

13. Awards to children and patients

13.1 The role of the court

From the earliest times the courts have always been anxious to protect those under a disability. The two obvious classes of such persons are those under the age of 18 who cannot, with certain exceptions, contract on their own behalf and those who by reason of mental disorder (as defined by s.1 of the Mental Health Act 1983) are unable to manage their affairs.

The first of these groups is termed 'children' and the second is known as 'patients'.

This protection is given by the need for the court to approve settlements or compromise of claims involving children or patients and is accorded by the courts to:

1. Ensure that monies awarded to them are the appropriate amount and are properly invested and expended for their benefit.
2. Give defendants a valid discharge.
3. Protect children and patients from the lack of experience or skill of their lawyers.
4. Ensure that the lawyers are only paid the proper amount of their costs and no more.
5. Ensure that all dependants in an award under the Fatal Accidents Act are treated fairly.

In the eyes of some, this control is seen as paternalistic but the experience of the judges who administer these funds is that parents and litigation friends overwhelmingly approve of this control and indeed frequently request the court to retain control of the fund until the recipient is at least 21 or 25, something which is not in fact permissible in law.

Guidance is given regarding the role of the court and the various procedures to be followed in the Practice Direction to Pt 21 of CPR.

13.2 Protection from the want of skill or experience of their legal advisors

Awards to children generally result either from them sustaining some injury for which compensation has been awarded or offered or as a result of the death of a parent upon whom they are dependant.

In the case of patients, their condition may be the result of a tortious act and the award/settlement in the main is designed to provide for their maintenance and treatment for their entire lives or until they recover.

To assess the merits of such claims and their potential value is difficult and often in the past inexperienced solicitors have endeavoured to handle such cases without properly appreciating their worth.

The task of the court is to assess the potential liability of the parties and to estimate quantum (unaided initially by knowing the terms of any proposed settlement) and then to determine in the light of its own judgment whether the child's/patient's interests have been best served by the proposed compromise: see *Black v Yates* (1992) QB 526.

Often where the settlement/offer is less than £1,000, it is considered sufficient, to avoid unnecessary/disproportionate costs, to seek an indemnity from the parents to be given to the defendants/insurers. This may appear initially to be attractive but it abrogates the court's duty to ensure that advantage is not taken of inexperienced claimant's solicitors by insurers keen to settle for the least possible sum. The court's experience is just as important in these small cases as in much larger awards and in any event the costs will be paid by the insurers.

If the award has been made as a result of contested trial on the merits and a judicial decision has been made as to quantum, then the judge charged with giving investment directions does not have to be concerned with this aspect.

13.3 Settlement, compromise and awards at trial

13.3.1 Settlement or compromise

It is essential that any settlement or compromise of a claim for damages be approved by the court if one of the beneficiaries is either a child or a patient. Solicitors acting in cases involving those under a disability should never be tempted to avoid the inevitable delay and added expense of such approval, by attempting to obtain a quick resolution of a claim. The court's approval gives the claimant's solicitor the protection against allegations of settling for too little and the risk of a subsequent claim on his indemnity policy. The benefits of court's approval are as much in the interests of the defendant – who obtains a valid discharge – as for the benefit of the child/patient.

At common law due to a child's/patient's want of legal capacity, any settlement or compromise will not bind him unless it can be proved to be for his benefit. A defendant does not want the uncertainty of waiting till the child/patient attains his majority and then decides to issue proceedings to test the validity of the settlement. The defendant will therefore be as anxious to obtain a valid discharge by having the settlement approved by the court as will the claimant's solicitor.

13.3.2 Where proceedings have not been commenced

The parties to the settlement do not need to commence proceedings as such. All they need to do is issue a Part 8 claim and seek the court's approval.

13.3.3 The interests of the child are paramount

The control of the funds must be with the court to ensure that the monies are wisely and prudently looked after for the child/patient.

Often in the case of a Fatal Accident Claim there will be other dependent children – sometimes by more than one marriage – and the court must ensure that all the dependants of the deceased receive a fair share of the award. The court is not concerned to approve the total amount of the award but only that part to be held for the benefit of the children.

13.3.4 Settlements at trial

Often the parties in the course of a trial will agree a settlement. In these events the approval of the trial judge should be sought. If he approves the settlement he should almost always order the sum agreed to be paid into court and placed in the Special Account pending the giving of investment directions by the Master or a district judge. To avoid these directions being overlooked, he should direct the claimant solicitor to make the application to the Master or a district judge by a specific date.

13.3.5 Awards at trial

Where there has been a trial on liability and/or quantum the judge will have determined how much the child/patient should receive. However, trial judges seldom have the experience for giving directions for the investment of the award and should therefore direct that the monies be paid into the Special Account and that the claimant's solicitor must make by a specific date an application for a hearing before a Master or a district judge for such directions.

13.4 Protection to the defendant against future claims when a child attains his majority

It is important to provide a means by which a defendant may obtain a valid discharge from a child's or patient's claim.

At common law a contract of compromise out of court does not bind such a claimant unless it can be proved to have been for his benefit. No prudent defendant wishes to take the risk of a claimant on attaining his majority issuing a claim for further damages. A judgment in proceedings or an order approving a settlement of proceedings binds the claimant and gives the defendant a discharge.

13.5 To ensure proper investment

The court has a duty to make sure that money recovered by or on behalf of a child or patient is properly looked after and wisely applied. Such money is placed under the control of the court which has wide powers.

In the past the court itself has determined the form of the investment; nowadays the court merely gives general guidance as to the requirements, e.g. a need for income or a need for a mixture of income and capital growth and the actual form of the investment is determined by the investment advisors for the Court Funds Office.

13.6 To protect the interests of third parties in Fatal Accident Act Claims

The court must ensure that the interests of all dependants entitled to a possible share in the settlement are properly protected: see *McDermott International Inc v Hardy* (1995) *The Times*, December 28.

13.7 Forms of settlements

There are essentially three types of settlements, namely:

- 1) Common law awards of damages to children and patients.
- 2) Fatal Accidents Act settlements.
- 3) Awards to fatally ill children.

In addition a child or a patient may be involved in a claim unrelated to any personal injury.

13.7.1 Common law awards

These flow from an award made following the trial of issues where the child is the claimant.

These can further be sub-divided into:

- i) Awards for injuries where there is no element of ongoing disability requiring expenditure of the award.
- ii) Awards where there is a need for continuing treatment/care requiring regular expenditure.

In respect of (i) the award may usually be invested with the aim of enabling the child on majority to collect a lump sum to be used as he thinks fit – hopefully invested or used for some form of adult training or education.

Although it may not be intended at the outset to spend any of the money during the minority, there may be circumstances where the child would benefit from expenditure of some of the award. But it should not be forgotten that parents and guardians have a primary responsibility for the welfare and maintenance of their children and must not regard the award of damages as a windfall which relieves them of this duty.

Example:

A boy awarded a sum following an accident when very young from which he has made a full recovery, has a small award of £3,500. This sum was invested in the Special Account. His family moved from a large Midland town to a coastal village in Cornwall.

In order to get to college at St Austell at the age of 16, a motor scooter was bought, driving lessons paid for and suitable safety equipment bought. Thus he was able to make greater use of the college's facilities instead of wasting hours each day travelling by a local bus to and from his home.

At 17 a car was bought for him, insurance cover paid for and he had the necessary driving lessons.

In both instances an application was made informally by letter from the father to the Master explaining the situation and the requests were granted for money to be paid out of the fund in court to meet the costs.

In this instance about £6,000 was spent during his minority yet such was the growth of the award on Special Account, he received £5,600 on attaining his majority.

This is a good example of adopting a prudent yet common sense approach to the use of the money.

What must be avoided in such cases is the wasteful expenditure of the award on fashionable fancies, expensive holidays or toys – usually requested with the wishes/benefit of other members of the family in mind.

Applications are often made for release of fairly large sums to buy a new house or adapt an existing one. The first question to be asked is, 'Is it in the child's best interest for the purchase or adaptations to be made?' If it is, then it is important for a trust deed to be prepared (and approved by the court) which reflects the fact that the child has a beneficial interest in the house equivalent to the percentage of the purchase price/cost of adaptations which has been provided by his fund.

The use of an award under (ii) can be more difficult. The award may be quite small yet the disability may be long term. The difficulty here is to decide how much of the interest should be expended each year and how much retained as a hedge against inflation.

The larger award, and usually therefore the greater the disabilities which have to be catered for, may call for professional advice from trained carers.

Here the problem of the form of the investment becomes vital. Investment in equities in the past provided the necessary hedge against inflation whilst a suitable proportion of the dividends could provide the income. It is a difficult balancing act. But the equity market is presently a difficult form of investment, hence the introduction of the use of tracker funds which track the performance of a range of shares rather than relying on individual share holdings.

- i) Do not advise an investment in equities unless the fund has at least five years to run and consider the use of tracker funds.

- ii) A public trust should not be set up unless there is at least £250,000 in the fund.
- iii) If a managed private or public trust is likely to be set up, the claimant's solicitor must ensure that the management fees are provided for in the settlement award.
- iv) For very small awards investment in government savings schemes (e.g. saving certificates) should be considered.

13.7.2 Fatal Accident Act settlements

The involvement of the child in such awards arises where he is the dependent of the deceased.

Usually there is a spouse who is likely to be the main recipient of such an award.

However, it has always been the practice of the courts to build into the award an element for the dependent children.

The normal rule is that a parent is at all times responsible for the care and maintenance of a child and the existence of an award does *not* remove this primary responsibility.

If the award reflects compensation for the removal of the breadwinner, then the bulk of the award must be in the hands of the remaining spouse who will have the task of providing for the children dependants. (See *R. v CICBex & Barrett* Latham J. Kemp & Kemp para. 23.103 which describes the 'pragmatic' approach of the court.)

However, the courts have always thought it wise to reserve a small proportion of award for the children dependants. This provides modest insurance against the feckless mother/father who fritters away the monies awarded to them. It also provides the 'nest egg' which any caring parent may have wished to have available for their child on reaching their majority.

The requests/demands of the surviving parent to 'raid' their child's award must be resisted.

Generally in FAA cases the child's award should not be paid out or diminished during minority other than to pay for those expenditure which the deceased parent might have been expected to pay for but which the surviving parent cannot now afford.

C) Awards to fatally ill children

This poses a particularly difficult task for the judge. He is faced with a life expectancy figure which might expire before majority is reached.

In such a case, the decision must be taken as to how best to spend the money to improve the child's quality of life during the remainder of his short life.

Ideally the fund should be exhausted by the time the child dies – save for funeral expenses.

Example:

An award made in respect of 300 plus children who were injected with contaminated fluids (Factor 8) connected with blood transfusions and thereby became HIV positive, posed such problems in 1990s.

The life expectancy was given at five years at the time of the award. The individual funds were all £20,500. The policy adopted was to use the money so that the infected child and its immediate family were able to enjoy as much of their company together during the child's last few years. In general this worked successfully and the mothers co-operated fully with the court's policy (the fathers, in possibly the majority of cases, could not face the prospect of coping with the trauma and left the family).

13.8 Procedure for approval of compromise or settlement

The Practice Direction to Pt 21 gives considerable assistance on all aspects of the procedure to be adopted in these cases and these notes should be read in conjunction with the Practice Direction.

13.8.1 Before proceedings begin

Where an agreement is reached for the settlement or compromise of a money claim by or on behalf of a child or patient before proceedings begin, the application to the court for its approval should be made by a Pt 8 claim. Such a claim may be issued in any division of the High Court, and even if the proceedings are assigned to the Chancery Division it may be issued out of the district registry. The county court is also a suitable venue for claims under £100,000. Claims of any value can be started in the county court which now has an unlimited jurisdiction. An acknowledgement of service if such a claim is issued for such approval must be returned to the appropriate court office. The claim should ask for:

- a) the approval of the court to the settlement or compromise; and
- b) the directions of the court for dealing with the money agreed to be paid.

If the claim is made under the Fatal Accidents Act 1976 the Pt 8 claim must also include the particulars mentioned in s.2(4) of the 1976 Act, namely the person or persons for whom and on whose behalf the claim is brought, and the nature of the claim in respect of which the damages are sought to be recovered.

A claim under Pt8 may be issued where the money claim by or on behalf of a child or patient is made alone or in conjunction with any other person. It may, therefore, issue where the claim includes a claim under the Law Reform (Miscellaneous Provisions) Act 1934, for damages to the estate of the deceased, or a claim for special damages by the litigation friend.

13.8.2 After proceedings have begun

Where a settlement or compromise of a money claim by or on behalf of a child or patient is arrived at after proceedings have begun, but before trial, the application for the approval of the court and for directions to deal with the fund recovered is made by an application in the action to the Master or district judge. If the settlement or compromise is agreed at or during the trial, it is made to the trial judge or to the Master or district judge.

The application should consist of:

- a) The application.
- b) A witness statement from the claimant's solicitors setting out the background, the respective merits and issues on liability and quantum and exhibiting the necessary reports.
- c) Often much of b) can be obtained from any opinion given by counsel. If counsel has given opinions at different stages all the opinions should be available to allow the court to appreciate how the eventual settlement/compromise has been reached.
- d) The amount of the settlement/compromise should *never* appear in either the application form or the supporting evidence. This allows the court to form its own view and then to compare its personal assessment with the figure which the parties have reached. In claims of low value in the county court there is a growing tendency for the agreed sum to be stated. It is for individual judges to consider whether this is a practice of which they approve.

The courts have always been anxious to protect the child/patient on the issue of costs by guarding against:

- 1) The case where the claimant's solicitor may seek to overcharge.
- 2) The case where the claimant's solicitor may be tempted to recommend an unfavourable settlement by agreeing costs with his opponent.
- 3) The solicitor who having been disappointed with the amount of costs recovered on assessment from the defendant, seeks to recover the balance from the damages awarded to his client.

The normal rule is that there must be a detailed assessment of the claimant's solicitor's costs who may not recover more from either the claimant or by deductions from his damages award. However if the solicitor agrees to limit his costs to those recovered often by agreement with the defendant, detailed assessment can be dispensed with. Judges should consider whether they would still require the solicitor to furnish the court with a breakdown of his costs.

However, it is important to remember that most trial judges will be unfamiliar with the manner in which investment directions should be given.

The most prudent course is for the Associate or Court Clerk to suggest that the judge orders the money to be placed on the Special Account and for the claimants solicitor to seek an investment hearing before a Master or district judge and for such a hearing to be sought by a given date so that the hearing is not overlooked.

If a claimant's solicitor forgets to obtain such directions, he risks the child on attaining his majority seeking the difference between the sum standing in court to the child's benefit and the amount it might have realised if proper investment directions had been given.

In such cases the solicitor may be invited to make good the lost interest/growth of the fund from his own pocket to avoid possible litigation against him by the child on majority – he will invariably do so.

13.8.3 Interim payments

Where the parties have agreed that an interim payment should be made to a person under a disability, often because an immediate payment is required, an application should issue for a private room appointment where the Master or district judge can consider for approval both the interim payment and the release of the money. He will want to know the purpose of the payment and the proportion of the probable final settlement that the interim payment represents so as to satisfy himself that the long-term interests of the child are not being prejudiced. In cases involving patients it may be necessary to seek the approval of the Court of Protection.

13.8.4 Ex gratia payments

The practice for interim payments applies equally to *ex gratia* payments made in the course of proceedings.

13.8.5 Enduring powers of attorney

The fact that a litigation friend holds a registered Enduring Power of Attorney (EPA) does not discharge him from his duty to apply to the court for approval of any interim payments or the compromise or settlement of an action. However, it is very rare for there to be EPAs in the case of children due to issues of voidability on attaining 18.

13.8.6 Action brought by direction of the court

It may happen that the institution of proceedings by or on behalf of a child or patient has been directed or authorised by the Court of Protection under Pt VII of the Mental Health Act 1983 or by the Family Division under the wardship jurisdiction. In such a case the authority of that court or Division should first be obtained to enter into the compromise before it is submitted for approval to the court in which the proceedings have been (or would be) taken.

13.9 The practice on compromise or settlement of a child's claim in the Divisions of the High Court

13.9.1 Queen's Bench Division:

In the QBD, applications are made to a Master and an appointment is taken before him in his private room. Such applications must *never* be made or listed in the Chambers list. As the Master may prefer to hear the facts of the case and the evidence (if any) before he is informed of the terms of the proposed compromise, the amount must not be stated in the application. Usually such applications should be listed as 'in private' – to exclude the public and the press. (See CPR 39.2(3)(d) and PD 39 para. 1.6.)

- i) On the return day, the solicitors or counsel for the parties attend. The solicitor for the claimant should have available in addition to the application, a separate copy of PF 172 for each child completed on its first side, a copy of the child's birth certificate, the pleadings if any, the evidence relating to liability if this is in dispute, the medical reports, the consent of the litigation friend to the settlement and counsel's opinion on liability and *quantum* if one has been obtained.
- ii) The first question to be considered is that of liability; the Master should be told whether the defendant admits or does not dispute liability and if he does dispute liability, whether and to what extent such liability can be established. For this purpose, in accident cases, the circumstances of the accident should be briefly described. The Master should be told the age (and occupation) of the child, the date and place of the accident, what evidence can be adduced and what witnesses can be called on behalf of the claimant and the defendant. If there are any police reports or notes of evidence or depositions in any criminal proceedings or in an inquest they should be produced or referred to, and if there has been any prosecution, against whom and with what results. If counsel has advised on liability, his opinion should be placed before the Master. In all, the Master should be put in possession of all the available material in the case, so as to enable him to form his own opinion as to the claimant's chances of success in the action, as to the probable extent of such success and as to the degree or percentage of contributory negligence on the part of the claimant or the deceased.
- iii) The second question to be considered is that of the quantum of damages. For this purpose, in accident cases, there should be placed before the Master medical reports of both sides describing the nature and extent of the child's injuries and their probable effect on the general health, education, enjoyment of amenities and earning power of the child. The medical reports should be brought up to date. A list of the items making up the claim (if any) for special damages should also be produced. In actions under the Fatal Accidents Act 1976, it is essential to inform the Master of the age, occupation and earnings of the deceased, the ages of the widower and the dependent children, the amount (if any) of the deceased's estate and the extent to which the widower and children were 'dependent' upon the deceased for their support and any other facts which go to show what is the pecuniary loss.

- iv) In considering whether to approve a settlement, the question before the court is, whether the settlement itself is a reasonable one and is for the benefit of the child having regard to all the circumstances of the case, including the risks of litigation, the desire of the parties to settle and the disinclination of the claimant to go to trial. If counsel has advised on the reasonableness or otherwise of the settlement, his opinion should be placed before the Master, who must, however, form his own judgment whether to sanction the settlement or not. In deciding upon the adequacy of a settlement it is often necessary to consider whether the amount offered adequately takes account of the interest to which the claimant might have been entitled if judgment were given after trial.
- v) If the Master does not feel entirely satisfied with the proposed settlement, he may (and often does) adjourn the application to give the parties a further opportunity to negotiate and possibly agree upon an increased sum by way of settlement. A fresh appointment is made before the Master for the adjourned hearing.
- vi) The general practice is that the Master does not require a witness statement but if the case is an exceptionally difficult one either as to liability or as to amount, the Master may admit or may require a witness statement by the claimant's solicitor on the lines of the practice in the Chancery Division (see *Re Birchall* (1880) 16 Ch.D. 41). However, in almost all cases the Master will require an opinion from Counsel as to liability/quantum.
- vii) The approval to the settlement of the litigation friend should in all cases be produced to the Master.
- viii) Though the Master does not generally require the attendance of the claimant or the litigation friend such attendance should be encouraged but in the more difficult type of case, e.g. where the child has sustained facial injuries or other cosmetic blemishes or if large sums are involved, the Master will normally wish to see the claimant and the litigation friend before approving the settlement.
- ix) If there are several dependants entitled to claim under the Fatal Accidents Acts, the compromise or settlement should not be approved unless the action is brought on behalf of all of them; otherwise any dependant excluded may intervene in the action and the order embodying the compromise or settlement, even if purporting to be by 'consent', may be set aside (*Cooper v Williams* [1963] 2 QB 567 [1963] 2 All ER 121, CA).

13.9.2 Admiralty actions

In Admiralty actions, applications for approval of a settlement or compromise are returnable before the Registrar. The practice is as in the QBD save that the relevant documents are lodged beforehand.

13.9.3 Structured settlements

1. Instead of receiving damages as one large lump sum it is possible for the parties to agree that all or part be paid in a series of tax-free lump sums, and legislation encourages this – see the Finance Acts of 1995 and 1996 (which inserted provisions into the Income and Corporation Taxes Act 1988) and the Damages Act 1996. This approach depends upon specialist advice but has become popular for settlements where there are substantial ongoing care needs and especially in the case of catastrophic physical injuries and brain injury. The settlement can be individually tailored to the claimant's needs and there should always be a capital 'contingency fund' to provide for one-off expenses and the acquisition of a home when necessary.
2. Advantages of structured settlements include:
 - Payments can be guaranteed for the lifetime of the claimant and can be index linked, thereby removing much of the investment worries and risks by ensuring an income stream for the relevant period.
 - The uncertainties (to both parties) of life expectancy are removed.
 - The indemnity provided by the Policyholder's Protection Act 1975 is increased to 100% for a structured settlement.
 - It is possible to have a minimum initial term for the payments.
 - In addition to being tax-free (thereby increasing the financial return to the claimant) the payments may not be means-tested for social security and other benefits.
 - The risk of dissipation by the beneficiary is removed.
 - There is less need for continuing financial and investment advice.
3. Disadvantages include:
 - A once and for all decision is made about the proportions of capital and income that are likely to be needed throughout the claimant's lifetime, and this could prove to be wrong.
 - The consent of *both* parties to the court proceedings is required.
 - A loss of personal freedom over use of the damages (although this is of little significance in the case of a patient).
 - In the event of premature death the capital involved is lost (although in the case of a patient this was never intended to be a windfall for the next generation).
 - It can be difficult to link a structured settlement with provisional damages.

4. A lump sum is usually negotiated on a conventional basis and then the Order provides for part of this to be paid back to the liability insurers for the purchase of the required annuity from an independent life office (the 'top-down approach'). This is necessary because the tax exemption is not achieved if the claimant purchases an annuity out of the damages. Where the defendant is self-funding (eg. a health authority or NHS Trust) a part of the damages is simply retained upon an agreement to provide the payments. There are obvious cash flow advantages to these defendants and disagreements over life expectancy can be circumvented by negotiating for a structured settlement without first seeking to agree the lump sum (the 'bottom-up approach').
5. When the claimant is a patient, both the lump sum and the structured settlement (or merely the latter if the 'bottom-up approach' is adopted) must be approved by the Court of Protection before approval by the High Court. There will usually be an adjournment order approving the conventional lump sum in principle and directing that advice be taken on the benefits of a structure. For the procedure see CPR PD 40C *Structured Settlements*.

13.9.4 Order if the settlement or compromise is approved

If the settlement is approved, the order directs by and to whom and in what amounts the money is to be paid and how the money is to be applied or otherwise dealt with.

Following the hearing, the order as minuted by the Master on the application, the PF172 and CFO212 (completed from the PF172) must be taken to the Action Department within seven days or the time allowed by the order, for the order to be sealed and for the CFO212 to be checked from the PF172, after which the CFO212 will be sent by the court to the Court Funds Office and the PF172 will be retained by the Action Department.

If the claimant's solicitor fails to draw up the order and serve it within the time allowed and there is a loss of interest to the child's fund, the solicitor will be ordered to make good the interest so lost from his own account.

It is essential that the claimant's solicitor should draw up and serve the Master's order promptly, which will ordinarily be directed to be done within seven days. In lieu, the defendant's solicitor should bespeak the requisite cheque immediately after the making of the order and without waiting for it to be served and indeed he can pay the money into court on Form 100 of the Court Funds Rules 1987 (Vol. 2, Pt 5) before service of the order on him (*Practice Note (Infants: Settlement of Actions)* [1969] 1 WLR 1284; [1969] 3 All ER 416). It is essential for the Form 100 to have been sealed by the court before the Courts Fund Office can accept the payment.

Except in the exceptional case where defendants make such deferment a condition of a liberal offer, the court has no power whether under its inherent jurisdiction or under the Variation of Trusts Act 1958, to order the payment to trustees of a sum recovered by way of damages by a

child on terms that would defer the child's entitlement beyond the age of *majority* (*Allen v Distillers Co. (Biochemicals) Ltd; Albrice v Distillers Co. (Biochemicals) Ltd* [1974] QB 384; [1974] 2 All ER 365). Similarly any money under the control of the court must be paid out to a child (not being also a patient) on his reaching majority and the order will so provide (*Re Empleton* [1947] KB 142).

Recently following many requests from parents of very disabled children in receipt of large awards, there has been a move to encourage such awards to be held in trust for the child even after majority. This is possible provided the deed contains a clear and unfettered provision for the child to terminate the trust on attaining his 18th birthday. Such trusts should generally provide for the child to become one of the trustees at the age of 18 (the child may not be a trustee whilst under the age of 18).

13.9.5 Directions if the settlement or compromise is not approved

Where the court refuses to give its approval, it must give directions as to what is next to be done. If proceedings have already begun it will give whatever directions are appropriate to bring the action to trial.

13.9.6 Appeal

If the settlement is not approved by the Master then either party may appeal to a judge.

13.9.7 Settlement at the trial

If a settlement is arranged at or during the trial, an application is made to the trial judge to sanction the proposed terms of settlement; he will either give directions as to how the money is to be applied or otherwise dealt with, or more usually will refer the matter to a Master to make the necessary order.

13.9.8 Settlement on appeal to CA:

Where an appeal has been entered, the Court of Appeal has seisin of the matter, and consequently, if a settlement is thereafter arrived at between the parties in respect of the amount of the damages to be paid to the child, such a settlement must be approved by the Court of Appeal (*Walsh v George Kemp Ltd* [1938] WN 120, CA).

13.9.9 Settlement on appeal to the House of Lords

Where a compromise or settlement is arranged after the Court of Appeal has disposed of a case, it no longer has seisin of the matter and it cannot be asked for its approval. If a petition to appeal has been lodged, the proper course is for the House of Lords to be asked for its approval of the agreed terms (*Flack v Withers* (No. 2) [1961] 1 WLR 1284; [1961] 3 All ER 388, HL; *Leather v Kirby* [1965] 1 WLR 1489; [1965] 3 All ER 927n., HL); but if no petition is lodged, it would (*Leather v Kirby*) seem that the terms of settlement cannot be submitted to the Court of Appeal for its approval and in such event the best course would be to submit the settlement to the QB Master for his approval under the inherent jurisdiction of the court.

13.9.10 Child claimant attaining full age during currency of the action

When a child comes of age after the issue of the claim and before compromise or judgment, he may adopt the action and file in the Central Office a notice of the fact that he has attained the age of 18 years and adopted the action. When so filed this rule has no further application.

13.10 Practice in the county court

1. In the county courts the procedure is broadly the same as that in the QBD, but the amounts involved are smaller and in the case of a patient the claim is generally unrelated to the cause of the disability. District judges throughout the country are involved on a daily basis in approving settlements of claims brought for children involving less than £10,000 (mainly the outcome of road traffic accidents from which the child has made a full recovery apart perhaps from some minor scars) as well as giving approval for claims of much greater value now that the county court has unlimited jurisdiction.
2. The procedure in CPR PD21 should be followed. In personal injury claims it is necessary for the district judge to peruse the medical evidence and, other than in the smallest of cases, counsel's advice on liability and quantum. The starting point is to ascertain whether the settlement is on a full liability basis. It is wise to see the claimant and litigation friend so the hearing should be transferred to the county court nearest to where they reside rather than that most convenient for the solicitors involved. If they reside abroad it may be possible to discuss the settlement with the absent parties by a telephone conference provided that good-quality, recent photographs of the residual scars are available. A video link may be another option if the damages justify this. A patient may also be requested to attend the approval hearing unless it is apparent that this would be an unnecessary trauma for him and that he could not contribute in any material way.

However, hearings for the approval of a settlement should *not* be unduly postponed if the litigation friend and/or the child/or patient is unable to attend as the offer may be withdrawn and/or the claimant will lose a substantial amount of interest. The district judge should use his discretion on these occasions and may have to rely on the help of the lawyers acting for the claimant.

3. There is a danger that low value claims are 'processed' without the full implications being recognised. It is desirable for the district judge to talk to the parent or other litigation friend *and* the child or patient. In the case of a young child an enquiry about bed-wetting may help to illustrate the extent of the child's distress in the period following the accident, and reluctance to travel in vehicles may also be significant. Two case histories illustrate these dangers:

- The ten-year-old claimant had sustained an ankle injury and the medical report indicated that a full recovery was anticipated. The family had moved to Ireland and the cost of requiring a personal attendance at the hearing appeared disproportionate but the district judge took the precaution of arranging to speak to them by telephone from the approval hearing. Whilst 'chatting' to the girl the District judge ascertained that whilst at school in England she had been a good runner but no longer engaged in this sport because there was now a vulnerability for the ankle to give way. It was agreed that in view of this continuing disability the settlement might not be sufficient and a further report should be arranged from the consultant.
- A boy with thick black hair had sustained a scar on his head but this was not treated as meriting significant damages because it was not visible. The district judge asked him to shake his head from side to side and the hair parted clearly showing a long, ugly scar. When asked if he had been teased about this at school the boy burst into tears. The true implications of the scar and the boy's psychological trauma had not been recognised and further negotiation was necessary.

The order approving a settlement should provide for the payment of the damages, either into court or wholly or in part to the litigation friend or parents as appropriate according to the district judge's discretion. An explanation can be given of the facility to apply at a later date for money to be released for specific purposes in the best interests of the child. The order should also make provision for interest on any money already paid into court. For claims of low value the solicitors will generally waive any costs other than those recovered from the defendant so that the damages are received in full but in any event it should be made clear that the claimant's costs must be approved by the court. Finally, it will be convenient to give investment directions and fully complete Form CFO320 at the hearing immediately following approval of the settlement. When a circuit judge approves a settlement at a trial or otherwise awards such damages this aspect will generally be referred to the district judge unless the trial judge has experience of these matters.

13.11 Forms of investment

The investment of children's fund must always build in a hedge and depending on the needs of the child, provide either for:

- i) capital growth
- ii) capital growth and available income
- iii) income alone.

This is the current procedure but changes to the investment strategies are being considered.

The judge has only to assess the future needs of the child and give a direction in this respect to the Court Funds Office who will then invest the fund in either:

- a) The Special Account – which pays currently 6% gross per annum at six-monthly intervals.
- b) Court unit trusts – these were formerly the Common Investment Funds which had all the features of commercial unit trusts.

These have been replaced with the Common Investment Fund Equity Index Tracker Funds Units which are so invested as to ‘track’ an index based on 20% of the FTSE World ex UK Index and 80% of the FTSE All Share Index.

- c) Shares – these are rarely bought nowadays unless there are special reasons such as religious or ethical grounds for not using the Index Tracker Funds as set out below.

The Court Funds Office has a Basic Account paying 4% gross but children’s funds must never be placed in this account.

Special forms of investment may have to be adopted in the case of children of a religious background such as Muslims who may not benefit from the earning of interest or where there is a request for investment in certain environmental friendly forms of funds. The Court Funds Office can advise judges with regard to this.

These are matters to be taken into account when completing Form CFO320 or Form PF172.

Judges should ensure that the following is observed:

1. Use a separate form for each child.
2. Obtain a signature from the litigation friend – a useful check for the authenticity of any subsequent request for payment out of the fund.
3. The litigation friend and solicitor’s addresses – the latter is important in cases where one needs to trace a parent who has moved house and failed to inform the court.
4. Ensure that the *full* names of the child as they appear on the birth certificate are recorded on the form as it is a copy of the birth certificate which will be required on majority before payment out is authorised.
5. Ensure that the amount actually in or to be paid into court is recorded.
6. Always give majority directions to pay out or *transfer* on majority, unless there is a particular reason why the judge would wish to see the child on attaining 18 to decide how the fund should be dealt with.
7. If necessary, record any information which may help a judge new to the case when requests for payment are made years later.

13.12 Patients

1. If an action is brought or defended by the litigation friend or by a patient under the sanction or direction of the Court of Protection, no compromise should be effected without the approval of the Court of Protection. Any property or money recovered should be directed to be transferred to the patient's account in the Court of Protection (*see M. v Lester* [1966] 1 WLR 134; [1966] 1 All ER 207). The money must either be paid into court or to the Court of Protection for neither the litigation friend nor the solicitor has any right to receive the money or to give a good receipt (*Leather v Kirby* [1965] 1 WLR 1489; [1965] 3 All ER 927n., HL). Even in such case, however, the approval of the court is required by Rule 21.10, just as it is required in actions by or against patients brought or defended without the sanction or direction of the Court of Protection. In each case, the decision whether or not to approve the settlement has to be arrived at by the High Court or County Court itself, although due regard will be paid to the view (if any) expressed by the Court of Protection. The practice under r.21.10 in the case of patients is the same as in the case of children. If the settlement is approved, the order will contain directions as to how the money is to be applied or otherwise dealt with (see r.12). The usual order is to transfer the fund to the Court of Protection, there to be administered for the benefit of the patient.
2. A patient must be a person who within the terms of s.1 of the Mental Health Act 1983 is incapable by reason of mental disorder from managing his affairs.
3. All patients come within the control of the Master (Master Lush) and Court of Protection at Archway Tower, 2 Junction Road, London, N19 5SZ. Deputy Judge Ashton is a deputy Master of the Court of Protection and based at Preston County Court.
4. A patient must be so found following an examination by a suitably qualified doctor and his report prepared in conformity with the requirements of the Court of Protection. Advice as to these and to procedure to follow should be sought from the Master.
5. The Court of Protection charges fees to manage the funds of patients and these should be included within the term of any award or settlement.
6. In the case of small awards (£20,000 or less) where the claimant is under a mental disability, and where the claimant is a child who will remain under mental disability after the age of 18, the Court of Protection will allow the QB Master or district judge to manage the fund as though it were a child's fund until or unless an application for payment out is accepted or the claimant's circumstances change. In such cases, if the claimant is a child, majority directions must not be given and the Form 212 should clearly state that the fund is to be retained after the age of majority because the child is under a mental disability. If the claimant is not a child the fund can be invested as per para 10. This is the only circumstance whereby a Form 212 should be completed for a patient.

7. If the award is in excess of £20,000 but less than £30,000 and the claimant will remain under a mental disability, the directions of the Master of the Court of Protection should be sought. However, if the Master is content that there are no other assets or reasons to necessitate the appointment of a receiver the fund can be invested as in (5) above.

13.12.1 *Who is a patient?*

Certain people are classified by the law as being *patients* and treated as being 'under a disability'. The consequences are threefold:

- i) Their financial affairs may be subject to the jurisdiction of the Court of Protection – see Pt VII Mental Health Act 1983.
- ii) They cannot conduct their own court proceedings without a representative – a *litigation friend* for civil proceedings (Pt 21 Civil Procedure Rules 1998) but still a *next friend* or *guardian ad litem* in family cases (Pt IX Family Proceedings Rules 1991).
- iii) Time does not run against them for the purpose of bringing a claim – see Limitation Act 1980's.28.

The definition, which been around for many years and applies with minor variations in all three situations is:

'... a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his property and affairs.'

Under the CPR this concludes '... his own affairs' but it is not thought that there is any material difference and it has long been held that *affairs* does not extend to personal welfare and health care decisions. *Mental disorder* is widely defined in s. 1 of the Mental Health Act 1983 as: 'Mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind.' This is concerned with the existence of a condition rather than its severity but expressly excludes the effect of alcohol or drugs. The need for a 'mental disorder' excludes mere eccentricity, etc.

13.12.2 *Applying the test*

A three-stage test has to be applied:

- i) Is the individual incapable of managing his affairs?
- ii) Does the individual suffer from a recognised mental disorder?
- iii) Is the lack of capacity due to that mental disorder?

In most cases it will be clear that the individual is a patient, but when there is significant doubt this should be resolved as a preliminary issue because proceedings conducted by a patient in the absence of a litigation friend are of no effect (although the court does have power to overlook this where there is no prejudice). There is a presumption of competence so the person who alleges lack of capacity has to prove this, but only on the balance of probabilities. Medical evidence is needed as to the existence of a mental disorder and further evidence is also needed as to the level of capacity of the individual. Under general principles a doctor or psychiatrist is regarded as an expert (even though he may not be) so may express an opinion, but other witnesses may only give evidence of fact. The person alleged to be a patient should be involved, to the extent possible, because even if capacity is lacking views may be expressed as to the choice of representative.

The test is based on understanding. The court should only take over the individual's function of decision-making 'when it is shown on the balance of probabilities that such person does not have the capacity sufficiently to understand, absorb and retain information (including advice) relevant to the matters in question sufficiently to enable him or her to make decisions based upon such information.' The mental abilities required include the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision; and the ability to communicate that decision. But individuals should not be deprived of capacity just because they may be vulnerable to exploitation or at risk of making rash or irresponsible decisions. It is not the task of the courts to prevent those who have the mental capacity to make rational decisions from making decisions which others may regard as rash or irresponsible. For further guidance see *Masterman-Lister v Brutton & Co and Jewell & Home Counties Dairies* [2002] EWCA Civ 1889, [2002] All ER (D) 297 (Dec).

13.12.3 Mentally disabled children

If it is clear that upon attaining majority a child will be a patient then it is appropriate for the child to be treated as such and the Court of Protection has jurisdiction. In cases of doubt it is sufficient for the child to be treated as such and issues of capacity can be addressed when the child is approaching majority. In terms of civil proceedings it makes little difference (apart from the treatment of any damages recovered) because the rules for representation are the same.

13.12.4 Implications for the patient

If there is sufficient capital and income (presently about £18,000 and significantly more income than state benefits which can be dealt with under the *appointee* procedure) then the Court of Protection will exercise its jurisdiction by appointing a *receiver*. When this is not required the court can make *short orders* dealing with single issues. It follows that, unless that court needs to be involved, small awards of damages to patients can be dealt with in the discretion of the civil court and if appropriate held and administered as if they were an award to a child. Guidance is to be found in CPR PD 21 at para. 11.2.

Any damages award that will require management by the Court of Protection should make allowance for the fees that are charged and any other consequent expenses.

13.13 Use and misuse of funds

Most parents are very careful and prudent in the use to which they put such monies as the court may release.

When parents write to the court it is useful to compare the signature on the letter with that on the PF172/CFO320.

Care should be taken when children themselves write to the court to ensure that they do so with the knowledge and consent of their parents.

School fees often form a major part of the expenditure of such funds. Such fees must be paid in advance of the start of the school terms otherwise schools tend to impose penalties.

Receipts should be obtained where there is substantial expenditure.

Care should be taken to ensure that a plea for the use of the funds is not some hidden agenda, such as paying for the entire cost of a family holiday.

If it appears that there has been a serious misuse of monies or an unreasonable request which makes the judge suspicious, the Official Solicitor/the CAFCASS Reporter may agree to send one of his welfare officers to visit the family and to report back to the Master/district judge. However, he has no funds specifically earmarked to assist in this respect and his services should only be requested on rare occasions.

There is no reason why a judge should not invite the parents to come to see him privately.

13.14 Investment of English-Welsh awards in foreign jurisdictions

Sometimes an award is made to a child living in a foreign jurisdiction. In such cases the money may remain in court in this jurisdiction and paid to the child on majority or transferred forthwith to the foreign jurisdiction.

If the money is kept in this country, it is very important to keep track of the child's whereabouts.

The following are instances where funds have been transferred abroad but circumstances and practices of foreign courts may change so it is important to check with the foreign lawyer as to the current practice of a foreign court.

13.14.1 Scotland

The monies awarded to children are normally held by the child's lawyer, who must produce to the Court of Session or Sheriff's Court, a bond to the value of the fund for the court's approval.

If monies from an English award are added to an existing Scottish bond, the Scottish attorney must *increase* the value of the bond to match the total of the Scottish and English awards *before* the English award is transferred.

Further assistance as regards procedure could no doubt be obtained from:

Mr Tom Thompson
The Accountant of Court
The Court of Session
Parliament House
Parliament Square
Edinburgh
EH1 1HQ

Main switchboard tel no. – 0131 225 2595

13.14.2 Northern Ireland

The procedure in the Province is very similar to that in England and Wales. The children's funds are under the control of:

Master John Wilson
Queen's Bench and Appeals Master
Royal Courts of Justice
Belfast
BT1 3JF

13.14.3 Republic of Ireland

The High Court in Dublin will accept and manage funds for children resident in the Republic. The contact in the Four Courts is:

Master Edmund Honohan
Master of the High Court
The Four Courts
Inns Quay
Dublin 7

13.14.4 The Rest of Europe

It is impossible to detail all the practices of other European courts. Local courts can be asked for details of how they proceed in such cases. However, it is very important to ascertain the age of majority in such jurisdictions.

The arrangement of having, in addition to the Court Special Account, the Common Investment Funds – divided into the High Yield Fund and the Capital Fund – has fallen out of favour for a number of reasons.

The previous arrangement of having, in addition to the Court Special Account, the Common Investment Funds, has now changed. The Capital Fund and the High Yield Fund have merged and are now known as the Equity Index Tracker Fund. This fund is based on equities and it can now be transferred to the child on attaining majority.

13.14.5 Transfer of monies

Tracker Funds cannot be transferred out of the jurisdiction; they would need to be sold and the proceeds transferred as cash to the other court together with any monies held on the Special Account.

13.15 Awards made by foreign courts to children resident within our jurisdiction

In appropriate cases, where similar restrictions are imposed on the payment of awards of damages to children by foreign courts when making an award to a child resident in England or Wales as would apply to awards made by our courts, but the foreign courts do not have facilities to hold and invest such monies, arrangements can be made for such awards to be held by the Court Funds Office.

In such cases an application should be made by a Part 8 claim to a Master or district judge who will give the appropriate directions. As there are many permutations for such cases, advice should either be sought from the Senior Master or the Court Funds Office.

Acknowledgements

The material in this chapter has been drawn from a number of sources and distils the experience of the Masters of the Queen's Bench, some of whom have spent nearly 20 years managing some of the 2,000 children's funds in their care.

I would wish to acknowledge in particular the co-operation of Sweet & Maxwell from whose authoritative work 'Civil Procedure' (The White Book) much of the basic material was obtained, the staff of the Central Office, Elizabeth Jeary of the Court Funds Office and District Judge Gordon Ashton, who assisted on County Court practice, patients and structured settlements, District Judge Michael Walker and Suzanne Burns.

I am especially grateful to Susan Harvey of the Queen's Bench Children's Section and to Masters Foster and Leslie for their advice and proof-reading and finally to Maxine, my long-suffering and patient Personal Assistant, for the many versions of this Handbook she has typed.

In some quarters, the judicial management of these funds is perceived as being paternalistic and that the impersonal hand of bureaucracy is to be preferred but the universal appreciation of parents for the care and consideration shown by judges in managing their children's monies is sufficient justification for their efforts and for retaining this jurisdiction.

Robert Turner
The Senior Master and Queen's Remembrancer
Trinity 2003

Annex A: The work of the Court Funds Office

Investing for Children

Background

The Court Funds Office has been in existence since the 18th century, receiving monies on behalf of litigants and paying out once the litigation was concluded. The Court Funds Office also receives monies on behalf of children, Court of Protection cases and in respect of some statutory deposits. Historically the Court Funds Office has banked, and continues to bank with the Bank of England.

Set Up

The CFO comprises six main areas:

Lodgments, which deals with the lodgment of all monies into Court, banking the sums received and depositing the funds to the appropriate account.

Suitors, which deals with the payment out of monies in litigation matters. Suitors also deals with Chancery cases, statutory deposits and Family Division matters. Suitors also deals with the lodgment and payment of any foreign currency received usually in Admiralty matters.

Funds, which deals with the setting up, investment and subsequent payment out of children's funds. Funds also deals with the transfer of monies to the Court of Protection and, somewhat bizarrely, Admiralty cases where payment out is to be made in sterling.

Court of Protection, which deals with the investment and payment of monies for Court of Protection cases.

Securities, which deals with the buying, selling and transfer of security holdings for children and Court of Protection cases.

Accounts, which deals with the Office accounts and their reconciliation.

There are approximately 95 staff within the Office. All accounts are detailed on a computer accounting system called the Funds Accounting System and generally known as FAS.

Investment of monies for children

The CFO holds approximately 10,000 funds deemed Children's Funds. However, these are not all cases where the beneficiary is under 18. Most are for children but some are where the beneficiary is under a mental disability, but there are insufficient funds to warrant the appointment of a Receiver. There are also funds where the child has reached majority, but has yet to claim his fund.

If monies are to be invested for a child the Court Funds Office needs to know the date of the settlement order and, when the monies are already in court, what is to happen to any interest accumulated prior to the order. If it is to be paid to the defendants, then a Form 200 is required from the court directing payment out of the interest. If any interest is to be reinvested with the capital, then this direction can be included in the directions on the Form 212. It is vital that a Form 212 is produced in every case where monies are to be invested for a child unless an application for the appointment of a Receiver is to be, or has been, made.

Investment decisions are often taken at a hearing after the settlement order has been made. This may mean that there is a delay in setting up the fund for the child, but this does not cause the CFO any problems as investment in the special account, which currently pays interest at 6%, can be backdated to the date of the order. There is no loss of interest to the child.

The majority of courts use the Form 320 as a basis for the investment decision, with the top half being completed by the litigation friend or their solicitors on behalf of the child and the bottom half being completed by the District Judge, having decided on how the monies should be invested. This information is then put onto the Form 212, which is then set to the CFO.

It is vital to the CFO that the Form 212 is fully and correctly completed, especially if the fund falls into the category where investment other than on special account is to be considered. The litigation friend's name and address is required so that twice-yearly statements of the fund can be sent to him. If interest or dividends are to be paid it is also vital to have the litigation friend's full name and address. The child's date of birth is not only used to decide whether other investment is required, but also so that the CFO can contact him prior to reaching 18 to tell him how to claim his fund. The majority direction determines which letter is sent to the child prior to his 18th birthday. If majority directions are given when the fund is set up, then the child is sent a form to complete and return to the CFO for payment out of his fund without the need to return to the court. If majority directions are not given, then the child is told to apply to the court for release of his fund.

When investment other than on special account is considered

The CFO does not make investment decisions and has no specialist investment knowledge. Such decisions are now made by the Investment Division of the Official Solicitor & Public Trustee Office (known as the OSPT).

If a Form 212 is received where the sum to be invested is £5,000 or more and the child has five or more years to go until majority, then the Form 212 is referred to the Investment Advisor in the OSPT for a decision.

The OSPT needs to know what the child's requirements are before an accurate decision as to whether to invest can be made. Broadly speaking, if a high income is required and the maximum income box has been completed, the fund will remain on special account, as the interest rate is favorable. Obviously, if the fund is very large, further consideration may be given. In such cases it is likely that the OSPT will contact the litigation friend or their solicitor for further clarification.

If capital growth only is ticked, then it is likely that a UK tracker investment vehicle will be purchased, with either accumulation or income units. Larger funds may have a basket of holdings, generally one tracker, one UK growth and one capital growth fund with a little overseas exposure.

If capital growth and income is ticked the same sort of investment would be considered, but in a vehicle that has a stated policy of generating some income as well as capital growth, and income rather than accumulation units would be held.

At present any investment in securities is normally in the Common Investment Fund Equity Index Tracker Fund. This fund is managed by Legal & General on behalf of the DCA and is only available to clients of the DCA, mainly Court of Protection clients or children. If a child reaches majority, or a Court of Protection client recovers, these units can be transferred into his name. The child/client cannot, however, transfer units to someone else or add to the holding after this transfer. Further information on the Equity Index Tracker Fund can be provided on request.

The amount invested in securities depends on the number of years to go until the child reaches majority. As a rough guide, if the child has nine or more years to go until majority, then up to 80% would be invested in security holdings, with the balance retained on the special account. The ratio would be decreased to 70/30, 60/40 or 50/50 according to the number of years until majority, with a 50/50 split if there are less than six years until majority.

It is, therefore, important that consideration is given to whether any income or capital expenditure is envisaged during the lifetime of the fund when the investment directions are made. If the fund is £5,000 with nine years to go until majority and capital expenditure of over £1,000 for the purchase of, say, a computer within the first year is anticipated then the fund may not have generated sufficient interest to meet the request, and part of the security holding would have to be sold. As the investment is for capital growth over at least four years this could result in a loss to the child.

If some of the capital is to be released immediately, then this should be made clear on the Form 212 so the correct advice can be given. Clearly, no one has a crystal ball to see into the future, and the child's needs may change dramatically over the lifetime of the fund. However, if the litigation friend is aware that investment other than on special account may be made, and they

are provided with details of the investment and regular statements, any sale deemed necessary will, hopefully, be accepted.

Exceptional cases

Investment other than on special account will also be considered in the following cases.

Where there are religious reasons why monies cannot be retained on special account, such as with Muslim children where their religion does not allow for receipt of interest. In such cases the whole fund can be invested in accumulation units. However, this requirement needs to be clearly stated on the Form 212.

Where the claimant is under a mental disability, but where the fund is under £20,000 and there are no other substantial assets to necessitate the application for the appointment of a Receiver, or where the fund is under £30,000 and the Master of the Court of Protection has confirmed that a Receiver is not required, consideration can be given to investing in securities for long-term growth. Once more, this needs to be clearly stated on the Form 212.

Where the litigation friend has specifically asked for part of the fund to be invested, or where the fund is large but there are less than four years to go until majority, the Investment Advisor may contact the litigation friend to discuss whether investment should be undertaken. If the litigation friend has asked to be involved in any investment decision, or has specifically requested investment, this should also be clearly noted on the Form 212.

If the fund is very significant, usually £250,000 or over, it is possible for it to be set up as a Supreme Court Declaration case (formerly known as Order 80/12 trusts). In such cases the Investment Advisor will contact the litigation friend to suggest this and, if agreed by the court, the fund will be invested in a managed portfolio under the direct control of the OSPT until the child reaches 18. Any funds to be kept as cash will be retained on the special account at the Court Funds Office. The court does, however, retain control over the fund in so far as access to monies during the lifetime of the fund is concerned.

Deciding on when to set up a fund

The CFO is often asked how it is decided whether to invest monies awarded to a child in court. It is, of course, up to your discretion. Part 21 of the CPR only says if the fund is very small it can be paid to the litigation friend to be put in a building society account, or similar investment. Because of the beneficial rate of interest paid it is unlikely that a high street account could pay better. The Court Funds Office also charges no fees; the brokers only charge commission on sales and purchases. If the fund is under £250,000 it is unlikely that a private trust will cost less. The OSPT does charge for managing an SCD case, details of which can be provided if required.

It is, however, for you to decide whether the fund is best off held in court or managed by the litigation friend or their advisors. All CFO would say is that if the fund is less than £500, or if the child has less than a year to go until he reaches majority, it may be better to release the fund direct to the child or his litigation friend. However, CFO would still set up a fund, even if it were for £200 with weeks to go until the child reached 18!

You are not required to give investment advice. The Investment Advisor makes that decision. It is, however, sensible to advise the litigation friend that the fund may be invested other than on special account if the sum is £5,000 or more and there are more than five years to go until majority.

Where the funds are significant a growing number of solicitors now appear with financial advisors, trust deeds, etc. for approval of the investment. If so requested, the CFO can refer such schemes to the OSPT for its advice as to the investment strategy. However, as the rules do not specifically provide for out-of-court investment of children's funds, it must be down to the judge's discretion as to whether to approve such a scheme rather than invest the monies in court.

There appears to be no discretion in the rules to allow a child to retain a fund after majority, unless that child is under a mental disability and the fund will either be administered by the Court of Protection or, if it is below the threshold for referral to the Court of Protection, the judge directs its retention. Once the child reaches 18 all interest and dividends are reinvested in the basic account at the lower rate of interest until a direction to pay them out is received.

However, at present the CFO has no mechanism to follow up those funds not claimed after the date of majority until they fall into the unclaimed balances category (ten years after the date of majority). So a child could delay claiming without the CFO following it up. CFO does intend to set up a procedure to chase payments out after majority, and would not encourage the deliberate retention of a fund.