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INFANT SETTLEMENT HEARINGS – COUNSEL'S EXPECTATIONS

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March 2016

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By Sue Pawar-Price

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- Counsel's Opinion on quantum is a privileged document and should never be disclosed to your opponent and a copy must to be lodged at court when issuing proceedings.

- Also when issuing proceedings – ensure that you issue under the Claimant's name as it appears on the Birth Certificate. Otherwise, at the hearing there will need to be an application for the name of the claimant to be amended and for re-service to be dispensed with. One judge recently commented that *"it is a simple thing to get right and not to do so was sloppy practise"* and does not reflect well.

- I cannot stress the importance of your fee earners carefully reading and checking the contents of the medical evidence and Counsel's Advice. I have dealt with cases where the headings are correct but the Advice itself relates to a completely different child with completely different injuries!

- The Litigation Friend needs it impressed upon them that once the settlement has been approved by the judge this finalises matters. In other words, if several months down the line – they think the minor still has some ongoing problems (and the settlement has already been approved), it's too late - they cannot come back for anymore! Therefore, it is really important the child has recovered (otherwise, you will need to take a view on best way forward e.g. do you need to update medical evidence?)

- Often, the parents cannot act as Litigation Friend because of the conflict situation. Normally in these sorts of cases, it will be another family member (e.g. Grandparent; Uncle/ Aunt; Brother; Sister) or perhaps a close family friend.

  Remember that the court will be writing to the Litigation Friend every year until the child's 18th birthday with details of the balance in the court account and if neither parent is down as the Litigation Friend then they may not know from one year to the next what is in the court account. So ...if the conflict has passed by the time the case gets to court then it makes common sense for one of the parents to now step into the role of Litigation Friend. For that to happen though, the Judge will expect the new Litigation Friend to attend the hearing because he will want to satisfy himself (by asking relevant questions) that he/she satisfies the requirements of CPR 21.4(3).

- When a child reaches the age of 18 (and assuming they are not a protected party), the Litigation Friend's appointment ceases and you will need to serve Notice on the other parties in accordance with CPR 21.9(4). The Rules are clear that if the relevant Notice is not served within 28 days after the day on which the appointment ceases the court may, on application from the other side strike out the claim.

  Remember also that the Litigation Friend has personal liability in respect of costs and this personal liability continues until the relevant Notice has been served. If the relevant Notice has not been served then the matter is likely to be adjourned, which will lead to unnecessary costs being incurred.

- The pre-hearing conference is really important – it is the only opportunity we (as Counsel) have to discuss the case with the client. It is therefore, important that the client is at court early (say ½ hour before hand) so that we can go through everything with them. I can personally say that most clients turn up late and unless there is a genuine reason for the delay, this never goes down well with the Judge and it means we have less time to discuss the case with them.

- Some Litigation Friend's forget to bring the Birth Certificate to court – this often results in them having to dash back home for it (normally in a panic) or the settlement being agreed in principle only until the Birth Certificate has been provided/seen by the Judge, which just delays proceedings.

- I personally prefer to complete Forms N292 + CFO320 at court with the client during the pre-hearing conference. This way the Form CFO320 contains the most up to date information/address/telephone number/contact email etc...

- Form CFO320 specifically asks whether the accompanying leaflet (CFO403) has been read. For the avoidance of doubt, a Judge will almost always ask the Litigation Friend the same question at the hearing. The majority of clients have either not been sent the leaflet or if they have, they have not read it. It would be helpful if the leaflet could be sent to them in advance with a request that they take the time to read it (although I do carry copies with me, so that if they have not read it then they can read it during the pre-hearing conference. However, this then eats into the valuable conference time).

- The Judge will want to see evidence of the agreement reached in respect of the settlement. However, I am very much of the view that more costs matters can be dealt with at the hearing as well (thereby boxing off everything in the same hearing and avoiding further costs from being incurred). It would be helpful if costs could be agreed in advance and evidence of the agreement reached in respect of costs will be required in exactly the same way. That said, if costs have not been agreed but the matter is a fixed costs case then I will always ask the Judge to summarily assess costs on the day. What would be helpful is if the Fee Earner in those cases can confirm what interim payments have been paid (I note that sometimes the Defendant will settle medical expert's fees direct with the medical agency).

- I strongly recommend exploring investment options with the Litigation Friend beforehand. For example – does the child have a Child ISA or Government Trust Fund account or alternative investment vehicle that would be a suitable alternative to money being paid into CFO? The rate of interest in respect of the CFO is currently very low (0.5%) when compared with say the majority of Child ISAs. If a Child ISA (or other suitable alternative) exists, then the Litigation Friend should be asked to bring documentary evidence of the account to the hearing with him/her. There are of course never any guarantees and whilst the Judge will take into account the preferences of the Litigation Friend, the final decision will rest with the Judge. Contrary to what many clients believe, an ordinary bank account simply will not do.

- If the money to be invested is 'very small', then the court may order it to be paid direct to the Litigation Friend for the child's use (in accordance with CPR 21.11.2). Unfortunately, there is no guidance in the Rules on what is meant by 'very small' and my experience is that there is no consistent approach by the courts but it is something to bear in mind.

- If you have entered into a CFA with the Litigation Friend, which provides for a success fee and there needs to be an application for relevant deductions then it is important that you have complied with the relevant Parts of CPR 21 and PD 21.11 otherwise, prepare for it to fail.