



Welcome to the March 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a cautionary tale about re-using material for DoLS assessment and capacity complexities in the context of medical treatment;

(2) In the Property and Affairs Report: an important case on the limits of powers of professional deputies to act without recourse to the Court of Protection;

(3) In the Practice and Procedure Report: medical treatment – delay, neglect and judicial despair, developments relating to vulnerable parties and witnesses, and Forced Marriage Protection Orders under the spotlight;

(4) In the Wider Context Report: Mental Capacity Action Days, when not to presume upon a presumption, and a number of important reports from bodies such as the CQC;

(5) In the Scotland Report: the DEC:IDES trial.

We have also recently updated our capacity guide and our guide to the inherent jurisdiction. You can find them, along with our past issues, our case summaries, and more on our dedicated sub-site [here](#).

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

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The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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Deputies, advice, litigation and conflicts of interest

Re ACC, JDJ and HPP [2020] EWCOP 9 (Senior Judge Hilder)

Deputies – Financial and property affairs

Summary

In these cases, three deputies brought applications concerning the extent to which the orders appointing them authorised expenditure of P’s estate in respect of getting legal advice and conducting proceedings on P’s behalf. The deputies were in 2 cases Irwin Mitchell Trust Corporation Ltd and in the other case a partner in Irwin Mitchell LLP.

In each case P was joined as a party and represented by the Official Solicitor and, because the issues related to the supervision of deputies, the Public Guardian was joined in the proceedings.

The Senior Judge set out a summary of her conclusions in an appendix and that is set out below in full (references in square brackets are references to paragraphs in the judgment):

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].

Comment

This is a very useful statement of what a P&A deputy can and cannot do in relation to seeking legal advice and taking steps in litigation.

A number of further points arise from the judgment that do not appear in the summary.

Paragraph 4 of the summary refers to the need to apply for specific authority to conduct litigation on P's behalf because the general order does not give such authority. Paragraph 51.4 of

the judgment suggests that in such an application, the deputy should consider whether there should be limitations as to the extent of the authority, for example to a certain stage in the proceedings.

Furthermore, because the general order does not give authority to conduct litigation, it must follow that CPR 21.4(2) will not apply to allow a deputy to be appointed litigation friend unless he gets specific authority to conduct the litigation (though he could be appointed under 21.4(3) in the same way as a non-deputy is appointed but with risk as to costs).

As regards the lack of general authority to incur costs regarding welfare issues referred to at paragraph 6 of the appendix, that was said with specific reference to matters relating to deprivation of liberty in the wake of the *Staffordshire* case. In such cases, and in a useful judicial clarification of how matters should proceed, Senior Judge Hilder made clear the P&A deputy should bring the situation to the attention of the appropriate authorities first and then the COP if those authorities fail to act (see paragraph 52.10 of the judgment). The Court of Protection would then consider what should be done including asking the deputy to investigate and report, considering if someone else should bring proceedings or authorising the deputy to do so (see paragraph 52.12).

Paragraph 5 of the appendix deals with steps prior to litigation. At paragraph 54.5 of the judgment, it is stated that those steps will include getting counsel's advice which is commonly required where a deputy is seeking authority to conduct litigation.

Paragraph 11 of the appendix states that 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. This was in response to the application in one case (HPP) where the damages claim had not concluded and where there was no suitable family member to act for an order in effect authorising the deputy to pay a solicitor in Irwin Mitchell to act as litigation friend. That application was refused on the grounds that it could not be in P's best interest for there to be a paid litigation friend where the OS would perform the task without payment (see paragraph 63 of the judgment), the court and the OS were, however, obviously unhappy about the fact that such a solicitor had been appointed litigation friend and had gone on to instruct Irwin Mitchell without, it seems, any regard for the "obvious" conflict of interest that had arisen. In that case, the court "reluctantly" gave retrospective authorisation for the instruction of Irwin Mitchell as the proceedings were so far down the line and indeed had settled by the time of the final judgment.

Plainly where a deputy wants to instruct the firm with which he is associated, then paragraph 9 of the appendix will apply. Here the litigation friend was not the deputy but a solicitor in the firm. In much personal injury litigation, proceedings are started before a deputy is appointed. If there is no family member to take that role, a solicitor in the firm involved may seem to be a good choice. It is the clear implication from this case, however, that the OS may well be a better one as it would get over the inevitable conflict of interest that would otherwise arise. This would be the more so if it were contemplated that the deputy

should be a person associated with the litigation firm.

As regards the latter situation, this judgment does not directly deal with it but it does focus on the issue of conflicts of interest. It is routine for a deputy appointed in cases arising out of awards in personal injury litigation to be associated with the litigation firm. Plainly the grant of such applications is in the gift of COP. Perhaps, to avoid the suggestion of a conflict of interest, COP should insist on seeing 3 quotations from possible deputies for the work (to include one from the associated person) to ensure P is getting at least best value (especially as the costs can amount to very large sums).

The implications of this judgment will take some time to work out. By way of example, we reproduce here observations made by Caroline Bielanska (member of the Law Society Mental Health and Disability Committee) in an email to the editors of the report:

I am concerned that the general authority of a PFA deputyship order would not extend to going through the complete NHS continuing health care (CHC) review process, and will be used by the NHS as an obstacle to a challenge. I do not believe that this should be considered 'litigation' for the following reasons:

(a) A challenge to an adverse decision is not an appeal- it is a review, and cannot be compared to the appeal of an adverse EHCP decision.

(b) There is no requirement in the CHC review process to have a person with express and specific authority to pursue a claim on behalf of a person who lacks capacity. There is no need for a litigation

friend. If the person does not have a welfare LPA or welfare deputy, the review team will decide whether the person seeking a review on behalf of the incapacitated person would be a suitable representative, based on a best interest decision.

(b) The review process for CHC, including the independent review panel stage is not litigious. It is not the forum to challenge legal issues. The National Framework Practice Guidance spells this out at para 53.1, 'the eligibility process is focused around assessing an individual's needs in the context of the National Framework rather than being a legal or adversarial process.' And at para, 58.2, 'If the individual chooses to have a legally qualified person to act as their advocate, that person would be acting with the same status as any other advocate nominated by the individual concerned. The MDT process is fundamentally about identifying the individual's needs and how these relate to the National Framework.' This is further stated in the National Framework at para 202, 'Independent review panels have a scrutiny and reviewing role. It is therefore not necessary for any party to be legally represented at independent review panel hearings, although individuals may choose to be represented by family, advocates, advice services or others in a similar role if they wish.'

4. The time limits for CHC reviews are tight and as such it will always be necessary to obtain an urgent Court order for authority or seek retrospective authority.

5. If it does not fall within the remit of general authority to go through the CHC process, it begs the question, does

making a complaint to the local authority or NHS about the funding of aftercare services under s117 Mental Health Act 1983 or social care funding fall outside the remit of the general order. In all cases, the local complaints process should be used and should be exhausted before making a complaint to the Ombudsman. Neither of these processes would generally be considered as litigious, and due to the era of austerity, it is very common for deputies to go through the process to get funding and care provision for their client.

5. This will inevitably lead to a significant increase in applications to the court.

Finally, we note that a recent hearing in the Court of Protection before Cheema-Grubb J touched on related issues: the defendant insurance company in a personal injury claim had sought to challenge the continued appointment of an English deputy in circumstances where, since the initial deputyship order was made, P had moved back to Poland to live and a Polish guardian had been appointed. In the course of the hearing, which did not lead to a judgment, Cheema-Grubb J expressed the view that it seemed obvious that P's best interests would be served by the Polish guardian taking control of his assets, rather than an English deputy dealing with them remotely, yet the claimant was seeking the future costs of the English deputy as part of the personal injury claim and had not brought the matter to the attention of the Court of Protection – again, the solicitors in the personal injury claim were associated with the appointed deputy.

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Conferences

Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the [Mental Health & Justice](#) project on 15 May 2020, in London. For more details, and to book, see [here](#).

2020 World Congress in Argentina

Adrian will be speaking at the 6th World Congress to be held at Buenos Aires University, Argentina, from 29th September to 2nd October 2020, under the full title “Adult Support and Care” and the sub-title “From Adult Guardianship to Personal Autonomy.” For more details, see [here](#).

Other conferences and events of interest

Mental Diversity Law Conference

The call for papers is now open for the Third UK and Ireland Mental Diversity Law Conference, to be held at the University of Nottingham on 23 and 24 June. For more details, see [here](#).

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in April. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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