

PRACTICE NOTE

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 March 2013 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, where the Family Division of the High Court is being invited to exercise its inherent jurisdiction in relation to a vulnerable adult¹ or where proceedings in relation to a child aged 16 or 17 are transferred into the Court of Protection;
 - (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.

In this Note “FPR 2010” means Family Procedure Rules 2010, “CPR 1998” means Civil Procedure Rules 1998 and “CoPR 2007” means Court of Protection Rules 2007.

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). 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.

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 See the Attorney-General’s Memorandum of 19 December 2001: “Requests for the appointment of an advocate to the court”. [2002] Fam Law 229

Appointment of a litigation friend for a protected party

4. A “protected party” requires a litigation friend. In family proceedings this requirement appears in Part 15 of the FPR 2010, 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 CPR 1998 and in proceedings in the Court of Protection it appears in Part 17 of the CoPR 2007.

5. 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 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 capacity to conduct the proceedings; 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.

Vulnerable adult

6. Applications made under the inherent jurisdiction in respect of a ‘vulnerable’ adult are made to the Family Division of the High Court but are not family proceedings; the CPR 1998 apply to proceedings under the inherent jurisdiction in respect of adults and the application should be made on a Part 8 claim form using the Part 8 alternative procedure.

7. Difficult questions may arise if the ‘vulnerable’ adult despite having capacity to make the decision or decisions in question nonetheless lacks capacity to conduct the proceedings.

8. A litigation friend is only required if the ‘vulnerable’ adult does lack capacity to conduct the proceedings and is therefore a protected party as defined in CPR 1998, rule 21.2.

Court of Protection

9. The Court of Protection was established by section 45 Mental Capacity Act 2005. Court of Protection proceedings are not family proceedings. ‘P’ in Court of Protection proceedings is any person (other than a protected party) who lacks or, so far as consistent with the context, is

alleged to lack capacity to make a decision or decisions in relation to any matter that is the subject of an application to the Court of Protection (CoPR 2007, rule 6).

10. A 'protected party' is a party or an intended party (other than P or a child) who lacks capacity to conduct the proceedings (CoPR 2007, rule 6).

Children who require a litigation friend in proceedings

11. Non-subject child: a child who is not the subject of family proceedings may nevertheless be a party and subject to FPR 2010 rule 16.6 (see paragraph 7), requires a litigation friend in family proceedings. 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 child arrangements order for contact with a sibling);
- (c) a child who has been joined as an intervener in a public law children case to respond to allegations;
- (d) a child intervenor in financial remedy proceedings;
- (e) a child party to applications for declarations of status under Part III Family Law Act 1986 other than section 55A applications;
- (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;

12. Child parties to applications for declarations of parentage under section 55A Family Law Act 1986: subject to FPR 2010 rule 16.6, in section 55A cases

- (a) any child whose parentage is in dispute and who has been joined as party under FPR 2010 rule 16.2 would have a children's guardian appointed under rule 16.4;
- (b) a child party whose parentage is not in dispute requires a litigation friend.

13. FPR 2010 Part 16 makes provision for the representation of children.

- (a) Rule 16.6 sets out the circumstances in which a child does not need a children's guardian or litigation friend. A child party to proceedings under the Children Act 1989, section 55A Family Law Act 1986, 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.
- (b) However this rule does not apply to those children who are the subject of and party to specified proceedings or proceedings to which Part 14 applies.

14. 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:

(a) Article 3(3) of the Order lists those factors to which the court must have regard when making a determination about transfer to the Court of Protection either on an application or of its own initiative;

(b) proceedings transferred under Article 3 are to be treated for all purposes as if they were proceedings under the Mental Capacity Act 2005 which had been started in the Court of Protection;

(c) as Court of Protection proceedings are not family proceedings transfer of proceedings into the Court of Protection means any involvement by CAFCASS in those proceedings will end;

(d) there should be reason to believe that the child lacks capacity (within the meaning of the Mental Capacity Act 2005) in relation to a matter or matters concerning their own welfare and that it is likely that they will still lack capacity to make decisions in respect of that matter when they reach 18.

15. Rules 141(4)-(5) of the CoPR 2007 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 CoPR 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

16. 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 interests⁴, 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.

⁴ Sir Robert Megarry V-C said in *Re E (mental health patient)* [1984] 1 All ER 309 at pages 312-3 "The main function of a [litigation] friend appears to be to carry on the litigation on behalf of the plaintiff and in his best interests. For this purpose the [litigation] friend must make all the decisions that the plaintiff would have made, had he been able... the [litigation] friend ... is responsible to the court for the propriety and the progress of the proceedings. The [litigation] friend does not, however, become a litigant himself..."

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

17. 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 party⁵;
- (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 Aid Agency where the protected party or child is eligible for legal aid;
 - (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.

Invitations to the Official Solicitor: new cases

18. 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

19. 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 cannot consent to act unless and until he is satisfied that his criteria are met.

20. If so satisfied, he will allocate public law children cases to a case manager within 2 working days of his criteria being met; all other cases will be allocated within 5 working days. The position in relation to allocation may be subject to change from time to time

Public law children cases

21. Allocation to a case manager does not preclude the need for the case manager to be given sufficient time to become familiar with the facts of, and issues in the case before the Official Solicitor, as litigation friend of the protected party or child, is able to give instructions. The case manager will have existing cases and must make decisions about priorities. Allocation to a case manager in close proximity to a hearing may require that the hearing be re-listed.

22. To enable the Official Solicitor promptly to consider the invitation to him to act, he should be sent as soon as possible the completed referral form for public law children cases (available at www.gov.uk⁶) and the documents that form refers to.

All other cases

23. In all other cases the Official Solicitor 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) (adult party):

(i) 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;

(ii) 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 and is available on www.gov.uk⁷);

(c) a full explanation as to how the costs of legal representation are to be paid (including any relevant supporting documents) - it is a matter for the Official Solicitor whether the proposed security for costs is satisfactory;

(d) confirmation that there is no other person suitable and willing to act as litigation friend (including enquiries made about this);

(e) 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

24. If one or more of the parties is or are litigants in person, and there is reason to believe that a 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 assessment of their 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 either to any suitable and willing person or to the Official Solicitor so as to provide the proposed litigation friend with

⁵ The Official Solicitor is able to provide a pro forma certificate of capacity to conduct proceedings and guidance notes. The pro forma is also available on www.gov.uk.

⁶ <https://www.gov.uk/government/publications/official-solicitor-referral-form-for-children-act-public-law-proceedings>

⁷ <https://www.gov.uk/government/publications/certificate-as-to-capacity-to-conduct-proceedings>

the documents and relevant information (including information to enable enquiries necessary to establish whether or not funding for legal costs is available);

(d) any resulting timetabling: where the Official Solicitor is being invited to be litigation friend regard should be had to the Official Solicitor's need to investigate whether his acceptance criteria are met including 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.

25. 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;

(b) whether directions should be made to ensure that the parties progress such enquiries on a timely basis;

(c) fixing a further directions appointment.

26. 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

27. 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.

28. In all cases to avoid unnecessary delay in progression of the case, he requires from the solicitors he appoints for the protected party or child:

(a) a reading list identifying the material documents;

(b) identification of the issues including those which require consideration on behalf of the protected party or child;

(c) a summary of the background to, and major steps in the proceedings;

(d) advice as to the steps the Official Solicitor, as litigation friend, should now take in the proceedings on behalf of the protected party or child;

(e) 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);

(f) confirmation of the protected party's or child's ascertainable present views and wishes in relation to the proceedings.

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

29. 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.

30. The Official Solicitor may be invited by the court 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) CAF/CASS Legal Services or to the Attorney-General. It is a matter for him whether he accepts that invitation.

Contacting the Official Solicitor

31. It may be helpful to discuss the question of appointment with the Official Solicitor or one of his staff by telephoning 020 3681 2755 (General enquiries: public law family cases) 020 3681 2754 (General enquiries: private law family cases including divorce), or 020 3681 2751 (General enquiries: Court of Protection healthcare & welfare). In particular:

- (a) if in doubt about whether the Official Solicitor's acceptance criteria are met, or
- (b) to request a copy of the Official Solicitor's pro forma certificate of capacity to conduct proceedings and guidance notes⁸.

32. Enquiries about the appointment of the Official Solicitor as litigation friend in family proceedings should be addressed:

- (a) (in private law family cases) to the Team Leader, Family Litigation (Private Law);
- (b) (in public law family cases) to the Team Leader, Family Litigation (Public Law).

All other enquiries should be addressed to a family lawyer.

The contact details are:

Office of the Official Solicitor to the Senior Courts
Victory House
30-34 Kingsway
London WC2B 6EX

DX 141423 Bloomsbury 7

Fax: 020 3681 2762

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

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<https://www.gov.uk/government/organisations/official-solicitor-and-public-trustee>

⁸ Also available online by navigating from: <https://www.gov.uk/government/organisations/official-solicitor-and-public-trustee>