

Re: ACC & Ors [2020] EWCOP 9

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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.

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