

JUDICIAL VISITS TO ‘P’

Introduction

1. This short practical guidance is intended to provide, hopefully helpful, suggestions as to how the Court and practitioners might ensure that meetings between the Judge and P, during proceedings, are conducted most effectively and enhance the participation of P. Earlier guidance was issued on the 14th November 2016, by Charles J, as Vice President of the Court. That document was primarily directed towards Health and Welfare cases and provided some additional assistance to participation of P in Property and Affairs cases. It did not seek to address meetings between the Judge and P in Serious Medical Treatment (SMT) cases. In principle, there should be no reason why the approach in SMT cases should differ from other cases. This document is intended to supplement, not to replace the earlier guidance. As the two require to be read together, and for convenience of access, I propose to reissue the 2016 guidance. I would add only one caveat. Charles J did not and could not have anticipated the wholesale migration to video conferencing platforms that has characterised every aspect of professional and indeed private life in the last 20 months. His guidance should be read with these developments in mind.
2. At the time of Charles J’s guidance, visits by Tier 3 may have been less common, though there are certainly a significant number of reported cases where this has occurred. In many Tier 3 cases the Court will be concerned with individuals in a compromised state of consciousness. Where P was unlikely to be conscious or unable to communicate effectively or at all (and where there were no available tools or strategies to promote this) a visit by the Judge was generally regarded as unlikely to yield any forensic value and perhaps even cause avoidable delay. The good sense of this is self-evident. Beyond this, it is unnecessary to say more.
3. During the course of the pandemic, the Court of Protection has conducted proceedings ‘remotely’ and in a manner which, whilst not a substitute for an attended hearing, is widely agreed to have been effective. Perhaps one of the most significant developments has been the realisation that the technology can be deployed to incorporate P into the court process in a more creative and flexible way than had hitherto been realised. Thus, Judges have made remote visits to Care Homes, Intensive Care Units, private homes, and a variety of other venues where it has been possible to meet with P. Additionally, P has frequently been able to attend remote hearings where attendance in a court room would not have been

possible. The increased use of technology has undoubtedly made remotely conducted judicial visits to P, in SMT cases, far more achievable than was previously the case.

4. A decision to visit P, either remotely or in person, will always be a matter for the individual Judge to determine. The guidance below is suggestive only. Neither is it intended to be a comprehensive checklist of the matters which need to be considered. It is not in any way to be taken as an indication that judicial visits will ordinarily be necessary. In short, it is not constructed to be prescriptive. The Court of Protection is a highly fact-specific jurisdiction, its central philosophy which emphasises the individual, is resistant to rigid or prescriptive guidance
5. Many SMT cases will require an urgent hearing, Counsel may be instructed on very short notice and a Judge will have been allocated late in the day. Detailed consideration is unlikely to have been given to the possibility of P meeting the Judge. Nonetheless, thought should always focus on whether it is likely to be possible and/or potentially productive. In rare instances, a judicial visit may simply be driven by respect for P's dignity. Family members are sometimes eager for a Judge to see P even where there is no easily identifiable purpose. Sometimes, it will be neither more nor less than a signal of respect, which may enable family members to come to terms with a grave decision.

Principles

6. The principles which will invariably apply to judicial visits are identified below. Again, the list is non-exhaustive:
 - I. A judge meeting with P can achieve a number of important objectives, including (where P lacks capacity) their participation in 'best interests' decision-making, as required by s.4(4) Mental Capacity Act 2005. Which provides:

*(4) He **must**, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*

It is important to emphasise the mandatory nature of this obligation.

- II. A decision to meet P is one which must be taken by the judge, having listened to any representations made on behalf of the parties. In particular, there should be discussion directed towards identifying a clear understanding, of the scope and ambit of the visit.
- III. However, it is in the nature of such visits that the parameters may become unsettled or expanded by events and exchanges. It is, important to emphasise that:

- i. a judge meeting P will not be conducting a formal evidence-gathering exercise;
- ii. a visit may serve further to highlight aspects of the evidence that the Judge has already heard, in a way which reinforces oral evidence given by either the experts or family members;
- iii. a visit may sometimes lead the Judge to make further enquiries of the parties, arising from any observations during the visit;
- iv. at any visit the Judge **must** be accompanied, usually, by the Official Solicitor or her representative (at Tier 1 and 2 this will usually be the instructed solicitor);
- v. it will be rare for a member of P's family to be present at a Judicial visit. In principle, this should usually be avoided;
- vi. a note **must** be taken of the visit and quickly made available to the Judge for his or her approval. That note should be circulated to the parties for them to consider and where appropriate to make any representations arising from it;
- vii. where the Judge considers that information from, or the experience of, visiting P may have had or might be perceived to have had an influence on the 'best interests' decision, the Judge must communicate that to the parties and, where appropriate, invite further submissions

Practicalities

7. In order to give effect to these principles and where the application is not made in an emergency, the parties should provide the Court with:
 - i. **information helping to inform the judge** as to whether a visit to P (remotely or otherwise) is likely to be required;
 - ii. **what practical steps require to be taken to facilitate a visit**. Where an in-person visit is canvassed, any relevant

risk factors should be identified, and measures thought necessary to mitigate risk. Most judicial visits at Tier 3 are to hospitals which will have their own protocols in place. These have been amended regularly during the course of the pandemic. The formal HMCTS sanctioned risk assessment process, where it is applicable, should apply to Tier 3 judges;

- iii. **whether there is any specific assistance that can be given to the judge** to facilitate communication with P most effectively. In this respect, it will always be helpful to have regard to Charles J's guidance at para. 14 which is set out here for convenience:

14. If P wishes to meet with the Judge, it must first be determined what the purpose of such a meeting would serve and the court and the parties must be clear about that in the particular case. In addition consideration should be given to:

- (a) Informing the Judge/regional hub of P's wish, and seeking the Judge's views as soon as possible, providing the Judge and court staff with any relevant information about how such a meeting might take place to maximise P's participation, and seeking their views about what is practicably possible, taking into account the above suggestions;*
- (b) Alerting the Judge and court staff to any risk issues which may be relevant for a visit by P to see the Judge at the Courtroom or in the Court building, or for the Judge visiting P at a care home or hospital;*
- (c) Who else might attend such a meeting?*
- (d) Whether the meeting should be video or audio recorded and if so how and by whom?*
- (e) Whether a note is to be taken of the meeting and if so by whom?*

- iv. **who will attend the visit** with the judge? Where the Official Solicitor is appointed as litigation friend for P, the expectation is that the attendance would be by a representative from the office of the Official Solicitor. In

any other case, the parties should consider, with the judge, who should attend; and

- v. **who will take the note of the visit** (audio- or video-recording will not be used to assist in the production of the note unless specifically sanctioned by the Judge).

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Facilitating participation of ‘P’ and vulnerable persons in Court of Protection proceedings

14th November 2016

1. This practical guidance is provided in order to provide helpful suggestions as to how practitioners might consider enhancing the participation of P in proceedings in the Court of Protection. Whilst this guidance is primarily directed towards health and welfare cases in the Court, it is also likely to be of assistance in some, but by no means all, property and affairs cases.
2. The guidance is not prescriptive. It is suggestive only. It is not a required checklist of all matters for consideration in all cases. Instead it is a list of suggestions for consideration by those representing P and also other parties, including statutory agencies, as to how P’s participation in proceedings might be enhanced. As each P is different, so will be the possible considerations for each case and it is important that the guidance is interpreted and applied as such. For many Ps, for example, it will not be realistic, feasible or necessary for many of these suggestions to be implemented. However for others, the suggestions will lead to P’s greater participation in proceedings.
3. Different considerations apply to interim directions hearings, as opposed to final hearings, or hearings where P is to ‘give information’ to the Court, or even to give evidence themselves in a fact finding process where P is found to be competent to give such evidence. In most cases P’s active participation in interim directions hearings will, for example, require less additional input than hearings where P is to give evidence or speak to P’s views as to their own best interests.
4. The guidance also briefly addresses the position of parties and witnesses who can be considered vulnerable – i.e. who need assistance to participate fully in the proceedings and to give their best evidence. These include not just those who are vulnerable by way of disability or (in the case of children) age, but also those who may be vulnerable by reason of fear of or intimidation from another party or individual.
5. Within this guidance, the word ‘participation’ is given a broad meaning. It includes giving evidence or information to the court as part of the judicial process, whether or not as a party, but also assisting the involvement and understanding of the individual – in particular P – in that process and its outcome.

Identification of the person’s needs within the court process

6. The key to the person’s effective participation will start with what is necessary for their effective participation within the court process. This concerns their best interests with regard to the conduct of the litigation and is not the same thing as:

- a. Determining their best interests as regards the decision or decisions to be made on their behalf; or
 - b. Determining their past or present wishes and feelings as to that decision or those decisions.
7. Sometimes what is necessary will be self-evident; sometimes it will not, especially with more subtle cognitive or other impairments. In some cases, the person's impairments will be sufficiently severe that they will be unable to participate in any meaningful fashion within the court process. In other cases, they will be able to participate with appropriate support and assistance. Consideration of the nature of that support and assistance should start at the earliest possible stage – in many cases, in the first meeting between the person and their representative, which should be arranged (especially in the case of P) as soon as possible in the proceedings.
8. In order to determine the level of support and assistance it will be necessary to determine what is necessary to enable the person to effectively participate in the proceedings. P's wishes and feelings
9. In order for P to be placed at the centre of the proceedings P's wishes and feelings on the issues to be determined by the Court are of vital importance in Court of Protection proceedings. Third party reports of P's wishes and feelings regarding the issues before the Court can be obtained from a variety of sources, including from carers, care staff, relatives, professionals concerned with P, IMCAs and other advocates (eg Care Act advocates, lay advocacy services, IMHAs) etc.
10. However it will also be important for those representing P (whether litigation friend or Accredited Legal Representative or Representative appointed by the Court) to elicit P's wishes and feelings about the issues before the Court. For a P who is more able to communicate their wishes and feelings, visits to P by their representative are likely to need to be more frequent than to a P who is much less able (even with assistance) to express their views.
11. Consideration might be given to the following (see also the MCA 2005 Code of Practice):
 - (a) P's communication abilities and how they might be enhanced, by Speech and Language Therapy input, communication aids etc.;
 - (b) Whether P's communication potential has been maximised by statutory or privately secured service input previously or whether such services might be required to be put in place at an early stage by statutory or other services to ensure that P's wishes are ascertained;
 - (c) How P's views can best be elicited, including in different surroundings and whether P might be put at ease by having another familiar person present as a supporter (subject always to the need to preserve confidentiality and being aware that P's responses might be affected or influenced by the presence of others);,
 - (d) How P can be given an explanation of the Court process and the issues before the Court, in a way that P can best understand. Without P being presented with an explanation of why the case is before the Court, P will not be able to express his/her views, but it is unlikely in most cases to be necessary or desirable for any

detailed or legalistic explanation to be given to P. Legal language should be avoided and the focus must be on the issues before the Court.

Attendance at a hearing or hearings

12. P's views should be sought at an early stage as to whether they wish to attend one or more of the court hearings, including meeting with the Judge. Suitable explanations will need to be given to P as to what this may mean, what may happen and what support might be available. Different considerations may apply to P's attendance at an interim directions hearing as opposed to a final hearing or a hearing where P might be giving evidence, or where P might wish simply to listen to the evidence of others.
13. If P wishes to attend a hearing, consideration should be given to the following:
 - (a) The impact on P of the hearing being in public and what directions about this should be sought;
 - (b) Liaising with the Court staff as soon as possible in advance to advise them of P's wish to attend, so that they and the Judge are made aware in advance;
 - (c) Seeking Court staff views as to how practical arrangements can be made which are proportionate given the demands on Court facilities and other users of the Court;
 - (d) Is the Court able to accommodate P's visit? If not, is there another Court able to accommodate P and can this be arranged without disproportionate additional work and resources?
 - (e) Whether use of video link would be an alternative option to an attendance by P? Are facilities available and do they actually work? There may be a need to test them in advance;
 - (f) What is P's understanding of a Courtroom, a hearing, the issues in the proceedings, what decisions are to be made and when? How can this be enhanced in the time available?
 - (g) What assistance can be provided to P to understand what is to be decided at the hearing, who is who, the layout of a Courtroom and who sits where (including P themselves)?
 - (h) Would it be helpful for P to be assisted to visit the courtroom before the hearing? Can this be arranged with the Court in practice? Who will accompany P? Is a visit feasible?
 - (i) Might P be provided with pictures of the courtroom (for which special permission will be required) (or a courtroom, there are plenty of pictures available on line)? Pictures of the parties and their representatives?
 - (j) What practical arrangements might need to be made? For example:
 - (i) Who will accompany P to the hearing and support them throughout, if needed?
 - (ii) What time will P need to arrive and how does this fit with P's routine (such as the taking of medication) and any support required?
 - (iii) How will P physically access the Courtroom?
 - (iv) What arrangements will be made for P's personal care if required?
 - (v) Are there accessible toilet facilities if needed?
 - (vi) Will P need a side room near the Courtroom for a break and are there facilities for this?

- (vii) Does P have any particular needs which should be considered in advance?
- (viii) Where will P sit in the hearing, and does this need to be discussed and agreed with court staff in advance of the hearing? For example in some cases P might need to be positioned in the hearing so as not to be within eyesight of another party or parties.
- (ix) Are there any safety/ security concerns – either relating to P’s potential conduct or the conduct of any other person in the courtroom?
- (x) Will P need breaks in the proceedings or if P’s input on all issues is not required, should the proceedings continue if P wishes to take a break or leave the hearing altogether?

(l) Where and how will the Court’s decision be communicated to P? By the judge in the courtroom or in any side room? In the presence of the parties or in private? Is it possible in appropriate cases to give a summary of the decision to P so as to allow P to leave before the full judgment is given if P wishes?

Meeting with the Judge

14. If P wishes to meet with the Judge, it must first be determined what the purpose of such a meeting would serve and the court and the parties must be clear about that in the particular case. In addition consideration should be given to:
 - (a) Informing the Judge/regional hub of P’s wish, and seeking the Judge’s views as soon as possible, providing the Judge and court staff with any relevant information about how such a meeting might take place to maximise P’s participation, and seeking their views about what is practicably possible, taking into account the above suggestions;
 - (b) Alerting the Judge and court staff to any risk issues which may be relevant for a visit by P to see the Judge at the Courtroom or in the Court building, or for the Judge visiting P at a care home or hospital;
 - (c) Who else might attend such a meeting?
 - (d) Whether the meeting should be video or audio recorded and if so how and by whom?
 - (e) Whether a note is to be taken of the meeting and if so by whom? P giving ‘information’ to the Court

15. In some cases P may wish to give information to the Court themselves about the issues in the case including P’s views as to their best interests. P’s litigation friend or representative may propose that such information is provided by P to the Court and parties. The Court of Protection Rules 2007 expressly provide (in Rule 95(e)) for the Court to admit, accept and act upon such information whether or not P is competent to give evidence.

16. Consideration should be given in advance to the following:
 - (a) Does P wish to attend the court and give the information in person?
 - (b) Alternatively, or additionally might P wish to be video or audio recorded (this could be on a mobile phone in some cases, as long as a copy is available for the Judge and the parties, and appropriate security and confidentiality assured)?

- Where might such a recording take place (in Court, outside Court or at P's home or day centre, for example)?
- (c) The impact of the hearing being in public on the choices made;
 - (d) How should questions be drafted and posed to P to elicit P's views, minimising leading questions? Who might be best placed to ask P questions to elicit P's views – P's representative or another professional? Will it be necessary to seek advice, for example from an intermediary who has assessed P's communication needs and abilities, to facilitate communication with P?
 - (e) In cases where P's communication is such that it is necessary to ask closed or leading questions, can these be broken down and drafted in such a way as to minimise (not avoid altogether) the extent that they lead P? Such work would need to be done in advance.
 - (f) What other advance work might need to be undertaken with P by, for example explaining the issues before the Court to P (see above) and ensuring that P knows what they are to be asked about either in person at a hearing or via a recording. P giving evidence to the Court
17. The number of cases where a fact finding hearing is required in the Court of Protection is relatively rare. Within that subset the number of cases where the Court finds that P is competent to give evidence will be rare. Nonetheless it is possible that this situation will arise.
18. Where P is to give evidence the following in particular should be considered:
- (a) A Ground Rules Hearing to discuss and determine the precise arrangements for P giving evidence;
 - (b) P's need for an intermediary should be determined and how this might be funded;
 - (c) Careful advance preparation and if possible agreement of questions to be posed to P by the Court and the parties is likely to be required in advance of the Ground Rules Hearing.
19. Ground Rules Hearings are regularly used in both criminal and family proceedings involving vulnerable witnesses, and guidance relating to such hearings is likely to be applicable (with appropriate modifications) to situations where P is to give evidence.
20. Similarly, intermediaries are used in both criminal and family proceedings, and the guidance relating to such intermediaries will often be helpful. An intermediary's role is to facilitate communication between the relevant person and the court; it is not to act as advocate or supporter on behalf of the person, or to act as an expert witness. The role is impartial and the intermediary's duty is to the Court. They are not a substitute for a representative.

Vulnerable parties and witnesses

21. Many of the same points as set out above in relation to P also apply in relation to vulnerable parties and witnesses. However, in respect of these individuals, the key considerations are likely to revolve around the support that they may require to give evidence. This will include, in particular, consideration of:

- (a) Whether support is required to facilitate making their witness statement and ensuring the witness understands its contents. Will extra time be required for this when any court order is made?
- (b) Whether the witness is competent to give evidence. Whilst the Court may admit and accept information from a witness who is not competent to give evidence (under Rule 95(e) of the Court of Protection Rules 2007), it is likely to be an unusual case in which the Court would wish to hear directly from a witness other than P who is not competent;
- (c) The practical support that the witness will require to give evidence prior to and at the hearing;
- (d) Time-tabling, including taking into account whether a fixed time for attendance is required, the need for breaks, and the additional length of time that may be required in light of any particular format of questioning required (including, for instance, the use of an intermediary);
- (e) Security concerns including, in particular, any steps that may be required to facilitate the giving of evidence by a witness who is vulnerable by reason of intimidation.

Further resources

22. The Advocate's Gateway (<http://www.theadvocatesgateway.org/>) provides free access to practical, evidence-based guidance on the effective participation of vulnerable witnesses and parties. It includes a number of toolkits for practitioners and the judiciary, including guidance as to Ground Rules Hearings, case management, intermediaries and preparation guides for questioning individuals with specific forms of disability.

23. The Law Society's Practice Note: Meeting the needs of vulnerable clients

(<http://www.lawsociety.org.uk/support-services/advice/practice-notes/meeting-the-needs-ofvulnerable-clients-july-2015/>) provides, in particular, useful guidance for solicitors as to identifying vulnerability.

Mr Justice Charles

3 November 2016