

APIL DISCUSSION: INVOLVING THE OFFICIAL SOLICITOR: FRIEND NOT FOE

Introduction

1. Most personal injury and clinical negligence solicitors will have some familiarity with acting for children or vulnerable adults often as the claimant in the litigation. Solicitors will also be familiar with the requirement for the appointment of a litigation friend (CPR 21.2).¹
2. A suitable family member will in most cases be available to be the litigation friend. However, the requirement that the individual is able to '*fairly and competently conduct proceedings*' gives rise to additional difficulties where the solicitor considers that the identified individual may not be able to satisfy this requirement. Problems often arise where (i) the family members are abroad (ii) where there are significant cultural differences with both language barriers and as to how the claim and the use of recovered funds might be viewed; and (iii) where a non-family member is put forward as 'a professional litigation friend' apparently selected by the family to act on their behalf and seeking a fee for the services to be provided!
3. As a consequence, there are an increasing number of cases where the litigation solicitor will face the dilemma as to whether there is available a suitable individual capable of meeting the test under CPR 21.4.
4. It is in these cases that consideration will need to be given to the Official Solicitor becoming involved.

¹ CPR 21.4(3) provides that

If nobody has been appointed by the court or, in the case of a protected party, has been appointed as a deputy as set out in paragraph (2), a person may act as litigation friend if he-

- (a) can fairly and competently conduct proceedings on behalf of the child or protected party;*
- (b) has no interest adverse to that of the child or protected party; and*
- (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party*

Who is the Official Solicitor?

5. The current Official Solicitor to the Senior Courts and Public Trustee, to give her full title, (OSPT) is Sarah Castle, a solicitor, the first woman and the 12th holder of this position in the 150 years history of the office.
6. The Official Solicitor performs two distinct statutory roles. As litigation solicitors in civil actions, you will most frequently come across the Official Solicitor in her role as litigation friend for those who lack capacity or are deemed to lack capacity.
7. The Official Solicitor is both an office and very much an individual who will in appropriate cases appear in court and conduct litigation in her own right. However, in personal injury and clinical negligence litigation the Official Solicitor will act as client and will instruct an external firm as litigation solicitors, to be on the court record, to instruct counsel and to carry out all of the litigation steps required when acting on behalf of any claimant, or in an appropriate case, defendant in an action.

What are you getting when the Official Solicitor becomes involved as a litigation friend?

8. The Official Solicitor will:
 - 8.1 step into the shoes of the client who lacks litigation capacity;
 - 8.2 carry on the litigation and make decisions on behalf of the client acting essentially in accordance with broad principles of best interest;
 - 8.3 Since the MCA 2005 the best interest approach is applied in accordance with the principles therein set out. The Official Solicitor will seek to make the decisions that the client would probably have made had s/he had been able to do so but the analysis is not an entirely straightforward one.²

² Whilst a litigant with capacity is free to conduct litigation as s/he feels is appropriate, including making unwise decisions to pursue or settle the claim as s/he sees fit. The Official Solicitor cannot be expected to make irrational decisions simply because she stands in the shoes of the claimant and even if it was convincingly shown that the claimant might himself have made such an irrational decision. As such the decision to be made by the Official Solicitor is by definition likely to be constrained by:

- (i) the evidence that is available;
- (ii) the best interest of the protected party; and

8.4 The observation of Brightman J in *Re Whittall* still apply and is a sound approach. These should be borne in mind when considering how the Official Solicitor as a professional litigation friend will approach the task.

“The litigation friend is required to take all measures he or she sees fit for the benefit of the child or protected party, supplementing the want of capacity and judgement of the child or protected party, his or her function being to guard or safeguard the interest of the child or protected for the purposes of the litigation. The discharge of that duty involves the assumption by the litigation friend of the obligation to acquaint him or herself of the nature of the action and, under proper legal advice, to take all due steps to further the interests of the child or protected party”³

9. Although you are getting a decision maker, it is important for the litigation solicitors to recognise the following:

9.1 The majority of the decision making will be carried out by the case managers or case workers who are not legally qualified.

9.2 The legally qualified solicitors within the OSPT will usually perform a supervisory role with the expectation that only the more complex issues in a case are referred to them.

9.3 An important consequence of the above is that the litigation solicitors should not expect the Official Solicitor to:

- *Act as the solicitor on the file.* She is not, you are.
- *Work out what the issues in the case are as well as provide the answer.* The solicitor should always work on the basis that: (i) s/he knows and has identified the issues that s/he wants the Official Solicitor to consider; and (ii) be ready to provide advice as to what s/he believes the answer to the question is or might be.
- *Plan the next steps in the action.* Your role as solicitor is no different to that when acting for a lay client. You provide information, you advise and if the

(iii) the wishes of the protected party provided the same can be given appropriate but not undue weight.

³ Although *Re Whittall* was a pre MCA case it was cited with approval by Norris J. in *OH v Craven* [2017]4 WLR 25

advice is reasoned and clear you can expect that an informed decision is likely to be made in accordance with the advice.

- 9.4 It has been said that the litigation solicitor should regard the Official Solicitor as they would an *intelligent, informed and appropriately inquisitive* professional lay client.

When will the OS become involved?

10. One of the most common errors made by the litigation solicitor is assuming that the Official Solicitor will become involved simply because the litigation solicitor, experienced or otherwise, has requested such involvement. This is a seriously flawed approach and is often the basis for misunderstanding and can cause difficulties.
11. There is guidance in place as to when and how the Official Solicitor will become involved in the litigation.⁴ The current guidance appears to be directed to family proceedings but is equally applicable to other civil claims.⁵ In order for the Official Solicitor to agree to becoming involved, the following must be satisfied:
- 11.1 There must be clear evidence that the party lacks capacity to litigate.
 - 11.2 There should be confirmation supported by evidence that there is no-one that is suitable and willing to act as litigation friend.
 - 11.3 There is security in a suitable form for the legal costs of the protected party's representation.
12. All of the above matters can present significant difficulties and/or create delay in the involvement of the Official Solicitor. Dealing with each in turn:

Evidence that the client lacks capacity or is a minor

13. Many cases will be straightforward and the issue of lack of capacity will be agreed or at least not capable of any real dispute. However, many TBI claims involve significant

⁴ See <http://www.justice.gov.uk/downloads/protecting-the-vulnerable/official-solicitor/litigation-friend-note.pdf>.

⁵ It is likely that a specific guide for civil claims will be published in due course.

disputes as to capacity to litigate and manage funds and can present significant problems.⁶
The following should be noted by any solicitor seeking to involve the Official Solicitor:

- 13.1 Appointing a family member or other lay person as litigation friend prior to commencement of proceedings involves no judicial scrutiny or determination and the evidential basis may be the strong belief of the litigation solicitor supported perhaps by early preliminary medical evidence. It must not be assumed that if the Official Solicitor is asked to take over she will be satisfied with the very early medical opinion which may be outdated supported only by the solicitors say so.
- 13.2 If the Official Solicitor is to be involved, the evidence as to lack of capacity will need to be strong, even if there is no unanimity. In a case of traumatic brain injury where recovery from injury may affect the issue of continued loss of capacity, there will need to be up to date evidence.
- 13.3 Expert medical evidence will invariably be required.
- 13.4 Particular difficulties can arise where, by the time the invitation is being made to the Official Solicitor, there is available evidence from the defendant in the proceedings, challenging the assertion of lack of capacity.
- 13.5 Be candid with the Official Solicitor. Disclose all of the evidence. She will be entitled to see it if she accepts the appointment as litigation friend. If necessary provide clear and reasoned explanation as to why the Official Solicitor can be satisfied that, at this point in the litigation, and despite assertions to the contrary from the defendant's expert, she can be satisfied that the client lacks litigation capacity.

Practice points:

⁶ Practitioners may be familiar with the guidance given by the Court in *Folks v Faizey* [2006] EWCA Civ. 381 which discourages defendant's from contesting the decision to appoint a family member as litigation friend, focussing on the fact that the decision is not usually to the defendant's financial advantage and will tend to unnecessarily increase the cost of litigation. However, no similar approach can be encouraged of the Official Solicitor who must be satisfied that there is good evidence that there is a lack of capacity.

- *Keep in mind the fact that the Official Solicitor is very familiar with the issues around capacity, the test to be applied, and how jealously it is guarded under the MCA and in proceedings in the COP;*
- *remember that you are able to share with the Official Solicitor, privileged information relating to the client and his/her understanding of the litigation that you would not be able or willing to share with the defendant. This evidence from a professional such as a solicitor, and directly relating to the client's understanding of the litigation issues, is likely to be very persuasive in supporting the contention, even if disputed, that litigation capacity is absent;*
- *If necessary, demonstrate to the Official Solicitor that you have taken into consideration and applied the legal test and principles set out in Masterman-Lister v Brutton and Co; Dunhill v Burgin, etc.*

There is no other person willing and able to act as litigation friend

14. The office of the OSPT has an ever expanded caseload, works under enormous pressures and with limited resources. In the civil jurisdiction there are many cases, particularly in medical consent and treatment cases, where the need for the Official Solicitor to become involved is self-evident and often urgent. It should not be surprising if the Official Solicitor questions the need for her involvement in cases where, on the face of the information provided, it appears that the requirement, that there is no other person willing and able to act, is not satisfied.

14.1 Do not expect the Official Solicitor to become involved just because you have asked for it. Whilst it may be accepted that the request itself might be a genuine one, the mere existence of a troublesome, inquisitive or even an obstructive litigation friend, is not ordinarily a sufficient reason to invite the Official Solicitor to become involved.

14.2 Even if the above facts might justify the request it does not guarantee an acceptance from the Official Solicitor.

14.3 Particular difficulties can arise where there are family members who are willing to act but, as solicitor, you wish to appoint the Official Solicitor because you believe that they are not, or no longer suitable, to act. In such circumstances:

14.3.1 Be prepared to provide clear details of the evidential basis for the required involvement of the Official Solicitor, explaining the difficulties that have arisen in the relationship. Be candid.

14.3.2 Where there is already in place a litigation friend, s/he may need to be removed.⁷ Be aware that any such application is not one that involves the Official Solicitor. It is a matter between the litigation solicitor, the existing litigation friend and the court. Until the court determines this issue the requirement to confirm to the Official Solicitor that there is no one '*willing and able to act*' cannot be satisfied;

14.3.3 The solicitor who has lost faith in the ability of the existing litigation friend with whom s/he has a retainer can nonetheless apply to the court for the removal, even if this action is against the instructions from the litigation friend.⁸

14.3.4 The Official Solicitor should be kept reasonably abreast of the application; however, it must be remembered that the Official Solicitor has no locus at this stage and any involvement is conditional on a finding by the court that (i) the existing litigation friend requires removal; and/or (ii) there is no suitable person to be the litigation friend.

14.3.5 The solicitor should ensure that the court can be informed that the Official Solicitor is, in principle, willing to become involved:

⁷ The jurisdiction is pursuant to CPR 21.7.

⁸ This necessarily will cause a breakdown in the relationship between solicitor and existing client. However, see *Sabri v Imperial College NHS Healthcare* Trust (unreported) 19.12.2017 for discussion as to circumstances in which the solicitors are likely to be justified in bringing matter before the court.

Practice points:

- *Any application to remove existing family members as litigation friend is by definition likely to be contentious.*
- *The defendant to the substantive proceedings should be notified of the application but should not be a party to the same. There should be no service of the application or evidence in support on the defendant.*
- *Appropriate orders will need to be obtained as to the restriction on the service of the evidence in support and on reporting of the details of the application and any judgment given by the court.⁹*
- *An issue may arise as to the costs of the application to remove. It does not follow that any costs order will be made against the recalcitrant litigation friend (or another family member who may apply to be substituted). The original defendant in the action may argue that the dispute is nothing to do with him and satellite to the substantive action and seek to resist meeting the costs of the same which can be considerable¹⁰.*
- *An application for the cost of the removal of the existing litigation friend and the appointment of Official Solicitor as new litigation friend if made against the existing defendant may need to be heard at the conclusion of the whole proceedings because of the necessary restriction in disclosing the basis of the application to remove.*

Security for the legal costs of the proceedings

15. The issue in relation to the costs of the Official Solicitor in the proceedings is often misunderstood.

⁹ Since court judgments are public documents unless otherwise directed they will be made public. As such, it will be necessary to seek a suitable direction under CPR 40.2

¹⁰ The outcome of such an argument advanced on behalf of a NHS Trust is currently subject to a reserved judgment which is awaited.

- 15.1 It is recognised that the actual cost of the Official Solicitor in acting as litigation friend will not be recovered.¹¹ This will be met from central government funding as part of the costs of the running of the OSPT.
- 15.2 The Official Solicitor as litigation friend will nonetheless need to give the undertaking required under CPR 21.4(3)(c). As such the Official Solicitor will need to be satisfied that there is in place a suitable method of meeting the costs of instructing the litigation solicitors and the costs of the defendant in the event that the claim is lost.
- 15.3 Where the claim is funded under a Legal Aid certificate, this will be sufficient; however, the solicitor will need to provide details of any limitation on the certificate and where the same has been reached at the time of the request to appoint the Official Solicitor, evidence that the certificate has or will be extended may need to be provided.
- 15.4 Where, as in most cases, the claimant acts under a CFA with his solicitors, it will be necessary to ensure that the CFA is in a form that the Official Solicitor will be prepared to agree to. It should not be assumed, for example, that the Official Solicitor will be willing to agree to a CFA that allows for the uplift on base costs or recovery of costs from the claimant's damages, to the extent agreed with a previous litigation friend.
- 15.5 The potential liability of the claimant for adverse costs will need to be considered and sufficiently explained.

Managing the ongoing relationship with the Official Solicitor

16. Assuming that the Official Solicitor agrees to act as litigation friend, the following observations are made in terms of the ongoing relationships:
- 16.1 It is likely that, once the Official Solicitor is appointed, the case will be allocated to a case worker who will be the point of contact. In order to allow for continuity, it may be that more than one point of contact is identified.
- 16.2 The Official Solicitor may also identify a number of service standards, ie, responding to incoming written correspondence and periodic review of the claim.

¹¹ See *Bradbury v Paterson* [2014] EWHC 3992 Foskett J.

- 16.3 Solicitors should not assume that the Official Solicitor will be able to respond immediately to communication and if the case demands or is likely to demand urgent attention in respect of certain issues, then these should be highlighted as soon as possible.
- 16.4 The solicitor should ensure that advice and information provided to the Official Solicitor is as thorough as possible. If a decision is required from the Official Solicitor, then the solicitor should seek to:
- identify the decision that requires to be made at that point;
 - identify and provide the evidential basis for the decision-making process and summarise the same;
 - indicate if possible what if any positive advice is being given to the Official Solicitor or, where it is not possible to provide such advice, explain the options;
 - where it is hoped that the case worker may be able to provide instructions without referring the matter to a senior solicitor, then it makes sense to consider whether all of the information is available for the decision to be made.

Concluding remarks

17. It is recognised that working with the Official Solicitor is not the same as having a lay litigation friend who might not only be eternally grateful for the presence of the solicitor but will often look to the solicitor not only for decision making, but also emotional support.
- 17.1 The Official Solicitor is not formally in need of nor expecting emotional support.
- 17.2 The Official Solicitor will, by reason of the role, be a more informed and possibly more challenging litigation friend. However, this should not be seen as a disadvantage and the advantages of clarity and certainty in decision making and support should be recognised. The Official Solicitor will not be '*phoning a friend*' and coming back the next day to question the decisions made at the last meeting.

- 17.3 However, in all cases the Official Solicitor and the litigation solicitor will want the same outcome and will be working to achieve the same.
- 17.4 Recognising and maximising the strengths of the different roles will be the most effective means of achieving the common objective.

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