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Litigation Friends and Legal Aid

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Jess Flanagan, Associate Solicitor

Clarke Willmott LLP

T: 0845 209 1160

M: 07917 580 137

E: jess.flanagan@clarkewillmott.com

W: www.clarkewillmott.com

Litigation Friend

- ✘ P should always be encouraged to participate in welfare proceedings as much as possible (MCA) – these slides apply to acting for P, not any other protected party
- ✘ Trend in welfare, medical treatment and s21A applications for P to be joined as a party. Recent guidance from the President suggests P need not be joined in all DOL applications (urge caution)
- ✘ If P is a party to the proceedings then he will require a litigation friend (Rule 141 COPR 2007) – extent of orders without Lit. Friend?
- ✘ Usually joined by initial order and the Official Solicitor invited to act as litigation friend BUT:

Litigation Friend cont...

- ✱ The Official Solicitor has strict criteria:
 1. P must lack capacity to litigate
 2. There must be no one else willing and able to act as litigation friend (OS is LF of last resort)
 3. He must have security for his costs (either private or Legal Aid) and this is based on P's means, not the litigation friend.

- ✱ IMCAs and RPRs should apply these criteria too if asked to act, and add:
 4. Am I insured / indemnified against any adverse costs orders?
 5. How is the extra work going to be funded?

Capacity to Litigate

- * Capacity is issue specific and capacity to litigate is not synonymous with capacity to make a decision or decisions which are the subject of the application
- * Apply the test set out in ss2 and 3 MCA 2005:
 - * Is there an impairment of or disturbance in the functioning of, the person's mind or brain?
 - * If so, does the impairment or disturbance mean that the person is unable to make a decision in relation to the matter(s) in question?
 - * person is regarded as being unable to make a decision if he/she cannot:
 - * Understand information relevant to the decision to be made;
 - * Retain that information;
 - * Use or weigh the information as part of the decision making process or
 - * Communicate the decision (by any means).
- * Case law is looked to for the relevant information to be understood, etc

***Masterman-Lister v Brutton & Co (No 1) [2002] EWCA
Civ 1889, [2003] 1 WLR 1511; paragraphs 75 and 79***

- * *“... the test to be applied ...is whether the party to legal proceedings is capable of understanding with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim I can see no reason why the law...should require the interposition of a next friend or guardian ad litem (or, as such a person is now described in the CPR, a litigation friend...)”*

- * *“... a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language; and...he should not be regarded as unable to make a rational decision merely because the decision which he does in fact make is a decision which would not be made by a person of ordinary prudence.”*

Sheffield CC v E & S [2005] FAM 236, Para 34
Mr Justice Munby at Para 39:

- ✱ *“The capacity to litigate is not something to be determined in the abstract. One has to focus on a particular piece of litigation in relation to which the issue arises. The question is always whether the litigant has capacity to litigate in relation to particular proceedings in which he is involved....*
- Someone may have the capacity to litigate in a case where the nature of the dispute and the issues are simple, whilst at the same time lacking the capacity to litigate in a case where either the nature of the dispute or the issues are more complex.”*

Capacity to litigate: Practical Issues

- ✘ Evidence of capacity to litigate is required by the court and by the OS. 'Certificate as to capacity to conduct proceedings' or letter from GP / medical practitioner or Social Worker with MCA experience should be filed with any application
- ✘ If P has capacity then the court should be invited to enable him or her to litigate him or herself (Re DC)
- ✘ If P regains capacity to litigate, but not re the issues in question, then the Litigation Friend can apply to court to discharge the litigation friend (one case Re SB) and must be supported by evidence.
- ✘ COP 9 to apply to be P's litigation friend when not OS (rule 143)
- ✘ COP 22 for other Protected Party & to support COP 9 (as it confirms rule 140 is met)
- ✘ The court can prevent, terminate or replace a Litigation Friend's appointment

Who Can act as Litigation Friend for P?

- ✘ Official Solicitor
- ✘ Family Members
 - Interim / kept under review
 - To ensure orders can be made swiftly
 - Might not be appropriate due to nature of the application but the mere fact that a person has strong views as to where P's best interests lie should not automatically disqualify them from acting as Lit Friend, especially if they instruct competent legal representatives
 - See *WCC v AB and SB* [2013] COPLR 157
 - Would need to demonstrate they can act in accordance with the rules and take a balanced approach to the issues

Who can act as Litigation Friend for P?

- * RPRs
- * IMCAs
- * In DOLS applications – RPRs have been appointed to act (AB v LCC (A Local Authority) and the Care Manager of BCH [2011] EWHC 3151 (COP)) – clear pathway?
- * Suggestion that this should often be investigated.
- * Should be aware how onerous this can be to do properly and must be aware of how time consuming this role can be.

Duties of a Litigation Friend

Rule 140 Court of Protection Rules:

- (1) A person may act as a litigation friend on behalf of [P, a protected party or a child]
- (2) if he-
 - (a) can fairly and competently conduct proceedings on behalf of that person; and
 - (b) has no interests adverse to those of that person.

Assumption that OS meets these criteria, but every proposed Litigation Friend **MUST** consent to act as litigation friend (rule 143(2))

Duties of a Litigation Friend...

✖ They are not:

- An Advocate, either a lay advocate, statutory advocate (ie IMCA or IMHA) or legally qualified advocate (solicitor)
- Equivalent of Children's guardian in family law proceedings
- McKenzie Friend (only relevant if the assisted person has capacity)

Duties of a Litigation Friend...

* They will:

- Carry on the litigation on behalf of P In his best interests
- Make all decisions P would have made, if he were able, but is not the litigant himself
- Relay P's wishes & feelings to the court upon relevant issues
- Question mark over how far to push P's wishes and feelings within the litigation and compatibility with Article 6 & Article 8 ECHR – guidance in RP v Nottingham Council & the OS [2008] EXCA 462, tension diminished if the Lit Friend does not positively support making of relevant orders in the face of P's opposition (Peter Jackson QC as he then was, paras 15-19)
- Consider testing whether the least restrictive option has been considered, especially in DOLS and DOL applications
- Leave difficult decisions to the Judge, especially if P wishes to bring a s21A application in the face of compelling evidence that the current arrangements are in his best interests (A5(4))

Costs and Insurance

- ✘ Suggest no one agrees to act as litigation friend without security for his costs of instructing lawyers OR for reimbursement of costs incurred if no lawyer instructing.
- ✘ Order at the outset permitting P's financial circumstances to be investigated to determine eligibility for Legal Aid or to be reimbursed from P's estate (rule 157 – each party bears own costs).
- ✘ Agreement from LA to fund extra work – conflict issues?
- ✘ Assess eligibility for legal aid:

Legal Aid

- * S16, s21A applications funded
- * Means test:
 - Stringent means test (under £8,000 capital and £733 monthly disposable income / pass porting benefit)
 - Pensioner Disregards (capital and income)
 - Between £3,000 - £8,000 - capital contribution (all of the difference up to £8K)
 - £260 (apx) per month disposable income; contribution dependent on amount over, up to £733 limit.
 - <https://www.gov.uk/civil-legal-aid-means-testing>
- * Residence test -12 months in UK – Evidence (not for DOLS)
- * Merits test:
 - Legal Help (sufficient benefit)
 - Legal Representation (hearing listed and overwhelming importance to the client, cost benefit, prospects of success)
 - Life, liberty or physical safety, medical treatment, marry, sexual relations, right to family life

Costs Risk...

- ✘ No requirement for litigation friend to undertake to pay costs incurred by other parties in COP proceedings.
- ✘ P (or the protected party) can be made subject of a costs order (in financial cases, P will pay everyone's costs) and it is the responsibility of the Lit Friend to ensure these costs were met but unlikely to give rise to personal liability on the part of the Lit Friend to meet the costs, but even if so – could look to P to reimburse them if proceedings have been properly conducted.
- ✘ Any Lit friend is potentially at risk of being ordered to pay costs themselves (COPR r166) but there are no known cases. Undertakings?

New rules and appeal awaited

- * Re X has been appealed in respect of whether P needs to be joined as a party, avoiding need for litigation friend in some cases. Awaiting judgment.
- * The [Court of Protection \(Amendment\) Rules 2015](#) were laid before Parliament on 9th March.
- * New Rule 3A, coming into force on 1st July 2015. This rule fundamentally refocuses the approach of the Court of Protection to the participation of P. It requires in each case the Court to consider, either on its own initiative or on the application of any person, consider whether it should make one or more of one of a 'menu' of directions relating to P's participation. That menu includes:
 - P being a party;
 - P's participation being secured by the appointment of a representative whose primary function is to give P a 'voice' by relaying information as to P's wishes and feelings;
 - Specific provision for P to address (directly or indirectly) the judge determining the application; or
 - No direction or an alternative direction (meeting the overriding objective) if P's interests and position can properly be secured.
- * Rule 3A provides that a direction may be made appointing an accredited legal representative ('ALR') to represent P. This can be done whether or not P is a party; importantly, if P is a party, then an ALR may be appointed without a litigation friend being appointed to act for P.
- * Drawn from Rule 11(7) of the Mental Health Tribunal Rules, is designed to supplement, not supplant, the role of litigation friends; the intention (as spelled out in the accompanying Practice Direction, 2A) is that ALRs can provide assistance where urgent orders are required and it is not possible to appoint a litigation friend. They may also play an important role in 'narrow' applications such as applications under s.21A MCA 2005, thereby allowing the resources of litigation friends – whether the OS or otherwise – to be reserved for more complex cases where, for instance, expert evidence will be required.