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Professional Deputies and Conflicts of Interest

***Re ACC & Others* [2020] EWCOP 9**

The Court of Protection regularly appoints solicitors (or trust corporations connected to solicitors' firms) to act as property and affairs deputies for P. This has the potential to lead to a conflict of interest where the deputy may wish to instruct their own firm to provide services in the course of the deputyship

The steps that should be taken to address these issues were considered by HHJ Hilder in *Re ACC & Others* [2020] EWCOP 9. This involved three cases in which either Irwin Mitchell Trust Corporation or a partner in Irwin Mitchell had been appointed to act as P's deputy.

- In *Re ACC*, P's deputy was seeking authority to incur costs in instructing Irwin Mitchell to challenge to the First Tier Tribunal against a decision by the relevant local authority to end support previously provided to P under an Education, Health and Social Care Plan. By the time the case was heard, the appeal had been settled and the application was limited to retrospective approval of the costs actually incurred
- *Re JDJ* involved a similar application to fund a Tribunal challenge against a local authority decision regarding P's college placement (the challenge was being brought by P's parents, instructing Irwin Mitchell). The appeal had been heard by the time of the COP hearing.

- *Re HPP* was an application by P's property and affairs deputy for authority to instruct Irwin Mitchell in PI proceedings that were being conducted on P's behalf in the Queen's Bench Division. P's litigation friend in the PI proceedings was a partner in Irwin Mitchell and authority was also sought to enable her to recover her costs of the time spent in acting as litigation friend.

In her judgment the Senior Judge considered not only the issues raised by the three specific cases (which were quite narrow by the date of the hearing) but also sought to give more general guidance on when a professional deputy may be under a conflict of interest and what steps should be taken where such a conflict arose. The judgment is detailed and deserves careful reading. Key issues dealt with in the judgment include:

- (1) The scope of the "general authority" conferred by the standard deputyship order;
- (2) The extent to which authority is needed for a deputy to litigate on P's behalf;
- (3) How a deputy should address the conflict of interest that is inherent where they wish to instruct their own firm.

General Authority

The judge sought to identify the types of task which are encompassed by the general authority conferred by a standard property and affairs deputyship order and other matters which fall outside it. Stating at [46] and [47]:

"[46] The standard template order for deputyship includes specific provisions in respect of major transactions but it would be impractical to include specific provision for every one of the smaller, day-to-day transactions conceivable. So, the Court adopts the approach of granting "general authority."

[47] 'General' is a term of ordinary language and should be understood as such

when used in a deputyship order. Various dictionaries define 'general' as 'common,' 'widespread', 'not specialised', and 'applying to or participated in by all or most of the members of a group.' The purpose of the 'general' authority is to enable a property and affairs deputy to do on behalf of P those myriad tasks too numerous to identify individually which are commonly required to manage an individual's financial affairs efficiently. The essence of its scope is the 'ordinariness' of the task contemplated."

The judge then went on to consider whether (a) litigation and (b) other tasks fell within the scope of the general authority conferred by the standard deputyship order.

The judge confirmed that the general conduct of litigation on P's behalf fell outside the scope of the general deputyship order and would require specific authorisation by the Court of Protection under section 18(1)(k) MCA 2005. An order under that section has a twofold effect:

- (1) It gives the deputy priority over others in the hierarchy of potential litigation friends for P (see eg CPR Part 21.4); and
- (2) It enables the deputy to use P's funds to meet the reasonable costs of the litigation and pay any costs order made against him in that claim.

It should be noted that such an order cannot oust the jurisdiction of the court dealing with the other claim to control the identity of the litigation friend of the protected party.

The principal exception to this principle relates to proceedings within the Court of Protection itself.

"The Applicants submit that an exception should be made in respect of

proceedings in the Court of Protection ie no prior authority to conduct litigation should be required where the proposed litigation is itself an application to the Court of Protection. The reasoning is that “otherwise the deputy would be in the absurd position of asking the Court of Protection to authorise him to incur costs in drawing up an application to the Court of Protection.””

The judge adopted a more nuanced position holding that:

- (1) A property and affairs deputy may apply to the Court of Protection in respect of any property and affairs issue regarding P:
- (2) There may however be other bodies or institutions (eg an NHS body or local authority) which is more appropriately placed than a property and affairs deputy to make a health and welfare application to the Court of Protection regarding P. Nonetheless circumstances may arise where a property and affairs deputy may be required to bring a health and welfare matter to the Court’s attention:

“So if, having been properly alerted by the property and affairs deputy, the appropriate body or institution drags its heels in referring a non-property-and-affairs issue to court, the deputy may - without specific authority to do so - appropriately make an application to draw this to the attention of the court and seek further directions. Moreover, the deputy *should* do so.”

Thus the “general” authority of a property and affairs deputy should be understood to extend as far as permitting an application to the Court of Protection to draw a welfare issue to the attention of the Court, but does not extend to permitting the conduct of welfare proceedings in the Court of

Protection on behalf of P without specific authority.

The judge then turned to consider whether other legal tasks (short of litigation) fell within the general authority of a property and affairs deputy. She held that the authority given to a deputy to act on behalf of P under a standard deputyship order would encompass “such ordinary legal tasks short of taking proceedings as are an ancillary part of giving effect to that authority”, for example completing a tax return, ensuring that a deputy is complying with a lease or tenancy agreement on P’s behalf or the direct employment of carers for P. On the other hand taking advice in relation to employment contracts relating to a business belonging to P may be outside the scope of a deputy’s general authority and where P has such a business, more detailed provisions authorising the deputy to deal with the business are usually included in a deputyship order. The deputy is required as part of his normal best interests decision-making to consider whether the cost of the advice / work is proportionate to P’s estate and the importance of the issue to P (and should evidence this as part of the decision-making process) and such costs will either be fixed (under PD 19B) or subject to SCCO detailed assessment. The judge declined to set a costs limit for such work (save where the conflict of interest provisions apply)

The judge indicated that:

“In respect of non-contentious matters, the deputy’s approach should be to ask themselves if the subject of the advice is within their authority ie will their existing authority be sufficient to act on the advice if taken? If it is, then seeking advice is likely to be an ‘ordinary’ part of that function. If it is not, seeking advice is likely to be outside their authority.”

A particular difficulty arises when a deputy needs to take advice in relation to matters that could develop into contentious litigation. The judge posed the question thus:

“...conduct of proceedings requires specific authorisation but there is necessarily a stage before proceedings are embarked upon, when a capacitous person or a deputy on behalf of P needs to form a view about whether it is appropriate to go down the path of litigation. When such a need arises, it is common to respond by seeking legal advice. To that extent, in my judgment there is scope for concluding that “general” authority includes authority to take some advice in respect of some contentious litigation. The difficulty lies in identifying the limits of this authority...

Fundamentally, the scope of the authority to take advice where necessary to discharge deputyship functions must be limited by the requirement that the deputy reasonably assesses the importance of the possible litigation to P, and the costs of the advice, to be such that seeking advice at all is in P’s best interests. Thereafter, the question becomes how far along the path towards conducting litigation does the authority extend?”

In answering this question the judge concluded:

- (1) Where the proposed litigation relates to P’s property and affairs the deputy’s general authority permits it to take advice (including counsel’s opinion), send a letter of claim and receive a response (ie most steps short of the preparation and issue of proceedings).
- (2) In contrast, where the proposed litigation does not relate to P’s property and affairs, it is outside the scope of the deputy’s authority (save to the extent that the deputy brings it to the attention of the Court of Protection).

Turning to specific issues that often arise the judge held:

- (1) Making an application for continuing healthcare funding for P would be within the scope of a property and affairs deputy's general authority as being part of the deputy's duty to ensure that P receives all the funds to which he is entitled. A property and affairs deputy would be entitled to take advice in relation to such an application and if funding were refused would be entitled to take preliminary steps in relation to an appeal (including taking advice in relation thereto). However, the deputy could not formally initiate the appeal by delivering the letter of appeal without further authority.
- (2) By contrast an Education, Health and Social Care Plan is a health and welfare matter and outside the general authority of a property and affairs deputy. Before taking any steps in respect of challenging an EHSC Plan the deputy should obtain authority from the Court of Protection. Without such authority the deputy is at personal risk of costs.

It was recognised that in some cases, the urgency of a situation may prevent the deputy from obtaining prior authority from the Court of Protection before incurring costs. The judge declined to give any general or prospective assurance of the outcome of an application for retrospective approval of costs incurred in such circumstances.

“Like any decision-maker in respect of persons lacking capacity, the Court's determination of such applications must be made in the best interests of P. It is axiomatic that the Court is unlikely to approve actions if the deputy did not reasonably believe that he was acting in P's best interests, and that the approach of the Court should be supportive of actions which do protect and have protected P's interests. It is not permissible to go beyond those obvious generalisations. Each application will be decided on its merits.”

The judge indicated that the reason why the matter was so urgent that approval could not be sought prospectively, and the length of time between taking the urgent action and making the application for retrospective approval were both likely to be relevant considerations in the Court's decision whether not to grant such approval.

Conflicts of Interest

Turning to the issue of the conflict of interest which arises where a professional deputy wishes to instruct his own firm to carry out legal tasks, the judge held that special measures were required to address that conflict.

A property and affairs deputy, when seeking appointment should consider whether there is a realistic prospect that they will wish to instruct someone else to give advice or carry out 'ordinary' legal tasks in order to be able to discharge the deputyship. If there is (and the deputy's own firm is a potential candidate for such instructions), they should consider seeking, within the deputyship application, specific authority to instruct their own firm to give the advice or carry out the task subject to a specified limit as to costs. Where such an application is made, the Court will consider whether or not it is the particular P's best interests to grant such authorisation and will give directions as to the period in which the authorisation may be exercised and the level of expenditure to which it should be limited. The judge suggested that the court's approach to determining the limit of authorised expenditure of this type should follow the language of section 12 MCA 2005 in respect of attorneys' authority to make gifts, that is to say that the authorisation must be limited so that it is not unreasonable having regard to all the circumstances and in particular the size of P's estate.

Where seeking legal advice or conducting 'ordinary' legal tasks is within the scope of a professional property and affairs deputy's authority, but no specific authority to instruct his own firm has been granted, prior to instructing his own firm a deputy must:

- Obtain three quotations for the work contemplated from providers of legal services who are properly qualified and appropriate to undertake the work. One of those quotations may be from the deputy's own firm. The obtaining of quotes must be done in a way which is proportionate to the magnitude of the costs involved and the importance of the issue to P. Both monetary and non-monetary significance to P will be relevant;
- Make a best interests decision as to which of the three providers to instruct, and document the decision-making process;

If the deputy's best interests decision is to instruct their own firm and the anticipated costs are less than £2,000 +VAT then these may be incurred without the need for further authority from the court. However if the anticipated costs of instructing the deputy's own firm exceeds £2,000 + VAT, then the deputy must make an application to the court for specific authority prior to incurring these costs. In every case the deputy should clearly set out any legal fees that they have incurred in their annual account to the Public Guardian, and append the notes of their decision-making process to the relevant return.

Other Matters

Two further points arise from the judgment:

- (1) The judge held that the standard terms of a deputyship order would not permit a deputy to reimburse costs incurred by a third party on P's behalf (for example costs incurred by P's parents in pursuing an appeal against an EHSC Plan) and

that specific authority from the Court is required for a property and affairs deputy to reimburse such costs.

- (2) A further issue arose whether a professional such as a solicitor should be entitled to charge for acting as litigation friend (the issue related to the time spent in fulfilling the role of litigation friend not in relation to the legal costs involved in the litigation friend's firm acting as P's solicitors). The Official Solicitor opposed litigation friends being authorised to charge and confirmed that she would be willing to act without charge if her criteria are met (ie there is evidence that P lacks capacity litigate, there is no other person willing to act without charging and there is some source of funding to cover the costs of solicitors and counsel for P). The judge declined to reach a view as to whether a litigation friend could charge for acting as such holding that given the Official Solicitor's stated willingness to act as litigation friend without charge:

“...it will be extremely difficult in circumstances such as the cases currently under consideration to satisfy the Court of Protection, either prospectively or retrospectively, that granting authority to any person to charge P for acting as litigation friend (as opposed to incurring the cost of solicitors and counsel when acting as litigation friend) is in the best interests of P.”

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