

## **You are going to a welfare hearing at the Court of Protection – what does this mean for you?**

### **Introduction**

Due to the current restrictions of physical distancing as a result of Covid-19, the vast majority of hearings before the Court of Protection are taking place remotely to ensure the continued access to the court which has ultimate responsibility for decision-making within the Mental Capacity Act 2005.

The Transparency Project has published a [Guidance Note](#) about remote hearings, explaining some of the mechanics of how remote hearings work. The Guidance Note is aimed at people taking part in family proceedings, but a lot of what the Note covers will apply also to people taking part in Court of Protection proceedings. The most important thing to remember is that, even though the remote hearing will be a different experience to the face to face hearing that takes place in court because people are at home or in their office, this does not mean the decision is treated any differently or less seriously than were it to occur in the court building. The Court of Protection remains a court of law, one that is dealing with sensitive, often emotive and difficult circumstances, notably, for the person whom the decision is about and their friends, family and wider community affected by whatever the outcome is. That must be at the forefront of what occurs within the hearing.

One effect of remote hearings is that it is more difficult for lawyers and judges to give the sorts of explanations to participants about what will be going on in court than it would be if the hearing was taking place face to face. This guide is intended to help, in particular, those family members or others who may be taking part in the hearing who do not have a lawyer to represent them. You may want to read this alongside the Basic Guide to the Court of Protection which gives an outline of what the Court of Protection is and how it does its work, and a Glossary of the words that the court commonly uses. Both of these can be found [here](#).

This guide, written by Jakki Cowley, an Independent Mental Capacity Advocate, focuses in particular upon welfare hearings, because they are the type of hearing that it is most likely that a family member may have to attend.

### **Language used**

The nature of any court and legal system means there will be words and language used that are commonplace to those that work within the court i.e. the solicitors, the barristers and the judge but less so to others in attendance. Saying 'P,' for example, to describe the individual who any decision is about is one of the most common ones and it is likely one you will hear often. "P" simply means "the person" and is a common term used within this area of the law, in part for simplicity so everyone knows who is being discussed or represented.

Confidentiality and privacy are also important when a decision is being made about someone who is unable to make the decision themselves and therefore not using the person's name but simplifying to P (or agreeing on one name e.g. Mrs B) ensures this occurs. It may well be that, during the hearing itself, the person's name will be used, but in any documents that are produced, it is almost always the case that the person will be anonymised.

"Best interests" will also be a frequently stated term, and there may be individuals within the court that have different views on what is in the person's best interests. There is no definition of best interests within the law, it is a series of factors that must be considered and weighed up. A determination of how much weight to put on an individual's views or their beliefs; the

risks and benefits that may occur depending on the decision proposed. These can be complex and difficult areas of a person's life and the experts involved to consider.

For the person whom the decision is about there is an expectation and assumption that this has been explained to them or those in their life; but there is no expectation that for those where court is not their place of work and where this is an unfamiliar environment, to be familiar with all of the language and words used.

The Court of Protection makes decisions about those who are unable to within the remit of the Mental Capacity Act 2005 and as such its use of language reflect what that law states, those working in this area will have a good understanding of it but most outside of this would not.

### **Who is in court and what is their role?**

When a decision reaches the court it is ultimately for the judge to be the decision maker and not the local authority or NHS trust / doctor. It is not for the judge to take a side, it is for the judge to hear all of the evidence put to him / her which will include, of course, the legal argument. This evidence will combine an individual's views i.e. the person who the decision is about if their wishes and views can be established and presented in any form; their family or friends; the professionals that have been part of the decision; experts may be used to offer clarity about a particular issue. This is what the law dictates should occur to ensure that when a person cannot make a decision about their own circumstances or situation, all the relevant information is presented as far as possible. The judge listens to all the evidence and will ultimately then make a decision.

### **Process of gathering evidence**

Each party that it is in court (the local authority or NHS, the individual who the decision is about, the representatives of family) is represented by a legal team. It is the role of each legal team i.e. the barrister to ask questions of everyone that is taking part in the hearing.

This will often be a range of professionals such as a doctor, nurse, physiotherapist, social worker as well as those who are part of the individual's life (family, friends, partners, colleagues) and of course the person who this decision is about if they are able to be part of the court proceedings.

This is ultimately where all those present provide evidence which will come in the form of talking about reports they've written, being asked their opinions or views, being asked to explain their particular expertise for example in psychiatry or medical treatment or community living.

Equally if you know the person or you are the person, your views will be asked about the decision, why you have certain beliefs or thoughts, you may describe conversations you had, how you know what the person would want or why you're not sure. This is not a test, there are no right or wrong answers: it is about gathering as much information about your knowledge or views as well as the person who this is about. If you are talking about what was or is important to P, are you able to offer examples of how you know this, can you recall experiences or conversations, can you talk about their values or what brings them enjoyment? There are so many examples, but the key point is that when being asked questions by each representative, it is the representative wanting to be sure all the facts or relevant information is heard, for the judge to hear this.

If you are the person who this is about or the family member, the colleague, the friend, the husband or wife, you are likely to have already described this to many people and have read

through statements of your words prepared by solicitors. When being asked questions it is about fully understanding those statements as well as an opportunity to express yourself in your own words and memories and values and beliefs and experiences.

The point is to gather evidence to ensure the decisions is made by the judge on what is heard and has been submitted to court. This can be a difficult process, you may be describing very personal or sensitive details and this can be even more difficult when describing this to people you may not have met. The court is aware of this and whilst cannot always alleviate how the process may feel, it is okay to express a difficulty or needing a break or asking for clarification if you don't understand the questions.

### **Dialogue with the judge**

You will find that in carrying out the above the relevant lawyers will often refer to past case law and judgments, that is, what has happened in the law in this area before. For example, what does the law say about people living in care homes, or their own homes when the decision may be finely balanced?

It therefore may seem that there is a conversation / dialogue happening between barrister and judge that may not be fully clear to others. When referring to the past law or existing guidelines, acronyms may be used, the name of a judgment is stated in a particular way, the law has its own language - legalese. It is about there being a common language within the law to aid communication and understanding for those working within it. For example the judge is given access to the judgements and it is for the barrister presenting them to explain why they are of the view this particular decision made in the court applies. The judge or other solicitors / barristers can then look at that and have a distinct understanding, within the law, of the point being made.

It is simply a way of communicating that all the representatives understand. It is about putting the common held facts or issues in a language that all legal representatives speak. This is not intended to exclude those present but it is important to recognise there may be times it feels like a different language is being spoken (because it is) or a specific point is being made that is not clear to you. Whilst all words and the legalese language may not be fully understood, the judge and others will generally always explain the point when it becomes relevant. For example if there is law that dictates certain things must occur if someone lives in a care home, this may be conveyed in legalese but then will be offered in language others commonly understand when it needs to be. This is not about exclusion, it is recognising the law and the court system have very specific rules that must be communicated in a way legal professionals who are part of the legal system understand.

### **The role of the Official Solicitor – commonly referred to as the ‘OS’**

The Official Solicitor is one person but the role is fulfilled by caseworkers (solicitors) and they instruct a barrister who acts on the OS behalf and they will be referred to both their name (as everyone in court is) as well as 'the OS'. It is the OS' role is to act as litigation friend, that is, to be Ps representative because P is deemed unable to represent themselves. A litigation friend is a safeguard for P and their primary role is to ensure that P's wishes, views, feelings and circumstances are conveyed. They also have a secondary role to this which is to consider what is in P's best interests, even if this may contradict the their wishes (for example P wants to stay at home but the risks and benefits are so great that to it would be false to say that this is in their best interests).

All litigation friends have to balance their task of ensuring P's wishes and feelings are heard with best interests and what the law states must be considered in best interests. They are representing the person and being their voice, which in whatever form (taken from letters,

past conversations, past decisions to current expressions, behaviour, personal statements) is paramount. There is also what may be a difficult task in stating the person's wishes and what they want the outcome to be which is viewed as not in their best interests. The role of the litigation friend is to make this balanced judgment and representation because P has been deemed unable to make the decision themselves but they have expressed views, wishes and feelings about the decision either in the past or present and they must be heard.

### **Decision-making process**

The precise order that the hearing will take will vary. However, in general, it is usually the case that the applicant will explain first what they want to happen. Very often in welfare cases, the applicant will be a public body, such as a local authority or NHS Trust, will be legally represented. They almost always have sent to the court, and to you, a document called a position statement or skeleton argument, which sets out what they think the court should do. They are likely to have witnesses who can explain to the judge whether or not the person has capacity, and what they think is in their best interests. You will get the chance to ask questions of those witnesses (to cross-examine them). The judge can help you ask appropriate questions. The judge will also be able to ask questions of the witnesses. It is always helpful to try to write down the most important questions that you want to ask before you go into the hearing, so that you don't forget anything.

You can take a friend with you into a hearing, who can help you by writing down things that other people say, and reminding you about the questions you wanted to ask. They may be able to speak to the judge too, if the judge agrees. This person is known as a McKenzie friend, and they must promise to obey any orders that the judge makes about what information can be shared outside court.

You do not necessarily give evidence, but the judge is likely to want to hear from you why you think (for instance) it is in P's best interests to return home. If you give evidence, the other parties – and the judge – will be able to ask you questions.

### **Etiquette**

A District Judge is called Sir or Madam.

A Circuit Judge is called Your Honour.

A High Court Judge is called My Lord, or My Lady.

If you are talking to a barrister or solicitor, you should say 'Ms X,' 'Mr Y' or "Mrs Z." They should have introduced themselves at the start of the hearing so you should know their name. If you cannot remember, it does not matter – simply say so.

### **Confidentiality**

There are strict rules about what you can and cannot say outside court about the proceedings, especially if they have taken place in private (as most hearings are doing at the moment because of the Coronavirus pandemic). If you do not have a lawyer, the judge should make clear to you at the start of the hearing what you can and cannot say about the case. If in doubt, it is important to ask first.