

The Official Solicitor and the President met in order to discuss the difficulties which the Official Solicitor had been having in accepting requests to act as guardian ad litem / litigation friend for protected parties in proceedings relating to children. The Official Solicitor's role in proceedings under the Mental Capacity Act 2005 was also discussed. At the end of the meeting the President invited Pauffley J to draft guidance for courts dealing with such cases. That guidance is now attached. It has been seen by, and has the endorsement of, both the Official Solicitor and the President.

NW
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Guidance in cases involving protected parties in which the Official Solicitor is being invited to act as guardian ad litem or litigation friend

Public and private law children's cases

1. Many practitioners and judges will know of the Official Solicitor's recent difficulties in accepting requests to act as guardian ad litem / litigation friend for protected parties in proceedings relating to children. Although, currently, there are unallocated cases, the backlog has reduced significantly in recent months.
2. The Official Solicitor is subject to severe budgetary constraints – a situation which is unlikely to ameliorate in the medium term.
3. In all cases, the Official Solicitor will need to be satisfied of the following criteria before accepting a case, and parties may need reminding of the need to provide confirmation of these matters immediately on approaching the Official Solicitor's office:
 - satisfactory evidence or a finding by the court that the party lacks capacity to conduct the proceedings and is therefore a protected party;
 - confirmation that there is security for the costs of legal representation;
 - there is no other person who is suitable and willing to act as guardian ad litem/litigation friend.
4. In order to assist the Official Solicitor in the decisions he makes about allocating case workers, in certain cases, judges should consider whether it may be appropriate to indicate with as much particularity as possible the relative urgency of the proceedings and the likely effect upon the child (and family) of delay. The Official Solicitor will very carefully consider giving priority to such cases.
5. It is and remains the judge's duty in children's cases, so far as he is able, to eradicate delay.

Court of Protection welfare cases (including medical cases)

6. The number of welfare cases brought under the provisions of the Mental Capacity Act 2005 is rising exponentially with concomitant resource implications for the Official Solicitor.

7. Judges should be alert to the problems the Official Solicitor may have in attending at each and every preliminary hearing. Consideration should be given, in appropriate cases, to dispensing with the requirement that he should be present at a time when he is unable to contribute meaningfully to the process. In circumstances where his position has been / will be communicated in writing it may be particularly appropriate for the judge to indicate that the Official Solicitor's attendance at the next directions' hearing is unnecessary.
8. The Court of Protection Rules make clear that the judge is under a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings. The explanatory note to r.121 states that the court will consider what 'added value' expert evidence will give to the case. Unnecessary 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.
9. The Practice Direction – Experts (PD15A) specifies that the expert should assist by “providing objective, unbiased opinion on matters within his expertise, and should not assume the role of advocate”. The form and content of the expert's report are prescribed, in detail, by paragraph 9 of the Practice Direction. It is no part of the expert's function to analyse or summarise the evidence. Focussed brevity in report writing is to be preferred over discussion.

Mrs Justice Pauffley
December 2010.