



Office of the Public Guardian issues practice note on approach to family care payments

On 18 May 2016, the Office of the Public Guardian (OPG) published a practice note on the Public Guardian's approach to family care payments made by deputies on behalf of someone who lacks mental capacity ("the client"). It applies only to deputies but attorneys may find the guidance helpful.

What is 'family care'?

- Informal care provided by family members where there are no set hours, breaks or agreed holidays and there is little or no demarcation of work between family members;
- Excludes formal arrangements where the family member would be considered to be employed as a carer with employment and contractual rights.

General duties

When deciding whether to make family care payments, deputies must consider the following:

- Is the payment proposed in the client's best interests, and whether the decision to make a payment conflicts with the deputies duty not to take advantage of their position;
- The checklist in section 4 of the Mental Capacity Act;
- The factors listed in the guidance (set out below).

Do I need to obtain the Court of Protection's authority?

Professional deputies - are able to make decisions about family care payments without applying to the court. These decisions must be supported by evidence of decision making in the client's best interests and consideration of all the relevant factors.

Lay deputies - are advised to apply to the court to ensure that their duties are not being breached where the deputy, or a closely connected person (the examples given are a spouse or a child) is providing the care.

Factors to be considered

- Care must be of a good standard and reasonably required to meet the client's needs. This could be backed up by a social services care assessment or medical reports in a litigation claim.
- Payments must be affordable. If they are not affordable from the client's income, the deputy must consider the effect on capital and the age, life expectancy, resources and future needs of the client.
- Payments must properly reflect the input by the family/carer. The deputy should evidence how the care payment has been calculated.



- Care must actually be provided and payments should only be made for as long as the client needs the care.
- Deputies should consider family care payments alongside the rate that would be paid for professional care. Payments should represent a saving on the cost of professional care.
- Care payments should take into account any other contributions that the client makes towards the household. For example, payments should be reduced if the carer lives in the client's home rent-free.
- The overall family situation should be considered.

Calculating an appropriate payment

A formulaic approach should not be applied to calculate the level of payments; how the level of payment is calculated will turn on the client's situation.

The Public Guardian suggests 3 possible approaches to calculating the level of payment:

1. In circumstances where the family provide most or all of the care, and the client's estate can afford it, the deputy may ask what amount the family carer needs. The payment must be reasonable, sustainable and affordable.
2. Where care is divided between the family carer and professionals, the deputy may calculate the allowance by taking the commercial cost of care and reducing it by 20% (to reflect that the payments are usually not taxable).
3. Where the estate is limited, the payment can simply reflect what the client can afford.

Payments should be reviewed regularly to ensure that they remain appropriate and affordable.

Tax

- Usually, HMRC considers payments to family members as voluntary, and therefore exempt from tax and national insurance.
- Deputies should obtain clearance from HMRC for payments to be made. Alternatively, family members may be employed as carers and tax and national insurance contributions should be made.

Record keeping

- Professional deputies are expected to keep a checklist on the file as evidence of the process that has been followed.
- Lay deputies may record their considerations in an annex to their annual report to the Public Guardian.

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