

SCHEDULE 2

Rule 8

“PART 21
CHILDREN AND PROTECTED PARTIES

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Scope of this Part

21.1.—(1) This Part—

- (a) contains special provisions which apply in proceedings involving children and protected parties;
- (b) sets out how a person becomes a litigation friend; and
- (c) does not apply to proceedings under Part 75 where one of the parties to the proceedings is a child.

(2) In this Part—

- (a) ‘the 2005 Act’ means the Mental Capacity Act 2005;

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- (b) ‘child’ means a person under 18;
- (c) ‘lacks capacity’ means lacks capacity within the meaning of the 2005 Act;
- (d) ‘protected party’ means a party, or an intended party, who lacks capacity to conduct the proceedings;
- (e) ‘protected beneficiary’ means a protected party who lacks capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings.

(Rule 6.6 contains provisions about the service of documents on children and protected parties.)

(Rule 48.5 deals with costs where money is payable by or to a child or protected party.)

Requirement for a litigation friend in proceedings by or against children and protected parties

21.2.—(1) A protected party must have a litigation friend to conduct proceedings on his behalf.

(2) A child must have a litigation friend to conduct proceedings on his behalf unless the court makes an order under paragraph (3).

(3) The court may make an order permitting a child to conduct proceedings without a litigation friend.

(4) An application for an order under paragraph (3)—

- (a) may be made by the child;
- (b) if the child already has a litigation friend, must be made on notice to the litigation friend; and
- (c) if the child has no litigation friend, may be made without notice.

(5) Where—

- (a) the court has made an order under paragraph (3); and
- (b) it subsequently appears to the court that it is desirable for a litigation friend to conduct the proceedings on behalf of the child,

the court may appoint a person to be the child’s litigation friend.

Stage of proceedings at which a litigation friend becomes necessary

21.3.—(1) This rule does not apply where the court has made an order under rule 21.2(3).

(2) A person may not, without the permission of the court—

- (a) make an application against a child or protected party before proceedings have started; or
- (b) take any step in proceedings except—
 - (i) issuing and serving a claim form; or
 - (ii) applying for the appointment of a litigation friend under rule 21.6,

until the child or protected party has a litigation friend.

(3) If during proceedings a party lacks capacity to continue to conduct proceedings, no party may take any further step in the proceedings without the permission of the court until the protected party has a litigation friend.

(4) Any step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise.

Who may be a litigation friend without a court order

21.4.—(1) This rule does not apply if the court has appointed a person to be a litigation friend.

(2) A deputy appointed by the Court of Protection under the 2005 Act with power to conduct proceedings on the protected party's behalf is entitled to be the litigation friend of the protected party in any proceedings to which his power extends.

(3) If nobody has been appointed by the court or, in the case of a protected party, has been appointed as a deputy as set out in paragraph (2), a person may act as a litigation friend if he—

- (a) can fairly and competently conduct proceedings on behalf of the child or protected party;
- (b) has no interest adverse to that of the child or protected party; and
- (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party.

How a person becomes a litigation friend without a court order

21.5.—(1) If the court has not appointed a litigation friend, a person who wishes to act as a litigation friend must follow the procedure set out in this rule.

(2) A deputy appointed by the Court of Protection under the 2005 Act with power to conduct proceedings on the protected party's behalf must file an official copy^(GL) of the order of the Court of Protection which confers his power to act either—

- (a) where the deputy is to act as a litigation friend for a claimant, at the time the claim is made; or
- (b) where the deputy is to act as a litigation friend for a defendant, at the time when he first takes a step in the proceedings on behalf of the defendant.

(3) Any other person must file a certificate of suitability stating that he satisfies the conditions specified in rule 21.4(3) either—

- (a) where the person is to act as a litigation friend for a claimant, at the time when the claim is made; or
- (b) where the person is to act as a litigation friend for a defendant, at the time when he first takes a step in the proceedings on behalf of the defendant.

(4) The litigation friend must—

- (a) serve the certificate of suitability on every person on whom, in accordance with rule 6.6 (service on a parent, guardian etc.), the claim form should be served; and
- (b) file a certificate of service when he files the certificate of suitability.

(Rule 6.10 sets out the details to be contained in a certificate of service.)

How a person becomes a litigation friend by court order

21.6.—(1) The court may make an order appointing a litigation friend.

(2) An application for an order appointing a litigation friend may be made by—

- (a) a person who wishes to be the litigation friend; or
- (b) a party.

(3) Where—

- (a) a person makes a claim against a child or protected party;

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- (b) the child or protected party has no litigation friend;
- (c) the court has not made an order under rule 21.2(3) (order that a child can conduct proceedings without a litigation friend); and
- (d) either—
 - (i) someone who is not entitled to be a litigation friend files a defence; or
 - (ii) the claimant wishes to take some step in the proceedings,

the claimant must apply to the court for an order appointing a litigation friend for the child or protected party.

(4) An application for an order appointing a litigation friend must be supported by evidence.

(5) The court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 21.4(3).

Court's power to change a litigation friend and to prevent person acting as a litigation friend

21.7.—(1) The court may—

- (a) direct that a person may not act as a litigation friend;
- (b) terminate a litigation friend's appointment; or
- (c) appoint a new litigation friend in substitution for an existing one.

(2) An application for an order under paragraph (1) must be supported by evidence.

(3) The court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 21.4(3).

Appointment of a litigation friend by court order – supplementary

21.8.—(1) An application for an order under rule 21.6 or 21.7 must be served on every person on whom, in accordance with rule 6.6 (service on parent, guardian etc.), the claim form must be served.

(2) Where an application for an order under rule 21.6 is in respect of a protected party, the application must also be served on the protected party unless the court orders otherwise.

(3) An application for an order under rule 21.7 must also be served on—

- (a) the person who is the litigation friend, or who is purporting to act as the litigation friend, when the application is made; and
- (b) the person who it is proposed should be the litigation friend, if he is not the applicant.

(4) On an application for an order under rule 21.6 or 21.7, the court may appoint the person proposed or any other person who satisfies the conditions specified in rule 21.4(3).

Procedure where appointment of a litigation friend ceases

21.9.—(1) When a child who is not a protected party reaches the age of 18, the litigation friend's appointment ceases.

(2) Where a protected party regains or acquires capacity to conduct the proceedings, the litigation friend's appointment continues until it is ended by court order.

(3) An application for an order under paragraph (2) may be made by—

- (a) the former protected party;
- (b) the litigation friend; or

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(c) a party.

(4) The child or protected party in respect of whom the appointment to act has ceased must serve notice on the other parties—

- (a) stating that the appointment of his litigation friend to act has ceased;
- (b) giving his address for service; and
- (c) stating whether or not he intends to carry on the proceedings.

(5) If the child or protected party does not serve the notice required by paragraph (4) within 28 days after the day on which the appointment of the litigation friend ceases the court may, on application, strike out^(GL) any claim brought by or defence raised by the child or protected party.

(6) The liability of a litigation friend for costs continues until—

- (a) the person in respect of whom his appointment to act has ceased serves the notice referred to in paragraph (4); or
- (b) the litigation friend serves notice on the parties that his appointment to act has ceased.

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

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.

(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 the settlement of the claim; and
- (b) the sole purpose of proceedings is to obtain the approval of the court to a settlement or compromise of 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.

(3) In proceedings to which Section II of Part 45 applies, the court will not make an order for detailed assessment of the costs payable to the child or protected party but will assess the costs in the manner set out in that Section.

(Rule 48.5 contains provisions about costs where money is payable to a child or protected party.)

Control of money recovered by or on behalf of a child or protected party

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,

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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.

Expenses incurred by a litigation friend

21.12.—(1) In proceedings to which rule 21.11 applies, a litigation friend who incurs expenses on behalf of a child or protected party in any proceedings is entitled on application to recover the amount paid or payable out of any money recovered or paid into court to the extent that it—

- (a) has been reasonably incurred; and
- (b) is reasonable in amount.

(2) Expenses may include all or part of—

- (a) an insurance premium, as defined by rule 43.2(1)(m); or
- (b) interest on a loan taken out to pay an insurance premium or other recoverable disbursement.

(3) No application may be made under the rule for expenses that —

- (a) are of a type that may be recoverable on an assessment of costs payable by or out of money belonging to a child or protected party; but
- (b) are disallowed in whole or in part on such an assessment.

(Expenses which are also ‘costs’ as defined in rule 43.2(1)(a) are dealt with under rule 48.5(2).)

(4) In deciding whether the expenses were reasonably incurred and reasonable in amount, the court will have regard to all the circumstances of the case including the factors set out in rule 44.5(3).

(5) When the court is considering the factors to be taken into account in assessing the reasonableness of the expenses, it will have regard to the facts and circumstances as they reasonably appeared to the litigation friend or to the child’s or protected party’s legal representative when the expense was incurred.

(6) Where the claim is settled or compromised, or judgment is given, on terms that an amount not exceeding £5,000 is paid to the child or protected party, the total amount the litigation friend may recover under paragraph (1) must not exceed 25% of the sum so agreed or awarded, unless the court directs otherwise. Such total amount must not exceed 50% of the sum so agreed or awarded.

Appointment of a guardian of a child’s estate

21.13.—(1) The court may appoint the Official Solicitor to be a guardian of a child’s estate where—

- (a) money is paid into court on behalf of the child in accordance with directions given under rule 21.11 (control of money received by a child or protected party);
- (b) the Criminal Injuries Compensation Authority notifies the court that it has made or intends to make an award to the child;

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- (c) a court or tribunal outside England and Wales notifies the court that it has ordered or intends to order that money be paid to the child;
 - (d) the child is absolutely entitled to the proceeds of a pension fund; or
 - (e) in any other case, such an appointment seems desirable to the court.
- (2) The court may not appoint the Official Solicitor under this rule unless—
- (a) the persons with parental responsibility (within the meaning of section 3 of the Children Act 1989⁽¹⁾) agree; or
 - (b) the court considers that their agreement can be dispensed with.
- (3) The Official Solicitor’s appointment may continue only until the child reaches 18.”

⁽¹⁾ 1989 c. 41.