



## **ACC and Others: Guidance for Property and Financial Affairs Deputies**

**Date:** 14 December 2020

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### **1. Introduction**

- 1.1 The Senior Judge of the Court of Protection has issued a judgment confirming the position on various issues regarding the authority deputies need to obtain legal services and how conflicts of interest should be managed. The judgment applies to any court appointed deputy.
- 1.2 The judgement was handed down on 27 February 2020. OPG expects deputies to comply with its conclusions by 1 April 2021.
- 1.3 The Judge has included a summary of her conclusions as an appendix at the end of the judgment. You can find the full judgment [here](#).
- 1.4 The following outlines OPG's position with regards to the judgement and does not constitute legal advice. Specialist legal advice should be taken in relation to specific circumstances.

### **2. Within general authority of property and financial affairs deputies**

- 2.1 This is confirmed as including ordinary 'non-contentious' tasks such as property conveyancing, managing leases, business and associated employment contracts, preparing tax returns, taking advice on tenancy liabilities and arranging care.
- 2.2 Paragraphs 1-3 of the Appendix of the judgement outline actions included under the general authority of a deputy.

### **3. Outside the general authority of property and financial affairs deputies.**

- 3.1 Specific authority is required to conduct litigation on behalf of the protected party except where the contemplated litigation is in the Court of Protection in respect of a property and financial affairs issue. Deputies can take advice on 'contentious litigation' on a property and financial affairs matter up to receiving a letter of response, but no further.
- 3.2 Specific authority is also needed to use the protected party's funds to reimburse a third party instructed to act on behalf of the protected party. This includes costs incurred by a member of the protected party's family.
- 3.3 A property and affairs deputy has no authority to make decisions that impact exclusively on health and welfare matters, unless stated in the court order. Where such decisions need to be made authorisation must be sought from the court.

- 3.4 Litigation for Continuing Health Care funding appeals, and Education, Health and Care Plans require authorisation from the court, as these fall outside the scope of authority of a finance and property affairs deputy.
- 3.5 Where OPG becomes aware of any unauthorised actions, it will refer the deputy to apply to the court for retrospective authorisation. If under OPG's supervisory role, we find a deputy has not been compliant, then we will refer the matter to the court to decide what is proportionate.

#### **4. Prospective deputies**

- 4.1 Prospective deputies should consider whether there is a potential need to instruct someone else to provide advice or carry out legal tasks at the time they apply to be appointed. If their own firm provides the service and they wish to instruct them, they should include a request for specific authority to do so, 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.
- 4.2 Where a prospective deputy has been granted authority to instruct someone else, but not specific authority to instruct their own firm, the deputy must obtain three separate quotations from appropriate providers, one of which can be from their own firm. The deputy should then make a best interests decision as to which provider best meets the needs of the client, and if they still wish to instruct their own firm should make an application for specific authority if the anticipated costs are in excess of £2,000 plus VAT.

#### **5. Existing deputies**

- 5.1 The judgment makes it 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. Authorisation from the court is required for all on-going and future work which falls outside of the authority of the deputyship.
- 5.2 Deputies will be expected to apply to the court for authorisation in any cases where projected costs exceed £2000 plus VAT.
- 5.3 The deputy should make a proportionate decision in instances where obtaining three quotations would cost more than the proposed work. In such cases the deputy must detail their decision in the annual report.
- 5.4 There may be some instances where it is not possible to obtain three quotations. In this case, OPG will take a proportionate approach and consider whether to refer the matter to court.
- 5.5 OPG expects deputies to have made the appropriate application for authorisation by 1 April 2021. Deputies will be expected to apply to the court for retrospective authorisation where the provision of services to a client may constitute a conflict of interests, and costs have exceeded £2000 plus VAT, in any case occurring or ongoing since the release of the judgment.
- 5.6 OPG does not envisage the need for deputies to make applications for retrospective authorisation in any cases completed prior to the release of the judgment, but this will be considered on a case by case basis to ensure that the best interest of the protected party are being met.

- 5.7 OPG's position is that these guidelines extend to any situation where a deputy is considering the procurement of services for a client which may include provision from the deputy's own firm and hence constitute a potential conflict of interest.
- 5.8 If a deputy believes that urgent action is needed to protect a client's interests, they may proceed at their own risk and make an application to the court for retrospective authorisation.
- 5.9 The judgment states that in welfare matters, other authorities may be better placed to act, such as local authorities and the NHS, who do not need court authorisation to carry out urgent work outside of the scope of deputyship. The deputy will need to consider whether they can ask someone else to handle the welfare issue and refer the issues to those agencies.

## **6. OPG's role in relation to this Judgment**

- 6.1 The Public Guardian, supported by the OPG, has a statutory duty to supervise all deputies appointed by the Court of Protection. When we ask deputies to report to us, we will require them to demonstrate that they have the necessary authority to carry out their work.
- 6.2 OPG would expect any decisions made by deputies in relation to this judgment to be outlined in the annual report.
- 6.3 We require applications to have been made in respect of any unauthorised work started or ongoing since the date of the judgment by 1 April 2021. Following this date, action will be taken to address any non-compliance with the judgment which could include OPG making an application to the court.
- 6.4 The judgment states that if a client has capacity to give instructions for litigation work then they can understand the costs involved. This should always be approached on a case-by-case basis with consideration to the client's circumstances.

## **7. Legal Disclaimer**

- 7.1 Nothing within the above constitutes legal advice or gives rise to a solicitor/client relationship. Specialist legal advice should be taken in relation to specific circumstances.
- 7.2 The contents of this site are for general information purposes only. Whilst we endeavour to ensure that the information on this site is correct, no warranty, express or implied, is given as to its accuracy and we do not accept any liability for error or omission.
- 7.3 We shall not be liable for any damage (including, without limitation, damage for loss of business or loss of profits) arising in contract, tort or otherwise from the use of, or inability to use, this site or any material contained in it, or from any action or decision taken as a result of using this site or any such material.
- 7.4 Some of the material on this site may have been prepared some time ago. Please contact us if you need a comprehensive and up-to-date statement of the relevant law
- 7.5 This statement sets out OPG's policy in relation to the actions required by a deputy if they are to act beyond the general authority of the order appointing them, and addresses issues of conflict of interest. Conformity with this policy statement is expected by 1 April 2021, and steps will be taken to address non-compliance, which may include court proceedings.