



Keeping it in the Family

By Miranda Marshall – Director at Hayes + Storr

Looking after ones elderly, incapable or vulnerable family members is natural and has happened forever. Many would consider it outside the interference of the legal system. Being paid within the family has always taken place on an informal basis, especially where someone has given up work to look after a relative and needs money to live on whilst they do so.

These days 'Family Care Payments' (FCPs) or 'gratuitous care payments' are the formal terms for such arrangements. The Office of the Public Guardian (OPG) has increasingly been requiring Deputies to seek authorisation to such packages. Its approach in the past has been over-zealous. The OPG has recently published useful guidance in the form of a practice note setting out the legal framework and the OPG's approach to such payments. This applies only to Court of Protection appointed Deputies under a Finance and Property Order. It does not yet apply to the same sort of arrangements made in other circumstances.

When family members provide informal care for an individual lacking mental-capacity, it may involve anything from small scale care or providing companionship, to full-time care. The kind of care arrangement that might justify a FCP includes situations where there would not normally be any formal contractual relationship between the person and the family member providing care, as that care is given out of their natural love and affection.

The new guidance explains the OPG's position on FCPs that Deputies make to such family members who provide care. It defines the arrangements and sets out the Deputy's authority to make payments; including factors to consider when agreeing and calculating such payments. The OPG considered that FCPs can be in the person's best interests, providing the FCP is properly set up and managed. The care must be of a good standard and required by the person in question. Guidance is provided as to increases in payments and record keeping.

Matters to be taken into account include: the care actually given, affordability, other contributions made to household upkeep, savings on the cost of commercial care and the overall family situation. Other family members should be consulted, wherever possible.

Although not applicable to those with Lasting or Enduring Powers of Attorney (LPAs and EPAs), the note is useful to families making best-interests decisions in similar situations.

In the 2015 case of Re HNL Senior Judge Lush lifted reporting restrictions and set in motion the issue of this guidance. In that case he commended the family on the 'exemplary care' which was provided on a 'significantly cheaper' basis than commercial care. Previously, he had held that the rate paid should be no more than the going commercial care but with a 20% reduction, largely to reflect the fact that no income tax is payable on FCPs. Inflation-proofing was authorised in advance so as to reduce the cost of returning to Court for a review.

It is good to see such a common-sense approach to an age-old situation.

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