



A

Handbook

For Judges and Court Staff

Edition III

Awards to Children and Protected Parties

and

The investment and control of such funds

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Introduction to the Third Edition

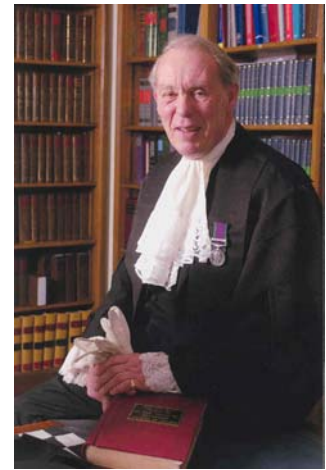
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Investing for Children

A Guide to Court Funds Office Practices by Elizabeth Jeary



Introduction to the Third Edition

The material in this Handbook 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 two thousand children's funds in their care.

A new edition has been made necessary by the radical reorganisation being undertaken at the Court Funds Office and the new financial guidelines and philosophy that are being adopted. Elizabeth Jeary of the Court Funds Office and I have tried, I hope successfully, to provide guidance to the Judiciary and the Profession in the management of this vitally important aspect of the court's responsibilities for children and those who are protected parties.

We wish to acknowledge the co-operation of Sweet & Maxwell from whose authoritative work "Civil Procedure" (The White Book), much of the basic material was obtained and the benefit of the experience of the staff of the Central Office and I am especially grateful to Susan Harvey of the Queen's Bench Children's Section and to Master Leslie and District Judge Ashton for their advice, especially that of Gordon Ashton on protected parties and proof-reading and finally to Sharon, my long-suffering and patient Personal Assistant, for the many versions of this Handbook which 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 and litigation friends 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 the Queen's Remembrancer

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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 are deemed to lack the capacity to manage their own financial affairs.

The first of these groups are termed “children” and the second are known as protected parties (formerly known as patients) when they are litigants and as “protected beneficiaries” once the award has been made.

This protection is given by the need for the court to approve settlements or compromise of claims involving children or protected parties 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 dependants a valid discharge.
3. Protect children and protected parties 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 in its recently revised (2007) form.

2. Protection from the want of skill or experience of a child or protected party’s legal advisor

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 protected parties, 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 from knowing the terms of any proposed settlement) and then to determine in the light of its own judgment whether the child's/protected party's interests have been best served by the proposed compromise *Black v. Yates (1992) QB 526*.

I understand that 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 concern him/herself with this aspect.

3. Settlement, compromise and awards at trial

(i) 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 protected party. Solicitors acting in cases involving those who lack capacity 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/protected party.

At common law due to a child's/protected party'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 attains his/her majority or a protected party ceases to lack capacity 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.

(ii) 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. See also under section 8(i) below.

(iii) The interests of the child or protected party 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/protected party.

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 but the court is not concerned to approve the total amount of the award only that part to be held for the benefit of the children.

(iv) Settlements at trial

Often the parties in the course of a trial will agree a settlement. In this event 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. See paragraph 9 of the Practice Direction.

(v) Awards at Trial

Where there has been a trial on liability and/or quantum the judge will have determined how much the child/protected party 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 in accordance with paragraph 9 of the Practice Direction.

4. Protection for the defendant against future claims when a child attains his/her majority

It is important to provide a means by which a defendant may obtain a valid discharge from a child's or protected party'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/her 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.

5. To ensure proper investment

The court has a duty to make sure that money recovered by or on behalf of a child or protected party 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.

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 (*McDermott International Inc v. Hardy* (1995) *The Times*, December 28).

7. Forms of settlements

There are essentially three types of settlements namely,

- (a) Common law awards of damages to children & protected parties.
- (b) Fatal Accidents Act settlements.
- (c) Awards to fatally ill children.

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

(A) Common Law Awards

These flow from an award made following the trial of issues where the child or a protected party 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/she 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 the 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 rely on individual share holdings.

- (i) Do not advise an investment in equities unless the fund has at least 5 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.

(B) Fatal Accident Acts

The involvement of the child in such awards arises where he/she 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 the 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/she 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 its short life.

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

An 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 1990's.

The life expectancy was given at 5 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).

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.

(i) Before proceedings begun:

Where an agreement is reached for the settlement or compromise of a money claim by or on behalf of a child or protected party before proceedings are begun, 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
- (c) 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 Act of 1976 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.
- (d) the application in respect of a child may normally be made to either a Master or a District Judge. In the case of a protected party it must normally be made to a Master or a designated civil judge or his nominee. See paragraph 5.6 of the Practice Direction.

A claim under this Part may be issued where the money claim by or on behalf of a child or protected party is made alone or in conjunction with any other person. It may, therefore be issued 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.

(ii) After proceedings have begun:

Where a settlement or compromise of a money claim by or on behalf of a child or protected party 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 claim; in the case of a child it is made to a Master or designated Civil Judge or his nominee and in the case of a protected party 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 or designated Civil Judge as may be appropriate.

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 judge to form his/her own view and then to compare his/her 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/protected party 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 Associate or court Clerk shall ensure that the judge orders the money to be placed on the special account and for the claimant's 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.

(iii) Interim payments:

Where the parties have agreed that an interim payment should be made to a person who lacks capacity, often because an immediate payment is required, an application should issue for a private room appointment where the Master or District Judge, designated Civil Judge or his nominee as may be appropriate 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 the interim payment represents so as to satisfy himself that the long-term interests of the child are not being prejudiced. In cases involving protected parties it may be necessary to seek the approval of the Court of Protection.

(iv) Ex gratia payments:

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

(v) Enduring powers of attorney/Lasting powers of attorney:

The fact that a litigation friend holds a registered Enduring Power of Attorney or Lasting Power of Attorney does not discharge him from his duty to apply to the Court for approval of any interim payment or the compromise or settlement of the claim. But in that event it is usually appropriate for any money recovered to be paid to the attorney rather than retained in court.

(vi) Claim brought by direction of the court:

It may happen that the institution of proceedings by or on behalf of a child or protected party has been directed, or authorised by the Court of Protection under the Mental Capacity Act 2005 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.

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

A. 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 para. 1.6 of PD.39).

- (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 CFO 320 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 claim, 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, the 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 claims under the Fatal Accidents Act, it is essential to inform the Master of the age, occupation and earnings of the deceased, the ages of the widow or widower and the dependent children, the amount (if any) of the deceased's estate and the extent to which the widow or 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 Ch. D (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 claim is brought on behalf of all of them; otherwise any dependant excluded may intervene in the claim 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 E.R. 121, CA).

B. Admiralty claims:

In Admiralty claims, 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.

C. 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 protected party);
- in the event of premature death the capital involved is lost (although in the case of a protected party 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 (e.g. 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 was a patient, both the lump sum and the structured settlement (or merely the latter if the 'bottom-up approach' is adopted) had to be approved by the Court of Protection before approval by the High Court. There was usually an adjournment Order approving the conventional lump sum in principle and directing that advice be taken on the benefits of a structure. There is no longer a requirement for such approval in respect of a protected party under the new jurisdiction introduced by the Mental Capacity Act 2005.

D. 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 CFO320 and CFO212 (completed from the CFO320) must be taken to the Judgments and Orders Section of the Action Department (Room E117) 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 CFO320, after which the CFO212 will be sent by the court to the Court Funds Office and the CFO320 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 E.R. 416). It is essential for the Form 100 to have been sealed by the court before the Court Funds Office can accept the payment in.

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] Q.B. 384; [1974] 2 All E.R. 365). Similarly any money under the control of the court must be paid out to a child (not being also a protected party) 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/her 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).

E. UUUUUUUDirections 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 claim to trial.

F. Appeal:

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

G. 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.

H. 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).

I. 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 E.R. 388, HK, *Leather v. Kirby* [1965] 1 WLR 1489; [1965] 3 All E.R. 927n.,HL); but if no petition is lodged, it would 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/her approval under the inherent jurisdiction of the court.

J. Child claimant attaining full age during currency of the claim:

When a child comes of age after the issue of the claim and before compromise or judgment, he may adopt the claim and file in the Central Office a notice of the fact that he has attained the age of 18 years and has adopted the claim. When so filed this rule has no further application. It would no longer be appropriate for the litigation friend to apply for approval of a settlement even if the child did not adopt the claim unless the child having attained majority did not have the capacity to conduct the litigation.

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 protected party 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 outcomes 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 protected party may also be requested to attend the approval hearing unless it is apparent that this would be an unnecessary trauma for them and that they 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 protected party 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 protected party. 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 10-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 her ankle tended to give way. It was agreed that in view of this continuing disability the settlement may 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.*

4. 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.

11. Forms of Investment

The investment of a child'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

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 Fund Capital Fund Units which had all the features of commercial unit trusts and these have been replaced with the Common Investment Fund Equity Index Tracker Fund Units which are so invested as to "track" an index based on 20% of FTSE World ex UK Index and 80% of FTSE All Share Index.
- (c) Shares – these are rarely bought nowadays unless there were special reasons such as religious or ethical grounds for not using the Equity 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 the forms CFO320.

Masters/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.
8. Because there is a risk that the court file may be destroyed before a child reaches his/her majority and the family may have changed their address, judges may find it useful to obtain information such as the child's National Insurance number so as to aid the Court Funds Office in tracing the child at majority.

12. Protected parties and Protected beneficiaries

(1) For many years a 'patient' was defined as: "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" - CPR r.21.1(2)(b). For family proceedings FPR r.9.1(1).

From October 2007 the term becomes *protected party* and means: "a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings". Section 2 of that Act provides that:

"... a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain".

This thus becomes a two stage test: (i) is there an impairment of, or disturbance in the functioning of, the person's mind or brain, and (ii) is this sufficient to render the person incapable of conducting the proceedings? The existence of a mental disorder no longer features in the test of capacity to conduct litigation.

Section 3(1) provides that a person is unable to make a decision if he/she is unable:

- to understand the information relevant to the decision;
- to retain that information;
- to use or weigh that information as part of the process of making the decision; or
- to communicate his decision (whether by talking, using sign language or any other means).

Courts should always investigate the question of capacity whenever there is any reason to suspect that it may be absent. Tests of capacity are now functional and decision-specific.

(2) If it is clear that upon attaining majority a child will be a *protected party* 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.

(3) A protected party must have a litigation friend to conduct proceedings on his behalf – CPR r.21(2)(1). A person may not, without the permission of the court, take any further step in proceedings until the protected party has a litigation friend – CPR r.21(3)(2). Any step taken before a protected party has a litigation friend is of no effect unless the court otherwise orders – CPR r.21(3)(4).

The procedure for the appointment of a litigation friend is to be found in CPR Part 21. The litigation friend will need to sign a Certificate of Suitability and give an undertaking as to costs.

(4) The duty of a litigation friend is “fairly and competently to conduct proceedings on behalf of a ... patient. He must have no interest in the proceedings adverse to that of the ... patient and all steps and decisions he takes in the proceedings must be taken for the benefit of the ... patient” - PD21, para 2.1. The litigation friend has no authority outside the proceedings so it may be necessary for the Court of Protection to be involved if money is awarded.

(5) The term *protected beneficiary* means a protected party who lacks capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings – CPR r 21.1(2)(e). A separate definition is needed because a party may lack capacity to conduct the proceedings but nevertheless have the capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings.

(6) Any settlement or compromise on behalf of a protected party must be judicially approved. 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. The practice under Rule 21.10 in the case of protected parties is the same as in the case of children. If a claim is brought or defended by the litigation friend of a protected party under the direction of the Court of Protection, no compromise should be effected without that court’s approval if it has so provided, although there is no longer a general requirement to obtain such prior approval.

The Court of Protection charges fees to manage the funds of protected parties so 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.

(7) If the settlement is approved, the order will contain directions as to how the money is to be applied or otherwise dealt with - CPR r.21.12. Unless there is a registered enduring power of attorney or lasting power of attorney (dealing with finances) any property or money recovered should be directed to be transferred to the protected beneficiary’s account in the Court of Protection (see *M. v. Lester* [1966] 1 WLR 134; [1966] 1 All E.R. 207) there to be administered for the benefit of the protected beneficiary although the court in which the award is made does have a discretion to release some of the money for urgent needs. 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 E.R. 927n.,HL).

If there is a registered enduring power of attorney or lasting power of attorney (dealing with finances) then the money should be ordered to be paid to the attorney(s) or donee(s) who can give a valid receipt. The only exception is in the case of a very large award where it might be thought that previously appointed attorneys or donees were not suitably experienced. It would then be appropriate to refer the award to the Senior Judge of the Court of Protection who could superimpose the appointment of a *Deputy*.

(8) If there is sufficient need then the Court of Protection will exercise its jurisdiction by appointing a *deputy*. It follows that, unless that court needs to be involved, small awards of damages to protected parties (i.e. up to £30,000) can be dealt with in the discretion of the civil court and held and administered as if they were an award to a child. Guidance is to be found in CPR PD 21 at para. 10.2.

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 lacks capacity. If the claimant is not a child the fund can be invested as if he or she were a child. This is the only circumstance whereby a Form 212 should be completed for a protected party.

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 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, neither the Official Solicitor nor CAFCASS have their 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.

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.

Scotland

Arrangement for the investment and handling of children's funds in Scotland are covered by the Children Scotland Act 1995, section 9.

The Act lays down three categories of cases

1. Low value - Under 5k, the funds are paid to the legal guardian on behalf of the child and the court has no further involvement.
2. Medium value - Between £5k -£20k, depending on the views of the guardian and the court, the matter may be referred to the Accountant of Court for his directions.
3. Over £20k - Arrangements for the investment of the monies must be agreed by the guardian with the Accountant of Court. In such cases the guardian takes advice from an Independent Financial Advisor and this advice is reviewed by the Accountant of Court who if he agrees the arrangements, leaves the investment to be made by the guardian but reviews the income and expenditure annually.

The Scottish courts do not hold the monies and there is no equivalent to the Court Funds Office

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:-

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

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 of the High Court
The Four Courts
Inns Quay
Dublin 7

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. Advice can be sought from the Senior Master, who has daily contact with European and overseas courts.

Transfer of Monies

Tracker Funds cannot be transferred out of the jurisdiction other than on transfer to a child on majority or protected beneficiary who ceases to lack capacity, 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.

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.

Robert Turner
The Senior Master & Queen's Remembrancer

Investing for Children

A Guide to Court Funds Office Practices with regard to Children's and Protected Parties' accounts

The Court Funds Office (CFO) holds approximately 89,800 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 lacks the capacity to manage their own finances, but there are insufficient funds to warrant the appointment of a Deputy. There are also funds where the child has reached majority, but has yet to claim their fund.

If monies are to be invested for a child the CFO needs to know the date of the settlement order and, if 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 special, then this direction can be included in the directions on the Form 320/212. 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 Deputy is to be, or has been, made.

It is understood that 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, whilst the CFO may backdate investment in the special account, which currently pays interest at 6%, to the date of the order or lodgment of the monies so there is no loss of interest to the child this could have a detrimental affect on the fund if investment in securities is appropriate. Judges and court staff are, therefore, urged to ensure that an investment decision is made, and a Form 212 sent to the Court Funds Office as soon as possible after the order.

It is also understood that 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 sent to the CFO. The forms 320 and 212 are being extensively revised and new versions should be available in late 2007.

It is vital to the CFO that the Form 320/212 is fully and correctly completed, especially if the fund falls into the category where investment other than on special 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 them. 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 them prior to reaching 18 to tell them how to claim their fund. The majority direction determines which letter is sent to the child prior to their 18th birthday. If majority directions are given when the fund is set up, then the child is sent a form (called Form 203) to complete and return to the CFO for payment out of their 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 their fund.

When investment other than on special is considered

The CFO does not make investment decisions. Such decisions are made by the Public Trustee using the investment expertise of 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 5 or more years to go until majority, then the Form 212 is referred to the investment advisor for a decision.

The investment advisor 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, as the interest rate remains favourable. Obviously, if the fund is very large further consideration may be given. In such cases it is likely that the advisor 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, at present this will be the Equity Index Tracker Fund, unless there is a specific need or request to invest in something different, such as an ethical unit trust fund.

If capital growth and income is ticked the same sort of investment would be considered, but the ratio of cash to security holding would be different, with more retained on the special account to provide for the required income.

The Common Investment Fund Equity Index Tracker Fund is managed by Legal & General on behalf of the Ministry of Justice (MOJ) and is only available to clients of the MOJ, 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 their name. They cannot, however, transfer them to someone else or add to their holding after this transfer. Any holding must be sold on the death of the child or Court of Protection client. 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 and whether the policy is capital growth or capital growth and income. As a rough guide, if the child has 9 or more years to go until majority, then up to 70% would be invested in security holdings, with the balance retained on the special account. The ratio would be decreased to

60/40 or 50/50 according to the number of years until majority, with a 50/50 split if there are less than 6 years until majority. If the policy is for capital growth and income the maximum invested would be 50/50, decreasing to 30/70 according to the number of years to 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 9 years to go until majority and capital expenditure of over £1,500 for the purchase of, say, a computer within the first year is anticipated then the sum on the special account may be exhausted and the fund will not be properly balanced. This could affect the overall return on the fund.

If some of the capital is to be released immediately, then this should be made clear on the Form 320/212 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 may be made, and they are provided with details of the investment and regular statements, any sale deemed necessary will, hopefully, be accepted.

The Court Funds Office, with our investment advisors, are now adopting a more active management of funds with security holdings. All such funds will be reviewed each year and a valuation sent to the litigation friend. If it is deemed appropriate, the litigation friend will also be asked whether they wish for the holding to be reduced in the year leading up to the child's majority.

Exceptional Cases

investment other than on special will also be considered in the following cases:

Where there are religious reasons why monies cannot be retained on special, 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 320/212.

Where the claimant lacks the capacity to manage their own finances, but where the fund is under £30,000 and there are no other substantial assets to necessitate the application for the appointment of a Deputy consideration can be given to investing in securities for long-term growth. Once more, this needs to be clearly stated on the Form 320/212.

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 4 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 320/212.

If the fund is very significant, usually £250,000 or over, it was 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 would 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. Whilst Part 21 still allows for this, in practice Supreme Court Declaration cases are very rare and the OSPT may be unwilling to accept any new cases without good reason. Consultation with the OSPT is, therefore, advisable before considering this option.

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 the Judge's 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 rate of interest paid it may be that a high street account would not be able to provide a similar rate and still offer access, on direction, with no penalties such as loss of interest. 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 they reach majority it may be better to release the fund direct to the child or their litigation friend. However, CFO would still set up a fund even if it were for £200 with 5 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 if the sum is £5,000 or more and there are more than 5 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 our advisors for their 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 lacks the capacity to manage their own finances and the Court of Protection will either administer the fund 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 force payment out of those funds not claimed after the date of majority until they fall into the unclaimed balances category (10 years after the date of majority). So a child could delay claiming without the CFO having any power to insist on releasing the funds. CFO does now have a procedure to chase payments out after majority, and would not encourage the deliberate retention of a fund.

Elizabeth Jeary
Court Funds Office

Useful contact information

Court Funds Office
22 Kingsway
London
WC2B 6LE

Customer Services Helpline: 0845 223 8500
E-mail: enquiries@courtfunds.gsi.gov.uk
Website: www.courtfunds.gov.uk

DX 149780 Kingsway 5

Official Solicitor and Public Trustee
81 Chancery Lane
London
WC2A 1DD

Customer Service: 020 7911 7127
E-mail: enquiries@offsol.gsi.gov.uk
Website: www.officialsolicitor.gov.uk

DX 0012 London/Chancery Lane

Office of Public Guardian (OPG)
Archway Tower
2 Junction Road
London
N19 5SZ

Customer Services: 0845 330 2915
E-mail: customerservices@publicguardian.gsi.gov.uk
Website: www.publicguardian.gov.uk

DX 141150 Archway 2