



Public Guardian practice note

OPG's approach to family care payments

Summary

This practice note sets out the Public Guardian's position on care payments deputies make to family members who are providing care for someone who lacks mental capacity (known as 'the client').

It defines what is meant by a family care payment, sometimes called a 'gratuitous care' payment. It sets out the legal framework,

the deputy's authority to make payments and the Public Guardian's view on factors to consider when agreeing and calculating such payments. It explains when the Public Guardian expects deputies to seek approval of payments from the Court of Protection ('the court') and when the Public Guardian will consider applying to the court over unauthorised payments.

Purpose and scope

This practice note sets out the legal framework and the Public Guardian's view of how deputies should approach family care payments, including factors for them to consider when deciding on the level of such payments. The Office of the Public Guardian (OPG) may amend this note at any time and in particular to keep in line with emerging Court of Protection judgments.

The guidance applies to deputies appointed by the court under a finance and property order. The position of attorneys acting under a lasting or enduring power of attorney will depend on the specific powers granted under the power. However, attorneys may find the factors to consider a useful guide when making best interest decisions about payments for care.

Definition – what is family care?

It is common for family members and friends to provide some level of informal care for the client – cooking meals, helping with hygiene, supervising or being a companion, for example. Arrangements may vary from being occasional and what the family member would see as part of their role as the client's relative, to full time regular care involving nursing and physiotherapy skills. In many cases, it is preferable for a family member to care for the client (in the case of children, by their parents) and many relatives provide this sort of care without any expectation of payment. In other cases, a payment can ease the carer's own financial situation and enable them to continue in their caring role.

The Public Guardian considers that payments to enable such care can be in the client's best interests, provided the factors this guidance outlines are considered. When managed properly, it is often best for everyone if the client gets a combination of professional care and care from a family member, thereby enhancing the quality of family life while also providing respite for the family member.

The kinds of care arrangements that might justify a family care payment include:

- there is normally no contractual relationship between the client and the family member involved
- the family member is providing the care by way of their natural love and affection for the client
- the care is informal in nature and not by way of a job description
- the family member(s) do not have formally agreed hours, breaks or holidays
- there is little or no demarcation of work between family members, and no one is responsible for securing contractual terms or service delivery – for example a case manager (regardless of any formal arrangements in place for professional or regulated care)

More formal sorts of arrangements than those above suggest that the family member is being directly employed as a carer, with employment and contractual rights. This guidance doesn't cover such arrangements.

Legal framework

Most orders appointing a deputy for property and affairs give general authority to manage the client's financial affairs. However, before making any family payments, the deputy must consider two things:

1. Whether the payment being proposed is in the client's best interests
2. Whether the decision to make a payment conflicts with the deputy's duty not to take advantage of their position

Sections 1 to 4 of the Mental Capacity Act 2005 states that, if a person lacks capacity to make a particular decision at a particular time, then any act or decision someone else makes on that person's behalf must be done or made in their best interests.

There is a checklist in section 4 of the Mental Capacity Act that requires a deputy to consider all the relevant circumstances when deciding what is in the client's best interests and, in particular, they must take the steps that section refers to. These include considering if the person has capacity to make or participate in the decision; not to make the decision based solely on the age or appearance of the person; to consider the person's past and present wishes, feelings and beliefs; and to consult others where appropriate, for example, those involved in caring for the person or with an interest in their welfare.

Section 19(6) of the Mental Capacity Act states that a deputy is to be treated as "the agent" of the client when they act on the client's behalf. Being an agent means that the deputy has legal duties to the person they are representing. This duty includes the deputy not taking advantage of their position or

putting themselves in a position where their personal interests conflict with their duties. This is called a 'fiduciary duty'. A deputy who is taking family care payments for themselves may be in breach of this duty if they lack specific authority from the Court of Protection to make such payments.

The court has published judgments that give an indication of its approach to family care payments, but it's important not to follow them too literally, as each case turns on its own circumstances. The judgments are:

HC, Re [2015] EWCOP 29 (23 April 2015)

In this decision, the senior judge of the Court of Protection approached payments for care in the same way as a court would do when hearing a personal injury claim – by allowing a commercial rate, discounted by 20% because the payment is not taxable. He also provided for annual increases in line with the Annual Survey of Hours and Earnings (ASHE) 6145 – carers and home carers.

A, Re [2015] EWCOP 46 (7 July 2015)

In this decision, the senior judge took into account the views of a professional deputy and found that the deputy had carefully gone through the checklist of matters to be taken into account when making a best interests decision.

HNL, Re [2015] EWCOP 77 (19 November 2015)

In this decision, the senior judge ordered a specialist report from a professional brain injury case manager to evaluate and quantify the care and case management services the deputy provided to his sister. He also specified that there was no need for further review of payments until 2022 or until such

time as there was a change in circumstances. That was due to the gulf between the commercial value of the services the deputy provided and the actual payment the deputy received.

The full judgments can be read on the British and Irish Legal Information Institute database at:

www.bailii.org/ew/cases/EWCOP/

Whether the Court of Protection's authority is needed

Professional (fee paid) deputies

The Public Guardian considers that professional deputies, who are being paid a fee for their services, are empowered to make decisions about family care payments under their court order. They are expected to follow the principles and guidance in this practice note.

As long as the professional deputy can provide evidence of best interest decision making, the Public Guardian won't require them to apply to court for approval of payments. However, in cases where agreement on the amount of payment cannot be reached, or there is a possibility of challenge by other family members, the professional deputy may wish to apply to the court themselves for specific approval of payments.

The Public Guardian may apply to the court for directions if he considers that the payments do not follow this guidance and are not in the client's best interests. In extreme cases, he may apply to the court for removal of the deputy.

Lay deputies

Where a lay deputy is both providing care and taking a payment, the Public Guardian will advise the deputy to seek court approval to avoid a breach of their fiduciary duty. The Public Guardian may also require a lay deputy to seek court approval if they are paying someone they are closely connected to – for example, a spouse or child – where the decision to pay may be influenced by the close relationship rather than objectively made in the best interests of the client.

Factors to consider

In deciding if family care payments are in the client's best interests, deputies should take the following factors into account:

- The care must be reasonably required to meet the client's needs and be of a good standard. If in doubt, the deputy may need to seek a care assessment from social services. If there has been any litigation
- claim for damages, the deputy should consider the level of care recommended by experts in the course of the litigation claim
- Affordability: the payments must be affordable taking into account the client's resources, age and life expectancy. If the payments cannot be met out of the

- client's income, deputies must consider the effect on capital, having in mind the client's future care needs
- Payments must properly reflect the input by the family/carer. There should be some evidence of how the care payment has been calculated in relation to the degree of care being provided. If the client is a very young child, deputies should consider whether care is over and above what a parent would normally give
 - The care must be actually provided. Temporary interruptions in provision of care, for example if the client is in hospital, do not mean the payments need to stop, but long term changes in the client's living arrangements that affect the amount of care being provided must be considered – for example, a permanent move to a care home or supported living arrangement
 - Deputies should consider payments alongside the level of professional care in place, ie they should be necessary to supplement professional care
 - Payments should represent a saving on the cost of professional care
 - Payments should take into account any other contributions the client makes towards the running of the household or paying bills. Payments may need to be adjusted down if the carer is living in the client's property rent-free or is getting other income
 - Payments should take into account the overall family situation, for example, whether anyone is in gainful employment. If two parents are providing care, what is their respective contribution? If the client needs two people at any time to manage their needs, payments may need to increase to reflect this
 - Payments should be agreed in consultation with the carer and other family members, where possible. It is good practice to consult others with an interest in the client's affairs to avoid situations of conflict

Calculating a payment level

There are 3 possible approaches to calculating the payment.

1. Where the client's estate is sufficient and the family provide most care, the deputy may ask what allowance would be needed. If the amount is affordable, sustainable and reasonable in relation to the amount of care provided, then payment can be made.
2. Where the client's estate is sufficient and a significant amount of professional care is being provided, then the deputy may wish to calculate the allowance with reference to the approach Senior Judge Lush recommended in the case of *Re HC* [2015] EWCOP 29. That involves calculating family care by taking the commercial cost of care in the client's home area and reducing it by 20%. This in turn follows the approach taken by the Queen's Bench Division of the High Court in quantifying heads of damages in personal injury litigation.
3. Where the client's estate is limited, then the payment should reflect only what the client can reasonably afford.

When considering affordability, if there is an annual periodic payment the client gets as

part of a litigation claim, then such a payment is normally for care and case management. It can also be useful to refer to counsel's advice on settlement of a damages claim. This helps in accessing an overall budget for family care when any professional care costs and case management costs are eliminated from the equation.

In some situations, the carer may have given up a well-paid job to care for the client. It is the Public Guardian's view that, in all but the most exceptional circumstances, family care payments are not intended to replace salaries

and should not be calculated at the level of the carer's previous earnings.

Deputies need to bear in mind that, when applying the different factors in this guidance, and particularly taking into account affordability, payments can vary widely. It is possible, for example, that two carers providing the same amount of care may get different family care payments. While on the face of it this appears unfair, it reflects the fact that carers' situations must be considered in the round rather than applying a simple formulaic approach.

Increases in payments

In the case of *re HC*, mentioned above, the senior judge suggested that payments are index-linked, to avoid the need for repeat applications to the court to recalculate a care allowance. Where it is deemed necessary to increase an allowance, payments may be linked to the actual cost of care, as set out in the Annual Survey of Hours and Earnings (ASHE), published by the Office for National Statistics. ASHE 6145 covers care workers

and home carers and ASHE 6146 covers senior care workers.

In recent years, ASHE increases have been modest and in some cases have reduced. Carers may need to be aware therefore that they are unlikely to see large annual increases in payments for care as a result of this indexation.

Frequency of payment

There are no hard and fast rules about frequency of payments; deputies agree on them with the carer.

Carers should be paid monthly, weekly or as an annual lump sum.

Record keeping and reviews

To demonstrate best interests decision making, it is good practice for deputies to keep a record of the factors they have considered when making a decision about family care payments. The Public Guardian expects professional deputies to keep a

checklist on the client file to evidence the process they followed when deciding the amount of payment. Lay deputies should note the considerations they have followed in an annex to their annual report to the Public Guardian.

Deputies should keep payments under regular review, to make sure they are still appropriate and affordable. Frequency of reviews will depend on the case but should in the least be carried out when there is a change in circumstances, for example, because the client's living arrangements change or their care needs increase or decrease.

Other circumstances that may prompt a change, or an end to payments, are entitlement to continuing health care funding, the carer's circumstances changing and any changes in the client's financial situation.

Tax liability on family care payments

HM Revenue and Customs (HMRC) regards payments to family members as voluntary payments exempt from tax and national insurance (Employment Status Manual – ESM 4016) and for this reason they are often called 'family' payments.

HMRC will consider a number of factors when deciding if payments are tax exempt.

OPG cannot give advice on tax matters and deputies will need to resolve any issues about treatment of payments directly with HMRC.

If HMRC clearance cannot be obtained, family members may sometimes need to be directly employed as carers alongside professional carers and to pay tax and national insurance on their payments.

For further advice:
Office of the Public Guardian
Telephone 0300 456 0300
www.gov.uk/opg