

## **PRACTICE DIRECTION – HOW TO START PROCEEDINGS**

*This practice direction supplements Part 9 of the Court of Protection Rules 2007*

### **PRACTICE DIRECTION E – APPLICATIONS RELATING TO SERIOUS MEDICAL TREATMENT**

#### **General**

1. Rule 71 enables a practice direction to make additional or different provision in relation to specified applications.

#### **Applications to which this practice direction applies**

2. This practice direction sets out the procedure to be followed where the application concerns serious medical treatment in relation to P.

#### **Meaning of ‘serious medical treatment’ in relation to the Rules and this practice direction**

3. Serious medical treatment means treatment which involves providing, withdrawing or withholding treatment in circumstances where:
  - (a) in a case where a single treatment is being proposed, there is a fine balance between its benefits to P and the burdens and risks it is likely to entail for him;
  - (b) in a case where there is a choice of treatments, a decision as to which one to use is finely balanced; or
  - (c) the treatment, procedure or investigation proposed would be likely to involve serious consequences for P.
4. “Serious consequences” are those which could have a serious impact on P, either from the effects of the treatment, procedure or investigation itself or its wider implications. This may include treatments, procedures or investigations which:
  - (a) cause, or may cause, serious and prolonged pain, distress or side effects;
  - (b) have potentially major consequences for P; or

(c) have a serious impact on P's future life choices.

### **Matters which should be brought to the court**

5. Cases involving any of the following decisions should be regarded as serious medical treatment for the purpose of the Rules and this practice direction, and should be brought to the court:
  - (a) decisions about the proposed withholding or withdrawal of artificial nutrition and hydration from a person in a permanent vegetative state or a minimally conscious state;
  - (b) cases involving organ or bone marrow donation by a person who lacks capacity to consent; and
  - (c) cases involving non-therapeutic sterilisation of a person who lacks capacity to consent.
  
6. Examples of serious medical treatment may include:
  - (a) certain terminations of pregnancy in relation to a person who lacks capacity to consent to such a procedure;
  - (b) a medical procedure performed on a person who lacks capacity to consent to it, where the procedure is for the purpose of a donation to another person;
  - (c) a medical procedure or treatment to be carried out on a person who lacks capacity to consent to it, where that procedure or treatment must be carried out using a degree of force to restrain the person concerned;
  - (d) an experimental or innovative treatment for the benefit of a person who lacks capacity to consent to such treatment; and
  - (e) a case involving an ethical dilemma in an untested area.
  
7. There may be other procedures or treatments not contained in the list in paragraphs 5 and 6 above which can be regarded as serious medical treatment. Whether or not a procedure is regarded as serious medical treatment will depend on the circumstances and the consequences for the patient.

## **Consultation with the Official Solicitor**

8. Members of the Official Solicitor's staff are prepared to discuss applications in relation to serious medical treatment before an application is made. Any enquiries about adult medical and welfare cases should be addressed to a senior healthcare lawyer at the Office of the Official Solicitor, Victory House, 30 to 34 Kingsway, London WC2B 6EX, telephone 020 3681 2751, fax 020 3681 2762, email: enquiries@offsol.gsi.gov.uk.

## **Parties to proceedings**

9. The person bringing the application will always be a party to proceedings, as will a respondent named in the application form who files an acknowledgment of service.<sup>1</sup> In cases involving issues as to serious medical treatment, an organisation which is, or will be, responsible for providing clinical or caring services to P should usually be named as a respondent in the application form (where it is not already the applicant in the proceedings).

(Practice direction B accompanying Part 9 sets out the persons who are to be notified that an application form has been issued.)

10. The court will consider whether anyone not already a party should be joined as a party to the proceedings. Other persons with sufficient interest may apply to be joined as parties to the proceedings<sup>2</sup> and the court has a duty to identify at as early a stage as possible who the parties to the proceedings should be.<sup>3</sup>

## **Allocation of the case**

11. Where an application is made to the court in relation to:
  - (a) the lawfulness of withholding or withdrawing artificial nutrition and hydration from a person in a permanent vegetative state, or a minimally conscious state; or
  - (b) a case involving an ethical dilemma in an untested area,

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<sup>1</sup> Rule 73(1).

<sup>2</sup> Rule 75.

<sup>3</sup> Rule 5(2)(b)(ii).

the proceedings (including permission, the giving of any directions, and any hearing) must be conducted by the President of the Court of Protection or by another judge nominated by the President.

12. Where an application is made to the court in relation to serious medical treatment (other than that outlined in paragraph 11) the proceedings (including permission, the giving of any directions, and any hearing) must be conducted by a judge of the court who has been nominated as such by virtue of section 46(2)(a) to (c) of the Act (i.e. the President of the Family Division, the Chancellor or a puisne judge of the High Court).

#### **Matters to be considered at the first directions hearing**

13. Unless the matter is one which needs to be disposed of urgently, the court will list it for a first directions hearing.

(Practice direction B accompanying Part 10 sets out the procedure to be followed for urgent applications.)

14. The court may give such directions as it considers appropriate. If the court has not already done so, it should in particular consider whether to do any or all of the following at the first directions hearing:
- (a) decide whether P should be joined as party to the proceedings, and give directions to that effect;
  - (b) if P is to be joined as a party to the proceedings, decide whether the Official Solicitor should be invited to act as a litigation friend or whether some other person should be appointed as a litigation friend;
  - (c) identify anyone else who has been notified of the proceedings and who has filed an acknowledgment and applied to be joined as a party to proceedings, and consider that application; and
  - (d) set a timetable for the proceedings including, where possible, a date for the final hearing.

15. The court should also consider whether to give any of the other directions listed in

rule 85(2).

16. The court will ordinarily make an order pursuant to rule 92 that any hearing shall be held in public, with restrictions to be imposed in relation to publication of information about the proceedings.

### **Declarations**

17. Where a declaration is needed, the order sought should be in the following or similar terms:

- That P lacks capacity to make a decision in relation to the (proposed medical treatment or procedure).  
E.g. "That P lacks capacity to make a decision in relation to sterilisation by vasectomy"; and
- That, having regard to the best interests of P, it is lawful for the (proposed medical treatment or procedure) to be carried out by (proposed healthcare provider).

18. Where the application is for the withdrawal of life-sustaining treatment, the order sought should be in the following or similar terms:

- That P lacks capacity to consent to continued life-sustaining treatment measures (and specify what these are); and
- That, having regard to the best interests of P, it is lawful for (name of healthcare provider) to withdraw the life-sustaining treatment from P.