



Office of the
Public Guardian

SD14

Public Guardian guidance

OPG's approach to family care payments

Summary

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

Purpose and scope

This guidance defines what is meant by a family care payment, sometimes called a 'gratuitous care' payment. It sets out the legal framework, the authority to make payments and the Public Guardian's view on things to consider when agreeing and calculating these payments. It explains when the Public Guardian expects deputies and attorneys to ask the Court of Protection (the court) to approve payments and when the Public Guardian will consider applying to the court in relation to unauthorised payments.

The Office of the Public Guardian (OPG) may amend this guidance at any time, particularly to stay in line with new Court of Protection judgments.

The guidance applies to deputies appointed by the court under a finance and property order and attorneys appointed under a finance and property lasting power of attorney or an enduring power of attorney.

Throughout this guidance the term 'P' is used to refer to a person who is the subject of a deputyship order or the donor of a lasting or enduring power of attorney.

What is family care?

Family members and friends often provide some informal care for P – cooking meals, helping with hygiene, supervising or being a companion, for example. This may vary from being occasional and in line with what the family member would consider as being part of being P'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 P (in the case of children, by their parents) and many relatives do so without any 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 P's best interests, provided the factors this guidance outlines are considered. When managed properly, it is often best for everyone if P 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 those where:

- the family member is providing the care by way of their natural love and affection for P
- 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).

In most cases a deputy or attorney will have authority to agree to the employment of a family member to provide care for P under a formal contractual arrangement. Authorisation from the Court of Protection will be required in any case where the deputy or attorney is being paid to provide care under a contractual arrangement as this constitutes a potential conflict of interest that can only be ratified by the court.

Legal framework

Most orders appointing a deputy for property and affairs give general authority to manage P's financial affairs. An attorney acting under a property and financial affairs power will usually have authority to make payments to a third-party providing care for the donor. However, where the attorney is also the person providing care a conflict of interest arises as attorneys are not allowed to take advantage of their position. Where this occurs, the attorney will be required to apply to the Court of Protection for authorisation. Before making any family care payments the attorney or deputy must consider:

- whether the payment being proposed is in P's best interests
- whether the decision to make a payment conflicts with the attorney's or deputy's duty not to take advantage of their position

Sections 1 to 4 of the Mental Capacity Act 2005 state 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 an attorney or deputy to consider all the relevant circumstances when deciding what is in P's best interests and 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 P when they act on P's behalf. Being an agent means that the deputy has legal duties to the person they are representing. This duty means the deputy must not take advantage of their position and must avoid any situation where their personal interests could conflict with their responsibilities.

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.

Paragraph 7.60 of the Mental Capacity Act Code of Practice states that attorneys have a fiduciary duty to ensure that they avoid taking advantage of their position and must not profit or obtain any personal benefit from their position which would include being paid for care.

The court has published judgments that give an indication of its approach to family care payments, but it's important not to recognise that each judgement turns on its own circumstances and may not be appropriate for every circumstance where family care payments are being paid. 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 considered 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 difference 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 and attorneys

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

As long as the professional deputy or attorney 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 or attorney may wish to apply to the court themselves for specific approval of payments.

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

Lay deputies and attorneys

Where an attorney or lay deputy is both providing care and taking a payment, the Public Guardian will require the attorney or deputy to seek court approval to avoid a breach of their fiduciary duty.

The Public Guardian may also require an attorney or 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 P.

Factors to consider

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

The care must be reasonably required to meet P's needs and be of a good standard. If in doubt, the attorney or deputy may need to seek a care assessment from social services. If there has been any litigation claim for damages, the attorney or deputy should consider the level of care recommended by experts in the course of the litigation claim.

The payments must be affordable considering P's resources, age, and life expectancy. If the payments cannot be met out of P's income, attorneys and deputies must consider the effect on

capital, having in mind P's future care needs.

Payments must properly reflect the input by the family/carer. There should be evidence of how the care payment has been calculated, in relation to the degree of care being provided. If P is a very young child, deputies should consider whether care is over and above what a parent would normally give.

The care must actually be provided. Temporary interruptions in provision of care, for example if P is in hospital, do not mean the payments need to stop, but long-term changes in P'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.

Attorneys and deputies should consider payments alongside the level of professional care in place, i.e., 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 P makes towards the running of the household or paying bills. Payments may need to be adjusted down if the carer is living in P's property rent-free or is getting other income.

Payments should consider the overall family situation, for example, whether anyone is in gainful employment. If two parents are providing care, what is their respective contribution? If P 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 P's affairs to avoid situations of conflict.

Calculating a payment level

Where P's estate is sufficient and the family provide the majority of care, the attorney or deputy may consider 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.

Where P's estate is sufficient and a significant amount of professional care is being provided, then the attorney or 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 and reducing it by 20%. This in turn follows the approach taken by the King's Bench Division of the High Court in quantifying heads of damages in personal injury litigation.

OPG will generally refer to the mean hourly salary (less 20%) for carers in the Annual Survey of Hours and Earnings (ASHE) (Table 26.5a) published by the Office for National Statistics as a benchmark for the commercial cost of care.

Where the High Court has determined that the higher rate of the 80th percentile of the hourly rates as set out in the ASHE table represents the commercial position in relation to providing care for P and has granted approval for a periodical payment order (PPO) at the higher rate, the 80th percentile will be an acceptable starting point as the benchmark for care payments. Family care payments and PPOs may be index linked, in which case annual assessment against the ASHE tables will not be required.

Where P's estate is limited, then the payment should reflect only what P can reasonably afford.

When considering affordability, if there is an annual periodical payment P 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 the 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 P. It is the Public Guardian's view that, in all but the most exceptional circumstances, family care payments are not intended to replace salaries.

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 ASHE. The ASHE table 26.5a covers the hourly rates for all care workers.

Attorneys and 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.

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; attorneys and deputies should agree them with the carer and they should not be calculated at the level of the carer's previous earnings.

Carers can 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 attorneys and deputies to keep a record of the factors they have considered when making a decision about family care payments. The Public Guardian expects all attorneys and deputies to provide evidence of the process they followed when deciding the amount of payment. Deputies should also record the payments in their annual report and provide a breakdown of who is providing the care, how many hours of care were provided and at what rate. They should also state whether the High Court has previously approved a periodical payment order and at what rate.

Attorneys and 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 at least be carried out when there is a change in circumstances, for example, because P'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
- 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

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