

Update: Practice & Procedure



CoPPA Cymru launch event

Monday 21 May 2018

By Emma Sutton





Introduction

- ❖ On **1 December 2017** the new Court of Protection Rules 2017 and Court of Protection Practice Directions 2017 came into force
- ❖ They incorporate the previous pilots (*transparency, case management and s.49 reports*) and bring the CoP Rules in line with the CPR. The vast majority of CoP Rules and PD's now have different numbers
- ❖ There are also a number of new Court Forms – in particular **COPDOL10** has been replaced with **COPDOL11**
- ❖ Any template or precedent documents that you have will need to be updated in terms of any cross references to the relevant CoP Rule or PD

Participation of P

Part 1

PD 1A

Part 17 (litigation friends and rule 1.2
representatives)

PD 17A and 17B



Rule 1.2 makes provision to:

- a) ensure that in every case the question of what is required to ensure that **P's 'voice; is properly before the court** is addressed; and
- b) **provide flexibility** allowing a range of different methods to achieve this, with the purpose of ensuring that the court is in a position to make a properly informed decision at all relevant stages of a case

The 'menu' of options are that –

- a) P should be **joined** as a party
- b) P's participation should be secured by the appointment of an **accredited legal representative** to represent P in the proceedings and to discharge such other functions as the court may direct
- c) P's participation should be secured by the appointment of a **representative** whose function shall be to provide the court with information as to the matters set out in s.4(6) of the Act and to discharge such other functions as the court may direct
- d) P should have the **opportunity to address** (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur
- e) P's interests and position can properly be secured **without any direction** under sub-paragraphs (a) to (d) being made or by the making of an alternative direction meeting the overriding objective

- On 2 April 2018 HMCTS introduced the process of appointing accredited legal representatives (ALRs) of the court's own motion, in appropriate cases. This means that the 'menu' of options for representing P, as set out in rule 1.2 is now complete
- The Law Society have a Mental Capacity Accreditation Scheme (many local solicitors have attended and passed)
- It is not clear at present how the court will appoint an ALR in proceedings, save that a COP9 application should be lodged by the proposed ALR at the commencement of the case) (PD 17B, paragraph 3)

Case pathways

Part 3

PD 3B



Rule 3.9: There are three case pathways

- (a) the Personal Welfare Pathway
- (b) the Property and Affairs Pathway
- (c) the Mixed Welfare and Property Pathway

Each case shall, on issue, be allocated to one of the three case pathways unless it is in an **excepted class of case**, or the court directs that an excepted class can be 'placed' onto a case pathway

PD3B

The **excepted classes** of cases are -

- (a) uncontested applications
- (b) applications for statutory wills and gifts
- (c) applications made by the Public Guardian
- (d) applications in Form COPDOL11 (*community DoLs*)
- (e) applications in Form DLA (*section 21A appeals*) and
- (f) Schedule 3 applications (under Part 23 of the Rules) (*international protection of adults*)

So the majority of cases before the CoP!



The pre-issue stage: personal welfare pathway (*not applicable for property and affairs*)

The applicant must take all necessary steps to—

- (a) identify all potential respondents and any other interested parties
- (b) notify P (where possible) and the potential respondents and other interested parties of the intention to start the proceedings
- (c) explain to those notified the nature of the proceedings and the matters which the court will be asked to determine
- (d) set out the applicant's proposals for resolving matters without the need for proceedings**
- (e) engage with those notified to resolve those matters as far as possible**
- (f) ensure, where it is not possible to resolve matters without starting proceedings, that all the documents and information required will be ready to be included with the application

Issuing the application

The applicant must include in the application, or refer in the application to and file with it, the following documents or information—

- (a) a draft final order or explanation of the order sought
- (b) a clear explanation of why an order, and the specific order sought, is required
- (c) an explanation of the nature of the dispute
- (d) a statement of what is expected of P's family and/or other connected individuals
- (e) the names of the key people involved in the case, and the nature of their involvement
- (f) a list of the options for P
- (g) a needs assessment, including where appropriate a risk assessment
- (h) a support plan for P, with a time line, including where appropriate a transfer plan

Issuing the application cont...

- (i) evidence that the key individuals and agencies have been consulted
- (j) confirmation that a best interests meeting has taken place, and a copy of the minutes of that meeting
- (k) any relevant medical evidence
- (l) except in applications under s.21A of the Act, a report from a medical practitioner or other appropriately qualified professional on P's litigation capacity and capacity to make decisions on the issues in the case
- (m) an explanation of how P can be supported to maximise any decision-making capacity which P has (if possible)
- (n) an indication of whether there is likely to be a public law challenge in the case, and if so, the nature of the challenge which is anticipated
- (o) a statement of how it is proposed that P will be involved in the case

Very front-loaded!



Court bundles

Part 4

PD 4B



The bundle

The bundle must contain copies of all documents relevant to the hearing, in chronological order from the front of the bundle, paginated, indexed, and divided into separate sections as follows—

- (a) preliminary documents;
- (b) any other case management documents required by any other practice direction;
- (c) a time estimate;
- (d) applications and orders including all Court of Protection forms filed with the application;
- (e) any registered enduring or lasting power of attorney;
- (f) any urgent or standard authorisation given under Schedule A1 of the Mental Capacity Act 2005;
- (g) statements and affidavits;
- (h) any care or support plans;
- (i) experts' reports and other reports; and
- (j) other documents, divided into further sections as may be appropriate (Paragraph 4.1, PD4B)

Timetable for preparing and lodging the bundle

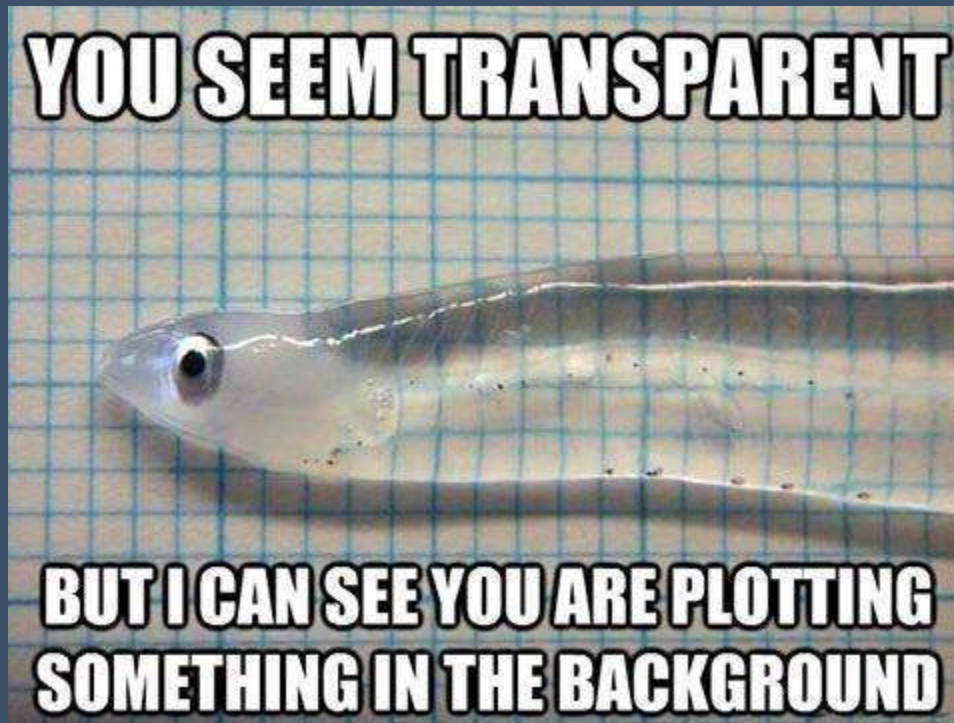


- ✓ The party preparing the bundle must, whether or not the bundle has been agreed, provide a **paginated index** and, when practicable, **paginated copies of updating material** to all other parties not less than **5 working days** before the hearing (paragraph 6.1, PD4B)
- ✓ Where counsel is to be instructed at any hearing, a paginated bundle must (if not already in counsel's possession) be delivered to counsel by the person instructing that counsel not less than **4 working days** before the hearing (paragraph 6.2, PD4B)
- ✓ The bundle must be lodged with the court not less than **3 working days** before the hearing, or at such other time as may be specified by the judge (paragraph 6.3, PD 4B)
- ✓ The preliminary documents must be lodged with the court no later than **11am on the day before the hearing** (paragraph 6.4, PD4B)

Transparency

Part 4

PD 4C



In all proceedings **except applications for a committal order**, the court will ordinarily:

- (a) make an order under rule 4.3(1)(a) that any attended hearing shall be in public; and
- (b) in the same order, impose restrictions under rule 4.3(2) in relation to the publication of information about the proceedings.

There is standard order published on the judicial website (the court may ask you to draft)

In deciding whether there is **good reason not to make an order**, the court will have regard in particular to -

- a) the need to protect P or another person involved in the proceedings
- b) the nature of the evidence in the proceedings
- c) whether earlier hearings in the proceedings have taken place in private
- d) whether the court location where the hearing will be held has facilities appropriate to allowing general public access to the hearing, and whether it would be practicable or proportionate to move to another location or hearing room
- e) whether there is any risk of disruption to the hearing if there is general public access to it
- f) whether, if there is good reason for not allowing general public access, there also exists good reason to deny access to duly accredited representatives of news gathering and reporting organisations



Steps following issue

- As soon as practicable and in any event within 14 days of the date on which the application form was issued, the applicant must **serve a copy of the application form on any person who is named as a respondent**, together with copies of any documents filed in accordance with rule 9.4 and a form for acknowledging service (**rule 9.6**)
- P must be notified in accordance with Part 7 that an application form has been issued, unless the requirement to do so has been dispensed with under rule 7.11 (rule 9.9)
- As soon as practicable and in any event within 14 days of the date on which the application form was issued, **the applicant must notify the persons specified in the relevant practice direction:**
 - a) that an application has been issued;
 - b) whether it relates to the exercise of the court's jurisdiction in relation to P's property and affairs, or P's personal welfare, or to both; and
 - c) of the order or orders sought (rule 9.10)



The following list of people, ordered according to the presumed closeness in terms of relationship to P, should be notified (**at least 3 people**) in descending order (as appropriate to P's circumstances):

- a) spouse or civil partner;
- b) person who is not a spouse or a civil partner but who has been living with P as if they were;
- c) parent or guardian;
- d) child;
- e) brother or sister;
- f) grandparent or grandchild;
- g) aunt or uncle;
- h) child of a person falling within sub-paragraph (e);
- i) step-parent; and
- j) half-brother or half-sister (PD 9B, paragraph 7)

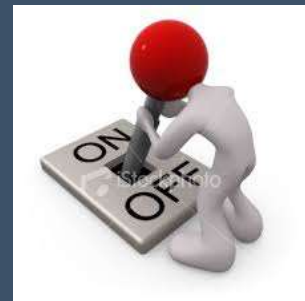


Evidence

Part 14

PD14A





The court **may control** the evidence by giving directions as to –

- (i) the issues on which it requires evidence;
- (ii) the nature of the evidence which it requires to decide those issues; and
- (iii) the way in which the evidence is to be placed before the court (**rule 14.2**)

The general rule is that any fact which needs to be proved by evidence of a witness is to be proved -

- (a) where there is a final hearing, by the witness's oral evidence; or
- (b) at any other hearing, or if there is no hearing, by the witness's evidence in writing (rule 14.3)

IMPT: PD14A, paragraphs 33-47, sets out how the witness statement (on COP24 form) should be formatted, and what it should contain

Section 49 reports

Part 14 of the Rules

PD 14E (*nb: the annex contains the form of an order*)



Section 49 of the MCA 2005 titled '*power to call for reports*' provides that:

- (1) This section applies where, in proceedings brought in respect of a person ('P') under Part 1, the court is considering **a question** relating to P.
- (2) The court may require a report to be made to it by the Public Guardian or by a Court of Protection Visitor.
- (3) The court may require a local authority, or an NHS body, to arrange for a report to be made—
 - a) by one of its officers or employees, or
 - b) by such other person (other than the Public Guardian or a Court of Protection Visitor) as the authority, or the NHS body, considers appropriate.
- (4) The report must deal with **such matters relating to P as the court may direct.**

PD 14E, paragraph 3(g): a common factor which the court may consider when deciding whether to order a section 49 report is when the '*evidence before the court does not adequately confirm the position **regarding P's capacity** or where it is borderline; or if information is required to **inform any best interests decision** to be made in relation to P by the court*' - it is very widely drafted

Reports under arrangements made by a local authority or an NHS body

- Wherever practicable, **before making an application** for an order requiring a report under section 49, a party to proceedings should use their best endeavours to:
 - (a) **make contact with an appropriate person** within the relevant local authority or NHS body so they are made aware that an application is to be made; its purpose; and the issues or questions which are hoped to be addressed within the report;
 - (b) **identify a named person** or by reference to their office (“the senior officer”) within the relevant local authority or NHS body who will be able to receive the court order on its behalf; and
 - (c) **enquire as to the reasonableness and time scales** for providing the report should the court order it (PD 14E, paragraph 7)
- The party making the application **must submit a draft letter of instruction** for the purpose of accompanying the order (PD14E, paragraph 8)

- **The court will make enquiry** of the party making the application as to what efforts have been made to comply with paragraph 7 above, and the response of the relevant local authority or NHS body, and will take this into consideration before making an order (PD14E, paragraph 9)



Written questions to person making a report under section 49

- (1) Where a report is made under section 49 **the court may, on the application of any party**, permit written questions relevant to the issues before the court to be put to the person by whom the report was made
- (2) The questions sought to be put to the maker of the report **shall be submitted to the court**, and the court may put them to the maker of the report with such amendments (if any) as it thinks fit and the maker of the report shall give replies in writing to the questions so put
- (3) The court shall send a copy of the replies given by the maker of the report under this rule to the parties and to such other persons as the court may direct (**rule 14.25**)

Experts

Part 15

PD 15A



Rule 15.3

(1) Expert evidence shall be restricted to that which is **necessary** to assist the court to **resolve the issues** in the proceedings.

(2) The court may **give permission** to file or adduce expert evidence only if satisfied that the evidence—

(a) is **necessary to assist the court to resolve the issues** in the proceedings; and

(b) **cannot otherwise be provided either—**

(i) by a rule 1.2 representative; or

(ii) in a report under section 49 of the Act

Rule 15.5(3)

When deciding whether to give permission, the court is to have regard in particular to—

- (a) **the issues** to which the expert evidence would relate
- (b) **the questions** which the expert would answer
- (c) **the impact** which giving permission would be likely to have on the timetable, duration and conduct of the proceedings
- (d) **any failure** to comply with any direction of the court about expert evidence, and
- (e) **the cost** of the expert evidence

Written questions to experts



Rule 15.7

- (1) A party may put written questions to—
 - (a) an expert instructed by another party; or
 - (b) a single joint expert about a report prepared by such a person

- (2) Written questions:
 - (a) may be put once only
 - (b) **must be put within 28 days** beginning with the date on which the expert's report was served
 - (c) must be for the purpose only of **clarification of the report**; and
 - (d) must be copied and sent to the other parties at the same time as they are sent to the expert

Costs

Part 19

PD 19A

(and Parts 44, 46 and 47 of the CPR)



- Where the proceedings concern P's **property and affairs** the general rule is that the costs of the proceedings, or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to P's estate (rule 19.2)
- Where the proceedings concern P's **personal welfare** the general rule is that there will be no order as to the costs of the proceedings, or of that part of the proceedings that concerns P's personal welfare (rule 19.3)

- The court may depart from the general rules if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances including:
 - a) the conduct of the parties
 - b) whether a party has succeeded on part of that party's case, even if not wholly successful, and
 - c) the role of any public body involved in the proceedings

The conduct of the parties includes:



- a) conduct before, as well as during, the proceedings
- b) whether it was reasonable for a party to raise, pursue or contest a particular matter
- c) the manner in which a party has made or responded to an application or a particular issue
- d) whether a party who has succeeded in that party's application or response to an application, in whole or in part, exaggerated any matter contained in the application or response; and
- e) any failure by a party to comply with a rule, practice direction or court order (rule 19.5)

Contempt of court

Part 21

PD 21A



- Rules and PD are now MUCH more detailed
- Different types of committal. Most commonly, applications are made due to breaches of a judgment or order
- A committal application is made by an application on COP9 form under Part 10 in the proceedings in which the judgment or order was made or the undertaking was given
- The application notice must—
 - a) **set out in full** the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and
 - b) be supported by one or more **affidavits** containing all the evidence relied upon
- The application notice and the evidence in support must be **served personally** on the respondent (unless there is a contrary order of the court) (rule 21.10)

Thank you for listening!

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