



Office of the
Public Guardian

Re ACC and Others: Guidance for property and affairs deputies

Summary

This guidance sets out the Public Guardian's position on the Re ACC judgment and the actions OPG expects deputies to take to ensure compliance.

Context

The Re ACC and Others judgment (Re ACC and Others [2020] EWCOP 9 [Re ACC and Others](#)) was handed down by the senior Judge of the Court of Protection on 27 February 2020. The judgment sets out positions on various issues including the authority deputies need to obtain legal services and how conflicts of interest should be managed. The judgement applies to any property and affairs court appointed deputy.

The following guidance outlines OPG's position with regards to the judgment and does not constitute legal advice. Specialist legal advice should be taken in relation to individual circumstances. The senior judge provided a useful summary of the main issues covered in Re ACC and Others in an appendix to the judgment.

General authority

The judgment sets out the position on the general authority of a property and affairs deputy which is defined as encompassing the common or ordinary day to day tasks that are required to administer P's estate effectively. Deputies must consider when taking property and financial decisions on behalf of P whether the action in question falls within the scope of general authority or whether specific authorisation is required from the court. The deputy acts at their own personal risk if they act outside their authority.

The standard property and affairs deputyship order template includes a section headed "Authority of deputy" which sets out the authority of the deputy. This includes the following standard provision:

"(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."

The second section of the standard template lists additional clauses that may be included to extend the authority of the deputy. These may include the following:

- 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

The deputy has no authority to perform any of the above activities on behalf of P unless the relevant clause is included in the order. For example, the deputy must not sell or purchase property on behalf of P if authority to do so is not included in the deputyship order.

The deputy may undertake ordinary non-contentious legal tasks that are ancillary to the authority conferred by the order including obtaining legal advice. For example:

- a. authority to purchase or sell property includes conveyancing
- b. authority to let property includes dealing with leases or tenancy agreements
- c. authority to conduct P's business includes dealing with employment contracts

General authority also includes:

- a. the preparation of an annual tax return, and therefore obtaining advice as to completion of the return
- b. discharging P's financial responsibilities under a tenancy, and therefore obtaining advice as to liabilities under the tenancy
- c. applying P's funds so as to ensure that the cost of his care arrangements are met, and therefore dealing with employment contracts of directly employed carers

Authority to litigate

Specific authority from the court is required to carry out litigation on behalf of P unless the proposed litigation is in the Court of Protection in respect of a property and affairs issue or to seek direction in respect of a personal welfare issue.

Where the deputy has specific authority to carry out certain defined tasks on behalf of P, he has authority to engage in contentious litigation up to the point of receiving the Letter of Response but no further. The judgment provides the following examples of possible contentious litigation related to respective specific authorities:

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

A property and affairs deputy may not initiate contentious litigation related to personal welfare decisions but may seek directions from the Court of Protection.

The general authority conferred on a property and affairs deputy does not include appealing against a decision of an Education, Health and Care Plan as this is a personal welfare issue.

The deputy may make an application for continuing healthcare funding as this is a financial issue.

In cases where the urgent litigation is required on behalf of P, the deputy may proceed at risk with respect to costs but may make an application to the court for retrospective authorisation to recover costs from P's funds. Such applications will be considered on a case per case basis; there is no guarantee that authorisation will be granted.

Specific authority will also be required to use P's funds to reimburse a third party instructed to act on behalf of P. This includes costs incurred by a member of P's family.

Conflict of interest

Where a conflict of interest arises because the deputy wishes to instruct a member of his own firm to carry out legal work on behalf of P, he may seek prior authorisation from the court to carry out the work in question.

If he does not have specific authority he must, where it is reasonable and proportionate to do so, obtain three quotations from appropriate providers, one of which may be from his own firm and to instruct the provider whose services will be in the best interests of P.

The deputy must seek approval from the court if the anticipated costs exceed £2,000 plus VAT.

Cases where P retains capacity to give instructions

If P has capacity to give instructions in relation to a specific piece of work, he must also have capacity to agree to costs associated with that work.

OPG's position

The Public Guardian, supported by 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.

OPG expects any decisions made by deputies in relation to Re ACC to be outlined in the annual report.

1. Existing deputies

The judgment makes clear that there is a continuing expectation that deputies will consider, in detail, the limits of their own authority and address any potential conflicts of interest.

Authorisation is required from the court for all on-going and future work which falls outside the authority of the deputyship.

Deputies should obtain three quotes if they wish to instruct a member of their own team to carry out work on behalf of P. They must apply to the court for authorisation in any case where projected costs exceed £2,000 plus VAT. 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 provide details of their decision in the annual report. There may be some instances where it is not possible to obtain three quotations. In these cases, OPG will take a proportionate approach and consider whether to refer the matter to the court.

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 per case basis to ensure P's best interests are being met.

OPG's position is that the positions set out in *Re ACC and Others* in relation to conflict of interest extend to any instance where a deputy is considering the procurement of services for P which may include provision from the deputy's own firm and hence constitute a potential conflict of interest.

The judgment states that in personal welfare matters, other agencies, such as local authorities and the NHS, who do not need court authorisation to carry out urgent work outside the scope of the deputyship may be better placed to act. OPG expects deputies to consider whether they can ask someone else to handle the personal welfare issue and refer the issue in question to those agencies.

2. Prospective deputies

Prospective deputies should consider whether there is a potential need to instruct someone else to provide advice or carry out legal tasks on behalf of P 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 whether this is in P's best interests, the period of the authorisation, and the level of expenditure.

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 P, and if they still wish to instruct their own firm, the deputy should make an application to the court for specific authority if anticipated costs are in excess of £2,000 plus VAT.

Legal disclaimer

Nothing within the above constitutes legal advice or gives rise to a solicitor/client relationship. Legal advice should be taken in relation to specific circumstances.

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Some of the material in this guidance may have been prepared some time ago. Please contact us if you need a comprehensive and up-to-date statement of the relevant law.

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. All court appointed deputies are expected to comply with the positions set out in this guidance, and steps will be taken to address non-compliance, which may include court proceedings.

For further advice:
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