

Protected Parties

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Protected Parties:

- ▶ Capacity
- ▶ The Court of Protection
- ▶ Anonymity
- ▶ Approval

What is a protected party?

- ▶ CPR 21.1(2)(d):

“a party, or an intended party, who lacks capacity to conduct the proceedings.”

- ▶ Note that a protected beneficiary is different. CPR 21.1(2):

“a protected party who lacks capacity to manage and control any money recovered by or on their behalf or for their benefit in the proceedings”.

- ▶ A litigant may lack capacity to litigate but maintain the capacity to manage their money and vice versa.

Capacity

- ▶ CPR 21.1 adopts the definition of capacity as set out in the Mental Capacity Act 2005. S(1):
 - (1) A person must be assumed to have capacity unless it is established that they lack capacity;
 - (2) A person is not to be treated as unable to make a decision unless all practicable steps to help them do so have been taken without success;
 - (3) A person must not be treated as unable to make a decision merely because they make an unwise decision;
 - (4) An act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made in their best interests;
 - (5) And before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restricted of the person's rights and freedom of action.

Capacity

- ▶ S2(1) of the Act states that 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(2) says that it does not matter whether the disturbance is permanent or temporary.
- ▶ Will usually cover:
 - ▶ Brain injury
 - ▶ Dementia
 - ▶ Psychological injuries
 - ▶ Learning difficulties/disabilities

Capacity

S3(1) says that a person is unable to make a decision 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 his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) 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.

Capacity - practicalities

- ▶ Capacity is binary: it is either present or it is not
- ▶ The burden of proof is on the party asserting lack of capacity on the BOPs
 - ▶ Will usually be claimants
 - ▶ Presumption is of capacity
 - ▶ Will be displaced by medical evidence, which is required probably even in the clearest of cases e.g. permanent vegetative state or where it is not in dispute
 - ▶ psychiatrists/neurologists/neuropsychologists/social worker
 - ▶ First must address and satisfy the diagnostic test (impairment) and then the functional test (inability to make decisions)
- ▶ Note that the court is obliged to investigate capacity even if neither side asserts it is lacking

Capacity - practicalities

- ▶ A protected party must have a litigation friend (CPR 21.2(1)). Court can order otherwise for a child
- ▶ Any steps taken before a child or protected party has a LF has no effect unless the court orders otherwise (CPR 21.3(4)).
- ▶ If a party loses capacity after proceedings have begun, no further steps in the proceedings can be taken until there is a litigation friend.
- ▶ Who?
 - Anyone who can fairly and competently conduct proceedings on behalf of the child or PP, has no interest adverse to that party and, crucially, where the PP is a claimant, is willing to undertake to pay any costs that party may be ordered to pay
 - The deputy appointed by the COP.
 - Official solicitor

Court of Protection

- ▶ Background
- ▶ Deputies
- ▶ Best interests
- ▶ Disputes

Court of Protection: Background

- ▶ The CoP is a superior Court of Record
- ▶ Created by the Mental Capacity Act 2005
- ▶ It is governed by its own set of procedures and rules (CoP Rules 2017)
- ▶ It has jurisdiction over the health, welfare and financial affairs of those who lack capacity
- ▶ The CoP has specific and unique powers

Court of Protection: Background

- ▶ Power to make declarations (s15) as to:
 - ▶ Whether a person has or lacks capacity
 - ▶ The lawfulness of any act done or yet to be done in relation to that person
- ▶ Power to make decisions and appoint Deputies (s16)
 - ▶ This section applies if a person lacks capacity in relation to personal welfare or their property and affairs
 - ▶ The Court may make an order on the person's behalf or appoint a Deputy on the person's behalf
 - ▶ A decision by the Court is to be preferred
 - ▶ The powers conferred on a Deputy should be "as limited in scope and duration as is reasonable practicable" (s16(4)(b))

Court of Protection: Background

- ▶ When exercising its powers, the CoP will be guided by its own Overriding Objective
 - ▶ Similar but not identical to CPR 1
 - ▶ At all times, the protected party's interests are paramount
 - ▶ It will deal with a case justly and at proportionate costs, so far as is practicable –
 - ▶ ensuring that it is dealt with expeditiously and fairly;
 - ▶ ensuring that P's interests and position are properly considered;
 - ▶ dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
 - ▶ ensuring that the parties are on an equal footing;
 - ▶ saving expense;
 - ▶ allotting to it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases; and
 - ▶ enforcing compliance with rules, practice directions and orders.

Court of Protection: Deputy

- ▶ What is a deputy?
 - ▶ An individual appointed by the CoP to deal with the affairs of a person who lacks capacity
 - ▶ Two types
 - ▶ Property and Financial Affairs Deputy
 - ▶ Personal Welfare Deputy

Court of Protection: Deputy

- ▶ What does 'property and affairs' mean?
 - ▶ As per s18 2005 Act., property and affairs extend to:
 - ▶ Control and management of property (including the sale, exchange, gift or other disposition of the person's property)
 - ▶ Acquisition of property in the person's name or on their behalf
 - ▶ The carrying on of any profession, trade or business on the person's behalf
 - ▶ The conduct of legal proceeding's on the person's behalf
 - ▶ The carrying out of any contract entered into by the person

Court of Protection: Deputy

- ▶ What does 'personal welfare' mean?
 - ▶ As per s17 2005 Act, personal welfare includes
 - ▶ Where the person lives
 - ▶ What contact, if any, they have with any specified persons
 - ▶ Whether specific treatments should be carried out and/or continued
 - ▶ Who is responsible for the person's health care (and in when someone else can take over that responsibility)

Court of Protection: Deputy

- ▶ Who can be a deputy?
 - ▶ Over 18
 - ▶ Friends and family
 - ▶ Know the individual
 - ▶ Familiar with what their wishes would be
 - ▶ Inclined to have the individual's best interest at heart (hopefully)
 - ▶ To be a Property and Affairs Deputy, an individual needs to demonstrate they have the skills needed to make the necessary financial decisions
 - ▶ Professional representation
 - ▶ Lawyer who has been instructed to manage the affairs of someone who lacks capacity
 - ▶ Can be chosen by the family or the CoP (a Panel Deputy, chosen from a list of court-approved professionals)
- ▶ Can have more than one Deputy

Court of Protection: Best Interests

- ▶ Best interests?
 - ▶ No definition within the 2005 Act
 - ▶ The assessment of what the best interest of an individual are requires a “consideration of all relevant circumstances” (Explanatory Notes)
 - ▶ The relevant circumstances being those of which the person making the decision is aware and which it would be reasonable to regard as relevant
 - ▶ Those relevant circumstances should not be limited to the person’s age, appearance, condition or behaviour
 - ▶ This may lead to a decision maker making unjustified assumptions about what the person’s best interest may be

Court of Protection: Best Interests

- ▶ Factors that must be considered, so far as reasonably practical, as per s4 2005 Act:
 - ▶ Where determination relates to life-sustaining treatment he must not be motivated by a desire to bring about his death
 - ▶ Must consider
 - ▶ Person's past and present wishes and feelings
 - ▶ Beliefs and values that would likely influence person's decision if they had capacity
 - ▶ Other factors the person would likely consider if they could
 - ▶ Should also take into account
 - ▶ Anyone named by the person as someone to be consulted on the matter in question (or similar)
 - ▶ Anyone engaged in the person's care
 - ▶ Anyone with a lasting power of attorney granted by the person
 - ▶ Any Deputy appointed for the person by the Court

Court of Protection: Dispute

- ▶ The Court of Protection is in place to deal with the care and affairs of a vulnerable individual
- ▶ Regrettably, there are often disputes between family and care provider, or the family and the Deputy
- ▶ CoP always has the same goal in mind: securing a course of action that is in best interest of the individual

Dispute: Cases

- ▶ *Aintree University Hospital NHS Trusts v James* [2013] UKSC 67
 - ▶ Baroness Hale reaffirmed the following propositions:
 - ▶ The 2005 Act is concerned with enabling the court to do for the patient what he could do for himself if of full capacity, but it goes no further
 - ▶ any treatment which the doctors do decide to give must be lawful
 - ▶ The individual's own wishes are of central importance when considering 'best interests'

Court of Protection: Dispute

“in considering the best interests of this particular patient at this particular time, decision makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask themselves what his attitude to the treatment is or would be likely to be; and they must consult others you are looking after him or interested in his welfare, in particular for their view of what his attitude would be...”

Court of Protection: Dispute

- ▶ Numerous current examples of disputes between health care providers and family members in relation to the Covid vaccine
 - ▶ *NHS Liverpool CCG v (1) X (2) Y [2022] EWCOP 17*
 - ▶ C sought declaration that it was in the best interests of X, a 50 year old woman with severe epilepsy and mild learning difficulties, to have the Covid vaccine
 - ▶ X considered 'clinically vulnerable' according to existing government guidelines
 - ▶ Family vehemently opposed, including eldest sister who has been "closely and continuously involved in X's welfare, care and upbringing from an early stage"
 - ▶ Considered the approach of Baroness Hale in *Aintree*

Court of Protection: Dispute

- ▶ *NHS Liverpool CCG v (1) X (2) Y [2022] EWCOP 17* (continued...)

- ▶ Judge also considered the balancing and evaluation of relevant considerations as per *SD v Royal Borough of Kensington and Chelsea [2021] EWCOP*

- ▶ “... in circumstances where an individual is not capacitous and cannot take medical decisions for themselves, the court is required, in the absence of agreement to identify best interests for itself, surveying the entire canvas of the available evidence. Strongly held views by well-meaning and concerned family members should be taken into account but never permitted to prevail or allowed to create avoidable delay. To do so would be to expose the vulnerable to the levels of risk I have identified, in the face a foot remains an insidious and highly dangerous pandemic virus...my task is to evaluate P’s situation in the light of the authorised, peer reviewed research and public health guidelines, and to set those in the context of the wider picture of P’s best interests...It is P’s voice that requires to be heard and which should never be conflated or confused with the voices of others, including family members however unimpeachable their motivations or however eloquently their own objections are advanced.”

Court of Protection: Dispute

- ▶ *NHS Liverpool CCG v (1) X (2) Y [2022] EWCOP 17* (continued...)
 - ▶ Judge ultimately directed that X should be offered a vaccination
 - ▶ Important for Judge, as best as possible, to put himself in X's position and take into account the considerations identified at s4 of the 2005 Act
 - ▶ There was limited evidence about what X would want
 - ▶ Court should not arbitrate medical controversy, but evaluate "in the light of public health guidelines and peer reviewed research"

Anonymity

- ▶ Most commonly seen where C is a protected party but not exclusively so
- ▶ Children are slightly different: section 39 of the Children and Young Person's Act 1933 allows the court to direct that the name, address, school or other details that could lead to ID of the child shall not be published and no photos.
- ▶ CPR 39.2(4) allows the court to order that the identity of any party must not be disclosed if it considers non-disclosure necessary to secure the proper administration of justice and **in order to protect the interests of that party.**
- ▶ Starting point is open justice and any departure from it must be exceptional
- ▶ Will nearly always be granted in the case of a protected party on the basis that PPs should be entitled to the same degree of privacy as an adult with capacity who is permitted to settle her own case without requiring the court's involvement. The PP has also not necessarily chosen to bring the case.

Anonymity

- ▶ Applications for anonymity can be made before proceedings are issued or at any stage. The party shouldn't usually need to make a formal application but it will depend.
- ▶ However, should be made early on once proceedings have been issued/served, *Jones v MOD* [2020] EWHC 1603 (QB):

Late applications prejudice the parties, the media and the good administration of justice. They prejudice the party on whose behalf a late application is made not least because it increases the likelihood that their identity might already have been placed in the public domain. In this case, for example, the pleadings would have been available to public inspection for some time together with previous orders of the Court and indeed this case was listed without objection on the daily cause list published on the Court Service website. A late application also unacceptably prejudices the representatives of the media who are given little, or no, opportunity to seek to challenge an application and ensure that their voice is properly taken into consideration before any principles of open justice are potentially infringed. It also puts the court in a difficult position as it is capable of depriving it of the time necessary for proper consideration of what are important applications.

Anonymity

▶ *JX MX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96:

- The approval hearing should be listed in public
- Starting point is that an order should be made restricting publication of the name and address of the claimant, the litigation friend, the parents of the claimant (if different to the LF) and restricts access by non-parties to documents on the court file other than those which have been anonymised
- Before the order is made, court should invite submissions from the press and non-parties.

Approval

- ▶ Key principles
- ▶ Procedure
 - ▶ Pre-issue
 - ▶ Post-Issue
- ▶ What happens to the money
- ▶ Costs

Approval: principles

Compromise etc. by or on behalf of a child or protected party¹

21.10—(1) Where a claim is made—

- (a) by or on behalf of a child or protected party; or
- (b) against a child or protected party,

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

Approval: principles

- ▶ 1. Approval is necessary
 - ▶ Why?
 - ▶ The requirement for approval imposes an external check on the propriety of the settlement (*Dunhill v Burgin [2014] UKSC 18*)
 - ▶ Children and PP are the most vulnerable litigants (as both C and D)
 - ▶ By requiring Court's approval:
 - ▶ Those vulnerable litigants are protected from the lack of skill or experience of legal advisers which might lead to a settlement less than it is worth
 - ▶ D may obtain valid discharge from child or PP's claim
 - ▶ Any money received is properly looked after and wisely applied
 - ▶ Ensures the interests of all dependants to a possible share in the settlement are properly defined and protected

Approval: principles

- ▶ 2. Approval is needed in all cases and forms of compromise
 - ▶ CPR 21.10 makes clear that it is needed for any settlement, compromise or payment (including voluntary interim payment)
 - ▶ This includes:
 - ▶ Agreement under Pt 36
 - ▶ Partial settlement (e.g. liability)
 - ▶ Where a child or PP dies during the course of litigation

Approval: principles

- ▶ 3. No settlement or compromise is binding until it is approved
 - ▶ Parties are entitled to withdraw from the agreement before approval
 - ▶ *Wormald v Ahmed [2021] EWHC 973 (QB)*
 - ▶ Includes settlement reached pre-litigation
 - ▶ *Drinkall v Whitwood [2003] EWCA Civ 1547*
 - ▶ Leading CoA case
 - ▶ Lord Justice Simon Brown:
 - ▶ “Claim” for the purpose of CPR 21.10 must necessarily pre-date the commencement of proceedings
 - ▶ The Court needed full control over any settlement compromising a claim with a child or PP
 - ▶ It would be intolerable for the requirement of the Court’s approval to be escaped merely because some issues remained to be agreed

Approval: principles

- ▶ 4. Once settlement is approved, it is binding
 - ▶ Thereafter, no claim can be brought by the child or PP against the instructed solicitors for negligent settlement (either too low or too high)
 - ▶ Practical tip:
 - ▶ If there is any doubt about capacity, it is sensible to seek approval in any event
 - ▶ *Coles v Perfect [2013] EWHC 1955 (QB)*
 - ▶ Neither party alleged incapacity, but both were anxious to secure court approval to ensure settlement was valid and binding
 - ▶ Held that Court had inherent jurisdiction to approve settlement
 - ▶ Were it later to be determined that C lacked capacity, the settlement would remain valid because it was court approved

Approval: principles

▶ 5. Discontinuance

- ▶ Slightly different (and not clear on the wording of the rules)
- ▶ In theory, mere discontinuance does not require approval
- ▶ However, if the discontinuance has arisen as a result of / in accordance with a settlement and/or compromise then the Court's approval will be necessary
 - ▶ *Sayers v SmithKline Beecham Plc [2004] EWHC 1899 (QB)*

Approval: principles

- ▶ 6. If it is later established that a party did not have capacity, an unapproved settlement Order can be set aside
 - ▶ *Dunhill v Burgin [2014] UKSC 18 / [2012] EWCA Civ 397*
 - ▶ C suffered severe brain damage. Settled claim worth approx. £800k for £12.5k
 - ▶ At the time of settlement, no one considered whether she was a PP
 - ▶ In 2009, C (acting via Litigation Friend), issued an application in the original claim seeking a declaration that she did not have capacity at the time of settlement and applied for the Order to be set aside
 - ▶ CoA held (and confirmed by Supreme Court)
 - ▶ The relevant question is whether C had capacity to conduct the proceedings, not whether she had capacity to compromise the claim
 - ▶ She was granted a declaration that she did not have capacity
 - ▶ Pt 21 took precedence over general law of contract
 - ▶ Therefore, Pt 21 invalidated a consent judgment involving a PP reached without approval of the Court
 - ▶ Compromise Order therefore set aside

Approval: Procedure (pre-issue)

► Pre-Issue (CPR 21.10(2))

(2) Where—

- (a) **before proceedings** in which a claim is made by or on behalf of, or against, a child or protected party (whether alone or with any other person) are begun, an agreement is reached for a settlement or compromise or a payment (including any voluntary interim payment) which relates to the claim; **and**
- (b) **the sole purpose of proceedings is to obtain the approval** of the court to a settlement or compromise or a payment (including any voluntary interim payment) which relates to the claim,

the claim must—

- (i) be made using the procedure set out in **Part 8** (alternative procedure for claims); and
- (ii) **include a request to the court for approval** of the settlement or compromise or payment (including any voluntary interim payment).

Approval: Procedure (pre-issue)

- ▶ If the sole purpose of the proceedings is to seek approval, the claim must be made under Pt 8
- ▶ CPR 8.9(c)
 - ▶ Where Pt 8 procedure is followed, the claim will be treated as having been allocated to the multi-track
- ▶ This is required where:
 - ▶ The whole claim is settled
 - ▶ An issue in the claim has been compromised
 - ▶ An interim payment has been agreed but the substantive claim is not ready
- ▶ Think carefully: is the sole purpose of the proceedings purely for approval?
 - ▶ If, for example, quantum agreed but parties want liability directions then the purpose of the proceedings is not solely for approval
 - ▶ In such a scenario, a Pt 7 claim should be issued and an application made for the approval

Approval: Procedure (post-issue)

- ▶ Pt 23 application must be made
- ▶ 21PD.6

6.1 Where in any personal injury case a claim for damages for future pecuniary loss, by or on behalf of a child or protected party, is dealt with by agreement after proceedings have been issued, an application must be made for the court's approval of the agreement.

Approval: Procedure

- ▶ Who will hear the application / conduct Pt 8 approval hearing?
 - ▶ DJ's do not have jurisdiction to approve a settlement involving a PP
 - ▶ If a child may have be a protected party, DJ will not have jurisdiction
 - ▶ 21PD5.6
 - ▶ Children
 - ▶ Master
 - ▶ District Judge
 - ▶ Protected Parties
 - ▶ Master
 - ▶ Designate Civil Judge (or their nominee)

Approval: Procedure...what will the Court need?

▶ Pre-Issue

- ▶ Claim must include (21PD.5)
 - ▶ Terms of the settlement / draft consent order in Form N292
 - ▶ Details of whether D admits liability
 - ▶ Age and occupation of child / PP
 - ▶ Litigation friend's approval
 - ▶ Copy of any financial advice relating to settlement
 - ▶ Circumstances of the incident
 - ▶ Medical and quantum reports
 - ▶ Schedule of loss
 - ▶ Opinion on the merits of settlement
 - ▶ Copy of the instructions for the opinion

▶ Post-Issue

- ▶ Application must include (21PD.6)
 - ▶ Terms of settlement / draft consent Order
 - ▶ Opinion on the merits of the settlement or compromise
 - ▶ A copy of the financial advice
 - ▶ Documentary evidence material to the above

Approval: What happens to the money?

► CPR 21.11

21.11–(1) Where in any proceedings—

- (a) money is recovered by or on behalf of or for the benefit of a child or protected party; or
- (b) money paid into court is accepted by or on behalf of a child or protected party,

the money will be dealt with in accordance with directions given by the court under this rule and not otherwise.

(2) Directions given under this rule may provide that the money shall be wholly or partly paid into court and invested or otherwise dealt with.

(3) Where money is recovered by or on behalf of a protected party or money paid into court is accepted by or on behalf of a protected party, before giving directions in accordance with this rule, the court will first consider whether the protected party is a protected beneficiary.

Approval: What happens to the money?

- ▶ Control of money recovered by or on behalf of a child or protected party
 - ▶ Court may direct that the money be paid into the Court, directly to the party, litigation friend or legal representative
 - ▶ If a child is likely to lack capacity upon reaching 18, their fund should be administered as a protected beneficiary's fund
- ▶ What is a protected beneficiary?
 - ▶ A protected party who lacks capacity to manage and control any money recovered by or on their behalf or for their benefit in the proceedings (CPR 21.1(e))

Approval: What happens to the money?

▶ Protected beneficiary

- ▶ CoP has jurisdiction to make decisions in the best interests of a PB
- ▶ Where sum to be invested is less than £50,000, it may be retained in Court and invested in the same way as the fund of a child
- ▶ Where the sum to be invested is more than £50,000, the order approving the settlement will contain a direction to the litigation friend to apply to the CoP for the appointment of a deputy, after which the fund will be directed by the CoP

Approval: Costs

► CPR 46.4

- 46.4—(1) This rule applies to any proceedings where a party is a child or protected party and—**
- (a) money is ordered or agreed to be paid to, or for the benefit of, that party; or**
 - (b) money is ordered to be paid by that party or on that party's behalf.**
- (“Child” and “protected party” have the same meaning as in rule 21.1(2).)**
- (2) The general rule is that—**
- (a) the court must order a detailed assessment of the costs payable by, or out of money belonging to, any party who is a child or protected party; and**
 - (b) on an assessment under paragraph (a), the court must also assess any costs payable to that party in the proceedings, unless—**
 - (i) the court has issued a default costs certificate in relation to those costs under rule 47.11; or**
 - (ii) the costs are payable in proceedings to which Section II or Section III of Part 45 applies.**

Approval: Costs

- ▶ Purpose of detail assessment is to protect money belong to a child or PP
- ▶ Court need not order detail assessment where:
 - ▶ There is no need to do so to protect the interests of the child or PP
 - ▶ Another party has agreed to pay a specified sum and waived the right to claim further costs
 - ▶ The Court has decided the costs payable to the child or PP by way of summary assessment and the legal representative acting for the child or PP has waived the right to claim further costs
 - ▶ An insurer or other person is liable to discharge the costs which the child or PP would otherwise be liable to pay to the legal representative and the Court is satisfied that the insurer or other person is financially able to discharge those costs