of understanding.

Frequent reference back to the pictures they have drawn can be helpful in reinforcing roles and processes and assessing the development of their knowledge and memory retention.

The capacity of children of any age needs to be considered, and communication methods may need to be adjusted accordingly.

In assessing whether or not children actually have the capacity to provide instructions consider the following:

* Are they able to focus on what you are saying?
* Are they able to understand your role?
* Do they understand the role of their social worker?
* Do they understand the role of the court and the impact of court decisions?
* Do they demonstrate any ability to understand why they are in court?
* Do they understand the possible consequences of the court proceedings?
* Do they understand what the social workers want?
* Do they understand what their parent/s, carer/s or others want, particularly any issues in dispute?
* Do they understand what might happen if they do let the court know what they think?
* Do they understand what might happen if they do not let the court know what they think?

If the answer to all of these is yes, then there is capacity.

## Getting the instructions

Instructions must be taken from the child at the outset and at a face-to- face introductory meeting to establish rapport and trust, particularly with young vulnerable clients. It is acknowledged that it is not always necessary or appropriate for children to see their lawyer at every subsequent court date and telephoned instructions are acceptable. This practice is the exception and not the norm. Children may not wish to attend court and arrangements must be made by the lawyer, to see a child away from court to take instructions. Instructions must be updated for each significant court appearance including conciliation conferences, directions hearings and throughout final contests. Remember that as a direct representative you need to advise and take instructions in a way that you can flesh out your submissions to demonstrate to the court how **what your client wants** is in their best interests. Simply stating their bald instructions or wishes is rarely sufficient to fulfil this role.

### On apprehension day

Obtain information about the DHHS case and position before seeing the child. It is preferable to also know the position of any other parties as well.

Explain that today is just about:

* where they are going to live for the next few weeks while the social workers check things out
* where their family members are going to live during this time (for example, is a parent, step parent or sibling to be out of the home?)
* what sort of things need to happen (conditions/rules) for them to be safe during this time.

### Who do they want to live with?

Emphasise at the outset that we can’t promise to get them what they want.

The first really big question we need to ask is: in an ideal world, who would they want to live with? The pictures are really helpful at this point because sometimes both parents and carers are referred to as mum and dad so the careful labelling and identification at the earlier stages can avoid confusion.

If it was up to you, where would you live?

You’ve told me that you want to go back home and live with your mum. But the social workers say that she is too unwell to look after you. If the court says you can’t live with your mum, what do you want me to tell the judge about who would be your next choice?

Remember to let them know that if they don’t want to say what they want, it is ok to say that they want to leave it to the adults/court to decide.

### Preliminary advice about placement instructions

If the child says birth mum/dad, ask them to tell you about:

* how safe things are at home
* if things have not been safe, how might things change to become safer
* what could they do if they felt unsafe in the future?

If DHHS want out-of-home care, explain why the social worker thinks that home might not be safe and ask them what they think about that.

If they do not agree with the social worker and they have some good reasons, check if they are ok about you telling everyone about what they have said or if they want you to keep it secret. If they are ok about you passing on what they have said, then tell them you can ask the judge to change things – but give your assessment of what the judge is likely to say.

If they say they want to stay with a carer/anyone else as suggested by DHHS, explain to them that this might be easy to arrange but that birth mum/dad might not agree and things might drag out.

If they say someone unexpected, ask them to draw a picture of that person and to explain to you while they're doing that who that person is and why they want to live with them. Questions and assessments should happen as previously discussed.

### When reports are available/subsequent days

Explain that today is about two things:

* whether they (still) need help from the social workers to keep them safe, and
* if they need help, what sort of help do they need – which includes:
  + where they are going to live
  + who makes the big decisions about their life
  + what sort of things need to happen (conditions/rules) to keep them safe?

### Proof and disposition

Distinguish between the two parts of the case.

(Proof) the social workers say you need help from outside the family to make sure that you are safe. They’ve written down lots of stuff about what they say has been happening in your family (application report).

The social worker says that you are not safe at home. I’d like you to tell me about what’s been happening at home for the social worker to think you might not be safe?

Try to get as much information as possible from letting the child speak freely and unprompted (a bit of silence can be ok – they might just need a bit of space to think about what to tell you next). If discussion of a specific incident/event is required:

Can you tell me about what happened on the day that … Can you tell me anything else?

What happened next?

What happened after that?

Asking about ‘after’ is better than ‘before’ because it continues the narrative and does not imply that they have left anything out or said anything wrong. If there might be something important missing it is preferable to wait until the narrative is clearly over, then go back over what you’ve been told and ask them to tell you if they can think of anything else important that might have happened after each bit.

(Disposition) if the judge says that you do need help to be safe, then they have to decide what sort of help that should be (disposition report).

Keep in mind the risk of re-traumatisation. Consider restricting discussions (beyond the basic facts to ascertain their understanding of why they are at court) to any issues that:

* are in dispute and might make a difference to the outcome of the case
* are relevant to supporting their instructions about their feelings of safety (or lack of safety).

With the duration of the order sought, link time to any special dates/event where possible:

* a year could be the time between birthdays or the time it takes to get from one Christmas to the next Christmas
* six months could be the time it takes to get from the Christmas school holidays to the winter school holidays
* three months could be the time from the beginning of one school holiday to the end of the next school holiday.

### Conditions

Tell them (paraphrasing heavily if the child is having difficulty understanding) about the conditions (rules) asked for by the worker and ask what they think (‘if it were up to you…’) about each one that directly affects them.

In these situations the parents' counselling conditions can often be wrapped up into talking generally about the parents getting 'special help for their problems'. It is not essential to discuss the finer detail such as names (unless the child is to be part of the condition), frequency or who pays.

**Contact** is a very important point for discussion – especially as this can set the program for years ahead if they don't get to see you again because they remain in the same placement. Start by asking them how often they have seen their mum and/or dad recently (using the names they gave in the pictures). Check if their recollection accords with the report, both in terms of correctness of the report and their understanding of time frames. Following up with questioning for details of times may be needed if there are differences to try to check if it's the worker who is wrong or if the child's memory is restricted.

Sometimes there's a different attitude about different parents. Again, using the pictures:

Here's mum – if it were up to you, how often would you get to see her?

For how long would you see her?

They say no overnights, what would you do if that was up to you? Why?

How safe do you feel when you visit mum?

Why do you think the social workers would say you might not be safe there?

What do you think should happen to make sure you would be safe when you’re there?

You will need to go through the same process as with placement about advice about the likely outcome.

Even if there is a single contact condition about both parents/siblings/grandparents, it is important to separate them out and talk about whether there are any different thoughts about individuals. If there are differences, then separate conditions may be required.

In each week/how often would you like to see mum/dad?

How often would you like to see your sister/brother/grandparents?

Supervision of contact also needs to be looked at (even if it hasn't been requested – sometimes children want supervision when the workers haven't raised it). While going through each individual for access, explain that sometimes another adult can be there to make sure that the child is safe.

Your social worker says X, what would you say if this was up to you? Why?

Once again we would need to advise what we think the judge would be likely to say.

Discussion of any other conditions should follow the same pattern.

## Confirming the instructions

### Summarise instructions

Go through a summary of the instructions with the child:

You've told me X, Y, Z. Have I missed anything important?

Then go through a summary of your advice about what is likely to happen. Ask them to tell you in their own words what is likely to happen to make sure that they have really understood.

### Confidential or not?

Also ask if they are ok about you telling everyone, including birth parents, what they have said or if they want you to keep it secret. Give your assessment of what the judge is likely to say, especially if not telling the judge what they think might lead to an outcome that they do not want.

Also check that they understand how their birth mum/dad will react to what they say, and if they think they will react badly that they understand how this might affect them. If they understand, re-check whether they would prefer that you keep what they’ve said secret or if they want everyone to know what they think.

Can I check with you about what I can tell DHHS, your mum/dad and the court? (run through the details of their instructions checking after each sentence whether you can tick or cross each bit)

How do you reckon your mum (or whatever she has been called in the pictures) will react when she hears that?

Ticking and crossing might be seen by some children as making a good or bad choice and that passing on information is therefore a good choice so they have to pass on all of the information to be good. An alternative strategy could be preferable such as asking which bits you can highlight, or asking them to choose a coloured pencil with which you can underline the bits that are ok to pass on.

# Concluding the interview

## Application for aid

A young child, especially one with an intellectual disability, should ordinarily not be signed up for anything because they generally don’t know what they're signing or the importance of their signature.

Most of the legal aid application form does not need to be completed because young people are always eligible for a grant of legal assistance as long as they are a ‘child’. However, a signature is needed on the form which can be explained by saying that:

It is so that Victoria Legal Aid can spend money for you to have a lawyer. You do not need to worry about the cost of having your own lawyer. It is free.

Remember to give your address as their postal address so that they don’t receive the standard grants letters – but just in case of a computer error, warn them that they might get a letter from someone at Victoria Legal Aid telling them about stuff like ‘grants of aid’ and ‘conditions for the grant of aid’. Tell them that if they get a letter they do not understand to ring you.

Tell them that when they get a letter from you it is a good idea to keep it in case they want to read it again later. It’s also another place where they can find your phone number.

## Any questions

Do they have any questions before they go? If they think of anything after they've gone they can ring you, especially if they change their mind about anything or they think of something they think you should know that they haven't mentioned.

## Make sure they understand how to get in touch with you

Finally, make sure they still have the business card (believe it or not, some can lose it in that short space of time!) and that they will put in a safe place.

Double check that they know how they could ring you:

How would you ring me at my office if you have any questions or worries?

If they think that their parents/carer would not let them ring, talk about alternatives such asking a teacher at school, or some other relative/support person referred to in the reports.

# Conclusion

If there are any questions about the information contained in this guide, please contact the author Suzanne Bettink in person or by email at [suzanneb@vla.vic.gov.au](mailto:suzanneb@vla.vic.gov.au).

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# Appendix 1 – Checklists

## Assessing capacity

[Children’s Court Family Division capacity checklist (doc, 174.51 KB)](https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-childrens-court-family-division-capacity-checklist.doc.docx) – Handy hints in checklist form for assessing the capacity of children aged ten or higher to give direct instructions in the Family Division of the Children's Court.

Taking instructions from all children in the family division

[Children's Court Family Division – taking instructions from young children (doc, 173.53 KB)](https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-checklist-taking-instructions-from-young-children.doc.docx) – Handy hints in checklist form about the information to be given to, and the instructions to be taken from, children capable of giving direct instructions in the Family Division of the Children's Court.