

Enabling Justice for Families where a Parent has Learning Disabilities

Western Australian Family Law Pathways
Network Conference

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Presented by

Dr Margaret Spencer
School of Education and Social Work
Faculty of Arts and Social Sciences



THE UNIVERSITY OF
SYDNEY



A painting by Kija/Yamitji artist Deborah Bonar

OVERVIEW



Terminology Labels Identity



The term parents with learning disabilities (LD) is used as an umbrella term to include parents with cognitive limitations that meets or falls just outside the formal diagnostic threshold for intellectual disability. Learning disability or learning difficulties is preferred by most parents.

Diagnosis

- Many adults with learning disability do not have 'paperwork' to prove they have ID or a learning disability.

Checklist

Educational & life history

Centrelink benefit

Work history

Reluctant to read

provides vague or naive information

Reluctant or struggles to fill out forms

Overwhelmed by routine demands

Concrete in thinking

Central role of a benefactor in their lives

Lack of knowledge things (pregnancy, basic child development and care)

Organisational skills

Why seek assessment?

Eligibility for Services (NDIS)

IQ test will not tell you about parenting capacity

Sometimes assessment can be useful for the person (or others) to understand why they have struggled with things.

But not required to know how to work with a parent. They will be your best guide as to what works for them.

WHY IS THIS A JUSTICE ISSUE?

- It is internationally recognised that there is a growing number of persons with learning disability are becoming parents
- In Australia the estimated number of parents with ID is between 0.41% (n= 17,000) of the parenting population (See: Man, Wade and Llewellyn (2017) Man, N., Llewellyn, G., & Wade, C. (2014)
- One in ten cases in Child Protection Matters involve a parent with learning disability
- Interestingly there is no data in relation to the prevalence of parents with learning disability in Family Law Court matters.
- Between 40-60% of children born to a parent or parents with learning disability will end up in Care by the time they reach school age.
- And this does not need to be the case.

ENABLING JUSTICE FOR FAMILIES MEANS PROTECTING CHILDREN /SUPPORTING PARENTS

- ARTICLE 9 CRC Children should not be separated from their parents unless it is for their own good. For example, if a parent is mistreating or neglecting a child. Children whose parents have separated have the right to stay in contact with both parents, unless this might harm the child.



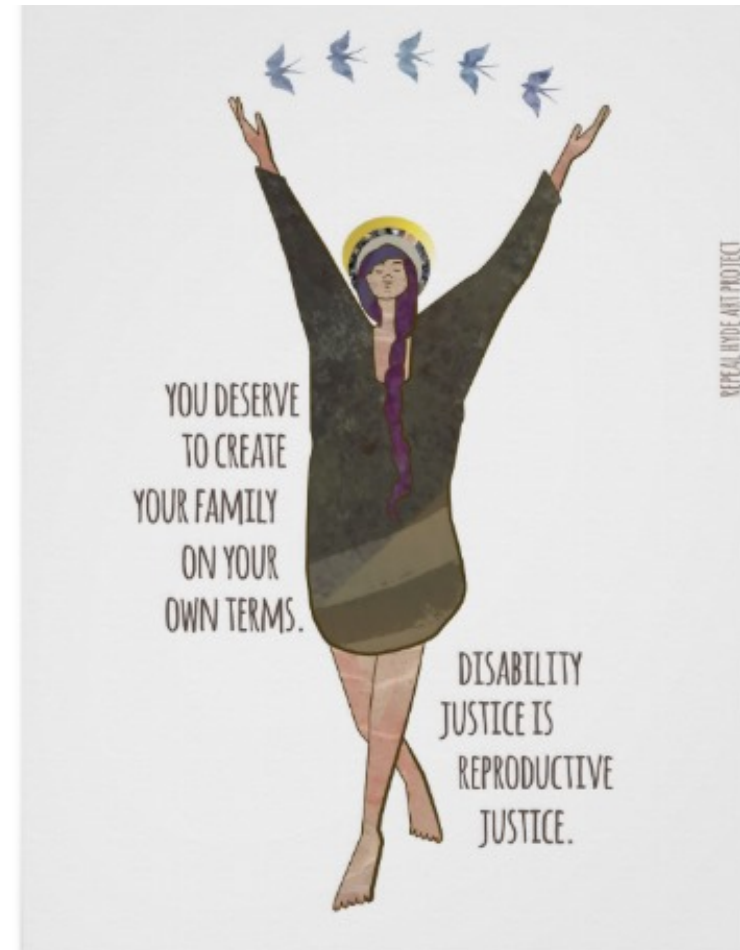
Our job is not to find better parents for children but to protect them from unsafe context and activities that harm their development.

- ARTICLE 23 (4) CRPD States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents



REPRODUCTIVE JUSTICE

- **Reproductive justice** is the human right to maintain personal bodily autonomy, have children, not have children, and parent the children in safe and sustainable communities.
- Origins in the black feminist movement (1994)
- Adopted by other marginalised and oppression women
- Relevant for women (and men) with intellectual disability.



ENABLING REPRODUCTIVE JUSTICE FOR PARENTS WITH LEARNING DISABILITY (UNCRC PD ARTICLE 23 *Respect for Home & Family*)

- States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others...
- **States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.**

Understanding the present through the past

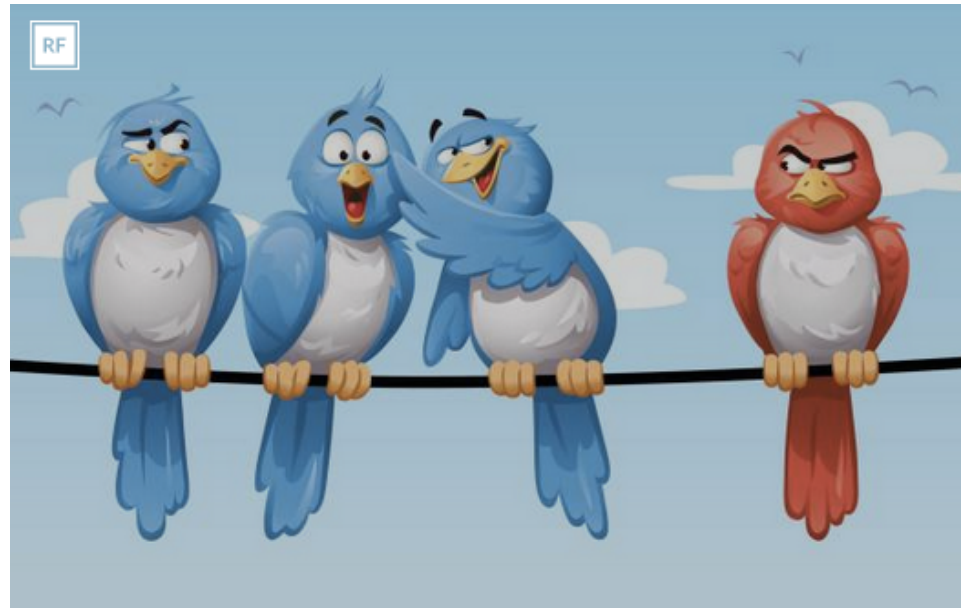
- As disability and parenthood are both part of the human condition, it is reasonable to assume that there have always been parents with disabilities, in every society, at every time.
- How we think about disability and parenthood in Western Society is very much influenced by the Eugenic Movement of the late 19th Century.
- Justice Oliver Wendell Holmes May 1927 US Supreme Court Decision *Buck vs Bell*, 274 US 200
- *Re Marion (No 2) (1992) 17 Fam LR 336, 35*



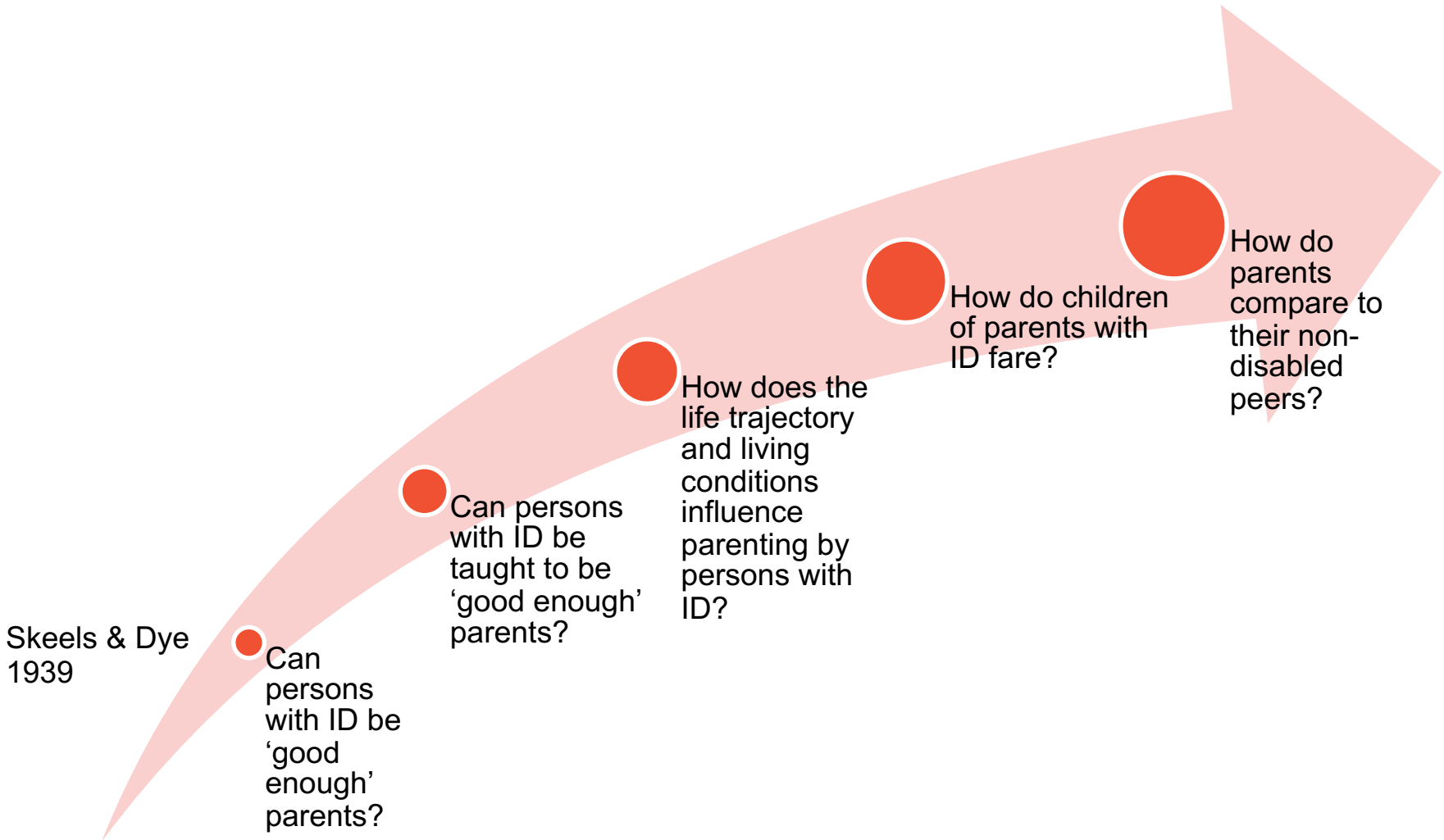
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ENTRENCHED ASSUMPTIONS

- **Promiscuous & irresponsible**
- They are more likely to have children without thought to how they will look after them.
- **Naïve & Vulnerable**
- Be taken advantage of by others.
- Think parenting is a game
- **A liability to the offspring**
- Pass on their disability
- Not fair on the children
- Their children 'outgrow' them
- **Incapable of learning**
- Can only learn so much



Generations of Research



What does the research tell us about parents and their parenting?

Parenting capability and support

- IQ (>55) is not a predictor of parenting capability
- Parents can provide good enough parenting with adequate supports in place
- Parenting capability is learnt (not inherited!) so can be taught/ learnt
 - Parenting is enhanced by learning parenting skills using proven, effective parent education programs
 - Programs need to be specific, structured, situational, with opportunities for generalization
- Parenting support needs to be relevant to parents' and children's needs as these change over time
- Parents and their children need opportunities for social participation in community life

Parents with intellectual disability and their families compared to non-disabled parents

- ❑ Major findings across populations of parents with intellectual disability and non-disabled parents
 - ❑ Parents with intellectual disability do more poorly on measures such as birth outcomes, maternal health, child outcomes, involvement with child protection services

Except that

- ❑ When environmental adversity factors such as low social support, unsafe neighbourhood, poor mental health in family are taken into account the significant differences between disabled and non-disabled parents disappear

See: Llewellyn, G., & Hindmarsh, G. (2015).

What does the research tell us about the children?

- ❑ Young children are *more likely than not* to develop in line with their peers from similar socio-economic backgrounds

- ❑ There is delayed development for some children *but only for those* who:
 - ❑ Have a pre-existing health condition, illness or disability
 - ❑ Live in poverty or disadvantaged circumstances including low socio-economic resources, unsafe neighbourhoods or who are exposed to risk factors such as domestic violence or maltreatment



In sum research supports that...

It is not so much the cognitive limitations but the social disablement that comes with having cognitive limitations that impact on a person's capacity to parent.

The social model of disability says that **disability** is caused by the way society is organised, rather than by a person's impairment or difference. It looks at ways of removing barriers that restrict life choices for disabled people.



Parents with learning disability in the child protection system

- More likely to come into contact with the child protection system earlier than their non-disabled peers
- When they do come in to contact, less likely to be offered services and more likely to end up in Court (see Slayter, 2018)
- When before the Court they are more likely to lose custody of their children
- One explanation for this is that parents with ID are exposed to more risk factors and confounding issues.
- But even controlling for multiple factors – mental illness, D&A use, Domestic Violence, the children of parents with ID are more likely to end up in the OOHC system (40 -60%)
- “So out-of-home placement appears to have more to do with who these mothers are than with what they do.” (McConnell =2012)

Parents with learning disability in the Family Law Court

- No empirical research on prevalence or profile of parents with learning disability in the Family Law Court.
- Case Examples:
- Parental responsibility shared or otherwise with a family member (e.g. Grandparents)
- Parenting plans/orders post separation and divorce

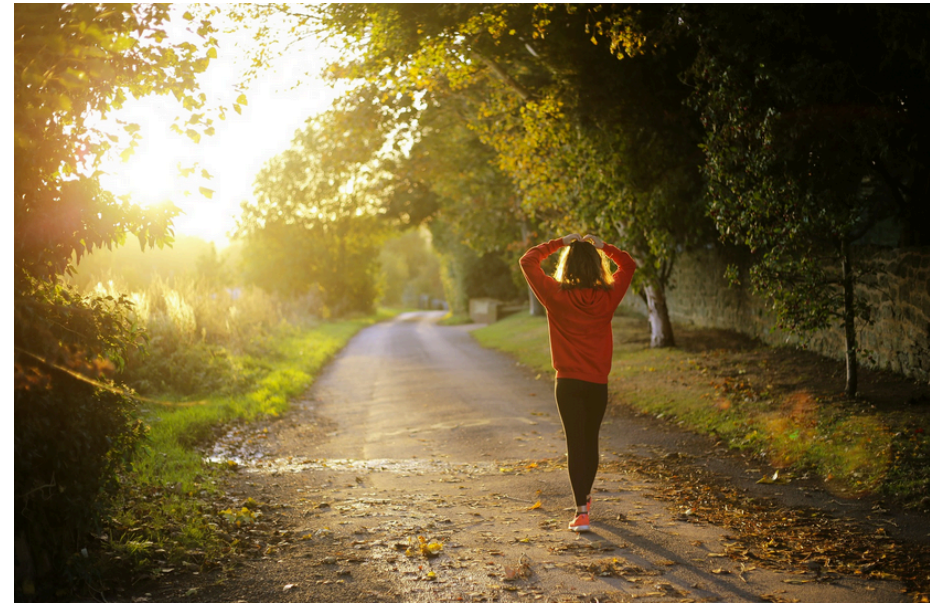


FAMILY COURT
OF AUSTRALIA



Improving the Pathways to Parenthood

- Ensuring Children (particularly girls) with learning disabilities don't get left behind.
- Social Inclusion and opportunities
- Sexual Education for young persons with learning Disabilities
 - Sexual Lives & Respectful Relationship
 - Living Safer Sexual Lives & Respectful Relationships
 - <https://www.slrr.com.au/>



Respectful Engagement

- Attitudinal changes – addressing misconceptions
- Making it safe for person with learning disability to seek support.
- Having access to supports that are relevant and appropriate.
- Working with *parents as partners* – Parents with learning disability want support on their terms. They want people to work with them to be good parents and not take over their parenting role.
- Seeing parenting as developmental (give parents a chance)
- Address contextual issues (poor housing, health issues, insufficient funds, domestic violence)

When parenting is under question to be treated fairly

- **CRPD Article 12 (Equal recognition before the law) Article 13 (Access to justice)**
- According to Article 12 of the CRPD, achieving equal recognition before the law may require states to take ‘appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’ (Para 3).
- Article 13 calls for the provision of procedural accommodations to ensure that people with disability have access to justice ‘on an equal basis with others’ (Para 1) and that ‘those working in the field of administration of justice’ receive appropriate training (Para 2).

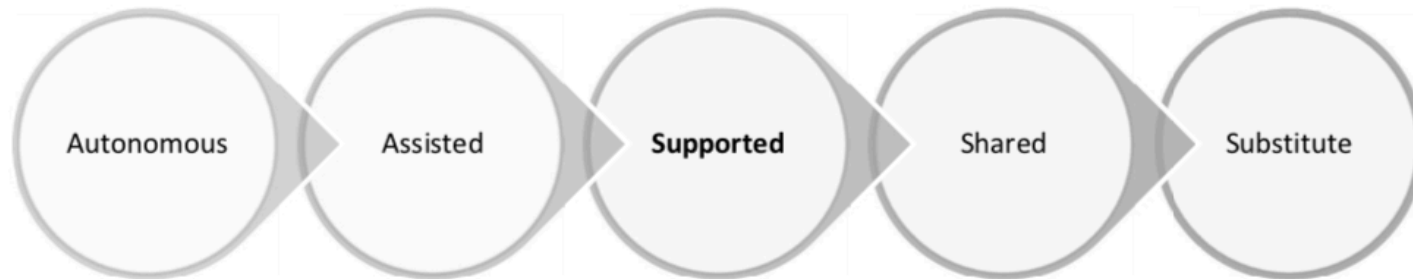
Access to Justice

See Collings (2018) Parents in Care Proceedings reported:

- Powerlessness
- Bewildered by the process *“Court is really hard because you don’t know what to expect”*
- Not heard *“No one was listening to what I was saying”*
- Made to feel competent - reinforcing a lifelong sense of being devalued because of their ID.
- *“Doubly victimized”* (DFV)
- Traumatized
- Unsupported

UNCRPD: SUPPORTING PERSONS WITH DISABILITY ENACT THEIR RIGHTS

Supported decision making as opposed substitute decision making



- Katia is a 35 years old of CALD background and has a 12 month old son named Caleb. Prior to having Caleb she lived independently in social housing. Katia reports having learning difficulties at school and being in a special class “but is ‘pretty okay’ now”. She has been on a Disability Support Pension since leaving school and worked in a supported employment setting up until a few years ago. She now lives with her parents who are in their late 70s. They have limited English and in poor health.
- Around the time Caleb was born a report was made by the hospital to Child Protection. The case was closed after it was determined there was no significant risk of harm to Caleb as she would be living with her parents. Katia attends a local play group but doesn’t have any other formal services involved.

Case Study



Case Study cont'd

- Sami is the father of Caleb and commenced proceedings in the Family Law Court to have parenting orders made. Sami is 50 years old and is from the same village as Katia's father.
- Katia, claims she was 'kidnapped' by Sami and they only lived together for a few months. She states Sami was cruel and controlling. She never reported any of this to the police because she was "afraid of getting into trouble" and does not have any apprehended violence orders in place.
- Katia is very distressed by the proceedings. She repeatedly states she does not want the Court make her live with Sami and is afraid of Caleb being "taken off her".
- You have tried to explain what the case is about and while you think she understands, by the next meeting you need to cover the same ground. She often walks out of meetings stating she "can't take it anymore."
- You are finding it hard to get instructions and wondering about having a case guardian appointed.

What happened

- The Lawyer engaged a disability advocate.
- The disability advocate met with Katia at her home. She met her parents and Caleb.
- She spent time observing Katia's communication patterns and discussing with Katia how she best understands and learns new things.
- She identified and trialed some communication tools
- Discussed with Katia her trauma and anxieties.
- Explored strategies to manage distress.
- Developed a plan (which included referrals to therapeutic services and commenced NDIS process)
- Set up a Court diary for Katia (included laminated cards with strategies for managing distress)
- The disability advocate met with the lawyer to discuss what she needed from Katia.
- She provided lawyers with a tip sheet for communication.

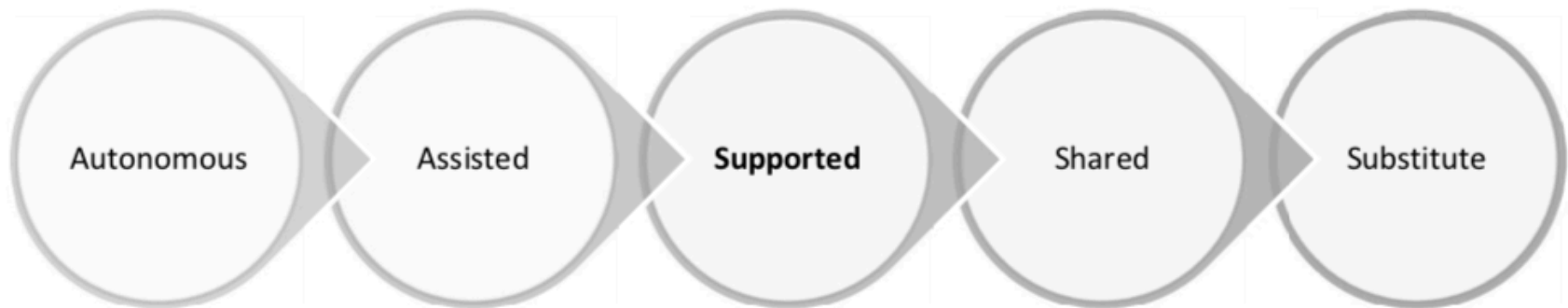
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- The Disability Advocate worked with Katia to record her story using a visual story board.
- Attending meetings with Katia to prepare an affidavit.
- Meetings were time limited with breaks included.
- When the lawyer needed to talk to Katia in between meetings she used teleconferencing (on her I-phone) to involve the advocate.
- The Disability Advocate read through documents with Katia. Recorded questions and extracted key information, making a Plain English summary that went into Katia Court diary.
- When decisions needed to be made or instructions given, options were recorded separate cards
- Each card had a pros & cons sheet. Coloured stickers were used to record implications – positive and negative – of each option.

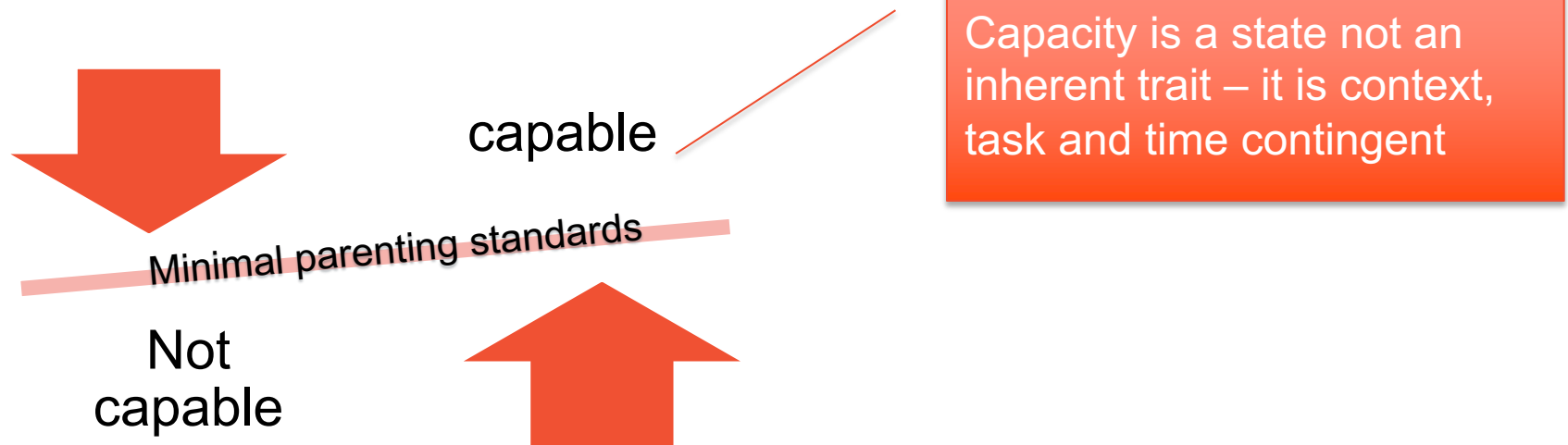
- Though this process the Lawyer became more proficient in communicating with Katia; and in turn Katia was more trusting and responsive to the guidance of the Lawyer.
- The Disability Advocate prepared Katia before each key sessions. For example, arranging for her to visit the Family Relationships Centre and meeting with the family dispute resolution practitioner beforehand. Similarly visiting the Court.
- Through the process Katia became more empowered, managed her anxiety and communicated more effectively. In doing so her capacity to give instructions improved.

CRPD Article 23: Re-Thinking Parenting

- States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.
- Understanding parenting as a shared and supported activity.
- Setting as a benchmark being able to parent independently is unrealistic.



UNCRPD Article 23 Challenges the legitimacy of the use of the concept of parental capacity



The focus shifts from assessing capacity to assessing support. Rather than asking, “is this parent capable of parenting?”, the question to be posed shifts to “Can this parent be supported to parent?”

Is so, how? And to what extent?

If not, why not?

Needing long term support to enact this life goal should not be an exclusion.

Enabling Justice for parents with learning disability and their children post removal and final orders



Enabling Justice for parents with learning disability and their children post removal and final orders

- Reproductive Justice for parents whose children are no longer with them.
- Whatever the reason for a child entering care, the grief and loss experienced by his or her birth parent is profound, complex and long lasting.
- Such grief has been shown to have a profound impact on the health and wellbeing of these parents.
- Broadhurst and Mason (2017) outlined other ‘collateral consequences’ for parents who statutorily lose custody of their children including social and legal stigmatization, sanctions on family relationship and loss of support.
- Parents poor adjustment to life post removal has been shown to potentially have a detrimental impact on their children.

Breaking the cycle

- Broadhurst et al (2017) UK study found 60% mothers involved in care proceedings were back before the court within one year for care proceedings involving a new born child.
- Rapid repeated pregnancy during or soon after care proceedings to be a maladaptive grief response which exposes women to future child removal.
- Need to put in place support for parents post removal.
 - Reproduction health
 - Emotional Support
 - Practical support (e.g. financial & accommodation transition period for relinquishing parents)
 - Therapeutic/supported contact to help parent/child healing and connection.

Letting families have the final say...

- <https://www.youtube.com/watch?v=yhGEdYvkaas>



References

- Bauer, A., Wistow, G., Dixon, J., & Knapp, M. (2015). Investing in advocacy for parents with learning disabilities: what is the economic argument?. *British Journal of Learning Disabilities*, 43(1), 66-74.
- Broadhurst, K., & Mason, C. (2017). Birth parents and the collateral consequences of court-ordered child removal: Towards a comprehensive framework. *International Journal of Law, Policy and the Family*, 31(1), 41-59.
- Choate, P. W., & Hudson, K. Parenting Capacity Assessments: When they Serve and When they Detract in Child Protection Matters”(2014). *CFLQ*, 33, 33-at.
- Collings, S., Spencer, M., Dew, A., & Dowse, L. (2018). 'She was there if I needed to talk or to try and get my point across': specialist advocacy for parents with intellectual disability in the Australian child protection system. *Australian Journal of Human Rights*, 24(2), 162-181.
- Cox, R., Stenfert Kroese, B., & Evans, R. (2015). Solicitors' experiences of representing parents with intellectual disabilities in care proceedings: attitudes, influence and legal processes. *Disability & Society*, 30(2), 284-298.
- Lightfoot, E., & Slayter, E. (2014). Disentangling over-representation of parents with disabilities in the child welfare system: Exploring child maltreatment risk factors of parents with disabilities. *Children and Youth Services Review*, 47, 283-290.
- Man, N., Llewellyn, G., & Wade, C. (October, 2014). The Number and Characteristics of Parents with Intellectual Disability from Centrelink Income Support Administrative Data: Technical Report 2. Lidcombe, NSW: University of Sydney.
- Man, N. W., Wade, C., & Llewellyn, G. (2017). Prevalence of parents with intellectual disability in Australia. *Journal of Intellectual & Developmental Disability*, 42(2), 173-179.
- McConnell, D., Feldman, M., Aunos, M., & Prasad, N. (2011). Child maltreatment investigations involving parents with cognitive impairments in Canada. *Child maltreatment*, 16(1), 21-32.
- Schofield, G., Moldestad, B., Hojer, I., Ward, E., Skilbred, D., Young, J. and Havik, T. (2011)
- 'Managing loss and a threatened identity: experiences of parents of children growing up in foster care, the perspectives of their social workers and implications for practice', *British Journal of Social Work* 41, 74-92.
- Slayter, E. M., & Jensen, J. (2019). Parents with intellectual disabilities in the child protection system. *Children and Youth Services Review*, 98, 297-304.