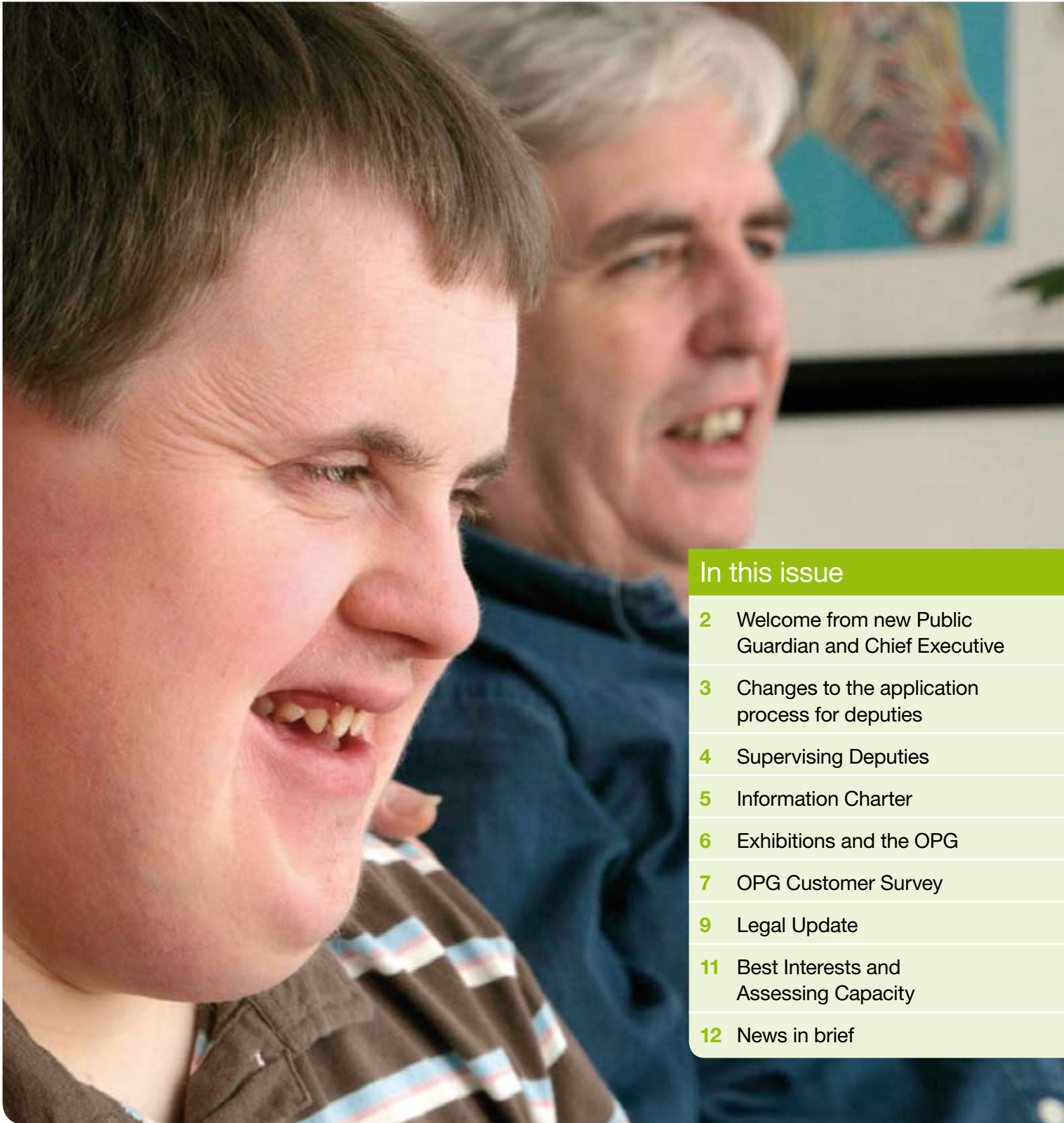


The newsletter for Deputies

Office of the
Public Guardian

OPG *in* Touch

Summer 2008



In this issue

- 2 Welcome from new Public Guardian and Chief Executive
- 3 Changes to the application process for deputies
- 4 Supervising Deputies
- 5 Information Charter
- 6 Exhibitions and the OPG
- 7 OPG Customer Survey
- 9 Legal Update
- 11 Best Interests and Assessing Capacity
- 12 News in brief

OPG: Safeguarding rights and enabling and encouraging choice for all who need our services.

Welcome

Dear Deputies,

Welcome to the Summer 2008 edition of OPG *in Touch*.

I am delighted to have been appointed Public Guardian and Chief Executive of the Office of the Public Guardian (OPG), taking over from Richard Brook, who left to join Sense, the charity for deafblind people. I am excited to work in this important area, protecting some of the most vulnerable people in society.

I have come from the Tribunals Service where I was Director of Business Development and before that, Director of Asylum and Immigration. In that environment I have a track record of organisational change and performance improvement – which fits well with OPG's circumstances:

- higher than predicted workloads;
- a vulnerable client group;
- keen public and parliamentary scrutiny.

Over the coming weeks and months my priority is to work with staff and stakeholders to ensure

that all our customers, including you as deputies, receive the right services at the right time.

The Office faces key challenges in dealing with the processing of applications to the Court of Protection and for Powers of Attorney. Extra resources have been brought in to tackle delays and we are already beginning to see improvements.

The OPG needs to process all sorts of personal information in order to provide its services and there is a big push, across all of government, to ensure all such data is managed securely. OPG is involved in reviewing all its data handling arrangements to make sure they comply with best practice.

We are also continuing to assess supervision – both in terms of allocating appropriate supervision regimes and managing the growing number of cases assessed as requiring a close supervision regime. We are already looking at changes to the application process for Deputies.

This Autumn we will launch the review of the Mental Capacity Act, assessing how well it works in practice. Engaging closely with customers and stakeholders will be vital to this process.

I look forward to working with you all.



A handwritten signature in black ink, appearing to read 'Martin John'.

Martin John
Public Guardian and Chief Executive
Office of the Public Guardian

Court of Protection News

Changes to the application process for deputies

Were you appointed as **Receiver** before 1 October 2007? If so, important changes to the way you make an application to the Court of Protection have come into effect on **1 July 2008**.

As you may know, Receivers appointed before 1 October 2007 automatically became Deputies under the Mental Capacity Act, but only with the same powers and authority set out in the Order appointing them as Receiver. The old Orders limit the decisions you are allowed to make, which means you have to return to Court for further Orders, or permission to spend money. Since October, the Court has issued new style Deputy Orders to more than two thirds of the Receivers appointed before 1 October.

If you are one of the many to have received one of the new Orders, you already know that it gives you much wider powers than before. Typically you will be allowed to access bank accounts, sell or purchase property, make improvements to property, and make the same gifts or charitable donations that the person might make themselves. As a general rule, unless the Order says you cannot do something, or the law says you need a separate Court Order, you can take any financial decision that is in the person's best interests. Some of the things you may need to come back to Court for are large gifts,

Inheritance Tax planning; making a will on behalf of the person; or if you wish to step down as Deputy.

You have told us, through letters and surveys, that you prefer working without the restrictions of the old Orders, and welcome the freedom to make decisions that the new Orders bring. If you are unsure about what your Order allows you to do, our Customer Contact Centre will be pleased to guide you. The telephone number is 0845 330 2900.

If you have not yet applied on form COP9, and you need to apply to Court in the future.

Those of you who have not yet received the new Order have been able to apply to Court, using form COP9 for straightforward matters like accessing bank accounts. Wherever possible, the Court has dealt with your request by giving you a new style Order, so you do not have to make similar applications in future.

From 1 October to 30 June 2008 we have not charged former Receivers a fee for making this sort of application.

On 1 July the rules relating to fees changed, and from that date all applications to Court will incur a fee of £400. However, if you have already sent us your COP9 application, and we received it before 1 July, no fee will be payable. If you only sent your application recently, it may be several weeks before you hear from us, as we have had a very high volume of applications trying to beat the deadline. If your application is urgent, we will do our best to process it quickly.

If you have not yet applied on form COP9, and you need to apply to Court in the future, then you will need to complete a different form, COP1. For straightforward decisions like accessing a bank account; dealing with investments; or selling a property, then COP1 is the only form required.

For a full list of relevant decisions you should read the Court practice direction 9D which you can download from the website, or ask our Customer Contact Centre to send you a copy. For other applications, not covered by practice direction 9D, you may need to complete additional forms and provide evidence. If you are unsure what forms to complete, there is guidance available on the website, www.publicguardian.gov.uk or through our Customer Contact Centre.

OPG News

Supervising Deputies: Priorities during the summer months

During the early summer months we have been dealing with two main priorities. We have continued to review all cases, allocating an appropriate supervision regime.

There are very few cases still to be assessed and most of these have outstanding issues before the Court, and are in the process of being resolved.

We also continue to manage the growing number of cases assessed that require a close supervision regime. This includes making contact with and offering support and guidance to Deputies, and by helping to resolve the outstanding issues in some of these cases.

In a number of cases applications have been made to the Court to discharge Deputies who have not fulfilled their obligations under the Mental Capacity Act 2005. These have been passed to our Compliance and Regulation team who have carried out a number



of investigations which have increased since implementation of the Act on 1 October 2007.

We also continue to check a sample of Deputy report forms, and are moving to a more detailed check of the form, which will involve asking for more supporting information in cases selected for review. A small number of Health and Welfare Deputy appointments have also now been made, and we have specialist advice and guidance in developing individual plans to support the Deputies in these cases.

Carrying out visits

In the Spring edition of OPG In Touch we explained that a review of the Visitors' service was being carried out, and that the service

would be restructured as a result to allow a more flexible provision. This work is now well under way. The vacancies for the first permanent visitors have been advertised, and we hope to have the first three visitors in place by October 2008.

The existing Visitors have recently undertaken a number of visits on cases which have been allocated a light-touch supervision regime to check that the allocation process is working as envisaged, and that there are no areas of concern. This programme of visits has helped us build a more detailed picture of our clients and our Deputies, and is enabling us to plan how we can supervise cases most effectively in the future.

Information Charter

The Information Charter from the Ministry of Justice, the OPG's parent Department, sets out the standards that you can expect from us when we request or hold personal information about you. It also tells you how to get access to your personal data, and what you can do if you think standards are not being met.

About personal information

Personal 'data' is information that relates to living individuals. It does not include information relating to dead people, groups or communities of people, organisations or businesses. The Data Protection Act 1998 regulates the management of personal information.

We need to handle personal information about you so that we can provide services for you. This is how we look after that information.

When we ask you for personal information, we promise to make sure you know why we need it, and ask only for what we need and not collect too much or irrelevant information. We will protect it and make sure no unauthorised person has access to it, and we will let you know if we share it with other organisations to give you better public services. We will not keep the information longer than is necessary, and we will not make your personal information available for commercial use without your consent. Should you wish us to stop processing data about you, we will consider your request very carefully.

In return, we ask that you give us accurate information and tell us

as soon as possible if there are any changes to your personal circumstances, such as your address. This helps us to keep your information reliable and up to date.

More information

After reading this some questions may have been raised. You may want to know:

- how to find out what information we hold about you
- how you can ask us to correct any mistakes
- about agreements we have with other organisations for sharing information
- of circumstances where we can pass on personal information without telling you, for example, to help with the prevention or detection of crime or to produce anonymised statistics
- what our instructions to staff are on how to collect, use or delete your personal information
- how we check that the information we hold is accurate and up to date
- how to make a complaint.

Please note that a fee may be charged for any personal information provided or for



information provided in languages other than English.

To find out more please contact Siobhan Hillman on 0207 664 7243 or by e-mail at **Siobhan.Hillman@publicguardian.gsi.gov.uk** .

Complaints

When we ask you for information, we will keep to the law. If you consider that your information has been handled incorrectly you can contact the Information Commissioner for independent advice about Data Protection, privacy and data sharing issues. You can contact the Information Commissioner at:

Wycliffe House,
Water Lane,
WILMSLOW,
Cheshire, SK9 5AF.
Tel: 01625 545745
Fax: 01625 524510
Web site: www.ico.gov.uk/

Exhibitions and the OPG

Royal College of Nursing Congress 2008



The Royal College of Nursing (RCN) held their annual Congress at the Bournemouth International Centre at the end of April 2008. The RCN Congress is where nursing and medical professionals meet to learn, develop and share excellent nursing practice. It is also where members inform the RCN agenda and influence nursing and health policies through debate. Running alongside the business of Congress is a large programme of professional, educational and social events, and the UK's largest exhibition of nursing products and services also takes place during the week.

Congress is held every spring and attracts upwards of 4,000 delegates. It is the perfect opportunity to network, meet like-minded colleagues and learn about the latest developments in nursing.

One of the debates during Congress 2008 was about concerns over whether nursing decisions can be vetoed by those with lasting power of attorney and how this can be reconciled. Nurses need to work with patients and the person with power of attorney.

Speakers pointed out that when the Mental Capacity Act 2005 first came into effect, hospital staff were uncertain of how they stood



when it came to best interest decisions. They went on to make very positive statements, however, explaining that since 1 October 2007, many situations experienced by staff where they had to make a best interests decision on behalf of patients had been clarified.

The OPG exhibited at the event to raise awareness of the Act and OPG services. We had over 1,000 visitors to the stand and it was pleasing that the majority of hospital staff had a good knowledge of the Act and were keen to get an even better understanding.

Visitors to our stand were very complimentary about our Making Decisions booklets, describing them as the most useful tool to explain how the Act works in different situations. The booklets, aimed at families, friends and workers in the care and health sectors, are available to download from our website, www.publicguardian.gov.uk, or from our Customer Contact Centre on 0845

OPG Customer Survey

IPSOS Mori, an independent research agency conducted the first OPG customer survey in March 2008. The survey looked directly at customer's experiences of the OPG including those of Deputies who made an application to the Court and Deputies appointed to a supervision regime.

The results have now come through and are promising. The survey also allowed respondents to write in their own comments of their experience. These comments along with all the survey data is currently being analysed and will help inform future OPG strategic planning. In the meantime, the key highlights from the survey are outlined below along with a selection of answers to questions raised by a number of Deputies in the survey.



Deputies who made an application to the Court

- Over eight in ten deputies were clear about their responsibilities as a Deputy under the Mental Capacity Act.
- Amongst those that had to contact the OPG for clarification of anything in the booklet, 64% found the contact very or fairly helpful although 28% found it fairly or very unhelpful.
- Just over half (53%) were confident about the process of applying to become a Deputy, but less than a third of people found the applications form easy to complete.

Deputies allocated a supervision regime

- Almost nine out of every ten supervision survey respondents (87%) stated that they understood why they were

allocated to the regime that they had been;

- Three quarters (72%) were notified within three months of their order about the supervision regime.
- The vast majority of respondents felt the information provided with the notification of the supervision regime was very or fairly clear (71%).

Questions and Answers

What are all of the different fees for?

Guidance booklet OPG506, "Court of Protection and Office of the Public Guardian fees, exemptions and remissions" sets out the fees payable and how you may be eligible for an exemption or remission of those fees under certain circumstances.

What can I do without reference / permission from the OPG and Court of Protection?

Your actions and decisions as a Deputy will depend on what the Court has specified that you should do in the Order appointing you. However, guidance booklet COP43, "A guide for Deputies appointed by the Court of Protection" provides an overview of your powers, duties and responsibilities as a Deputy.

What should I do if I do not agree with the level of supervision I have been assessed at?

As outlined in part B of guidance booklet OPG507, "A guide to Supervision of Deputies", you should write to the OPG asking for the reasons you were given that level of supervision within 14 days of our notification letter. If you still do not agree with the level, you

have a further 14 days to write and ask for a review.

You should support your request for a review with a statement about why you are requesting it, together with any relevant documentation or evidence.

What information and in what form will the OPG report need to be made annually?

We will write to you and provide you with Deputyship report OPG102, one month before the anniversary of your Court Order to complete within 8 weeks of receipt. You will need to decide what documents you should retain to support the decisions and transactions you have made during the year in your role as Deputy.

It may assist you to download a copy of OPG102 now to help determine how best to record your decisions and transitions throughout the year.

Does the Deputyship report have to be audited by an independent accountant?

No. Instead we will carry out a sample check of reports, and if your report is selected for checking we may contact you for copy statements, or more information.

Where can I go for more information?

For more information, including all the guidance booklets and the Deputyship report you can:

- Visit the OPG website www.publicguardian.gov.uk.
- Call the OPG on **0845 330 2900** (9am – 5pm Monday to Friday).
- If you have speech or hearing difficulties and have access to a textphone, call the OPG on **0207 664 7755** (9am – 5pm Monday to Friday).
- E-mail customerservices@publicguardian.gsi.gov.uk.

However, please note that OPG staff cannot provide legal advice. We recommend that you consider seeking your own independent legal advice.

Some of our publications you may find useful

OPG503 – Office of the Public Guardian and Court of Protection – Service standards

OPG506 – Court of Protection and Public Guardian – Fees, exemptions and remissions

OPG601 – Making Decisions – About your health, welfare or finance – who decides when you can't?

OPG602 – Making Decisions – A guide for family, friends and other unpaid carers

OPG603 – Making Decisions – A guide for people who work in health and social care

OPG605 – Making Decisions – An Easyread Guide

EPA101 – A guide to Enduring Powers of Attorney

LPA102 – A guide for people who want to make a personal welfare Lasting Power of Attorney

LPA103 – A guide for people who want to make a property and affairs Lasting Power of Attorney

LPA104 – A guide for people taking on the role of personal welfare Attorney under a Lasting Power of Attorney

LPA105 – A guide for people taking on the role of property and affairs Attorney under a Lasting Power of Attorney

LPA107 – A guide for Certificate providers and Witnesses



You may download these from our website at www.publicguardian.gov.uk, or you may order the actual publications, free of charge, by calling Contact Centre on **0845 330 2900**

Legal Update

Local Authority Care Funding

This item looks at a few aspects of local authority care funding:

- Capital limits for residential care funding
- Recent changes in the regulations on local authority residential care funding where there is a personal injury damages award
- The effect of those changes on funding for non-residential care
- Recent court decisions dealing with funding issues and the deputy's position in personal injury cases

Capital limits for residential care funding

Deputies who act for people in residential care homes should be aware that they can apply to the local authority for funding or a contribution to the funding when the resident's capital assets have fallen to a particular level (income is also taken into account). The capital limits are increased annually, and are now as follows from 7 April 2008:

England

Lower limit: £13,500
Upper limit: £22,250

Wales

Lower limit: £19,000
Upper limit: £22,000
(unchanged since 2007)

Although some types of assets are not taken into account, the general rule is that residents with

capital above the upper limits are ineligible for funding. They are entitled to funding (subject to contributing income) if their capital does not exceed the lower limits. If their capital falls between the two limits, the amount above the lower limit is converted into a notional income (called tariff income) of £1 for each £250 of capital, and this figure is taken into account as income in the assessment along with their actual income.

Residential care funding and personal injury awards

We can now update deputies who represent someone who has been awarded damages for personal injury. In the Spring 2007 issue of "Reaching Out" (the previous name of our newsletter), we drew attention to amendments in the regulations which apply to means-tested benefits (such as income support) where there is a personal injury award. For many years these awards have been left out of account in the benefits assessment provided they were either held by trustees or held in Court (either on the Court's special account or as investments in the name of the Accountant General). A change in the benefits regulations in October 2006 relaxed this rule, as well as getting rid of some other restrictions and inconsistencies in the regulations. The main change was that the award would now be ring-fenced in Court of Protection cases whether or not it was held in court or by trustees. So, for example, investments in the client's own name or held by brokers were to be left out of account in the

assessment provided they were purchased from the award. The income from a personal injury award is also left out of account.

The change to the regulations in October 2006 did not apply to eligibility for local authority funding for residential care, so it remained the case that a personal injury award would be left out of account in this situation only if it was held in court or held by trustees. The Department of Health carried out a consultation, and changed the regulations (which relate to England only) in April 2008. As a result of this change, the regulations on residential care funding have now been brought into line with those on means-tested benefits on this point. The details of the regulations cannot be given here, but the general position is that a personal injury award (the capital sum and income from it) must now be left out of account by the local authority in Court of Protection cases whether it is held in court, out of court or by trustees.

We understand that the Department of Health intends to carry out another consultation later this year on more substantial changes to the regulations on funding residential care.

Funding for non-residential (domiciliary) care

Neither set of regulations mentioned above apply to local authority funding for services provided outside a residential setting (for example, paying for carers in the person's own home). Legislation allows local authorities

to charge what they consider reasonable. They must follow Department of Health guidance (the Fairer Charging Policy), which says that local authorities should apply the same principles about leaving capital out of account as apply under the regulations for residential care funding. It follows that, as from April 2008, the capital of a personal injury award must be left out of account by the local authority when considering eligibility for funding for non-residential services in Court of Protection cases, whether the money is held in court, out of court or by trustees.

Unfortunately the position on income from an award is unclear. In the case of *Crofton v NHS Litigation Authority* in 2007 the Court of Appeal confirmed that the same rules applied about leaving capital out of account whether the local authority funding related to residential or non-residential care, but said that the Department of Health guidance was unclear on whether the rules on income were the same. Until this is clarified by another court decision, some local authorities may argue that they are entitled to take the income from a personal injury award into account when assessing eligibility for non-residential services.

The deputy's position in obtaining care in personal injury cases

The question whether the local authority will be obliged to fund someone's care in personal injury cases is relevant to the calculation of the award. If the local authority will have to leave the award out of account and fund the person's care, it can be argued that the award should be reduced accordingly. The trouble with this is that the state would be paying for the care instead of the person

who caused the injury (normally that person's insurer). This was the issue in the *Crofton* case (above), where the court considered that the amount of the award should only be reduced if it was clear that the claimant would be receiving "direct payments" from the local authority to fund carers for at least a certain period of time.

Another significant recent case is *Peters v East Midlands SHA and Nottingham City Council*, decided in May 2008. It involved a young woman who had a professional Deputy, who was also her "litigation friend". She was living in high cost residential care. The question was whether the damages award should be reduced to reflect the fact that she would be entitled to local authority funding of her care. The judge held that the award should not be reduced, because the claimant was entitled to "have control over her own destiny" rather than make herself dependent on State resources. It was confirmed that, where local authorities were assessing a person with a personal injury award for eligibility for care funding, they had to leave the entire award out of account, not just that part of it which was to compensate for pain, suffering and loss of amenity. A full award, with no reduction to reflect local authority funding, would guarantee good quality care for life and avoid the uncertainties of relying on the State, especially as the law on funding could change. The judge was aware of the problem that a claimant should not recover twice for the same loss, in other words it would be wrong for someone to get full damages as well as local authority funding. He considered whether the Deputy should give an undertaking not to apply for local authority funding, but decided that



there was no legal basis for this: the suggestion was "fraught with difficulty", and it was not clear whether the Deputy would be acting within her powers if she gave such an undertaking. The judge solved the problem by saying that he was confident that the Deputy would not apply for local authority funding in the absence of some unexpected development, and that he could rely on any successor Deputy to take the same view. In this way "double recovery" would be avoided.

References

The new regulations on residential care funding are

The National Assistance (Sums for Personal Requirements and Assessment of Resources) Amendment (England) Regulations 2008 (S.I. 2008 No. 593)

and

The National Assistance (Assessment of Resources and Sums for Personal Requirements) (Amendment) (Wales) Regulations 2008 (S.I. 2008 No. 743).

They may be viewed in the Statutory Instruments section of the website www.opsi.gov.uk. The reference for the *Crofton* case is [2007] EWCA Civ 71, and for the *Peters* case is [2008] EWHC 778 (QB).

Mental Capacity Act

Best Interests and Assessing Capacity

In the Spring edition of **OPG In Touch** we ran the first of a series of articles about various aspects of the Mental Capacity Act 2005 that may affect you as a Deputy.

The first article was about the principles of the Act and what they actually mean in practice.

In this second article, we take a look at “best interests” and the things to think about when considering whether a person has capacity to make decisions.

What does the Act mean by best interests?

The term ‘best interests’ is not actually defined in the Act and this is because so many different types of decisions and actions are covered by the Act, and so many different people and circumstances are affected by it.

When working out what is in the best interests of the person who lacks capacity to make a decision or act for themselves, you must take into account all relevant factors that it would be reasonable to consider, not just those that you think are important. You must not act or make a decision based on what you would want to do if you were the person who lacked capacity.

So how do you work out what the best interests of a person who lacks capacity are? Well, there is a useful checklist of common factors that must always be considered by anyone who needs to decide what is in the best interests of a person who lacks capacity in any particular situation. However, you should

bear in mind that this checklist is only the starting point, and in many cases extra factors will need to be considered.

The common factors you need to be aware of are:

1. Equal consideration and non-discrimination
2. Considering all relevant circumstances
3. If the person may regain capacity
4. Permitting and encouraging the person’s involvement
5. Special considerations for life sustaining treatment
6. The person’s wishes and feelings, beliefs and values, particularly where these are written down
7. The views of other people (where practicable and appropriate)

You must remember that this checklist does not define best interests and is not exhaustive. More detailed information on best interests is available in chapter 5 of the Code of Practice which is available on our website www.publicguardian.gov.uk or in hard copy from TSO www.tsoshop.co.uk at a cost of £15.00.

Assessing capacity

Of course, before any of the above applies, you must first ensure that you have provided all the help and support the person needs to make a decision on their own. If, however, the person is unable to make a decision, then they will need an assessment of capacity.

When an assessment of capacity is required, it is vital to remember that the assessment is decision specific and must be assessed in relation to the particular decision, and at the time the decision needs to be made. When you need to do an assessment, it is undertaken with the key principle that the person has the capacity to make the decision in question.

The Code of Practice outlines a two-stage test of capacity, in order to decide whether a person has the capacity to make a particular decision. They are:

- Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It doesn’t matter whether the impairment or disturbance is temporary or permanent.)
- If so, does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

Assessing ability to make a decision

You may need to assess the capacity of the person because you need to do something in order to care for them. You are not expected to be an expert in assessing capacity, but you have to have a 'reasonable belief' that they lack mental capacity. You will need to think about the following.

1. Does the person have a general understanding of what decision they need to make and why they need to make it?
2. Does the person have a general understanding of the likely consequences of making, or not making, this decision?
3. Is the person able to understand, retain, use and weigh up the information relevant to this decision?
4. Can the person communicate their decision (by talking, using sign language or any other means)?
5. Would the services of a professional (such as a speech and language therapist) be helpful?

Case Study: Finding a less restrictive option

Sunil, a young man with severe learning disabilities, also has a very severe and unpredictable form of epilepsy that is associated with drop attacks. These can result in serious injury. A neurologist has advised that, to limit the harm that might come from these attacks, Sunil should either be under constant close observation, or wear a protective helmet. After assessment, it is decided that Sunil lacks capacity to decide on the most appropriate course of action for himself. But through his actions and behaviour Sunil makes it clear he doesn't like to be too closely observed – even though he likes having company. The staff of the home where he lives consider various options, such as providing a special room for him with soft furnishings, finding ways to keep him under close observation or getting him to wear a helmet. In discussion with Sunil's parents, they agree that the option that is in his best interests, and is less restrictive, will be the helmet – as it will enable him to go out, and prevent further harm.

However, you must always remember that a decision must never be based simply on their age, their appearance, assumptions about their condition, or any aspect of their behaviour.

For further information, contact our Customer Services and ask for a copy of our booklet Making Decisions: A guide for family, friends, and other unpaid carers, reference number OPG602, or download it from our website at www.publicguardian.gov.uk.

News in Brief

Office Closure

Please note that the Office of the Public Guardian will be closed on:

Monday 25 August 2008, which is a Bank Holiday.

Contact Us:

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Archway Tower
2 Junction Road
London N19 5SZ
DX 141150 Archway 2

Tel: **0845 330 2900**
Fax: **020 7664 7705**
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Web: www.publicguardian.gov.uk

In accordance with our Welsh Language Scheme, we are able to provide this newsletter and other publications in Welsh.

If you would like information in Welsh, please go to our website, or contact us on 0845 330 2900.

Yn unol â'n Cynllun Iaith Gymraeg, mae'r cylchlythyr hwn ar gael yn y Gymraeg.

Os hoffech gael gwybodaeth yn y Gymraeg, edrychwch ar ein gwefan neu ffoniwch ni ar 0845 330 2900.