QUEEN SQUARE
CHAMBERS

Infant Settlements… what the court wants

"No settlement, compromise or payment….shall be valid….without the approval of the court" CPR 21.10

The rules surrounding children and protected parties is generally well known and set out in CPR 21 and 21PD. It is worth remembering that reasons given for having the Courts approval is:

1. to protect the child from incompetent lawyers
2. to give a defendant a valid discharge from the claim
3. to ensure a child's award is properly protected

The Courts undertake thousands of infant approval hearings up and down the country each year, most conducted before the District Bench, and yet there is little guidance on how these cases are to be conducted, who is to attend, how monies are to be invested and what expenses incurred by the Litigation Friend can properly be deduced from the infant's damages. These issues are explored, with some suggestions as to what steps ought to be taken. It is, in the main, aimed at the lower value claims.

The Litigation Friend

A child MUST have a Litigation Friend to conduct proceedings [*21.2(2)]* and it follows that any steps taken without one have no effect – *21.3(4).* A parties' ability to withdraw an agreement before approval is well recognised – see *Drinkall v Whitwood [2003] EWCA Civ 1547*

The process for appointing a Litigation Friend can be performed with or without a court order, with the essential ingredients being that the Litigation Friend:-

- can fairly and competently conduct proceedings
- has no current or likely future conflict with the child
- gives an undertaking as to costs – *4(3)*

A certificate of suitability is required confirming the above. Any application to appoint a Litigation Friend is to be supported by evidence and it must be served on all parties to the proceedings – *21.5(4).*

The Application for Approval

It is often overlooked that it is not just infant settlements that require court approval. Where *interim payments* have been agreed by the parties the courts approval is also required. (usually such an application is considered on the papers and doesn't require a

court hearing). The vast majority of infant approval hearings are before the District bench and arise *before* proceedings have begun. In such circumstances CPR *21.10(2)* requires the Claimant to issue a Part 8 Claim which must request the matter be listed for a court approval hearing. It must also include the following *[21 PD.5.1]*

- a draft consent order (Form N292 is specified although see below)
- evidence about the age of the child (usually in the form of a copy of the birth certificate)
- the signed approval to the terms of the settlement from the Litigation Friend
- the details of the claim and the terms of the settlement
- a copy of the medical report(s) and (where appropriate) a schedule of the loss, together with any counter schedule (if relevant)
- a copy of counsel's opinion (or that of a solicitor) together with any evidence specifically relied upon within that opinion
- if the claim includes any future losses then counsel's opinion needs to address the issue of periodical payments and matters specified in *8* (the terms of a PP order) together with *41.9* (the funding of any PPs)

Whilst District Judges (including Deputies) or Masters will hear such applications, where the child is also a protected party the matter will "normally" be heard by a Designated Civil Judge (or nominee) or a Master – *21PD.6.5*

The Approval Hearing – a pre-hearing checklist

Curiously, the CPR is silent on who should attend the approval hearing and accordingly local guidelines have developed. Most would require the following:-

1. The Litigation Friend and the child should be in attendance
2. They should bring with them a copy of the birth certificate AND the original (or Deed Poll if change of name)
3. They must bring with them details of any Child Trust Fund or Junior ISA account (if they exist) for the court to consider on investment (see below)
4. The Litigation Friend's bank details should also be brought to court if they are requesting any immediate payment out
5. The initial section of Form 320 (CFO) and Form 212 needs to be completed and signed by the Litigation Friend and brought to court should the court decide to consider investing in the court fund's office.

At the hearing the court will want to hear from the Litigation Friend and ensure that the medical prognosis has been achieved, to ask about investment and to see any scars of the child. A common error is the lack of any evidence from the defendant about the agreed sum for costs.

Following guidance in the Court of Appeal decision in *JXMX v Dartford & Gravesham NHS Trust [2015] EWCA Civ 96*, the court is required to list the case in public with the default position being that the Judge *should* make an anonymity order for the protection of the Claimant and his/her family unless satisfied after hearing argument that it is not necessary to do so. *In the vast majority of infant approval hearings before the District Judge this*

issue never arises, but it is suggested that the Judge might add a recital to the order indicating that an anonymity order is considered unnecessary.
It might also be thought that because the hearing is in public then the rights of audience exemption given to "solicitor agents" (to conduct matters in chambers) would not apply.

Investment

This is an area that is frequently over looked by practitioners and all too often the parties attend the hearing automatically assuming that all monies will be invested in the Court Funds Office and a draft order is accordingly produced. The Court has a duty under Pt 21.11 to give directions as to how the monies are to be dealt with and it *"will consider the general aims to be achieved" (21PD.9.2).* There is a wide judicial discretion.

His Honour Judge Platt at Romford County Court in GW V BW (22.7.11) stressed the need for Judges AND practitioners to *think* about what is the best investment for the child and not blindly to place monies into the CFO Special Account where the rate is a woeful 0.5%. He pointed out that better rates could be achieved with Child ISA or Child Trust Fund or similar accounts where the monies are protected until the child is 18.

With sums under £5000 it is strongly recommended that the solicitor enquire of the Litigation Friend, well before the hearing, as to the existence of such accounts and if necessary for the Litigation Friend to consider opening one for the child before the approval hearing. This will ensure that at the hearing the draft order can allow for the monies to be paid by the defendant to the claimant's solicitors who will then pay it directly into the specified child account.

Expenses of the Litigation Friend

This is very much a hot topic and arises mainly where an ATE insurance policy has been taken out by the Litigation Friend (usually on legal advice) and/or where he/she has entered into a CFA and seeks to recover the success fee being charged by the solicitor.

The problem has arisen since the introduction of fixed success fees from 1st April 2013 under LASPO with a maximum cap of 25% of the damages for pain, suffering and loss of amenity and past losses [s.44(2) LASPO]. The cap includes both the ATE and any success fee.

Whilst CPR 21.12(1) clearly provides for the expense/costs of a Litigation Friend to be recoverable from the child's damages, it is qualified by the requirement that these have been both reasonably incurred and reasonable in amount.

The recent decisions of DJ Lumb in Birmingham County Court in *A v Royal Mail Group [2015] EW Misc B24 (CC)* and the subsequent cost decision on 18.9.15, reflect the

concerns that the judiciary have over claims for ATE premiums and success fees being deducted from children's damages.

In relation to the recovery of an ATE premium, the Litigation Friend must provide details and explain why it was necessary [21PD.11.2]. Applying the 21.12(1) criteria, the court will needed considerable persuasion that such a policy was necessary, especially with the advent of Qualified One Way Costs Shifting.

Where the Litigation Friend is seeking to recover any success fee being sought by the solicitor, and damages are less then £25,000, then under *21 PD.11.3,* the court must be provided with:-

- a copy of the CFA
- a copy of the risk assessment
- why that funding model was used
- the advice given to the Litigation Friend about the funding issues
- details of any agreed or recovered costs so far
- the amount agreed for PSLA and past losses

As DJ Lumb pointed out, *"Simply because an ill-informed Litigation Friend signs up to a CFA with a success fee of 100% does not mean that a 100% success fee is a reasonable expense for CPR 21.12."*

Since most claims will involve an innocent child passenger, it is difficult to see what litigation risks arise. Many courts are awarding no more than 10% of the General damages agreed, on the basis that this was the increase recommended in the Jackson reforms (to compensate for the irrecoverable expense of a success fee) and subsequently adopted by the Court of Appeal in Simmons v Castle.

Conclusions

The procedure of approving infant settlements has been in existence for a very long time and is recognised as an important practice for protecting the most vulnerable. It is regrettable therefore that they are often poorly prepared and listed for too short a period. The lack of any guidance within the CPR can result in Litigation Friends and/or infants not attending and with little or no consideration having been given beforehand to investment choices. A simple standard check-list that includes investment issues needs to be adopted by those conducting this litigation. Advocates need to be properly briefed and thought given to the draft order. Whether and what costs/expense can be deducted would benefit from guidance from a senior court.

By Christopher Taylor – August 2016