Guidance Note

Acting as a litigation friend in the Court of Protection

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Introduction

1. The Court of Protection plays a vital role in securing the rights of some of the most vulnerable people in society. Judges of the court daily have to determine whether individuals have or lack capacity to take specific decisions, and – if they lack capacity – what should be done in their best interests.

2. The person who lacks (or may lack) capacity to take their own decisions will not always be involved directly in the proceedings. If they are, and if they do not have capacity to participate in those proceedings, then they will need a 'litigation friend' – a person who can conduct the proceedings on their behalf. Litigation friends are therefore a crucial part of the working of the Court of Protection, ensuring that those whom the proceedings concern have their voice heard before the court.

3. This Guidance aims to demystify the Court of Protection generally and the role of litigation friend specifically so as to enable more people to consider taking up the role – thereby ensuring the better promotion and protection of the rights of those said to be lacking capacity to take their own decisions.

4. The Court of Protection – being a court – has formal procedures and its own language. This Guidance has to use that language and make reference to those procedures, but it tries to do so in as simple a fashion as possible and to sign-post the way to other resources aimed at non-lawyers wanting to learn more about the workings of the court.

5. This Guidance was commissioned by the Department of Health. It could not have been written without the invaluable assistance of the many individuals identified in the Acknowledgments and others who provided comments but did not wish to be named.

As an Independent Mental Capacity Advocate (IMCA) fulfilling the role of litigation friend for P has been an inspiration. It has given me a deeper insight into the workings of the Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards. It has brought to life the workings of the Court of Protection. It has enhanced the significance of what I do in respect of supporting and representing my clients.

Working with solicitors and barristers engaged in public law has given me a sense of the wider commitment to upholding the rights of the vulnerable and of people who lack the capacity to make important decisions for themselves. I am impressed by the focus that judges bring to what is in the best interests of the incapacitated person.

I am reassured by the comparative informality of the Court. The majority of judges, particularly at district level, where appropriate, are willing to hear from the protected party in person. By the same token, I have never been treated with anything less than respect by legal professionals.

I commend to all concerned the value of the role of litigation friend as a means of enabling access to justice for those we represent as well as enhancing the skills and abilities of advocacy.

Daryl Crosskill, IMCA

A: Overview

What is a litigation friend?

6. A person who is involved in court proceedings ('a litigant' or 'a party') must have the capacity to conduct those proceedings.[1] They must, in other words, have the capacity to participate in those proceedings as a party. If they wish to use lawyers, they must be able to give instructions to those lawyers as to the decisions that will be required of them in the proceedings. If they do not wish to (or cannot afford) to use lawyers, they must be able to participate in them by being able to complete the necessary paperwork and understand the decisions made by the judge during the course of the proceedings. This capacity is known as 'litigation capacity.'

7. If a party lacks litigation capacity then the court must appoint a 'litigation friend' to carry on the proceedings on their behalf. This rule applies in all civil proceedings. It is of particular importance in applications to the Court of Protection because such applications will almost invariably seek decisions or declarations to be made as to the best interests of a person who is said lacks capacity to take their own decisions. The person – 'P'[2] – will not always be made a party to the proceedings;

[1] Different considerations apply if a person is facing a criminal prosecution; this guidance does not cover this situation.

[2] 'P', as defined in Rule 6 of the Court of Protection Rules, "*means any person (other than a protected party) 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*." Neither in the Rules nor in the Guidance is any disrespect intended to the individuals who are the subject of applications to the court by the use of this necessary shorthand. P is also used as a shorthand in this Guidance for a person who may be the subject of proceedings before the court, even if, strictly, the definition only applies once the application has been made.

but if they are then the Court of Protection Rules 2007 – the rules that govern proceedings before the court – require that they have a litigation friend appointed to act on their behalf.[3]

Who is this Guidance aimed at and what is its purpose?

8. This Guidance has been written for non-legal advocates such as Independent Mental Capacity Advocates ('IMCAs') and Relevant Person's Representatives ('RPRs') as well as family members or friends of P. As its primary audience is likely to be IMCAs and RPRs, and to avoid unnecessary repetition, it will generally refer to 'IMCAs' or 'advocates' as a shorthand for those who may be considering fulfilling the role of litigation friend. It is also important to note that the word 'advocate' that is used throughout this Guidance does not mean - unless the context makes clear – an advocate in the sense of a person who is legally qualified and has the right to appear before a court. Rather, it means an advocate such an IMCA or an RPR.

9. The Guidance has two distinct purposes:

    1. To enable an advocate or a family member/friend of P to take a matter to the Court of Protection as litigation friend for P and properly to discharge their duties as litigation friend. To this end, the Guidance looks in Chapter F at when it is appropriate to bring matters to the court so as to promote P's rights.

    2. To enable an advocate (or, which is probably less likely, a family member/friend of P) to be able to accept an invitation to act as litigation friend for P in proceedings before the Court of Protection brought by another person or body, and properly to be able to discharge their duties as litigation friend.

10. The Guidance will be of most relevance to applications to the Court of Protection relating to P's health and welfare (including those relating to deprivation of liberty) as these are the types of cases in which it is most likely that someone other than the Official Solicitor will be appointed to act as litigation friend for P.

11. The Guidance focuses on acting as litigation friend for P. It may be that another adult involved in the proceedings lacks the capacity to act and also requires a litigation friend: they are known as a 'protected party.' The principles set out below will generally apply in such situations; the Guidance also highlights some specific points where they will not.

12. If a child is a party to proceedings before the Court of Protection (and is not 'P' – as they could be if they are aged 16 or 17), they will also usually require a litigation friend; whilst the principles set out here will mostly apply, it is more likely than not that a child in such a situation would be represented by the Official Solicitor and this Guidance does not therefore address their position further.

13. This Guidance – of necessity – uses legal terminology in places. Whilst explanations are given of the most important terms, an extremely useful basic guide to the Court of Protection and a glossary of the most commonly used terms can be found at http://courtguides.wordpress.com/.[4]

[3] Rule 141. See also paragraph 146 below for the circumstances where this rule does not apply.

14. The Guidance contains both a number of (fictional) examples designed to illustrate particular points and also a number of case studies which are taken (in anonymous form) from real-life situations.

How is this Guidance arranged?

15. This Guidance is divided into a number of chapters, as follows:

16. There are also three appendices:

Appendix A: Checklists for advocates considering (1) bringing an application in P's name or; (2) accepting an invitation to act as litigation friend for P in proceedings brought by another person or body

Appendix B: A template position statement for a directions hearing

Appendix B: Details of how to undertake a 'balance sheet' exercise for purposes of determining where P's best interests lie.

17. The reader in a hurry can skip to the Frequently Asked Questions at in Chapter J but it is strongly suggested that the FAQs are read together with the body of the Guidance as they serve to summarise rather than to replace the more detailed discussions it contains. Likewise, whilst the Checklists in Appendix A provide practical guidance as to (for instance) the forms that must be completed, they must be read alongside the main body of the text to give the necessary context.

18. Wherever cases decided by the courts are referred to, a hyperlink is given to the case comment provided at www.copcasesonline.com, a database of cases relating to the Mental Capacity Act 2005

[4] Prepared by Victoria Butler-Cole, a barrister at Thirty Nine Essex Street.

('MCA 2005') maintained by Thirty Nine Essex Street Chambers. If one is not available, then, where possible, a hyperlink is given to a freely available copy of the judgment.

B: An overview of the Court of Protection

19. The Court of Protection was created by the MCA 2005 to create one specialist court charged with determining questions in relation to those who lack capacity to take their own decisions. The Court has a number of tasks, of which the most important are:

    1. To decide whether P has or lacks the capacity to take a specific decision or decisions (for instance as to where they should live or as to the management of their financial affairs);[5]

    2. Where P lacks capacity to take a specific decision, either:

        (i) To take the decision on their behalf and in their best interests;[6]

        (ii) To appoint a deputy to take the decision, again in their best interests.[7]

    3. To declare whether acts done or yet to be done in relation to P are or are not lawful (for instance, whether life-sustaining medical treatment can be withdrawn or withheld from P); [8]

    4. To make decisions in relation to authorisations granted under the Deprivation of Liberty Safeguards regime contained in Schedule A1 to the MCA 2005;[9]

    5. To authorise deprivations of liberty in settings outside the scope of the regime set down in Schedule A1 to the MCA 2005 (most obviously supported living placements);[10] and

    6. To determine questions in relation to Lasting and Enduring Powers of Attorney[11] and Advance Decisions to refuse medical treatment.[12]

20. See also Chapter F below for more on when it is appropriate to bring an application to the Court of Protection.

21. It is important to note what the Court of Protection cannot do. In particular:

    - It cannot take any decision on behalf of a person with capacity to take that decision. There may be some circumstances in which it is possible to ask a court to intervene in such a case where an

[5] Section 15(1)(a) MCA 2005.
[6] Section 16(2)(a) MCA 2005.
[7] Section 16(2)(b) MCA 2005.
[8] Section 15(1)(c) MCA 2005.
[9] Section 21A MCA 2005.
[10] See *Re X (Deprivation of Liberty)* [2014] EWCOP 25.
[11] Sections 22 and 23 MCA 2005 and paragraph 16 of Schedule 4 to the MCA 2005.
[12] Section 26 MCA 2005.

adult with capacity who is nonetheless vulnerable requires assistance, but the court to which it will be necessary to go will not be the Court of Protection;[13]

- It cannot make best interests decisions in relation to certain excluded matters such as marriage and consenting to sexual relations;[14]

- As a general rule, it cannot require a particular option to be put before it by a public authority discharging the functions of that authority (e.g. the provision of accommodation by a local authority).[15] In other words, the Court of Protection is generally confined to choosing between the options that are actually available to P; see further in this regard paragraph 101 below for the importance of this when it comes to deciding whether it is appropriate to bring an application on behalf of P.

22. The parties to the proceedings before the Court of Protection will always include the person or body asking the court to make a decision or a declaration as to P's best interests and any person or body who objects to that decision being made. P themselves will not always be a party to the proceedings,[16] but will in general be a party in all but very straightforward proceedings involving their health and welfare. As set out above, if P is a party, then the starting point is that they will require a litigation friend to act on their behalf (the circumstances when they will not are addressed at paragraphs 146-148 below).

23. Proceedings before the Court of Protection can be heard before one of three levels of judge:[17]

- District judges, who are the lowest tier, but who can hear almost all types of cases except for ones involving serious medical treatment and – at present – claims specifically relying upon the Human Rights Act 1998. District Judges sit in designated courts across England and Wales, and the trend is – wherever possible – for cases involving welfare to be transferred from London (where all applications have to be made) to be heard by District Judges in the court closest to the parties;

- Circuit Judges, who sit above District Judges. They are subject to the same limitation upon the types of case that they can hear as District Judges;

- Judges of the High Court.[18] These judges can hear any type of case; serious medical treatment cases and claims specifically relying upon the Human Rights Act 1998 must be heard by them.

[13] It will most likely be the High Court, to ask it to make orders under what is called its inherent jurisdiction to prevent a third party from taking certain steps in relation to the vulnerable adult (for instance to order that third party not to prevent access by social workers to the adult) so as to allow the vulnerable adult to take a decision free from the influence of that individual.
[14] I.e. decisions within s.27 MCA 2005.
[15] *ACG & Anor v MN & Ors* [2013] EWHC 3859 (COP).
[16] Rule 73(4) of the Court of Protection Rules provides that P is not a party to the proceedings unless the court specifically orders that they are joined.
[17] Certain types of uncontentious property and affairs applications can also be determined by Authorised Court Officers. Such Court Officers have no power to determine applications relating to health and welfare.
[18] Technically, 'puisne' judges of the High Court, i.e. 'full' judges of the High Court rather than deputies.

These judges tend to hear the more serious and complex applications, in particular those involving new issues of law.

24. The President of the Court of Protection will sometimes hear cases of particular significance; he is treated for these purposes as a judge of the High Court (in other words, and in particular, an appeal against his decision would be to the Court of Appeal).

C: Who can be a litigation friend for P in proceedings before the Court of Protection?

The criteria – introduction

25. In principle, anyone can act as a litigation friend for P (or indeed any other party to proceedings before the Court of Protection) if they:

    1. Are able to conduct proceedings on behalf of P competently and fairly;

    2. Have no interests adverse to that of P; and

    3. Agree to act as litigation friend.

26. The process by which a person can be appointed as litigation friend is discussed at paragraphs 43-46 below, and the criteria are discussed in more detail at paragraphs 31ff below. Before doing so, it is important to note that the role of litigation friend for P in proceedings before the Court of Protection (and its predecessors) has very often been fulfilled by the Official Solicitor and to outline his functions and role.

The Official Solicitor

27. The Official Solicitor is appointed by the Lord Chancellor.[19] For many years, one of his most important functions has been to prevent injustice to the vulnerable by acting as the litigation friend of last resort for those who lack litigation capacity in proceedings before the Court of Protection and its predecessors. The Official Solicitor will also sometimes act as solicitor for such individuals, primarily in cases involving serious medical treatment, as well as in cases involving P's property and affairs such as statutory will and cases and application for the ratification of gifts.

28. To allow the Official Solicitor to discharge his functions, he has a staff of lawyers and case-workers to assist him in his role. The Official Solicitor's resources are limited, and he applies strict acceptance criteria deciding whether to accept an invitation – most usually extended by the Court of Protection – to act as litigation friend. As they apply in Court of Protection proceedings in relation to P:[20]

[19] Under s.90 Senior Courts Act 1981.

[20] See http://www.justice.gov.uk/downloads/protecting-the-vulnerable/official-solicitor/litigation-friend-note.pdf. It should be noted that the waiting list referred to in this note was abolished as of October 2013.

1. There must be evidence or a finding with regard to P's lack of relevant decision making capacity;

2. There must be no one else suitable and willing to act as litigation friend;

3. The Official Solicitor must be satisfied that there is security for the costs of legal representation of P[21] or the case falls in one of the classes in which, exceptionally, he funds the litigation services out of, or partially out of, his budget, in accordance with long standing practice (for practical purposes, this relates only to serious medical treatment cases in which the convention is that the relevant NHS trust will pay half of the Official Solicitor's costs).

29. All three of these criteria are applied strictly, which means that there are a significant number of cases in which the Official Solicitor will not act as litigation friend because:

- There is someone else who is suitable and willing to act as litigation friend; or

- Even though there is no one else suitable and willing, P is not eligible for legal aid and the Official Solicitor considers that they do not have sufficient money or disposable assets to be able to meet the costs of legal representation.

30. Even if there is an increasing trend for others to act as litigation friends for P in a range of cases before the Court of Protection, and even if – as discussed below – there may be positive advantages to P in some cases of someone other than the Official Solicitor acting as litigation friend, the Official Solicitor will continue to play a vitally important role as litigation friend in many cases, especially those of particular complexity or of wider public importance. Nothing in this Guidance should be taken as detracting from the importance of the role of the Official Solicitor. He and his predecessors have developed practices and procedures over many years in relation to the discharge of his role as litigation friend that have helped guide how the Court of Protection approaches its difficult tasks. As set out in more detail in Chapter E below any person – whether they be a non-legal advocate or a family member – considering acting as a litigation friend, should seek, wherever possible, to model their conduct upon that of the Official Solicitor.

The criteria in more detail (1) suitability

31. The courts have considered the criteria for being a litigation friend in a number of cases, and have given the following guidance:

- The mere fact that a person (for instance a family member) has strong views as to where P's best interests lie does not automatically disqualify them from acting as P's litigation friend, especially where competent legal representatives are instructed by that (proposed) litigation friend:[22]

[21] In other words, that there is a guarantee that his costs incurred (if properly incurred) will be repaid.

[22] *AVS v NHS Foundation Trust and P PCT* [2011] EWCA Civ 7; [2011] COPLR Con Vol 219, at paragraph 28 per Ward LJ See also *WCC v AB and SB* [2013] COPLR 157 and *Westminster City Council v Manuela Sykes* [2014] EWHC B9 (COP).

- However, where there is a family dispute concerning P's best interests, it would be rare for it to be appropriate for a family member to be appointed as P's litigation friend in proceedings relating to that dispute. If they were to be so appointed, they would have '*to demonstrate that he or she can, as P's litigation friend, take a balanced and even-handed approach to the relevant issues*.'[23]

32. There are reported cases in which IMCAs[24] and RPRs[25] have acted as litigation friends, and these cases represent the tip of the iceberg. The Court of Protection has recognised that there can be positive benefits to the appointment of such advocates to act as litigation friend for P. In *AB v LCC* (a case under s.21A MCA 2005), Mostyn J identified the following advantages to a paid RPR acting as litigation friend for P in such an application:

> *"i) they will probably have met the detained person;*
>
> *ii) they provide continuity;*
>
> *iii) it may be cost effective if having been involved it avoids the duplication of work by a publicly funded litigation friend;*
>
> *iv) they may often be situated local to the geographical area where the detained person resides;*
>
> *v) it does not require the detained person to meet yet more people which may be unsettling or confusing."*[26]

33. Advocates have also themselves identified positive benefits to acting as a litigation friend. In informal research conducted for purposes of writing this Guidance, those who have acted as litigation friends have emphasised, in particular, the added value that they feel that they can bring:

- from prior knowledge of and familiarity with P (where they had previously been involved with P through, for instance, an IMCA instruction);

- from their expertise in and understanding of the application of the MCA 2005 to health and social care;

- from the fact that they are in general, especially where P lives far from London, likely to be able to visit P more often than would a case-worker allocated the case in the Official Solicitor's office. The Official Solicitor will almost invariably appoint solicitors who are based locally and therefore able to visit P, but advocates have identified a difference between solicitors reporting upon a visit and the litigation friend themselves being able to visit.

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[23] *Re UF* [2013] EWHC 4289 (COP); [2014] COPLR forthcoming at paragraph 23 per Charles J.
[24] *Re M (Best Interests: Deprivation of Liberty)* [2013] EHWC 3456 (COP).
[25] *AB v LCC (A Local Authority) and the Care Manager of BCH* [2011] EWHC 3151 (COP); [2012] COPLR 314.
[26] At paragraph 43. Mostyn J also identified a number of disadvantages, but concluded that "*in many cases…the RPR can well fulfil* [the litigation friend] *role*" (paragraph 45).

34. These advantages apply whether or not the advocate brings the application in P's name or agrees to act as litigation friend in proceedings brought by another person or body.

35. It is also important in this regard that the ability of an IMCA to act as litigation friend for P to bring an application to the Court of Protection – discussed further below – acts as a vital extension to their role in advocating for P's interests in decision-making involving public bodies:

- IMCAs are more often than not the only independent person involved whose sole function is to represent the person and to advocate for them in decision-making. Their right to challenge decisions extends as far as taking an issue to the Court of Protection. Further, because they can – in appropriate circumstances – take a challenge in P's name as P's litigation friend means that they can bring a challenge without the pressure of facing the additional costs that would be likely to be incurred if they applied in their own name;[27]

- If an IMCA considers that all avenues have not been exhausted in reaching the decision that is in P's best interests on an informal basis,[28] then – again – the potential for making an application to the Court of Protection in P's name can serve as a vital tool to ensure that they are fulfilling their responsibilities to P. Even if the IMCA goes no further than seeking legal advice as to whether an application is, in fact, appropriate, seeking such legal advice can – itself – be extremely useful in ensuring that the issues being considered in the informal decision-making process have properly been identified;

- By acting as litigation friend, the IMCA can also further P's interests by making an application to the Court of Protection where they consider that a delay in informal decision-making is having a negative impact on P. Conversely, where the application has been brought by someone else, an IMCA can assist to 'unlock' the situation by agreeing to act as a litigation friend and moving to minimise the delays to the resolution of the proceedings.

36. In short, therefore, paid RPRs and IMCAs in particular, should see the opportunity to act as a litigation friend for P (whether to bring a challenge on P's behalf or to accept an invitation to act) as a way to deploy their knowledge and expertise so as to bring real benefits to P. Above all, an advocate who knows P – or a family member – will be able to use that knowledge so as to be able to ensure that the 'real' P is at the heart of the proceedings.

37. It is very important to note, though, that the role of a statutory advocate and that of a litigation friend, whilst similar, are not the same. This gives rise to two issues:

1. If they are to continue in the role for which they were previously appointed,[29] the advocate must be satisfied that they have the time to dedicate both to that role and to the separate task of acting as litigation friend;

[27] And also the need to pay court fees: discussed further at paragraph 153 below.
[28] I.e. outside the Court of Protection as part of the process that must be followed for those doing acts in connection with the care and treatment or that individual can rely upon the defence contained in s.5 MCA 2005.
[29] Which will depend very much upon the nature of the appointment.

2. Equally importantly, and as discussed further in chapter E below, a litigation friend is not, solely, P's advocate before the court in the sense of advancing arguments based upon their understanding of P's wishes and feelings. In some cases, an advocate may wish to retain the freedom to advocate P's wishes and feelings strongly to the court in their capacity as advocate without having to proceed by the more limited and specific task appointed to a litigation friend. In such a case, the advocate should consider carefully whether they should continue their original role and allow someone else to act as litigation friend. In some cases, an advocate may also feel that there are other reasons why they would find it hard to take on the role of litigation friend whilst still continuing to act as advocate.

Case study: Jean

Jean's advocate, Andy, has supported her on many issues in recent years. Andy's support has meant that Jean has felt empowered to speak up on many different issues and throughout that time, Jean has always been clear in her view that she would never want to live in a Care Home. Their advocacy partnership is based on trust and Andy has always faithfully represented her views.

Jean's neighbour finds her unconscious and she is rushed to hospital. Tests reveal that she's had a stroke resulting in paralysis on one side and clinicians think it is very unlikely that she will regain full mobility. Andy visits her in hospital and some time later when a decision is to be made about where Jean will live, he is instructed as an IMCA. He talks to Jean about the decision and although confused about her current situation, she tells him "I want to go home". The treating team cannot agree about where Jean will live. Some think that the essential adaptations to Jean's home would be too expensive and that Jean lacks capacity to make a decision about that and about where to live.

The case is to go to court and although Andy would be an obvious person to be Jean's litigation friend, he feels that it is probably in Jean's best interests to move to a care home and would rather not be in a position where he would have to express that in court. He feels that this would be detrimental to their relationship. Instead he continues to be Jean's IMCA and advocates for her to return home and supports her to express her views, wishes and feelings about where she will live.

38. It is also important to remember that it is also always possible for the advocate themselves to bring proceedings:[30]

- In the case of an advocate other than an RPR, they would need the permission of the court; an RPR does not need permission to bring an application.[31] If an advocate brings proceedings themselves, they would be treated as any other party to the proceedings, and could (within reason) argue the case that they wanted to advocate as to where P's best interests lay as

[30] Specific provisions have been made in relation to IMCAs. Regulation 7 of The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006 (SI 2006/1832) provides that if an IMCA has been instructed to represent a person ('P') in relation to any matter, and (b) a decision affecting P (including a decision as to his capacity) is made in that matter, an IMCA has the same rights to bring a challenge as a person caring for P or interested in his welfare:
[31] Rule 51(2A) of the Court of Protection Rules 2007.

strongly as they wished. As we will see, a litigation friend appointed to act for P has a somewhat more limited function.

- An advocate bringing the application themselves would have to fund the application and the proceedings themselves or to secure funding for this purpose, as well as to pay any court fees (for more on funding, see chapter I). In such a case, it is suggested that if the advocate is employed by an organisation, the organisation should meet the costs of the application, but that would be a matter for resolution between the advocate and their employer (and the organisation would, itself, have to consider where it is to obtain funding for this purpose);

- Whilst the matters above means, realistically, that in most cases the advocate would not be able to bring an application themselves, it is always important to remember that this is – technically – an option;

- The advocate should always therefore ask themselves as part of their consideration of whether to take on the role of litigation friend so as to bring an application in P's name why they cannot bring the application themselves in their own right.

39. Even when an advocate – and, indeed, any litigation friend – has been appointed to act as litigation friend, they must always keep in mind the possibility that they may, at some stage, cease to meet the suitability criteria. What should happen where a litigation friend thinks that they cannot properly continue is addressed at paragraph 150.

The criteria in more detail (2) agreement

40. No one can be forced to act as litigation friend, and a litigation friend must either (a) actively put themselves forward to act as one (for instance by bringing an application in P's name as P's litigation friend; or (b) agree to an invitation. These two situations merit separate consideration.

    1. An advocate proposing themselves as litigation friend for P in bringing an application is – self-evidently – agreeing to act as P's litigation friend. Because the advocate is 'making the running,' they will need to be satisfied that they have in place the necessary arrangements to meet the costs both of acting as litigation friend and of instructing solicitors. Both of these points are addressed further in Chapter I: Practicalities;

    2. An IMCA who is being asked to act as a litigation friend for P is in a slightly different position. They are, in effect, in a position of some power, because they are presumably being asked to act as litigation friend so as to allow the proceedings to go forward. In such a case, the proposed litigation friend is quite entitled to say that they will only act if they are given sufficient funding to allow them to instruct legal representatives.[32] This is, in essence, exactly what the Official Solicitor does. In such a situation, what will then happen will depend upon whether P is eligible for legal aid:

[32] Whether a litigation friend has to instruct lawyers is discussed at paragraphs 47-50 below.

- If P is eligible for legal aid, then an order will be made entitling the litigation friend to sign the relevant paperwork on P's behalf so as to receive legal aid which covers the cost of the fees incurred by the legal representatives;

- If P is not entitled to legal aid, then an order will be made making it clear that the litigation friend is entitled to spend a certain amount of P's money on legal fees. In either case, the fees that are actually incurred by the lawyers will be scrutinised carefully by the court at the end of the case. This will primarily be a matter for the legal representatives to address, but one of the litigation friend's roles is always to have in mind whether the steps that are being taken by the lawyers are necessary and proportionate.

3. It is therefore suggested that, in a case where an advocate is invited by the court to act as a litigation friend in a case brought by a public authority, the advocate can quite properly make that appointment conditional on receiving funding from the relevant public authority to allow them to spend adequate time upon their role as litigation friend. In other words, the advocate can say 'I am not happy to accept the invitation to act as litigation friend for P without payment for my time, so as to ensure that my other clients can continue to receive IMCA services.'

4. In informal research conducted for purposes of writing this Guidance, a frequent concern expressed by IMCAs was that, by accepting an invitation to act as litigation friend, they might somehow end up being required to pay the costs of one or more of the other parties to the proceedings. Whilst it exists, this risk is, in reality, very small (as explained further at paragraphs 138-139). To make the risk even smaller, IMCAs in cases brought by public authorities routinely ask for and are given undertakings – i.e. are promised – by the public authorities that the public authority in question will not seek to make them pay any of their costs. It is quite proper to make the giving of such an undertaking a pre-condition of agreeing to act as a litigation friend.

41. It is important to emphasise that in agreeing either to put themselves forward to act as litigation friend or agreeing to accept an invitation to act as litigation friend, an advocate must take into account that:

1. They must be satisfied that they can conduct the litigation 'competently.' There is no definition in the MCA 2005 or the Court of Protection Rules as to what constitutes 'competence' for these purposes. It is suggested that it does not equate to perfection, but rather to approaching the task with suitable degree of detachment to be able to make objective decisions, as well as suitable knowledge of the principles of the MCA 2005. It is also suggested that conducting litigation competently also involves the litigation friend being able to dedicate adequate time to devote to the task and to being aware when it is necessary to obtain legal advice and/or representation (and having access to such advice/representation); and

2. Whilst it might superficially seem better to take on a case to meet an immediate need even if the advocate has doubts as to whether they will be able to take the matter to a conclusion, care needs to be taken here. In general, it may very well cause disruption to the proceedings further down the line if the advocate then withdraws as litigation friend, and a judge is likely to look rather dimly upon someone withdrawing (for instance) on the basis that the workload was more

than was anticipated. However, there may be circumstances in which unless the advocate acts as litigation friend for purposes of getting a matter to court, it simply will not get there and the advocate may at that point feel that the priority is to bring P's situation to the attention of the court even if they cannot then take it further forward. The IMCA or other advocate in such a case may well be justified then in bringing the application and making very clear from the outset that they are not in a position to do more than put the matter before the court. This is discussed further at paragraph 50 below.

Can an organisation be appointed to act as litigation friend?

42. Informal research conducted for purposes of producing this Guidance, as well as unreported cases in the author's own experience, has suggested that organisations – in particular – IMCA organisations are sometimes appointed to act as P's litigation friend, either by being named as the litigation friend in the appointment or on the basis that a specific individual is appointed as litigation friend "on behalf of X Organisation." There are obvious benefits to an IMCA organisation being appointed, not least in terms of ensuring continuity if the individual IMCA leaves the service, and also to make clear that the individual IMCA has the backing of their service behind them should anything go awry. However, the Court of Protection Rules are not entirely clear in this regard, and there are, as yet, no reported cases in which this issue has been examined in detail by a judge, so it is unfortunately not possible to say that such a "corporate" appointment can always be made. That having been said, until and unless there is a ruling to the effect that an appointment cannot be made, it is suggested that it is always sensible at least to consider asking the court to appoint the IMCA body. If this is done, one obvious point is arrangements will need to be made, and recorded as appropriate in an order of the court, as to (1) the individual with overall responsibility at the IMCA service for discharging the functions of litigation friend; (2) arrangements in the event that they are not available; and (3) the handling and dissemination of confidential information from the proceedings.

D: Becoming a litigation friend and instructing lawyers

How is a litigation friend appointed?

43. There are two ways in which a litigation friend can be appointed: without a court order and with one:

    1. If there is no deputy, a person can become a litigation friend for a protected party or for a child without a court order if they file and serve a certificate of suitability (with a statement of truth) on a form COP 22, which must also include the information set out in Practice Direction 17A.33.

    2. A person can only be appointed to act as litigation friend for P with a court order.

44. An order appointing a person as a litigation friend for P (if P is joined to the proceedings) can be made either at the court's own initiative or upon application by any person (i.e. not just by the

[33] In particular that the litigation friend knows or believes that the child or protected party lacks capacity to conduct the proceedings themselves, and the grounds of that belief set out above. If the belief is based upon medical opinion, or the opinion of another suitably qualified expert, the document should be attached to the certificate.

proposed litigation friend). Any application must be supported by evidence that will allow the court to be satisfied (as it must also be satisfied if it is contemplating making the order of its own initiative) that:

- The proposed litigation friend can fairly and competently conduct proceedings on behalf of the individual in question;
- The proposed litigation friend has no interests adverse to the individual in question; and
- The proposed litigation friend consents to the appointment.

45. Perhaps curiously, a person other than the Official Solicitor who either actively advances themselves to act as litigation friend for P or whom the court is contemplating of its own motion appointing to act for P does not, formally, need to file and serve a certificate of suitability, although (as set out above) the court will still need to be satisfied that they meet the criteria for appointment before making the order.

46. Although this power is rarely exercised, it should be noted that, if the court considers that it requires further evidence before it can grant someone's application to be appointed as litigation friend, it will make directions to enable to such evidence to be obtained.

Does a litigation friend need to instruct lawyers?

47. In a judgment given in August 2014,[34] the President of the Court of Protection held that a 'lay' litigation friend[35] does not need to instruct solicitors in order to act as litigation friend and to conduct proceedings on behalf of P. In other words, a 'lay' litigation friend does not need to instruct solicitors in order – for instance – to issue an application in the Court of Protection. However, the President also held that a 'lay' litigation friend[36] will need the permission of the court to act as an advocate on behalf of P – in other words – to address the court. If they do not, they will be committing a criminal offence.

48. Lay litigation friends will also need to be aware that, as matters stand, they may encounter difficulties in seeking to instruct a barrister to appear on their behalf as an advocate without instructing a solicitor. The rules in this regard regarding what is called 'direct access' or 'Public Access'[37] – i.e. instructing a barrister without using a solicitor – were not designed with this situation in mind, and the legal position in this regard is not clear.

[34] *Re X and Ors (Deprivation of Liberty)* [2014] EWCOP 25 and [2014] EWCOP 37.
[35] I.e. a litigation friend who is not, themselves, a practising lawyer or appropriately qualified legal executive.
[36] Or a legally qualified litigation friend who does not have rights of audience.
[37] For more details about the Public Access scheme and a list of barristers who offer their services on this basis, see http://www.barcouncil.org.uk/instructing-a-barrister/public-access/. There is no specific category identified as 'Court of Protection' or 'Mental Capacity' work in the directory, but at least some of those who offer services under the 'Mental Health' heading will be able to act in cases before the Court of Protection.

49. Informal research conducted for purposes of writing this advice found that some experienced IMCAs would consider acting without a solicitor in a straightforward case (and, indeed, that some had already done so). Courts are – in general – careful not to allow those who are not legally qualified but who are receiving money for their services to appear as advocates before them. However, and although no guidance has been issued as to when permission should be granted to a litigation friend to act as an advocate and formally to address the court, there is no reason why an experienced IMCA should not seek such permission in an appropriate case.

50. There is, therefore, a very important place for litigation friends to conduct proceedings without the need to act through lawyers (seeking appropriate permission to address the court), and it may well be that the practice spreads as IMCAs and other advocates become more familiar with acting as litigation friends. Examples of situations where an IMCA (or other advocate) may well consider acting as a litigation friend without a solicitor would be:

- Where a public authority has made an application for an order authorising the deprivation of a person's liberty in a supported living placement (i.e. outside the scope of the 'DoLS regime'), P has been joined to the proceedings, and there is no serious dispute as to whether the deprivation of liberty is in P's best interests;[38]

- Where there is a dispute about a limited single issue (for example contact between P and a family member) which has been brought before the court by a local authority, where the IMCA has sufficient familiarity with P's circumstances and wishes and feelings, and where the IMCA does not consider that there is any mismatch between P's wishes and feelings and where their best interests may ultimately lie;

- For the more limited purpose of bringing a sufficiently urgent and serious dispute to the attention of the court where, as in the circumstances set out at paragraph 92 below, no other person/body (and, in particular the public body with statutory responsibility for P) is prepared to make the application. In such case, the advocate should make clear in their application the efforts that they have gone to persuade the public authority to bring proceedings, and indicate whether

    (1) they would be prepared to continue acting as litigation friend for P in the event that the public authority, in fact, takes over as applicant (and, if so, whether they would be prepared to continue acting without the benefit of legal representation – it may well be that an advocate would feel more comfortable acting without the benefit of such representation if they are not 'making the running' in the proceedings);

    (2) they would wish to cease acting as litigation friend upon the matter being before the court and a suitable alternative litigation friend being identified – most obviously – instance – the Official Solicitor.[39]

[38] For more on the role of a litigation friend in cases involving a deprivation of liberty, see further paragraphs 74- 76 below.
[39] If the proposal is the advocate ceases to act as litigation friend in favour of the Official Solicitor, it would be very sensible for the advocate to identify whether P is eligible for legal aid and/or otherwise in a position to meet the Official Solicitor's

51. Subject to the caveat that spending P's money always requires the authority of the court (or an attorney/deputy with appropriate authority), it would always be open to an advocate to instruct solicitors for limited purposes – for instance, to provide initial advice or to draft an application. Equally, most reputable community care solicitors will usually provide an initial consultation for free, and an advocate may well be able to gauge during the course of that consultation whether they feel confident to be able to proceed without the benefit of further legal representation.

52. It should be noted that a professional litigation friend (i.e. a litigation friend other than a carer or family member acting voluntarily) acting as both litigation friend and, in effect, P's solicitor for purposes of conducting the litigation may well feel that they should be entitled to greater reimbursement, not least because of the greater time that they will no doubt spend on the case. For instance, drafts of witness statements are often prepared by solicitors instructed by the litigation friend; if solicitors are not instructed, then the advocate will not just be considering what stance to take on P's behalf and what evidence to give in the witness statement, but will also have to spend time drafting the statement. However, a litigation friend in such a situation will need to be aware that they may well be limited in what they can recover by way of reimbursement for their time spent on these legal tasks. This is discussed further at paragraph 163 below.

53. A final complication is that the judgment in *Re X* noted above is currently under appeal, and it may be that the Court of Appeal takes a different approach to the question of whether litigation friends can act without the benefit of lawyers. Any litigation friend who is considering conducting proceedings without a lawyer should therefore double-check the position by making use of the resources outlined in the last section of this Guidance.

54. Whilst it may well be that the picture will change in future, the informal research conducted for purposes of producing this Guidance suggests it is perhaps more likely for the time being that most litigation friends will want to obtain the benefit of legal representation, and the rest of this Guidance is for the most part predicated upon the basis that the litigation friend will instruct solicitors to advise and represent them.

How to instruct solicitors

55. The question can be broken down into two:

    1. How to find a solicitor;

    2. How to give instructions to a solicitor (and what can be expected from a solicitor (and also a barrister if one is also instructed).

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legal costs, because, as noted at paragraph 28 above, the Official Solicitor will not accept an invitation to act as litigation friend without a guarantee that his legal costs will be met.

How to find a solicitor[40]

56. A useful overview of the general issues that will arise in this area can be found on the Law Society's guide 'Using a solicitor.'[41]

57. How easy it is to find an appropriate solicitor will vary. Some suggestions include:

- using the Law Society's 'Find a Solicitor' service,[42] which includes the ability to search for solicitors by area of law, including (on the 'pro search' option) 'mental health law.' Not all solicitors who practice in mental health law will also be able to act in cases involving the MCA 2005, but, if they do not, they may be able to make suggestions;

- using the website of the Mental Health Lawyer's Association,[43] which includes a list of solicitors who are members of the Association who practice in the field of mental capacity law;

- looking in the legal directories Chambers and Partners[44] and the Legal 500,[45] both of which offer recommendations of solicitors specialising in Court of Protection work;

- looking at recent judgments of the Court of Protection on websites such as www.bailii.org.uk (which has a specific section devoted to Court of Protection cases) and identifying solicitors' firms involved in the most important cases;

- ringing the Official Solicitor's office on 020 3681 2751.

58. In all cases, it is important to establish at the outset a number of practicalities. In particular, if it appears that P may be eligible for public funding (commonly known as 'legal aid'), it is important to know whether the solicitors in question are able to act in publicly funded welfare applications before the Court of Protection (not all solicitors have the necessary contracts with the Legal Aid Agency). Other useful questions that can be asked include:

- "*Do you specialise in welfare applications?*" (quite a number of solicitors firms who advertise themselves as doing Court of Protection work have financial deputy departments but they will not tend to do contentious work of the kind under discussion here)

- "*How many CoP cases do you have? - do you have capacity to take on another case?*"

[40] In light of the current uncertainty as to whether a Public Access barrister would accept instructions directly from a litigation friend (rather than via a solicitor), this section is predicated on the basis that the litigation friend will be looking in the first instance for a solicitor rather than a barrister.
[41] http://www.lawsociety.org.uk/for-the-public/using-a-solicitor/.
[42] www.solicitors.lawsociety.org.uk.
[43] www.mhla.co.uk.
[44] www.chambersandpartners.com
[45] www.legal500.com.

59. It is also useful to provide an anonymous summary of the situation and ask the solicitor their initial thoughts.

60. Most solicitors will give an initial consultation without charge, which will give an opportunity to gauge their level of expertise in the area and also – importantly – to establish the (more intangible) extent to which it will be possible to form a close working relationship, which will be vital to the effective creation of a team to run the case on behalf of P.

61. If it appears that P may not be eligible for legal aid (as to which, see further paragraphs 154-158 below), the solicitor should be asked whether they would consider acting pro bono (i.e., without charge). Some solicitors – in particular some of the larger firms who specialise in Court of Protection work – may be in a position to offer such services.

62. If the solicitors' firm is not in a position to act, then it can be worth asking whether they can recommend anyone else who might be able to: good solicitors will usually be willing to assist wherever they can in such a situation.

63. Once an appropriate solicitor has been identified, there are a number of formalities that have to be gone through before the litigation friend can instruct them; these will be explained by the solicitor and ultimately recorded in a client care letter.

The relationship between litigation friend and lawyer

64. In this regard, one point cannot be emphasised enough – a litigation friend is, for these purposes, treated as the client and, as such, is entitled to set the agenda in terms of what it is that they want from the solicitor. This will include simple things such as whether they want to be copied in to all correspondence or whether they only want to be sent correspondence to which a specific answer is required. Court of Protection proceedings can generate very considerable amount of 'routine' correspondence which is not necessary for a litigation friend to read – they must, though, be provided with all the information that they need in order to be able to tell the solicitors ('give instructions') as to what they consider should happen at each stage of the proceedings. It is also vital that if at any point a litigation friend feels that they need further explanation or advice from their solicitor as to what steps can or should be taken they should ask: this is part of fulfilling the duty to act competently.

65. That having been said, in informal research conducted for purposes of writing this Guidance, a consistent theme was that the most effective representation of P before the Court of Protection came about where everyone (including – where instructed – a barrister) worked together as a team, allowing the litigation friend to take the 'strategic' decisions as to how to conduct the litigation on P's behalf.

E: What does a litigation friend do?

What are the duties imposed by the law?

66. Unhelpfully, there is no guidance contained in the MCA 2005 or in any of the supporting materials as to how a litigation friend should discharge their duties, and it is therefore necessary to look more widely for guidance upon this question. This area of the law is not straightforward, and the litigation friend should seek specific legal advice both at the outset and in relation to any specific points that may arise. What follows, however, is a summary of what appears – as matters presently stand – to be the proper approach to take when a litigation friend acts for P. It focuses primarily upon the practical steps, rather than examining the legal questions in any detail.[46]

67. It is perhaps easiest to start by identifying what a litigation friend is not. They are not:

- a party themselves. They must always remember that they act on behalf of P, and subject to the duty to conduct the litigation fairly and competently on P's behalf;

- the advocate of the party on whose behalf they act, whether (a) a lay advocate; (b) a statutory advocate;[47] or (c) a legally qualified advocate authorised to carry out the conduct of litigation – they are 'a great deal more;'[48] or

- the equivalent of a children's guardian appointed in certain categories of family proceedings to represent the interests of a child.[49] The duties of such a guardian are wide-ranging[50] but, crucially, involve an investigatory and reporting role that is very different to that of a litigation friend; or

- a person discharging the function of a "McKenzie friend."[51] Such a friend can only assist a person who has litigation capacity.

68. In order to discharge their functions and to give instructions to legal representatives, a litigation friend acting on behalf of P will have to form a view as to:

- whether P has capacity to take the decisions in issue (if they form the view that P has, in fact, got capacity to litigate, then, as discussed at paragraph 148 below, they must bring that matter to the attention of the court as soon as possible); and

- if P lacks capacity to take the decisions in issue, where P's best interests lie. In this regard, the litigation friend may well find it useful to draw up a balance sheet to identify the risks and benefits of the various options before the court. Such balance sheets are regularly used by the judges seeking to identify where P's best interests lie, and it can be extremely useful for the

[46] For more discussion, see Alex Ruck Keene, Kate Edwards, Professor Anselm Eldergill, Stephen Knafler QC and Sophy Miles, *The Court of Protection Handbook: A User's Guide* (Legal Action Group, 2014), chapter 12, upon which this section draws.
[47] Such as an IMCA or an Independent Mental Health Advocate discharging functions under the MHA 1983.
[48] *RP v Nottingham City Council and the Official Solicitor (Mental Capacity of Parent*). [2008] EWCA Civ 462; [2008] 2 FLR 1516 at paragraph 129 per Wall LJ.
[49] Under Children Act (CA) 1989 s5; see also FPR 2010 Part 14 and FPR 16.3 and 16.4.
[50] They are set out in Practice Direction 16A to the FPR 2010.
[51] A "McKenzie Friend" is someone who provides reasonable assistance to a litigant in person. A McKenzie friend does not represent the litigant but can sit beside them in court and "quietly assist". See the Practice Guidance: McKenzie Friends (Civil and Family Courts), issued by the Master of the Rolls and the President of the Family Division on 12th July 2010.

litigation friend to have drawn up a balance sheet themselves at an earlier stage, both to ensure that they have considered all the material matters and to assist in putting a case on P's behalf to the court. Balance sheets are discussed in more detail in Appendix C.

69. Whilst the litigation friend can – and should – proceed upon the basis of the views concluded upon the two issues set out above, and (where appropriate) to put a case as to both to the court, it is vital that:

- the litigation friend does not thereby seek to take on an investigatory role, a role that was specifically not provided for in the MCA 2005 or the Court of Protection Rules 2007. This does not mean that a litigation friend could not properly visit P and provide what is known as an attendance note of their visit – i.e. a note of their conversation with P – to put before the court. Indeed, this would usually be a very important part of the functions of a litigation friend. Rather, this means that the litigation friend should not seek to carry out extensive 'detective' work so as to be able (in essence) to put an expert report to the court for it to accept or reject;

- whether by taking on an investigatory role or otherwise, the litigation friend does not seek to pre-empt the court's determination upon the issues in the case by seeking to impose themselves as decision-maker.

70. The need for a litigation friend to be careful to remember the limits of their role is particularly important where:

- the assessment either of capacity or of best interests is finely balanced; or

- P has very strong views which conflict with the litigation friend's assessment of the relevant issue.

71. In respect of this latter category of case (which is not unusual), as the law stands at present, it appears clear that a litigation friend is not bound to advance a case to the court that they properly consider – after suitably anxious consideration – to be unarguable.[52] In other words, the litigation friend could properly conclude that (for instance) even if P very strongly wishes to have contact with an abusive family member, the risk posed by that abusive family member was such that the litigation friend could not properly argue that such contact was in P's best interests.

72. However, it is important to recognise that, if P has a strong view as to what they wish the court to do but the litigation friend properly considers that (a) P does not have capacity to make the decision in question; and (b) that such a view is unarguable, then there is a tension between the position of the litigation friend and P's rights under Articles 6 and 8 of the European Convention on Human Rights ('ECHR'):

[52] See in this regard *RP v United Kingdom* (Application no. 38245/08, decision of 9 October 2012); [2013] 1 FLR 744, at paragraph 76.

- A person who has capacity to conduct their own litigation has the right under Articles 6 and 8 ECHR to advance to the court any argument that they wish as to the decision the judge should reach (subject to the court's powers to manage cases so that entirely meritless arguments are given short shrift as to not to occupy disproportionate amounts of time and expense);

- The fact that a litigation friend is appointed to act on P's behalf and thereby to act – in part (and for proper reasons) – as a filter or check upon the ability of P to advance their wishes and feelings to the court as arguments as to what outcome should be reached is, inevitably, an interference with their rights under Articles 6 and 8 ECHR;[53]

- As the law currently stands, a litigation friend is entitled – properly – to advance arguments that conflict with P's wishes and feelings without breaching their rights under Articles 6 and 8 ECHR. However, it is equally important to recognise that the stronger the conflict between the arguments advanced in P's name to the court and P's own wishes and feelings, the greater the interference with P's rights and the more important the need for the litigation friend to proceed with caution and to make P's own wishes clear to the court.

73. In a case where there is clear conflict between what P would like to happen and what the litigation friends considers that they have to submit to the court:

- The litigation friend should consider very carefully whether to concede the issue (i.e. whether actively to agree to the course of action with which P does not agree), or whether, rather, simply to say to the court that they will leave it to the court to decide. Whilst little might appear to turn on this distinction, it can be very important for P not to hear their litigation friend appearing actively to argue for the opposite course of action to that they wish; and

- The litigation friend is under a particularly important duty to make sure that P's views are relayed as clearly as possible to the court.[54] It would, in many cases, be appropriate in such a case for the litigation friend to make clear that it the court needs to hear directly from P themselves.

Example

A wealthy widower, Mr Mason, has Alzheimers-related dementia. He has four children, split into two 'factions.' Both factions accuse the other of seeking to exploit him financially and abuse him, both emotionally and physically. Both also purport to take (or to be able to participate in taking) best interests decisions on his behalf as to his daily living and medication arrangements. Those decisions are inconsistent, leading to variations in his medications and adverse impacts upon his health. The two factions regularly have fights in the house in front of Mr Mason. The local authority with statutory responsibility for his welfare bring proceedings in the Court of Protection seeking the appointment of a professional health and welfare deputy to take day to day decisions as

[53] In some other ways, it is an important safeguard of their rights, ensuring that the court procedures are conducted in such a way that their participation is secured insofar as possible.
[54] This was emphasised in *RP v United Kingdom* at paragraph 76.

to his medication and contact arrangements with his children – in particular to minimise the possibility that members of both factions are present in his house at the same time.

The expert evidence is that Mr Mason, whilst not yet substantially impaired by the effect of the Alzheimer's disease, lacks capacity to take decisions as to his medical needs and treatment, as well as contact with his children. As regards contact with his children, his lack of capacity arises in part because he is unable to use and weigh the information that they are in conflict with each other and cannot cooperate to reach collaborative best interests decisions. Mr Mason considers that he is still able to take all material decisions. His perception regarding his children is that they are all still a loving family and that they should be able to resolve any differences by all seeing each other regularly in his house. He does not want a deputy to be appointed because he feels it is an unnecessary intrusion into his own affairs, and also he strongly resents having to spend his own money on their services.

His litigation friend, Ms Parides, having considered the evidence very carefully, considers that the evidence as to his lack of capacity in respect of both medical and contact matters is overwhelmingly strong, and that it is also clearly in Mr Mason's best interests that a deputy be appointed. Having considered how best to proceed, Ms Parides ultimately decides to file written submissions outlining Mr Mason's views and the basis upon which she will accept – on Mr Mason's behalf – the evidence as to capacity and best interests, and also to make arrangements to bring Mr Mason to court so that the judge can hear directly from him. In court, the lawyer instructed by Ms Parides on Mr Mason's behalf addresses the court very briefly before the judge hears from Mr Mason, at Ms Parides' request.

Deprivation of liberty cases – the principles

74. It is suggested that litigation friends should be particularly careful to ensure that they seek to uphold P's right to liberty under Article 5 ECHR, especially in cases brought under s.21A MCA 2005 in relation to authorisations granted under the DOLS regime (i.e. appeals against authorisations under Schedule A1 to the MCA 2005).

75. Article 5 ECHR provides legal safeguards to those deprived of their liberty by the state. This applies to those subject to DOLS authorisations in the same way as it does to those detained under the MHA 1983. One such safeguard is set out in Article 5(4) and is the ability to challenge the detention before a court able to order the person's release if the detention is not lawful.

Deprivation of liberty cases – what a litigation friend should do

76. In the circumstances, and taking into account, in particular, the case-law from the European Court of Human Rights as to the nature of the obligations imposed by both Articles 5(1) and 5(4) ECHR,[55] it is suggested that in a case involving a deprivation of liberty:

[55] See, in particular, *Stanev v Bulgaria* [2012] ECHR 46 at paragraph 143.

- a litigation friend for P must always consider testing whether it is correct that the assertion implicit in a request that the court uphold an authorisation or otherwise approve a deprivation of liberty that the regime in question is the least restrictive option. In other words, and to use the language of the European Court of Human Rights, the litigation friend must consider testing whether other, less severe measures have been considered and found to be insufficient to safeguard the individual interest which might require that the person concerned be detained;[56]

- Where P wishes to challenge that deprivation, then it is suggested that the litigation friend is, in fact, obliged to do so unless satisfied, after the most careful deliberation, that there truly is no properly arguable case that the deprivation of liberty does not represent the least restrictive requirement.[57] If this is the case, then it is further suggested that it would never be appropriate for the litigation friend actively to concede that the deprivation of liberty was in P's best interests. At most, it suggested that the litigation friend could leave it to the judge to decide (having ensured that P's views were relayed to the court). This would most likely require an oral hearing.

  Example

  Mr Laurie is accommodated in a supported living placement, where he is given 2:1 care and is not allowed to leave by himself. The basis upon which it is said to be necessary is so as to protect him from the risk that he will drink to excess if he leaves unaccompanied (a risk that it is said that he cannot protect himself from because of the effects of an acquired brain injury which has rendered him unable to regulate his drinking). He is not allowed to drink either in the placement or in the community on supervised visits. The local authority that has placed him in the supported living placement recognises that the circumstances amount to a deprivation of liberty and bring an application to the Court of Protection for authorisation by way of a court order. Mr Laurie is joined to the proceedings, and Mr Martel is appointed to act as Mr Laurie's litigation friend.

  Mr Laurie does not, in terms, object to being deprived of his liberty or to his precise care arrangements, but does repeatedly and strongly demand to be able to drink. Mr Martel takes the view that the fact that this demand cannot be complied with given the nature of the care arrangements in place amounts to an implied objection on Mr Laurie's part to those care

[56] As did the Official Solicitor in *Y County Council v ZZ* [2013] COPLR 463, in which ZZ vigorously disputed the necessity for the restrictions imposed upon him – primarily so as to secure against the risk that he would commit sexual offences against children.

[57] Note in this regard the observation of Moses LJ in *TA v AA and Knowsley Metropolitan Borough Council* [2014] EWCA 1661 in relation to an application under s.21A MCA 2005: "*75. But it may be useful, to prevent any repetition of this unfortunate history, to record that the Official Solicitor did not in these proceedings dispute the proposition that HHJ Gore QC was required to determine the appeal and could not lawfully refuse to consider it, however obvious the outcome and however short the hearing and disposal of the appeal.* […] *I need only emphasise that due and proper consideration of an appeal under section 21A MCA 2005 may not require any lengthy consideration. A full hearing is not necessarily a lengthy, time consuming or expensive hearing.*" In other words, it is quite proper for a litigation friend to take the steps they consider necessary to ensure to advance P's objections to a deprivation of liberty even if they have only very limited prospects of success, in the knowledge that the court will be able to calibrate its consideration of the application appropriately.

arrangements and to the deprivation of liberty that they entail. He therefore takes steps to ensure that the evidence before the Court of Protection justifying the restrictions on Mr Laurie is tested thoroughly and, in particular, to ensure that there are no less restrictive ways in which Mr Laurie can be protected against the risk that he will drink to excess.

At the end of a two day hearing before the Court of Protection in which evidence has been given by – amongst others – an independent social worker – that there is, in fact, no less restrictive way in which to secure Mr Laurie against the risk of drinking to excess, Mr Martel reaches the conclusion that he cannot properly argue against the order sought by the local authority being made. Mr Martel instructs the lawyer acting on his behalf to highlight the passages in the evidence before the court recording Mr Laurie's views and his desire to drink, and to say in closing arguments that the matter is one for the court to decide.

Litigation friend acting for a protected party

77. To some extent, the position of a litigation friend acting for a protected party other than P is easier. As the focus of the proceedings is not upon the best interests of the protected party, but rather upon the best interests of P, the potential risks of the litigation friend interposing themselves as decision-maker do not arise.

78. The main issue that is likely to arise is that which arose – by analogy – in the *RP* case – i.e. that the protected party will want to advance a positive case as to where P's best interests lie that the litigation friend considers after proper consideration not to be properly arguable. In such a case, it is suggested that the litigation friend is not required positively to advance that case to the court, albeit that it is vital that they put clearly the protected party's view to the court so as to secure their rights under Article 6 ECHR (and arguably also Article 8).

How to decide what instructions to give

79. If P is capable of expressing wishes and feelings, it is vitally important that the litigation friend takes all reasonable steps to ascertain them. This is for two reasons: (1) to inform the litigation friend in their consideration of where P's best interests lie; and (2) to ensure that the litigation friend can then place those views before the court.

80. IMCAs are particularly well-placed in this regard because the process of deciding what instructions to give is closely allied to the process of preparing a report pursuant to an instruction under one of the relevant provisions of the MCA 2005 for purposes of decision-making outside the scope of the court.[58]

81. If the litigation friend is not already acquainted and familiar with P, this may well involve enlisting the assistance of P's support workers or family members who are familiar with P, although the litigation

[58] Very useful guidance as to the preparation of such reports, and – by extension – the preparation of instructions in cases before the Court of Protection – can be found in the Report Writing Guidance prepared by Empowerment Matters, available at http://www.empowermentmatters.co.uk/Wordpress/wp-content/uploads/2012/07/IMCA-Report-Writing-Guidance.pdf.

friend must always be careful to ensure that – so far as possible – they are receiving P's wishes and feelings unmediated by anyone else.

82. As noted, P's wishes and feelings – whilst vitally important – will not necessarily be determinative of the approach that the litigation friend will take on their behalf. The litigation friend should also ensure that they have considered the other evidence that is available (and the evidence that might become available).

Example

Mrs Abrams is in a care home; she is visited once a month by her cousin, and once a month goes on an outing to meet her cousin at a café, supported by a support worker from the home. The question before the court is as to whether contact between Mrs Abrams and her cousin is in Mrs Abrams' best interests. As a result of her advanced dementia, Mrs Abrams's communication abilities are very limited and she is not in a position verbally to express her wishes and feelings as to contact with her cousin. Likely sources of useful evidence as to her wishes and feelings will be:

- *The care home records – which are likely to indicate Mrs Abrams's mood before and after visits from her cousin;*

- *Witness statements from support workers who have taken Mrs Abrams out into the community to the café. These statements are likely to indicate not just Mrs Abrams' mood during her meetings at the café but also her cousin's conduct and behaviour towards her.*

83. In many cases, the litigation friend – and, in turn, the court – will want to have independent evidence to assist in the assessment of where P's best interests lie, either by way of a report prepared under s.49 MCA 2005 or a report from a suitably qualified expert. This is addressed further in Chapter G below. One of the litigation friend's most important tasks is gauging – and then informing the court – whether such evidence is required (and, if so, what evidence).

Example

Mr Jeffers has a learning disability. He has recently started expressing amorous intentions towards a fellow resident at the care home where he lives. Mr Jeffers's parents are worried that he does not have capacity to consent to sexual relations, but the care home staff think that he does. The local authority brings an application to court for a determination of whether he has or lacks this capacity. This is a case where expert evidence will be necessary for the court to make this decision. Whilst the litigation friend may be able to form their own provisional view based upon their discussions with Mr Jeffers, it would be unwise of the litigation friend to advance any argument one way or another to the court until they have seen the conclusions of the expert report.

84. Assuming that the litigation friend has instructed lawyers, they should seek advice as to any points upon which they are unclear, and should enlist the assistance of the lawyers in (for instance) reviewing relevant documentation. It is ultimately, however, for the litigation friend to decide what instructions to give.

85. Finally, the litigation friend should always keep matters under review and allow for the possibility either that matters evolve or that (as often happens) new evidence sheds very different light upon the picture that was initially presented. This is particularly important as regards the position that the litigation friend is intending to adopt towards the 'ultimate' questions in the application – i.e. whether P has capacity to take the relevant decision(s), and the decision(s) that the Court is being asked to take on P's behalf. The Official Solicitor almost invariably expresses all his views as (in essence) subject to confirmation having heard all the evidence at the end of the final hearing; there is a great deal to be said to following this practice.

Example

An application has been brought by a local authority for declarations that it would be in Ms Spearman's best interests to live in a care home, rather than at home with her father who has been caring for her since she was a child (she is now 24). The basis upon which the application has been brought is a safeguarding concern arising out of bruising noted by staff one afternoon upon Ms Spearman's arrival at a day-care centre that she attends. Ms Spearman is not capable of giving an explanation for the bruising. The local authority assert that the bruising was sustained at home, as a result either of a direct assault by her father, or as a result of a failure by him to secure her against the risk of falls. An independent social work expert instructed to provide a report to the court reports that they consider that (1) if Ms Spearman's father did assault her, then this would suggest that it may be in Ms Spearman's best interests not to continue to reside with him; (2) they would have some doubts as to whether this would be in her best interests if the bruising resulted from a fall that took place because he had not taken adequate care to protect her against; but (3) if the bruising resulted from another cause, they would have no hesitation in recommending that she continues to live at home. The social work expert – properly – does not seek to decide the cause of the bruising, this being a factual question for the court. At the hearing, it emerges that, in fact, Ms Spearman fell whilst being driven from her home to the day-care centre in a minibus arranged by the local authority, but the driver and the carer assigned to the minibus did not report the incident at the time. Given the independent social worker's view as to the relevance of the allegation of assault, the decision as to where Ms Spearman's best interests lie is likely dramatically to change as a result of this revelation.

F: When is it appropriate to bring a case to the Court of Protection as litigation friend for P?

86. In this section, we cover the position where an advocate or a family member/carer is considering bringing a case on behalf of P as litigation friend (rather than the position where proceedings are already on foot and the advocate or family member/care is being invited to act as litigation friend).

When should matters go to the Court of Protection?

87. There are, in very broad terms, two reasons why applications should be brought to the Court of Protection:

    1. There is a dispute that cannot be resolved by the informal and collaborative decision-making structures established by the MCA 2005; [59]

    2. The decision in question is one that is particularly difficult or serious;

88. A specific sub-set of cases in the first category is cases concerning people deprived of their liberty in care homes and hospitals under authorisations granted under Schedule A1. The importance of securing the right under Article 5(4) ECHR of those deprived of their liberty in such settings to an independent judicial review of the lawfulness of their detention cannot be over-emphasised, and the role played by RPRs and IMCAs here is particularly important, especially the role of IMCAs appointed under s.39D MCA 2005 to assist unpaid RPRs. So as to render the Article 5(4) ECHR rights of detained residents effective, it is particularly important in such cases that:

    - where appropriate, the detained person is enabled to bring a challenge to the Court of Protection under s.21A MCA 2005; and

    - any litigation friend appointed to act on that person's behalf in the proceedings follows the guidance set out at paragraphs 74-77 above and is tenacious in ensuring that the evidence advanced in support of the deprivation of liberty is properly tested.

89. It is sometimes easy to overlook the second category of case outlined above and to think that the Court of Protection exists solely to resolve disputes. That is an extremely important function, but focussing too much upon the court as a forum to turn to only as a last resort to resolve disputes can blur the fact that, as judges have said on numerous occasions, their function can also be to take decisions on behalf of P that public authorities feel are too risky for them properly to be able to take themselves. As Peter Jackson J said in *Re M (Deprivation of Liberty)*,[60] in the context of a case where the choice facing the commissioning bodies was depriving a diabetic woman in a care home where she was desperately unhappy or allowing her to return home where she would undoubtedly be non-compliant with her medication and be at very high risk of death:

> *"… my decision* [to decide on the woman's behalf that she should go home] *implies no criticism whatever of any of the witnesses from the local authority or by the CCG. I understand the position taken and the reasons for it; indeed it would be difficult for them to have taken a different view on the facts of the case. There are risks either way and it is perfectly appropriate that responsibility for the outcome should fall on the shoulders of the court and not on the shoulders of the parties."*

[59] See *G v E (Deputyship and Litigation Friend)* [2010] EWHC 2512 (COP) at paragraph 57.
[60] [2013] EWHC 3456 (COP).

90. That a matter comes to the Court of Protection is therefore not necessarily a sign of 'failure.' Indeed, in the case of certain medical decisions,[61] the matter has to come to court.

Alternatives to the Court of Protection

91. If the case falls into the first category set about above, i.e. a dispute about where P's best interests may lie, then it is necessary to ensure that all alternative options have been explored to resolve that dispute before going to the Court of Protection. The Code of Practice to the MCA 2005 explores some of these options at Chapter 15. An option that is not set out in the Code of Practice that can be particularly useful in disputes about welfare is the commissioning (by the relevant local authority) of a report from an independent social worker. Obtaining such a report can provide the reassurance to the family of the individual in question that the option being advanced by the local authority is, indeed, in their best interests; it can, on occasion, also lead to suggestions as to alternative options that the local authority might not have considered.

Who should bring matters to the Court of Protection?

92. If there is no option but to go to the Court of Protection, then it is clear that the applicant should be the relevant public authority, whether that be the local authority, Clinical Commissioning Group or other NHS body. The Code of Practice makes this clear (in paragraph 8.6); judges have also emphasised the importance of the public body bringing the application where there is a real dispute as to where P's best interests lie. The most famous example of this is the case of Steven Neary.[62] In that case, the London Borough of Hillingdon was found to have breached the rights of Steven Neary under Articles 5 and 8 of the European Convention on Human Rights. Peter Jackson J was specifically asked to consider the fact that local authority had delayed bringing the matter to court, and held

> *"… I have already indicated that the protracted delay in applying to court in this case was highly unfortunate. There are repeated references, particularly by the service manager, to the burden being on Mr Neary to take the matter to court if he wished to challenge what was happening. That approach cannot be right. I have already referred to the decision in Re S, which rightly observes that the practical and evidential burden is on a local authority to demonstrate that its arrangements are better than those that can be achieved within the family. It will discharge the practical burden by ensuring that there is a proper forum for decision. It will not do so by allowing the situation it has brought about to continue by default. Nor is it an answer to say, as Hillingdon has done, that Mr Neary could always have gone to court himself, and that it had told him so. It was Steven's rights, and not those of his father, that were in issue. Moreover, local authorities have the advantage over individuals both in terms of experience and, even nowadays, depth of pocket. The fact that an individual does not bring a matter to court does not relieve the local authority of the obligation to act, it redoubles it."*

[61] Namely (a) decisions about the proposed withholding or withdrawal of artificial nutrition and hydration from a person in a permanent vegetative state or a minimally conscious state; (b) cases involving organ or bone marrow donation by a person who lacks capacity to consent; and (c) cases involving non-therapeutic sterilisation of a person who lacks capacity to consent. Practice Direction 9E to the Court of Protection Rules 2007. See also the guidance endorsed in *NHS Trust v FG* [2014] EWCOP 30.

[62] *London Borough of Hillingdon v Steven Neary & Ors* [2011] EWHC 1377 (COP).

93. The London Borough of Hillingdon ultimately paid £35,000 together with costs to Steven Neary, and a proportion of those damages reflected the local authority's failure to bring the matter to court sooner than it did.

94. The *Neary* case concerned the right to liberty under Article 5 ECHR, which carries with it a specific additional right of speedy access to a court able to consider the lawfulness of any deprivation of liberty, but the point made by Peter Jackson J is of wider application.

95. In a case involving a public authority, an advocate or family member/friend concerned as to P's circumstances, therefore, should be careful to make sure that they have made very clear to the relevant public authority that they consider that it is for the public authority to bring the application. They should also make clear that they will be seeking their legal costs of bringing the application (as to which, see further paragraphs 135-137 below)

Bringing an application on behalf of P

96. If the public authority will not bring an application to the Court of Protection, it is at that point that consideration should be given to bringing an application on behalf of P.

97. However, it is important to remember that, as set out at paragraph 38 above, an advocate will – in principle – be able to bring an application themselves in their own right. A family member or a friend who can demonstrate that they are properly interested in P's welfare will also be able to bring the application in their own right. In all cases except for an RPR, they will need the permission of the Court of Protection, but such permission is likely to be granted if the person bringing the application can show (a) that there is a real dispute as to P's welfare; and (b) the relevant public authority has declined to bring the application.

98. In many cases, it is likely that, for the reasons set out at paragraphs 36-37 above, it would be better that the application is brought in P's own name by the advocate/family member/friend acting as litigation friend. If this does happen, though, it is sensible to make clear in the application why the option of the proposed litigation friend acting in their own right has been discounted.

99. In the case of an IMCA, it would also be sensible in the application to set out any contact that they may have had with the Official Solicitor's office because paragraph 10.38 of the Code of Practice to the MCA 2005 suggests that an IMCA wishing to challenge a decision should first approach the Official Solicitor with a view to seeing whether the Official Solicitor will apply in P's name. In practice, the Official Solicitor very rarely brings applications on behalf of P, but it would be sensible to make clear that the IMCA has gone through the hoops envisaged by the Code.

Case study: Ms Powell

Ms Powell, aged 54 was a patient in a psychiatric ward at her local hospital, having been originally admitted under section 3 of the Mental Health Act 1983 with a diagnosis of schizophrenia. A Mental Health Tribunal discharged her with the view to discharge back to her own home. However, her treating mental health team were concerned that she would be at risk from her two adult children if she returned home where they also lived. Both in the past and whilst Ms Powell was detained she had been physically, emotionally and financially abused by her son and daughter. A local IMCA was instructed, primarily to assist in the process of decision-making relating to her accommodation; safeguarding procedures were also instigated. Ms Powell was deemed to lack capacity about where she should be discharged to although she repeatedly expressed her desire to return home. Despite the fact there was a long history of abuse including police involvement and witnessed by the mental health team, Ms Powell often denied this had occurred and described her children as very loving although occasionally she acknowledged the abuse she experienced. The abuse impacted on Ms Powell's mental health, her ability to self-care as well as her medication regime; when at home she often quickly stopped taking medication; there was also clear evidence of a link between the abuse and her ability to take her own decisions.

Ms Powell remained on the psychiatric ward. Ms Powell's options regarding accommodation were (1) that she move into residential care, which would ensure that the potential for future abuse was minimised; or (2) that she return home. Ms Powell wanted to return home, but this meant that the risks from her children needed to be addressed. The IMCA met with Ms Powell on several occasions and discussed all the options available and subsequently wrote a report advocating that Ms Powell should return home. The IMCA also raised concerns that the delay in the decision-making was impacting on Ms Powell's mental health along with the fact she was not clear as to her rights as an informal patient and she was potentially deprived of her liberty.

The IMCA asked the local authority's mental health team to progress the decision to the Court of Protection in order to resolve the issue with her children and the need for potential supervised contact with them. The mental health team, whilst agreeing that Ms Powell ultimately, should return home, did not progress the court application. The IMCA therefore approached a local legal firm who had been recommended by the Official Solicitor as a firm that carried out this kind of work in the geographical area and the role of litigation friend was discussed. The IMCA and solicitor met with Ms Powell to discuss the application to court and potential ways this could support the decision making. Legal Aid was obtained in Ms Powell's name, and the law firm applied to the Court in her name, with Ms Powell's IMCA as her 'litigation friend.'

The matter came before a Judge of the Court of Protection. The judge confirmed the IMCA's appointment as her litigation friend. The judge then made orders for an expert's report to be received on the issue of Ms Powell's mental capacity. The expert's report confirmed that Ms Powell lacked the capacity to make decisions about her own welfare and therefore the Court was able to make orders requiring the son and daughter to leave the property, allowing Ms Powell to return home. The Court also made orders that prevented the son and daughter to have contact with Ms Powell except under the supervision of the local authority.

Defining the issue(s)

100. If the application is being brought on behalf of P, one of the litigation friend's most important tasks is to ensure that they have defined the issue(s) clearly for the court. Especially in a case involving a dispute between a public authority and family members, it is likely that many issues will be flying about that are – at best – tangentially relevant to the central questions relating to P's best interests. Defining the issues carefully at the outset will help ensure that the application is progressed as quickly as possible.

Example

Mr Radford, aged 21, has autism and Prader-Willi syndrome. As a result of the latter he is at serious risk to his physical health because of his inability to control his eating. He has been cared for at home by his mother since birth. His mother has been engaged in a long-running dispute with both the local authority and the local Clinical Commissioning Group ('CCG') as to the level of funding that they will offer Mr Radford by way of a care package. She has, separately, been involved in a series of disputes with the local authority housing department in relation to the tenancy of the local authority owned property in which she lives with her son, as a result of complaints being brought by her neighbours as to her son's behaviour. She has also been involved in an escalating series of disputes with the Chief Executive of the local CCG relating to a complaint that she has made in relation to an allegation that a GP racially abused her during a surgery that she attended for purposes of her own medical needs. The local authority and the CCG jointly consider that it is appropriate for Mr Radford to be placed away from his mother's care in a specialist residential facility. His mother at first agrees, but shortly after he is moved, changes her mind and requests that he be returned to her care. It is recognised that Mr Radford is deprived of his liberty at the residential facility and a standard authorisation is given by the local authority under the DOLS regime. Mr Radford's mother is not appointed his RPR, and a paid RPR, Ms Neville, is appointed. Ms Neville considers that it is appropriate that the matter be taken to the Court of Protection in light of the dispute between Mr Radford's mother and the statutory authority as to where he should live. Neither the local authority nor the CCG are prepared to take the matter to court. In bringing an application under s.21A (as Mr Radford's litigation friend, rather than as his RPR), Ms Neville makes clear that the only issue for the court to decide is whether the best interests requirement under Schedule A1 is met. In deciding this question, issues of the extent to which to Mr Radford's mother may be in dispute with the statutory authorities involved in her son's care are only relevant to the extent that they impact upon the care that can be given to Mr Radford either at home or in the residential facility.

101. Another way in which issues need to be defined is by reference to the question of what options are actually on the table. As noted above the Court of Protection is generally confined to choosing between the options that are actually available to P. If the real debate is whether a public authority is willing to fund a particular care package for the individual, it may be that the proper place in which this decision should be challenged is not in the Court of Protection, but by way of a judicial review

application of that decision in the Administrative Court.[63] In deciding whether to bring an application in the Court of Protection, therefore, the advocate will have to make sure that they have got to the bottom of the public authority's decision-making process to identify whether the real issue is one for the Court of Protection.

G: How do cases before the Court of Protection proceed?

102. Space precludes a detailed discussion of all the stage of an application of a welfare application before the Court of Protection;[64] rather, the focus will be on the key stages at which the input of the litigation friend will most be required.

103. As a preliminary point, it should be emphasised that proceedings before the Court of Protection, especially when they are conducted before District Judges, are intended to be conducted in a relatively informal fashion. Precisely how informal they will be will depend upon the nature of the issues at stake, and it should always be remembered that they are, ultimately, proceedings before a court. This means, for instance, that directions made by a judge are not akin to invitations or suggestions, but should be complied with (and, if they cannot be complied with, the judge should be notified as soon as possible).

Procedural rules and orders

104. The Court of Protection Rules can be found online,[65] as can precedent versions (in downloadable – free Word – form) of orders[66] covering the majority of issues that will arise during the 'life' of proceedings before the Court of Protection.

Permission

105. The following do not require permission to bring applications to the Court of Protection:

- P themselves;
- Attorneys appointed under an LPA to which the decision relates;
- Court appointed deputies;
- The RPR (or, where relevant, s.39C IMCA) for a person deprived of the liberty pursuant to an authorisation under the DOLS regime;
- The Official Solicitor;

[63] For more about this, see paragraph 114 below.
[64] For a detailed discussion, reference should be made in particular to *The Court of Protection Handbook* and also Jordans' annual *Court of Protection Practice*.
[65] Most easily at http://courtofprotectionhandbook.com/legislation-codes-of-practice-forms-and-guidance/.
[66] At www.courtofprotectionhandbook.com/precedents.

- The Public Guardian.

106. Others properly concerned with P's welfare can bring an application, but must seek permission. It should be noted that the Court of Protection Rules relating to permission are at the time of preparing this Guidance (October 2014) are under review: the current position is most easily ascertainable by checking for updates at www.courtofprotectionhandbook.com/handbook-updates.

107. Permission is usually dealt with by a judge 'on the papers' (i.e. without a hearing).[67] The judge may at that stage decide whether to join P to the proceedings or may defer that decision until a directions hearing. As noted at paragraph 43 above, a court order is required in order to appoint a litigation friend for P; if there is sufficient evidence before the judge at the initial paper stage to satisfy the judge that the proposed litigation friend meets the criteria, then it is quite possible that the first order made by the court on the papers will (1) grant permission; (2) join P; and (3) appoint the individual in question as P's litigation friend.

The first directions hearing

108. In a case of any complexity, the court will be very likely to order a directions hearing at an early stage. This is a hearing at which, in essence, the judge can gather the parties before them with a view to:

- Identifying the issues in the case; and

- Identifying what evidence is necessary in order to decide those issues (and how such evidence is to be put before the court).

109. A further important task for the judge will be to make such interim declarations and decisions as are necessary to secure P's interests pending the final determination of those central issues. A judge has jurisdiction to make such interim declarations and decisions where: (1) there is reason to believe that P lacks capacity in relation to the matter; (2) the matter is one to which its powers under the MCA 2005 extend; and (3) it is in P's best interests to make the order, or give the directions, without delay.[68] The judge need only have before them sufficient evidence to justify a reasonable belief that P may lack capacity, or evidence which gives good cause for concern or raises a real possibility that P may lack capacity.[69]

110. The first directions hearing is therefore a very important hearing because it will not just set the timetable for the resolution of the questions before the court, but is also therefore likely to see declarations and/or decisions made that may well have effect for a number of months.

[67] Wherever a decision is made 'on the papers,' an application can be made for it to be reconsidered under Rule 89 of the Court of Protection Rules 2007.
[68] Section 48 MCA 2005.
[69] [2009] EWHC B30 (Fam).

Example

Mrs Hawks, aged 87, is in a specialist dementia care home. She has become increasingly agitated when visited by her husband, and has made a number of concerning statements about her husband's conduct both during visits and in the years prior to her admission to the home. The local authority brings an application to the Court of Protection for declarations that it is in her best interests for contact with her husband to be supervised. At the first directions hearing the judge, in addition to making directions relating to the disclosure of relevant records and the obtaining of a report under s.49 MCA 2005 (as to which, see further below), makes declarations that contact should be supervised pending the next hearing in the case, listed for 2 months' time.

111. The general rule is that directions hearings take place in private (the exception is in the case of serious medical treatment cases). They will usually be listed for between 30 minutes and one hour, and it is now very common for a direction to be made that parties are to attend one hour before for purposes of discussions. As set out further below, such discussions can be immensely productive, and every effort should be made to attend in good time for such discussions.

112. Directions hearings can also take place by telephone or video-link. This can save time and expense in terms of travel, but frequently at the cost of additional expense before and after the hearing in terms of seeking to agree an order to put to the judge or to agree the terms of an order reflecting the directions made by the judge at the hearing. In anything other than a straightforward directions hearing, therefore, careful consideration needs to be given as to whether the cause of effective case management is not better served by personal attendance.

113. In advance of any directions hearing, one of the most important steps that must be taken is the preparation of a position statement – a document (ideally running to no more than 1-2 pages) that sets out succinctly the issues that the judge will need to consider at the hearing and the particular decisions/directions that the party preparing the statement will want the judge to make. A template position statement is provided at Appendix B. If solicitors have been instructed, this will usually be prepared by them, but one of the litigation friend's most important tasks is ensuring that any position statement filed on behalf of P is focussed squarely on these two matters. The other parties to the proceedings may well have their own agendas; one of the key roles for the litigation friend appointed for P is to ensure that the focus at all stages remains squarely upon P.

114. A particularly important task for the litigation friend is to consider whether it is clear precisely what options are before the court and, if not, to take steps to ensure that clarity is brought as soon as possible. As noted at paragraph 21 above, the Court of Protection is – in general – confined to making decisions between the options before it. If a public body has not put an option before the court then – in very broad terms – the only place in which this decision can be challenged is in the Administrative Court by way of an application for judicial review of the decision.[70] Judicial review

[70] Note, there may in some exceptional circumstances be the possibility to bring a claim in the Court of Protection on the basis of the Human Rights Act 1998 to the effect that the decision by the local authority breaches the person's rights under the ECHR. It was made clear in *ACG & Anor v MN & Ors* [2013] EWHC 3859 (COP) that this would be exceptional. This is undoubtedly an area in which specialist legal advice will be required.

challenges are different to applications before the Court of Protection because – again in very broad terms – the judge is not focused on the merits of the decision but on the process by which the public body reached its decision, asking (for instance) whether the public body took into account an irrelevant consideration or failed to take account of a relevant consideration.[71]

115. However, because there may frequently be a degree of (sometimes inadvertent) confusion in decision-making regarding those without capacity to take important decisions in their life, it can quite often be the case that a public body will have brought a case to the court on the basis that they are inviting a decision to be made in P's best interests when, in reality, there is only one option. In that case, the role of the Court of Protection will be very limited indeed and money (whether public money or that belonging to P) should not be spent on examining hypothetical options.

116. That does not mean, it should be emphasised, that a litigation friend is bound to accept an assertion by a public body that an option is not on the table. It would be entirely right for the litigation friend to take steps to ensure that the assertion is tested – for instance by inviting the court to require the local authority to require a suitably senior individual to file a statement to explain precisely why one option is not before the court.

Example

A local authority makes an application to the Court of Protection for a declaration that it is in Ms Oliviera's best interests to live in a residential care home, rather than at home with an extensive package of care. Ms Oliveira is joined to the proceedings, and Mr Daly is appointed to act as her litigation friend. In advance of the first directions hearing, Mr Daly files a position statement noting that it is not clear whether the local authority would, in fact, be willing to fund the care package at home. The local authority, asked a direct question by the judge at the first directions hearing, confirms that, in fact, they would not be willing to fund the package of care at home. They are directed to and subsequently file a letter in which they explain that this is because they consider that both options (i.e. care in a residential care home or care at home with an extensive package of care) would meet Ms Oliveira's assessed needs, and that the cost of a package at home is so significantly higher than the cost of care in a residential care home that they are not prepared to fund a package of care at home. At that point, Mr Daly will need to consider whether it is possible to bring a challenge to that decision in the Administrative Court by way of judicial review proceedings on the basis (for instance) that the decision of the local authority is irrational. The Court of Protection will, in the meantime, essentially have no role to play as regards the question of where Ms Oliveira is to live, but may well (for instance) have a role to play in making decisions as regards contact between Ms Oliveira and members of her family.

117. If the hearing is to take place in person, then even if there has been no specific direction to attend before the hearing for discussions, it is usually very sensible to try to agree with the other parties to attend (at least) one hour before. The litigation friend should be involved in these discussions, which be very important in setting the tone of the proceedings. Proceedings before the Court of

[71] A very good – and relatively inexpensive – guide to judicial review proceedings is the Legal Action Group's "*Judicial Review Proceedings: a practitioner's guide*" by Jonathan Manning, Sarah Salmon and Robert Brown (3rd edition, June 2013).

Protection are intended to be very different to those before civil courts – they are essentially inquisitorial rather than adversarial in nature. In other words, the judge will expect a high degree of collaboration and cooperation between the parties to assist the court in resolving the questions of P's capacity and best interests.

118. As noted above, the judge will be particularly keen to identify what evidence they require in order to resolve the questions before them. Much of this evidence will be in the form of documents (for instance social services or medical records). Some will be in the form of witness evidence that either exists at the time of the directions hearing (because, for instance, it accompanied the application form) or for which permission will be given. Some will be in the form of expert evidence going to specific issues. Some of the key issues that will arise in this regard with specific regard to litigation friends are:

Disclosure

- Judges are, understandably, cautious about allowing confidential information about P contained in social services or medical records to be widely disseminated. However, it is clearly established that both common law fairness and the right to a fair trial in Article 6 ECHR require (in essence) parties to have access to all the information upon which the judge will make their decision. This is subject to a very limited exception where it can properly be established that withholding a disclosure to a party of (i.e. stopping the party seeing) relevant material is strictly necessary to meet the real possibility of significant harm to P;[72]

- A common practice where the Official Solicitor has been instructed on behalf of P is for the judge to direct that (for instance) social services records are disclosed to the solicitors instructed on behalf of P in the first place. The solicitors, together with the Official Solicitor's case-worker, will then review those records and decide whether any of the records are sufficiently relevant to the issues before the court that they need to be disclosed to the other parties and/or if an application needs to be made to withhold disclosure;

- There is no reason why a similar practice cannot be adopted where a litigation friend other than the Official Solicitor acts on behalf of P (although it may well be that a judge is more cautious if the litigation friend is a family member rather than a professional such as an IMCA). It is important to note, however, that undertaking such a review exercise can be a detailed and lengthy one; even if the bulk of the work would lie with the solicitors instructed by the litigation friend, the litigation friend would have to be given sufficient information in order to be able to give instructions as to the stance to adopt in relation to particular documents;

- It is important to make sure that any order providing for disclosure makes clear (1) how far back in time records are required from; (2) whether the person or body holding the materials is expected to provide copies of them or simply to provide an index (and, potentially, access to the place where they are stored so that they can be reviewed – which can be a much more efficient way of proceeding); and (3) precisely whom the records can be seen by. If an IMCA organisation

[72] *RC v CC and X Local Authority* [2014] EWHC 131 (COP).

is appointed to act as litigation friend, this last provision is particularly important so that the judge can be sure that confidential information relating to P is only seen by the minimum necessary number of people;

Witness statements and statements

- The Official Solicitor will produce a statement for purposes of the final hearing in any case in which he acts on behalf of P. This is not a witness statement, as he does not have first-hand knowledge of the relevant facts. Its purpose is, in essence, to set out the position taken by the Official Solicitor on behalf of P and his reasons for that position. The Official Solicitor would not be cross-examined upon the contents of that statement, although he might be asked to amplify its contents by way of submissions (i.e. representations) made on his behalf at the final hearing;

- It is suggested that it is likely to be right in most cases for the same approach to be adopted by litigation friends other than the Official Solicitor, and the litigation friend will therefore produce a statement (not a report) for the court which is not, strictly, a witness statement, but which serves the purpose both of explaining why the litigation friend is taking the position that they are on P's behalf, and ensuring that P's wishes and feelings (where they are ascertainable) are put before the court. If steps are not to be taken for the judge to hear directly from P (as to which see further below), those wishes and feelings are usually best relayed by way of an 'attendance note' – i.e. a record – ideally verbatim – of a visit or visits by the litigation friend to P recording P's wishes and feelings;

- There might be room for an exception to the approach set out above if the litigation friend has first-hand knowledge of P because, for instance, they have previously been instructed to act as an IMCA under one of the provisions of the MCA 2005. If there is a particular factual matter that the litigation friend considers that they need to bring to the attention of the court from that first-hand knowledge, it might be appropriate to put in a witness statement alongside the main statement in which to record that evidence. It is suggested, however, that this is a course that should be adopted with caution as this risks the litigation friend losing the 'semi-detached' role that they need to have in order to be able to discharge their functions. Put another way, there is a risk that if the litigation friend seeks to give evidence to the court directly, they move from being a litigation friend to being an (informal) advocate, which is not – currently – the role allocated to them. This is undoubtedly an area where the litigation friend would be likely to want to seek specific legal advice but the following example may show the way to proceed:

  Example

  Ms Kidwell was appointed to act as Ms Poirier's IMCA under s.39 MCA 2005 for purposes of making arrangements for her move into a residential care home. Ms Kidwell visited Ms Poirier at her home prior to the move, and saw the conditions of self-neglect in which she lived. Ms Poirier is now the subject of a standard authorisation at the care home; a sister who had previously lived in America has now returned to England and wishes to challenge the authorisation by way of an application under s.21A MCA 2005 (and has been given permission to do so). Ms Poirier has been joined to the proceedings. Ms Kidwell has been

invited to, and has agreed to act, as Ms Poirier's litigation friend. The sister contends that Ms Poirier did not live in conditions of squalor. The relevant social worker who was involved in the decision to move Ms Poirier is no longer with the local authority, and no social workers are in a position to assist the court directly with the conditions in which Ms Poirier lived. If there is no appropriate contemporaneous documentary evidence (for instance photographs or detailed descriptions contained in the social work records), it might, in these circumstances, be appropriate for Ms Kidwell to seek permission to put in a witness statement to explain what she saw at the house when she acted as the IMCA. She should be careful to frame her witness statement in neutral and factual terms, and confine it to those things she saw for herself. She should also consider very carefully whether, if she is the only (or main) witness to the relevant factual matters, this might not be a case in which it would be better for another person to act as litigation friend.

- The cautious note expressed above as to the extent to which it is appropriate for a litigation friend to give first-hand evidence should not be taken as constraining their role in ensuring that P's wishes and feelings are relayed to the court. As discussed at paragraphs 69 above, this is vital. It will, however, often be appropriate (if P is not in a position to come to court) for the wishes and feelings to be recorded not in a formal witness statement, but rather in an attendance note – in other words, in (as near as possible) a verbatim transcript of P's views as relayed in discussion with the litigation friend and/or the solicitor instructed by the litigation friend. That attendance note can be attached to a witness statement so that, formally, it is before the court as evidence, but providing it in this fashion makes it clear that the litigation friend is relaying P's wishes and feelings, rather than seeking to put their own spin on them. It should be noted that there can be room for creativity here – it would, for instance, potentially be possible for a video-recording to be made of a visit to P if this would provide a better way to capture the real P;

- If P is not in a position to express wishes and feelings verbally, then it may be necessary for the litigation friend to expand in a witness statement upon how it is that they understand P to express the wishes and feelings that they do. Again, however, the litigation friend should be careful to make sure that they give their evidence in this regard in as neutral a fashion as possible – they are not in giving this evidence advancing a particular case to the court, but rather seeking to assist the court in getting the best possible picture of P's wishes and feelings;

Section 49 reports

- One important task that the litigation friend can do is to remind the parties present (and, sometimes, the judge) of the availability and significance of reports prepared under s.49 MCA 2005. This provision gives the power to court to call for a report in respect of such matters relating to P as it may direct from:

    - The Public Guardian;

    - A Court of Protection Visitor, appointed by the Lord Chancellor to one of two panels, Special Visitors and General Visitors, the former requiring a medical qualification and

special knowledge of and experience in cases of impairment of or disturbance in the functioning of the mind or brain;

- o A local authority or NHS body (such report to be produced by one of its officers or employees or such other person other than that the Public Guardian or a Court of Protection Visitor as the authority/NHS body considers appropriate.

- Section 49 reports, especially those produced by Court of Protection Visitors, bear strong resemblance to expert reports, in that they will include both discussion of factual matters and also opinions reflecting the expertise of the maker of the reports. They can frequently serve as an effective route by which the court can obtain independent evidence as to matters relevant to the application, and thus as an alternative to the grant of permission to the parties to instruct (jointly or separately) an expert to give evidence. There is one substantial advantage to the parties in the obtaining of such a report, namely that there is no provision in the MCA 2005 or the Court of Protection Rules 2007 for the express provision for the payment of any fees. This is in contrast to the position in relation to experts where the default position is that the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses. In practice, this means that the costs fall upon the body required to produce the report;

Expert evidence

- More than in many other types of proceedings, judges sitting in the Court of Protection will often require assistance from suitably qualified individuals as to such matters as:

  - o Whether P has or lacks capacity to take the decision(s) in question; and

  - o What course of action is in P's best interests.

- Although it is not necessary to obtain permission to file expert evidence as to capacity and/or best interests with the initial application to the court, the court's permission must be obtained before filing any subsequent expert evidence (and evidence filed with the application can only be relied upon to the extent and for the purposes that the court allows).

- The requirement to obtain permission is an important tool in the court's case management armoury. In addition to its general obligation to have regard to the general requirement to deal with cases in a proportionate fashion, the court is also under a specific duty to limit expert evidence to that which is reasonably required to resolve the proceedings. This duty extends not just to requiring careful consideration of whether expert evidence is required at all, but also, where possible, requiring expert evidence upon a particular issue to be dealt with by a single expert. In guidance sanctioned by the President of the Court of Protection, the provisions of the Court of Protection Rules 2007 and Practice Direction 15A (relating to experts) were amplified to make clear that '[u]nnecessary expert assessments must be avoided. It will be rare indeed for the

court to sanction the instruction of more than one expert to advise in relation to the same issue.'[73]

- An important task for any litigation friend is to consider – with the assistance of suitable advice – whether to invite the court to give permission for expert report(s) to be obtained and, if so, in what disciplines. Instructing experts to provide reports will inevitably cost money. The usual rule is that the costs of instructing an expert will be divided between all the parties who have instructed the expert (i.e. who have taken part in the process of identifying the expert, ensuring that the right information and the right questions are put to the expert, and ensuring that they provide their report within the time-frame set by the court).

- If P is legally aided, the Legal Aid Agency will need to be satisfied that public monies are being properly spent upon obtaining expert evidence.[74] If P is not legally aided, then the likelihood is that P's own money will be spent upon obtaining the expert evidence,[75] as the general rule in proceedings relating to welfare is that there is no order as to costs – in other words, each party will bear their own costs and expenses (including such matters as obtaining expert evidence).

- Both for reasons of ensuring that either the public or P's monies are properly spent, and also to ensure that the steps taken to obtain expert evidence are proportionate, it is suggested that the prudent test to apply in this regard is whether the litigation friend properly considers that it can be said that the expert report is necessary.[76]

Example

Mr Paige has a life-long severe learning disability; he has seen one particular specialist psychiatrist regularly for the past five years. A question before the court is as to whether he has the capacity to decide whether to go upon a cruise. It is unlikely to be proportionate to appoint an independent expert to provide a report upon this specific question; it is much more likely to be proportionate to direct that the specialist psychiatrist provide a report as to his capacity under the provisions of s.49 MCA 2005.

The progress of proceedings

119. The litigation friend is responsible to the court "*to the court for the propriety and the progress of the*

[73] 'Guidance in cases involving protected parties in which the Official Solicitor is being invited to act as guardian ad litem or litigation friend,' available at http://www.familylaw.co.uk/system/uploads/attachments/0001/4515/Guidance_in_cases_involving_the_Official_Solicitor_-_December_2010.pdf.

[74] Complicated issues can arise if one or more of the parties to the proceedings are not eligible for legal aid but cannot afford to pay their share of the expert's fees. It is not possible to address them here, but the issues and the leading case (*JG v Lord Chancellor and Ors* [2014] EWCA Civ 656) are discussed in Chapter 6 of the Court of Protection Handbook.

[75] As discussed further at paragraph 164 below, it is important that the litigation friend has clear authority to expend P's moneys on expert evidence.

[76] This is the test that is applied in relation to proceedings involving children, and it is likely that the test in the Court of Protection will be amended to bring the two into line in due course.

proceedings."[77] This does not mean that the litigation friend is responsible for the conduct of all of the parties to the proceedings, but it does mean that the litigation friend must keep a careful eye on how matters are progressing and, if necessary, take steps to alert the court to the fact (for instance) the time-table set by the court for the provision of documents or evidence is slipping.

Alternative Dispute Resolution[78]

120. It is very important to remember that, merely because a matter has come before the Court of Protection, this does not mean that the parties should not continue talking outside the courtroom to see whether it is possible to find a way to agree an order. This is something that the litigation friend for P can and should consider raising – more than once – if appropriate.

121. Especially in cases involving breakdowns in trust between local authorities and family carers, mediation can be very useful indeed in allowing issues to be ventilated before a neutral third party and, at the very least, narrowing the areas of disagreement that require resolution by a judge.

122. Alternative Dispute Resolution ('ADR') can take a number of different forms, from Round-Table Meetings, gathering the parties together in a setting away from the court room, to formal mediations chaired by an external mediator.[79] All types will cost varying amounts of money, the costs usually being split between the parties. Precisely which type of ADR which might be appropriate will depend upon the precise nature of the issues at stake. In all cases, the presumption will be that the litigation friend should be present; they can (especially if they know P well) provide invaluable input, for instance as to P's wishes and feelings. Moreover, the result will need to be put to the court to be endorsed as being in P's best interests, and it stands to reason that the litigation friend will find it more difficult to agree if they have not been sufficiently involved in the earlier stages of the process.

Fact-finding

123. In some cases, the court may need to make determinations upon contested facts before it is possible for it then to go on to consider where P's best interests lie (or to make other decisions/declarations open to it). It is open to a judge in the exercise of their case management powers to decide that it is necessary that such a determination of fact take place as a separate, stand-alone hearing, known as a fact-finding hearing.

Example

A Clinical Commissioning Group is responsible for funding the very complex care needs of Ms Gaines. She has been cared for at home with her parents, and her parents have had a significant role in caring for her. An allegation has been made by a nurse who visited the home that an IV line had been tampered with by her parents. If the judge is invited to make a decision

[77] *Re E (mental health patient)* [1984] 1 WLR 320 at page 324F-H, per Sir Robert Megarry V-C.
[78] Also now known in family proceedings as "Non-Court Dispute Resolution."
[79] See, for a very useful guide to mediation: Kate Aubrey-Johnson with Helen Curtis, *Making Mediation Work for You* (Legal Action Group, 2012).

as to whether restrictions should be placed upon her parents' involvement with her care, then the judge is very likely to have to decide whether the IV line was tampered with and by whom before they can go on to consider where Ms Gaines' best interests may lie. This is the type of issue that a judge may well decide it is appropriate to decide by way of a stand-alone fact-finding hearing as it is a single, discrete, but very important issue that should be capable of resolution in isolation.

124. It is unlikely that a litigation friend acting for P would be advancing any positive case at the fact-finding stage. Rather, the role of the litigation friend at this stage is likely to be limited to:

- (with the benefit of appropriate legal advice[80]), assessing whether it is necessary that all the allegations advanced to the court be resolved in order to allow the judge to make the relevant decisions as to P's best interests. Parties can frequently advance a whole host of allegations, only a limited number of which are actually directly relevant to the application, and one of the advantages of the litigation friend's 'semi-detached' role is that they can bring a degree of objectivity to assisting the judge identify the relevant ones.

  Example

  Mr and Mrs Graham are in the process of divorcing. They have an adult daughter, Amy, with profound physical disabilities and severe autism, who they had always cared for at home on a rotating basis (one working for a week and the other caring for Amy for that week, and then vice versa). They cannot agree about who should look after her for the future. Mr Graham has issued an application in the Court of Protection for this question to be determined by a judge. Permission has been granted, Amy has been joined as a party, and Mr Baez has been appointed to act as Amy's litigation friend. Both Mr and Mrs Graham have made allegations against each other as to the quality of care that the other has given to Amy over the years, and the judge has decided that it is necessary in order to resolve the question of where she should live that she should determine a limited number of allegations made by both Mr and Mrs Graham. In documents prepared by Mr and Mrs Graham (both of whom are acting without the benefit of legal representation), both make allegations about the other's conduct relating not just to the other's care of Amy, but also ranging far and wide in relation to other aspects of their married life. At – or preferably substantially in advance – of any hearing to decide the factual allegations, a key task for Mr Baez, with the benefit of the lawyers he has instructed, will be to identify which allegations are actually relevant to the question of Amy's future best interests. It is also likely in such a case that he will wish to seek to identify whether it would be possible further to reduce relevant but repetitious allegations to a set of two or three 'sample' allegations.

- Instructing legal representatives to test the evidence advanced in support of the allegations by way of cross-examining the relevant witnesses.

[80] Because of the forensic complexities involved, it is suggested that it would be unlikely to be appropriate for a litigation friend to act without instructing legal representatives to act on P's behalf in all aspects of any case involving a substantial element of fact-finding.

The final determination of the application

125. Many welfare applications before the Court of Protection, even those which start out hotly contested end up being resolved by consent without the need for a final hearing. This can be, for instance, because an independent expert has provided a report making entirely clear where P's interests lie which is accepted by all parties and encapsulated in a proposal put to the court to be endorsed as a consent order. In other cases, mediation or some other form of alternative dispute resolution can achieve a resolution to the issues dividing the parties that they consider that they can properly put to the court as being in P's best interests.

126. If it has not been possible to reach agreement on all issues (and/or that agreement has not been endorsed by the court[81]), then there will have to be a hearing at which the judge can determine all the outstanding issues and make final declarations as to P's capacity in the material regards and as to where their best interests lie.

127. P's litigation friend will play a key role in the lead-up to and at the final hearing. Whether they will, themselves, address the court will depend upon whether they have instructed legal representatives; if they have not instructed legal representatives, and if they do not themselves have a right of audience (i.e. if they are not themselves a lawyer) then, as discussed at paragraphs 47 above, the litigation friend will have to seek the permission of the judge (ideally in advance of the hearing) to address the court. The balance of this section is set out on the basis that the litigation friend has instructed lawyers and is not, themselves, addressing the court.

128. As set out at paragraph 68 above, the litigation friend will have to reach a (provisional) conclusion upon the questions of P's capacity and where their best interests lie in order to be able to decide precisely what case to advance at that hearing, by way of the statement referred to at paragraph 118, and also by way of any submissions made at the close of the case. Again, though, it must be stressed that the role of the litigation friend is not to make the ultimate decisions as to P's capacity or to where their best interests lie. Both of these are decisions for the court to take. It is also very important to stress that the litigation friend must take all appropriate steps to bring their views of P to the attention of the court.

129. As discussed at paragraph 118 above, it is unlikely that a litigation friend will give a witness statement for the purposes of the final hearing. If they do, then in theory it is possible for the litigation friend to be asked to give oral evidence, and to be cross-examined. In most cases, however, the role of the litigation friend in relation to evidence will be to ensure that witnesses called on behalf of other parties are cross-examined on the points relevant to the specific issues before the court.

130. The usual order in final hearings is that the applicant will go first. Sometimes the judge will ask the applicant to 'open' their case, but increasingly judges want to have as much information as possible set out in writing in advance, in a position statement and/or a skeleton argument. In many cases, therefore, the lawyer for the applicant can have been standing up addressing the court for only a

[81] Which can happen, for instance, if the court considers that the reasons advanced in support of the proposed consent order are inadequate.

very few minutes before they call their first witness. The usual order in terms of questioning witnesses is that the party who has called the witness gets the witness to confirm their name, their address (which will sometimes be their professional address), and to confirm the contents of their statement.[82] Because the idea is that the witness will have given all their relevant evidence in writing in their witness statement, they will only be allowed to amplify that statement in so-called evidence in chief[83] with the permission of the judge. This means that the witness will be likely to have been giving evidence for only a short period of time before they are subject to cross-examination by the other parties to the proceedings. One feature that can surprise those who are not used to proceedings before the Court of Protection is that the judge will frequently take a very active role in questioning. This is because, as set out above, the jurisdiction of the court is essentially inquisitorial. The judge must therefore be absolutely satisfied that they have the evidence - but only the evidence - that they need in order to decide whether P has or lacks capacity, and where P's best interests lie.

131. Once all the witnesses for the applicant had given their evidence, the witnesses for the next party will give their evidence, and so on. The court will usually want to hear from any experts who have been called to assist at the end of all the other evidence. This will allow the experts to have (hopefully) heard the evidence given by the other witnesses, and therefore be in a better position to be able to give their final opinions as to the matters upon which they are assisting the court. The normal practice where the Official Solicitor is instructed on behalf of P is that the Official Solicitor's lawyers will call the expert(s) and take the lead in confirming, for instance, the expertise of the expert. If a person other than the Official Solicitor is acting as the litigation friend (and especially if they are acting without the benefit of legal representation), then the court may well look to the representatives of any public authority involved formally to call the expert.

132. Once all parties have given their evidence, the judge will usually want to hear closing submissions, in other words oral arguments as to what the judge should do or find on the basis of the evidence that is before them. The usual practice is that the judge will want to hear from or on behalf of the litigation friend acting on behalf of P at the very end.

133. It should be noted that litigation friends can sometimes feel slightly left out in the hustle and bustle surrounding the final hearing. There is frequently a great deal to be done, and not a great deal of time in which to do it. Lawyers, and judges, can sometimes be guilty of using legalese by way of shorthand in such circumstances. The litigation friend must always remember that they are quite entitled to be demanding in terms of getting appropriate explanations as to precisely what is under consideration. If in doubt, ask!

Judgment

134. In some cases, the judge will give their judgment on the spot, or after a very short period of reflection and gathering of thoughts. In a more complicated case, however, the judge will 'reserve' judgment, in other words there will be a delay of anywhere from a number of days to a number of weeks before the judgment is given. The judgment in such a case may well be given in writing, and if

[82] The witness will usually have been sworn or have taken the oath as soon as they get into the witness box.
[83] I.e. evidence given in response to questions asked on the behalf of the party who has called the witness.

it is, it is likely that it will have been sent in advance to the parties in draft. Very strict conditions of confidentiality apply in such a case, and any litigation friends for P who has a copy of such a draft judgment in advance must be very careful not to disclose its contents to anyone or to discuss them with anyone other than their own lawyers and other parties to the proceedings. If a body has been appointed to act as a 'corporate' litigation friend, then it is suggested that the clarification should have been sought as to precisely whom within the organisation the draft judgment can be shared with.

Costs

135. There are two aspects to questions involving costs:[84]

(1) Legal costs incurred by the litigation friend by instructing lawyers to act on P's behalf;

(2) Payment of costs incurred by other parties during the proceedings.

136. As to the first, a litigation friend is, in principle, entitled to be reimbursed by the party on whose behalf they act for the legal costs that they properly incur.[85] There is, though, a difference between an entitlement to reimbursement and security for costs – i.e. a guarantee that the costs incurred (if properly incurred) will be repaid. As set out at paragraph 40 above, it is suggested that it is entirely proper for a litigation friend such as an IMCA or family member to decline an invitation to act without sufficient security for the legal costs that they incur by so doing.

137. As to the second, the general rule in welfare proceedings is that no costs order will be made.[86] It is possible for the court to depart from this rule where, in particular, the conduct of one of the parties before or during the proceedings is in some way worthy of criticism. It may in some cases be appropriate, for instance, for a litigation friend acting on behalf of P to make an application for all or part of their legal costs be paid by another party. The most obvious case will be where a public authority has failed to bring an application in circumstances where it was clearly necessary that they have should done so (especially where the upshot has been that the litigation friend has ended up having to bring an application on behalf of P).

Example

A local authority brings an application seeking to prevent contact between Ms Haynes (who has severe learning disabilities and lives in a residential care home) and her brother, on the basis of allegation that her brother sexually abused whilst the two of them were on a brief holiday abroad. The brother vigorously denies the allegation. Whilst the court set in motion a mechanism to determine the factual accuracy of the allegation contact is suspended between the two. A specialist in communication with individuals with the learning disability is jointly instructed (at considerable expense) to provide a report to the court as to the nature of

[84] There is another aspect that might appear to come under the same heading, i.e. the reimbursement of the litigation friend for the time spent acting as litigation friend. This raises different issues and is addressed at paragraph 159.
[85] *B v B* [2010] EWHC 543 (Fam); [2012] COPLR 480.
[86] Rule 157 of the Court of Protection Rules 2007.

ambiguous statements made by her. Shortly before a fact-finding hearing listed to determine the accuracy of the allegation, the local authority files a position statement stating that it no longer seeks to rely on the allegation because they are not satisfied that they will be able to establish them. It emerges that the local authority had become aware that her brother had, on the holiday in question, been accompanied by his wife, and at no point had slept in the same room as his sister, as the local authority had previously alleged. Both the brother and the litigation friend for Ms Haynes seek that costs that they had incurred as a result of the fact that the local authority ran and maintained the allegation for several months. That judge finds that, had the local authority investigated the allegations properly, it would have found at the very outset that the brother's wife had been on holiday with Ms Haynes and her brother, and orders that the local authority pay the costs both of the brother and of the litigation friend on behalf of Ms Haynes.

138. One question that is frequently asked is whether a litigation friend is themselves at any risk of being ordered to pay costs. The short answer is that, in theory, they could be joined as a party to the proceedings solely for purposes of being required to pay all or part of the costs of one or more of the other parties.[87] They could also, potentially, be made the subject of a wasted costs order. In practice, however, it is very unlikely that any litigation friend would be ordered to pay all or part of the costs of another party or parties unless their conduct had been extravagantly bad, and had significantly increased the costs of the proceedings to the other parties.

139. So as to attempt to protect themselves against the (remote) possibility that costs will be sought against them, it has become an increasing practice for RPRs and IMCAs in welfare proceedings to make their agreement to act as litigation friend conditional on the giving of an undertaking on the part of the relevant public authority that they will not seek their costs against the RPR/IMCA. It is suggested that this is a useful mechanism by which RPRs/IMCAs can be given reassurance in the discharge of what is an important public function, although it cannot (and would not be seen by the court as) acting as a carte blanche to the RPR/IMCA acting as litigation friend to depart from the proper and proportionate conduct of litigation.

Appeals

140. Any party, or any person affected by a decision of the court, may seek permission to appeal. In broad terms, appeal courts are likely to be reluctant to intervene in 'evaluative' decisions – in particular as to where P's best interests may lie.[88]

141. This Guidance does not cover the position in relation to the appeals, but it should be noted that the general principles set out above in relation to the duties of a litigation friend will apply equally for the purposes of any appeal.

[87] This is confirmed by Paragraph 22 of Practice Direction 17A.

[88] See *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, in which Baroness Hale (at paragraph 42) that, if a judge of the Court of Protection has correctly directed themselves as to the law, an appellate court can only interfere with their decision as to the evaluation of best interests if satisfied if it was wrong.

Confidentiality

142. Welfare proceedings before the Court of Protection are, as a general rule, private.[89] This means that a litigation friend acting on behalf P must be very careful before discussing the details of their work on the case with those who are not directly involved in the proceedings. If in any doubt as to whether it is appropriate to disclose details of the proceedings, it is always prudent to seek the approval of the court in advance.

Damages and declarations

143. The Court of Protection has a jurisdiction to grant:

- a declaration that the ECHR rights of P have been breached;
- a declaration that the ECHR rights of another person who can claim to be a victim have been breached;
- damages under s.8 Human Rights Act 1998 ('HRA 1998') where such are required to afford just satisfaction for either category of breach;[90]
- a declaration under s.4 HRA 1998 that a provision of the MCA 2005 is incompatible with the ECHR. To date, no declarations have been granted (or, indeed, sought, at least in any reported case).

144. If a declaration or damages for a breach of rights under the ECHR is sought, it is necessary that the precise basis for this claim be set out. Practice Direction (PD) 11A, dealing with HRA claims, outlines the relevant procedure at paras 1–3 for making a claim, but in summary the most important requirement is that it is set out as soon as practicable so that the other parties and the court are aware that a specific claim in this regard is being made. It is strongly suggested that it is unlikely to be appropriate for a litigation friend to seek to mount a claim for either a declaration or damages under the HRA 1998 without the benefit of legal representation.

H: When would an appointment of a litigation friend come to an end?

Proceedings come to an end

145. Because a litigation friend is appointed for purposes of a particular set of proceedings, their appointment will come to an end when the final order is made. In the normal course of events, this will cause no difficulties, but one potential complication litigation friends need to be careful of is in cases relating to deprivation of liberty. If the court has – itself – authorised a deprivation of P's liberty (i.e. by making an order under s.16(2)(a) MCA 2005), then the court will need to review the deprivation of their liberty if it is to extend for any period of time. The courts have held that such

[89] Serious medical treatment cases will usually be held in public, but subject to important restrictions upon what can be reported; P and P's family will almost invariably be anonymised.
[90] See YA(F) v A local authority and others [2010] EWHC 2770 (COP).

reviews can be yearly unless circumstances require a shorter period.[91] In any case in which there is to such a review, the litigation friend will need to be careful that the 'final' order made in the main proceedings provides for:

- how they are to be involved in the review process, including how and when they are to receive information about P;
- how they are to be paid for their services, and how any legal representatives they may wish to instruct are to be paid;
- if they are not to be further involved (for instance because the litigation friend does not consider that they can properly continue to be involved), what arrangements will be made for ensuring that a litigation friend is identified who can act for P.

P ceases to lack capacity

146. P (or their litigation friend or any other party to the proceedings) can apply to discharge the appointment of P's litigation friend if P ceases to lack capacity to conduct the proceedings, but continues to lack capacity in relation to the matter or matters to which the application relates. If P regains capacity in relation to the matter or matters to which the application relates, then the court will have no jurisdiction under the MCA 2005 and an application should be made (supported by evidence as to P's capacity in the relevant regard(s)) to bring the proceedings to come to an end.

147. An application to discharge a litigation friend acting on behalf of P must be supported by evidence. Examples of applications made by or on behalf of P to discharge a litigation friend appointed to act on their behalf are rare. Indeed, at the time of writing this Guidance, there had been only one reported case[92] where the Official Solicitor applied successfully to be discharged on the basis of expert evidence that P had litigation capacity. If an application is successfully made, the proceedings will continue and P will be able either directly to instruct solicitors or theoretically (although it is unlikely that this will occur in practice) to conduct the proceedings themselves; in any event, the litigation friend previously instructed would cease to play any function in the proceedings.[93]

148. Save in a case where it is entirely clear that P can never have litigation capacity because of the severity of their underlying disability, the litigation friend acting on P's behalf should, nonetheless, be very astute to keep P's capacity to conduct the litigation under review and, if it appears that they may have regained litigation capacity, take immediate steps to bring matters before the court in short order.

Protected party ceases to lack capacity

149. Where an adult protected party ceases to lack capacity to conduct the litigation, an application can

[91] See *Re X* [2014] EWCOP 25 at paragraph 22.
[92] *Re SB* [2013] EWHC 1417 (COP), a medical treatment case.
[93] If they were also (for instance) P's IMCA, the fact that they were no longer P's litigation friend would not necessarily affect that appointment.

be made for the litigation friend's order of appointment to be discharged akin to that discussed above in respect of P themselves. Such application can be made by the protected party, their litigation friend or any other party to the proceedings. Such application must be supported by evidence that the former protected party now has the requisite capacity. Again, it is suggested that a litigation friend acting for a protected party must be careful to ensure that if they have reason to consider that the party may no longer lack litigation capacity, they take steps to bring this before the court as soon as reasonably practicable.

Other circumstances

150. Any litigation friend can also be removed by the court:

- on their own application (if, for instance, P is no longer eligible for public funding and the litigation friend cannot continue to discharge their functions without such funding to pay for legal advice and representation);
- on the application of another party; or
- of the court's own motion.

151. There is no guidance as to when a litigation friend would be likely to be removed by the court against their will. It is suggested, though, that it would not solely be where the litigation friend has acted either negligently or in bad faith, but also where – perhaps through misguided zeal – they have or are proposing to take a course of action 'manifestly contrary' to the best interests of the person on whose behalf they act.[94]

152. In any case where a litigation friend's appointment is terminated, the court will strive, if at all possible, to appoint a suitable person to act as replacement litigation friend so that the proceedings can continue in an uninterrupted fashion.

I: Practicalities

Court fees

153. There are a number of fees payable during proceedings before the Court of Protection by (in general) the person or body bringing the application.[95] Depending upon their means, it may well be the case that P is eligible for a remission of the fees – in other words an exemption from the requirement to pay the fees. The fees remission system is somewhat complex[96] but in very broad terms eligibility depends upon two tests: (a) a disposable capital test; and (b) a gross monthly income test. Different rules apply depending on whether the proceedings relate to P's property and affairs or health and welfare (or are mixed). Guidance as to the fees payable and to the remissions

[94] See, by analogy, *Re A (Conjoined Twins: Medical Treatment) (No.2)* [2001] 1 FLR 267.
[95] Note: there may well be applications brought by other parties during the currency of proceedings, in which case there will be a fee payable by the person making that application.
[96] It is governed by the Courts and Tribunals Fee Remissions Order 2013 (SI 2302/2013).

available can be found in the COP44 leaflet and the leaflet "EX160A Court and Tribunal Fees – do I have to pay them?"

Funding

154. It is important to outline some of the key principles relating to public funding (legal aid). The topic of legal aid is complex, and it is one of the areas in which any litigation friend would be looking for considerable assistance from any solicitors who they instruct.[97]

155. In very brief terms, however, in order to qualify for any form of legal aid at all, the following criteria have to be met.

- The case must be within scope of legal aid;
- The client (which will be P or the protected party, not the litigation friend) must meet the 'merits test' as to whether legal aid is warranted;
- With one exception set out below, the client must meet the 'means test,' in other words be financially eligible for legal aid;
- The client must produce the relevant evidence of their means (benefits, bank statements etc.) to satisfy the requirements of the Legal Aid Agency.

156. In due course, there may well also be a residence test (i.e. a requirement that those seeking legal aid must demonstrate that they have been lawfully resident in the UK, Channel Islands, the Isle of Man or British overseas territory for 12 months). At the time of writing this Guidance, precisely when and how this test will be introduced and will apply is not clear, but the Government has stated that the test will not apply in relation to issues involving deprivation of liberty arising under s.4B MCA 2005 (deprivation of liberty necessary for life-sustaining treatment); an order under s16(2)(a) MCA 2005 (a personal welfare order) or in relation to those deprived of their liberty under the DOLS regime.

157. Legal aid is, in principle, available to fund advocacy services in the Court of Protection if the case concerns at least one of the following issues:

(a) a person's right to life;

(b) a person's liberty or physical safety;

(c) a person's medical treatment (within the meaning of the Mental Health Act 1983);

(d) a person's capacity to marry, to enter into a civil partnership or to enter into sexual relations; or

[97] See in this regard also, *The Court of Protection Handbook*, chapter 6, upon which this section draws.

(e) a person's right to family life[98]

158. In all cases for which legal aid is in principle available to fund advocacy services in the Court of Protection, such legal aid will not, in fact, be available if the person does not satisfy the means test. The only exception to this is where the person is deprived of their liberty under the DOLS regime and there is an appeal against the authorisation under s21A Mental Capacity Act 2005. In this case the person under the authorisation can obtain legal aid without their means being assessed, and so can their RPR.[99]

159. It is very important to stress that public funding is funding for the costs of the lawyers instructed by the litigation friend. It is not funding for the time spent by the litigation friend in acting as litigation friend. Precisely how a professional litigation friend (i.e. one other than a family member or carer who is undertaking the task voluntarily) will be compensated for this will vary from case to case. In the case of litigation friends who work for commissioned advocacy services, payment will depend upon the commissioning arrangements made with the relevant commissioning body (most usually the local authority). Although local authorities do not get ring-fenced funding from central government in this regard, it is important to note in relation to IMCAs that:

- one of their functions is to challenge and change non-MCA compliant decisions and practices;

- IMCAs appointed under s.39D MCA 2005 are appointed to provide support to a person or their unpaid RPR in relation to their rights where a deprivation of liberty has been authorised. As part of this role IMCAs not only have a power, but an active duty to help people exercise their rights to challenge a detention if that is what they want to do;

- the Social Care Institute of Excellence (SCIE) Guide 42: 'Good practice guidance in accessing the Court of Protection'[100] endorsed by ADASS explicitly states that IMCAs can act as litigation friend if necessary to mount challenges; and

- SCIE's Guide 31: 'Good practice guidance for the commissioning and monitoring of the Independent Mental Capacity Advocate services'[101] notes that "[e]*nsuring IMCA services have the resources to make applications is a key aspect of supporting the independence of the service*."[102] It also details the proposed budget of IMCA contracts to include money for legal costs thus:[103]

> *When reviewing commissioning arrangements local authorities may wish to consider the following:*

[98] Part 3 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (often known as 'LASPO'). Funding for 'full representation' will only be granted if the Court of Protection has ordered or is likely to order an oral hearing and it is necessary for the individual to be provided with full representation in the proceedings (Regulation 52 (3) of the Civil Legal Aid (Merits Criteria) Regulations (SI 2013/104).
[99] Regulation 5(1)(g) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations (SI 2013/480).
[100] http://www.scie.org.uk/publications/guides/guide42/files/guide42.pdf
[101] http://www.scie.org.uk/publications/guides/guide31/files/guide31.pdf
[102] Page 9.
[103] Page 10.

- *Identifying a proportion of the IMCA funding to be set aside for the service to pay for any legal costs directly associated with the IMCA role.*

- *Making a contractual agreement that the local authority will not seek to recover costs from the IMCA provider if legal action is taken involving the local authority.*

- *Seeking similar agreements from local health trusts.*

160. In its report upon the sixth year of the Independent Mental Capacity Advocacy (IMCA) Service: 2012/2013, the Department of Health specifically outlined best practice in relation to commissioning of IMCA services so as to allow IMCAs to act as litigation friends as follows:[104]

> *Best practice in commissioning has involved:*
>
> *(a) local authorities setting aside a resource pot for the role of litigation friend, which can be drawn on when necessary;*
>
> *(b) local authorities indemnifying the IMCA organisation for reasonable costs incurred in the course of the Court proceedings. For example where the Court commissions a specialist independent report, the costs of these are picked up by the local authority, in the same way as if they had taken the case to court themselves.*
>
> *If the Courts are increasingly requiring the role of the Litigation Friend to be carried out by IMCAs, then this needs to be recognised within commissioning contracts.*

161. If P/the protected party on whose behalf the litigation friend is to act is not eligible for public funding, then it will be necessary for an order to be made at the earliest possible stage in the proceedings providing for the legal costs incurred by the litigation friend to be met out of P's assets. This will invariably be accompanied by an order that these costs will be the subject of detailed assessment at the end of the proceedings – in other words, a process to scrutinise whether all the costs have been properly and proportionately incurred. Depending upon the size of P's assets, it might in such a case also be appropriate for the court to declare that it is in P's best interests for a professional litigation friend to be compensated for their time spent in acting as such; this, would, however, be something that the court would want to scrutinise with considerable care, and the court would not be willing to give any litigation friend free rein in this regard.

162. In some cases, it may be possible to find a solicitor who is willing to act *pro bono* – i.e. without charge. As discussed at paragraph 58 above, this is a question that should be asked in the initial consultation if it appears that P may not be financially eligible for legal aid.

163. If a 'professional' litigation friend[105] chooses not to instruct solicitors for purposes of conducting the litigation, then the litigation friend will need to be aware that they will not necessarily be able to recover all the costs of their time spent carrying out their 'legal' tasks:[106]

[104] Page 49.
[105] Other than the Official Solicitor, for whom the Court of Protection Rules make special provision.

- There is no guidance in the Court of Protection Rules or associated Practice Directions as to the basis upon which a litigation friend is entitled to seek reimbursement for that element of their services which – in essence – are those which they are providing in place of a lawyer. However, in ordinary civil proceedings, if the successful party has acted in person (as a litigation friend would effectively be doing in such a case as that under discussion here), then they will be awarded a fixed hourly rate of £18/hour if they win their case, unless they can prove that they have incurred a financial loss in conducting the action; any costs that might be awarded to a litigant in person also cannot exceed two-thirds of what could be claimed by a professional lawyer;[107]

- Applying these principles would suggest that a person who acts both as litigation friend and (in effect) P's solicitor for purposes of conducting the litigation may well face difficulties persuading a court to order that they are entitled to recover the full cost of their time spent acting as both litigation friend and (in effect) P's solicitor. There is, though, nothing to stop an IMCA who has been asked by a public authority to accept an invitation to act so as to allow that authority's application to proceed to negotiate a more generous rate as a condition of acting.

164. Finally, it should be noted that there will always be room for creative funding solutions to be explored so as to allow advocates to act on behalf of P, and to meet such legal costs as may be necessary. All such solutions, however, must have the endorsement of the court[108] to the extent that they involve the disbursement of any of P's own money.

Employment arrangements and professional indemnity insurance

165. Whilst this guidance cannot address the precise arrangements that advocates may make in order to discharge their responsibilities as litigation friends, it is important to note the following further practical matters that need to be considered:

- The time commitment. The precise time commitment that being a litigation friend will require will vary dramatically from case to case, depending upon the complexity of the proceedings. However, in informal research conducted for purposes of producing this Guidance, IMCAs and/or other advocates who had carried out the role of litigation friend reported having spent anything from 40 to 161 hours on their cases (in the latter case, over a period of some 9 months). Any advocate (whether appointed personally or as the 'lead' individual on behalf of an IMCA organisation) must make sure that they have in place suitable arrangements with their employers as regards the time that they will be spending upon their role as litigation friend. It is also important that advocates record the time spent upon their work as litigation friend carefully for purposes of contract monitoring;

[106] It is very unlikely indeed that a family member or friend acting as a litigation friend on a voluntary basis would be able to claim any recompense for their time.
[107] Civil Procedure Rules r 46.5 and Practice Direction 46.
[108] Or an attorney/deputy with appropriate authority.

- It may be possible to obtain professional indemnity insurance to cover a professional litigation friend for purposes of discharging their functions. Precisely what form this cover will take will depend upon whether the litigation friend is acting in a personal capacity or if (as discussed at paragraph 42 above may be possible) on behalf of their IMCA/RPR organisation. If the litigation friend is acting in a personal capacity but is employed by an IMCA/RPR organisation, it would still be worth checking whether (a) the employer has a relevant professional indemnity insurance policy; and (b) whether the insurer would be willing to extend that cover to include the activities of the individual IMCA/RPR acting as litigation friend. A litigation friend acting in a personal capacity who wishes to obtain professional indemnity insurance could also contact an advocacy provider in the area to ask which professional indemnity insurer they use and whether that insurer provides insurance in relation to litigation friend services.

Case study: Paul

At the age of 17 Paul had attempted to hang himself following a period of alcohol and drug fuelled chaos. Paul was left with hypoxic brain damage which meant that he was confined to a wheelchair, required full assistance with all personal care, struggled to communicate or understand what was being said to him and suffered from periods of depression.

Whilst at the unit Paul received ad hoc visits from family members – the care staff were particularly concerned about Paul's vulnerability and they believed that his uncle was taking money from Paul and causing him to become anxious and distressed during visits. Eventually the home banned the uncle from visiting and applied for a DoLS authorisation as they believed this was a significant restriction on Paul's family life.

An IMCA was appointed to represent Paul during the assessment process and then appointed as Paul's representative whilst the authorisation was in place. The IMCA got to know Paul well and learnt how best to communicate with Paul. It became clear that, whilst Paul struggled to articulate his views and wishes, he missed the contact he had with his family and his uncle in particular. The other members of the extended family had also stopped visiting and Paul was feeling increasingly isolated. The managing authority was not willing to lift the ban and the ongoing safeguarding investigation failed to come up with any plans that would facilitate contact safely. The IMCA made representations several times on Paul's behalf and eventually the local authority agreed to take the case to the Court of Protection.

The IMCA attended the first hearing and discussion took place regarding representation for Paul. An application had been made to the Official Solicitor but there was a backlog of cases and it would take several months before he could consider the case. The Judge asked the IMCA if she would be prepared to act as Litigation Friend – she agreed in principle but needed to seek clarification that the local authority would be willing to fund this role as it fell outside the contract the advocacy service had with the LA. This was agreed shortly afterwards and the IMCA was appointed as Paul's Litigation Friend.

Case study Paul (cont)

The IMCA, now acting as Litigation Friend, instructed a solicitor to act for Paul – this solicitor was able to guide the IMCA through the ongoing process including the reams of forms that were required to be completed in order to access legal aid. The IMCA introduced the solicitor to Paul and spent time facilitating communication between them. Over time, the IMCA was able to help Paul articulate his views and wishes in order to allow the solicitor to construct a position statement. In the meantime Paul's cousin, who was currently serving a prison sentence for armed robbery, had requested to be joined as a party as he felt the uncle, his father, was being unfairly treated. During the first hearing the cousin was able to make representation via video link. It was agreed at this hearing that a further capacity assessment would be undertaken and that written statements would be required by the parties. At each stage the IMCA would communicate what was happening to Paul and ensure he had an opportunity to comment.

The independent capacity assessment was undertaken in the period between hearings – the assessor findings were that, whilst Paul had significant impairment he did have the ability to understand the perceived risks his uncle posed and weigh up the decision as to whether he should see his uncle or not. At the next hearing a consent order was granted on the basis that Paul had capacity and all parties were asked to confirm agreement to this.

Following the hearing there were some difficulties in communicating with the cousin who was required to confirm agreement with the consent order – this was delaying the process. The applicant's solicitor requested that the IMCA visit the cousin in prison and explain the situation – the IMCA did so and was able to get the cousin to confirm his agreement with the order.

Whilst Paul never had a great deal of contact with his uncle or extended family he had the freedom to do so if he chose to. This whole process also made professionals involved in Paul's life think differently about Paul's ability to make decisions – Paul now lives a relatively full and active life in a supported environment where he is able to enjoy the activities of any 21 year old.

Throughout this process the IMCA visited Paul around once a fortnight – the role of litigation friend took approximately 52 hours of the IMCAs time all of which was funded by the local authority. The IMCA reports that they did not feel compromised by the funding arrangement.

J: Frequently asked questions

166. What follows are some of the most frequently asked questions that have been asked during the course of conducting informal research for purposes of writing this Guidance. The answers are summary only and are not a substitute for the longer discussions in the relevant parts of the Guidance.

Can I be a litigation friend if I have been P's IMCA?

167. Yes. In fact, IMCAs are in some ways uniquely qualified to act as litigation friends, and an IMCA who has been instructed previously in relation to P will have the advantage of knowing P and being in a stronger position to ensure that their voice is properly before the court. It is important to remember, however, that an IMCA and a litigation friend are different tasks and it would be difficult to carry on being an IMCA and be a litigation friend at the same time.

Is a litigation friend P's advocate?

168. Not precisely. Whilst a litigation friend has a vital role to play in ensuring that P's voice is before the court, the litigation friend must ultimately make their own decision as to what arguments to advance on P's behalf to the court both as to P's capacity and to their best interests.

Do I have to instruct lawyers, and how do I find a lawyer?

169. As the law stands at present, a litigation friend does not have to instruct a solicitor to conduct proceedings before the Court of Protection in P's name, but will either have to obtain the permission of the court to address the court or to instruct a lawyer to do so on their behalf. Finding a lawyer in part requires research to identify potential firms, and in part requires asking the right questions of the potential lawyer to ensure that the litigation friend is confident that the lawyer has the right skills and experience.

Does the lawyer make the decisions?

170. No. The litigation friend stands in the shoes of the person without capacity, and for purposes of making decisions is the client. The lawyer can give expert advice as to the proceedings and to the potential options open to pursue, but it is ultimately for the litigation friend to take the decisions as to what instructions to give. The most effective representation of P will involve team-work between the litigation friend, the solicitor and (if instructed) the barrister.

Can I take a case to the Court of Protection in P's name, or do I have to wait until someone else does?

171. Anyone can, in appropriate circumstances, take a case to court in P's name if they satisfy the suitability criteria to put themselves forward as P's litigation friend. Indeed, it is an extremely important part of the role both of IMCAs and RPRs to take matters to Court of Protection on P's behalf where this is necessary to promote and secure P's rights.

How big a commitment is being a litigation friend likely to be?

172. It is very difficult to give a precise estimate because each case is different. However, a litigation friend, especially a litigation friend for P, plays an extremely important part in the proceedings, and must make sure that they have allowed sufficient time for them to take all the necessary steps to ensure that they are able properly to be able to discharge their functions.

Can I get legal aid?

173. Legal aid (or public funding to give it its proper name) is – in principle – potentially available for many of the cases that come before the Court of Protection concerning health and welfare. In almost all cases, it will be subject to a means test – but it is important to remember that it is the means of P, not of the litigation friend, that are being tested.

Am I at risk of having to pay anyone's costs if I act as litigation friend?

174. In theory, it is possible that a litigation friend could themselves be ordered to pay the costs of another party to proceedings before the Court of Protection. In practice, it is extremely unlikely that this will be the case if the litigation friend has sought to conduct the litigation diligently and proportionately.

K: Useful sources of information

Free websites

175. Finding out about the law:

- www.courtofprotectionhandbook.comL: a free site maintained by Alex Ruck Keene and Sophy Miles that accompanies the Legal Action Group book of the same name, and includes all the COP forms and downloadable orders (in Word form) to cover most situations

- www.copcasesonline.com: site maintained by Thirty Nine Essex Street Chambers with searchable database of cases relating to mental capacity law, as well as back issues of newsletter (available – free – on a monthly basis at marketing@39essex.com)

- www.mclap.org.uk: a website maintained by Alex Ruck Keene dedicated to improving understanding of and practice in the field of mental capacity law, including articles, papers and other resources on the MCA 2005, and discussion forums

- www.mentalhealthlawonline.co.uk: an extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as the ability to sign up for a (free) discussion email list.

- www.scie.org.uk: Social Care Institute of Excellence, including good practice guidance in a number of areas relating to mental capacity and related law as well as a guide (Guide 42) to accessing the Court of Protection

- http://courtguides.wordpress.com: a basic guide to the Court of Protection for non-lawyers written by Victoria Butler-Cole, a barrister at Thirty Nine Essex Street, and including a very useful glossary of the most commonly encountered terms

- www.bailii.org: British and Irish Legal Information Institute: transcripts of judgments including increasing numbers of decisions of the Court of Protection

- www.gov.uk/apply-to-the-court-of-protection: contains all the Court of Protection forms and current details as to fees

- www.judiciary.gov.uk/publications-and-reports/practice-directions/cop-practice-directions: contains Practice Directions and Court of Protection Rules

176. Finding a lawyer:

- www.lawsociety.org.uk: Law Society website, which includes ability to search for solicitor by area of law, including 'mental health and incapacity law'

- www.mhla.co.uk: Mental Health Lawyers Association website including list of members (and associate members) practising in the field of mental health and, increasingly, mental capacity law

- www.barcouncil.org.uk: The Bar Council maintains a list of all barristers, and a further list of those offering public access, on its website There is also a dedicated telephone number for questions about public access: 020 7 611 1472.

- www.chambersandpartners.com: legal directory offering information about leading solicitors and barristers, including those specialising in Court of Protection work.

- www.legal500.com: Legal directory offering information about leading solicitors and barristers, including those specialising in Court of Protection work.

- www.solicitorsfortheelderly.com/: SFE is an independent, national organisation of lawyers, such as solicitors, barristers, and legal executives who provide specialist legal advice for older and vulnerable people, their families and carers. Their website includes a 'find a lawyer' function.

Useful books

177. Practice and procedure:

- Alex Ruck Keene, Kate Edwards, Professor Anselm Eldergill, Stephen Knafler QC and Sophy Miles, *The Court of Protection Handbook: A User's Guide* (Legal Action Group, 2014);
- Gordon Ashton, Penny Letts, Marc Marin, Martin Terrell and Alex Ruck Keene, *Court of Protection Practice* (annual, Jordans);
- Denzil Lush and David Rees, consultant editors, *Heywood & Massey: Court of Protection Practice* (loose-leaf, Sweet & Maxwell)

178. Mental capacity law generally:

- Gordon Ashton, Penny Letts, Marc Marin, Martin Terrell and Alex Ruck Keene, Mental Capacity: Law and Practice (2nd edition, 2012)
- Richard Jones, *Mental Capacity Act Manual* (5th edition, Sweet & Maxwell 2012)
- Penny Letts, general editor, *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (3rd edition, British Medical Association and Law Society, 2009)

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Appendix A: Checklists

Advocate considering bringing application on behalf of P[109]

1. Consider whether P has the capacity to conduct the proceedings.

2. (If a professional advocate, e.g. IMCA), identify basis upon which the work to be done as litigation friend is to be funded.

3. Identify the issues that may require resolution by the Court of Protection – is the issue actually one for that court?

4. Identify whether other steps may be possible to resolve issues without application to the Court of Protection – e.g. Alternative Dispute Resolution.

5. (Where relevant) take – and document – appropriate steps to require public authority to bring the application.

6. If those steps have not succeeded, contact Official Solicitor's office to see whether Official Solicitor would apply on P's behalf as litigation friend.

7. Consider whether necessary to instruct solicitors:

    a. make use (where possible) of any initial free consultation offered by appropriately qualified solicitors' firm;

    b. confirm whether P is eligible for public funding (legal aid);

    c. if P is not eligible for public funding, need to consider (with legal advice) steps necessary to secure mechanism for legal costs to be met out of P's assets

8. Consider, with care, whether advocate can fulfil the requirements set out in the COP22 certificate of suitability.

9. If P eligible for public funding, ensure that solicitors instructed have taken appropriate steps to apply for public funding.

10. Investigate whether P eligible for any fee remission and take appropriate steps when applying in P's name for such exemption.

11. If acting without solicitors, complete necessary COP forms (in a welfare case, COP1 and COP1B and, if necessary, a COP9 witness statement), and take steps to have COP3 form completed (addressing P's lack of capacity). Complete also the COP22 certificate of suitability. If instructing solicitors, ensure that solicitors have properly explained the contents of the forms and (in particular) the relief sought from the court – i.e. the orders and/or declarations.

[109] These are no substitute for reading the body of this Guidance. In these Checklists, again, 'P' is used as shorthand even though, strictly, the definition only applies to a person in respect of whom an application has been brought.

12. Make clear why the application is brought in P's name (as opposed, for instance, by the IMCA personally) and what contact has been had with the Official Solicitor's office to investigate whether the Official Solicitor will act on P's behalf as applicant.

13. If advocate is bringing application solely for purposes of ensuring that a matter comes to the attention of the court, make this very clear in the application.

14. Once matter is before the court, ensure that all stages the focus is upon (1) the actual issues that need to be resolved; and (2) that those procedural steps – and only those steps – required to resolve those issues are taken.

Advocate invited to consider acting as litigation friend for P in proceedings brought by another person/body

1. Consider whether P has the capacity to conduct the proceedings.

2. Consider whether P (If a professional advocate, e.g. IMCA), identify basis upon which the work to be done as litigation friend is to be funded:

    a. If this is to be by way of funding from another party (e.g. local authority applicant), take appropriate steps to secure confirmation of this in writing;

    b. If this is to be by way of funding from P's own assets, take steps to confirm with the court whether this would meet with approval, noting that it would be unusual for the court to approve payment for the costs of acting as litigation friend for P's own assets.

3. Consider whether necessary to instruct solicitors:

    a. make use (where possible) of any initial free consultation offered by appropriately qualified solicitors' firm;

    b. confirm whether P is eligible for public funding (legal aid);

    c. if P is not eligible for public funding, need to consider (with legal advice) steps necessary to secure mechanism for legal costs to be met either by another party to the proceedings or out of P's assets.

4. Consider, with care, whether advocate can fulfil the requirements set out in the COP22 certificate of suitability.

5. (If appropriate) seek undertaking from applicant that they will not seek any legal costs against the litigation friend personally if they were to accept the appointment.

6. Having consented to invitation and having been appointed, ensure that all stages the focus is upon (1) the actual issues that need to be resolved; and (2) that those procedural steps – and only those steps – required to resolve those issues are taken.

Appendix B: Precedent position statement

IN THE COURT OF PROTECTION

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

IN THE MATTER OF JOHN SMITH

B E T W E E N:

ANY COUNTY COUNCIL

Applicant

-and-

JOHN SMITH
(P, by his litigation friend, Judith Jones)

First Respondent

-and-

JANE SMITH

Second Respondent

POSITION STATEMENT OF JOHN SMITH (BY HIS LITIGATION FRIEND, JUDITH WILLIAMS) FOR DIRECTIONS HEARING 2 APRIL 2015

References in square brackets are to the page numbers in the bundle before the court

Essential re-reading:

(i) Order of District Judge Bloggs 1 March 2015 [B20-4]
(ii) Report of Dr Williams of 1 February 2015 [G1-9]
(iii) Witness statement of Ms Cavanagh, Mr Smith's social worker, dated 15 February 2015 [E1-15]

A. Introduction and dramatis personae[110]

1. This position statement is filed on behalf of John Smith (acting by his litigation friend, Judith Jones) ahead of the directions hearing listed before District Judge Jones on 2 April 2015. These proceedings concern Mr Smith, who is 33 years old. The medical report of Dr Williams of 1 February 2015 [G1-9]

[110] Note: it is usual for position statements and other documents prepared for the purposes of court proceedings to be double-spaced.

concludes that, as a result of an Acquired Brain Injury sustained on 1 December 2013, he does not have capacity to decide where he should live or as to his care arrangements. Dr Williams also considers that Mr Smith lacks the capacity to make decisions as to contact with his wife, Jane Smith (the Second Respondent), with whom Mr Smith is currently residing.

2. Any County Council has brought proceedings for (1) declarations as to Mr Smith's capacity to make decisions about his residence and care arrangements and as to contact with his wife; and (2) decisions/declarations as to where Mr Smith should live and receive care, and as future contact with his wife. The proceedings were initiated as a result of concerns as to quality of care being provided to Mr Smith by his wife, detailed in the statement of Ms Cavanagh at [**E1-15**], which have led the Council to consider that Mr Smith's interests are best served by his moving into a specialist rehabilitation unit in Anytown.

3. Permission was granted to the Council to bring these proceedings by order of District Judge Bloggs on 1 March 2015, at which point John Smith, 'P', was joined as a party and – Judith Jones (his IMCA) having consented – Ms Jones appointed to act as his litigation friend. As at 1 March 2015, Mrs Smith did not have legal representation but indicated that she was intending to seek such representation. District Judge Bloggs therefore made no substantive directions at the hearing on 1 March 2015, instead adjourning matters until the first open date after 1 April 2015 to allow Mrs Smith to obtain such representation.

B. Issues for this hearing and Mr Smith's position in respect of each

4. At this hearing, the Court will need to consider:

   (1) What, if any, further evidence as to capacity is required in addition to the report of Dr Williams. Having considered the medical evidence of Dr Williams, Ms Jones submits that there is no requirement for any further evidence, because it is clear upon the basis of that evidence that Mr Smith lacks capacity in all material domains, and that lack of capacity is permanent. Ms Jones does not understand that either the Council or Mrs Smith disagrees.

(2) What, if any, evidence is required as to Mr Smith's best interests. Ms Jones submits that, given the draconian nature of the interference with the family life of Mr and Mrs Smith, the court will need particularly detailed evidence as to where Mr Smith's best interests lie. She will invite the court to agree to the appointment (on a joint basis with the Council and Mrs Smith) of an independent social worker to report upon his best interests in this regard, and will provide to the court at the hearing the CVs of two social workers who can report within a suitably short time-frame.

Ms Jones would also emphasise that it is clear both from the evidence of Dr Williams, the other evidence before the court, and Ms Jones' own interactions with Mr Smith, that, notwithstanding his lack of capacity to take the material decisions, Mr Smith nonetheless retains the ability to communicate clear wishes and feelings in relation to both his residence and contact with his wife. Ms Jones submits that arrangements should be made to allow the court to hear directly from Mr Smith at the final hearing of this matter, whether by bringing Mr Smith to court or – potentially – making arrangements for the judge to visit Mr Smith.

(3) Further evidence. Mrs Smith has put in a detailed witness statement addressing matters raised by Ms Cavanagh; Ms Jones understands that the Council would wish the chance to file a short supplemental statement responding to certain points in Mrs Smith's statement. Ms Jones suggests that it would be sensible for this to be done prior to the report of any independent social work expert (if such is permitted) as this will allow the expert to have the complete picture before them.

(4) Further hearings. It is clear from the witness statement of Mrs Smith that she does not substantially dispute the factual matters outlined in the statement of Ms Cavanagh, but rather would invite the court to put a different interpretation upon those matters than those set out in Ms Cavanagh's statement. In the circumstances, Ms Jones would submit that there is no requirement that a separate fact-finding hearing be listed, but rather that the court can proceed to list a final hearing to determine where Mr Smith's best interests lie. Ms Jones would envisage that it will be necessary for such a hearing to be listed for 2 days in order to allow sufficient time for the giving of evidence, the making of submissions, and delivery of judgment. As before, Ms Jones will invite the court to make arrangements to allow the court to hear directly from Mr Smith.

C. Directions order

5. A draft directions order is attached.

JUDITH JONES
30 March 2015

Appendix C: The balance sheet

Note: whilst there is no formal requirement that either the litigation friend for P prepare a 'balance sheet,'[111] or the court adopt a balance sheet approach when identifying where P's best interests may lie, they provide a useful way in which to ensure that all the material considerations have been identified. It can often be useful for P's litigation friend to prepare a balance sheet in their statement for the final hearing (assuming that the main issue at that hearing is P's best interests as opposed to their capacity to take a decision or decisions), which can (a) help explain why they advance the case that they do; and (b) help provide a framework for the judge in due course to determine the issues.

To prepare a best interests balance sheet:

- Identify the options
- Enter all the actual and potential benefits, risks, advantages and disadvantages you think are relevant, and estimate how likely they are to happen
- Then underline the factors that you think are particularly important
- If there is one factor which you think is of overriding importance, put an asterisk next to it as well as underlining it
- Using the best interests balance sheet, assess which option is in P's best interests

Option A			
Points in favour	Certainty	Points against	Certainty
Option B			
Points in favour	Certainty	Points against	Certainty

[111] Following the well-established 'balance sheet' approach identified by Thorpe LJ in *Re A* [2000] 1 FLR 549 at 560: "*There can be no doubt in my mind that the evaluation of best interests is akin to a welfare appraisal. … Pending the enactment of a checklist or other statutory direction it seems to me that the first instance judge with the responsibility to make an evaluation of the best interests of a claimant lacking capacity should draw up a balance sheet. The first entry should be of any factor or factors of actual benefit. In the present case the instance would be the acquisition of foolproof contraception. Then on the other sheet the judge should write any counterbalancing dis-benefits to the applicant. An obvious instance in this case would be the apprehension, the risk and the discomfort inherent in the operation. Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously, only if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant*.