



Neutral citation number: [2024] EWCOP 9

Case Numbers: 97401156

**Court of Protection**

First Avenue House  
42-49 High Holborn,  
London, WC1V 6NP

**DESCRIPTION**

**Heard on 6 November 2023**

**Judgment given on 19 February 2024**

**Before**

**DEPUTY DISTRICT JUDGE WEERERATNE**

**Between**

**BH**

Appellant

**and**

**JH**

**(acting by his litigation friend, the Official Solicitor)**

Respondent



**Representation:**

For the Appellant:  
Chambers

Ms Elissa Dacosta-Waldman, Counsel, instructed by New Court

For the Respondent:

Ms Georgia Bedworth, Counsel, instructed by Tenold Square

**Re P**

**Re Statutory Will costs application**

**Before Deputy District Judge Weeraratne sitting at First Avenue House, Holborn, London on 8 February 2024.**

**Issued on 19 February 2024**

1. This judgment concerns an application for costs made by the Official Solicitor (OS) acting as litigation friend for P following judgment on 10 November and an oral hearing on 6 November 2023. The two judgments should be read together. The application before the court concerned a variation to a statutory will made in 2008 on behalf of P. It was made by P's deputy who is also his brother. There was no dispute as to the substantive changes to the statutory will by the time of the hearing.
2. As the judgment sets out the only issue for the court was a procedural one. The deputy disputed the need for notification of beneficiaries under paragraph 9 of Practice Direction (PD) 9E. The application to the court to resolve that dispute was made by the OS. The notification dispute arose in relation to two categories of proposed beneficiary under the old and new statutory wills: carers and unidentified charities ('charity').
3. The dispute at the hearing centred on the residuary bequest made to unidentified charities ('charity') as set out in paragraphs 6 and 7 of the earlier judgment. The deputy also argued against the OS that paragraph 9 of PD9E did not apply to the carers as beneficiaries. The OS accepted by the time of the hearing that there were grounds for dispensing with notification to the carers that would require an order of the court.
4. I accepted the OS's arguments that notification pursuant to paragraph 9 of PD9E to the carers class of beneficiaries and to the Attorney-General in relation to the charitable bequests was necessary as a matter of fairness, and that paragraph 9 of PD9E did apply to the carers class of beneficiaries. I dispensed with notification to the carers for reasons that were agreed to be compelling. My reasons are set out in

full in my earlier judgment. At paragraph 49 I noted that the deputy had 'fundamentally misunderstood' the purpose of the service rules.

5. The OS made an application for costs and invited the court to depart from the usual order in CPR rule 19.2, and to exercise powers in rule 19.5. I directed that written submissions be filed with response by the deputy and a reply from the OS, and that the application would be determined on the papers.
6. In the absence of forthcoming or impending sitting dates, and in the interests of judicial continuity, special arrangements have been made for me to consider this application albeit with some unavoidable but regrettable delay.

### **The Official Solicitor's application**

7. Detailed and lengthy written submissions have been filed by both parties: 14 pages on behalf of each of the OS and the applicant, and 11 pages from the OS in reply.
8. The application seeks either a) that the deputy shall pay P's costs, namely the costs incurred by the OS of the determination of the service issue, including the hearing, alternatively, b) there be no order as to costs, such that the applicant will bear his own costs of the determination of the service issue including the hearing, and not be entitled to recover them from JH's estate. The OS's costs on behalf of JH would be recoverable from the estate in the usual way.
9. The deputy refutes the points made by the OS and invites the court not to depart from the usual rule, alternatively, that there should be 'no order as to costs' (paragraph 41 of his written submissions).
10. The OS is a public authority, and the deputy has been legally represented and advised in relation to the statutory will issues arising in this matter.

### **The law**

11. The general rule as to costs in proceedings concerning P's property and affairs is set out in Court of Protection Rules 2017 (COPR) 19.2: "costs of the proceedings, or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to P's estate."

12. The Court has a discretion to depart from the usual rule in CPR 19.2 “if the circumstances so justify”: rule 19.5(1). This also applies to the usual rule on costs in welfare cases (set out in CPR 19.3).
13. Rule 19.5(1) further provides that “in deciding whether departure is justified the court will have regard to all the circumstances including –
- (a) the conduct of the parties,
  - (b) whether a party has succeeded on part of that party’s case, even if not wholly successful; and
  - (c) the role of any public body involved in the proceedings.”
14. Rule 19.5(2) provides that “the conduct of the parties includes –
- (a) The conduct before, as well as during, the proceedings;
  - (b) whether it was reasonable for a party to raise, pursue or contest a particular matter;
  - (c) the manner in which a party has made or responded to an application or a particular issue;
  - (d) whether a party who has succeeded in that party’s application or response to an application in whole or in part, exaggerated any matter contained in the application or response; and
  - (e) any failure by a party to comply with a rule, practice direction or court order.”
15. In their submissions the applicant (deputy) cites *Hillingdon v Neary* [2011] EWCOP 3522, and the OS relies on *AH v Hertfordshire Partnership NHS Foundation Trust and others* [2011] 3524 (COP). There is no difference of approach between the parties discernible. Both are decisions of Mr J Peter Jackson (as he then was) in which sets out the relevant considerations for departing from the general rule.
16. In essence, each case must be considered on its own merits or lack of merits with a clear appreciation that there must be a good reason for departure from the general rule. There is no requirement of bad faith or exceptional circumstances before the discretion may be exercised, though if bad faith is found this may justify an order for indemnity costs. No bad faith is alleged in this case. Reported cases are no more than illustrations of the rules but offer helpful non-binding guidance.

### **The Parties’ submissions**

17. The OS relies on grounds that fall under the headings of 'conduct', and 'success' or lack of it.
18. Dealing first with 'success'. It is correct to state that the deputy failed in his contention that i) PD9E paragraph 9 does not apply to the carers, or to charity, ii) that service on the A-G be dispensed with. The deputy's position if notification on the carers was found by the court to be required, was that he agreed with the OS that notification on the carers could be dispensed with.
19. The deputy pressed his arguments at i) and ii) above with vigour at the hearing. The court was invited to consider this as a point of law on which judicial consideration was required.
20. The OS argues that the court dispensed with service on the carers in spite of, rather than because of the deputy's stance. She states that she recognised that there may be good reasons for dispensing with service and made it clear to the deputy on 4 July 2023 that a court order would be required for the same. The deputy notes that this was a date on which the OS also indicated her view that the A-G should represent the interests of charity and be notified.
21. The deputy asserts in his written submissions that he succeeded on part of his case in relation to dispensing with notification to the carers (see e.g. paragraph 6 of his written submissions). I cannot accept this as an accurate characterisation of the way in which deputy's case was put, and the primary position of the deputy in relation to the carers is reflected in the earlier judgment, namely that PD9E does not apply to the carers at all. The OS's position on dispensing with notification was known from the outset of the hearing and had been known to the deputy prior to the hearing.
22. I would not consider the lack of success, whether on all or part of a case, alone to be a sufficiently good reason for departing from the general rule.
23. On conduct, the OS makes three points, the deputy:
  - a. Unreasonably raised and pursued points which were plainly without merit ignoring clear case law, (COPR 19.5(2)(b),
  - b. Has conducted the proceedings in an aggressive manner (COPR19.5(2)(c),
  - c. Failed to comply with PD9E by not considering or appreciating what it required, and not providing documents and information as required by paragraph 6 of PD9E, and then delayed remedying that failure.

24. On a. above, the OS refers to correspondence prior to the hearing on the law, referring to the deputy's 'misunderstandings' that she attempted to correct on 4 July 2023.
25. In response the deputy refutes that he acted in an unreasonable way and that he clearly did have regard to the authorities suggesting that the limited jurisprudence on the service point needed expanding.
26. On this point, I agree with the OS. My earlier judgment reflects that the deputy's arguments on the interpretation of PD9E and its application to the carers and charity stretched credulity in some respects. See paragraphs 42 and 43 of that judgment. Furthermore, they did not reveal an appreciation that the service requirements are mandatory for the important purposes of procedural fairness and the interests of justice. They wrongly referred to the 'best interests' of P as noted in paragraph 20 of my earlier judgment, a point which it appears is still not appreciated by the deputy's written submissions (see paragraph 24). I accepted that there was a compelling reason to dispense with notification of the carers as identified by the OS, and agree in the alternative by the deputy.
27. My view that the deputy had fundamentally misunderstood the purpose of notification (paragraph 49 of my earlier judgment) indicates his lack of understanding of PD9E, the case law, and the points raised prior to the hearing by the OS in correspondence, as demonstrated throughout the hearing and before.
28. The words of PD9E are plain and do not require sophisticated judicial analysis, and had the deputy understood the purpose of PD9E he would have accepted the need for notification of carers and the AG. I regret that I did not consider that it was reasonable for the deputy to raise the arguments and contest the matter, as he did.
29. In my judgment, an agreed position could have been adopted on dispensing of notification to the carers prior to the hearing. An agreed order could have been filed at court setting out the rationale for the orders sought and basis for the agreement, thus avoiding a hearing altogether, subject only to the agreement of the court. Any hearing called for would have been limited and uncontested. Indeed, I did question why a hearing was taking place at the outset. I consider it more likely that the matter would have been dealt with on the papers.

30. On b. and c. above the parties make detailed submissions relying on correspondence, and make allegations and counter allegations of aggressive behaviour. The OS in her Reply takes issue where the deputy has referred to her being 'misleading' on she says no less than seven occasions. She says there is no basis for these serious allegations of professional misconduct.
31. I do not intend, nor need, to consider and determine each point raised. I will deal with this aspect of the OS's application in a summary form for which I intend no discourtesy. I do not refer to each and every point raised. The tenor of the application and the response indicate significant frustrations between the parties which I do not dismiss lightly.
32. The OS's case under b. and c. s is at paragraphs 30 and 31 of her written submissions. The deputy for his part alleges that the OS was aggressive and critical and asserts that he has been cordial and cooperative. The submissions focus on the responsibility and failure to obtain a copy of the statutory will from the relevant bank, and whether or not and when the OS took a 'firm view' in relation to PD9E requirements. The OS raises complaints with the bundle provided for the hearing, the lack of compliance with service requirements, and the deputy's delays and failure to bring the matter to the court promptly.
33. These submissions underline to me the point I have concluded above which is that the deputy has vigorously contested the PD9E notification issue without reasonable regard to PD9E, and existing case law, leading to protracted and perhaps tense correspondence on both sides. It is not possible for me to determine the level of aggression and criticism between the parties. There clearly have been frustrated exchanges on both sides for reasons I cannot clearly determine on the papers and which it is neither proportionate nor necessary for present purposes to hold a hearing to determine. The matters complained of by the OS are illustrative of an approach to the overall conduct of these proceedings by the deputy that have led to there being what I have determined to be an unnecessary contested hearing on what should have been a relatively straightforward issue. I say nothing about whether the deputy has been aggressive in these proceedings and as noted he disputes any aggression on his part.



34. The issue of a proposed round table meeting appears to me to be somewhat of a red herring, especially as it was made clear to me at the outset of the hearing that no agreement could be reached which was why the parties agreed that a hearing was required. By that stage also a paper determination was not possible as the matter had become highly contentious.

### **Decision**

35. It follows from the above that in my judgment all the circumstances in this case, and especially the conduct of the deputy due to a fundamental misunderstanding of the purpose of PD9E, justify a departure from the general rule as to costs in CPR 19.2.

36. I have not considered it necessary to determine each and every complaint made by the OS and have found it sufficient for my decision to rely on the conduct outlined above.

37. The order I make takes account of the conduct of the deputy in relation to the PD9E issue particularly in ignoring the advice from the OS from 4 July 2023 after receipt of the statutory will and counsel's advice.

38. My order is that the general rule in CPR 19.2 is disapplied in relation to the PD9E issue, and the deputy shall i) pay P's costs (being the costs incurred by the OS acting as his litigation friend) of the determination of the service issue under PD9E from 4 July 2023, including the hearing, and ii) bear his own costs of determination of P9E issue from the same date, including the hearing.

8 February 2024