

Mitra's Monday Aide-Mémoire

Welcome to my Monday Aide-Mémoire ...

Deputies and Legal Costs

Can deputies for property and affairs use P's monies to pay legal fees?

Deputies are given specific powers by the Court of Protection. At the risk of sounding like Uncle Ben from the Spiderman film, deputies should be advised that "with great power comes great responsibility". Indeed, even though a deputy can make several financial decisions on behalf of P- for instance paying utility bills; paying for services provided by others such as cleaners, gardener, accountants, tax experts, etc. - such financial decisions or payments must be in P's best interests.

P's legal fees

If the deputy can use P's monies to pay for professional services, does this extend to the payment of legal fees?

This was a grey area. If a deputy took legal action which the deputy thought would ultimately benefit P, then in theory, the deputy should be able to use P's monies to fund this. However, as we all know, in litigation, legal fees can escalate to tens of thousands of pounds and potentially expose P to adverse costs. How and when is it decided that incurring such substantial legal fees is in P's best interests? At what point should the deputy consider making an application to the Court of Protection?

ACC & Others [2020] EWCOP9

This case gives some clarity to practitioners and deputies. I do not intend repeating the facts of the case but the key points to bear in mind are:

- A deputy can use P's monies to fund legal fees in the very early stages of a dispute. The early stage for a dispute is clearly defined as writing a letter of claim and receiving a letter of response.
- If it is clear from the opponents' response that the dispute will be ongoing, the deputy should then consider making an application to the Court of Protection seeking specific authority to use P's monies to fund contentious litigation.
(Note – this application process involves setting out key information to the Court and warrants a separate Aide-Memoire from me, so watch this space!).

Practical steps for practitioners and deputies:

1. Although obvious, check if P has the capacity to conduct litigation. If they do, then P will be the one giving you instructions and paying for the legal costs.
2. If P lacks capacity and you will be dealing with P's deputy, check the Deputyship Order for what authority the deputy has. If the deputy only has standard authority, make them aware that they can use P's



monies to pay for legal fees up to the point they receive the letter of response (in reality, this may also extend to initial advice as to the next steps and the merits of pursuing litigation).

3. Make an application to the Court of Protection. I strongly suggest that a separate file is opened as the costs rules in the Court of Protection are different. Feel free to contact me in respect of such applications – I have done quite a few!
4. Inform the other side of the steps your client is taking and ask them to place matters on hold.
5. If the matter cannot be placed on hold (whether it is as a result of an obstructive opponent, or due to limitation), put the deputy on notice that they will be responsible for the interim costs until the Court of Protection's approval is obtained. You should also consider seeking retrospective approval of these costs.
6. Upon receiving the Court of Protection's authority, pursue matters.

A few pitfalls to be mindful of:

- The standard authority given to a deputy does not extend to the authority to conduct litigation.
- If a deputy pursues litigation (post receipt of a letter of response) and uses P's money to fund this, they will be in breach of their fiduciary duty.
- Very often, this is picked up by the OPG during the course of their checks/investigation. If the breach is substantial, the OPG may make an application to have the deputy removed or replaced.
- There is no guarantee that an application for the retrospective approval of a deputy's legal costs will be approved by the Court of Protection. The deputy may therefore remain personally liable for P's legal fees.

Finally.....

If you are in the process of applying for a Deputyship Order (or to have a deputy replaced by another deputy due to their misconduct), consider seeking the Court of Protection's authority for the new deputy to commence and conduct litigation on behalf of P. This is a quick and cost-effective way forward. The Court of Protection adopts a very pragmatic approach in applications of this nature and I have been successful in securing such orders in a few of my cases.

If you have any questions or wish to discuss the above, feel free to contact me on 0121 746 3352.

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