

Practice Note

March 2013

The Official Solicitor to the Senior Courts: Appointment in Family Proceedings and Proceedings under the Inherent Jurisdiction in Relation to Adults

Introduction

1 This Practice Note replaces the Practice Note dated 2 April 2001 issued by the Official Solicitor.

2 It concerns:

- (a) the appointment of the Official Solicitor as “litigation friend” of a “protected party” or child in family proceedings or where the Family Division of the High Court is being invited to exercise its inherent jurisdiction in relation to a vulnerable adult¹;
- (b) requests by the court to the Official Solicitor to conduct *Harbin v Masterman*² enquiries; and
- (c) requests by the court to the Official Solicitor to act as, or appoint counsel to act as, an advocate to the court³.

The Note is intended to be helpful guidance, but is always subject to legislation including the Rules of Court, to Practice Directions, and to case law.

- 1 In this context a “vulnerable adult” is a person who has mental capacity in respect of the decisions in question but who lacks litigation capacity.
- 2 [1896] 1 Ch 351.
- 3 Pursuant to the Memorandum “Requests for the appointment of an advocate to the court” of the Attorney General and the Lord Chief Justice of 19 December 2001.

3 For the avoidance of doubt, the Children and Family Court Advisory and Support Service (CAFCASS) has responsibilities in relation to a child in family proceedings in which their welfare is or may be in question (Criminal Justice and Court Services Act 2000, section 12). Since 1 April 2001 the Official Solicitor has not represented a child who is the subject of family proceedings (other than in very exceptional circumstances or where a transfer to the Court of Protection is being considered see paragraph 7 below). In cases of doubt or difficulty, staff of the Official Solicitor’s office will liaise with staff of CAFCASS Legal Services to avoid duplication and ensure the most suitable arrangements are made.

Children and Protected Parties who require a litigation friend in proceedings

4 Adults : a “protected party” requires a litigation friend. In family proceedings this requirement appears in Part 15 of the Family Procedure Rules 2010 (“FPR 2010”) and in proceedings in the Family Division of the High Court of Justice under the court’s inherent jurisdiction it appears in Part 21 of the Civil Procedure Rules 1998 (“CPR 1998”). In family proceedings, a “protected party” means a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings: FPR 2010, rule 2.3; and in proceedings under the inherent jurisdiction the expression has the same meaning: CPR 1998, rule 21.2. The following should be noted:

- (a) there must be undisputed evidence that the party, or intended party, lacks capacity to conduct the proceedings;
- (b) that evidence, and what flows from the party, or intended party, being a protected party, should have been disclosed to, and carefully explained to, the party or intended party;

- (c) the party, or intended party, is entitled to dispute an opinion that they lack litigation capacity and there may be cases where the party's, or intended party's, capacity to conduct the proceedings is the subject of dispute between competent experts. In either case a formal finding by the court under FPR 2010, rule 2.3, or CPR 1998, rule 21.2 is required.

5 Non-subject child: a child whose own welfare is not the subject of family proceedings may nevertheless be a party. The most common examples are:

- (a) a child who is also the parent of a child, and who is a respondent to a Children Act 1989 or Adoption and Children Act 2002 application;
- (b) a child who wishes to make an application for a Children Act 1989 order naming another child (typically a contact order naming a sibling);
- (c) a child witness to some disputed factual issue in a children case and who may require intervenor status;
- (d) a child party to an application for a declaration of status under Part III of the Family Law Act 1986;
- (e) a child intervenor in financial remedy proceedings ;
- (f) a child applicant for, or respondent to, an application for an order under Part IV (Family Homes and Domestic Violence) or Part 4A (Forced Marriage) of the Family Law Act 1996.

6 FPR 2010 Part 16 makes provision for the representation of children. Rule 16.6 sets out the circumstances in which a child does not need a children's guardian or litigation friend. Any child party to proceedings under the Children Act 1989, Part 4A Family Law Act 1996, applications in adoption, placement and related proceedings, or proceedings relating to the exercise of the court's inherent jurisdiction with respect to children may rely on the provisions of rule 16.6.

7 Children aged 16–17 years: the Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 (SI 2007/1899) makes provision for the transfer of proceedings from the Court of Protection to a court having jurisdiction under the Children Act 1989. The Order also makes provision for the transfer of the whole or part of the proceedings from a court having jurisdiction under the Children Act 1989 to the Court of Protection where it considers that in all circumstances, it is just and convenient to transfer the proceedings. Article 3(3) of the Order lists those factors to which the court must have regard when making a determination about transfer either on an application or of its own initiative. Court of Protection proceedings are not family proceedings and therefore transfer of proceedings into the Court of Protection will mean that any involvement by CAFCASS in those proceedings will end.

8 The Court of Protection Rules 2007 apply to proceedings in the Court of Protection. Rule 141(4)–(6) of those Rules make provision for a child to be permitted to conduct proceedings in the Court of Protection without a litigation friend. However if the child is 'P' within the meaning of rule 6 of the Court of Protection Rules 2007 reference should be made to rule 141(1) and rule 147 of those Rules in relation to the appointment of a litigation friend.

The role of a litigation friend

9 The case law and the Rules provide that a litigation friend must fairly and competently conduct the proceedings in the protected party's or child's best interests, and must have no interest in the proceedings adverse to that of the protected party or child. The procedure and basis for the appointment of a litigation friend and the duty of a litigation friend are contained in Part 15 (Representation of Protected Parties) FPR 2010 and Part 16 (Representation of Children and Reports in Proceedings Involving Children) FPR 2010 and the associated Practice Directions.

The Official Solicitor's criteria for consenting to act as litigation friend

10 The Official Solicitor is the litigation friend of last resort. No person, including the Official Solicitor, can be appointed to act as litigation friend without their consent. The Official Solicitor will not accept appointment where there is another person who is suitable and willing to act as litigation friend. The Official Solicitor's criteria for consenting to act as litigation friend are:

- (a) in the case of an adult that the party or intended party is a protected party⁴;
 - (b) there is security for the costs of legal representation of the protected party which the Official Solicitor considers satisfactory. Sources of security may be
 - (i) the Legal Service Commission where the protected party or child is eligible for public funding;
 - (ii) the protected party's or child's own funds where they have financial capacity or where they do not where the Court of Protection has given him authority to recover the costs from the adult's or child's funds;
 - (iii) an undertaking from another party to pay his costs;
 - (c) the case is a last resort case.
- 4 The Official Solicitor is able to provide a pro forma certificate of capacity to conduct proceedings and notes for guidance.

Invitations to the Official Solicitor: new cases

11 Solicitors who have been consulted by a child or a protected party (or by someone acting on their behalf, or concerned about their interests) should write to the Official Solicitor setting out the background to the proposed case and explaining the basis on which the Official Solicitor's criteria for acting are met.

Invitations to the Official Solicitor: pending proceedings

12 Where a case is already before the court, an order inviting the Official Solicitor to act should be expressed as being made subject to his consent. The Official Solicitor aims to provide an initial response to any invitation within 10 working days. But he cannot consent to act unless and until he is satisfied both that his criteria are met and that he has a member of his staff to whom the case can be allocated as the case's case manager. So from time to time there will be a waiting list of cases which meet the Official Solicitor's acceptance criteria but in respect of which, because he has no case manager available to take the case, he cannot accept appointment as litigation friend. Save in exceptional circumstances, cases will be accepted in strict chronological order starting with the earliest placed on the waiting list of cases which have met the criteria for acceptance. What constitutes exceptional circumstances will be fact specific; the decision to expedite acceptance of a case is one for the Official Solicitor.

13 To enable the Official Solicitor to consider the invitation to him to act, he should be provided with the following as soon as possible:

- (a) the sealed court order inviting him to act as litigation friend (with a note of the reasons approved by the Judge if appropriate);
- (b) a copy of the letter of instruction to the expert by which an opinion was sought as to the party's capacity to conduct the proceedings whether in the form of the Official Solicitor's certificate of capacity to conduct the proceedings or otherwise;
- (c) (adult party) the opinion on capacity (the Official Solicitor's pro forma certificate of capacity to conduct proceedings may be requested from his office for the purpose of obtaining an opinion);
- (d) confirmation that there is satisfactory security for the costs of legal representation (including any relevant supporting documents); it is a matter for the Official Solicitor whether the proposed security for costs is satisfactory;
- (e) confirmation that there is no other person suitable and willing to act as litigation friend (including the enquiries made to this end);
- (f) the court file (provision of the court file may not be necessary if the court directs a party to provide a full indexed copy of the bundle to the Official Solicitor on a timely basis).

Litigants in person

14 If one or more parties is or are litigants in person, and there is reason to believe that any litigant in person may lack capacity to conduct the proceedings, the court will need to consider, and if necessary give directions as to:

- (a) who is to arrange for the assessment of capacity to conduct the proceedings;
- (b) how the cost of that assessment is to be funded;

- (c) how any invitation to act as litigation friend is to be made to either any suitable and willing person or the Official Solicitor so as to provide him with the documents and information (including information to enable him to make the enquiries necessary to establish whether or not there is funding available;
- (d) any resulting timetabling and, where the Official Solicitor is being invited to be litigation friend, having regard to the Official Solicitor's need to investigate whether his acceptance criteria are met, the need for him to have a case manager available to deal with the case and the possibility that an application to the Court of Protection (for authority to pay the costs out of the protected party's or child's funds) may be necessary.

15 The Official Solicitor will notify the court in the event he expects a delay in accepting appointment either because it is not evident that his criteria are met or for any other reason. The court may wish to consider:

- (a) making enquiries of the parties as to the steps being taken by them to establish that the Official Solicitor's criteria for acting are met in the particular case;
- (b) whether directions should be made to ensure that such enquiries are progressed on a timely basis;
- (c) fixing a further directions appointment.

16 If, at any time, another litigation friend is appointed before the Official Solicitor is in a position to accept the invitation to him to act, the Official Solicitor should be notified without delay.

Where the Official Solicitor has accepted appointment as litigation friend

17 Once the Official Solicitor is able to accept appointment as litigation friend he will need time to prepare the case on behalf of the protected party or child and may wish to make submissions about any substantive hearing date.

18 To avoid unnecessary delay in progression of the case, he will require from the solicitors he appoints for the protected party or child:

- (a) a reading list identifying the material which the solicitors considers will assist by way of introduction to the case in obtaining an overview of the issues from the perspective of the protected party or child;
- (b) a summary of the background to the proceedings, of any major steps that have occurred within the proceedings, and identification of the issues in the proceedings;
- (c) advice as to the steps the Official Solicitor should now take in the proceedings on behalf of the protected party or child;
- (d) copies of all notes of attendance on the protected party or child so that the Official Solicitor is properly informed as to the views and wishes expressed by the protected party or child to date;
- (e) confirmation of the protected party's or child's present ascertainable views and wishes in relation to the proceedings.

Advising the court: *Harbin v Masterman* enquiries and Advocate to the Court

19 Where the Official Solicitor is invited, with his consent, to conduct enquiries under *Harbin v Masterman* and it appears to the Official Solicitor that any public body wishes to seek the assistance of the court but is unwilling to carry out the enquiries itself, the Official Solicitor may seek an undertaking from that public body to indemnify him in respect of his costs of carrying out those enquiries.

20 As noted at paragraph 2(c) above, the Official Solicitor may be invited, with his consent, to act or instruct counsel as a friend of the court (advocate to the court) if it appears to the court that such an invitation is more appropriately addressed to him rather than (or in addition to) CAFCASS Legal Services or to the Attorney-General.

Contacting the Official Solicitor

21 It may be helpful to discuss the question of appointment with the Official Solicitor or one of his staff by telephoning 020 7911 7127 (family litigation) or 020 7911 7233 (divorce litigation), in particular:

- (a) if in doubt about whether his criteria for acting are met, or
- (b) to request a copy of the Official Solicitor's pro forma certificate of capacity to conduct proceedings and notes for guidance.

The Official Solicitor's certificate of capacity to conduct proceedings, a sample letter of instruction, other precedent documents and further guidance in relation to the appointment of the Official Solicitor are also available at www.justice.gov.uk (follow the links to the Official Solicitor).

22 Enquiries about the appointment of the Official Solicitor as litigation friend should be addressed:

- (a) (in divorce and financial remedy proceedings) to the Divisional Manager, Divorce Litigation;
- (b) (in children proceedings or proceedings under Part IV Family Law Act 1996) to the Divisional Manager, Family Litigation;

All other enquiries should be addressed to a family lawyer.

The contact details are:

81 Chancery Lane,

London WC2A 1DD.

DX 0012 London Chancery Lane

Fax: 020 7911 7105

E-mail address: enquiries@offsol.gsi.gov.uk

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