



THE OFFICIAL SOLICITOR

STANDARD INSTRUCTIONS TO SOLICITORS¹ INSTRUCTED BY THE OFFICIAL SOLICITOR

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¹ These instructions apply equally where the Official Solicitor instructs a Legal Executive

1. INTRODUCTION

- 1.1 You have accepted instructions from me to act in proceedings where I am litigation friend. A litigation friend may be appointed for:

“a child”: a person under 18; or

a “protected party”: a party, or an intended party (other than ‘P’ or a child) who lacks capacity within the meaning of the Mental Capacity Act 2005 to conduct the proceedings (Civil Procedure Rules 1998 r21.1(2), Family Procedure Rules 2010 r2.3, Court of Protection Rules 2017 r2.1); or

“P”: (a) 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; and (b) a relevant person as defined by paragraph 7 of Schedule A1 to the Mental Capacity Act 2005 (Court of Protection Rules 2017 r2.1).

In each case ‘the client’.

- 1.2 For the purposes of the Mental Capacity Act 2005 a person lacks capacity in relation to a matter if at the material time they are unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in, the functioning of the mind or brain (s2(1) Mental Capacity Act 2005). A lack of capacity cannot be established merely by reference to (a) a person's age or appearance, or (b) a condition of their, or an aspect of their behaviour, which might lead others to make unjustified assumptions about their capacity.
- 1.3 A person is not to be treated as being unable to make a decision merely because they have made an unwise decision.
- 1.4 There are four functional elements for capacitated decision making (section 3(1) MCA 2005) – a person is unable to make a decision for themselves if they are unable:
- (a) to understand the information relevant to the decision.

- (b) to retain that information.
- (c) to use or weigh that information as part of the process of making the decision,
or
- (d) to communicate the decision (whether by talking, using sign language or any
other means).

1.5 The information relevant to a decision includes information about the reasonably foreseeable consequences of (a) deciding one way or another, or (b) failing to make the decision. In the context of proceedings:

- (a) the relevant information includes legal advice.
- (b) the assessment is by reference to conduct of the proceedings as a whole,
not by reference to each step in the process of the litigation².

1.6 Where one or more of the functional elements are absent, an (adult) party will lack capacity to conduct the proceedings.

1.7 There is no presumption that a child has capacity to conduct proceedings. The general rule is that a child acts by a litigation friend. The court rules explain the exceptions to the general rule (including when a child is represented through a children's guardian rather than acting by a litigation friend)³.

1.8 Within my office, a case manager will be responsible for the file and for providing instructions to you.

1.9 During the case you must send my case manager (by electronic means only) copies of all pleadings, documents, and correspondence (other than routine correspondence). Please include my reference in all correspondence.

1.10 My case manager will password protect documents sent to you which contain sensitive personal data. You will be sent a unique password under separate cover.

² see Kennedy LJ at paragraph 27: *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 and Lady Hale at paragraph 15, *Dunhill v Burgin* [2014] UKSC 18: ... *a party whose capacity does not fluctuate either should or should not require a litigation friend throughout the proceedings. It would make no sense to apply a capacity test to each individual decision required in the course of the proceedings...*

³ Civil Procedure Rules 1998, r21.2, Family Procedure Rules 2020 r16.6, Court of Protection Rules 2017, r17.2

If you have a CJSM account that can be used without password protection.

- 1.11 Please note I do not consent to the use of artificial intelligence tools for any personal data, whether that is belonging to my staff or to clients. Please ensure you do not use such tools, or permit any third parties to use such tools, when working with personal data from my office.

2. OUR RESPECTIVE ROLES

- 2.1 You are the solicitor I appoint and instruct on behalf of the client. You take instructions from me as the client's litigation friend. My function as litigation friend is to supplement the client's want of capacity and judgement. I may do anything, which is required or authorised by the rules to be done by a party. You should consult me on all matters on which you would seek instructions from a client of full capacity.
- 2.2 I will rely on you (and counsel where appropriate) for legal advice. I have a duty, taking proper legal advice, to inform myself fully of the nature of the case and instruct you of the course which should be taken on behalf of the client.⁴ Throughout the case I expect my case manager to be kept fully informed about:
- (a) the timetable.
 - (b) compliance with court directions.
 - (c) developments in the case.
 - (d) new or novel issues as they arise.
 - (e) your assessment of the evidence.
 - (f) your advice about (i) the way forward (ii) costs.
- 2.3 You should provide your advice (or comments as appropriate) on all documents originating from other parties. If advice is provided by counsel and your advice differs, you must first discuss your reasons for that differing advice with counsel. If your advice to me continues to differ you must identify the areas of disagreement with counsel's advice and give me your reasons for the differing advice.
- 2.4 Your normal professional standards and duties apply including the Code of Conduct

⁴ Re Whittall [1973] 3 All ER 35, 38 e-f.

issued by the Solicitors Regulation Authority⁵.

- 2.5 If you delegate work to a colleague, the work must be carried out under your close supervision as you are the solicitor I have appointed and am instructing on behalf of the client.
- 2.6 Since I am instructing you, it is for me and not for the client to terminate your retainer. I will of course consider any difficulties in the relationship between you and the client. Please advise me immediately if any difficulties arise.
- 2.7 I rely on you for all direct involvement with the client. You will be the client's first point of contact and the person to whom the client should look for information about the proceedings. I do not expect my case manager to meet the client or to attend any court hearings. Please note, however, that you should not approach meetings with the client as "taking instructions" since you may only take instructions from me as litigation friend. A full attendance note must be taken of any such meeting and forwarded to my case manager.
- 2.8 Some clients may be challenging to work with. If challenges arise, please discuss with my case manager how best these are to be managed.
- 2.9 It is important to ensure that information given to the client is done so in a way which they can understand and, in a way, appropriate to the client's age and circumstances (using simple language, visual aids or any other means). It is equally important to ensure that sharing information is managed in a way that minimises any adverse effect on a client's welfare or mental or physical condition. You may wish to discuss this further with my case manager. If the client would like information shared with another person, please discuss this first with my case manager.

3. MY APPROACH AS LITIGATION FRIEND

- 3.1 The duty of a litigation friend is to conduct the proceedings fairly and competently on behalf of the person for whom the litigation friend acts. A litigation friend must have no interests adverse to those of that person. All steps and decisions I take in the proceedings must, therefore, be taken for the benefit of the client. Please note

⁵ For Legal Executives the CILEX Code of Conduct

the role of a litigation friend is limited to making decisions about the conduct of the proceedings and does not extend to making other decisions for or on behalf of the client.

3.2 In determining the client's best interests I will consider all the circumstances and the unique facts of each case, always taking into account:

- (a) the client's ascertainable past and present wishes and feelings, the beliefs and values that would be likely to influence their conduct of the proceedings if they had capacity, and the other factors they would be likely to consider if able to do so.
- (b) the need, so far as reasonably practical, to permit and encourage the client to participate, or to improve their ability to participate, as fully as possible in decisions relating to the conduct of the proceedings.

3.3 I must have due regard to the client's rights and wishes in formulating my submissions. Whatever the client's views, however, I will not put forward a case, which will be contrary to the client's own interests or well-being. This may mean that I decide to depart from the client's expressed wishes when I instruct you about the conduct of the case, for example because:

- (a) you advise me that there is no evidence which can be adduced in support.
- (b) I consider that achieving the client's wishes will not promote the client's own health or welfare; or
- (c) I consider that the client's views will inevitably be rejected by the court.

4. COSTS

4.1 I do not charge for acting as litigation friend. I am not however funded to meet the legal costs of those for whom I act as litigation friend, and **I will not pay any costs or disbursements from my own budget.**

4.2 These instructions assume that I am satisfied that there is in place sufficient security for the client's legal costs.

4.3 If you have exercised delegated functions to grant legal aid, I will not meet any costs

if the Legal Aid Agency does not then grant funding.

- 4.4 You should not seek a costs order or wasted costs order against another party without first obtaining my agreement to this course of action.
- 4.5 If any issues arise which may impact on the security in place for the client's costs, you must contact me immediately, for example:
- (a) the client or the client's partner failing to make a legal aid contribution.
 - (b) if the client has an appointee for State benefits, attorney or deputy who is not making the legal aid contributions.
 - (c) legal aid limitations being imposed, or legal aid being refused.
 - (d) if you are informed a deputy for property and financial affairs is appointed for the client.
 - (e) if you are informed the client has an Enduring Power of Attorney.
 - (f) if you are informed the client has a Lasting Power of Attorney for property and financial affairs.
 - (g) if the client's costs are being paid from out of the client's estate and (i) the client becomes financially eligible for legal aid or (ii) if the client's circumstances change such that the client is no longer financially eligible for legal aid.
 - (h) if an interim bill is not paid or there is a delay in payment.
 - (i) if a third party who has agreed to pay the client's costs is failing to do so.
- 4.6 You must copy to my case manager all correspondence (both from and to your firm) that raises issue in respect of costs, the arrangements for securing the costs, the payment of costs or suggests that costs may be sought against me, as the client's litigation friend.

5. CONDUCT OF THE CASE

- 5.1 You should file and serve notices of acting/issue/amendment in the usual way once the costs position has been secured.
- 5.2 Subject to the client's age, understanding and circumstances, please arrange to meet the client to discuss the proceedings and to obtain relevant information. Please bear in mind that information provided by the client may or may not be reliable. You should also explain to the client about my appointment as litigation

friend and my role. If it is proposed that a third party should be present for such discussions, please discuss first with my case manager. It is important that a client is properly supported but it is also important to ensure that the third party is aware of confidentiality issues.

- 5.3 You may have to see the client more than once as evidence from the other party or parties is produced. Please have in mind the need to ascertain the client's wishes and feelings at all stages and to keep yourself informed about what is happening in the client's life insofar as this is relevant to the issues before the court.
- 5.4 The client may have had little or no experience of the court process and find their involvement in proceedings stressful or bewildering. This is likely to be even more so in the case of a party who acts by a litigation friend. I expect you to consider and discuss with the client, what is the best form of communication for them⁶.
- 5.5 Whenever you see or speak to the client, you must prepare and forward a detailed attendance note for me to consider (please also forward any emails or other messages from the client). In general attendance notes should record:
- (a) the client's wishes and feelings.
 - (b) the client's views about the proceedings.
 - (c) any relevant information provided by the client or those caring for, or providing support to the client, or by those interested in their welfare.
 - (d) the client's comments on their own circumstances.
 - (e) if the client can understand and comment on the case made by the other party or parties, then the client's comments about that case.
 - (f) the client's views, if any, about attending court.
- 5.6 If the client or those responsible for the client's care and welfare would like more information about me, further information is available at www.gov.uk.

Your comments and advice

⁶ Please consider if the client has a reduced ability to read or write, impaired hearing or sight, needs extra time or third-party support for meetings, needs information in easy read or age-appropriate format or has specific communication difficulties about which professional advice is required.

- 5.7 In general your attendance notes should reflect what the client has told you rather than your own questions or observations. Please include your own observations and advice about the case and any meetings with the client in a covering letter or separate note to my case manager.

6. DRAFT PLEADINGS AND POSITION STATEMENTS

- 6.1 It is your role as solicitor or that of counsel to draft pleadings (including any position statement). You should discuss with my case manager who should be responsible for preparing the draft – see also 7.5 below. Pleadings and position statements must be filed in accordance with the court timetable. Draft documents must, therefore, be provided to my case manager on a timely basis to allow sufficient time for the process of approval by me.
- 6.2 You should always discuss the contents of a position statement in broad terms with my case manager once you are ready to draft it.
- 6.3 My position statement should set out my position as litigation friend on the application before the court. I will arrive at my view after discussions with you and after consideration of all the evidence gathered on the client's behalf. I will consider and take your advice on the evidence filed by the other parties. It is important that my position statement also brings to the court's attention evidence of the client's wishes and feelings, insofar as those are relevant to the matters before the court; and that it does so where my position differs from the client's wishes.
- 6.4 If counsel is instructed, they should draft any position statement or skeleton argument. You should see and approve the draft before it is submitted to me for approval.
- 6.5 Draft documents should be sent as an e-mail attachment in Microsoft Word, and all words should remain in lower case (for example: litigation friend and court), unless the name of a person or place. Draft documents should be clearly labelled and dated (e.g. DRAFT OS PS (v1) 01.01.2023). Any subsequent draft should be identified as such (e.g. (v2)).
- 6.6 Pleadings and position statements should refer to the client as "acting by [his][her]

litigation friend, the Official Solicitor”.

7. HEARINGS

- 7.1 Generally, my case manager will not be at hearings. You must discuss any forthcoming hearing with my case manager and advise about and obtain instructions on the directions we should seek as early as is practicable in advance of the hearing. If new issues arise during a hearing, you must seek further instructions from my case manager. It is not acceptable to say that you are without instructions from me unless the court has refused you the opportunity to take instructions on the new issue(s). If my case manager is unavailable for any reason, one of their colleagues will always assist.
- 7.2 Please ensure the timetable is realistic, bearing in mind:
- (a) you may need to discuss evidence with the client before providing your advice to me and may need more than one meeting having regard to the client's age or circumstances.
 - (b) your need for instructions from me as litigation friend.
 - (c) the time needed for approval of any pleadings / position statement.
- 7.3 Immediately following the hearing you must inform my case manager of the outcome. A full attendance note of any hearing must be sent to my case manager together with your advice on any issues arising. Draft minutes of orders should, where possible, first be approved by my case manager.
- 7.4 Sealed orders must be obtained and sent to my case manager at the earliest opportunity.
- 7.5 I rely on you to instruct counsel at an early stage, not just for the final hearing – see also 6.1 above. A decision not to instruct counsel must only be made after discussion with my case manager. Please consult my case manager about the choice of counsel. Briefs must be sent to counsel sufficiently far in advance of the hearing to allow enough time to advise and for the pre-hearing work.
- 7.6 It is your responsibility to ensure that counsel is informed about the role of a litigation friend. A copy of my Standard Instructions should be included with the brief.

- 7.7 Any need for a conference should be discussed with my case manager. If a conference is arranged, please check with my case manager if they wish to be joined into the conference before finalising the arrangements.
- 7.8 Unless notification is likely to cause the client significant and disproportionate distress, please tell the client the date of any hearing and the address of the court. The client should not have to attend hearings but if they express a wish to attend, in general I consider that they should be present unless the advice is that this would be harmful to them. Please make appropriate enquiries and arrangements if necessary.
- 7.9 In the event of counsel being instructed, I expect you or an appropriate colleague to attend with counsel especially if the client is attending the hearing.

8. DISCHARGE OF MY APPOINTMENT AS LITIGATION FRIEND

- 8.1 The need for the client to have a litigation friend must always be kept under review.
- 8.2 The client's health may improve during the proceedings, or the client may turn 18. I can only act as litigation friend of a party, while that party continues to lack capacity to conduct the proceedings or is under 18.
- 8.3 If I am litigation friend of a child, and you consider they are likely to continue to require a litigation friend when they turn 18, you should obtain an assessment of their capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings in the run up to their 18th birthday.
- 8.4 If you are in doubt at any point during the proceedings, that the client continues to lack capacity to conduct the proceedings, you should obtain further evidence if necessary, using my standard certificate of capacity to conduct proceedings⁷. If that evidence confirms the client has gained or recovered capacity to conduct the proceedings, I will instruct you to apply for my discharge so the client may conduct the proceedings on their own behalf. Any application for my discharge should be

⁷ published on www.gov.uk

made promptly as my appointment as litigation friend will continue until I am discharged by court order.

8.5 If at any stage the client does not accept that they are not capable of conducting the proceedings on their own behalf, or an issue is raised about this, I will continue to act as litigation friend until satisfactory evidence is received supporting this view.

8.6 Please note that if a dispute about capacity does arise or if there is conflicting evidence the question of capacity falls to be decided by the court as a matter of fact and law. You may need to request an urgent hearing to determine a disputed issue of capacity to conduct the proceedings.

9. DATA PROTECTION

9.1 In the event of a data protection breach or suspected data breach, you must inform me within 24 hours of the breach coming to your firm's attention. When notifying me, you must confirm:

- (a) the scale of the potential compromise of the client's data.
- (a) whether the compromise of data relates to any other client of mine for whom your firm also acts.
- (b) the steps taken by your firm and any steps you recommend I take because of any identified or suspected data compromise to mitigate what has happened.

10. OTHER ISSUES

10.1 Please seek specific instructions if transfer or disclosure of the file is requested.

10.2 If ancillary issues arise during the proceedings, please contact the case manager. Common examples include the issue of, or a proposal to issue other proceedings or a criminal investigation or charge arising out of the same facts.

11. COMPLAINTS

11.1 My complaints policy is published on www.gov.uk.

Sarah Castle

Official Solicitor to the Senior Courts

April 2025

www.gov.uk