

## PRACTICE NOTE

### THE OFFICIAL SOLICITOR TO THE SENIOR COURTS:

#### APPOINTMENT IN PROPERTY AND AFFAIRS PROCEEDINGS IN THE COURT OF PROTECTION (INCLUDING STATUTORY WILL AND STATUTORY GIFTING APPLICATIONS)

##### Introduction

1. This Practice Note concerns:
  - a. the appointment of the Official Solicitor as “litigation friend” of the person concerned (“P”) specifically in *property and affairs proceedings* in the Court of Protection;
  - b. requests by the court to the Official Solicitor to act as, or appoint counsel to act as an advocate to the court
2. The Official Solicitor is frequently invited to act as litigation friend for P in “property and affairs” applications in the Court of Protection to authorise:
  - a. execution of a statutory will/codicil,
  - b. the making of a large gift on behalf of P (or ratification of an unauthorised gift that has already been made),
  - c. execution of a settlement of assets belonging to P;
  - d. gratuitous care payments;
  - e. transactions at an undervalue; and
  - f. transactions or investments where one of the parties faces a conflict of interest, such as a purchase by or from the attorney/deputy or a proposed purchase of investments on behalf of P aimed at Inheritance Tax efficiency.
3. Less frequently, the Official Solicitor may be invited to act as P’s litigation friend in relation to applications to appoint a deputy for property and affairs or to revoke a lasting power of attorney.
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.
6. In so far as it is relevant to this Practice Note, “P” means the person who is the subject of an application to the Court of Protection, and who lacks or, so far as consistent with the context, is alleged to lack capacity to make the decision or decisions being considered by the court. *For instance, it will refer to the person for whom the court is considering authorising the signing of a will (in a statutory will application) or the person from whose funds the court is considering authorising a gift (in statutory gifting applications).*

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 are set out in Practice Direction 3G to the CPR<sup>1</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.
8. For avoidance of doubt, the Official Solicitor no longer accepts appointment as a deputy for property and affairs. In a last resort situation where a deputy is required, it is suggested that the local authority or a panel deputy is considered.

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

9. 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.
10. Where P is to be joined as a party to property and affairs proceedings and lacks mental capacity to conduct those proceedings, P will require a litigation friend<sup>2</sup>.
11. Rule 17.4(1) CoPR 2017 provides that the court may appoint the Official Solicitor or some other person as litigation friend for P – or for a “protected party” or child. (In practice, in property and affairs proceedings the Official Solicitor normally is appointed as litigation friend for P rather than for another party in the proceedings.)

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

12. The basis for the appointment of a litigation friend 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>

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

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<sup>1</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>2</sup> Accredited Legal Representatives can be appointed to represent P in welfare proceedings but this does not apply to Court of Protection property and affairs cases, at the time of writing.

<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 context of Court of Protection proceedings see the judgment of Charles J in *NRA & Ors* WLR(D) 394, [2015] EWCOP 59 at 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”. (Please note however that the latter case concerned Health and Welfare – rather than Property and Affairs – proceedings, and some of the judge's comments appear to be specific to that context.)

13. 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 (in Court of Protection property and affairs proceedings) are:
- a. There is evidence or reason to believe that P lacks capacity to conduct the legal proceedings.
  - b. There is security for the costs of legal representation of P which the Official Solicitor considers satisfactory. The Official Solicitor will need to be satisfied that her costs 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. Evidence that P owns liquid funds that the Official Solicitor considers adequate in all the circumstances;
    - ii. A professional 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
    - iii. 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.
  - c. In addition, the Official Solicitor may consider whether her costs of acting are likely to become disproportionate to P's assets or contrary to P's best interests. If the Official Solicitor concludes that her costs are likely to become disproportionate and/or it would not be in P's best interests to incur those costs, the Official Solicitor is likely to decline the invitation to act as litigation friend.
14. 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 to be discharged as litigation friend.

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

15. In property and affairs proceedings before the Court of Protection, the Official Solicitor is normally invited to act as litigation friend by way of an order of the court.
16. 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**

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

17. 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.
18. Please also ensure that the application papers include all information and documents required under the relevant practice direction – Practice Direction 9E to the CoPR 2017 is normally relevant to applications concerning statutory wills, gifting and/or property transactions. If any required information is missing from the application papers, it should be provided to the Official Solicitor (as well as to the court and the other parties) promptly.
19. Applicants (and other parties to the proceedings) should serve the Official Solicitor electronically where possible. The general email inbox for initial service is: [OSPTSecretarialSupport@ospt.gov.uk](mailto:OSPTSecretarialSupport@ospt.gov.uk)
20. The initial administration of cases is assisted if each document and exhibit is provided as a separate PDF and clearly labelled as such (e.g. COP24 by ABC dated dd.mm.yy or copy will dated [date]). Combining different documents in one amalgamated PDF document can delay administration.
21. When the matter has been allocated, the applicant will be notified of the relevant contact details.

#### **Urgent cases**

22. In the case of an urgent 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 contact the secretarial support team on 020 3681 2758 and ask to speak to a lawyer in the "Property and Affairs Team". You may also wish to send an email marked in the subject line "URGENT: for the attention of a Property and Affairs lawyer" to the Official Solicitor's Property and Affairs inbox: [OSPTSecretarialSupport@ospt.gov.uk](mailto:OSPTSecretarialSupport@ospt.gov.uk)
23. Many of the cases in which the Official Solicitor acts concern individuals who are elderly, frail and/or otherwise vulnerable. It is also noted that treating a case with "expedition" may mean that it is not possible to complete all the enquiries and investigations that the Official Solicitor would normally wish to undertake. Therefore, the Official Solicitor will normally only be willing to deal with a case with expedition where the court has so directed.

#### **Conclusion of cases and costs collection**

24. The Official Solicitor will normally seek payment of P's SCCO-assessed costs via P's deputy or attorney (unless the final order provides differently) after the conclusion of the case. There is often a time delay between the end of the case and the Official Solicitor obtaining a final costs certificate so that she can collect her costs from P.
25. If P has died in the meantime, please advise the Official Solicitor's finance team of this as soon as possible, so that the costing can be prioritised, if necessary. Please also confirm the contact address for the executors/administrators of the estate or their solicitors (if they are legally

represented). The deceased's personal representatives should ensure that they retain sufficient assets from P's estate to settle the Official Solicitor's costs.

26. The contact email address for the Official Solicitor's finance team is: [OSPTFinance@ospt.gov.uk](mailto:OSPTFinance@ospt.gov.uk)

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

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 constraints before deciding whether to accept or decline such an invitation, as such costs are normally met from the Official Solicitor's limited internal budget. Offers of funding by a third party, usually another public authority applicant, will generally be accepted.
29. Where the court wishes to invite the Official Solicitor to act as Advocate to the Court in a Property and Affairs matter, the order containing the invitation should be sent to the Court of Protection Property and Affairs Team Leader.

### **Contacting the Official Solicitor**

30. It may be helpful to discuss the question of appointment of the Official Solicitor as a litigation friend with one of her staff by telephoning 020 3681 2758 (General enquiries: Property and Affairs cases), 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.
31. Enquiries about the appointment of the Official Solicitor as litigation friend in property and affairs proceedings should be addressed to the team leader of the Court of Protection Property and Affairs Team.
32. All other enquiries should be addressed to a property and affairs team lawyer.

*Address :*

Official Solicitor and Public Trustee  
The Official Solicitor & Public Trustee office  
Post Point 0.53  
102 Petty France  
London  
SW1H 9AJ  
DX 152380 Westminster 8.

*Email address for service of documents and property and affairs enquiries:*  
[OSPTSecretarialSupport@ospt.gov.uk](mailto:OSPTSecretarialSupport@ospt.gov.uk)

*Email address for finance team:* [OSPTFinance@ospt.gov.uk](mailto:OSPTFinance@ospt.gov.uk)

*Property and Affairs Team enquiries telephone number:* 020 3681 2758

Sarah Castle, Official Solicitor

3 February 2021

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

**ANNEX:**

**Flow Chart – Steps where Official Solicitor is invited to act as litigation friend for P**

