

## PRACTICE NOTE

### THE OFFICIAL SOLICITOR TO THE SENIOR COURTS:

### APPOINTMENT AS LITIGATION FRIEND IN PERSONAL WELFARE PROCEEDINGS IN THE COURT OF PROTECTION (INCLUDING SERIOUS MEDICAL TREATMENT CASES) AND APPOINTMENT AS ADVOCATE TO THE COURT

#### Introduction

1. This Practice Note concerns:
  - a. the appointment of the Official Solicitor as litigation friend of the person concerned (“P”) specifically in personal welfare proceedings in the Court of Protection including applications issued under s21A Mental Capacity Act 2005;
  - b. the appointment of the Official Solicitor as litigation friend of the person concerned (“P”) specifically in serious medical treatment proceedings in the Court of Protection;
  - c. the appointment of the Official Solicitor as litigation friend of a protected party in proceedings in the Court of Protection;
  - d. requests by the court to the Official Solicitor to act as, or appoint counsel to act as, an advocate to the court;
  - e. requests by the court to the Official Solicitor to conduct *Harbin v Masterman*<sup>1</sup> enquiries.
2. The Official Solicitor is frequently invited to act as litigation friend for P in personal welfare proceedings in the Court of Protection, including s21A applications and cases that involve serious medical treatment. Typically, the issues involved may include capacity and best interests regarding:
  - a. residence;
  - b. care;
  - c. contact;
  - d. consent to sexual relations;
  - e. consent to marriage;
  - f. consent to serious medical treatment;
  - g. challenges to authorisations granted under the Deprivation of Liberty Safeguards.
3. The Official Solicitor is also invited to act as litigation friend on behalf of a protected party in such proceedings. A protected party is a party or intended party (other than P or a child) who lacks capacity to conduct the proceedings.
4. This Practice Note is intended to be helpful guidance, but it is always subject to legislation including the Rules of the Court, to Practice Directions and to case law.
5. In this Practice Note “MCA 2005” means the Mental Capacity Act 2005, “CoPR 2017” means the Court of Protection Rules 2017 and “CPR” means the Civil Procedure Rules 1998.

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<sup>1</sup> [1896] 1 Ch 351.

6. In so far as it is relevant to this Practice Note, “P” means any person 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 (under Rule 2.1 of CoPR 2017).
7. The Official Solicitor is also sometimes invited to act as Advocate to the Court. A court may seek the assistance of an Advocate to the Court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument. The Advocate to the Court’s function is to give to the court such assistance as they are able on the relevant law and its application to the facts of the case. An Advocate to the Court does not represent any party. Further information about the role of Advocate to the Court is set out in Practice Direction 3G to the CPR<sup>2</sup>. Guidance as to the procedure when the court is inviting the Official Solicitor to act as Advocate to the Court is set out below.

### **Appointment of a litigation friend of P**

8. Under CoPR 2017 rule 1.2, in every case the court must consider the participation of P, including whether P should be joined as a party to the proceedings.
9. Where P is to be joined as a party to proceedings in the Court of Protection and lacks capacity to conduct those proceedings, the order joining P as a party will take effect only upon the appointment of a litigation friend or (in welfare proceedings) an accredited legal representative, in accordance with Rule 1.2 CoPR 2017.
10. Rule 17.4(1) CoPR 2017 provides that the court may appoint the Official Solicitor or some other person as litigation friend for P.

### **The role of a litigation friend**

11. The basis for the appointment of a litigation friend in the Court of Protection and the duties of a litigation friend are contained in Part 17 of the CoPR 2017 and in Practice Direction 17A thereto.<sup>3</sup>

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<sup>2</sup> Which draws on the Attorney-General’s Memorandum of 19 December 2001: “Requests for the appointment of an advocate to the court” [2002] Fam Law 229

<sup>3</sup> As to the role of a litigation friend, Sir Robert Megarry V-C stated 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...” For additional guidance on the role and duties of a litigation friend in the specific context of the Court of Protection proceedings see the judgment of Charles J in *NRA & Ors* WLR(D) 394, [2015] EWCOP 59 at paragraphs 127 to 175 and in particular 144 and 145 which confirm that “the litigation friend is not obliged to advance any argument that P wants him to and that it would not be in P’s best interests to advance an unarguable case” and “by applying the best interests test the litigation friend.....may have to take a position that is contrary to, or does not fully accord with, the expressed wishes and feelings of a P”.

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

12. No person, including the Official Solicitor, can be appointed to act as litigation friend without his/her consent<sup>4</sup>. The Official Solicitor's criteria for consenting to act as litigation friend for P (save for serious medical treatment cases) are:

- a. There is evidence or reason to believe that P lacks capacity to conduct the legal proceedings.
- b. The Official Solicitor is invited to act as litigation friend by court order.
- c. The Official Solicitor is litigation friend of last resort i.e. there is no other person that is suitable to act because they cannot fairly and competently conduct proceedings on behalf of P or a protected party, or they have an interest that is adverse to P or the protected party.
- d. There is security for the costs of legal representation of P which the Official Solicitor considers satisfactory, which will cover the costs of external solicitors retained on P's behalf. The Official Solicitor does not charge for acting a litigation friend. The Official Solicitor will need to be satisfied that the costs of retaining solicitors to act for P can be settled as and when they fall due, taking into account that there may be other calls on P's funds. This requirement can normally be satisfied by either:
  - i. The issuing of a legal aid certificate by the Legal Aid Agency where P or the protected party is eligible for legal aid;
  - ii. Evidence that P has liquid funds that the Official Solicitor considers adequate in all the circumstances;
  - iii. An undertaking to settle the Official Solicitor's costs as and when they fall due, in a form which the Official Solicitor considers satisfactory and covering an amount of costs that the Official Solicitor considers adequate; or
  - iv. The Official Solicitor receiving from the applicant (or another appropriate party) a sum of money on account of her costs which the Official Solicitor considers adequate.

13. If, at any time after consenting to act, the Official Solicitor is no longer satisfied that there is adequate security for her costs, the Official Solicitor will apply for her appointment as litigation friend to be brought to an end.

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<sup>4</sup> Rule 17.4(2)(b) CoPR 2017

### **The Official Solicitor's criteria for consenting to act as litigation friend in serious medical treatment cases**

14. The Official Solicitor does not apply her criteria that she must be litigation friend of last resort in serious medical treatment cases.
15. As a general rule the Official Solicitor conducts cases relating to serious medical treatment herself, with the assistance of the lawyers employed in her office, and does not retain external solicitors to act for P. She does not charge for acting as P's litigation friend, but time spent by lawyers employed by the Official Solicitor will be charged for in the usual manner. The Official Solicitor will seek to have 50% of her reasonable costs (including any costs incurred before the application is formally issued and also those which may arise from any subsequent appeal or applications to review orders which may be brought by any of the other parties) secured by way of an undertaking given by the appropriate public authority involved in the proceedings: in most instances this will be an NHS Trust or CCG which has brought the proceedings as the applicant but in cases where the applicant is a private individual/s this may be one or more of the public bodies acting as respondent. The other 50% of her costs are met from the Official Solicitor's budget. The Official Solicitor does not seek to recover costs from P's own funds for acting in cases concerning serious medical treatment.
16. In cases relating to serious medical treatment in which it is envisaged that she will be appointed to act as litigation friend for P, the Official Solicitor will accept service of documents on P's behalf before proceedings have been issued, subject to paragraph 15 above.

### **Invitation to the Official Solicitor to act as litigation friend**

17. In personal welfare proceedings before the Court of Protection, the Official Solicitor is invited to act as litigation friend by way of an order of the court.
18. An order inviting the Official Solicitor to act as litigation friend should be expressed to be subject to her consent.

### **Where the Official Solicitor has been appointed as litigation friend for P**

19. Normally, where the Official Solicitor has been invited to act as litigation friend for P, the court will direct the applicant to serve a copy of the relevant papers on the Official Solicitor. Please ensure that this is done promptly to avoid unnecessary delay. The office operates a paperless policy and all papers should where possible be sent electronically, by email to [oswelfarereferrals@ospt.gov.uk](mailto:oswelfarereferrals@ospt.gov.uk)
20. In addition, the court will normally make an order authorising the Official Solicitor to investigate the property and financial affairs of P for the purposes of ensuring that the costs of P's representation are secured in the proceedings. It is essential the Official Solicitor is served with a sealed copy of this order promptly to avoid any delays to the proceedings.

21. Please also ensure that the application papers include all information and documents required under the relevant practice direction.
22. When the matter has been allocated to a case manager the case manager will retain an external solicitor to act for P and the external solicitor will contact the applicant in due course. In serious medical treatment cases the lawyer in the Official Solicitor's office to whom the case is allocated will make contact.
23. The Official Solicitor retains external solicitors to represent P or the protected party in all personal welfare cases, with the exception of serious medical treatment cases, which are conducted by the lawyers employed in her office. Only once security for costs has been obtained will the Official Solicitor be in a position to retain external solicitors. This may mean obtaining relevant evidence of P's or the protected party's means for the purposes of securing legal aid. Those enquiries are made by the Official Solicitor's pre-acceptance team. The team will use its best endeavours to avoid delays. Often, however, the progress of its enquiries is subject to the time taken to respond by the financial institutions or other parties it has been necessary to approach. If it appears that the necessary enquiries will not be completed in time for the Official Solicitor to accept the court's invitation before the first listed hearing, the Official Solicitor will notify the applicant and the court of that fact.

#### **Urgent medical treatment cases**

24. In the case of an urgent serious medical treatment application, it may assist to contact the Official Solicitor's office in early course to notify her staff of the urgent application and to discuss any pressing issues. In such a case, please send an email marked in the subject line "URGENT: for the attention of a healthcare and welfare lawyer" to the healthcare and welfare inbox [oswelfare referrals@ospt.gov.uk](mailto:oswelfare referrals@ospt.gov.uk)
25. If an urgent serious medical treatment application is made to the urgent business judge out of hours then it will be a matter for that judge whether the involvement of the Official Solicitor is required and, if so required, the judge will take steps to ensure that contact is made with the Official Solicitor's out of hours lawyers.

#### **Invitations to the Official Solicitor to act as Advocate to the Court**

26. The Official Solicitor may be invited by the court to act or instruct counsel as Advocate to the Court if it appears to the court that such an invitation is more appropriately addressed to her rather than (or in addition to) to the Attorney-General. It is a matter for the Official Solicitor whether she accepts that invitation
27. The appointment of an Advocate to the Court is limited to cases where there is a danger of an important and difficult point of law being decided without the court hearing the relevant argument. As such the Official Solicitor's role when acting as advocate to the court is to advance relevant contrary arguments or otherwise test the approach being contended for by the parties to the proceedings.

28. The Official Solicitor will carefully consider funding availability and budgetary and other resource constraints before deciding whether to accept or decline such an invitation. The Official Solicitor will give serious consideration to an offer of funding by a third party such as a public authority applicant, when she is asked to act as advocate to the court.
29. Where the court wishes to invite the Official Solicitor to act as Advocate to the Court in a personal welfare matter, the order containing the invitation should be sent to [oswelfarereferrals@ospt.gov.uk](mailto:oswelfarereferrals@ospt.gov.uk)

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

30. Where the Official Solicitor is invited, to conduct enquiries under *Harbin v Masterman* any such invitation is subject to her consent. If 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 her in respect of his costs of carrying out those enquiries.

**Contacting the Official Solicitor**

31. It may be helpful to discuss the question of appointment of the Official Solicitor as a litigation friend with one of her staff. Please email [oswelfarereferrals@ospt.gov.uk](mailto:oswelfarereferrals@ospt.gov.uk) in particular:
- (a) if in doubt about whether the Official Solicitor's acceptance criteria are met, or
  - (b) to alert the Official Solicitor to a case where you are applying for the matter to be expedited.

*Address:*

Official Solicitor and Public Trustee

Post point 0.53

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Westminster

London

SW1H 9AJ

DX 152384 Westminster 8

*General enquiries email:* [enquiries@ospt.gov.uk](mailto:enquiries@ospt.gov.uk)

*Email address for service of documents:* [oswelfarereferrals@ospt.gov.uk](mailto:oswelfarereferrals@ospt.gov.uk)

Phone number: 020 3681 2751 (operated from 9am to 5pm)

Sarah Castle, Official Solicitor

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