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by email only

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Dear CoP Newsletter Team

In December 2011 I wrote to Sir Nicholas Wall, then President of the Court of Protection, in relation to the difficulties I was experiencing in accepting appointment as litigation friend in health and welfare cases as quickly as I would have liked.

I issued a formal Note on 21 February 2012 to reiterate my acceptance criteria for accepting appointment and to clarify the position, at that time, in relation to the waiting list I was having to introduce for acceptance of cases even where those criteria had been met.

As we are now a year on, I have reviewed the position. I will issue a revised Note.

While the position has been exacerbated by long term absence from the office of key staff, I am pleased to say that, following some internal redeployment of staff and financial resources, all cases which were on the waiting list have now been allocated to case managers in my office.

The maximum number on the waiting list was 47 cases and the longest time a case had been on the waiting list was some 8 months. A problem which had been identified was that the existing criteria for urgent allocation, in practice, led to so many cases being given priority that some cases were languishing on the waiting list for more than a desirable time.

I will continue to accept as a priority serious medical treatment cases. I will continue to be willing to consider giving priority to any other case on its particular facts, if a proper case is made out for expedition. I have however always to have in mind that to advance one case is to potentially prejudice others in which the issues may be of equal importance to the person or persons concerned.

But I now have approximately 68 welfare cases at the stage where my staff are making enquiries to establish if my criteria for acting are met.

Once those criteria are met, cases are still likely to have to be placed on the waiting list to be accepted in chronological order once a case manager becomes available. The relevant date for acceptance is the date on which my criteria were met, not the date on which I was asked to act.

I take this opportunity of reiterating my criteria for acting:

1. Capacity: that the party, or intended party is P or a protected party or child within the meaning of rule 6 of the Court of Protection Rules 2007.

2. Last resort: I only act in the last resort. Enquiries should be made of possible alternative litigation friends and if a suitable and willing person can be identified, I will not normally act; if the court considers that any proposed alternative litigation friend is unsuitable for any reason, that should be made clear when I am asked to act.

3. Security for the costs of legal representation: I make no charge for acting as litigation friend. I am only funded to conduct proceedings in house in serious medical treatment cases. In all other cases I need to retain an external solicitor, to conduct the case on behalf of the party for whom I am acting as litigation friend, on my instructions. But I have no funds to retain such solicitors and I therefore need to secure a source of funding before I can consent to act. This is the most complex and time consuming aspect of the work of my case acceptance team, particularly where P or the protected party or the child is financially ineligible for legal aid. It will be of great assistance in establishing on a timely basis whether my criteria are met if routinely the applicant (particularly if a public authority) or any other party to the proceedings can make such enquiries as are open to them, and provide information and supporting documentation about P's or the protected party's financial circumstances for this purpose when contacting my office.

The changes to financial eligibility for legal aid will come into effect on 1 April 2013. After that date all cases (other than section 21A applications) will have to be funded either on the basis of fully means tested legal aid (as the capital means test will apply to all applicants whether or not they are in receipt of income-based benefits) or on a privately funded basis (whether by the party lacking capacity or through an undertaking by another party to meet my costs).

All parties to proceedings should clearly have in mind that legal representation is expensive to fund and if P or the protected party is not of high means, and the funding is to come out of that party's means, those means are likely to be seriously depleted or exhausted by contested proceedings.

If there is an appointee for State benefits, an attorney appointed under a registered Enduring Power of Attorney or under a Lasting Power of Attorney, or a financial deputy that person should be approached for the relevant information and supporting documents.

The court's order will be required for the purpose of third party disclosure. Any order for this purpose:

- should be drawn as a **separate order**, as it is unlikely that the third party will need to receive information which is private and confidential;
- should both authorise the public authority (or other person) to make such enquiries *and* authorise the third party (HMRC requires that it is specifically named in the order) to provide information and documents in response to those enquiries.

My staff can provide further more detailed guidance about the wording of any proposed draft order.

Yours sincerely

Alastair Pitblado
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