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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 clearl[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]