



PUMP COURT

CHAMBERS

**ACC & Others [2020] EWCOP 9:
Costs and Conflicts of Interest in the Court of Protection
Jennifer Lee**



ACC & Others [2020] EWCOP 9

- Decision of HHJ Hilder, Senior Judge of the Court of Protection - important guidance for professional P&A deputies..
- Test case concerning costs and conflicts of interest that may arise where a professional P&A deputy instructs their own law firm to carry out acts/ conduct litigation for P.
- Also raised the question of whether it is within the scope of a P&A deputy's general authority to instruct solicitors and conduct litigation on behalf of P.

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Facts

- Three individuals: ACC, JDJ and HPP who each lacked capacity to (i) manage their property and affairs, and (ii) conduct litigation.
- Each had a professional deputy for P&A.
- None of the deputyship orders contained express provision either granting or excluding authority for the deputy to instruct solicitors or to conduct any kind of proceedings on behalf of P.

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- ACC's deputy was the Irwin Mitchell Trust Corporation Limited ("IMTC"). IMTC sought advice from a legal team at Irwin Mitchell regarding an appeal against LA's decision to end ACC's Education Health and Care Plan. The deputy applied to the COP for retrospective authorisation of costs incurred.
- JDJ's deputy was a partner of Irwin Mitchell. JDJ's parents wanted to appeal a decision made by the LA about JDJ's education. JDJ's deputy made an urgent application to the COP for authority to appeal and to instruct Irwin Mitchell to provide legal representation/ advice.
- HPP's deputy was IMTC. A PI claim was brought on behalf of HPP, who was represented by Irwin Mitchell in that litigation. A director of IMTC was appointed litigation friend. IMTC applied to COP for authority for the Senior Courts Costs Office ("SCCO") to carry out a detailed assessment of the litigation friend's costs.



Guidance for professional P&A deputies

- P&A deputy's authority to do an act on behalf of P includes such ordinary non-contentious tasks as are ancillary to giving effect to that exact authority.
- This includes obtaining legal advice ancillary to giving effect to that authority. E.g.:
 - Authority to purchase or sell property includes conveyancing
 - Authority to let property includes dealing with leases or tenancy agreements.
 - Authority to conduct P's business includes dealing with employment contracts of that business

Guidance for professional P&A deputies

- “General” authority also encompasses:
 - The preparation of annual tax returns, and obtaining advice as to completion of the return.
 - Discharging P’s financial responsibilities under a tenancy, and obtaining advice as to liabilities under the tenancy
 - Applying P’s funds so as to ensure that the costs of care are met, and dealing with employment contracts of directly employed carers
- These are seen as an ordinary part of managing property and affairs and therefore an appropriate step within the general authority of a deputy.



Guidance for professional P&A deputies

- The “general authority” conferred upon a P&A deputy does not include authority to conduct litigation on behalf of P.
- Specific authority is required to conduct litigation on behalf of P except where (a) the contemplated litigation is in the COP re: a property and affairs issue; or (b) to seek directions in respect of a welfare issue.
- If a health and welfare issue arises, the deputy should bring the welfare issue to the attention of the Court and seek further directions. Deputy must not initiate proceedings themselves.



Guidance for professional P&A deputies

- “General authority” may include authority to take steps in contemplation of contentious litigation.
- Distinction drawn between the contemplation of litigation re: property and affairs, and the contemplation of other litigation (the latter unlikely to fall within the general authority of a P&A deputy, and would require specific authority from COP).
- A P&A deputy’s authority in the realm of litigation re: property & affairs only goes so far as writing a Letter of Claim and receiving a Letter of Response. Specific authority is required before proceeding further.

Guidance for professional P&A deputies

Permissible steps in contemplation of contentious litigation includes:

- Authority to let property encompasses taking steps to form a view as to whether there are grounds to evict a tenant.
- Authority to manage P's funds includes taking steps to form a view about whether a debt incurred by P is properly payable under section 7 of the MCA 2005.
- Authority to manage P's funds includes steps up to but not including delivery of a letter of appeal re: decision that P is not eligible for healthcare funding.

Where authority encompasses steps in contemplation of contentious litigation, that includes obtaining Counsel's opinion.



Guidance for professional P&A deputies

- Where matters are urgent and authority to litigate cannot reasonably be obtained before taking action to protect P, the deputy proceeds at his own risk as to costs, but may make an application to Court for retrospective approval and authority to recover costs from P.
- No presumption that such an application will be granted. Although COP made the orders sought, it warned that nothing in decision should encourage P&A deputies to consider that future applications to retrospectively authorise litigation will achieve positive result.
- If can take steps to act to litigate, can also apply for authorisation at the same time? If really urgent, best to do both.



Guidance for professional P&A deputies

- Guidance on the approach to addressing conflicts of interest.
- A proposed P&A deputy should consider whether there is a realistic prospect they may wish to instruct their own firm in relation to legal tasks. If there is, they should seek specific authority within the deputyship order, subject to a specified costs limit, with their initial application.
- The court will decide on whether this is in the client's best interests, the period of the authorisation, and the level of expenditure.
- Post appointment, if no specific authority has been granted to instruct their firm, the deputy must – (see overleaf)



Guidance for professional P&A deputies

- 1) Obtain three quotations for the work proposed (including one from the deputy's own firm) (in a manner which is proportionate to the magnitude of the costs involved and importance of the issue to P)
- 2) Make a best interests decision as to which of the providers to instruct (properly documenting the decision-making process).
- 3) If the anticipated costs exceed £2,000 + VAT, apply to the Court for specific authority to incur the costs; and
- 4) Set out legal fees so incurred in the annual account submitted to the PG by the deputy.

Guidance for professional P&A deputies

Other matters:

- A deputy who wishes to act as P's litigation friend in civil proceedings must apply for the COP's authorisation.
- Litigation friend in civil proceedings should not be charging for acting as such where the OS is willing and able to act in cases where her criteria for appointment are met.
- This was in response to the application in one case (HPP) for an order in effect authorising the deputy to pay a solicitor in Irwin Mitchell to act as litigation friend.

Guidance for professional P&A deputies

- Specific authority is also required for a P&A deputy to use P's funds to pay a third party's costs, even if the third party is a family member and the costs were incurred to benefit P.
- Litigation for Continuing Health Care funding appeals, and Education, Health and Care Plans require authorisation from the court (outside the scope of authority of a P&A deputy.)
- Finally - if P has capacity to give instructions for particular work, he will also have capacity to agree the costs of that work



- Helpful summary of conclusions included as an appendix to judgment. MUST READ.
- Judgment handed down on 27 February 2020. OPG expects deputies to comply with its conclusions by 1 April 2021. Thereafter, action will be taken to address any non-compliance which could include OPG making an application to the court.
- Judgment makes clear that there is a continuing expectation that deputies will consider, in detail, the limits of their own specific authority and address any potential conflicts of interest.



- Specific authority required to conduct litigation on behalf of P except where the litigation is in the COP re: a P&A issue.
- Deputies will be expected to apply to COP for retrospective authorisation where services to a client may constitute a conflict of interests, and costs have exceeded £2000 plus VAT in any case since release of the judgment.
- Where deputy does not have specific authority to instruct own firm, must obtain three quotations from appropriate providers (one from own firm). The deputy should then make a best interests decision as to which provider best meets the needs of the client. If they wish to instruct own firm, specific authority needed if the anticipated costs will exceed £2,000 plus VAT.

Related case on costs: PLK & Ors (Court of Protection: Costs) [2020] EWHC B28

- Indemnity principle applies. Costs officers will have no discretion to allow higher hourly rates than have been claimed. Judgment will be of relevance only where rates in excess of the 2010 GHR have actually been claimed.
- A deputy may not withdraw/ amend a detailed bill or substitute a new bill without the consent of the client or a court order. As the consent of a protected party cannot usually be obtained, any application to withdraw/ amend will have to be made to a costs judge on form N244 supported by evidence that the indemnity principle has been complied with.
- Deputies are entitled to the informal re-consideration of bills provisionally assessed by a costs officer before the issue of a Final Costs Certificate. Any request for re-consideration designed to recover rates higher than those claimed in the bill is unlikely to be successful.



Useful Resources:

- **ACC & Ors [2020] EWCOP 9:**
<https://www.bailii.org/ew/cases/EWCOP/2020/9.html>
- **OPG Guidance – ACC and Others: Guidance for Property and Financial Affairs Deputies (Dec 2020):** <https://www.gov.uk/government/publications/new-guidance-for-deputies-in-response-to-acc-judgement/acc-and-others-guidance-for-property-and-financial-affairs-deputies-web-version>
- **STEP Briefing Note for Practitioners – ACC Judgment:**
https://www.step.org/system/files/media/files/2021-02/briefing_note_professional_deputies_seeking_authority_from_cop_following_re_acc_judgment.pdf
- **Practice Note from Senior Costs Judge: PLK & Ors (COP: Costs) [2020] EWHC B28:**<https://courtofprotectionhandbook.files.wordpress.com/2020/10/scco-practice-note-on-cop-hourly-rates.pdf>



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Jennifer Lee
Barrister (Call: 2007)

T: 020 7353 0711

E: j.lee@pumpcourtchambers.com

Twitter: @JLeeBarrister

www.pumpcourtchambers.com



"Her attention to detail is second to none. In a particularly complex case, she was able to grasp both the key details and the minutiae with ease and her intricate knowledge of the matter really impressed the client."

-Chambers & Partners 2020

- Jennifer is a specialist family law practitioner. with a thriving practice in family finance. She has successfully represented HNW clients in cases involving family businesses, inherited wealth, substantial pensions, nuptial agreements, and trusts. Many of her cases involve foreign assets and cross-jurisdictional issues, such as the validity of an overseas marriage/divorce, and competing claims in multiple jurisdictions (including Asia and Africa).
 - Over the years, Jennifer has developed an interest in the Court of Protection, particularly where there are parallel divorce/ financial remedy proceedings. She leads the Court of Protection Team with Leslie Samuels QC. She also has experience in the area of surrogacy and modern families, having acted for commissioning parents in HFEA cases for some years.
 - Jennifer has appeared in a number of high-profile reported cases, most notably in *Velupillai v Velupillai & Ors* [2015] EWHC 3095 (Fam) (High Court), *LFL v LSL (McKenzie Friends & Breach of Court Orders)* [2017] EWFC B62, and *N v N (Afghanistan: Validity of an Overseas Marriage)* [2020] EWFC B55.
 - Jennifer continues to be ranked as a “Leading Junior (Tier 1) - Family and Children Law” in The Legal 500, and as a specialist in “family/matrimonial law” in Chambers & Partners (UK Bar). She appears in arbitrations and private FDRs, and also sits as a private FDR “Judge”. She has been highly commended for her attention to detail and her robust approach, both in negotiations and during hearings.
- Jennifer is a member of Resolution, the Chartered Institute of Arbitrators (ACI Arb), and the FLBA. She serves on Resolution’s ED&I Committee, and regularly contributes to seminars and articles on family law and COP, including for ThoughtLeaders4 and Westlaw.

3 Pump Court, Temple, London, EC4Y 7AJ

T: 020 7353 0711 DX: 362 London, Chancery Lane



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COURT OF PROTECTION TEAM

At Pump Court we have extensive experience of protecting the rights of vulnerable adults and children through the Court of Protection and related proceedings within the High Court.

Headed by [Leslie Samuels QC](#) and [Jennifer Lee](#), our Court of Protection team consists of a core group of barristers with considerable expertise in this field. The team includes a Deputy High Court Judge with authorisation to sit in the Court of Protection, Recorders, and Deputy District Judges. Several of our team members have also worked in-house for local authorities dealing with adult social care and COP matters.

Our team also benefits from our strong technical expertise in the related fields of family law (children law and family finance), mental health law, inheritance law, and property law. This breadth and depth of experience ensures that we are well placed to advise and represent parties to the highest standard in this specialist area of practice.

Members of the team regularly provide in-house seminars to solicitors in private practice and to local authorities, at times in conjunction with Solicitors for the Elderly and the Hampshire Law Society. We also run a series of Court of Protection webinars with external organisations and in-house seminars in London, Hampshire and elsewhere.

For further information please contact our head clerk, Tony Atkins (t.atkins@pumpcourtchambers.com), and our senior family clerk Sean Gentleman (s.gentleman@pumpcourtchambers.com).

Thank you for listening

Jennifer Lee

Pump Court Chambers

E. j.lee@pumpcourtchambers.com



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