

## PRACTICE DIRECTION

## CHILDREN AND PATIENTS

**This Practice Direction supplements CPR Part 21**

## GENERAL

- 1.1** In this practice direction ‘child’ means a person under 18 years old and ‘patient’ means a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his property and affairs<sup>1</sup>.
- 1.2** A patient must bring or defend proceedings by a litigation friend (see paragraph 2 below for the definition of a litigation friend).
- 1.3** In the proceedings referred to in paragraph 1.2 above the patient should be referred to in the title as ‘A.B. (by C.D. his litigation friend)’.
- 1.4** A child must bring or defend proceedings by a litigation friend unless the court has made an order permitting the child to do so on his own behalf<sup>2</sup>.
- 1.5** Where:
  - (1) the child has a litigation friend, the child should be referred to in the title to proceedings as ‘A.B. (a child by C.D. his litigation friend)’, and
  - (2) the child is conducting proceedings on his own behalf, the child should be referred to in the title as ‘A.B. (a child)’.
- 1.6** The approval of the court must be obtained if a settlement of a claim by or against a child or patient is to be valid. A settlement includes an agreement on a sum to be apportioned to a dependant child under the Fatal Accidents Act 1976.
- 1.7** The approval of the court must also be obtained before making a voluntary interim payment to a child or patient.

*(Rule 39.2(3) provides for a hearing or part of a hearing to be in private)*

## THE LITIGATION FRIEND

- 2.1** It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of a child or patient. He must have no interest in the proceedings adverse to that of the child or patient and all steps and decisions he takes in the proceedings must be taken for the benefit of the child or patient.
- 2.2** A person may become a litigation friend:
  - (1) of a child –
    - (a) without a court order under the provisions of rule 21.5, or
    - (b) by a court order under rule 21.6, and
  - (2) of a patient –

<sup>1</sup> See rule 21.1(2).

<sup>2</sup> See rule 21.2(3).

- (a) by authorisation under Part VII of the Mental Health Act 1983, or
- (b) by a court order under rule 21.6.

**2.3** In order to become a litigation friend without a court order the person who wishes to act as litigation friend must:

- (1) if he wishes to act on behalf of a patient, file an official copy of the order or other document which constitutes the authorisation referred to in paragraph 2.2(2)(a) above, or
- (2) if he wishes to act on behalf of a child, or on behalf of a patient without the authorisation referred to in (1) above, file a certificate of suitability<sup>1</sup> –
  - (a) stating that he consents to act,
  - (b) stating that he knows or believes that the [claimant] [defendant] is a [child][patient],
  - (c) in the case of a patient, stating the grounds of his belief and if his belief is based upon medical opinion attaching any relevant document to the certificate,
  - (d) stating that he can fairly and competently conduct proceedings on behalf of the child or patient and has no interest adverse to that of the child or patient,
  - (e) where the child or patient is a claimant, undertaking to pay any costs which the child or patient 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 patient, and
  - (f) which he has signed in verification of its contents.

**2.4** The litigation friend must serve a certificate of suitability<sup>2</sup>:

- (1) in the case of a child (who is not also a patient) on one of the child's parents or guardians or if there is no parent or guardian, on the person with whom the child resides or in whose care the child is, and
- (2) in the case of a patient on the person authorised under Part VII of the Mental Health Act 1983 to conduct proceedings on behalf of the patient or if there is no person so authorised, on the person with whom the patient resides or in whose care the patient is.

**2.4A** The litigation friend is not required to serve the documents referred to in paragraph 2.3(2)(c) when he serves a certificate of suitability on the person to be served under paragraph 2.4.

**2.5** The litigation friend must file either the certificate of suitability together with a certificate of service<sup>3</sup> of it, or the authorisation referred to in paragraph 2.3(1) above:

- (1) where the litigation friend is acting on behalf of a claimant, when the claim form is issued, and
- (2) where the litigation friend is acting on behalf of a defendant, when he first takes a step in the action.

## APPLICATION FOR A COURT ORDER APPOINTING A LITIGATION FRIEND

**3.1** Rule 21.6 sets out who may apply for an order appointing a litigation friend.

**3.2** An application should be made in accordance with Part 23 and must be supported by evidence<sup>4</sup>.

**3.3** The application notice must be served:

- (1) on the persons referred to in paragraph 2.4 above, and

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<sup>1</sup> See rule 21.5(3).

<sup>2</sup> See rule 21.5(6) and rule 6.9 (service).

<sup>3</sup> See rule 6.10 for the certificate of service.

<sup>4</sup> See rule 21.6(4).

- (2) where the application is in respect of a patient, on the patient unless the court orders otherwise.
- 3.4** The evidence in support must satisfy the court that the proposed litigation friend:
- (1) consents to act,
  - (2) can fairly and competently conduct proceedings on behalf of the child or patient,
  - (3) has no interest adverse to that of the child or patient, and
  - (4) where the child or patient is a claimant, undertakes to pay any costs which the child or patient 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 patient.
- 3.5** Where a claimant wishes to take a step in proceedings against a child or patient who does not have a litigation friend he must apply to the court for an order appointing a litigation friend.
- 3.6** The proposed litigation friend must satisfy the conditions in paragraph 3.4(1), (2) and (3) above and may be one of the persons referred to in paragraph 2.4 above where appropriate, or otherwise may be the Official Solicitor. Where it is sought to appoint the Official Solicitor, provision should be made for payment of his charges.

## CHANGE OF LITIGATION FRIEND AND PREVENTION OF PERSON ACTING AS LITIGATION FRIEND

- 4.1** Rule 21.7(1) states that the court may:
- (1) direct that a person may not act as a litigation friend,
  - (2) terminate a litigation friend's appointment,
  - (3) substitute a new litigation friend for an existing one.
- 4.2** Where an application is made for an order under rule 21.7(1), the application notice must set out the reasons for seeking it. The application must be supported by evidence.
- 4.3** If the order sought is the substitution of a new litigation friend for an existing one, the evidence must satisfy the court of the matters set out in paragraph 3.4 above.
- 4.4** The application notice must be served:
- (1) on the persons referred to in paragraph 2.4 above, and
  - (2) on the litigation friend or person purporting to act as litigation friend.

## PROCEDURE WHERE THE NEED FOR A LITIGATION FRIEND HAS COME TO AN END

- 5.1** Rule 21.9 deals with the situation where the need for a litigation friend comes to an end during the proceedings because either:
- (1) a child who is not also a patient reaches the age of 18 (full age) during the proceedings, or
  - (2) a patient ceases to be a patient (recovers).
- 5.2** A child on reaching full age must serve on the other parties to the proceedings and file with the court a notice:
- (1) stating that he has reached full age,
  - (2) stating that his litigation friend's appointment has ceased<sup>1</sup>,

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<sup>1</sup> Rule 21.9(4)(a).

- (3) giving an address for service<sup>1</sup>, and
  - (4) stating whether or not he intends to carry on with or continue to defend the proceedings.
- 5.3** If the notice states that the child intends to carry on with or continue to defend the proceedings he shall subsequently be described in the proceedings as:  
A.B. (formerly a child but now of full age)<sup>2</sup>
- 5.4** Whether or not a child having reached full age serves a notice in accordance with rule 21.9(4)(a) and paragraph 5.2(2) above, a litigation friend may at any time after the child has reached full age serve a notice on the other parties that his appointment has ceased.
- 5.5** The liability of a litigation friend for costs continues until a notice that his appointment to act has ceased is served on the other parties<sup>2</sup>.
- 5.6** Where a patient recovers, an application under rule 21.9(3) must be made for an order under rule 21.9(2) that the litigation friend's appointment has ceased.
- 5.7** The application must be supported by the following evidence:
- (1) a medical report indicating that the patient has recovered and that he is capable of managing and administering his property and affairs,
  - (2) where the patient's affairs were under the control of the Court of Protection, a copy of the order or notice discharging the receiver, and
  - (3) if the application is made by the patient, a statement whether or not he intends to carry on with or continue to defend the proceedings.
- 5.8** An order under rule 21.9(2) must be served on the other parties to the proceedings. The patient must file with the court a notice:
- (1) stating that his litigation friend's appointment has ceased,
  - (2) giving an address for service<sup>3</sup>, and
  - (3) stating whether or not he intends to carry on with or continue to defend the proceedings.

## SETTLEMENT OR COMPROMISE BY OR ON BEHALF OF A CHILD OR PATIENT PRIOR TO THE START OF PROCEEDINGS

- 6.1** Where a claim by or on behalf of a child or patient has been dealt with by agreement prior to the start of proceedings and only the approval of the court to the agreement is sought, the claim:
- (1) must be made using the Part 8 procedure,
  - (2) must include a request for approval of the settlement or compromise, and
  - (3) subject to paragraph 6.4 in addition to the details of the claim, must set out the terms of the settlement or compromise or have attached to it a draft consent order in practice form N292.
- 6.2** In order to approve the settlement or compromise, the information concerning the claim that the court will require will include:
- (1) whether and to what extent the defendant admits liability,
  - (2) the age and occupation (if any) of the child or patient,
  - (3) the litigation friend's approval of the proposed settlement or compromise, and
  - (4) in a personal injury case arising from an accident –
    - (a) the circumstances of the accident,

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<sup>1</sup> See rule 6.5.

<sup>2</sup> Rule 21.9(6).

<sup>3</sup> See rule 6.5.

- (b) any medical reports,
- (c) where appropriate, a schedule of any past and future expenses and losses claimed and any other relevant information relating to personal injury as set out in the practice direction which supplements Part 16 (statements of case), and
- (d) where considerations of liability are raised –
  - (i) any evidence or police reports in any criminal proceedings or in an inquest, and
  - (ii) details of any prosecution brought.

### **6.3**

- (1) An opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child or patient should, except in very clear cases, be obtained.
- (2) A copy of the opinion and, unless the instructions on which it was given are sufficiently set out in it, a copy of the instructions, must also be supplied to the court.
- (3) A copy or record of any financial advice must also be supplied to the court.

**6.4** Where in any personal injury case a claim for damages for future pecuniary loss is settled, the provisions in paragraphs 6.4A and 6.4B must in addition be complied with.

**6.4A** The court must be satisfied that the parties have considered whether the damages should wholly or partly take the form of periodical payments.

**6.4B** Where the settlement includes provision for periodical payments, the claim must-

- (1) set out the terms of the settlement or compromise; or
- (2) have attached to it a draft consent order, which must satisfy the requirements of rules 41.8 and 41.9 as appropriate.

**6.5** Applications for the approval of a settlement or compromise will normally be heard by a Master or district judge.

(For information about provisional damages claims see Part 41 and the practice direction which supplements it)

## SETTLEMENT OR COMPROMISE BY OR ON BEHALF OF A CHILD OR PATIENT AFTER PROCEEDINGS HAVE BEEN COMMENCED

**6.6** Where in any personal injury case a claim for damages for future pecuniary loss, by or on behalf of a child or patient, is dealt with by agreement after proceedings have been commenced, an application should be made for the court's approval of the agreement.

**6.7** The court must be satisfied that the parties have considered whether the damages should wholly or partly take the form of periodical payments.

**6.8** Where the settlement includes provision for periodical payments, an application under paragraph 6.6 must-

- (1) set out the terms of the settlement or compromise; or
- (2) have attached to it a draft consent order, which must include the requirements of rules 41.8 and 41.9 as appropriate.

**6.9** The court must be supplied with-

- (1) an opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child or patient, except in very clear cases; and

- (2) a copy or record of any financial advice.

## APPORTIONMENT UNDER THE FATAL ACCIDENTS ACT 1976

- 7.1** A judgment on or settlement in respect of a claim under the Fatal Accidents Act 1976 must be apportioned between the persons by or on whose behalf the claim has been brought.
- 7.2** Where a claim is brought on behalf of a dependent child or children, the money apportioned to any child must be invested on his behalf in accordance with rules 21.10 and 21.11 and paragraphs 8 and 9 below.
- 7.3** In order to approve an apportionment of money to a dependent child, the court will require the following information:
- (1) the matters set out in paragraph 6.2(1),(2) above, and
  - (2) in respect of the deceased
    - (a) where death was caused by an accident, the matters set out in paragraph 6.2(3)(a),(b) and (c) above, and
    - (b) his future loss of earnings, and
  - (3) the extent and nature of the dependency.

## CONTROL OF MONEY RECOVERED BY OR ON BEHALF OF A CHILD OR PATIENT

- 8.1** Money recovered or paid into court on behalf of or for the benefit of a child or patient shall be dealt with in accordance with directions of the court under rule 21.11.
- 8.2** The court:
- (1) may direct the money to be paid into the High Court for investment,
  - (2) may also direct that certain sums be paid direct to the child or patient, his litigation friend or his legal representative<sup>1</sup> for the immediate benefit of the child or patient or for expenses incurred on his behalf, and
  - (3) may direct the applications in respect of the investment of the money be transferred to a local district registry.
- 8.3** The Master or district judge will consider the general aims to be achieved for the money in court (the fund) by investment and will give directions as to the type of investment.
- 8.4** Where a child is also a patient, and likely to remain so on reaching full age, his fund should be administered as a patient's fund.
- 8.5** Where a child or patient is legally aided the fund will be subject to a first charge under s. 16 of the Legal Aid Act 1988 (the legal aid charge) and an order for the investment of money on the child or patient's behalf must contain a direction to that effect.

## EXPENSES INCURRED BY LITIGATION FRIEND

- 8A.1** A litigation friend may make a claim for expenses under rule 21.11A(1) –
- (a) where the court has ordered an assessment of costs under rule 48.5(2), at the detailed assessment hearing;

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<sup>1</sup> See rule 2.3 for a definition of legal representative.

- (b) where the litigation friend's expenses are not of a type which would be recoverable as costs on an assessment of costs between the parties, to the Master or District Judge at the hearing to approve the settlement or compromise under Part 21 (the Master or District Judge may adjourn the matter to the Costs Judge); or
  - (c) where an assessment of costs under Part 48.5(2) is not required, and no approval under Part 21 is necessary, by a Part 23 application supported by a witness statement to a Costs Judge or District Judge as appropriate.
- 8A.2** In all circumstances, the litigation friend shall support a claim for expenses by filing a witness statement setting out –
- (i) the nature and amount of the expense;
  - (ii) the reason the expense was incurred.

## GUARDIAN'S ACCOUNTS

- 9** Paragraph 8 of the practice direction supplementing Part 40 (Judgments and Orders) deals with the approval of the accounts of a guardian of assets of a child.

## INVESTMENT ON BEHALF OF A CHILD

- 10.1** At the hearing of the application for the approval of the agreement the litigation friend or his legal representative should provide a CFO form 320 (request for investment) for completion by the Master or district judge.
- 10.2** On receipt of that form in the Court Funds Office the investment managers of the Public Trust Office will make the appropriate investment.
- 10.3** Where an award of damages for a child is made at trial the trial judge may direct:
- (1) the money to be paid into court and placed in the special investment account, and
  - (2) the litigation friend to make an application to a Master or district judge for further investment directions.
- 10.4** If the money to be invested is very small the court may order it to be paid direct to the litigation friend to be put into a building society account (or similar) for the child's use.
- 10.5** If the money is invested in court it must be paid out to the child when he reaches full age.

## INVESTMENT ON BEHALF OF A PATIENT

- 11.1** The Court of Protection is responsible for protecting the property of patients and is given extensive powers to do so under the Mental Health Act 1983. Fees are charged for the administration of funds by the Court of Protection and these should be provided for in any settlement.
- 11.2** Where the sum to be administered is:
- (1) over £30,000, the order approving the settlement will contain a direction to the litigation friend to apply to the Court of Protection for the appointment of a receiver, after which the fund will be transferred to the Court of Protection,
  - (2) under £20,000, it may be retained in court and invested in the same way as the fund of a child, or

- (3) in intermediate cases the advice of the Master of the Court of Protection should be sought.
- 11.3** A form of order transferring the fund to the Court of Protection is set out in practice form N292.
- 11.4** In order for the Court Funds Office to release a fund which is subject to the legal aid charge to the Court of Protection the litigation friend or his legal representative should provide the appropriate area office of the Legal Aid Board with an undertaking in respect of a sum to cover their costs, following which the area office will advise the Court Funds Office in writing of that sum, enabling them to transfer the balance to the Court of Protection on receipt of a CFO form 200 payment schedule authorised by the court.
- 11.5** The CFO form 200 should be completed and presented to the court where the settlement or trial took place for authorisation, subject to paragraphs 11.6 and 11.7 below.
- 11.6** Where the settlement took place in the Royal Courts of Justice the CFO form 200 should be completed and presented for authorisation:
- (1) on behalf of a child, in the Masters' Secretary's Office, Room E214, and
  - (2) on behalf of a patient, in the Action Department, Room E15.
- 11.7** Where the trial took place in the Royal Courts of Justice the CFO form 200 is completed and authorised by the court officer.

## PAYMENT OUT OF FUNDS IN COURT

- 12.1** Applications to a Master or district judge;
- (1) for payment out of money from the fund for the benefit of the child, or
  - (2) to vary an investment strategy,
- may be dealt with without a hearing unless the court directs otherwise.
- 12.2** When the child reaches full age, his fund in court:
- (1) where it is a sum of money will be paid out to him, and
  - (2) where it is in the form of investments other than money (for example shares or unit trusts), will be transferred into his name.
- 12.3** An application for payment out of funds being administered by the Court of Protection must be made to the Court of Protection.

(For further information on payments into and out of court see the practice directions supplementing Parts 36 and 37.)