



Court of Protection Update: Property and affairs

By Emma Waldron and Matthew Wyard



Emma Waldron

Year of Call: 2011

'Emma is an excellent advocate, very tenacious and has a high level of mental fortitude. She is passionate about the work she does and instils confidence in clients, even those who are anxious and vulnerable.'

"Emma Waldron successfully acting for Queen Mary, University of London in a discrimination claim."

Legal 500 2021 - Leading Individual – Education

'Does a very good job even in difficult circumstances.'

Legal 500 2020 - Leading Individual – Education

Has a broad practice encompassing a wide range of education matters. She offers expertise in special educational needs and discrimination issues, and is also able to advise on admission and exclusion appeals. She regularly represents universities, schools, academies and local authorities, as well as parents and young persons.

Strengths: "Her questioning of witnesses is really good - sensitive and to the point. Her written submissions are also really clear." "She has the ability to calm anxious clients and makes them understand why they are there and what the issues are."

Recent work: Represented Southampton City Council in an appeal against a decision by the First-tier Tribunal to refuse to name a particular specialist provision in a child's education health and care plan.

Chambers UK 2021 - Up and coming - Education - London (Bar)

Overview

Emma Waldron practises exclusively in the fields of Education Law, Clinical Negligence, Personal Injury and Court of Protection. She has a very busy practice and finds herself in Court or in Tribunal regularly in tandem with a busy paperwork practice. Emma's practice has led her to deal with clients in the High Court, Upper Tribunal, County Court and First Tier Tribunal, most recently dealing with two appeals to the Upper Tribunal that were both successful.

Within Emma's Education practice, she has been instructed on a number of cases on the National Trial involving complex social and health care issues. As a former Teaching Assistant and Governor at a Maintained Special School for children with severe profound and multiple learning difficulties, Emma has a strong interest in dealing with cases within the SEN arena.

In a recent B, F and I appeal, Emma successfully negotiated a settlement at the door of the court which led to a local authority naming a 38-week placement at a specialist Independent school.

Emma's knowledge and experience within the care industry gives her a real sense of what good care is. She has regularly dealt with Personal Injury cases involving accidents in care homes, most recently dealing with a fatal accident claim. The service that Emma provides to her lay clients is second to none and has been proven when dealing with an extensive range of cases of a sensitive nature within the Personal Injury field.

Expertise

Court of Protection

Emma's practice in the fields of Education Law and Personal Injury Law has, in recent years, led her to advise on matters of capacity and issues involving the Court of Protection.

She has a particularly strong interest in:

- Deprivation of Liberty Safeguarding
- Issues surrounding consent to medical treatment
- Lasting Powers of Attorney
- Deputyship.

Having previously worked in the care industry and in special schools, Emma has a unique insight into questions of care and capacity. She recently delivered a talk on the Care Act 2015 and its interplay with the Mental Capacity Act 2005.

She is happy to take instructions from local authorities or individuals.

Recent cases:

- Re MD: acting on behalf of the Official Solicitor in relation to an application to revoke an LPA and appoint a Welfare Deputy
- Re ALS: acting on behalf of the Official Solicitor in respect of challenge to a standard authorisation which deprived P of his liberty
- Re FL: acting on behalf of the Applicant who was seeking to oppose the registration of an LPA which had been purportedly obtained by duress
- Re RB: judicial review proceedings, challenging a local authority's decision that the Applicant was not eligible for care and assistance under the Care Act 2014.

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Matthew Wyard

Year of Call: 2014

Overview

Matthew Wyard specialises in public law with a focus on court of protection, social care and education issues. He has appeared in courts/tribunals of all levels up to and including the Court of Appeal. Alongside his successful practice as a barrister, he also sits as a Chair of the Valuation Tribunal for England, is a non - executive director of a higher education institution and is a widely published author on his practice areas.

He is listed as a 'rising star' for court of protection and community care work in the Legal 500 and is the only ranked individual for Welsh education law.

Prior to joining chambers Matthew spent 3 years working in house in the public law and court of protection departments of a national law firm where he gained experience across the range of court of protection instructions.

Expertise

Court of Protection / Community Care

Matthew is considered an expert in Court of Protection (both jurisdictions) and Community Care matters.

Matthew will advise any party to property and affairs proceedings and enjoys working alongside private client solicitors to achieve appropriate and thorough end of life planning.

In the health and welfare jurisdiction, Matthew is regularly sought after to advise individuals and institutions on the competing statutory schemes for those transitioning between children and adults services.

Recent representative examples of Matthew's work in the Court of Protection include:

- Re: DS – Advising on the appropriate method of structuring a high value property transaction within ongoing civil proceedings where the Defendant had lost capacity.
- S City Council v KSC – Advising and representing a local authority in a contested application for a deputyship order over P's property and affairs following his falling victim to online fraud and inadvertently money laundering.
- Re: LCD – Advising a national law firm's private client department on the risks arising out of the transfer of property from a PI trust and the appropriate method of making the transfer.
- Re: MR – Advising and representing P in a dispute over a ward change following the Covid-19 pandemic.
- KH v S County Council – Advising a local authority on the interplay between the different regimes under the Mental Health Act 1983, s21A Mental Capacity Act and s39 Children and Families Act 2014.
- S City Council v JDC & Ors – Advising and representing a family member in this long running s21A and contact challenge.
- Re: CEM – Representing P in a dispute over her end of life arrangements.

As confirmed in the recent edition of the Legal 500, Matthew's encyclopaedic knowledge of both English and Welsh social care law "*is an advantage*" to his clients.

In light of his public law expertise, he is regularly instructed in matters where young people are transitioning between children and adult services and has experience in disputes about assessments and care planning, charging issues, compliance, care leavers, carers' allowance, special guardianship allowance.

At the other end of the spectrum, Matthew is developing a practice in respect of the elderly, in particular, focusing on the legitimate evasion of care home fees and the corresponding end of life planning.

Recent examples of Matthew's community care practice include:

- Re: TG – Advising on the appropriate response to and legality of a local authority's threatened proceedings over the estate of the deceased who passed with unpaid care fees.
- Re: AM – Advising on the appropriate estate structuring to legitimately avoid care home fees through efficient planning.
- Re: MA – Advising on the appropriate way to seek the reinstatement of direct payments.
- CJ v P County Council – Advising and representing the claimant in a claim concerning the refusal to assist with an application for a Disability Funding Grant.

Matthew also has extensive experience of judicial review proceedings within the community care arena.

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Re: ACC & Ors [2020] EWCOP 9

By [Matthew Wyard](#)

3PB Barristers – Public and Regulatory law team

Introduction

1. The judgment in the test case of Re: ACC & Ors [2020] EWCOP 9 was handed down by Her Honour Judge Hilder, Senior Judge of the Court of Protection, on 3 March 2020.
2. The case concerned the conflicts of interests that may arise where property and affairs deputies employed by a law firm instruct that firm to carry out instructions for P, or to conduct litigation on P's behalf.
3. Paragraphs number referred to below are to the judgment.

Facts

4. The three applicants, ACC, JDJ and HPP, were individuals who lacked capacity to manage their property and affairs, and conduct litigation. Each had professional deputies to manage their property and affairs. The respective deputyship orders did not contain any express provisions or exclusions relating to authority to instruct solicitors or conduct litigation on P's behalf.
5. ACC's deputy was employed by Irwin Mitchell Trust Corporation Limited who sought advice from Irwin Mitchell LLP in respect of an SEN appeal to the First Tier Tribunal. The deputy applied to the Court of Protection for retrospective authorisation of the costs incurred in conducting the SEN appeal.
6. JDJ also wanted to bring an SEN appeal. An urgent application was made to the Court of Protection by JDJ's deputy (a partner of Irwin Mitchell LLP) seeking authorisation to bring an appeal conducted by Irwin Mitchell LLP. Due to the timescales applying, the firm was instructed prior to the Court of Protection providing authorisation.

7. HPP's deputy was also Irwin Mitchell Trust Corporation Limited who had instructed Irwin Mitchell LLP in relation to a personal injury claim. An application was made to the Court of Protection seeking authorisation to bring proceedings for a detailed assessment of P's litigation friend's costs to the Senior Courts Cost Office.
8. The three cases were joined and listed together to allow the Court to consider the issue of the conflict of interest that may arise where professional deputies instruct solicitor's firms with which they are affiliated to undertake legal tasks in respect of P.

The Court of Protection's guidance

9. The Court gave the following guidance (in summary).
10. The "general" authority to manage property and affairs which is granted by the standard deputyship order encompasses those common or ordinary tasks which are required to administer P's estate efficiently.
11. Authority to make a decision / do an act in respect of P's property and affairs encompasses such ordinary non-contentious legal tasks, including obtaining legal advice, as are ancillary to giving effect to that authority. In particular:
 - a. authority to purchase or sell property includes conveyancing [paragraph 53.2]
 - b. authority to let property includes dealing with leases or tenancy agreements [paragraph 53.3]
 - c. authority to conduct P's business includes dealing with employment contracts of that business [paragraph 53.4]
 - d. "general" authority encompasses:
 - i. the preparation of an annual tax return, and therefore obtaining advice as to completion of the return [paragraph 53.7(a)];
 - ii. discharging P's financial responsibilities under a tenancy, and therefore obtaining advice as to liabilities under the tenancy [paragraph 53.7(b)];

- iii. applying P's funds so as to ensure that the costs of his care arrangements are met, and therefore dealing with employment contracts of directly employed carers [paragraph 53.7(c)]
12. Specific authority is required to conduct litigation on behalf of P [paragraph 51] except where the contemplated litigation is in the Court of Protection in respect of a property and affairs issue [paragraph 52.4] or to seek directions in respect of a welfare issue [paragraph 52.10].
13. Where a deputy has authority to make a decision / do an act in respect of P's property and affairs, such authority encompasses steps in contemplation of contentious litigation in the realm of that authority up to receiving the Letter of Response but no further [paragraph 54.4]. In particular:
- a. authority to let property encompasses taking steps to form a view as to whether there are grounds to evict a tenant of such property [paragraph 53.13];
 - b. "general" authority to manage P's funds includes taking steps to form a view about whether a debt said to have been incurred by P is properly payable pursuant to section 7 of the Mental Capacity Act 2005 [paragraph 53.13];
 - c. "general" authority to manage P's funds includes steps up to but not including the delivery of a letter of appeal in respect of a decision that P is not eligible for continuing healthcare funding [paragraph 54.8(a)];
 - d. where authority encompasses steps in contemplation of contentious litigation, that includes obtaining Counsel's opinion. [paragraph 54.5]
14. "General" authority of a property and affairs deputyship order does not encompass seeking advice or other steps preliminary to litigation in respect of welfare issues; it does encompass making an application to the Court of Protection for further directions /specific authority in respect of welfare issues. [paragraph 54.6]
15. "General" authority of property and affairs deputyship does not encompass steps in contemplation of an appeal against the decision of an Education, Health and Care Plan. [paragraph 54.8(b)]

16. If circumstances arise where the protection of P's interests requires action to be taken so urgently that prior authority to litigate cannot reasonably be obtained, a deputy proceeds at risk as to costs but may make a retrospective application for authority to recover costs from P's funds. There is no presumption that such application will be granted - each application will be considered on its merits. [paragraph 55]
17. Where a deputy wishes to instruct his own firm to carry out legal tasks, special measures are required to address the conflict of interest:
- a. the deputy may seek prior authority [paragraph 56.7(a) - (e)];
 - b. the deputy is required to seek - in a manner which is proportionate to the magnitude of the costs involved and the importance of the issue to P - three quotations from appropriate providers (including one from his own firm), and determine where to give instructions in the best interests of P [paragraph 56.7(f)(i)];
 - c. the deputy **must** seek prior authority from the Court if the anticipated costs exceed £2 000 + VAT;
 - d. the deputy must clearly set out any legal fees incurred in the account to the Public Guardian and append the notes of the decision-making process to the return. [paragraph 56.7(f)(iv)]
18. Specific authority is required to use P's funds to pay a third party's legal costs, even if those costs relate to litigation for the benefit of P. [paragraph 57]
19. The Official Solicitor is willing to act as litigation friend for P without charge in any of the existing classes of cases in which she acts where her usual criteria are met. [paragraph 58]
20. If P has capacity to give instructions for particular work, he will also have capacity to agree the costs of that work. [paragraph 59]

Practical implications

21. For those acting as professional deputies either within, or in a corporation/organisation affiliated or associated with, a solicitor's firm, care will have to be given moving forward in respect of instructing that related firm in legal matters pertaining to P, unless the tasks being undertaken are those ancillary to carrying out the functions associated with the role of being a professional deputy for property and affairs.
22. A deputy may go no further than the pre action stage in litigation before the Court's authority is required to commence litigation and this is only in relation to litigation concerning P's property and affairs.
23. Those deputies that refer cases to their own affiliated firms to conduct personal injury, clinical negligence, or SEN appeals, will need to be able to demonstrate to the Office of the Public Guardian that they have acted in P's best interests by obtaining a variety of quotations and, presumably, demonstrating why, if their own firm does not offer the lowest quote or is not considered the most experienced in the relevant area of law, why they have chosen to instruct that firm.
24. Professional deputies are now, arguably, at a greater cost risk following this explicit guidance if they retrospectively seek approval for legal fees without having followed the guidance. Further, at an enhanced risk of challenge from the Office of Public Guardian, should they fail to act in P's best interests.
25. In principle this should open up the legal market and a new potential revenue stream for those firms not affiliated with professional deputies. That said, this will only happen if professional deputies, and those corporations that employ them, enforce the guidance.

10 March 2020



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IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated persons and members of their families must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Neutral Citation Number: [2020] EWCOP 9

Case No.s: 1219069, 12067238, 12636322

IN THE COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 27th February 2020

Before :

Her Honour Judge Hilder

IN THE MATTERS OF

**ACC
JDJ
HPP**

Mr. David Rees QC (instructed by Irwin Mitchell LLP) for the Applicant Deputies
Miss Ruth Hughes (instructed by the Official Solicitor) for the protected persons
Ms. Joanne Clement (instructed by the Public Guardian) for the Public Guardian

Hearing: 7th October 2019

Judgment

The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

Judge Hilder:

The Background

1. These proceedings concern three individuals who are connected only by the fact that each has a property and affairs deputy who is in some way part of the same firm of solicitors. For ACC and HPP that deputy is Irwin Mitchell Trust Corporation Ltd; for JDJ, the deputy is Kelly Greig, who is a partner of Irwin Mitchell LLP.
2. The common issue in each matter is whether, and in what circumstances, the deputy can recover from the protected person's assets costs which have been or are likely to be incurred in legal proceedings.
3. In view of the obvious conflict of interest, each of the protected persons in this matter has been represented by the Official Solicitor as Litigation Friend. The Public Guardian has also been joined as party to these proceedings.
4. In this judgment, each of the persons who is the subject of the application before the Court will be referred to by the anonymised initials settled when the transparency orders were made. Where reference is made to matters of general application to persons within the jurisdiction of the Court, I will adopt the generic 'P' as used in the Mental Capacity Act 2005. I hope that all persons involved in the care of ACC, HPP and JDJ will understand that this approach is adopted for purposes of clarity only.

Matters Considered

5. I have considered position statements filed on behalf of the deputies (by Mr. Rees QC), the Official Solicitor (by Miss Hughes) and the Public Guardian (by Ms. Clement), all dated 26th September 2019.
6. I have read all of the documents collated in the three lever arch files of the hearing bundle, including in particular the following statements:

6.1 ACC 1219069T

Niall Baker, dated 28th August 2018 [B20]

Elizabeth Perry, dated 5th March [B60] and 2nd September [B106] 2019

6.2 JDJ 12067238

Kelly Grieg dated 31st January [C20], 6th March [C73] and 3rd May [C91] 2019

Polly Sweeney dated 11th June [C98] and 25th July [C140] 2019

Advice by Katherine Barnes of Counsel dated 19th July 2019 [C143]

6.3 HPP 12636322

Charlotte Waite, undated [D20]

6.4 Generally, on behalf of the Public Guardian

Julie Lindsay, dated 19th September 2019

The factual background of each case

7. ACC 1219069T

7.1 ACC is now 20 years old. At the age of 4 she was involved in a road traffic incident in which she sustained serious injury and her mother died. A claim for damages was brought on her behalf, and settled in 2012 in the sum of £3 million plus periodical payments which presently amount to £180 000 per year. She lives in her own home, with her grandparents.

7.2 Capacity is not in issue. I accept the COP3 assessment [B90] by a consultant neuropsychologist dated 11th June 2019 that ACC lacks capacity in the domains relevant to these proceedings.

7.3 By order made on 11th September 2013 [B44] and varied on 17th July 2017 [B46] Irwin Mitchell Trust Corporation Limited (“IMTC”) was appointed as property and affairs deputy for ACC. The deputyship order states at paragraph 2(a) that “The court confers general authority on the deputy to take possession or control of the property and affairs of [ACC] and to exercise the same powers of management and investment, including letting property, as she has as beneficial owner, subject to the terms and conditions set out in this order.” The order does not contain any express provision either granting or excluding authority to instruct solicitors or to conduct any kind of proceedings on behalf of ACC.

7.4 In 2018 the relevant local authority decided to end the support previously provided to ACC under an Education Health and Care Plan. IMTC sought advice from the Public Law and Human Rights team at Irwin Mitchell LLP as to an appeal against this decision.

7.5 The Tribunal in which such appeal would be heard is a ‘no costs’ jurisdiction, and costs do not ‘follow the event’ so it was never likely that the local authority would bear the costs of any appeal. Accordingly, by COP1 application dated 23rd August 2018 [B10] IMTC sought “an order authorising the Deputy to take whatever steps are necessary to ensure that [ACC] has the benefit of legal advice and assistance in relation to the Education, Health and Care Plan appeal and that costs incurred by the Deputy in retaining solicitors to act on her behalf in that matter are to be assessed on the standard basis” and authority for such costs to be paid from ACC’s funds.

7.6 It was explained in a statement supporting the application [B29] that the costs for which authorisation sought fell into a number of categories:

“26. The initial advice from the PLHR team at a fixed fee of £750 plus VAT is now complete

27. In terms of next steps.... there are approximately five hours of work to be provided in relation to actually securing instructions on this matter, considering any amended decision and Plan by the local authority and providing advice on those issues. The costs of this will be in the region of £1 000 plus VAT.

28. Overall costs of an appeal if fully contested (it is too early to advise on the likelihood of it being fully contested) are likely to be in the region of £35 000 plus VAT... should it become necessary to instruct Counsel such fees would be in the region of £7 500 plus VAT....Expert fees in support of appeals to the tribunal would be in the region of £7 500.... If mediation was considered appropriate at the time then this would cost in the region of £2 000 to £3 000 plus VAT including attendance and preparation.”

7.7 Directions were given by orders made on 6th February [B1], 23rd April [B3], 26th April [B5], 17th May [B7] and 24th June [B9] 2019.

7.8 The Local Authority finalised the amended Education Health and Care Plan in November 2018, although it was apparently only submitted to the Irwin Mitchell Public Law and Human Rights Team solicitors in January 2019 [B67]. The deadline for submitting any appeal was 21st January 2019. An appeal was issued. As of May 2019 [B85], those proceedings have been satisfactorily concluded.

7.9 The application before the Court of Protection is therefore now limited to retrospective authorisation of costs actually incurred. In part those costs have already been assessed by the Senior Courts Costs Office: on a bill submitted as £1 201.50 + VAT [B67], costs were assessed as £906.10 + VAT. A further bill of £1 550.20 + VAT [B69] has yet to be assessed and there may be “possibly some additional work.”

7.10 There is some lack of clarity as to who actually instructed the Public Law and Human Rights team at Irwin Mitchell LLP and with what authority:

- a. the ‘terms of business’ letter from Irwin Mitchell LLP [B51] is addressed to ACC’s grandmother and begins “Thank you for instructing Irwin Mitchell LLP to act for you”; but
- b. it is noted in that letter that “[ACC’s] financial deputy is aware of our instruction and potential proceedings. I will keep [ACC’s] financial deputy up to date throughout”; and
- c. later in the letter it is further explained that “[ACC’s] property and affairs deputy, Irwin Mitchell Trust Corporation, has agreed that your legal costs can be paid from [ACC’s] damages award. I confirm that a copy of this Terms of Business has been sent to them for signing to confirm their agreement to these terms. The Deputy will need to ensure that it has any necessary authority to pay our costs”; but
- d. according to the statement of Elizabeth Perry [B66] “the terms of business were in fact only signed by the Deputy on [ACC’s] behalf. This was raised by the PLHR team as the Deputy did not feel that it was necessary for [ACC’s grandmother] to sign the terms of business; instructions having been provided by the Deputy. It is respectfully submitted therefore, that the costs incurred by the PLHR team were not in fact [ACC’s grandmother’s] but [ACC’s], acting via her deputy, as [ACC] lacked capacity to give instructions herself....”

8. JDJ 12067238

8.1 JDJ is 17 years old. He sustained brain injury due to clinical negligence at birth. He lives in his own home with his parents. Capacity is not in issue.

8.2 A damages claim brought on behalf of JDJ settled in 2013 with an award of £3 million and periodical payments which are currently £45 000 per year. JDJ’s estate has since grown [C97] but his outgoings exceed his income by approximately £30 000 per year.

8.3 An order was made on 5th April 2013 appointing Kelly Grieg and Michael Wilson as property and affairs deputies for JDJ. Paragraph 4 (a) of that order conferred on the deputies “general authority...to take possession or control of the property and affairs of [JDJ] and to exercise the same powers of management and investment, including letting property, as he has as beneficial owner, subject to the terms and conditions of this order.” The order does not contain any express provision either granting or excluding authority to instruct solicitors or to conduct any kind of proceedings on behalf of HPP.

8.4 An order was then made on 7th August 2013 [C71] which restricted the deputies' authority "in accordance with undertakings given on behalf of [JDJ] by his litigation friend" in the damages proceedings. The order precludes the deputies from making any application for public funding of JDJ's care, case management and full time residential education between the ages of 19 and 25, unless and until certain specified steps (of notification to the NHS and subsequent granting of permission by the Senior Judge) have been taken. Given JDJ's age, this restriction does not currently apply.

8.5 By order made on 4th April 2014 [C28] the appointment of Michael Wilson was discharged and the continuation of appointment of Kelly Grieg as sole deputy was confirmed, on the same terms as the previous orders.

8.6 In the summer of 2018 JDJ's family identified a specialist educational placement which they considered suitable for him to attend from September that year. On 10th December 2018 the Local Authority made a decision that JDJ's needs could be met at a different, mainstream college.

8.7 By COP1 application dated 31st January 2019 [C10] the deputy applied for:

"... authority for costs to be incurred by Irwin Mitchell's Public Law & Human Rights Department on [JDJ's] behalf to ensure he receives the correct level of legal advice and representation in relation to education and social care.

Urgent authority is sought in order to liaise with the Local Authority regarding funding for [JDJ's] future college placement and to appeal against their decision to the Tribunal if necessary.

The last day for doing this is 10 February 2019, hence the urgency. Anticipated costs in relation to this depends upon what action is required and the experts that will need to be instructed, however we would suggest a limit of £40 000 + VAT."

8.8 Directions were given by orders made on 12th February [C1], 23rd April [C3], 26th April [C5], 17th May [C7] and 24th June [C9] 2019.

8.9 Meanwhile, and to comply with Tribunal deadlines, the Public Law and Human Rights team of Irwin Mitchell LLP were instructed to advise and then to appeal against the Local Authority's decision. The deputy has confirmed that "no instructions were given to PLHR and no costs incurred by PLHR until after the application was sent to the Court" [C78]. Quite who gave the instructions is less clear:

a. the Irwin Mitchell Terms of Business letter dated 20th February 2019 [C83] is addressed to JDJ's father and signed by both his parents. It contains a paragraph which states that "It has been agreed that your legal costs will be paid from [JDJ's] damages award which is administered by her (*sic*) property and affairs deputy, Irwin Mitchell Trust Corporation (*sic*). I confirm that a copy of this letter has been sent to them for approval and signature to confirm their agreement regarding our costs."

b. In Kelly Grieg's statement of 31st January 2019 it is explained [C24] that "PLHR were instructed by [JDJ's] parents... and, to the extent that he lacks capacity to make some decisions, by [JDJ] acting by me as his deputy..."

c. In Ms. Grieg's statement of 6th March 2019 it is said [C78] that "The instructions to the PLHR have come from [JDJ's] parents but with my assistance as [JDJ's] Deputy."

d. In Mr. Rees' position statement it is said [paragraph 32] that "JDJ's parents acted as an 'alternative person' under Reg 64 of the Special Educational Needs and Disability

Regulations 2014. The decision to instruct Irwin Mitchell was therefore taken by JDJ's parents rather than by the deputy."

8.10 At the request of the Official Solicitor, acting as JDJ's litigation friend in these proceedings, Counsel's advice was sought on the prospects of success of the contemplated appeal. A copy of that advice has been filed [C143]. Counsel considered the prospect of an appeal succeeding to be "strong (70% or over)." In fact, after a hearing on 2nd and 3rd September 2019, the Tribunal upheld the Local Authority's decision. Some amendments were made to the Plan as a result of the appeal proceedings.

9. HPP 12636322

9.1 HPP is now 50 years old. In September 2014 he sustained severe brain injury and multiple orthopaedic injuries when his bicycle was hit by a lorry.

9.2 Capacity is not in issue. I accept the COP3 assessment [D50] by a clinical neuropsychologist dated 6th June 2019 that HPP lacks capacity in the domains relevant to these proceedings.

9.3 By order made on 19th May 2015 [D28] IMTC was appointed as property and affairs deputy for HPP. The deputyship order states at paragraph 2(a) that "The court confers general authority on the deputy to take possession or control of the property and affairs of [HPP] and to exercise the same powers of management and investment, including purchasing, selling and letting solely owned property, as he has as beneficial owner, subject to the terms and conditions set out in this order." The order does not contain any express provision either granting or excluding authority to instruct solicitors or to conduct any kind of proceedings on behalf of HPP.

9.4 A claim for damages has been brought in the name and on behalf of HPP. Irwin Mitchell LLP act for HPP in that litigation. Liability has been admitted but quantum had not, at the date of the hearing before me, been resolved. HPP's estate is currently comprised of liquid assets of approximately £170 000, a property with a value of approximately £290 000 and an annual income of approximately £20 000 (with annual outgoings of approximately £195 000.)

9.5 To date, there have been three litigation friends appointed for HPP in the civil proceedings. Initially, the litigation friend was HPP's partner but she stepped down when their relationship came to an end. Michael Knott of Irwin Mitchell LLP was then appointed. When he left the firm, HPP's litigation solicitors "reviewed [his] circumstances" [D25] and came to the conclusion that there was no family member suitable and willing to act. A file note [D42] records that one of his personal injury litigation solicitors explained to HPP that the litigation friend "could be Charlotte Waite of Irwin Mitchell" and states that "[HPP] has met her previously in her Deputy role and is familiar with her." (There is no recognition in the file note that Ms. Waite is not the appointed deputy but rather a director of Irwin Mitchell Trust Corporation.)

9.6 On 22nd June 2018 an order [D32] was made in the civil proceedings appointing Charlotte Waite as HPP's litigation friend.

9.7 By COP1 application [D10] dated 28th September 2018, IMTC Ltd has applied for:

"1. Authority for the Senior Court Costs Office to carry out a detailed assessment of the costs of Charlotte Lorna-Leigh Waite, as Director of Irwin Mitchell Trust Corporation Ltd as Deputy for [HPP], in connection with her role as litigation friend in the proceedings relating to his personal injury claim, under claim number

HQ17P02455, following her appointment as litigation friend by the High Court of Justice, Queen's bench Division.

2. Authority for the Senior Court Costs Office to carry out a detailed assessment of the costs of Charlotte Lorna-leigh Waite for any other proceedings where she has been appointed to act as [HPP's] litigation friend."

9.8 Within these proceedings it has been explained that the second head of the application is otiose. The applicant is not actually seeking orders in respect of any proceedings other than the current personal injury damages claim but it is asking for authority to charge for acting as litigation friend within those proceedings.

9.9 By order made on 10th January 2019 [D1] a District Judge dismissed the application. A COP9 application [D43] was duly made for reconsideration of that order, which was set aside by order made on 24th April 2019 [D2]. Subsequently directions have been given by orders made on 26th April [D5], 17th May [D8] and 20th May [D48] 2019.

The linking of the applications

- 10 On 19th July 2019 I made an order [A212] by consent which provided for a round table meeting between the parties "with a view to ascertaining areas of common ground", and listed all three matters for attended hearing. Position statements were directed to be filed and served by 20th September, and "should the Court consider that there are specific questions that the Court will require the parties to address at the hearing" written confirmation of such questions would be given by 4pm on 1st October. Transparency orders were made in respect of each matter [A197, A207 and A202].
- 11 On 26th July 2019 [A215] I made a further order which recited that "The Official Solicitor considers that the issues raised by the applications are likely to be relevant to how the Public Guardian discharges his duties with regard to the supervision of deputies, and that the Public Guardian therefore has an interest in being involved in these proceedings." The Public Guardian was joined as second respondent to each application, and directions were given for the filing of a statement and a position statement. Those directions were subsequently varied by an order made on 4th September [A218] to allow the Public Guardian more time, and to refine the issues which the statement should address.
- 12 By separate order also made on 4th September 2019 [A221] permission was granted to Irwin Mitchell Trust Corporation and the Public Guardian to disclose to the Official Solicitor an unreported judgment given by Senior Judge Lush on 11th March 2016 in the matter of MWS 12258848.
- 13 Position statements were filed in accordance with the direction, and on 27th September 2019 I issued to all parties a four page document of questions, which were addressed at the attended hearing on 7th October.

The positions of the parties

14 The Applicants

14.1 The Applicant deputies together characterise these applications as raising a broader question: when may a professional deputy instruct a legal firm with which it is associated, and recover the costs from P?

14.2 The Applicant deputies contend that “one of the advantages” of appointing a solicitor or solicitor-owned trust corporation as deputy is that it provides P with “ready access to the expertise, not just of the deputy, but of his or her firm or associated practice;” and moreover that “These advantages may be particularly evident in a case where the deputy is associated with solicitor in a full service legal firm (such as Irwin Mitchell.)” [**Position statement paragraph 10**]

14.3 The Applicant deputies contend that a deputy’s standard “general” authorisation in respect of “management” of a person’s property and affairs should be understood as including:

- a. “unexceptional non-contentious legal tasks,” even if carried out by other members of the deputy’s firm. They give as examples conveyancing of a property, completion of tax returns, drafting of leases and tenancy agreements, and drawing up of carers’ employment contracts;
- b. obtaining legal advice/incurred legal costs in relation to contentious matters but falling short of conduct of litigation. They suggest that this should cover actions up to, but not including, sending a letter of claim. In contrast, they accept, formal issue of legal proceedings should require formal authorisation by the Court of Protection except where the proposed litigation is in the Court of Protection itself.

14.4 The Applicant deputies contend that, where circumstances demand urgent action, a deputy should be able to issue proceedings and seek interim relief without specific prior authorisation from the Court of Protection, and the Court of Protection should look upon a retrospective application for authority for such actions sympathetically.

14.5 The Applicant deputies contend that it would be “too restrictive” to require that every use of a deputy’s own firm outside a narrow definition of “management” required prior authorisation. They suggest that such an approach would be likely to result in disproportionate costs to P. If their broader understanding of “management” authority is not confirmed, they suggest that property and affairs deputyship orders should include a standard provision authorising the use of P’s funds as they suggest up to a maximum of £2 000 + VAT.

14.6 The Applicant deputies recognise that instruction by a deputy of his or her own firm (or associated legal practice) in circumstances where P will be charged for the work done by that firm gives rise to a potential conflict of interest. However, they contend that any concerns about such conflict could be addressed by requiring the deputy to obtain details from other firms of applicable rates, either on a case by case basis or by way of annual review, and/or by requiring the deputy to take advice on the merits of proposed course. Additionally, they contend that the decision of which firm to instruct would be a best interest decision for the deputy to make, that it would not necessarily be in P’s best interest to instruct the firm with the lowest fees, and that advice on merits need not always be sought from independent counsel.

14.7 Where a family member of P has instructed solicitors, including the same firm as the deputy, the Applicant deputies assert that the standard terms of a deputyship order already permit the deputy to reimburse the costs incurred by the family member from the funds of P. They suggest that the involvement of a family member imports a degree of external detachment

sufficient to meet any concerns about conflict of interest but concede that some checks may be appropriate. They suggest that a check should be made as to whether the family member is eligible for public funding, written notices should be given to the family members that they are not obliged to instruct the deputy's firm, thought should be given to obtaining comparative quotes, and the merits of the litigation should be assessed before issue.

14.8 In respect of acting as a litigation friend, the Applicant deputies contend that there is no legal reason why a trust corporation cannot act as a litigation friend, and no legal reason why a litigation friend cannot be authorised to charge for so acting.

14.9 The Applicant deputies contend that, if a person has capacity to give instructions for the work in question, he will also have capacity to agree the legal costs of the work.

15 The Official Solicitor

15.1 The Official Solicitor accepts that decisions to obtain legal advice or services on behalf of a protected person, and where from, are 'best interests' decisions.

15.2 The Official Solicitor accepts that obtaining such advice will sometimes be within a deputy's general authority, and in those circumstances, choosing to instruct the deputy's own firm is a 'best interests' decision to be taken by the deputy. However, the Official Solicitor also contends that in some cases it would be most appropriate to obtain specific authority from the Court to obtain legal advice and in the best interests of the protected person that such advice is obtained from a different firm.

15.3 The Official Solicitor contends that it is foremost the responsibility of the deputy to decide how to proceed, in the context of the Public Guardian having oversight of such decisions. She suggests that the relevant factors will include the merits of the legal action under consideration, the likely value to P of the advice sought, proportionality, experience of the proposed solicitors, and management of conflict of interest.

15.4 The Official Solicitor's view is that the standard terms of a property and affairs deputyship order do not encompass authority to litigate. She points out that litigation is risky and expensive and concludes that any right to take costs for such actions from the funds of P should be limited to occasions when the Court of Protection has specifically considered the merits of the proposed litigation and specifically granted such authority; and any application for such authority should be supported by counsel's opinion.

15.5 On the other hand, the Official Solicitor accepts that the standard terms of a property and affairs deputyship order do permit a deputy to obtain "modest levels of advice and incur costs...falling short of conducting litigation," for example conveyancing. She contends that a deputy should therefore be able to obtain for P legal services for non-contentious work "up to a limit" without seeking specific authority [**position statement paragraph 60**]. (In oral submissions, the Applicants' proposal that the limit be £2 000 + VAT was accepted.) However, the Official Solicitor cautions that the deputy is obliged to consider how best to procure such services in the best interests of P, which is likely to involve obtaining quotes and recording the process of decision-making. She acknowledges that the very process of tendering is likely to incur costs, but "does not discourage it" at any level, on the basis that it would "be likely to protect P from conflicts of interest" [**position statement paragraph 61**].

15.6 As to where the line is drawn between seeking advice and conducting litigation, the Official Solicitor sees attractions in making the distinction at the point of sending a letter before

claim, but on balance prefers the later point of the Letter of Response, which will provide further information about the potential claim.

15.7 The Official Solicitor agrees with the Applicants that no prior authority should be required for a deputy to bring proceedings in the Court of Protection.

15.8 If the deputy is not the instructing party, the Official Solicitor contends that the deputy should obtain specific authority before paying that party's legal costs from the funds of P, even where the legal action is for the benefit of P. Furthermore, she contends that such costs would need to be assessed before being paid from P's funds.

15.9 If a deputy concludes that urgent circumstances justify (in the best interests of P) action beyond the current authorisations of the deputy's appointment, the Official Solicitor considers that the deputy acts at his own risk as to costs but should be able to obtain retrospective authorisation if the Court of Protection subsequently accepts that the deputy's action was in the best interest of P.

15.10 The Official Solicitor is very concerned about the Applicants' position in respect of acting as a litigation friend. She:

- a. contends that, if a litigation friend is proposing to instruct his or her own firm, they ought to be able to show that a 'best value' process has been undertaken such that such instruction is in the best interest of P;
- b. points out that conflict of interest concerns are particularly acute where there is a conditional fee agreement and asserts that only the Court of Protection, at the time of considering an application for authority to conduct litigation, has the practical opportunity to build in protection for P against the risks of conflict of interest;
- c. considers that the prospect of a litigation friend being paid to act as such "raises concerns" such that it would have to be authorised by the Court;
- d. offers, wherever payment for acting as litigation friend is proposed in any of the existing classes of cases in which she acts¹, to act as litigation friend instead and without charge for doing so. (To be clear, charging fees for discharging the functions of litigation friend is to be distinguished from the fees of legal representation which a litigation friend incurs on behalf of P; and all of the Official Solicitor's standard criteria for acting as litigation friend would need to be met.)

15.11 The Official Solicitor agrees with the Applicants that if a person has capacity to give instructions for the work in question, he will also have capacity to agree the legal costs of the work.

15.12 In respect of the individual applications, the Official Solicitor is satisfied that the costs incurred in respect of ACC and JDJ should be authorised with retrospective effect. She does not consider that authority should be granted for Ms. Waite to charge fees for acting as litigation friend.

¹ There are certain types of proceedings – such as most Tribunal proceedings - in which the Official Solicitor does not accept invitations to act. She does act in all proceedings to which the CPR apply and those in the Family Courts.

16 The Public Guardian

16.1 The Public Guardian does not take a position on the facts of any of the three matters under consideration.

16.2 The Public Guardian explains that his statutory duty of supervising deputies is discharged by the publication of a set of professional deputy standards by which professional deputies are assessed. Deputies file annual reports which are reviewed by his Office and regular assurance visits take place. If concerns are raised, the Public Guardian may conduct an investigation and has power to make applications to the Court of Protection where he considers it necessary and appropriate to do so.

16.3 The Public Guardian considers that the supervision process would be greatly assisted if deputyship orders specified the extent of the deputy's powers "as clear[ly] as possible" and invites the Court to "give guidance" on the issue raised in these applications.

16.4 The Public Guardian's standards for professional deputies include a requirement that such deputies ensure that all decisions taken are free from any conflict of interest, be it personal or organisational. If a deputy instructs an associated law firm, "it would usually be necessary to adopt some form of 'beauty parade' to avoid a potential conflict of interest" [**position statement paragraph 13**].

16.5 The precise nature of that exercise will depend on the nature of the issue, the likely costs involved, the potential benefit for P and the proportionality of the steps to be taken. In general "at least three quotes from different law firms" will be required. Where "particularly high fees are envisaged with far reaching consequences for P" a more extensive, face to face exercise may be necessary. There may be some cases where the cost of even obtaining three quotes would be disproportionate to the benefit to P, although "the costs of obtaining and considering quotes is likely to be relatively low in such cases and would involve nothing more than sending an initial e-mail outlining the issue to different law firms" [**position statement paragraph 13**].

16.6 The requirement is that a deputy is "able to evidence that alternative options have been considered to using their own law firm, and that a best interests decision has been made" [**position statement paragraph 13**].

Law and Procedure

Deputyship

- 17 The 'General Powers of the Court' are set out in sections 15 and 16 of the Mental Capacity Act 2005 ("the Act"). On behalf of persons lacking capacity to make a decision for themselves, section 16(2) provides that the court may either make the decision itself or appoint a deputy to do so. Subsection 3 provides that the appointment of a deputy is a 'best interests' decision:

16 Powers to make decisions and appoint deputies: general

(1)....

(2) The court may –

(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

(b) appoint a person (a 'deputy') to make decisions on P's behalf in relation to the matter or matters.

(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).

- 18 The Court of Protection broadly considers the work of its jurisdiction in two streams: property and affairs on the one hand, and welfare on the other. The Act, and the Court of Protection Rules and Practice Directions all make distinct provision for property and affairs and for welfare where appropriate. Of course real life does not always fit into such neat categorisation. The Rules and Practice Directions also lay down ‘mixed’ procedures to cater for this.
- 19 The court’s powers specifically in respect of a person’s property and affairs are further spelled out in section 18 of the Act. Power to authorise a person to act as litigation friend is explicitly included as a distinct power, at subsection (k):

18 Section 16 powers: property and affairs

- (1) The powers under section 16 as respects P’s property and affairs extend in particular to –
- (a) the control and management of P’s property
 -
 - (k) the conduct of legal proceedings in P’s name or on P’s behalf.

- 20 Pursuant to section 19(6) of the Mental Capacity Act 2005 (“the Act”), a deputy is to be treated as P’s agent in relation to anything done or decided by him within the scope of his appointment and in accordance with Part 1 of the Act. The relationship between agent and principal (and therefore between deputy and P) carries with it fiduciary duties.

Authority granted to a deputy

- 21 The authority of a deputy derives from the wording of the court order appointing him, and any subsequent orders varying or augmenting the deputyship order. When appointing a deputy, the court is required by section 16(4) of the Act to have regard to the principle that the powers granted to the deputy should be as limited as is reasonably practicable in the circumstances:

16...

- (4) When deciding whether it is in P’s best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that –
- (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
 - (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

- 22 In the last twelve months, approximately 12 000 property and affairs deputyship appointments have been made. The trend is for the number of appointments to be increasing year on year. In

order to achieve broad consistency and predictability, the Court of Protection has ‘template’ orders in standard terms, which are adapted by the judge or Authorised Court Officer making the individual order to meet the needs of a particular case.

- 23 The standard property and affairs deputyship ‘template’ order has a section headed “Authority of deputy”, where the authorisations of the deputy are set out. The first paragraph of that section provides as follows:

“(a) the court confers general authority on the deputy to take possession or control of the property and affairs of [P] and to exercise the same powers of management and investment, including [selling and] letting property, as he has as beneficial owner, subject to the terms and conditions set out in this order.”

- 24 Section 2 of the template deputyship order then continues with various clauses, to be selected as appropriate to the case, dealing with authority to

- a. purchase freehold or leasehold property;
- b. sell, lease or charge freehold or leasehold property;
- c. appoint an investment manager;
- d. use P’s funds to provide for others;
- e. make gifts to charity or on customary occasions;
- f. obtain a grant of representation; and
- g. execute or sign deeds or documents.

- 25 The standard template order does not include any provision explicitly addressing section 18 (1)(k) of the Act.

- 26 It is of course possible, and in fact necessary, for judges and Authorised Court Officers making deputyship orders to depart from the terms of the standard template order (both by omitting certain ‘standard’ authorisations and by including additional non-standard ones) to address the requirements of a particular case.

- 27 Some examples of frequently-used additional authorities have been collected together and set out in the ‘Precedents’ chapter of Court of Protection Practice 2019. At page 2216 under the heading ‘Litigation Friend’, the following three examples are given:

1. The deputy is hereby authorised to conduct proceedings in the action in the name and on behalf of *AB* and to act therein as litigation friend.

2. The deputy is hereby authorised to act as litigation friend for *AB* in the divorce and financial remedies proceedings and to approve any financial settlement.

3. The deputy is authorised to conduct proceedings as litigation friend in the name and on behalf of *AB* under the Inheritance (Provision for Family and Dependents) Act 1975 in relation to the estate of [*name*] deceased.”

- 28 In respect of a professional deputy’s costs, the standard template order provides as follows:

“The deputy is entitled to receive fixed costs in relation to this application, and to receive costs for the general management of [P’s] affairs [at the public authority/solicitors’ rate]. If the deputy would prefer the costs to be assessed, this order is to be treated as authority to the Senior Courts Costs Office to carry out a detailed assessment on the standard basis.”

- 29 The “fixed costs” authorisation is to be understood by reference to Practice Direction 19B, which “sets out the fixed costs that may be claimed by solicitors and public authorities acting in Court of Protection proceedings and the fixed amounts of remuneration that may be claimed by solicitors and office holders in public authorities appointed to act a deputy for P.” Paragraph 2 of the Practice Direction expressly provides that “the court may direct that its provisions shall also apply to other professionals acting as deputy....” Paragraph 5 provides that “Where a court order or direction provides for a detailed assessment of costs, professionals may elect to take fixed costs or remuneration in lieu of a detailed assessment.”
- 30 In so far as is relevant to these proceedings, Practice Direction 19B includes specific provisions as follows:

....

Remuneration of solicitors appointed as deputy for P

10. The following fixed rates of remuneration will apply where the court appoints a solicitor to act as deputy (but not where an office holder of a public authority is appointed and employs a solicitor, or a solicitor employed by a public authority is appointed as an office holder of a public authority):

.....

Category VI

(a) Preparation of a Basic HMRC income tax return (bank or NS&I interest and taxable benefits, discretionary trust or estate income) on behalf of P. An amount not exceeding £250 (plus VAT)

(b) Preparation of a Complex HMRC income tax return (bank or NS&I Interest, multiple investment portfolios, taxable benefits, one or more rental properties) on behalf of P. An amount not exceeding £600 (plus VAT)

.....

Conveyancing costs

14. Where a deputy or other person authorised by the court is selling or purchasing a property on behalf of P, the following fixed rates will apply for the legal cost of conveying the property except where the sale or purchase is by trustees in which case, the costs should be agreed with the trustees:

Category VII

A value element of 0.15% of the consideration with a minimum sum of £400 and a maximum sum of £1 670 plus disbursements.

....

Authorisation after the event

- 31 If a deputy acts outside the authorisations of the deputyship order, he is in breach of his duties and acts at personal risk as to costs.
- 32 The Mental Capacity Act makes specific provision at section 23(3)(d) for the Court of Protection to relieve an attorney wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as donee. There is no equivalent provision in respect of deputies but section 16 has generally be construed as incorporating the equivalent power. It is commonly referred to as “retrospective authorisation.”

- 33 In respect of the Court’s approach to applications for retrospective authorisation, the parties have drawn my attention to the case of *Re Nottley* (1839) 3 Jur (OS) 719. In the language and brevity of a past age, the entirety of the report of that case reads as follows:

“This was a petition presented by the committee of a lunatic, praying a reference to the Master to ascertain the amount of costs incurred by the petitioner, in respect of certain actions at law, brought by him in behalf of the lunatic against one of the tenants of the estate. Counsel in support of the petition said that he had an affidavit, stating, among other reasons for the application, that there was not sufficient time to apply and obtain the sanction of the court to the actions before they were commenced.

Barber, for the petition.

The LORD CHANCELLOR expressed his regret that an affidavit was sworn containing a statement of facts which could not be true. It would be very singular, indeed, that a party could find time to get up actions, and yet could not, as he alleged, find time to apply to the court for its sanction. Expenses enough had been already incurred improvidently without adding to them the further costs of a reference. It might easily have been ascertained that the parties against whom the actions were brought were not worth the costs. The petition must be refused with costs.”

Delegation

- 34 An agent may not delegate his authority in whole or in part except with the express or implied authority of the principal, or the delegation may be ratified by the principal.²
- 35 On the other hand, an agent may delegate the performance of purely minimal or ancillary acts, unless there are statutory or other provisions to the contrary or evidence of usage not permitting this.³
- 36 The duty of a deputy not to delegate his functions is explained in the Code of Practice to the Act at paragraphs 8.61 and 8.62:

Duty not to delegate

8.61 A deputy may seek professional or expert advice (for example, investment advice from a financial adviser or a second medical opinion from a doctor). But they cannot give their decision-making responsibilities to someone else. In certain circumstances, the court will authorise the delegation of specific tasks (for example, appointing a discretionary investment manager for the conduct of investment business).

8.62 In certain circumstances, deputies may have limited powers to delegate (for example, through necessity or unforeseen circumstances, or for specific tasks which the court would not have expected the deputy to attend to personally). But deputies cannot usually delegate any decisions that rely on their discretion. If the deputy is the Director of Adult Social Services in England or Director of Social Services in Wales, or a solicitor, they can delegate specific tasks to other staff. But the deputy is still responsible for any actions or decisions taken, and can therefore be held accountable for any errors that are made.

² Bowstead & Reynolds on Agency at 5.001

³ Bowstead & Reynolds on Agency at 5.003

- 37 The Public Guardian’s “Summary guidance on general management costs” (SD9) sets out the following “overview of the approach taken by the SCCO when assessing bills”:

....
2. Delegation of duties

Professional deputies are expected to delegate work to the appropriate level of fee earner.

That means routine GM activities such as paying bills or checking bank statements should be carried out by an administrative assistant or a Grade D fee earner at best.

The deputy will need to justify any bill where a higher grade of fee earner is claimed. There are times when the use of a non-fee earner would be considered more appropriate, for example, if delivering goods or money to the client.

Conflict of interest

- 38 It is a well-established principle that an agent must not profit from his position as agent except with the principal’s consent. In the context of a deputy appointed by the Court of Protection it is the Court, rather than P, to whom the deputy must look for consent.
- 39 The risk of a conflict of interest arising between a deputy and P is recognised in the Code of Practice to the Act, in particular at paragraph 8.58 - 8.60:

8.58 A fiduciary duty means deputies must not take advantage of their position. Nor should they put themselves in a position where their personal interests conflict with their duties. For example, deputies should not buy property that they are selling for the person they have been appointed to represent. They should also not accept a third party commission in any transactions. Deputies must not allow anything else to influence their duties. They cannot use their position for any personal benefit, whether or not it is at the person’s expense.

8.59 In many cases, the deputy will be a family member. In rare situations, this could lead to potential conflicts of interests. When making decisions, deputies should follow the Act’s statutory principles and apply the best interests checklist and not allow their own personal interests to influence the decision.

8.60 Sometimes the court will consider appointing the Director of Adult Services in England or Director of Social Services in Wales of the relevant local authority as deputy. The court will need to be satisfied that the authority has arrangements to avoid possible conflicts of interest. For example where the person for whom a financial deputy is required receives care services from the local authority, the court will wish to be satisfied that decisions about the person’s finances will be made in the best interests of that person, regardless of any implications for the services provided.

- 40 Conflict of interests in deputyship was considered by Senior Judge Lush in *GGW v. East Sussex County Council* [2015] EWCOP 82. His observations in that judgment include the following:
- a. Conflicts of interest are ubiquitous in any mental capacity jurisdiction and it would be unrealistic, if not impossible, to eradicate them entirely. [paragraph 31]

- b. Notwithstanding paragraph 8.58 of the Code, in practice all professional deputies profit from their position because they act for reward. The history of Court of Protection practice over the last hundred years has been a gradual relaxation of what was once an absolute prohibition on the appointment of solicitors as deputies on account of the conflict of interests. [paragraphs 33 – 36]
 - c. One of the principal functions of the Court of Protection is to manage conflicts of interest to ensure that any act done or any decision made on behalf of a person who lacks capacity is done or made in their best interests. [paragraph 44]
 - d. The “classic way” of managing the conflict of interests when appointing solicitors as deputies is to require that their costs be assessed by the Senior Courts Costs Office to ensure that they don’t abuse their position. [paragraph 45]
- 41 The Applicants brought to the attention of the Court and, once granted permission, the other parties a further decision of Senior Judge Lush, namely *Re MWS*, which is unreported but dated 11th March 2016. In a written judgment, he noted that:
- a. The proceedings included a wider application by Irwin Mitchell Trust Corporation for an order relating to the circumstances in which it may appoint an associated company to manage the investments of clients for whom it acts as a deputy for property and affairs. [paragraph 1]
 - b. Irwin Mitchell LLP acted for MWS in a personal injury claim which settled for £2.5 million, and IMTC was appointed as his property and affairs deputy. [paragraph 4]
 - c. The deputy applied for authority to appoint Irwin Mitchell Investment Management as independent financial adviser in respect of its management of MWS’s funds, and general authority to adopt the same procedure in other matters where there was no family input into choice of financial adviser. [paragraph 5]
 - d. Evidence was filed as to how the decision to appoint Irwin Mitchell Investment Management had been reached:

“in view of the circumstances of [MWS]...it was not considered appropriate to incur the level of costs associated with going through a full beauty parade process.

Rather than undertaking a beauty parade in this case, I obtained a report from Enhance Wealth Consultancy Limited, a leading provider of investment oversight services to the fiduciary sector. The purpose of the report is to provide independent verification as to whether there is any reason why Enhance would disagree with IMTC’s choice of IMAM as an investment solution and provider. In this case Enhance were asked to compare two recommendations. There would usually be three but in this case I was able to discount one based on high costs before proceedings to external verification.

.... Enhance see no reason to object to the appointment of IMAM as financial planner and investment manager for MWS’s funds managed under the deputyship.” [paragraph 7]
 - e. The Public Guardian was joined as party and identified the likely conflict of interest. [paragraph 9(1)]

- f. The Public Guardian identified a document which suggested that “[t]here appears to be a retainer or fee for Enhance to support Irwin Mitchell’s applications.” He noted that the Enhance report “cannot properly be said to be an independent expert report” and that “There does appear to be ‘rubber stamping.’” [paragraph 12] He made proposals for improving the verification process in the particular case, and opposed the application for any “general” authority.
- g. Senior Judge Lush concluded that “both the Court of Protection and the OPG are prepared to allow IMTC to instruct IMAM to manage P’s investments provided they are satisfied that it is in P’s best interests and there are effective safeguards in place to prevent abuse. This means that there should be a level playing field when selecting of investment managers for persons for whom IMTC acts as a deputy.” [paragraph 23]
- h. In the particular case of MWS, the appointment of IMAM as financial adviser was accepted to be in his best interests. The application for a general authority was dismissed.
- i. Senior Judge Lush identified three options open to IMTC as deputy [paragraph 24]:
 - 1. “...work with the wider profession in the form of the Law Society with the OPG by consulting on and negotiating a protocol on using connected investment companies, advisers and third party verifiers to ensure that the best interests of persons with disabilities are safeguarded from conflicts of interest”;
 - 2. “...follow the Solicitors Regulation Authority’s guidance and recuse itself”;
 - 3. “...let the Court of Protection manage the conflict of interests. This means that an application would need to be made to the court in every case for permission to instruct IMAM to manage the investments of a person who lacks capacity to manage their own assets. On receiving such an application, P would be joined as a party and the court would then appoint a panel deputy to act as P’s litigation friend for the purpose of conducting a beauty parade or otherwise ensuring that P’s interests can be properly secured. This would be an expensive option, but the choice of a suitable investment manager is a decision of such fundamental importance and its potential impact on P is so great that it warrants a rigorous procedure and the additional costs that this entails.”

42 Conflicts of interest in a context other than deputyship were considered by Norris J in *OH v. Susan Craven; AKB v. Christopher Willerton* [2016] EWHC 3146 (QB). In those matters, applications had been made for orders directing payment of funds out of the Court Funds Office to the trustees of a trust, those trustees being connected with the solicitors who conducted the litigation which led to the award of damages held in the CFO. In the judgment Norris J:

- a. emphasised that the Court’s concern emerged from the general nature of the transaction, namely “that funds should be removed from the control of the Court and placed into the hands of trustees who will have powers of distribution, application and investment outside the control of the Court and will do so for reward.” [paragraph 16]
- b. focussed his enquiry on “whether the applicant has made a free and informed decision, not whether the decision is a wise one.” [paragraph 17]
- c. observed that “[t]he firm of solicitors who have acted in the successful litigation will have established a relationship of trust and confidence with the claimant or the litigation friend. At the successful conclusion of the litigation the person in whom trust is reposed then

suggests a further transaction out of which its associate will derive a personal benefit. The adviser suggests that a private trust is the preferable arrangement, and that its associated trust corporation should be appointed trustee and should charge for acting, although there are many other trust corporations who could fulfil the role. So the client is retained for the long term.” [paragraph 28]

- d. reflected the solicitors’ position that “this arrangement was not about an integrated business model...but was an arrangement for the convenience of clients who wanted a ‘one stop shop’ in personal injury litigation” but noted that “this is a shop that stocks only one product.” [paragraph 29]
- e. identified “the principled approach” in such situation to be as follows:
 1. The law irrebuttably presumes that a solicitor has influence over his client;
 2. Vesting a large sum of money to which the settlor has recently become entitled in the settlor’s solicitor upon bare trust for the settlor but subject to charging and other powers vested in the solicitor is a transaction that calls for explanation, giving rise to a rebuttable presumption that the solicitor’s influence has been undue;
 3. The burden lies on the solicitor to adduce evidence rebutting this presumption. Typically, that evidence will demonstrate that the settlor had independent advice;
 4. Where the litigation firm proposes that its in-house trust corporation becomes trustee in relation to a settlement of £1 million or more, then a separate partner in the firm should instruct Chancery Counsel of not less than 5 years’ standing to advise the claimant or litigation friend in writing as to the advantages and disadvantages of the proposed trust and as to the trusteeship arrangements.
 5. This advice should be obtained at the expense of the firm.
 6. The instructions to Counsel and the Opinion should be put in evidence when the Court’s approval of the proposal or direction for payment out of the CFO is sought.

Litigation Friend

- 43 Where the Court of Protection, pursuant to section 18(k), authorises a person (X) to conduct proceedings in the name and on behalf of P, that person (X) can generally act as litigation friend within civil or family proceedings without obtaining any further permission from the court seized of those proceedings, pursuant to the Civil Procedure Rules Part 21.4(2) and FPR Part 15.4(2):

Civil Procedure Rules 1998

Who may be a litigation friend without a court order

21.4 (1) This rule does not apply if the court has appointed a person to be a litigation friend.

(2) A deputy appointed by the Court of Protection under the 2005 Act with power to conduct proceedings on the protected party’s behalf is entitled to be the litigation friend of the protected party in any proceedings to which his power extends.

(3) If nobody has been appointed by the court or, in the case of a protected party, has been appointed as a deputy as set out in paragraph (2), a person may act as a litigation friend if he –

- (a) can fairly and competently conduct proceedings on behalf of the child or protected party;
- (b) has no interest adverse to that of the child or protected person; and
- (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party.

Family Procedure Rules 2010

15.4 Who may be a litigation friend for a protected party without a court order

- (1) This rule does not apply if the court has appointed a person to be a litigation friend.
- (2) A person with authority as a deputy to conduct the proceedings in the name of a protected party or on that party's behalf is entitled to be the litigation friend of the protected party in any proceedings to which that person's authority extends.

.....

44 However, the ultimate control of who acts as litigation friend lies with the court seized of the proceedings. Pursuant to CPR Part 21.7 and FPR Part 15.7, and even if the Court of Protection has granted X authority to conduct proceedings, the court seized of the proceedings can discharge them from that role:

Civil Procedure Rules 1998

Court's power to change a litigation friend and to prevent person acting as a litigation friend

21.7 (1) The court may –

- (a) direct that a person may not act as a litigation friend;
- (b) terminate a litigation friend's appointment; or
- (c) appoint a new litigation friend in substitution for an existing one.

....

Family Procedure Rules 2010

15.7 Court's power to change litigation friend and to prevent person acting as litigation friend

(1) The court may –

- (a) direct that a person may not act as a litigation friend;
- (b) terminate a litigation friend's appointment; or
- (c) appoint a new litigation friend in substitution for an existing one.

.....

Discussion

- 45 The management of a person's property and affairs typically involves a combination of occasional, protracted transactions (such as buying or selling a house) and frequent, day-to-day transactions (like paying bills or buying necessities.) If they are to be undertaken by a third party, appropriate authority is required⁴ – capacitous consent, or valid and effective appointment as attorney, or order from the Court of Protection.
- 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
- 48 In practice, this approach means that the deputy must satisfy himself that any particular act in respect of P's property and affairs is either specifically authorised or falls within the “general” authority. The safeguard for P in this approach is that the deputy is subject to supervision by the Office of the Public Guardian. Ultimately, the deputy is personally at risk as to costs if he acts outside his authority.
- 49 These proceedings have arisen because the Court had concerns about what the Applicants regard as a reasonable interpretation of ‘general’ authority. The Applicants, the Official Solicitor and the Public Guardian all now seek guidance. Whilst these three cases demonstrate a clear need for further amplification of the Court's approach, I approach that task with caution. ‘General’ authority is not susceptible to exhaustive definition.
- 50 It has been helpful to consider these cases in a series of questions.
- 51 What authorisation is required to conduct litigation on behalf of P?

51.1 The effect of the Court of Protection authorising a deputy to conduct proceedings on behalf of P is two-fold:

- a. Firstly, it gives the deputy priority over others in the hierarchy of potential litigation friends for P; and
- b. Secondly, it enables the deputy to use P's funds to meet the reasonable costs of the litigation and to pay a costs order made against him in the proceedings.

51.2 The Applicants venture to articulate the suggestion that the standard deputyship order is drawn sufficiently widely to permit a deputy to engage in contentious litigation on P's behalf

⁴ Section 5 of the Mental Capacity Act 2005 gives protection from liability in respect of acts done in connection with the care or treatment of P so long as specified requirements are met. There is no equivalent provision in respect of P's property and affairs.

but – very sensibly, in my judgment – recognise that this is not the view taken by the court [position statement paragraph 18]. There is therefore no argument on this point.

51.3 If the authority of a deputy is to extend to conducting litigation on behalf of P, such authority must be specifically granted. The ‘general’ authority does not encompass authority to conduct litigation on behalf of P.

51.4 When the court considers an application for authority to conduct proceedings, it will consider whether there should be limits to such authority. If there are concerns as to merits or costs or otherwise, the authority may be (and often is) granted only up to a specified stage of proceedings (when another merits assessment may be required), or with a limit on the costs which may be incurred without further application.

52 What about further proceedings in the Court of Protection?

52.1 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.” [position statement paragraph 20]

52.2 The Official Solicitor agrees. [position statement paragraph 51]

52.3 I do not fully accept their agreed position. In my judgment, a distinction has to be drawn between proceedings about property and affairs, and proceedings about welfare.

52.4 If a property and affairs deputy wishes to make an application to the Court of Protection in respect of property and affairs issues, I agree that no prior application for authority to do so is required.

52.5 However, a property and affairs deputyship does not confer any authority in respect of welfare. If a welfare issues arises, there may be a body or institution more appropriately placed than the property and affairs deputy to make that application, at less cost to P.

52.6 Of course life does not in reality divide neatly into property and affairs issues on the one hand and welfare issues on a quite separate hand. It will sometimes be the case that decisions properly made within a property and affairs authority sit alongside a need for welfare proceedings in the Court of Protection. Such a situation was considered by the then Vice-President, Charles J, in the case of *Staffordshire County Council v. SRK, RK, Irwin Mitchell Trust Corporation and The Secretary of State for Justice* [2016] EWCOP 27, a matter which concerned the need for authorisation of deprivation of liberty.

52.7 In the *Staffordshire* case, Charles J drew the following conclusions:

- a. SRK’s damages award provided the funds for his accommodation and care package. The damages award was managed by his property and affairs deputy. The accommodation and care package was provided without input from any public authority. [paragraphs 64 and 65]
- b. The property and affairs deputy notified the Council of SRK’s situation, and the Council made an application to the Court of Protection for a welfare order authorising SRK’s deprivation of liberty. [paragraph 67]

- c. The case was transferred for hearing by a Tier 3 judge to determine whether SRK's care arrangement amounted to a deprivation of his liberty which is imputable to the State. [paragraph 70]
- d. Charles J determined that it was "because the court that awards the damages, *the COP when appointing a property and affairs deputy, and the deputy* or the trustees or attorney or other person to whom the damages are paid *should take steps to ensure* (a) that the relevant local authority with duties to safeguard adults knows of the regime of care, and (b) that if... the least restrictive available care regime to best promote P's best interests creates a situation on the ground that satisfies the objective and subjective components of a deprivation of liberty... *a welfare order based on that regime of care is made* by the COP." [paragraph 10(5) emphasis added, and 133]
- e. A deputy who agrees to pay for care and treatment of P or for a property for P "could not properly ignore the issues (a) whether P was being deprived of his liberty or restrained, and (b) whether that was lawful or needed authorisation under the DOLS or by the making of a welfare order." [paragraph 56]
- f. The need for everyone considering and applying the best interests test to take these matters into account is based in the principle in s1(6) of taking the least restrictive option and the general point that decisions made on behalf of P should result in a lawful situation on the ground. [paragraph 57]
- g. As a result, "a deputy should raise those issues with the relevant providers and the relevant local authority with statutory duties to safeguard adults. By so doing he would be taking proper steps.... he would be enabling public authorities and others with duties to safeguard adults to perform such duties..." [paragraph 58]
- h. "Unless the situation on the ground could be altered in a way that meant P was not being deprived of his liberty, then...I consider that the deputy would then ... have to take steps...to ensure that the situation on the ground was authorised under the DOLS or by the making of a welfare order..." Such steps are "directed to ensuring that there is no failure by public authorities and others to perform their obligations...." [paragraph 59]
- i. This approach means that "the local authority with the safeguarding role.....knows or should know of the situation on the ground and...this triggers its obligation to investigate, to support and sometimes to make an application to court (or to consider doing those things.) [paragraph 137]

52.8 It is clear from the *Staffordshire* case that the responsibility which burdens a property and affairs deputy is to ensure that such decisions as they make in management of P's funds result in a lawful situation. To do that, the deputy is required to alert those bodies with responsibility to take appropriate action (as the Council did in that case.) It must be within the 'general' authority of the property and affairs deputy to go that far.

52.9 In an ideal world of course the responsible bodies would take immediate action and the duty of the deputy would be discharged with only modest cost to P. What is the deputy's obligation where the responsible body does not act so ideally? Charles J considered that the deputy would "have to take steps" to ensure appropriate authorisation, but he did not specify what those steps would be.

52.10 In my judgment the requirement on the deputy is to bring the need for welfare proceedings to the attention of the Court. 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.

52.11 Such application will need to include an explanation of the issue on which the need for proceedings has been identified and the importance of the issue to P. If the deputy seeks authorisation to conduct the proceedings on behalf of P, the application should also include a summary of P's estate, an estimate of costs as far as the stage for which authority is sought, and an explanation of why it is considered that the property and affairs deputy is most appropriately placed to bring the application/conduct the proceedings on behalf of P.

52.12 It would be open to the Court considering such an application to authorise the deputy specifically to conduct the contemplated proceedings, or to make more limited directions. In particular, the Court can consider whether someone other than the deputy may be a more appropriate applicant in welfare proceedings. The Court may, for example, grant the property and affairs deputy specific authority to 'investigate and report' as to any welfare issues; or the Court may direct the filing of a report by a local authority, NHS body, Court of Protection Visitor or the Public Guardian pursuant to section 49 of the Mental Capacity Act.

52.13 Where a damages award to P specifically incorporates an element to compensate the costs of welfare proceedings (eg for reviews of deprivation of liberty authorisations) being brought by his property and affairs deputy, that will be a relevant consideration.

52.14 In my judgment, it is appropriate and practicable that the 'general' authority of a property and affairs deputy is understood to extend as far as permitting an application to the Court of Protection to draw to the attention of the Court a need for consideration of a welfare issue. However, in my judgment there is no basis for concluding that it should extend as far as permitting the conduct of welfare proceedings in the Court of Protection on behalf of P without specific authority. I find nothing in the *Staffordshire* judgment to suggest that Charles J intended a property and affairs deputy's 'general' authority to encompass either extensive engagement on welfare issues, or the conduct of welfare proceedings on behalf of P, without further consideration by the Court of Protection of his authority to do so (and therefore the potential for costs implications to P.) A property and affairs deputy *is* required to obtain specific authority to conduct *welfare* proceedings in the Court of Protection.

53 To what extent does "general authority" encompass authority to take legal advice on behalf of P?

53.1 The Applicants suggest that "general management" extends to "unexceptional non-contentious legal tasks even if they are carried out by other members of the deputy's firm." That submission is based on three observations:

- a. whilst a professional deputy retains responsibility for taking decisions in P's best interests, there is no requirement that the deputy personally carries out every act on P's behalf;
- b. the Public Guardian/SCCO Guidance to professional deputies 'expects' delegation of tasks to an appropriate level fee earner; and
- c. Practice Direction 19B includes a specific provision for conveyancing costs.

53.2 I am not convinced that Practice Direction 19B provides any basis for determining the extent of 'general' authority. In respect of conveyancing, the wording of the relevant provision

(paragraph 14) clearly links to a deputy's authority to sell or purchase property, which nowadays is expressly included in or excluded from a deputy's authority in a standard order, and not to the 'general' authority. Irrespective of whether any party to the process has or lacks the relevant capacity, conveyancing is a necessary part of purchase or sale of property. A deputy's authority to purchase or sell property on behalf of P can therefore only be effective if it incorporates authority to complete the conveyancing process on P's behalf. That the process is unlikely to be administered by the deputy personally is within the ordinary understanding of permitted delegation.

53.3 In the same way, dealing with leases or tenancy agreements where the property belongs to P is better seen as part of the deputy's authority to let property, which nowadays is also explicitly addressed in the standard deputyship template.

53.4 Where P was running a business before incapacity intervened, the requirements of the deputyship will be more complex than is usual. To that extent, characterising any requirement to "draft and advise in relation to employment contracts relating to a business belonging to P" as "unexceptional" is something of a stretch. Moreover, it is the experience of the central registry that applicants for deputyship in such circumstances generally seek specific authority to deal with the business, and the authorisations granted are individually framed for the needs of the particular case. In my judgment, dealing with employment contracts relating to P's business is better seen as part of such authorisation than as part of "general management."

53.5 The other two pillars of the Applicants' argument are essentially one and the same – the expectation that professional deputies will arrange for appropriate tasks to be performed at an appropriate level. This expectation is obviously motivated by the need to meet the best interests of P by ensuring that he is not charged more than is reasonable (as opposed to meeting the business interests of a professional deputy by ensuring that he can charge his client at a higher than reasonable rate.) I am not persuaded that it suggests anything about what tasks a deputy is authorised to do on behalf of P. Moreover, obtaining advice is not delegating a ministerial task; it is seeking a professional service.

53.6 The conclusion I draw is not that "general" authority encompasses unexceptional non-contentious tasks; but the rather different proposition that authority to do an act on behalf of P encompasses such ordinary legal tasks short of taking proceedings as are an ancillary part of giving effect to that authority.

53.7 How do Mr. Rees' examples fare when measured against that proposition?

a. Tax return: The preparation of an annual tax return is an ordinary requirement of any person whose estate falls within the relevant HMRC rules, whether they have capacity or not. It is one of those myriad tasks which the "general" authority was intended to encompass. Practice Direction 19B provides (at paragraph 10) for a rate of fixed costs for preparation of a tax return, but the PD is not the basis for concluding that such a task is within the "general" authority of a property and affairs deputy. Rather, it is within the "general" authority because it is an ordinary part of managing property and affairs.

Where a deputy's associated legal firm employs persons with particular expertise or experience in completion of tax returns, it may be good practice within the terms of the Public Guardian's Professional Deputy standards to delegate to such persons the preparation of P's tax return (although any discretionary decisions remain the responsibility of the deputy.) I accept that such an approach may reasonably be described as "one of the advantages" of appointing a solicitor or solicitor-owned trust corporation as deputy.

Where a person's affairs are relatively extensive or complicated, it is ordinary and unexceptional to take advice from a tax expert about how to complete the required tax return. Seeking such advice may therefore be an appropriate step within the "general" authority of a deputy. However, in the absence of any suggestion that the advice is to be charged to P at less than the market rate, in my judgment it cannot reasonably be said that the availability of in-house tax advisers would be "one of the advantages" of appointing a solicitor or solicitor-owned trust corporation as deputy. Any advantage is not to P but to the legal firm, in having a ready supply of tax clients.

b. Where P is a tenant: A property and affairs deputy is properly part of the decision-making process about where P lives but a decision about where P lives is a welfare decision. The function of the property and affairs deputy is to apply P's finances so as to give effect to the welfare decision. For that reason the court's usual approach is to make express provision either including or excluding authority to enter into or terminate a tenancy agreement. A tenant does not usually bear the burden of drafting the lease but where P is a tenant, steps reasonably necessary to ensure that the deputy is acting appropriately in connection with the lease would be encompassed within the "general" authority to manage P's funds.

c. Employment contracts for directly employed carers: Similarly, the authority of a property and affairs deputy does not encompass determination of P's care needs but it does encompass the application of P's funds to meet the costs of care arrangements. If those arrangements involve direct employment of carers, preparation of employment contracts will be encompassed within the "general" authority to manage P's funds.

53.8 I have referred to "ordinary" legal tasks related to a deputy's authority. I am conscious of the vagueness of the term. Seeking legal advice will be obviously an "ordinary" part of discharging some functions of deputyship but not others. This is what I understand the Official Solicitor to be saying when she takes the position that obtaining advice on behalf of P will sometimes be within the "general" authority, and will sometimes require specific authority. The effect is the same. 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.

53.9 The Official Solicitor submits that there should be a limit to the extent to which non-contentious tasks fall within the standard authorities of a property and affairs deputy, and refers to a proposal from Irwin Mitchell of £2 000+VAT in any given year. My understanding is that the Applicants make such proposal only as a way of addressing conflict of interest, where a deputy wishes to instruct his own firm to carry out contemplated legal tasks (considered below). In respect of the current, wider question, the Applicants' position appears to be [**position statement paragraph 17**] that assessment by the SCCO is sufficient protection for P.

53.10 In my judgment, the non-contentious nature of the work envisaged itself limits somewhat the scope for costs exposure. Moreover, the deputy will be required as part of the normal best interests decision making process to consider whether the cost of the advice/work is proportionate to P's estate and the importance of the issue to P; and to evidence that decision-making process. Any costs will be either limited to fixed rates or subject to SCCO assessment. In my judgment, those requirements are a proportionate means of protecting P's interests. It is not helpful for me to 'fix' a financial limit to the non-contentious legal tasks within a deputy's authority (subject to conflict of interest considerations below). In any case where the deputy is in doubt, of course application to the Court can and should be made.

53.11 Involvement in contentious litigation is a much less ordinary feature of life, and costs are inherently likely to be significant. As concluded above, 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.

53.12 Helpfully, Mr. Rees again suggests examples of situations where a property and affairs deputy may need to form a view about potential proceedings:

- a. whether there are grounds to evict a tenant of a flat belonging to P; and
- b. whether a debt said to have been incurred by P is properly payable as being in respect of “necessary goods and services” under section 7 of the Mental Capacity Act 2005.

53.13 Both of these examples are clearly in the realm of property and affairs. Where a deputy has authority to let property belonging to P, forming a view about (a) may reasonably be considered to fall within the “ordinary” discharge of that authority. Using P’s funds to settle his debts falls within the “general management” authority, and forming a view about (b) may reasonably be considered to fall within the “ordinary” discharge of that authority.

53.14 However, not all contentious litigation is to do with property and affairs. It must be borne in mind that the “general” authority in the standard terms of the deputyship order is limited by reference to possession, control, management and investment of “property and affairs.” As already observed, it is in my judgment important to distinguish between the contemplation of litigation *in the realm of property and affairs*, and the contemplation of *other* litigation. Steps towards contentious litigation of the latter type are unlikely to fall within the “ordinary” discharge of the property and affairs deputy’s authority, and so are not encompassed within the “general management” provision.

54 Where is the line drawn between seeking advice and conducting litigation?

54.1 Having concluded that taking legal advice on behalf of P in respect of at least some potential contentious litigation falls within a deputy’s “general” authority, it becomes necessary to draw a line between taking advice and conducting litigation.

54.2 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?

54.3 The Applicants submit specific authority should only be required when the point of sending the letter of claim is reached. The Official Solicitor points out that this would leave the Court with limited information on which to base a decision of whether or not to authorise the deputy to conduct proceedings. She suggests a deputy should be permitted to go as far as receiving the Letter of Response before requiring specific authority, so that the Court would have information about possible defences when considering the application for such.

54.4 I am conscious that both approaches potentially allow considerable costs to be incurred before the court has opportunity to consider the situation. However, the application for specific authority will itself incur costs. After careful consideration, I am persuaded by the Official

Solicitor's approach. It stops short of formal issue of proceedings. The additional costs on top of what could be incurred under the Applicants' approach are likely to be relatively small; the additional information made available, likely to be significant. In respect of contemplated litigation *in the realm of property and affairs*, the Official Solicitor's approach is in my judgment sensible and proportionate.

54.5 When the Court considers the application for authority to conduct litigation on behalf of P, the Court will need to consider some evidence of the prospects of success of the litigation. The strength of the prospects required to satisfy the Court that its pursuit is in the best interests of P will differ according to the importance of the issue to P and the risks (including as to costs) of the litigation. The evidence of merits need not always be in the form of independent counsel's opinion but most commonly it will be. Logically therefore, where (as concluded above) the deputy's authorities extend to seeking advice without specific authority, they also encompass obtaining counsel's opinion on the merits.

54.6 In contrast, where the contemplated litigation is not in the realm of property and affairs, there is simply no line to be drawn. A property and affairs deputy's authority relates only to property and affairs; it does not encompass seeking advice on welfare issues. It extends no further than meeting the deputy's responsibility to draw to the court's attention that there is or may be a welfare issue for determination by seeking directions as to how such (potential) issue may be addressed. Without such application being made and granted, the deputy proceeds at risk as to costs.

54.7 I acknowledge that there is sometimes scope for argument as to whether contemplated litigation is in essence a property and affairs matter, or a welfare matter. In response to my written questions, Mr. Rees argues that it is within the authority of the property and affairs deputy "to obtain initial advice on public law decisions which will have an impact on P's property and affairs (for example because P is being deprived of a source of funding or because P is being deprived of a service which the deputy may need to provide or supplement from P's funds.)"

54.8 In order to consider the import of the conclusions drawn thus far, it is helpful to consider two particular types of public law decisions where the experience of the Court suggests that property and affairs deputies may find themselves having to consider closely the limits of their authority: continuing healthcare funding, and Education, Health and Social Care Plans.

a. Applications for continuing healthcare funding:

- i. the assessment criteria are not financial, but the decision is. Making an application for continuing healthcare funding for P is ancillary to the "general" authority of a property and affairs deputy to ensure that P receives all the funds he is entitled to;
- ii. if the process of application reasonably requires the taking of advice, obtaining that advice is within the "general" authority of the deputy, and no specific authority is required;
- iii. where an application is refused, the question of appeal arises. Procedures are not as considered in paragraph 54.3 above – this type of appeal is made by letter to the CCG (or Health Board, in Wales), to be delivered within 6 months of the date of decision;
- iv. It is within the "general" authority of a property and affairs deputy to take preliminary steps (including taking advice on the merits of potential appeal) up to but not including delivery of the letter of appeal. The deputy should seek specific

authority to conduct the appeal on behalf of P, and without it proceeds at risk as to costs.

b. Education, Health and Social Care Plans:

- i. the assessment criteria are not financial, and neither is the decision. Even though there may be financial impact, the process of applying for an Education, Health and Social Care Plan is not within the “general” authority of a property and affairs deputy;
- ii. Appeal lies to the First-tier Tribunal (Health, Education and Social Care Chamber), and must be made within two months of the decision, either by a parent of P or by P themselves, according to age.
- iii. A property and affairs deputy should seek specific authority to take any steps in respect of challenging an Education, Health and Social Care Plan, and without it proceeds at risk as to costs.
- iv. Given the short time period for lodging the appeal, any application for authority to conduct such proceedings on behalf of P should clearly indicate that expedited consideration by the Court is sought.

55 What about urgent matters?

55.1 The Applicants and the Official Solicitor agree that “there will be some matters that are so urgent that authority to litigate cannot reasonably be obtained prior to taking action which will protect P.” I agree.

55.2 They further agree that in such cases, the deputy proceeds initially at his own risk as to costs but may make an application to the Court for retrospective approval of the steps taken and authority therefore to recover costs from P’s funds. Again, I agree.

55.3 The Applicants and the Official Solicitor part company in respect of the approach to be taken by the Court when considering such retrospective applications. The Official Solicitor’s position is that the deputy “should be able to obtain retrospective approval...provided the Court decides the action was in P’s best interests.” This is merely a statement of the position in law. The Applicants however submit that retrospective applications “should be treated by the Court sympathetically provided that they have been promptly made and the deputy has at all times reasonably believes that he is acting in P’s best interests.” The Applicants effectively seek a general and prospective assurance that the theoretical risk as to costs is unlikely to be realised. Mr Rees submits that this “accords with the approach in the Chancery Division in relation to *Beddoe* applications (see Lewin on Trusts para 27-057).”

55.4 In my judgment, the Court cannot – in this judgment or otherwise – give any general and prospective assurance of the outcome of any application. 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.

55.5 When making such an application, the deputy will need to explain why a matter was so urgent that authority could not be sought prospectively. The length of time between taking the urgent action and making the application for retrospective approval is likely to be a relevant

consideration. I do not suggest that the robust approach of *Re Nottley* will always be appropriate but there is force in the observation that if a deputy has been able to take the urgent action, they should also be able to make the application for retrospective authorisation hard upon its heels.

55.6 The Official Solicitor acknowledges that a deputy can “find himself in a situation where he wants to issue a claim for an urgent injunction on P’s behalf... [and] will almost certainly need to offer a cross-undertaking in damages to be able to obtain such a remedy.” Without authority to take such proceedings the deputy “would not necessarily have recourse to P’s assets ... [and] would want to act with great care.” In such circumstances, the application the Court of Protection for retrospective authority should clearly indicate the deputy’s exposure and seek urgent consideration by the Court. At the central registry, the application would then be referred for consideration by the Urgent Business Judge.

56 How should conflicts of interest be addressed?

56.1 Where a deputy instructs his own firm, there is clear potential for conflict of interests, as the Applicants acknowledge. However they contend that a strict requirement for separate authorisation of every such occasion would be disproportionate, and suggest two alternative mechanisms to address the risks:

a. a declaration (in these proceedings) that the terms of a standard deputyship order permit a professional deputy to incur non-contentious legal costs and contentious legal costs falling short of issue of litigation, and the deputy may therefore instruct in his own firms in such matters. As part of general management, any costs incurred must be assessed by the SCCO; or

b. include within the standard provisions of deputyship authority to incur legal costs without further approval up to a limit of £2 000 + VAT in any given year⁵.

56.2 There has been no attempt to persuade me that (a) falls within the Court’s jurisdiction pursuant to section 15 of the Act. I cannot see that it does. The closest that the Court may come to the mechanism suggested at (a) is to publish this judgment. I am not persuaded that assessment of costs by the SCCO alone is sufficient protection to P against the potential for conflict of interest when a deputy instructs his own firm.

56.3 As I made clear to the parties at the attended hearing, I have concerns about (b). I acknowledge that a ‘standard’ approach has the attraction of clarity but the current concern is to address the risks of conflict of interest. Perversely, a ‘standard’ authority may act as an incentive for a deputy to find occasions to instruct his own firm to ‘use up’ this sanctioned source of business. Moreover, once the early stages of advice have been obtained, that fact in itself is likely to have an impact on any later consideration of whether it is in P’s best interests for advice/tasks to be obtained from a different source. As Ms. Clement put it, “it is almost always in P’s best interests to avoid duplication.” In my judgment, the concerns about standardised authority of a threshold for instructing a deputy’s own firm outweigh its merits.

56.4 A third approach could be that a deputy is *always* required to go through a tendering process before instructing his own firm. This approach offers advantages of transparency but disadvantages of itself incurring cost, and probably delay, to P. The Applicants’ suggestion of an “annual review exercise” to mitigate this seems to me unlikely to achieve the transparency needed - as in *Re MWS*, summarised above.

⁵ In oral submissions Mr. Rees explained that this figure was suggested “based on the reality that the simplest application to the Court costs £1 500.”

56.5 The Public Guardian's position is that tendering is required "in almost all cases" but the nature of the tendering process should fit the nature of the issue. Generally that would require three quotes from different law firms. Sometimes it would entail no more than sending to different law firms an e-mail outlining the issue. Where particularly high fees are envisaged a "traditional, face to face, beauty parade" would be required, and an application to Court for specific authority will be "more likely."

56.6 The Official Solicitor's position is that the Applicants' proposal of £2 000 "might be an appropriate level for there to be only a limited expectation that the deputy would obtain tenders..."

56.7 In my judgment, the proportionate and required approach to addressing conflict of interests is as follows:

- a. when making an application for appointment, a prospective professional deputy considers whether, in the circumstances of this P as known at the time, there is a realistic prospect that the deputy will wish to instruct someone else to give advice or carry out 'ordinary' legal tasks in order to be able to discharge the responsibilities of the appointment;
- b. if such realistic prospect is identified, the prospective professional deputy further considers whether he may wish to instruct his own firm to advise or carry out the task;
- c. if his own firm does provide the service for which he reasonably considers there to be a realistic prospect of need, the prospective professional deputy should then include in his COP1 application a request for specific authority to instruct his own firm to give the advice or carry out the task subject to a specified limit as to costs;
- d. when considering the application, the judge or Authorised Court Officer will make a decision about whether or not it is in this particular P's interests to grant such authorisation, the period in which the authorisation may be exercised (ie in any given year, in total...etc.) and the level of expenditure to which it should be limited;
- e. the Court's approach to determining the limit of authorised expenditure of this type should follow the language of the Act in respect of attorneys' authority to make gifts ie 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. In some cases, the suggested limit of £2 000 + VAT in any given year may be considered sufficiently modest so as not to be disproportionate, sufficiently generous to be useful, and in the best interests of P to avoid the delay and expense of tendering. In other cases a different limit, or no such authorisation at all, may be more appropriate;
- f. where seeking advice/ordinary legal tasks is within a deputy's authority but no specific authority to instruct his own firm has been granted, prior to instructing his own firm a deputy **must**:
 - i. 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; then
 - ii. make a best interests decision as to which of the three providers to instruct, and document the decision-making process; then

iii. where the deputy's best interests decision is to instruct his own firm and the anticipated costs exceed £2 000 + VAT, make an application to the court for specific authority; and

iv. clearly set out any legal fees incurred in their account to the Public Guardian, and append the notes of the decision-making process to the relevant return.

56.8 Nothing in this approach derogates from the responsibility of the deputy to seek specific authority where such is otherwise required, or limits the ability of the deputy to make an application in any case where there is doubt as to the limits of his authority. The Court will expect that, as part of his supervisory function, the Public Guardian will refer to it any failure to make the application in (iii) as a potential breach of fiduciary duty.

57 What about cases where the deputy is not the instructing party?

57.1 The Applicants submit that the standard terms of a property and affairs deputyship order are sufficient to permit the deputy to use P's funds to reimburse expenditure incurred by a third party provided only that the deputy is satisfied it is in P's best interests to do so, and legal costs incurred by family members are simply an instance of this.⁶ They suggest that concerns about conflict of interest are "not as acute" because "the family member will bring a degree of detachment to the decision as to whether to instruct the deputy's firm." They suggest that the SCCO is in practice willing to assess such costs if the Court so directs, and identify a number of "precautions" which could be adopted:

- a. checks should be made as to whether P or the family members qualify for public funding;
- b. the family member should be told, preferably in writing, that they are under no obligation to use the deputy's firm;
- c. "thought should be given" as to whether comparative quotes from other firms should be obtained;
- d. there should be a merits assessment of the claim before substantive work is undertaken, and always before proceedings are issued.

57.2 In oral submissions the Public Guardian expressed concern that, without any deliberate intention, it is "an inevitable consequence" of the deputy being known to the family that "some form" of undue influence arises. Accordingly, external safeguards are required.

57.3 The Official Solicitor considers that a deputy should obtain authority from the Court before paying another party's legal costs from P's funds, even if the action is for the benefit of P. She considers that such costs should be assessed before being paid, which may require the Court of Protection to grant authority to the Senior Courts Costs Office. She agrees with (a), (c) and (d) above, and considers that the notice in (b) should always be in writing.

57.4 I do not agree with the Applicants that a third party's legal costs can be approached in the same way as any other head of expenditure, such that a standard deputyship order is sufficient

⁶ In oral submissions Mr. Rees submitted that the family member's costs would be an 'obligation' within s18(1)(g), and drew analogy with a deputy reimbursing P's carer for expenses incurred taking P on a social outing.

to enable the deputy to use P's funds to pay them. Such costs may well be extensive and, in the kinds of cases where this scenario may occur, family members are likely to be so closely aligned with P and the deputy that the degree of "external detachment" they bring will be minimal. The Applicants' approach effectively circumvents all the considerations which have preoccupied the Court in these proceedings by the relatively simple device of 'sponsoring' someone else to front the litigation.

57.5 I agree with the Official Solicitor that specific authority is required for a property and affairs deputy to use P's funds to pay a third party's costs. The 'general' authority of a property and affairs deputyship does not encompass such a use of P's funds.

58 What about acting as litigation friend?

58.1 The Applicants contend that there is no legal reason why a trust corporation cannot act as litigation friend, and no legal reason why a litigation friend cannot be authorised to charge for acting as such⁷. The question of whether a particular person should be authorised to act (and be paid for acting) as P's litigation friend is a best interests decision, where the intention to charge fees for so acting is a relevant consideration but not necessarily determinative.

58.2 To the Official Solicitor, the prospect of P paying their litigation friend for so acting "raises significant concerns." She points out that such costs would be additional to the costs of the solicitor instructed by the litigation friend, and likely to be payable from damages recovered. She emphasises that risk of conflict of interest is particularly acute where a conditional fee agreement is entered into, especially where it provides for P to be liable for the solicitors' unrecoverable costs.

58.3 The Official Solicitor does not invite the Court to find that it is impossible for the Court to authorise a litigation friend to charge for so acting, but points out that "the cases in which it is in P's best interests to have a litigation friend who charges, if P can have a litigation friend who does not charge, will be vanishingly remote." To underline that point and quite impressively, the Official Solicitor offers to act as litigation friend without charge in *any* of the existing classes of cases in which she acts where her usual criteria are met (ie there is evidence that P lacks capacity to 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.) Miss Hughes confirmed that, before making this offer, there *has* been full consideration of the likely numbers of cases affected. Indeed, such is the level of the Official Solicitor's engagement with this issue that she took the trouble personally to attend the hearing.

58.4 The Applicants point out that, on occasion, the Official Solicitor instructs in-house lawyers. In my view, this is not equivalent to a professional deputy instructing their own firm. As Miss Hughes spelled out, the Office of the Official Solicitor is not a profit-making organisation. Neither the Official Solicitor nor any staff member in her Office has an incentivised pay structure (meaning that they are free to discourage bad applications without concern that it will reduce work available to them).

58.5 In view of the Official Solicitor's offer, it is not presently necessary for me to reach a reasoned conclusion as to whether a litigation friend may charge for acting as such. Conscious that any such decision may have far-reaching consequences, I decline to do so. The practical reality is that 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

⁷ Mr Rees referred me to an example of a case where the Chancery Division authorised charging by a replacement litigation friend for acting as such: *Flora Elizabeth Keays (by her litigation friend, Sara Keays) v. The Executors of the Late Right Honourable Cecil, Baron Parkinson* [2018] EWHC 1006 (Ch), at paragraph 28.

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.

59 What if P has capacity to give instructions for the work in question?

59.1 The Applicants and the Official Solicitor are agreed that, if P has capacity to give instructions for a specific piece of work, then he will also have capacity to agree the costs in question.

59.2 The ‘information relevant’ (as the term is used in section 3(1) of the Act) to a decision to give instructions for a specific piece of work includes:

- a. that the specific piece of work will need to be paid for from P’s own funds (where that is the case);
- b. that there is a range of options about whom to instruct; and
- c. the broad range of cost amongst the available options of whom to instruct.

59.3 On that basis, I agree that if a person has capacity to give instructions for a specific piece of work, they will also have capacity to agree the costs in question.

60 For convenience, I have summarised these conclusions in an appendix to this judgment.

Determination of the individual cases

61 ACC 1219069T

61.1 The instruction of Irwin Mitchell’s Public Law and Human Rights Department was outside the deputy’s authority granted by the orders made on 11th September 2013 and 17th July 2017. The terms of the COP1 application implicitly accept that.

61.2 The deputy’s COP1 application was made after initial advice had been taken but before extensive costs had been incurred, and before any appeal was lodged. The appeal in fact settled by mediation so the actual costs in issue are modest relative to ACC’s estate.

61.3 The Official Solicitor acting as Litigation Friend for ACC supports the deputy’s application. It appears that ACC has derived benefit from the steps taken by the deputy on her behalf.

61.4 In all the circumstances, including that the application predates the clarification of the Court’s approach which it brought about, I am satisfied that it is in the best interests of ACC now to authorise the deputy to pay the costs of the challenge to her Education Health and Care Plan, subject to assessment by the Senior Courts Costs Office and up to a limit of £2 500 + VAT (inclusive of the sum of £906.10 that has already been assessed by the SCCO.)

62 JDJ 12067238

62.1 It is incumbent on each part of Irwin Mitchell to be clear about who is giving instructions. It is apparent that there was no such clarity in the approach taken to JDJ’s Education Health and Care Plan. A deputy cannot properly consider whether she is acting within her authority if she is not clear whether she is acting at all.

62.2 Whether it was the deputy or JDJ’s parents who instructed Irwin Mitchell’s Public Law and Human Rights Department in respect of a challenge to JDJ’s Education Health and Care plan, specific authority is required. It is not within the “general” authority of the deputyship orders made on 5th April 2013 and 4th April 2014 to use JDJ’s funds to pay legal costs incurred by his parents.

Nor is it within the authority of those orders to act in respect of a welfare issue, other than to make an application to the Court of Protection for directions/further authority; or to conduct proceedings.

62.3 The appeal was unsuccessful. The costs incurred are significant. It is important to emphasise that the Court will not lightly authorise actions retrospectively when there is no good reason why authorisation was not sought prospectively.

62.4 However, in this particular case, I acknowledge that the appeal proceeded on the basis of a positive merits assessment by independent counsel, and before the clarification of the Court's approach which this application has brought about. It seems that the appeal did achieve some amendment to the plan to JDJ's benefit. In oral submissions, Miss Hughes explained that JDJ's parents have modest resources, and it is the view of the Official Solicitor as JDJ's litigation friend in these proceedings that – in the particular circumstances of this case - leaving them 'out of pocket' would not be in JDJ's best interests.

62.5 In the end, I am satisfied that it is appropriate in this matter to authorise the deputy to pay from JDJ's funds the costs incurred in the proceedings to challenge his Education, Health and Care Plan, subject to assessment of those costs by the Senior Courts Costs Office.

62.6 Nothing in this decision should encourage property and affairs deputies to consider that there will on other occasions be a similarly positive determination of applications effectively to authorise litigation after the event. Conducting litigation on behalf of P is a significant step, likely to incur significant costs. Appropriate authorisation should be secured in advance.

63 HPP 12636322

63.1 It is clearly in the best interests of HPP that the damages claim is pursued on his behalf. Ms. Waite has been appointed as his litigation friend by the court seized of those proceedings. The current application to be determined by this court effectively has three limbs:

- a. to authorise the deputy to pay Ms. Waite's fees for acting as litigation friend;
- b. to authorise Ms. Waite to instruct Irwin Mitchell LLP (a firm with which she is associated) to act for HPP in the damages litigation;
- c. to authorise the deputy to indemnify Ms. Waite from HPP's funds for any costs liability – either to Irwin Mitchell LLP or to the Defendants – that she may incur in acting as HPP's litigation friend, such costs to be subject to assessment by the SCCO.

63.2 Given that the Official Solicitor is willing to act as litigation friend for HPP in the damages litigation without making any charge for so acting, it is clearly not in the best interests of HPP to grant the authority sought in (a). To the extent that there may be disadvantage to HPP in changing his litigation friend, such disadvantage is clearly outweighed by the financial benefit of not having to pay professional fees for carrying out the role. In any event, in oral submissions Mr. Rees has confirmed that Ms. Waite is willing to continue to act as litigation friend without charge, subject to provision being made for her legal costs.⁸ The application for authority to pay from HPP's funds any fees of Ms. Waite for acting as litigation friend is refused.

63.3 It is submitted on behalf of HPP's deputy that it is in the best interests of HPP for those solicitors who are familiar with his case to be allowed to continue it. In particular, Mr. Rees informed the Court that a settlement meeting was scheduled for the week after this hearing.

⁸ At the conclusion of the hearing Ms. Waite agreed to continue acting as litigation friend without charging for such.

63.4 Plainly there is a conflict of interest in Ms. Waite instructing Irwin Mitchell LLP. The Official Solicitor points out that there is a conditional fee agreement in place in respect of HPP's damages proceedings. The original agreement was signed by the original litigation friend – HPP's then partner. However, an amended CFA was subsequently entered into by the next litigation friend, Michael Knott. This second (current) version included an increased success fee (20%) [D79] even though by then liability had been admitted. The Official Solicitor points out that the *only* person able to decide whether or not to enter into this new agreement on behalf of HPP was Michael Knott, who was at the time a partner in Irwin Mitchell LLP and a Director of Irwin Mitchell Trust Corporation. With no external control at all, the conflict of interest could not be clearer. The Official Solicitor considers that, if she were acting as litigation friend for HPP, it is "certainly possible that she could obtain terms for [him] which are better than those presently being offered to him by Irwin Mitchell" [position statement paragraph 31].

63.5 In response Mr. Rees refers to the recent amendment of Rule 21.12 of the Civil Procedure Rules as providing a check on the terms of a CFA through a requirement for the court (through a costs judge) to consider any uplift. He explained that the original CFA in HPP's damages case was the Irwin Mitchell minimum at the time; and the second one became necessary when Irwin Mitchell varied its minimum requirement in the light of statutory changes to public funding arrangements.

63.6 Since the attended hearing, the Court has been informed that HPP's claim has been settled for £3 million (inclusive of interim and other payments) with periodical payments of £65 641 per year.

63.7 In all the circumstances, and not without some reluctance, I am satisfied that it is in the best interests of HPP now to regularise the position in respect of the conduct on his behalf of litigation from which he has clearly derived benefit. With such retrospective effect as is necessary, I will authorise Ms. Waite to instruct Irwin Mitchell LLP in those proceedings, and the deputy to indemnify her from HPP's funds for any costs liability – either to Irwin Mitchell LLP or to the Defendants – incurred in acting as HPP's litigation friend, such costs to be subject to detailed assessment by the SCCO.

Costs

64 These are property and affairs proceedings. The general rule, pursuant to Rule 19.2 of the Court of Protection Rules 2017, that the costs will be paid from the protected person's estate. Pursuant to Rule 19.5, the Court may depart from that approach if the circumstances so justify. These proceedings have been much more extensive than future applications for the same authorities will need to be. Others will benefit from that but ACC, JDJ and HPP potentially face the burden of costs incurred to reach that position.

65 The Public Guardian does not seek to recover his costs in these proceedings.

66 The Official Solicitor proposes that the Court depart from the general rule in respect of her costs as follows. In respect of ACC she invites the Court summarily to assess her costs as £1 000 + VAT plus Counsel's costs to be subject to detailed assessment on the standard basis, and to direct that the combined amount is paid from ACC's estate. In respect of JDJ and HPP, she proposes that her costs and Counsel's costs are subject to detailed assessment on the standard basis; and that half of her assessed costs plus Counsel's assessed fee are paid from the relevant estate.

67 The Applicants too accept that it is appropriate in these matters to depart from the general rule. They explain that they have "stripped out" the costs incurred in respect of the "wider issues" and estimate that their costs in respect of ACC are £6 000 + VAT plus the costs of the hearing, in respect of JDJ are £16 600 + VAT plus the cost of the hearing (although they agree to consider this further, as the work of two fee earners may have covered similar ground so that the overall figure

should be lower), and in respect of HPP are £2 700 + VAT plus the cost of the hearing. They ask that their costs are assessed and 50% of the assessed costs are paid from the relevant estate.

- 68 I am satisfied that it is appropriate to depart from the general rule in these cases. These proceedings have been more protracted than usual because of the need for the Court to clarify its expectations in respect of the deputies' own "one stop shop" approach. However I am also satisfied that the parties' proposals reflect an appropriately measured approach to the substance of these proceedings. I will make orders in the terms of the parties' proposals.

HHJ Hilder

27th February 2020

Appendix

Summary of conclusions

1. The “general” authority to manage property and affairs which is granted by the standard deputyship order encompasses those common or ordinary tasks which are required to administer P’s estate efficiently. [paragraphs 46 – 48]

2. Authority to make a decision / do an act in respect of P’s property and affairs encompasses such ordinary non-contentious legal tasks, including obtaining legal advice, as are ancillary to giving effect to that authority. [paragraph 53]

3. In particular:

a. authority to purchase or sell property includes conveyancing [paragraph 53.2]

b. authority to let property includes dealing with leases or tenancy agreements [paragraph 53.3]

c. authority to conduct P’s business includes dealing with employment contracts of that business [paragraph 53.4]

d. “general” authority encompasses:

i. the preparation of an annual tax return, and therefore obtaining advice as to completion of the return [paragraph 53.7(a)];

ii. discharging P’s financial responsibilities under a tenancy, and therefore obtaining advice as to liabilities under the tenancy [paragraph 53.7(b)];

iii. applying P’s funds so as to ensure that the costs of his care arrangements are met, and therefore dealing with employment contracts of directly employed carers [paragraph 53.7(c)]

4. Specific authority is required to conduct litigation on behalf of P [paragraph 51] except where the contemplated litigation is in the Court of Protection in respect of a property and affairs issue [paragraph 52.4] or to seek directions in respect of a welfare issue [paragraph 52.10].

5. Where a deputy has authority to make a decision / do an act in respect of P’s property and affairs, such authority encompasses steps in contemplation of contentious litigation in the realm of that authority up to receiving the Letter of Response but no further [paragraph 54.4]. In particular:

a. authority to let property encompasses taking steps to form a view as to whether there are grounds to evict a tenant of such property [paragraph 53.13];

b. “general” authority to manage P’s funds includes taking steps to form a view about whether a debt said to have been incurred by P is properly payable pursuant to section 7 of the Mental Capacity Act 2005 [paragraph 53.13];

c. “general” authority to manage P’s funds includes steps up to but not including the delivery of a letter of appeal in respect of a decision that P is not eligible for continuing healthcare funding [paragraph 54.8(a)];

d. where authority encompasses steps in contemplation of contentious litigation, that includes obtaining Counsel's opinion. [paragraph 54.5]

6. "General" authority of a property and affairs deputyship order does not encompass seeking advice or other steps preliminary to litigation in respect of welfare issues; it does encompass making an application to the Court of Protection for further directions /specific authority in respect of welfare issues. [paragraph 54.6]

7. "General" authority of property and affairs deputyship does not encompass steps in contemplation of an appeal against the decision of an Education, Health and Care Plan. [paragraph 54.8(b)]

8. If circumstances arise where the protection of P's interests requires action to be taken so urgently that prior authority to litigate cannot reasonably be obtained, a deputy proceeds at risk as to costs but may make a retrospective application for authority to recover costs from P's funds. There is no presumption that such application will be granted – each application will be considered on its merits. [paragraph 55]

9. Where a deputy wishes to instruct his own firm to carry out legal tasks, special measures are required to address the conflict of interest:

a. the deputy may seek prior authority [paragraph 56.7(a) – (e)];

b. the deputy is required to seek – in a manner which is proportionate to the magnitude of the costs involved and the importance of the issue to P - three quotations from appropriate providers (including one from his own firm), and determine where to give instructions in the best interests of P [paragraph 56.7(f)(i)];

c. the deputy **must** seek prior authority from the Court if the anticipated costs exceed £2 000 + VAT;

d. the deputy must clearly set out any legal fees incurred in the account to the Public Guardian and append the notes of the decision-making process to the return. [paragraph 56.7(f)(iv)]

10. Specific authority is required to use P's funds to pay a third party's legal costs, even if those costs relate to litigation for the benefit of P. [paragraph 57]

11. The Official Solicitor is willing to act as litigation friend for P without charge in any of the existing classes of cases in which she acts where her usual criteria are met. [paragraph 58]

12. If P has capacity to give instructions for particular work, he will also have capacity to agree the costs of that work. [paragraph 59]

IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C - Transparency. It may be published on condition that the anonymity of the incapacitated person must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Neutral Citation Number : [2020] EWCOP 48

IN THE COURT OF PROTECTION

CASE NO: 12501237

THE MENTAL CAPACITY ACT 2005

IN THE MATTER OF AH

First Avenue House
42- 49 High Holborn
London, WC1V 6NP

Date: 28th September 2020

Before: Her Honour Judge Hilder

PENNTRUST LIMITED

Applicant

- and -

WEST BERKSHIRE DISTRICT COUNCIL

First Respondent

- and -

THE PUBLIC GUARDIAN

Second Respondent

Hearing: 19 May 2020

Mr. Chandler (instructed by Penningtons Manches LLP) for the Applicant
Ms. van Overdijk (instructed by West Berkshire District Council) for the First Respondent
Ms. Whittington (instructed by The Public Guardian)

The hearing was conducted in public subject to a transparency order made on 15th March 2020. The judgment was handed down to the parties by e-mail on 28th September 2020. It consists of 21 pages, and has been signed and dated by the judge.

The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

A. The Issue

1. Practice Direction 19B provides for fixed costs in the Court of Protection. There is specific provision in the Practice Direction “where the net assets of P are below £16000.” The option for detailed assessment of costs for such estates “will only arise if the court makes a specific order.”
2. The Applicant trust corporation was formerly appointed as property and affairs deputy for AH. At all times during the deputyship AH’s liquid assets were less than £16 000 but her total assets, including a property in which she lives, were substantially higher. The deputyship order includes authorisation to seek SCCO assessment but makes no explicit reference to the size or nature of AH’s estate. The Applicant contends that it is entitled to rely on the authorisation in its deputyship order to seek SCCO assessment of its costs. In the event that the Court does not agree, the Applicant seeks retrospective authority to obtain SCCO assessment.
3. The Respondents take no substantive position on the issue to be determined. West Berkshire District Council is “largely neutral” but, as current deputy, is concerned to understand what debt AH has incurred. The Public Guardian “seeks no specific outcome.” His approach to the matter has simply been to assist the Court where he can.

B. Matters considered

4. I have read all the documents collated into the hearing bundle and additional documents filed at and after the hearing, including:
 - a. filed by the Applicant:
statement by Julie Burton dated 3rd January 2019 [**15**]
statement by Gary Tidmarsh dated 18th May 2020
skeleton argument by Mr. Chandler, dated 13th May 2020
 - b. filed by the First Respondent:
statement by Jo England dated 22nd March 2019 [**92**]
skeleton argument by Ms. van Overdijk, dated 13th May 2020
 - c. filed by the Public Guardian:
skeleton argument by Ms. Whittington, dated 12th May 2020
5. I have heard oral submissions from Counsel for each party.

C. The Background

6. AH is now 93 years old. She was born in Poland but she has lived in the UK since the age of 15. Her husband died in 2003 and her son shortly afterwards but she has two living daughters, M and Z. She lives in her own home at 25 CW, with her grandson, D (who is the son of Z). She has dementia and receives a package of care support which is funded by West Berkshire Council.
7. In or about 2013, some financial transactions made on AH's account were questioned but AH was unable to recall or explain them. The Local Authority conducted a safeguarding investigation. No definitive conclusion was reached. At the same time, the Local Authority was involved in relation to the package of care provided to AH.
8. In 2014 West Berkshire District Council commenced proceedings in respect of assessment of AH's capacity. The matter was transferred from the central registry of the Court of Protection to a regional court.
9. In the course of those proceedings a report was obtained from Dr Hugh Series dated 19th July 2014 [35]. He confirmed that AH lacks capacity to manage her property and affairs, to make decisions about her care management, to decide on contact with family members and to litigate the proceedings.
10. There was an attended hearing on 27th August 2014. West Berkshire District Council has filed an attendance note, which includes the following account:

“J[udge] asked what the current position was with P’s finances. KB explained that currently [P’s grandson] was managing them, but that it had been made clear by P’s daughters that this situation was unacceptable to them. As far as they were concerned it needed to be formalised and they wanted it to be either themselves or, in the alternative a panel deputy. Confirmed that the Council’s view was that a Panel would be appropriate as it would be independent from the Council and due to the complaints this was preferable, equally it would be independent from each of the family members, and that due to disagreements between the family this would be appropriate. If necessary the Council were prepared to make the relevant application.

J[udge] asked what knowledge there was of the size of the estate. Outlined that there was potentially circa £1k in the bank plus a small income from state pension, benefit allowances and a private pension but that the major asset was the house. Agreed that it was likely to be mortgage free Approximate value of the house is assumed to be £230-240k...

J[udge] queried if the Council has considered appointeeship in the interests of keeping control of the costs and time of the proceedings. HW pointed out that the private pension would not be covered...

J[udge] raised the fact that there was apparently no conflict between the sisters.... Queried why there had been no application. KB outlined that they had not indicated any intention to make their own. J[udge] asked what the cost of a panel deputy was, LH indicated that the current level was

unknown (£320/annum – as of 02/12). J[udge] agreed that a deputy seemed like a better option than (sic) the OS ... but what are other options? KB repeated that we could wait for either side of the family to make an application or we could make one for them.

J[udge] handed down a draft order using the courts powers under 16(6) to make an order without application. J[udge] outlined that the next step was that the London office would find a relevant deputy and appoint them....”

11. With the usual assistance from staff at the central registry of the Court of Protection, PennTrust Ltd was identified as the appropriate panel member. On 6th October 2014 [25] the hearing judge duly made an order appointing PennTrust Ltd as property and affairs deputy for AH.
12. Paragraph 4 of the deputyship order provides as follows:

“the deputy is entitled to receive fixed costs in relation to their application and to receive fixed costs for the general management of the affairs of [AH]. If the deputy would prefer the costs to be assessed, the order is to be treated as authority to the Supreme Courts Costs Office to carry out a detailed assessment on the standard basis.”
13. Paragraph 5 of the deputyship order required the Deputy to obtain and maintain security in the sum of £150 000.
14. The deputyship apparently did not run smoothly. Ultimately the Applicant came to the conclusion that there were “*potentially complex issues*” [20] to deal with, and it would be appropriate for its appointment as deputy to be discharged and the Local Authority to be appointed instead as “*this would ensure that decisions can continue to be made on [AH’s] behalf without incurring additional fees which would further deplete her capital.*” [20]
- D. These proceedings
15. By COP1 application dated 3rd January 2019 [5] PennTrust Limited applied for:
 - a. its appointment as property and affairs deputy for AH to be discharged;
 - b. authority to bill costs which had been incurred between 6th October 2014 and 5th October 2017 and assessed in the sum of £34 935.95;
 - c. authority to have costs from 6th October 2017 to the date of discharge assessed by the SCCO; and
 - d. authority to secure a charge against 25CW in relation to all outstanding costs.
16. D filed a COP5 Acknowledgment dated 2nd February 2019 [86] objecting to the appointment of West Berkshire Council as replacement deputy.
17. By order made on 9th May 2019 [97] the matter was transferred to the regional court for listing of a Dispute Resolution Hearing, which was then arranged for 17th July 2019.

18. At the Dispute Resolution Hearing, an order was made [108] which recorded that the issues in the case were separated into the “Deputyship Element” and the “Fees Element”:
 - a. M and Z confirmed that they had no objection to the Deputyship Element, and did not intend to pursue any objection in respect of the Fees Element;
 - b. D withdrew his objection to the Deputyship Element, and also indicated that he did not intend to pursue an objection in respect of the Fees Element;
 - c. The appointment of PennTrust Limited as deputy for AH was discharged and (in a separate order [111]) the authorised officer of West Berkshire District Council was appointed as replacement deputy.
 - d. The Council indicated that it had “queries” in relation to the Fees Element;
 - e. The matter was listed for a final hearing “for the purposes of determining the Fees Element” on the first open date after eight weeks.
19. By COP9 application dated 5th November 2019 [114] the Local Authority Deputy applied for outstanding issues to be transferred for consideration by me, on the basis that they raise “a broader point of principle concerning the application of Practice Direction 19B and following on from the *Matrix* case.”
20. By order made on 6th November 2019 [123], the case was transferred for initial consideration on the papers. The issues to be considered were identified as follows:
 - a. whether D should be discharged as a party to these proceedings;
 - b. whether the OPG should be invited to join the proceedings
 - c. whether the Applicant should have applied to the SCCO for detailed assessment of its professional fees (and is entitled to charge the assessed bills) against [AH’s] estate pursuant to:
 - i. paragraph 4 of the deputy order issued on 6th October 2014;
 - ii. Practice Direction 19B as applicable to professional deputy costs for remuneration periods ending on or before 31st March 2017; and/or
 - iii. Practice Direction 19B as applicable to professional deputy costs for remuneration periods ending on or after 1 April 2017
 - d. Whether “net assets” for the purposes of PD19B as applicable to professional deputy costs for remuneration periods ending on or after 1 April 2017 does or does not include the property P is living in.
 - e. In the event that the Applicant is/was not authorised to seek assessment of any or all of its assessed costs by the SCCO, whether the Court will grant retrospective authorisation in relation to any fees already assessed for which the Applicant was not entitled to seek assessment and whether the Court will authorise detailed assessment in relation to any unauthorised fees for which the Applicant is not presently authorised to seek assessment and authorise the applicant to charge the same.
 - f. In the event that the Court determines that some or all of the Applicant’s fees (as assessed or to be assessed) are payable by [AH], whether it is in [AH’s] best

interests for the Court to make orders in relation to the charge against [AH's] property proposed by the Applicant to discharge its professional fees and, if so, the appropriate orders to make.”

21. The matter was duly referred to me. By order made on 21st November 2019 I discharged D as party to these proceedings, joined the Public Guardian as party and provided for an attended hearing. Unfortunately that order was not issued until 16th March 2020 due to administrative oversight. A further order was made on 15th March amending the case management dates to account for this; and a transparency order was also made.
22. Of the issues identified in paragraph 20 above, (a) and (b) have been resolved. The four others remain.
23. West Berkshire District Council has filed an up to date summary of AH's estate. Save that the property is now said to be valued at approximately £340 000, it is broadly the same as outlined in the August 2014 hearing. AH's liquid assets are minimal, and she still lives at 25CW.

E. Law and Practice

24. Section 19(7) of the Mental Capacity Act 2005 (“MCA”) provides as follows:

(7) The deputy is entitled–

(a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and

(b) if the court so directs when appointing him, to remuneration out of P's property for discharging them.

25. As set out by Charles J in *Re AR* [2018] EWCOP8 at paragraph 32, a decision as to remuneration is a “best interests” decision, to be determined by reference to the individual facts of a particular case.
26. Further provision as to costs is made in Part 19 of the Court of Protection Rules 2017. Relevant terms are defined in Rule 19.1 as follows:

‘detailed assessment’ means the procedure by which the amount of costs or remuneration is decided by a costs officer in accordance with Part 47 of the Civil Procedure Rules 1998 (which are applied to proceedings under these Rules, with modifications, by rule 19.6);

‘fixed costs’ are to be construed in accordance with the relevant practice direction;

27. The range of options for remuneration is set out in Rule 19.13:

(1) Where the court orders that a deputy, donee or attorney is entitled to remuneration out of P's estate for discharging functions as such, the court may make such order as it thinks fit including an order that –

(a) the deputy, donee or attorney be paid a fixed amount;

(b) the deputy, donee or attorney be paid at a specified rate; or

(c) the amount of the remuneration shall be determined in accordance with the schedule of fees set out in the relevant practice direction.

(2) Any amount permitted by the court under paragraph (1) shall constitute a debt due from P's estate.

(3) The court may order a detailed assessment of the remuneration by a costs officer in accordance with rule 19.10(b).

Pursuant to Rule 19.14, a Practice Direction sets out further provisions. The relevant practice direction is PD19B. For the purposes of these proceedings, two versions of PD19B are relevant:

- a. "the old version," which was effective between 1st February 2011 and 30th March 2017; and
- b. "the current version," which has been in effect since 1 April 2017.

28. Both the old version and the current version of PD19B set out the same provision in respect of "Claims generally:"

"5. The court order or direction will state whether fixed costs or remuneration applies, or whether there is to be a detailed assessment by a costs officer. Where a court order or direction provides for a detailed assessment of costs, professionals may elect to take fixed costs or remuneration in lieu of a detailed assessment."

29. Both the old version and the current version of PD19B have a section headed 'Remuneration of solicitors appointed as deputy for P', which sets out the fixed rates of remuneration that will apply where the court appoints a solicitor to act as deputy. In respect of 'Category III' costs, both versions of the PD state that:

"Where the net assets of P are below £16,000, the professional deputy for property and affairs may take an annual management fee not exceeding 4.5% of P's net assets on the anniversary of the court order appointing the professional as deputy."

30. There is further provision in respect of small estates in each version of the Practice Direction. A typographical error in the old version has been removed and the initials of the SCCO (rather than its full title) are used, but otherwise paragraph 11 of the old version and paragraph 12 of the current version both provide as follows:

"In cases where fixed costs are not appropriate, professionals may, if preferred, apply to the SCCO for a detailed assessment of costs. However, this does not apply if P's net assets are below £16,000 where the option for detailed assessment will only arise if the court makes a specific order for detailed assessment in relation to an estate with net assets of a value of less than £16,000."

31. However, the two versions of PD19B differ in the extent of information provided to aid interpretation of the term “net assets”. The current version of PD19B offers no explanation at all. The old version includes a footnote which provides some definition, in the following terms:

“ Net assets includes any land or property owned by P except where that land or property is occupied by P or one of P’s dependents.”*

32. In response to my request, the parties have now filed historical versions of provision in respect of fixed costs. In particular, it is to be noted that:

- a. In respect of arrangements before the Mental Capacity Act 2005 was implemented, a Practice Note signed by Master Lush on 7th December 2005 and having effect from 1st January 2006 provides for Category III costs for small estates as follows:

“(e) Where a professional is dealing with the affairs of an individual under an order of the court, and the assets of that individual are less than £16 000, then the professional may take a general management fee not exceeding 4% of the patient’s assets on the anniversary of the date of the order appointing the professional to act (plus VAT).”

There is no qualification of assets as “net” or otherwise, and there is no suggestion that occupation of a property affects the calculation.

The Practice Note further provides for assessment of costs as follows:

“In all categories, except for category III(e), professionals will have the option of the Costs Officer carrying out a detailed assessment of the costs rather than accepting fixed costs, if they wish. However, professionals must take fixed costs where it is appropriate to do so: in other words, where the amount of the bill is within the maximum allowed under the relevant category...”

- b. The qualification of “assets” by the word “net” is common to all versions of Practice Direction 19B (ie post-implementation of the Mental Capacity Act 2005) but the version effective between 1st February 2011 and 1st April 2017 is the only one which includes any definition of the term “net” or indeed any suggestion that occupation of a property affects the calculation.
- c. Despite invitation to do so, the parties have not filed any document or other point of reference which may illuminate any policy behind the difference in the 2011 – 2017 version of the Practice Direction, or why the current version does not replicate it, seemingly because they were unable to identify any such information.

33. I have previously considered the meaning and effect of PD19B in *London Borough of Enfield v Matrix* [2018] EWCOP 22. In so far as is relevant to the present case, it was there concluded that:

- a. The authority for the deputy to charge a fee comes from the court order alone. SCCO assessment does not itself give authority to charge the assessed fee. (paragraph 69)

- b. Where assessment has been obtained without authorisation, the deputy will need to make an application for relief of any liability which attaches to the taking of the unauthorised fee. In such application the deputy may seek to rely on the SCCO assessment as demonstrating some independent, reasonably contemporaneous acceptance of the reasonableness of the fee but it will be for the court to decide whether or not it is appropriate to grant the authorisation and effectively authorise the fee retrospectively. (paragraph 71)
 - c. Where an order permitting SCCO assessment had been made at a time when an estate exceeded £16,000, but the estate subsequently fell below that level, the deputy could not continue to rely on that authorisation to seek assessment. At the point when the estate fell below £16,000, the deputy should either accept the stipulated percentage or seek further, specific authority for assessment in respect of a small estate. (paragraphs 74 -78)
34. The underlying logic for the requirement for specific authorisation to obtain SCCO assessment where an estate reduces to less than £16 000 was set out (at paragraph 76) in the following terms:

“When funds are reduced to £16 000, in the ordinary run of events the demands of deputyship, and therefore the reasonableness of seeking costs higher than the stipulated percentage rate, are likely to be few. It is a sensible protective measure to require that any deputy who does seek assessment in those circumstances, with the attendant costs of the procedure and the aim of higher charges, should be obliged to explain to the court why.”

F. Common ground

35. After some discussion, all parties now agree that:
- a. the old version of PD19B (which includes a definition of net assets) applies to the first two periods of the costs claim in this matter (2014/2015 and 2015/16); and
 - b. the current version of PD19B (which has no definition of net assets) applies to all other parts of the costs claim (2016/2017 and all the as yet unassessed costs.)

G. The Applicant’s Position

36. In Mr Chandler’s position statement (using figures taken from the statement by Ms. Burton) it was said that the Deputy has incurred the following costs:
- a. for the period 2014/15 £9 660 [A58];
 - b. for the period 2015/16 £15 850 [A60]; and
 - c. for the period 2016/17 £9 425 [A62].
- (These sums total £34 935.)
- d. further costs up to the discharge of the appointment in the region of £20 000 (but not yet assessed.)

37. In oral submissions Mr Chandler clarified that these figures are in fact only the amount which are said to be due to the Deputy in respect of managing AH's funds. There are additional disbursements, so that the costs claim is in fact as follows:
- a. for the period 2014/15 £16 899.12 [A57];
 - b. for the period 2015/16 £20 994.97 [A59]; and
 - c. for the period 2016/17 £12 541.38 [A62].
- (These sums are the result of SCCO assessment inclusive of VAT and they total £50 425.47.)
- d. further costs up to the discharge of the appointment in the region of £20 000 (but not yet assessed.)
38. Mr. Chandler further clarified that the only amount so far billed to AH is an interim amount of £4 000 in the first year of deputyship, which is included in the sum itemised at paragraph 37(a) above. In view of AH's lack of liquid funds, no other costs have yet been paid from AH's estate.
39. The Applicant considers that, throughout its appointment as deputy for AH, the level of activity required was "high." [22] Mr. Tidmarsh's statement describes difficulties establishing an acceptable regime for day to day expenditure against a background of family conflict and requests from D for capital expenditure. It was necessary to review transactions in AH's account, and to review her will. There was liaison between three family members. The possibility of an equity release scheme was investigated but sourcing a financial institution willing to enter into such an arrangement was complicated by the fact that D lives in the property, and then Z indicated that she felt AH's interests required her to move into residential care. Two applications to the Court have been required (for release of the will and for authority to enter into an equity release scheme).
40. The Applicant accepts (as it must) that, if the property is not included in the calculation, AH's assets have at all material times been less than £16 000 but emphasises that, if the value of the property is included, AH's estate clearly has at all material times had a value significantly above £16 000.
41. The Applicant's primary case is that paragraph 4 of the deputyship order authorises the assessment of its costs in every charging period. Mr. Chandler points out in his position statement (**paragraph 34**) that the deputyship order was made against a known background of family discord, when the assets other than the property in which AH lived were already less than £16000. There was no discussion at the hearing in respect of SCCO assessment, and there were some six weeks between the hearing and the making of the deputyship order, but it should be inferred that the judge "positively decided" to include authority to seek assessment, and so there has been "a specific order for detailed assessment in relation to an estate with net assets of a value of less than £16,000." (I shall refer to this as "the Context Argument.")
42. Mr. Chandler asserts that Public Guardian's contrary interpretation requires that the order is understood to mean "the antithesis" (**paragraph 35(b)**, *emphasis in original*) of the plain words of the order. The order should, he says, be taken at face value.

43. In the alternative the Applicant contends that, where the current version of PD19B applies (ie in respect of the 2016/2017 costs and all the as yet unassessed costs), paragraph 12 is of no import because AH's total assets exceed £16 000. In the absence of the footnote defining "net assets" by exclusion of property where the protected person lives, the term means "what the words naturally denote ie all of P's net assets, including property which he or she occupies." (**position statement paragraph 38**). That being so paragraph 12 does not apply, and the Deputy has authority in paragraph 4 of the deputyship order to seek assessment. (I shall refer to this as "the Definition Argument.")
44. Further in the alternative, if the Court concludes that there is no extant authority to seek assessment, the Applicant seeks such authorisation now, on the following grounds (which I shall refer to as "the Best Interests Argument"):
- a. The circumstances of the Applicant's appointment, namely allegations of misappropriation against D and complex family dynamics, make clear that this was never a straightforward deputyship where fixed costs would be appropriate;
 - b. The statements of Julie Burton and Gary Tidmarsh are evidence of what was actually done on behalf of AH by the Applicant as deputy (and any suggestion that any of this work was inappropriate or unnecessary is rejected);
 - c. The Applicant did genuinely understand that it already had such authorisation. (*"It is in the context of the proceedings for its replacement, together with a changing jurisprudential backdrop, that uncertainty has now arisen."*) (**Position statement paragraph 40(c)**);
 - d. The overall value of AH's estate – more than £340 000;
 - e. The costs, accumulated over a long period, have been (in part at least) assessed by the SCCO as reasonable.
 - f. The Applicant will only take steps to recover the costs when the property is sold.
45. In so far as West Berkshire District Council sought to suggest that the Applicant had not acted appropriately either (whilst appointed as AH's deputy) by failing to make proper applications for carer assessments or (whilst appointed and afterwards) by failing to answer questions about AH's property and affairs, the Applicant explained at the hearing [129] that it had taken the view - in circumstances where the Council "was raising a whole host of criticisms whilst professing to act neutrally" - that it was "not proportionate to respond to each and every criticism."
46. The Applicant's position as to security for its costs changed in the course of the hearing. It was initially contended that, using powers under section 18(1)(b) of the Mental Capacity Act 2005, I should now make provision for the sums due in costs to be charged to AH's property. By the time of his closing submissions, Mr. Chandler sought instead an order authorising the present deputy to execute a charge in respect of costs due to the Applicant.
- H. The First Respondent's Position
47. The First Respondent Local Authority – whose authorised officer is now AH's deputy for property and affairs - "remains largely neutral" on the issues in these proceedings but is concerned, as current deputy, to "understand what debts AH has properly incurred to

be able to deal with that debt in her best interests” and to assist the Court where invited to do so. (**position statement paragraph 6**)

48. In Miss van Overdijk’s position statement it is asserted that:
- a. (at **paragraph 33**) “until 1st April 2017 PennTrust Ltd were required to apply to the Court for a specific order for detailed assessment of their costs as AH’s net assets were below £16 000 at all material times given the express definition of net assets provided in the PD.” No application was made, so the Deputy must seek retrospective authorisation.
 - b. (at **paragraph 36**) “unless the Court takes a different view to the PG”, since the current version of the PD took effect “the definition of ‘net assets’ remains unchanged...AH’s assets were below £16 000 at all material times ...If Penn Trust Ltd wish to charge more than fixed costs during this period, it must now seek retrospective authorisation from the court to allow their costs to be assessed by the SCCO....”
49. Miss van Overdijk addressed the Context Argument in oral submissions. She confirmed that there was no indication in the 2014 proceedings that the provision of PD19B in respect of “net assets” had been considered or raised; and that the Local Authority “follows the position of the Public Guardian.” She agreed that the starting point was the order itself but submitted that the Applicant’s approach makes the first sentence of paragraph 4 (re. fixed costs) “effectively redundant.”
50. Miss van Overdijk also addressed the Definition Argument in oral submissions, confirming her neutrality on the issue and declining to advance any positive argument.
51. In respect of the Best Interests Argument, Miss van Overdijk went into some detail about questions the current deputy has in respect of PennTrust Limited’s approach whilst acting as deputy:
- a. In summary, the questions boil down to “why did PennTrust Limited not disclose to the Local Authority the level of its fees so that they could be taken into account in the assessment of AH’s liability to pay care home fees?”¹
 - b. Miss van Overdijk referred to questions posed by e-mail in August 2019 [**127-128**] and the Applicant’s response [**129**] that the writer of the response was “*not prepared for my team to spend excessive time trawling through past papers and statements which are not reasonably needed for the new deputy to take over their duties.*”
 - c. The Local Authority’s suggestion is that “*it is difficult to tell if AH benefitted*” from the work which was done by PennTrust Ltd as deputy – no equity release

¹ By e-mail timed at 16.24 on 26th May 2020, Miss van Overdijk has confirmed to the Court and the other parties the dates when financial assessment took place and the information that would have been requested by the Local Authority. It is said that PennTrust Ltd “*did complete and return the forms but the evidence for Disability Related Expenses (“DRE”) was often missing or inaccurate.*”

scheme was in fact ever applied for, and AH's living arrangements remain unchanged.

52. However, Miss van Overdijk expressly accepted that "*a lot of avenues were pursued that were unsuccessful*" and stopped short of saying that such avenues should not have been pursued – "*All I can do is raise concerns.*" She suggested that the difficulties described by the Applicant are "*not that unusual*" and asked "*is the work really justifiable from the amount of money sought?*"
53. The First Respondent's position in respect of the application in respect of security for PennTrust Limited's costs was more forthright: the application is misconceived. Court of Protection orders may be enforced in the same way as orders of the High Court but the order which is being sought from the Court of Protection in these proceedings is not one which lends itself to enforcement by charging order. The order sought in these proceedings would grant retrospective authorisation to seek SCCO assessment but it would not confirm the debt. The debt is set out in the SCCO orders, which fall to be enforced through Part 70 of the CPR and civil proceedings.
54. Since the hearing, Miss van Overdijk has been able to take instructions on the Applicant's final position in respect of seeking a charge. By e-mail timed at 10.47 on 26th May 2020 she informed the Court and the other parties that:
 - a. any authority to the current deputy to execute a charge (on AH's property to secure a debt in respect of costs) should be set out in a separate order identifying "the specific sum chargeable in terms of assessed costs (totals as per the SCCO certificates, minus the amount already charged and paid out of AH's estate – exact figures to be confirmed by Penn Trust" and "a specific sum for unassessed costs for the period 7 October 2017 to 16 July 2019 (to be assessed by the SCCO)";
 - b. there should be a recital in the main order confirming that such separate order has been made "but that it is for the Deputy to action as appropriate in AH's best interests upon confirmation to the Deputy of the amount chargeable to AH";
 - c. there should be a further order that Penn Trust Limited is required to serve on the current deputy within a set timescale and at the time of submission to the SCCO, a copy of the application and bill of costs submitted to the SCCO (as the SCCO has advised the current deputy is appropriate.)

I. The Public Guardian's position

55. The Public Guardian "seeks no specific outcome in this matter." His approach has been to assist the Court by providing an explanation of the advice given to the other parties by his Office in his statutory role.
56. In essence, the Public Guardian's position is that "[a]s there has not been a ruling or notification of a policy change, the policy remains the same with regards to 'net assets' as it did in the previous PD." [133/position statement paragraph 32] This position is taken on the basis that "the removal of the footnote from PD19B is believed to be an omission rather than intentional." [131] The Public Guardian acknowledges that "removal of text from a previous version of a practice direction may in some

circumstances be of material significance” but “so far as the OPG has been able to ascertain there has been no guidance or explanation for the removal of the footnote definition.” Therefore “the OPG’s position is that it remains the same definition under the current PD19B as the old one.” (**position statement paragraph 26(d)**)

57. In respect of the Context Argument, the Public Guardian contends that “the order needs to be read in the context of the Practice Direction.” The 2014 deputyship order gave Penn Trust Limited “general authority” to have its costs assessed but “in line with PD19B (both versions) and the *Matrix* case, where AH’s net assets fall below £16 000 ... if they wished/wish to opt to have their costs assessed then specific further authorisation was/is required from the court.” (**position statement paragraph 26(b)**) In this case, there was no such specific authorisation.
58. Miss Whittington points out that paragraph 4 of the 2014 deputyship order is standard wording. She acknowledges that the Judge who made the order was clearly aware of the nature of AH’s estate but suggests the possibility that no one in the case addressed their mind to the provisions of the Practice Direction in respect of small estates.
59. Miss Whittington rejects any suggestion that the Public Guardian’s construction of the order renders the express provision for SCCO assessment otiose, on the basis that AH’s estate would be likely to vary over time – for example her property may have been sold.
60. In respect of the Definition Argument, the Public Guardian’s position (**position statement paragraph 32** and guidance to date) is that:
 - a. save for the missing footnote, the wording in respect of the £16 000 threshold is identical in the 2011-2017 version and the current version of the PD;
 - b. there is no additional legislation, guidance or case law of which the OPG is aware which suggests that the words “net assets” are intended to have any different meaning in the current PD19B to the express definition provided in the previous version;
 - c. removal of text from a previous version of a practice direction may in some circumstances be of material significance;
 - d. However, so far as the OPG has been able to ascertain there has been no guidance or explanation for the removal of the footnote definition. In the absence of some explanation of an intentional change, the words should have the same meaning as they were expressly defined to have previously.
61. In oral submissions Miss Whittington suggested that the logic of excluding a property which P occupies from the quantification of her assets for the purposes of costs entitlement is that P “doesn’t have access to that asset, so it is logical to protect that sum.” She further suggested that, whilst P is living in a property, “it’s likely that the property doesn’t require much management.”
62. In respect of the Best Interests Argument and the application for a charge to secure PennTrust Limited’s costs, the Public Guardian considers that each is outside the scope of his statutory role, and he therefore takes a neutral position. (**position statement paragraphs 33 and 34**)

J. Discussion

63. *The Definition Argument: does the express definition of “net assets” in the old version of PD19B ‘carry over’ into the current version?*
64. As all the parties agreed when asked, the ordinary accounting meaning of the term “net assets” is “total assets minus total liabilities.” By excluding land or property which is occupied by P or P’s dependents from the tally of P’s assets, the 2011 – 2017 version of PD19B adopts its own specific meaning for an otherwise common term.
65. The Public Guardian’s position in these proceedings rests on the proposition that, once a term has been defined in a particular context, even if the definition ceases to be express, in the absence of authority otherwise the definition simply ‘carries over’ in the same context.
66. Although the Public Guardian’s approach has a simple logic, in my judgment it is not persuasive. An equally simple logic runs in exactly the opposite direction: where there was previously a specific definition but now it has been removed, in absence of authority otherwise, removal means the specific definition does not carry over.
67. It is helpful to consider the various versions of PD19B over a longer timescale. In defining the term “net assets” at all, the 2011-17 version is the outlier. Neither the earlier versions, nor indeed the pre-Mental Capacity Act equivalent, adopted that approach. In the absence of specific definition, the ordinary meaning of the language used must have applied.
68. Was there a reason why the definition was introduced into the 2011-2017 version? The parties have not been able to provide any explanation.
69. Miss Whittington suggests that it may have been intended to “protect” assets to which Ps themselves do not have access. This interpretation has attractions but, in my judgment, it is not compelling because:
- a. it confuses the quantification of deputyship costs with their enforcement. (It is notable that, even whilst believing that management costs of AH’s estate were not limited by the “net assets” definition of the 2011-17 Practice Direction, PennTrust Ltd has taken no step in respect of AH’s property or her occupation of it from which it could be said that AH should have been “protected”);
 - b. there are more effective ways of protecting P’s home than defining how costs are quantified - such as excluding from the deputy’s powers any authority to sell or charge P’s property. (In fact, there was no such exclusion in PennTrust Ltd’s deputyship order in this matter, and the level of the security requirement indicates that sale of the property was clearly considered as a possibility.)
70. Ms. Whittington further suggests that the definition in the 2011- 2017 version of PD19B may be explained by the consideration that, whilst P is living in a property, “it’s likely that the property does not require much management.” Experience suggests that this is too simplistic. When P is living in a property there are the ordinary day to day management issues which can indeed usually be arranged to operate smoothly (by direct debits etc) but there may also be one-off or sustained issues which require a lot of

management decisions (eg urgent repairs, dispute as to title or interest, adaptations to meet increasing needs, sale for 'downsizing').

71. Having included a specific definition of an otherwise common term in the 2011 – 17 version of the Practice Direction, why was no definition included in the current version? Again, the parties are unable to offer an explanation. Given that the current version follows so closely the terms of its predecessor, in my judgment it is difficult to see the limited points of difference as other than deliberate.
72. So, in respect of the definition argument, I am not persuaded to adopt the Public Guardian's approach. In my judgment, the definition from the 2011-17 version of Practice Direction 19B does not somehow "carry over" into the current version from which it is omitted. The term "net assets" in the version of PD19B effective from 1st April 2017 falls to be interpreted according to the ordinary meaning of the phrase, as "total assets minus total liabilities."
73. It follows that, for the periods 2016/17 and until discharge of PennTrust Ltds' deputyship order, the value of AH's net assets (within the meaning of the Practice Direction then current) were above £16 000, and the restriction at paragraph 12 does not apply. Therefore PennTrust Ltd already has sufficient authority, pursuant to paragraph 4 of the deputyship order, to seek SCCO assessment of those costs.
74. For the earlier periods (2014/15 and 2015/16), it is common ground that the version of PD19B which includes specific definition of the term "net assets" applied to the PennTrust Ltd deputyship in this matter. In respect of those costs, it is necessary therefore to consider next the context argument on which PennTrust Ltd relies.
75. *The Context Argument: was the authority granted to PennTrust Ltd to seek SCCO assessment "a specific order" for the purposes of paragraph 11 of the old version of PD19B?*
76. The Practice Direction states that "...if P's net assets are below £16 00... the option for detailed assessment will only arise if the court makes a specific order for detailed assessment in relation to an estate with net assets of a value of less than £16 000." This wording leaves no doubt that, in principle, being authorised to seek SCCO assessment where net assets are below £16 000 is possible. The argument in this matter is whether the required "specificity" has to be in the determination, or the wording, of the order.
77. At paragraphs 74 - 78 of the *Matrix* judgment, the Court was expressly considering circumstances where the option to seek SCCO assessment was "granted at a time when an estate exceeded £16000" but it "subsequently falls below £16 000." Where an estate has dwindled since the costs authority was granted, it is indeed "a sensible protective measure" to require that at a particular threshold (£16 000) the deputy "should be obliged to explain to the court why" the more expensive costs regime remains appropriate. However, the circumstances in this matter are materially different. AH's estate was already less than £16 000 (as defined by the Practice Direction at the time) when the deputyship order was made. Where the costs authority is being determined in circumstances when the estate is already below the threshold, the court is already considering whether the more expensive costs regime is appropriate in relation to a small estate – from the outset - and there is no need for further protective opportunity.

78. Most property and affairs deputyship orders are made “on the papers” after consideration of a formal COP1 application, where the details of P’s estate are set out in a supporting form COP1A. The costs authorisations are part of the determination. The basis of the decision may be traced by reference to the paperwork. Any lack of clarity in the terms of the deputyship order can and should be quickly questioned by a COP9 application for reconsideration.
79. In this matter, the process was rather different. A highly experienced District Judge decided to make the property and affairs deputyship order “of the court’s own motion” (which was properly within his powers under the Mental Capacity Act), when he perceived a need whilst considering a different sort of application at an attended hearing.
80. It is clear from the attendance note of the hearing in August 2014 that the District Judge was:
 - a. fully aware of the background of family disputes in respect of AH;
 - b. fully aware of the size and nature of AH’s estate (and specifically that her liquid assets were minimal but she also owned a property where she lived); and
 - c. fully aware of the need to keep the costs of managing AH’s finances under control.
81. So it is very clear that, in this particular matter, the District Judge authorised the option of SCCO assessment specifically “*in relation to an estate with net assets of a value of less than £16000*” (within the definition of the version of Practice Direction then in effect.) What he did not do was spell that out explicitly in the wording of the order. (Miss Whittington may be right when she suggests that no one involved in the case actually addressed their mind to paragraph 11 of PD19B by name.)
82. In my judgment, the wording of the Practice Direction is ambiguous. An order may be “*a specific order for detailed assessment in relation to an estate with net assets of a value less than £16 000*” either by explicitly stating that fact, or by being made in that specific context.
83. In reaching that conclusion, I am persuaded in particular by the following considerations:
 - a. As Mr. Chandler points out, the contrary conclusion would require this particular order to be understood, in respect of authorisation to seek SCCO assessment, as meaning the antithesis of what the plain words say. That is not a workable approach to court orders.
 - b. Miss Whittington sought to suggest that the authorisation for SCCO assessment in this order would not be completely otiose, even if not effective whilst the estate remains as the judge settling the terms of the order knew it to be, because circumstances might change - in particular, AH’s house may be sold. In my judgment, that argument is not persuasive. It still requires the order to be construed – until that change of circumstances – as meaning the opposite of its plain words. Moreover, it seems to me rather perverse to argue at once both that the plain words of the order when made do not have any practical meaning because the quantification of the deputy’s costs should be restricted to protect AH’s occupation of her home; but also that an authority to seek more generous

quantification of costs would be effective when P's house is sold. Such an interpretation entails an inherent incentive to the deputy to sell the house. The second argument effectively undermines the first.

- c. I am not persuaded by Miss van Overdijk's submission that my conclusion renders the first sentence of paragraph 4 of the deputyship order "effectively redundant." It was always open to PennTrust Ltd to choose fixed costs if preferred. The limited likelihood that the deputy would do so does not make it any less a choice.
 - d. There is a material difference between an order being made in a specific context (as here, that AH's estate was within the definition of less than £16 000) and circumstances changing since an order was made (as considered in *Matrix*, where a larger estate has dwindled to a net value of less than £16000 *since* authorisations were determined.) The arguments in favour of further protective opportunity set out in *Matrix* do not apply where the Court's initial consideration is already in the circumstances where protection is considered necessary.
84. It follows that, in all the circumstances of this particular matter, I am satisfied that the context in which the order (including authorisation for SCCO assessment) was made is sufficient specificity for the purposes of paragraph 11 of the 2011-17 version of Practice Direction 19B. PennTrust Ltd therefore always had the necessary authority to seek SCCO assessment of their 2014/15 and 2015/16 costs.
85. I acknowledge that there are obvious disadvantages to not having explicitly recorded the context of the SCCO authorisation in this matter (and corresponding appeal in the Public Guardian's approach). It has allowed scope for doubt and argument, which have been resolved by reference to an attendance note not previously available to all relevant persons. Those disadvantages do not alter the fact that this order was specifically made "*in relation to an estate with net assets of a value of less than £16 000*" (as defined in the Practice Direction effective at the time) but they do illustrate the need for greater clarity in the future.
86. Going forwards, to avoid the necessity for proceedings such as these, where a deputy is appointed in respect of a net estate worth – at the time of appointment - less than £16 000 (within the meaning current at the time of appointment) but with authority to seek SCCO assessment, the decision-maker (either judge or Authorised Court Officer) should make explicit reference to the nature of the estate and paragraph 12 of PD19B in the wording of the order (as has been the practice at the central registry for some time.) Additionally, the deputy should check the terms of the costs authorisation carefully on first receipt of the order. If it includes the option of SCCO assessment but does not expressly confirm that such authorisation applies even where the net estate is worth less than £16 000 for the purposes of paragraph 12 of Practice Direction 19B, the deputy should make a speedy COP9 application pursuant to Rule 13.4 of the Court of Protection Rules 2017 for reconsideration. Such an approach would be of minimal cost to P and would avoid future argument.

87. *The Best Interests Argument: should PennTrust Ltd now be granted authority (with retrospective effect) to obtain SCCO assessment of costs incurred in respect of management of AH's estate in the periods 2014/2015 and 2015/2016?*
88. It follows from the conclusions above that, since PennTrust Ltd already had authority to seek SCCO assessment for the entire period of the deputyship, it is not necessary to consider whether granting such authority now, with retrospective effect, would be in the best interests of AH. However, for the avoidance of doubt, I am so satisfied.
89. As a panel deputy, PennTrust Ltd was asked by the Court to take on deputyship for AH. I am satisfied that the deputyship was not a straightforward one. Even though some avenues of investigation pursued by the deputy were ultimately not given effect, there is nothing before me to suggest that such investigations were not appropriately pursued at the time. Sometimes establishing what is possible entails working out what is not possible. I bear in mind that there have been two applications to the Court, with no suggestion of any concern that PennTrust Ltd was acting inappropriately. Work has clearly been done on AH's behalf, and she has had the benefit of that. Any questions about whether fees claimed for are appropriate can properly be addressed through independent assessment by the SCCO. For the avoidance of doubt, in this matter I am satisfied that, had it been necessary to authorise assessment of PennTrust Ltd's costs retrospectively, it would have been appropriate to do so.
90. *The application in respect of a charge to secure assessed costs:* In my judgment, Miss van Overdijk's analysis of this part of the application is entirely correct. Indeed, in its change of position during the course of the hearing, PennTrust Ltd seems now to accept that too.
91. The management of AH's funds is now the responsibility of the authorised officer of West Berkshire District Council. The current deputy may take the view that it is in the best interests of AH to manage her debt to her former deputy by securing it against her property. If the Court agrees, the Court could authorise that. Miss van Overdijk has set out the structure of the order which would be required.
92. However, at present, AH's debt to PennTrust Ltd has still to be quantified. There seems to be a possibility that the arrangements for AH's residence will change, and her property be sold, before the debt is quantified. I am therefore not presently satisfied that it is in the best interests of AH that her current deputy is authorised to execute a charge on her property. The process may yet turn out to be an unnecessary expense to AH.
93. Instead, the emphasis now should be on the prompt resolution of such issues as remain outstanding. So, if (as seems likely) PennTrust Ltd wishes to have their costs for the period 2017/2018 and until discharge of their appointment assessed, it should make the application to the SCCO no later than 1st October 2020. It must provide to the current deputy a copy of the bill and the application at the same time as making the application to the SCCO; and further provide a copy of the final SCCO order within 7 days of receipt.
94. Once AH's debt to her former deputy is quantified, the current deputy will need to consider how to deal with it in the best interests of AH. The current and former deputies are encouraged to communicate directly with a view to agreeing an appropriate approach. If, in the circumstances of AH's residence arrangements then in place and in the light of any other options for settling the debt, the current deputy considers that securing the debt

on AH's property would be in her best interests, the Court can give the matter further consideration. The current deputy should make an application on form COP9 (in view of these proceedings, any requirement to file COP1 may be dispensed with) with a COP24 statement in support, no later than eight weeks after being notified of the SCCO determination. (Any such application shall be reserved for consideration by me if possible.)

K. Conclusions

95. Taking each of the issues identified at paragraph 20 above in turn:
- a. Yes, it is clear from the attendance note of the August 2014 hearing that the authorisation to seek SCCO assessment at paragraph 4 of the deputyship order was granted specifically in relation to an estate with net assets (as then defined by the Practice Direction) less than £16 000; and so the Applicant was always authorised to obtain SCCO assessment of its costs.
 - b. In my judgment, "net assets" for the purposes of PD19B as applicable to professional deputy costs for remuneration periods ending on or after 1 April 2017 should be understood to have its ordinary meaning of "total assets less total liabilities." P's occupation of property does not exclude it from the quantification of assets for the purposes of the Practice Direction. (Realisation of such costs is a separate issue.)
 - c. In this matter, it is not necessary to grant retrospective authorisation in relation to any fees already assessed or further authorisation in relation to the as yet unassessed fees of PennTrust Ltd.
 - d. If PennTrust Ltd. seeks any further SCCO assessment of its costs, it should make the application to the SCCO no later than 1st October 2020. It must provide to the current deputy a copy of the bill and the application at the same time as making the application to the SCCO, and a copy of the final SCCO order within 7 days of receipt. Once AH's debt to her former deputy is quantified, if the current deputy seeks authority to secure the debt on AH's property, the current deputy should make an application on form COP9 with a COP24 statement in support, no later than eight weeks after being notified of the SCCO determination. (Any such application shall be reserved for consideration by me if possible.)
96. I would be most grateful if the parties could draft (and preferably agree) the wording of an order which gives effect to these conclusions.
97. Going forwards, it is not commonly the case that costs of deputyship higher than the fixed rate regime will be appropriate where P's assets are less than £16 000 but such cases do occur. In order to avoid the need for proceedings of this type in the future, where a deputy is appointed in respect of such an estate but with authority to seek SCCO assessment of their costs, the authorisation should explicitly state that it applies in the context of such an estate. If those are the circumstances when the appointment is made but the order does

not explicitly confirm it, the deputy should make an application for clarification promptly upon the order being issued.

HHJ Hilder



IN THE HIGH COURT OF JUSTICE

SCCO Refs: 13080340, 12177963,

SENIOR COURTS COSTS OFFICE

11775290, 11620036

FROM THE COURT OF PROTECTION

Thomas More Building, Royal Courts of Justice

London, WC2A 2LL

Date: 30th September 2020

Before

Master Whalan

In The Matters Of:

- 1. PLK**
- 2. Aayan Ahmed Thakur**
- 3. Nathaniel Chapman**
- 4. Paul Nigel Tate**

Mr Richard Wilcock, counsel, instructed by Clarion Solicitors Limited (t/a Clarion), costs solicitors for all four applicants.

Hearing date: 26th May 2020

Judgment Approved by the court

Master Whalan

Introduction

1. These assessments raise a common point of principle applicable to the decisions of Costs Officers and Costs Judges when assessing costs incurred in the Court of Protection ('COP') by a court appointed Deputy (and his/her associates) in the general management of the affairs of a protected party. The issue for determination concerns the method of assessment of the hourly rates claimed by Deputies. It is the applicants' submission that the court's current approach which, broadly speaking, relies on the application of the Guidelines Hourly Rates ('GHR') approved by the Costs Committee of the Civil Justice Council is, by 2020, incorrect and unjust. Instead the assessment of COP work should be predicated on a more flexible exercise of the discretion conferred by CPR 44.3(3), whereby the GHR are utilised as merely a 'starting point' and not a 'starting and end point'.

Cases for assessment

2. The court has consolidated the assessments in four cases that are chosen to represent the costs claimed by Deputies in different parts of England, in the management of the affairs of protected parties who had sustained significant brain or birth injuries.

PLK

3. The protected party is an adult male who sustained an injury at birth. He received damages of £5,649,938.50. The Deputy is Alexander Wright of Boyes Turner LLP, Reading. The bill claims £28,974.34 (including VAT) for the period 21st July 2018 to 27th February 2019. The hourly rates claimed are:

A	£284.00
B.	£252.00
C.	£211.00
D.	£155.00

Aayan Ahmed Thakur

4. The protected party is a 9 year old boy who suffered brain damage at birth. His estate is worth in excess of £12,000,000. The Deputy is Chris Proxamatis of Gillhams Solicitors LLP, Golders Green, London, NW11. The bill claims £50,113.32 (including VAT) for the period 19th September 2018 to 18th September 2019. The hourly rates claimed are:

A	£350.00
D	£159.00

Nathanial Chapman

5. The protected party sustained a significant head injury in a cycling accident which aggravated underlying mental health issues, including schizophrenia. He received damages in 2014 of £2,325,000, plus periodical payments of £75,000 pa, which are indexed linked. The Deputy is Lynne Bradey of Wrigleys Trustees Limited, Sheffield. The bill claims £40,672.58 (including VAT) for the period 20th August 2018 to 19th August 2019. The hourly rates claimed are:

A	£263.00
B.	£232.00
C.	£191.00
D.	£145.00

Paul Nigel Tate

6. The protected party was 11 years old when he sustained a serious brain injury when he was hit by a bus. The claim settled in about 2011 for a lump-sum award of £4,000,000. The Deputy is Natasha Molloy of Freeths LLP, Nottingham. The bill claims £123,764.74 (including VAT) for the period 12th December 2017 to 11th December 2018. The hourly rates claimed are:

A	£284.00
B.	£252.00
C.	£211.00
D.	£155.00

7. The bills in all four cases were drafted by Clarion and the hourly rates claimed are based on the GHR of 2010 plus a percentage uplift to reflect RPI inflation (of approximately 31%) between 2010 and 2019.

The Civil Procedure Rules ('CPR')

8. COP costs are assessed by reference to the relevant factors set out in CPR 44.4(3), entitled 'Factors to be taken into account in deciding the amount of costs', as applied by rule 19.6 of the Court of Protection Rules 2017. The relevant factors listed in CPR 44.4(3) are:

- (b) *the amount or value of any money or property involved;*
- (c) *the importance of the matter to all the parties;*
- (d) *the particular complexity of the matter or the difficulty or novelty of the questions raised;*
- (e) *the skill, effort, specialised knowledge and responsibility involved;*
- (f) *the time spent on the case;*
- (g) *the place where and the circumstances in which work or any part of it was done.*

Guideline Hourly Rates

9. Guideline Hourly Rates were issued originally by the Supreme Courts Costs Office as part of its Guide to the Summary Assessment of Costs. Revised rates were issued regularly by the SCCO until 2006. Revisions from 2007 were issued by the Master

of the Rolls following reports from the Advisory Committee on Civil Costs. These revisions were based primarily on inflation rate rises. The last revision occurred in 2010. The GHR rates are set out in a table which is made up of grades of fee earner and geographical bands. The rates are as follows:

Year	Guideline Hourly Rates 2010			
Bands	A	B	C	D
London	£409	£296	£226	£138
London 2	£317	£242	£196	£126
London 3	£229-267	£172-229	£165	£121
National 1	£217	£192	£161	£118
National 2	£201	£117	£146	£111

10. In 2010 the responsibility for the GHR passed from the ACC to the Costs Committee of the Civil Justice Council. Subsequently the Costs Committee was instructed to analyse the GHR by conducting ‘a comprehensive, evidence-based review of the nature of the Guideline Hourly Rates and to make recommendations to the Master of the Rolls’. In May 2014 the Committee reported that the datum which had been gathered in respect of GHR was insufficiently strong to form the basis of a comprehensive, evidence-based review. As such, the GHR have not been revised since 2010.

11. The failure to revise the GHR since 2010 has attracted adverse comment from within the legal profession and, more recently, from the senior judiciary. In Ohpen Operations UK Limited v. Invesco Fund Managers Limited [2019] EWHC 2504 (TCC), for example, O’Farrell J. made a ruling on costs after granting the defendant’s application for the claim to be stayed pending compliance by the parties with an agreed dispute resolution procedure. The defendant’s costs were £52,152 and the claimant submitted that the defendant’s solicitors’ hourly rates were unreasonably high. O’Farrell J. commented (at paragraph 14) that:

It is unsatisfactory that the guidelines are based on rates fixed in 2010 and reviewed in 2014, as they are not helpful in determining reasonable rates in 2019. The guideline rates are significantly lower than the current hourly rates

in many London City solicitors, as used by both parties in this case. Further, updated guidelines would be very welcome.

12. In 2020, the Civil Justice Council established a Guideline Hourly Rates Working Group chaired by Mr Justice Stewart QC. Stewart J. is currently gathering evidence which includes details of the hourly rates claimed and allowed by Costs Judges and Costs Officers on detailed assessments for a three month period between 1st September and 27th November 2020. When all the relevant evidence is received and collated, the Working Group will make recommendations to the Master of the Rolls. Reports in the media have suggested that this process may be completed by the end of 2020, but it seems to me that this timescale may prove to be optimistic.

Case guidance

13. In recent years, the assessment of hourly rates in COP cases have been directed by the decisions in three SCCO cases.
14. In Re: Michael Ashton [2006], 31st July 2006, Master O'Hare determined the hourly rates applicable to a 'Specialist Support Services Manager' following a provisional assessment by a Costs Officer. At paragraph 17 of his judgment, Master O'Hare made a number of general observations concerning hourly rates in COP matters:

As the solicitors in this case recognise there are several reasons why hourly rates which are appropriate for receivers and their staff in most Court of Protection matters will be lower than the rates for other work. General management work of a receiver usually has lower levels of urgency and adrenaline than compared with other work. Although the decisions which have to be made can sometimes be of the greatest importance and can merit the most anxious consideration a solicitor receiver and his staff have greater autonomy than their equivalents in other work. There is also the fact that especially in a larger estate such as this the receiver will produce a steady stream of work.

The convention that was applied following Ashton was that Costs Officers in assessing Court of Protection bills generally applied hourly rates that approximated (albeit very broadly) to 90% of the GHR.

15. In Re: Smith and others [2007] EWHC 90088 (Costs), Master Haworth determined six consolidated appeals from Costs Officers in respect of the hourly rates allowed to COP Receivers. The appellants were represented by two senior costs counsel, Mr N. Bacon and Mr A. Post, who submitted that the decision in Ashton (ibid) was not a persuasive authority and, in any event, that it had been determined incorrectly. Master Haworth allowed the appeals and in respect of each of the cases applied in 'the relevant guideline rate for the appropriate locality where the work was done for

the grade of fee earner who carried out that work' (paragraph 56). Master Haworth's reasoning is summarised at paragraphs 51-53 of his judgment:

51. I accept the submissions made to me by both Mr Post and Mr Bacon with regard to the fact that there should be both consistency and certainty in relation to the costs which those lawyers and their clerks who act as receivers in Court of Protection work are to be remunerated. Court of Protection work in many respects is no different from modern litigation where it is incumbent upon a solicitor receiver to act with economy in relation to the work to be done, to plan and advance that work, the appropriate level of person to carry out that work, the overall time which will be necessary and appropriate to spend on the various stages of that work in dealing with the patient's affairs.
52. I accept the evidence of Ms Fox with regard to the work of a professional receiver set out in her note of 15 February 2007, that by the very nature of the patient the work can be stressful, relentless and that crisis are commonplace. The receiver is not dealing with a client who can give instructions but must act on his or her own initiative. In that respect I accept that the receiver takes on a greater not a lesser level of responsibility and must apply his or her own judgement to matters which in other fields the lawyer would seek specific instruction from his or her client. I accept that greater autonomy in fact results in greater responsibility and the need for greater skill and expertise not less.
53. I also find that substantial elements of day-to-day general management work are mundane and routine, once the receiver has provided overall direction as to the issues which are to be dealt with. In that respect it is incumbent upon the receiver to pass that work down to a lower but relevant level of grade of fee earner to be implemented. In relation to that work the receiver cannot expect to be remunerated at anything like the level of his or her own expertise. Mr Bacon accepted and I find that it is entirely possible for a receiver to reclassify and downgrade (where appropriate) his or her own staff within the bands provided in Appendix 2 to the Guide of Summary Assessment in order that general management work is dealt with with the utmost economy and expedition by the appropriate level of fee earner in individual cases. The issue as to the appropriate status or grade of fee earner for the work in question will always be a matter for discretion when Costs Officers and/or Costs Judges are assessing a receiver's general management costs.

Accordingly in Smith the court allowed the GHR, as claimed, as opposed to rates that were lower than the GHR, as contended for by the Respondents to the appeals.

Since 2007, therefore, Costs Officers have generally (Mr Wilcock submits ‘slavishly’) applied the GHR in assessing the vast majority of COP bills of costs.

16. In Yazid Yahiaoui and others [2014], January 2014, Master Haworth followed (in so far as he felt no reason to depart from) his judgment in Smith (ibid), but he added that ‘blended hourly rates’ could be applied reasonably and appropriately ‘where work is being carried out either as a team or by an individual that spans work that would normally be dealt with by a Grade B, C or D fee earner’.

Hearing of the preliminary issue

17. The hearing of the preliminary issue was conducted (remotely) on 26th May 2010. Mr Wilcock, counsel for the applicants, attended and made oral submissions; his Skeleton Argument is dated 21st May 2020. Also in attendance were Mr Russell Caller, Mr Alexander Wright, Ms Molloy and Ms Stephanie Kaye, Costs Provider.
18. I was provided with the written statements of six witnesses: Mr Russell Caller, dated 11th May 2020, a Solicitor and Director of Court of Protection Services at Gillhams Solicitors LLP; Ms Lynne Bradey, dated 12th May 2020, a Solicitor and Partner at Wrigleys Solicitors LLP, Ms Natasha Molloy, dated 12th May 2020, a Solicitor, Partner and Head of the COP Team at Freeths LLP, Nottingham; Mr Alexander Wright, dated 12th May 2020, a Solicitor and Senior Associate in the Court of Protection Team at Boyes Turner LLP, Ms Stacey Bryant, dated 13th May 2020, Legal Director and Head of the COP Team at Enable Law, Plymouth; and Mr Simon Hardy, dated 15th May 2020, a Solicitor, Partner and Head of the COP Team at Kingsley Napley LLP. Messrs Caller and Wright are also Directors of The Professional Deputies Forum (‘PDF’), a professional association with a large and expanding membership of professional COP Deputies.
19. The hearing bundle (paginated 1-307) also contains the following evidence: a ‘Briefing Paper on the financial sustainability of professional deputies’, drafted by the PDF (undated) (pp 9-14); a ‘Report on Non-chargeable Activities for COP Work’, drafted by Clarion and dated May 2020 (pp 298-306); a report entitled ‘SCCO Guideline Rates and the Impact of Inflation’, drafted by Brown Shipley & Co. dated October 2019 (pp1-8); and the guide ‘Deputy standards, Professional deputies’, issued by the Office of the Public Guardian in July 2015 (un-paginated).
20. I have considered all this written material carefully and I refer (where it is necessary and relevant to do so) to the matters raised therein during the course of my analysis and conclusions set out below.

The Deputy’s Submissions

21. Mr Wilcock, counsel for the applicants, advances two broad submissions, described as the 'primary' and 'secondary' arguments.
22. First, the court should assess the hourly rates claimed in COP bills by reference to the relevant factors in CPR 44.4(3). In doing so, the court should not 'slavishly' follow and apply the GHR, but should instead use them as a starting point for an unfettered assessment conducted 'by reference to the Court's judicial experience' (SA, paragraph 36). COP work should be recognised as 'esoteric' and specialised, and clearly not 'run of the mill'. This speciality, combined with the fact that 'they carry, in general, higher overheads, including increasing overhead time', means that a straightforward application of the GHR is unreasonable. At best, the GHR should be no more than a starting point for an assessment which, by reference to the 44.4(3) factors, should usually lead to the endorsement of higher hourly rates.
23. Secondly, or alternatively, if the court feels it desirable to use the GHR as a 'starting point' – described as 'a skeletal framework in which to assess the hourly rate' (SA, paragraph 43) – then it must apply an empirical uplift to reflect the incidence of inflation between 2010 and 2019. This should be based on RPI inflation, as utilised in the Brown Shipley report, and not CPI inflation. RPI inflation between 2010 and 2019 is approximately 31%, whereas the CPI increase is approximately 21%. This is something of a 'blunt approach', but it reflects the practise invoked prior to 2010 and is the approach endorsed by experienced commentators such as Dr Mark Friston, the author of *Friston on Costs* (SA, paragraph 46).

My analysis and conclusions

24. Two preliminary observations inform my initial analysis of the applicants' primary submission. The first recognises the importance of both consistency and certainty in relation to the assessment of COP costs. The importance of judicial consistency is, of course, axiomatic, but it assumes a particular relevance in the COP, where the protected party's assets very often derive from an award of damages. If COP costs are not predictable accurately, then a protected party's legal representatives will be unable to plead or assess quantum accurately in any substantive inter partes litigation. The second point recognises that the assessment of COP costs is a role undertaken primarily by Costs Officers. The SCCO processes over 8000 COP bills annually and the vast majority (certainly over 95% of the total) are assessed by Costs Officers. They comprise a specialist team that has amassed considerable experience in COP costs. They also they have the benefit of mature leadership and attentive judicial oversight. Yet the Costs Officer's general experience is limited necessarily, so that it cannot really be said they have the broad 'judicial experience' in applying CPR 44.4(3) as anticipated by Mr Wilcock at paragraph 36 of his Skeleton Argument.
25. The applicants' primary argument then rests substantially on the assertion of 'specialism' and the incidence (both atypical and increasing) of 'overhead time and expense'.

26. It is clear that COP work comprises a discrete area of professional practice, so that Deputies tend to work (over many years) in this area exclusively. The work is often (but not invariably) complex and the amount of money or property involved in the management of a protected party's assets is generally high. Protected parties can be difficult and time consuming clients and this often imposes a considerable burden of responsibility on Deputies. It is likely that the role of Deputy has become more complicated over the years, particularly after the implementation of the Mental Capacity Act 2005. But this reality was recognised by Master Haworth in Smith (ibid), when he acknowledged that 'the work can be stressful, relentless and that crisis are commonplace' (paragraph 52). Mr Wilcock criticises Master Haworth's suggestion that 'substantial elements of general management COP work is mundane and routine' (SA, paragraph 24), but the priority he gives to this observation is, in my view, mistaken. Master Haworth stated that many aspects of the day-to-day general management of a protected party's interests are routine, but this does not detract materially from his acknowledgment of the significant responsibility undertaken by a deputy in overseeing a large estate over many years. This issue, in any event, is more relevant to the determination of the appropriate status or grade of fee earner for the work in question, rather than the calculation of hourly rates generally.
27. The witnesses adduce some evidence concerning the incidence of 'overhead time' in COP work. Overhead time is defined as non-chargeable time resulting from costs which are either not claimed in the bill or disallowed on assessment. Mr Wilcock submits that the parties have 'produced significant evidence of the increase in hard and soft overheads' (SA, paragraph 45). Boyes Turner LLP estimates that its COP team 'spends 28% of its time on activities that are deemed as overheads' (Wright, 38). Freeths LLP COP Team in Nottingham estimates overhead time of 25% at Grade A, rising to 40-50% for Grade D (Molloy, 59). Wrigleys Solicitors LLP of Sheffield estimate the overhead time to be 'on average 19.83% of our costs per matter' (Bradey, 15). Clarion Solicitors Limited prepare 'circa. 2000 COP bills for assessment' per annum', almost 25% of the total assessed by the SCCO. Their estimate, having analysed ten files selected randomly, suggests that the time written off as overheads averages 13.1% per file. This small statistical snapshot, therefore, exhibits some considerable variation, an inconsistency that may well be firm or case specific. Given the broad experience of Clarion, that firm's findings may constitute the most accurate assessment of overhead time.
28. The witness evidence also produces evidence as to the incidence and/or increasing burden of overhead expenditure. Boyes Turner LLP states that COP overheads have increased by 18% since 2010 (Wright, 28). Anthony Collins Solicitors of Birmingham cite an increase of 64.5% in overhead costs since 2010 'on a per head basis' (Caller, 11, RAC 5). Freeths LLP of Nottingham, on the other hand, cite an overall increase of overheads of 8.4% between 2010/11 and 2018/19 (Molloy, 24). Slater & Gordon, who have 'one of the largest Court of Protection departments in the UK', suggest an increase in overheads of 30% (Caller, 10, RAC 4). Again, therefore, the datum exhibits an inconsistent pattern with, at the very least, some considerable geographical variation. It seems to me, in fact, that each estimate is likely to be dependent on factors that are specific to each individual firm, in circumstances where the relevant components may or may not be included in the

evidence. Enable Law of Plymouth, for example, estimates that its overheads increased by 67.57% between April 2014 and April 2019, but this corresponds to an increase in turnover of 61.06% over the same period (Bryant, 9, 10), meaning that the latter may explain the former. Anthony Gold cite an increase in overhead costs of 7% from 2010, ‘despite our firm making some savings on support staff with restructuring and on premises’ (Caller, 14, RAC 8). Perhaps the most illustrative response was that of Kingsley Napley LLP of London EC1, who reported that they cannot report on overheads since 2010 ‘as the department and indeed the firm has changed so much since that time that no reliable comparison can be drawn’ (Hardy, 10).

29. Ultimately I am not satisfied that the evidence supports Mr Wilcock’s contention that COP firms have experienced ‘a significant increase in hard and soft overheads’ (SA, 45). The evidence, both in respect of time and expenditure, is inconsistent and, in my view, incomplete. Nor am I persuaded by the submission made in the oral hearing that ‘it is clear that no other area of practice requires such a level of unrecoverable time’. So far as the datum is consistent and stable – and, as noted, the most reliable figures are probably those produced by Clarion – it suggests a comparatively modest incidence of time and expenditure. However reliable the figures produced may be, they do not, in my view, demonstrate that the burden is one that is exclusive to COP work or that it is atypically high in comparison with that experienced by practitioners in comparable areas of practice. Fee earners in personal injury, medical and professional negligence, for example, incur invariably time and expense that is irrecoverable, in marketing, accessing cases that are not proceeded with or, indeed, pursued and lost. These are burdens which do not apply to Deputy’s sources of work (on a case by case basis) which is often consistent and predictable over many years.
30. I am not, therefore, persuaded by the applicants’ primary argument. I find that the approach set out by Master Howarth in Smith (ibid) and confirmed in Yazid (ibid) is still correct and applicable for the assessment of hourly rates in COP bills. Every assessment is conducted by reference to the procedural guidance set out in CPR 44.3(3). Although the GHR is adopted properly as a ‘starting point’, most COP bills will be properly assessed by Costs Officers, who will apply the relevant GHR unless there is good reason to depart from them. Some bills – in the future, as now, a small minority of the total – will be forwarded to Costs Judges for assessment, mainly because the total sum claimed is large or because the assessment raises a particular point of difficulty or complexity. Then, as now, Costs Judges may depart from the GHR if there is a good, case specific reason for doing so. In general, however, COP assessments can be conducted by Costs Officers utilising the GHR as the reasonable hourly rate. The issue as to the appropriate status or grade of fee earner for the work in question will always be a matter for discretion of Costs Officers and/or Costs Judges.
31. Three preliminary observations then inform my initial approach to the applicants’ secondary argument. First, it should be emphasised from the outset that this court has no power to review or amend the GHR, either formally or informally, as this role is the exclusive preserve of the Civil Justice Council. This reality is recognised

properly by Mr Wilcock in his written and oral submissions. Secondly, while the court has received submissions concerning the application of an inflationary uplift when applying the GHR, this is not just a ‘blunt tool’, but an approach which endorses the application of a practise which has been rejected explicitly since 2014, from which time the emphasis has been on a ‘comprehensive, evidence based review’. Thirdly, however, it must be acknowledged that the GHR cannot be applied fairly as an index of reasonable remuneration unless these rates are subject to some form of periodic, upwards review. O’Farrell J. in Ohpen (ibid) observed that it ‘is unsatisfactory that the guidelines are based on rates fixed in 2010’ as these ‘are not helpful in determining reasonable rates in 2019’. These observations were made in the context of an assessment of London City solicitor rates in an assessment where the court was not bound by the GHR. It seems clear to me that the failure to review the GHR since 2010 constitutes an omission which is not simply regrettable but seriously problematic where the GHR form the ‘going rates’ applied on assessment. I do not merely express some empathy for Deputies engaged in COP work, I recognise also the force in the submission that the failure to review the GHR since 2010 threatens the viability of work that is fundamental to the operation of the COP and the court system generally.

32. In support of the secondary argument the applicants have filed evidence of RPI inflation between 2010 and 2019, and of salary increases in various COP firms over the same period.
33. The Brown Shipley & Co. report entitled ‘SCCO Guideline Rates and the Impact of Inflation’ and dated October 2019 demonstrates an RPI inflation rate increase of 31% between 2010 and the end of 2018. The hourly rates claimed in the bills drafted by Clarion and considered in this assessment all apply RPI inflation to the 2010 GHR. Indeed, this is the only basis upon which the hourly rates are argued in the PLK, Thakur, Chapman and Tate bills. Mr Wilcock submits, as a secondary alternative to his primary argument, that the court ‘is invited to apply RPI inflation to the GHR and allow the rates as claimed’ (SA, paragraph 49). But the problem with this approach (at least in empirical terms) is that most official indexes of the impact of inflation prefer the CPI to the RPI rate. The official rate of UK inflation has used the CPI since 2004. Dr Friston, as Mr Wilcock acknowledges, uses CPI inflation in his table(s) at 68.3 to 68.10 in the third edition of Friston on Costs. CPI inflation from 2010 to 2019 is approximately 21%.
34. The evidence on salary increases adduced by the applicants’ witnesses again suggests some considerable variation dependent upon geographical locality, the grade of fee earners and, I suspect, other firm-specific factors. At Kingsley Napley LLP salary increases between 2010 and 2020 varied between 25% and 50%, corresponding to an average increase of 33.5%. Enable Law reports salary increases averaged 32% between 2013 and 2020 (i.e. a 7 year period). In contrast, at Boyes Turner LLP, salary increases for the COP team between 2010 and 2020 total 11-13%. Russell Caller, a director of The Professional Deputies Forum, adduces evidence of salary increases (since 2010) for private client solicitors in the regional offices of a leading firm; London 21.5%, Guildford 21.4% and Cheltenham 14.9%, producing an overall average of a cumulative 19.6% salary increase between 2010

and 2020. Again, therefore, the evidence indicates a fairly broad range of salary increases, in circumstances where the uplifts are dictated (at least in part) by subjective factors.

35. I am satisfied that in 2020 the GHR cannot be applied reasonably or equitably without some form of monetary uplift that recognises the erosive effect of inflation and, no doubt, other commercial pressures since the last formal review in 2010. I am conscious equally of the fact that I have no power to review or amend the GHR. Accordingly my finding and, in turn, my direction to Costs Officers conducting COP assessments is that they should exercise some broad, pragmatic flexibility when applying the 2010 GHR to the hourly rates claimed. If the hourly rates claimed fall within approximately 120% of the 2010 GHR, then they should be regarded as being prima facie reasonable. Rates claimed above this level will be correspondingly unreasonable. To assist with the practical conduct of COP assessments, I produce a table below which demonstrates the effect of a 20% uplift of the 2010 GHR. I stress again that I do not purport to revise the GHR, as this court has no power to do so; instead this is a practical attempt to assist Costs Officers and avoid unnecessary delay (caused by individual re-calculation) in a busy department conducting over 8000 COP assessments per annum:

	Guideline Hourly Rates			
Bands	A	B	C	D
London 1	£490	£355	£271	£165
London 2	£380	£290	£235	£151
London 3	£275-320	£206-275	£198	£145
National 1	£260	£230	£193	£142
National 2	£241	£212	£175	£133

This approach can be adopted immediately and is applicable to all outstanding bills, regardless of whether the period is to 2018, 2019, 2020 or subsequently. It goes without saying that this approach is subject ultimately to the recommendations of Mr Justice Stewart and his Hourly Rates Working Group and the Civil Justice Council.

Ultimately the recommendations of the Working Group must be adopted in preference to my findings.

The cases for assessment

36. Applying the principles set out above in the individual bills for assessment I assess and allow the following hourly rates:

PLK	
A.	£260
B.	£230
C.	£193
D.	£142

Thakur	
A.	£300
D.	£145

Chapman	
A.	£241
B.	£212
C.	£175
D.	£133

Tate	
A.	£260
B.	£230
C.	£193

D.	£142
----	------

37. I will distribute a draft of this decision to the interested parties and then fix a date to hand down judgment. Permission to apply granted in respect of the costs of the hearing of the preliminary issue. The bills will then be returned to the relevant Costs Officers to carry out the rest of the assessment(s).

COURT OF PROTECTION - BILLS OF COSTS
PRACTICE NOTE BY THE SENIOR COSTS JUDGE

1. This practice note is issued for the assistance of costs officers and practitioners in relation to the assessment of Court of Protection (COP) bills of costs in the Senior Courts Costs Office following the judgment of Costs Judge Whalan in *PLK and others* [2020] EWHC B28 (Costs). The judgment concerned the assessment of the hourly rates of Deputies and their staff in relation to general management charges in dealing with the affairs of a protected party. This guidance explains some practical consequences of that judgment.

Bills in relation to general management years ending on or before 31 December 2017

2. The judgment is limited to the years 2018 and following [para 35]. While it is recognised that every bill is fact specific, it was noted [para 30] that the approach taken in the cases of *Louise Smith* and *Yazid Yahiaoui* remains applicable. It follows that bills up to 31 December 2017 will continue to be assessed by costs officers on that basis and that *save in exceptional circumstances* the 2010 guideline hourly rates (GHR) will continue to apply.

Bills in relation to general management years 2018, 2019, 2020

3. The judgment recognised that costs officers should *exercise some broad, pragmatic flexibility when applying the 2010 GHR to the rates claimed* and that *if the rates claimed fall within approximately 120% of the GHR they should be regarded as prima facie reasonable* [para 35]. The judgment does not disapply or abrogate the indemnity principle. Consequently, costs officers will have no discretion to allow higher hourly rates than have been claimed. The judgment will be of relevance only where rates in excess of the 2010 GHR have actually been claimed in the bill.

4. On general principles, a Deputy may not withdraw or amend a detailed bill or substitute a new bill without the consent of the client or an order of the court. As the consent of a protected party cannot usually be obtained, any application to withdraw, amend or substitute a bill will have to be made to a costs judge on form N244 supported by evidence that the indemnity principle has been complied with.

5. Deputies are entitled to the informal re-consideration of bills provisionally assessed by a costs officer before the issue of a Final Costs Certificate. They should note that any request for re-consideration designed to recover rates higher than those claimed in the bill is unlikely to be successful. Any application and any appeal made after the issue of a FCC can be made only to a costs judge.

6. Costs officers will continue to have regard to the Deputy's terms and conditions of business, correspondence regarding hourly rates with the Court of Protection or Office of the Public Guardian, Form OPG 105 lodged with the bill, and the solicitor's certificate on the bill.

Andrew Gordon-Saker
Senior Costs Judge
October 2020

Court of Protection Update: Property and affairs

Emma Waldron and Matthew Wyard

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Today's Agenda

1. Penitrust Ltd v West Berkshire District Council
2. PLK & Ors (Court of Protection Costs)
3. ACC & Ors (property and affairs deputy:
recovering asset costs for legal proceedings)

2

Penitrust Ltd v West Berkshire District Council

- [2020] EWCOP 48
- Concerned with the interpretation of paragraph 12 of Practice Direction 12B and the circumstances in which deputies may seek detailed assessment when P's estate has a net value of less than £16,000.



Penitrust Ltd v West Berkshire District Council

“In cases where fixed costs are not appropriate, professionals may, if preferred, apply to the SCCO for a detailed assessment...this does not apply if P's net assets are below £16,000 where the option...will only arise if the court makes a specific order for detailed assessment in relation to an estate...of a value of less than £16,000”

Para 12 of PD19B



Penitrust Ltd v West Berkshire District Council & Ors

- The application Trust Corporation had previously been appointed as the property and affairs deputy for AH (“P”).
- At the time of the application, West Berkshire District Council was P’s deputy for property and affairs.
- The OPG was joined as a party.



Penitrust Ltd v West Berkshire District Council & Ors

- The hearing concerned an application by the Trust Corporation seeking an order as to whether it could apply for detailed assessment of its costs to the SCCO. Alternatively, for retrospective approval of the costs it incurred in carrying out its role.
- Both respondents were neutral.



Penitrust Ltd v West Berkshire District Council & Ors

- At all times when the Trust Corporation was deputy, P's liquid assets were less than £16,000 however her total assets, including the property in which she lived, were substantially higher.
- The key issue arose from the deputyship order granted in the Trust Corporation's favour which included authorisation to seek detailed assessment but made no mention of the value of P's net assets.



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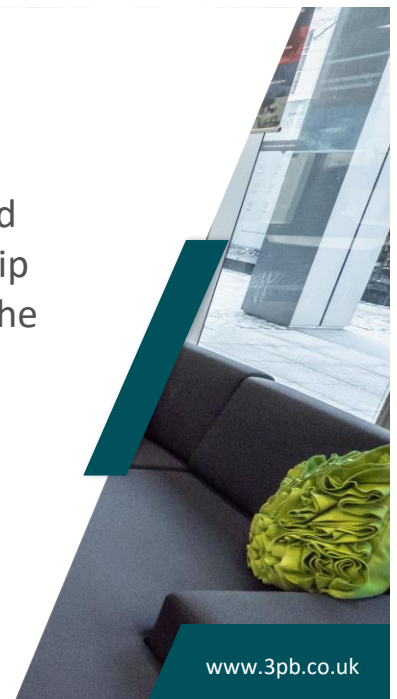
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Penitrust Ltd v West Berkshire District Council & Ors

- Trust Corporation argued that it was entitled to rely on the authorisation in the deputyship order to seek detailed assessment despite the value of P's estate.
- If it was wrong about that, it sought retrospective approval for the costs it incurred.



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Penitrust Ltd v West Berkshire District Council & Ors

- Led to a discussion regarding a footnote found in the earlier version of the COPR which excluded property lived in by P within the net assets calculation.



Penitrust Ltd v West Berkshire District Council & Ors

- Senior Judge Hilder said that the footnote in the previous COPR did not apply now.
- Trust Corporation had always been authorised by the deputyship order to obtain SCCO assessment of its costs however, it recognised the difficulty caused. Guidance was given on the position moving forward.



Penitrust Ltd v West Berkshire District Council & Ors

- [86]
- *“Where a deputy is appointed in respect of a net estate worth at the time of the appointment less than £16,000 but with authority to seek SCCO assessment, the decision maker should make explicit reference to the nature of the estate and paragraph 12 of PD19B...Additionally, the deputy should check the terms of the costs authorisation carefully on receipt of the order”*



11



Penitrust Ltd v West Berkshire District Council & Ors

- *“If the option includes SCCO assessment but doesn’t expressly confirm that such authorisation applies even where the net estate is worth less than £16,000, the deputy should make a speedy COP9 application pursuant to Rule 13.4 for reconsideration. Such an approach would be of minimal cost to P and would avoid future argument.”*



12



Penitrust Ltd v West Berkshire District Council & Ors

- Takeaways?
- Check the terms of the deputyship order carefully in light of the value of P's estate.
- Where the value is less than £16,000 but SCCO authorisation is made, check explicit reference is made to para 12 of PD19B.
- If not, apply to the CoP.
- If there is reference then you should be fine.



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PLK & Ors (Court of Protection costs)

- [2020] EWHC B28 (Costs).
- SCCO decision.
- Master Whelan considered the method of assessment of hourly rates by deputies and whether they need to reflect the commercial realities of practice in 2020 rather than rely on the 2010 Guideline Hourly Rates.



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PLK & Ors (Court of Protection costs)

- 4 conjoined cases
- The primary position of all deputies was that the court's current approach to costings which gives deference to the 2010 GHR was incorrect and unjust. Rather, assessments should be predicated on a flexible exercise of the discretion conferred under CPR44.3, where the GHR are a starting point only, not the start and end point.



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PLK & Ors (Court of Protection costs)

- *“The failure to review the GHR since 2010 constitutes an omission which is...seriously problematic where the GHR...are applied on assessment...I recognise also the force in the submission that the failure to review the GHR since 2010 threatens the viability of work that is fundamental to the operation of the CoP and the court system generally”*

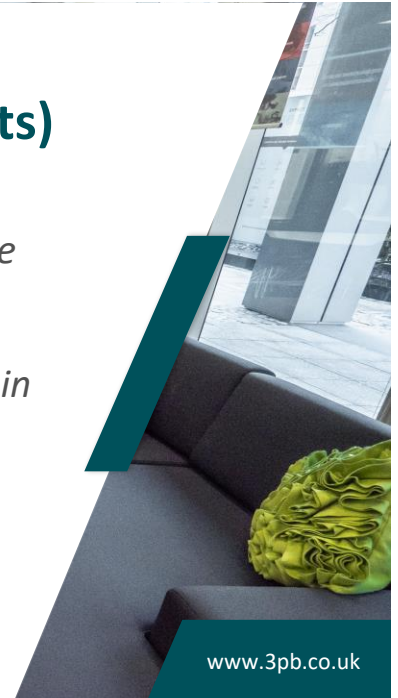


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PLK & Ors (Court of Protection costs)

- “...my direction to Costs Officers conducting COP assessments is that they should exercise some broad pragmatic flexibility when applying the 2010 GHR to the hourly rates claimed. If the hourly rates claimed fall within approximately 120% of the GHR then they should be regarded as being prima facie reasonable. Rates claimed above this level will be correspondingly unreasonable.”*



PLK & Ors (Court of Protection costs)

Bands	Guideline Hourly Rates			
	A	B	C	D
London 1	£490	£355	£271	£165
London 2	£380	£290	£235	£151
London 3	£275-320	£206-275	£198	£145
National 1	£260	£230	£193	£142
National 2	£241	£212	£175	£133



PLK & Ors (Court of Protection costs)

- The approach was then adopted in a Practice Note by the Senior Costs Judge Gordon-Saker.
- Reiterated that the judgment is limited to the years 2018 and following.
- Judgment only of relevance where rates in excess of the GHR have been claimed in the bill as the SCCO does not have discretion to allow higher hourly rates than have been claimed.

PLK & Ors (Court of Protection costs)

- A Deputy may not withdraw or amend a detailed bill or substitute a new bill without the consent of the client or court order. An application would need to be made via an application notice.
- Deputies are entitled to the informal re-consideration of bills provisionally assessed by a costs officer before the issue of a Final Costs Certificate. They should note that any request for re-consideration designed to recover rates higher than those claimed in the bill is unlikely to be successful.

PLK & Ors (Court of Protection costs)

- Costs officers will continue to have regard to the Deputy's terms and conditions of business, correspondence regarding hourly rates with the Court of Protection or Office of the Public Guardian, Form OPG 105 lodged with the bill, and the solicitor's certificate on the bill.



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PLK & Ors (Court of Protection costs)

- Also prompted the OPG to issue a Policy Statement 'Assessment of General Hourly Rates Charged by Solicitors'
- *"OPG recognises that the assessment of solicitor's fees is primarily a matter for the SCCO. However, the judgment will inevitably result in an increase in fees claimed against the estates of protected parties."*



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PLK & Ors (Court of Protection costs)

- *“The OPG does not expect to be notified of any increases in costs that are in accordance with the principles set out in the judgment of PLK and Ors. However, OPG will continue to require notification of any increases in costs that fall outside of those principles.”*



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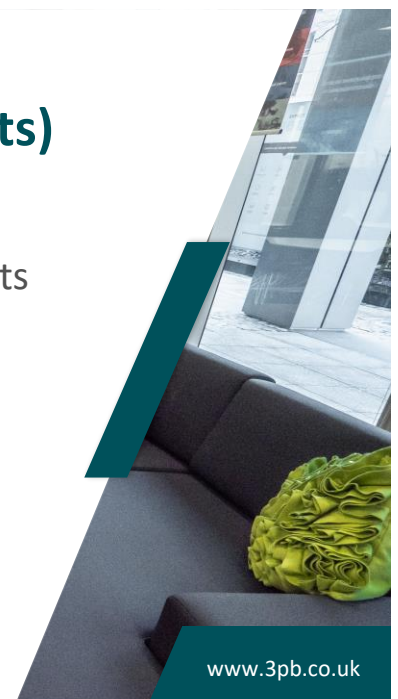


PLK & Ors (Court of Protection costs)

- Takeaways?
- Professional deputies can increase their costs by 20%.
- No need to notify the OPG.



24



ACC & Others (property and affairs deputy; recovering assets costs for legal proceedings)

- [2020] EWCOP 9
- Three sets of proceedings involving Irwin Mitchell (in some capacity) as deputy
- Concerned with whether, and in what circumstances, the deputy can recover from P's assets costs which have been or are likely to be incurred in legal proceedings



25



ACC & Others

- P represented by the Official Solicitor, due to the conflict of interest
- The Public Guardian was also a party, due to the matters of principle for determination
- Seeking retrospective permission for the authorization of legal fee expenditure



26



ACC & Others

- Standard wording of the Deputy appointment
“The court confers general authority on the deputy to take possession or control of the property and affairs of [P] and to exercise the same powers of management and investment, including letting property, as she has as beneficial owner, subject to the terms and conditions set out in this order.”
- The orders did not contain any express provision either granting or excluding authority to instruct solicitors or to conduct any kind of proceedings on behalf of P.



27



ACC & Others – Case 1

- ACC had sustained a serious injury aged 4 and received a substantial damages award.
- The Local Authority decided to end its support under an EHCP
- Deputy wished to challenge this and sought advice from IM
- Deputy issued an application for authorisation for this and to pursue an appeal.
- Appeal was issued and proceedings were successfully concluded
- Application determined retrospectively



28



ACC & Others – Case 2

- JDJ sustained a brain injury due to clinical negligence at birth
- Family identified a specialist educational placement but the Local Authority determined a different, mainstream college would meet his needs.
- Deputy issued an application for authorisation for advice and to pursue an appeal.
- 10 days later, an appeal was issued.
- The appeal was lost, but some modifications achieved.
- Question of whether IM was actually instructed by the parents or the Deputy.



29



ACC & Others – Case 3

- HPP was an adult male who sustained significant injuries in an accident.
- Liability was admitted, quantum of damages was not.
- Three different litigation friends over time.
- Entered into CFA's (conditional fee agreements), with large uplifts, even after liability admitted.
- Deputy sought a detailed assessment of costs by the Senior Court Costs Office



30



ACC & Others

- Irwin Mitchell argued that the general authorisation should include “unexceptional non-contentious legal tasks”, such as conveyancing, tax returns, leases and contract drafting and obtaining legal advice, incurring costs, short of the conduct of litigation.
- If urgent action is required, the deputy should be able to issue proceedings without specific advance authorisation and that the COP should consider retrospective applications “sympathetically”.



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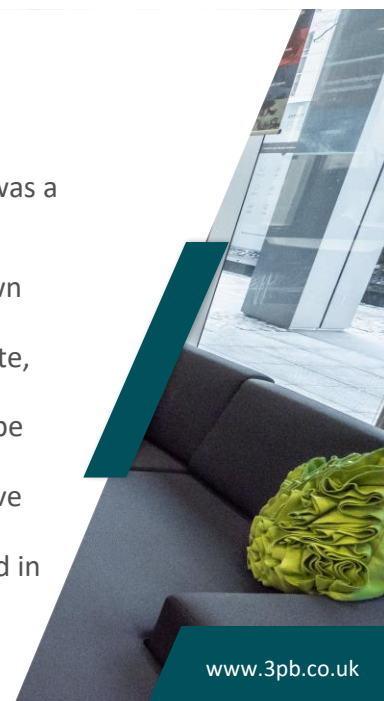


ACC & Others

- The Official Solicitor accepted that obtaining legal advice was a best interests decision.
- Obtaining advice will “sometimes” be within the deputy’s general authority and this may include instructing their own firm
- The standard wording does NOT include authority to litigate, although could include some modest work.
- The line between advice and conducting litigation should be after the letter of response.
- In urgent situations, should be able to achieve retrospective authorisation.
- Opposed to Deputy charging a fee to act as litigation friend in HPP



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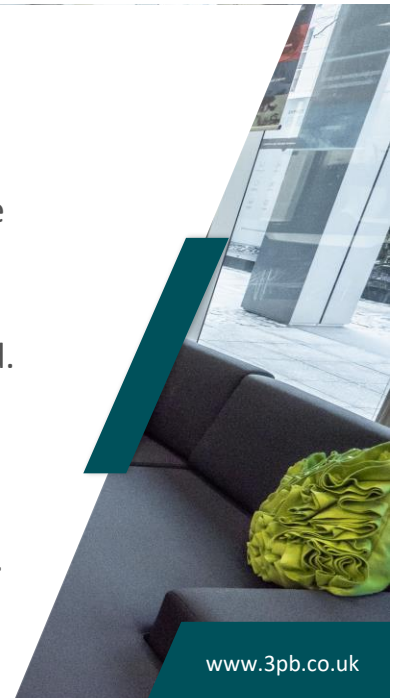


ACC & Others

- The Public Guardian sought further clarity in the specification of a deputy's powers, stating it would be "greatly assisted" by this.
- Sought guidance of the COP on the issues raised.
- Noted its guidance provides for a Deputy to consider the instruction of alternative lawyers, rather than an associated law firm.
- This could include obtaining three other quotes.



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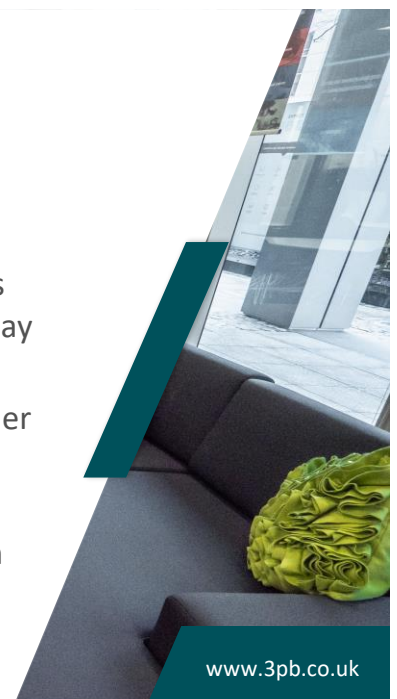
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ACC & Others

- Lengthy judgment and Appendix, considering the various powers.
- Section 18(1)(k) gives "the conduct of litigation in P's name" as one of the examples of a decision which may be made under section 16
- Accepted retrospective authorisation is possible under section 16, by analogy with second 23(3)(d) for attorneys.
- The general authority to act should be interpreted in accordance with the ordinary use of language.



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ACC & Others

- Authority to conduct litigation must be specifically granted - it is not covered by the general authority.
- Care should be taken before a P&A deputy makes an application to the COP in relation to a health and welfare issue
- The authority to act on behalf of P “encompasses such ordinary legal tasks short of taking proceedings”.
- Costs for such activities should be covered by fixed fees or assessed by the SCCO, to ensure the scope of costs exposure is limited.



ACC & Others

- Authority should be sought in advance of appeals against both continuing healthcare funding and challenges to EHCP.
- The Court should be asked to determine the matter expeditiously.
- There will be some urgent matters where an application cannot be obtained in advance and in those circumstances a retrospective application should be considered.



ACC & Others

- However, each case would turn on its own facts and merits and the Court cannot be relied upon to treat such matters sympathetically.
- Court gave specific guidance as to the circumstances where the Deputy seeks to instruct his own firm, seeking either specific authorisation of the same in the application or following strict rules (set out at paragraph 56.7(f)) before such appointment.



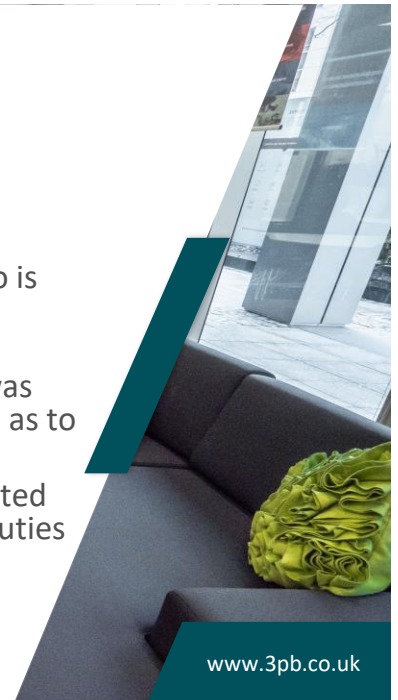
ACC & Others

- The COP was very concerned as to the idea that P should ever need to pay for a particular person to act as her Litigation Friend.
- However no determination was necessary or appropriate, given a concession offered by the OS to act free of charge in certain appropriate cases.



ACC & Others – Individual outcomes

- **ACC** – retrospective authorization of the costs to challenge the EHCP
- **JDJ** – the Deputy must be abundantly clear as to who is giving the instructions, him or the family.
- The COP noted that there was no good reason why authority had not been sought in advance. Weight was however given to the advice of independent counsel as to the merits of the appeal.
- Retrospective authorisation granted but the COP stated “Nothing in this decision should encourage P&A deputies to consider that there will on other occasions be a similarly positive determination”. (para 62.6)



ACC & Others – Individual outcomes

- **HPP** – In light of the OS’s offer, the Deputy conceded that she would act free of charge
- The COP noted the OS’ concerns that another LF would have possibly been able to obtain better terms than a 20% CFA uplift
- Authorisation for fees granted but “Not without some reluctance” (para 63.7)



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