

PRACTICE DIRECTION 1A – PARTICIPATION OF P

This practice direction supplements Part 1 of the Court of Protection Rules 2017

1. Developments in the case law both of the European Court of Human Rights and domestic courts have highlighted the importance of ensuring that P takes an appropriate part in the proceedings and the court is properly informed about P; and the difficulties of securing this in a way which is proportionate to the issues involved and the nature of the decisions which need to be taken and avoids excessive delay and cost.

2. To this end, 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 for 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.

3. The great majority of cases in terms of numbers before the Court of Protection relate to non-contentious matters concerning property and affairs, where there is a need to preserve P’s resources and experience has shown that they can be dealt with on paper and without joining P as a party or appointing anyone to represent P. This is covered by rule 1.2(2)(e) which provides that none of the listed directions need be made.

4. Other cases, involving a range of issues relating to both property and affairs and personal welfare do or may call for a higher level of participation by or on behalf of P at one or more stages of the case.

5. Rule 1.2 accordingly requires the court in every case to consider whether it should make one, or more, of a number of possible directions for securing P’s participation. These directions cover a range from the joining of P as a party securing P’s participation by the appointment of an accredited legal representative; securing P’s participation by the appointment of a representative; securing P’s participation by giving P the opportunity to address the judge directly or indirectly; and securing P’s participation in some other way which meets the overriding objective.

6. In considering whether it should make any of these directions, and if so which of them, the court is required to have regard to a range of factors to determine the participation and representation needed. In this way the court is both required and enabled to tailor the provision it directs for P’s participation and representation to the circumstances of the individual case.

7. If the court concludes that P lacks capacity to conduct the proceedings and the circumstances require that P should be joined as a party, the order joining P as a party shall only take effect on the appointment of a litigation friend or, if the court so directs, on or after the appointment of an accredited legal representative. This enables steps to be taken and orders to be made before P becomes a party. During that period P's participation can be secured and the court can seek relevant information in any of the ways set out in rule 1.2(2)(b) to (e).

8. Provisions relating to the appointment of a litigation friend and rule 1.2 representatives (namely an accredited legal representative appointed pursuant to rule 1.2(2)(b) and a representative appointed pursuant to rule 1.2(2)(c)) are contained in Part 17. Rule 1.2 representatives can only be appointed with their consent.

9. An accredited legal representative is defined in rule 2.1. When such representatives exist one can be appointed whether or not P is joined as a party and this may be of assistance if urgent orders are needed, particularly if they are likely to have an impact on the final orders (e.g. an urgent order relating to residence).

10. When P lacks capacity to conduct the proceedings and is made a party an accredited legal representative is not intended as a substitute for a litigation friend, but as an alternative in a suitable case (or in the early stages of the case).

11. When P lacks capacity to conduct the proceedings and an order that he or she is to be a party is made factors relevant to the choice between appointing a litigation friend and an accredited legal representative to represent him or her as a party will include—

Whether there will be a need for expert or other evidence to be obtained and filed, or other material gathered, on P's behalf;

The nature and complexity of the case;

The likely range of issues.

12. In other cases their nature and complexity, the issues raised or likely to be raised in them and the stage they have reached could mean that the assistance of an accredited legal representative is not required or is inappropriate and that P's participation is best secured and the court will be properly informed by the appointment of a representative under rule 1.2(2)(c) (who could be a friend, an IMCA, an advocate appointed under the Care Act 2014, a family member or anyone with relevant knowledge) or by directions being made under rule 1.2(2)(d) or (e).

13. A rule 1.2 representative must be able to discharge his or her functions fairly and competently. It is possible that a rule 1.2 representative may be in, or find himself or herself in, a personal or professional position in which he or she cannot properly represent P, provide the court with information about P or carry out other functions directed by the court. In such a case, Section 2 of Part 17 allows for the court to vary the terms of the appointment with a view to resolving the difficulty, or to discharge the appointment altogether (in which case the court will consider afresh whether it should make one or more of the directions in paragraph (2) of rule 1.2).