

Briefing Paper on the challenges and financial sustainability for professional deputies

Key concerns:

- The drive to ensure that the professional deputy's role is sustainable to the person for whom the deputy is appointed to act (P) is imbalanced to the point that there is a real and present risk that the work is financially unsustainable and significant numbers will not seek appointment or wish to retire.
- The judgment of Re ACC [2020] EWCOP 9 (Re ACC) has increased the work of the deputy, resulting in additional costs; has created difficulties in implementation; and with the risk that the professional deputy may not recover costs for necessary work.
- Human resource shortages across multiple organisations is resulting in delays and additional costs, which have a detrimental impact on P and the ability to act in an efficient and cost-effective way.
- Lack of investment in the Court of Protection's information technology is hampering its ability to deliver an efficient and effective service to the detriment of users.
- Lack of understanding of financial organisations about the role of a deputy and the Mental Capacity Act (MCA 2005) is such that it can take a long time to open an account, and can restrict how the account is managed and can increase the risk of misuse due to organisations technology.

Reference throughout is made to the following:

- The Office of the Public Guardian (OPG) Deputies Standards Policy and separate Guidance for Professional Deputies against which the deputy is assessed as to whether they are meeting the standards (February 2023)
- The case of Re ACC : <https://www.gov.uk/government/publications/new-guidance-for-deputies-in-response-to-acc-judgement>
- Fixed Costs Practice Direction 19B (PD19B)
- Guideline Hourly Rates (January 2024)
- Senior Court Costs Office (SCCO) Costs Guidance 2023
- Joint good practice guidance on Professional Deputy Costs from the OPG and the SCCO (SD9)(July 2016)

Recruitment difficulties for legal practices

Court of Protection work is not as profitable as other areas of law, and in some cases it is being run at cost or marginally above cost. Overheads have increased because of the cost of utilities, insurances and salaries have all gone up. The lack of profitability restricts the salaries which can be offered to recruits. Firms of all sizes are experiencing difficulties in recruiting fee earners into this area, as potential candidates can find more lucrative work elsewhere.

As a result it is not always possible to match the most appropriate grade of fee earner to the task required and increases the risk that the SCCO does not allow the actual time spent on the case.

Difficulties in other organisations

Recruitment problems are also experienced by a wide range of organisations, including the Court of Protection, the OPG, the NHS and social services, where there are consequential delays, requiring the fee earner to chase organisations, incurring additional costs for P which are not always allowed by the SCCO.

As an example, the Court will not make an order allowing the deputy to sell P's home, unless it has evidence that P lacks capacity to decide where to live, that residency in a care home is in P's best interests and the local authority has authorised P's deprivation of liberty (DoLS). In most cases, P will not object to their deprivation of liberty and the authorisation is routine. There are considerable delays in local authorities authorising deprivation of liberty. According to the Care Quality Commission in its State of Care 2022/23 report, it found that *'the average application took 156 days - over 7 times the statutory timeframe. Over 39,000 people had been waiting for longer than a year for their DoLS application to be completed as at 31 March 2023.'*

This is partly due to the volume of applications for authorisations and the limited number of assessors who can prepare the various assessments that form part of the authorisation process.

Often P's home needs to be sold to fund their care, but without the DoLS authorisation, the court will not make an order for sale. This puts P at risk of eviction if the care home fees cannot be paid. If P has some liquid funds, the applicant deputy may make an application to the Court for an interim order, adding to time spent by the applicant deputy and the Court's human resource pressures.

If P has limited capital other than their home, the local authority can be approached for a care and support assessment and a request that they pay the care fees in the interim under section 18 of the Care Act 2014 or section 35 of the Social Services & Well-being (Wales) Act 2014. However, there are significant delays in assessments due to the increase in demand for services and staff shortages. Data from the National Audit Office reveal that the number of people waiting more than six months for a care assessment has almost doubled since the end of 2021, reaching around 82,000 as at March 2023.

Some care homes will continue to fund care in the interim but will charge P significant interest on the accruing debt.

Many local authorities do not want to take on the responsibility of deputyship, particularly as there is no statutory duty on them to do so. Some professional deputies will take on a limited number of low value cases but it is increasingly difficult to find anyone prepared to be appointed as a deputy. This gap is being filled by unregulated and unqualified people acting in a commercial capacity. They may have no legal qualifications. This places P at risk of exploitation. For example, Matrix Deputies Limited were removed as deputies and are now in administration, but not before significant numbers of P's were exploited.

The Court of Protection is experiencing recruitment problems, which at a simple level means there are long delays in relation to communication which falls outside of the deputyship application made on line, including waiting up to 2 months for a sealed order to be dispatched after the date of the deputyship order. Other applications can encounter significant delays and it is not uncommon to be waiting almost a year for a matter to be resolved.

The lack of investment in IT at the Court is preventing it from maximising efficiencies. It is not uncommon for orders to be made and dispatched which have been superseded by events, notwithstanding the Court being informed about the changes but the legal papers have not been matched to the Court file. Obsolete orders require further orders- all which has to be funded by P.

Financial organisations continue to fail to understand the role of a deputy, the court order, and the working of the MCA 2005. Opening an account is time consuming and can be harder where P has capacity to manage some of their money. It is not uncommon for financial organisations to merge

one account with other accounts, belonging to different clients and the professional deputy's personal bank account, running the risk of mistakes. The professional deputy has to overcome organisational delays, loss of documentation and limiting the type of account or banking product on offer.

Re ACC has created practical and costly difficulties

The judgment of Re ACC sets out what is encompassed within the authority of the property and affairs deputy and has created additional work, which at times is of little benefit to P and can be difficult to implement. For example:

1. Where P lives in their own home, and the deputy has contacted P's local authority to ensure there is no deprivation of liberty, but they have failed to act, the deputy is required to bring a personal welfare application to the Court for directions. As mentioned above, delays with obtaining DoLs are common place so the deputy must make an application for directions. Re ACC did not set out what period of time the deputy should wait to decide whether the local authority has failed to act. Some may take the view that so long as it's in the 'system', then there is little benefit in commencing an application for directions. Others will make an application, and P will be responsible for the costs.
2. A challenge for funding for NHS continuing healthcare (CHC) is considered by the Court as litigious. The deputy is permitted to draft a 'letter of appeal' but not deliver it, meaning authority from the Court must be obtained for any further steps to be taken, where the costs of the deputy in challenging the decision are sought to be recovered out of P's estate. A challenge to CHC must be made within a short time frame (in Wales within 28 days of the decision letter and in England set locally, but usually within 6 weeks), meaning that professional deputies have little choice other than to seek a review and then apply for retrospective costs. Alternatively, the deputy may decide that their costs of getting court authority is disproportional to the costs of the review so undertake the work without payment.

It should be noted that neither the English nor Welsh Government's National Framework on CHC consider seeking a review of continuing healthcare as litigious, because

- (i) it is a review and not an appeal, and in most cases are completed on the papers;
 - (ii) the independent review does not allow for legal representation, as any legal representation is only permitted to act as an advocate for P;
 - (iii) it is not possible to make legal arguments, as such challenges should be made by way of judicial review;
 - (iv) the local NHS commissioning body is not obliged to follow the recommendation of the independent review even where they make a recommendation of eligibility.
3. Following Re ACC there is a strong argument that a complaint to social services is also considered litigious and requires express authority. For example, if the local authority social services department have failed to meet P's eligible care needs because they have reduced P's personal budget, the deputy should follow the social services complaint's procedure. This may extend to pursuing the complaint to the relevant Ombudsman, incurring additional costs for P, which may not be fully recoverable by the deputy.
 4. To manage conflict of interest, if the professional deputy wishes to instruct their own firm to provide advice or carry out legal tasks, which forms part of their deputyship role, such as whether to evict a tenant, they must obtain 3 quotes, including one from their own practice and make a best interest decision as to which to accept. This in itself takes up the deputy's time as the request must disclose all the relevant details for the quote to be

given, Obtaining competitive quotes can be difficult as other firms can be unwilling to tender for work they believe they are unlikely to get and is of a low value.

In the event that the quote for their own firm is £2,000 or over (excluding VAT and disbursements), an order from the Court is required before the work is commenced, with a risk to costs for any urgent work that is conducted in the interim. Retrospective authority may be sought (but not necessarily granted) where urgent work is needed. In a footnote in Re ACC the figure of £2,000 was suggested 'based on the reality that the simplest application to the Court costs £1,500.' In many cases, there are costs savings for P by simply instructing an external firm rather than incurring the additional costs of applying to the Court for an order. So the deputy's practice loses business as a result of their appointment.

5. Appealing an Education, Health and Social Care Plan (EHSCP) is not within the deputy's general authority. Specific authority must be obtained from the Court to take any steps in respect of challenging an EHSCP, and without it the deputy proceeds with the risk that they may not recover their costs. This is needed, even if a parent who has legal status in the EHSCP process to act on behalf of their child, asks for their legal fees incurred to be reimbursed.

If the deputy's own practice has the expertise to undertake the work, the deputy must obtain 2 external quotes before making an application to the Court for authorisation. The deputy can experience difficulties in obtaining quotes for the work as such appeal is a specialist area of law, with few firms willing to provide a quote when they believe they will not get the work. Furthermore, the timescale to submit an appeal is 2 months, so firms have no choice but to submit the appeal and seek retrospective authority (which may not be allowed).

Authority to obtain a Deferred Payment Agreement require an express order

OPG deputy standards guidance 6b states that '*If P is in public authority funded care, you should consider setting up a deferred payment arrangement where this is appropriate and in the best interests of P.*' Such an arrangement can only occur if P lives in care home; has under £23,250 in England or £50,000 in Wales; and their home is not occupied by a qualifying occupant which renders the home to be disregarded in the means test.

Authority to obtain a deferred payment agreement has to be specifically sought from the Court and it is not always arranged on the outset of the deputyship that this is required. On such occasions a further application is required, which takes time to obtain with additional cost to P. Local authorities are expected to set up the arrangements by the end of 12 weeks following P's permanent admission to the care home. In many cases, local authorities will put pressure on deputies to sign without the Court authority.

Costs are not recoverable at their true rate

The requirements of the Mental Capacity Act 2005 (MCA 2005), undertakings which the deputy has given to the Court, the OPG Deputyship Standards, the Fixed Costs Practice Direction 19B, and the approach taken by the SCCO as to what is allowed to be recovered, has increase the level and complexity of work undertaken by deputies, but at the same time they are not able to recover the true cost of providing their service.

Undertakings given to the Court

The applicant deputy gives undertakings to the Court in COP4 (Deputy's Declaration) accepting the duties and responsibilities of being a deputy, and to have regard to the principles set out in s1 MCA 2005, make decisions in the best interests of P, as set out in s4 MCA 2005 and have regard to the MCA 2005 Code of Practice, and includes confirmation that they will:

- visit P regularly, as is appropriate and take an interest in their welfare (undertaking 9)
- work with P and their carers to achieve the best quality of life within the funds available (undertaking 10)
- cooperate with any representative of the Court or Public Guardian who wishes to meet the deputy or to check the deputyship arrangements are working (undertaking 11)
- immediately inform the Court and the Public Guardian if they have any reason to believe that P no longer lacks capacity and may be able to manage their own affairs (undertaking 12)

As such the professional deputy is required to:

- Regularly review P's capacity (s1(2), s2, s3 and s20(1) MCA 2005)
- Facilitate support to enable P to make those decision which they are capable of making (s1(3) and s20(1) MCA 2005)
- Where practicable, involve P in decisions that are proposed to be made on their behalf (s4(4) MCA 2005)
- Where appropriate and practicable, consult with P, their carers and interested people about their views, wishes, beliefs etc concerning decisions (s4(7) MCA 2005)
- Keep in regular contact with P, their carers and people who are interested in P's welfare to ensure their welfare needs are being met through the commissioned arrangements which the deputy has established.

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Points of tension in relation to the undertakings

The following points of tension occur between the undertakings given to the Court and being properly remunerated in complying with those undertakings:

1. Expectations of the deputy : Arranging formal mental capacity assessments

Regularly reviewing P's capacity is not limited in practice to management of P's property and financial affairs and veers into capacity to make welfare decisions.

OPG Deputy Standard 2(b) states:

'Deputies must make sure that formal mental capacity assessments are carried out as and when appropriate'. Guidance 2b expands on this to require the deputy to 'consider P's capacity to make particular decisions at the relevant time' and at 3a, 'You should regularly review P's capacity to handle money.'

In *A, B and C v X, Y and Z* [2012] EWHC 2400 (COP), Mr Justice Hedley said at para 41,

'..the general concept of managing affairs is an ongoing act and, therefore, quite unlike the specific act of making a will or making an enduring power of attorney. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent.'

Mental capacity to make financial decisions is considered a single macro decision, so it is unlikely that a capacity reassessment is required to make decisions relating to the management of P's property and affairs in those cases where P has a capacity condition which will not improve.

It is more likely that the deputy will need to arrange to assess P's capacity to make personal welfare decisions, which have financial ramifications, such as whether P has capacity to get married. This affects P's financial position as marriage automatically revokes a will and it may prompt a need for a statutory will, but also that it triggers maintenance responsibility towards a new spouse. There are many welfare decisions which impact on finances, particularly around commissioning and sustaining care packages, social activities, and supporting P's own lifestyle choices.

Local authorities are not under any statutory obligation to become involved unless there is a risk of abuse or neglect and the adult at risk is not able to protect themselves (see section 42 Care Act 2014 or section 126 of the Social Services & Well-being (Wales) Act 2014). Where there is doubt about capacity the deputy is not expressly authorised to make an application to the Court as it is a welfare decision, and they do so with the risk that costs will not be allowed.

2. Expectations of the deputy : visiting P

The OPG's deputy standard 3 states that the deputy must:

'visit P at least once a year; deputies must demonstrate an awareness of P's circumstances and provide justification for more frequent visits if required.'

Accompanying guidance at 3a builds on this and states that the deputy should

'make regular assessments of their needs' and 'must demonstrate an awareness of P's circumstances and provide justification of more frequent visits if required.'

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Where it is justified the OPG take the view that the deputy is able to visit P more than once a year- but this does not equate to being remunerated for these additional visits.

The joint guidance SD9 on 'Levels of Contact' states:

'The SCCO's usual practice is to allow one home visit in each 12-month period, which is considered to be appropriate in cases which are stable.'

It is accepted that more visits may be necessary to meet the particular needs of the case, but deputies should be prepared to justify this with reference to their duties under the Mental Capacity Act.

*The SCCO allows the cost of one fee earner to visit in all except the **most exceptional cases**.' (emphasis added)*

The nature of this area of work often requires high levels of contact with P. Many P's can only participate in decision making by face to face. Sticking to the guidance arguably puts the deputy in breach of its undertaking to the Court to visit regularly, and undermines the working of the MCA 2005.

Even where the deputy justifies more frequent visits, their judgement can be undermined by the OPG supervision process who may take the view more frequent visits are not justified and the SCCO assessment process, when costs are not permitted or reduced.

Furthermore, the SCCO may decide that additional visits are only allowed for exceptional cases, rather than the costs of more than one fee earner attending being allowed in the 'most exceptional' of case. The consequence is that when the deputy makes a decision that it is appropriate to see P more than once a year, they do so at risk of not having their costs allowed - even where they have justified this to fulfil their duties under the MCA 2005.

3. Expectations of the deputy : managing P's frequent level of contact

The OPG's deputy standard 3 sets out the overarching responsibility that:

'All deputies must engage with P in an appropriate manner taking into account P's individual circumstances.'

Standard 2(b) states that:

'Deputies must include P in decision making wherever possible. Records of conversations including evidence of P's wishes and feelings must be kept.'

This is supplemented by the OPG's guidance 2b, which requires the deputy to keep full records of conversations with P and at 3(a):

'You should discuss and record P's feelings, wishes, beliefs and interests, both past and present, with P, You should use appropriate ways to communicate with P, for example, in their preferred language.'

This responsibility is based on the decisions to be made and P's own circumstances, rather than setting up front how much contact is required. Each interaction has to be recorded in detail (with justification for how and why) to meet this standard and the requirements of the MCA 2005.

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Contact is not always one-way. There are times where P contacts the deputy, who has to manage the level of contact, as set out in OPG deputy standard 3(a) which states:

'Deputies must make sure that cases where P makes frequent contact with the deputy are managed appropriately with minimal additional cost to P.'

In contrast the joint guidance SD9 on 'Levels of Contact' takes the view that regardless of who initiates contact:

'Professional deputies should try to limit excessive contact with all parties, including the client, their family members and case workers.'

'In all cases, professional deputies are expected to use their judgement in deciding the most cost effective method of communication, and take a balanced approach to meeting the client's needs against incurring excessive costs.'

There will be cases where P is stable and able to engage via the telephone or by email but there are significant numbers of cases where it can be very difficult to manage P's frequent contact, particularly where P has an acquired brain injury and an impairment in their executive function. They may have difficulties with poor concentration, emotional dysregulation, anxiety, and impulsive behaviour. Their behaviour can negatively impact on their family and those providing care resulting in a breakdown in relationships and disruption to care which has to be managed. The time spent justifying decisions is in itself time consuming and even where the deputy uses their judgement, having exhausted alternative avenues for communication, their judgement is undermined by the SCCO process, which may reduce the costs they are allowed to recover.

4. Expectations of the deputy : consulting others

The OPG's deputy standards guidance at 3(a) provides that:

'You should discuss and record P's feelings, wishes, beliefs and interests, both past and present, with [P] their family, and care providers.....'

You should maintain regular contact with family members and carers, and make sure they are involved in making best interest decisions for P when appropriate.'

This is necessary to comply with section 4 of the MCA 2005 as the deputy must consult other people for their views where it is appropriate and practicable to do whenever they are to make a decision in P's best interests. The guidance at 2a sets out that the deputy *'must retain full records of conversations with [P and] relevant persons....'*

Those interested in P's welfare are often heavily involved in P's life and will in many cases be the first line of contact. The more complex P's care situation and needs, the greater the contact with others and the more detailed record keeping is required. But even when the deputy has justified their reasons for consulting with others and the time spent, costs may not be fully allowed.

5. Expectations of the deputy : general management and welfare decisions

The OPG professional deputy guidance 1(a) requires that

'You should make sure that staff have access to appropriate advice and expertise on state benefits, continuing health care, NHS-funded nursing care, and funding under section 117 of the Mental Health Act 1983.' and

'You should make sure that staff know about public authority funding and charges for care, and how to access appropriate expertise and advice.'

The guidance at 4(f) provides *'You should make sure that P's care provision is good value for money, and appropriate to the level of funds available.'*

In SD9, headed 'Welfare Work' sets out the following guidance:

'Where a property and affairs deputy is appointed to manage the client's finances, work in respect of welfare is not recoverable from the client's estate without permission from the COP.'

If the professional deputy for property and affairs is finding that a large proportion of their time is being taken up in health and welfare related matters, they should ensure they engage with appropriate professionals who can meet those needs (for example, alert agencies to safeguarding concerns).

They may also consider it is in the client's best interests for an application to be made to the COP for the appointment of a health and welfare deputy.'

The SCCO Costs Guidance at 27.12 states:

'On occasions, some activity which does not relate to P's property and affairs, such as visits to clients or attendances at case conferences, may be necessary in order to safeguard P's property. In such cases, the Costs Officer may accept well founded arguments that such general management costs should be allowed on assessment. If the

circumstances of the case are unusual and require the deputy to be actively involved in the management of P's day to day affairs, then the deputy should draw this to the Costs Officer's attention in a covering letter submitted with the bill.'

A property and affairs deputyship does not confer any authority in respect of P's personal welfare and yet the deputy is required to take an interest in P's welfare. There are times where these two areas of P's life are inseparable, particularly in relation to the arrangement, commissioning and maintenance of care which includes commissioning care plans, obtaining eligible state support and touch points relating to P's deprivation of liberty. Where the NHS or local authority are involved in the care arrangements and funding, challenges about the extent of support and the consequential funding may be required. The OPG expects the deputy to engage in these arrangements; yet the Court places limits on what the deputy can do by the court order; and the SCCO takes the position it must always be justified, and where possible the work should be passed to either the local authority or other public body or to an appointed health and welfare deputy.

The deputy is working to inconsistent expectations, trying to navigate this is time consuming. Even when the deputy has justified their reasons for engaging in an activity which is not directly related to P's property and affairs, costs may not be allowed or reduced.

6. Expectations of the deputy : Grade of fee earner

Para 27.12 of the SCCO Costs Guidance, states:

'The Costs Officer would also expect that any deputyship work, be it legal or non-legal, be undertaken by an appropriate grade of fee earner in the firm which may not necessarily be a deputy.'

SD9, headed 'Delegation of duties' expands on this:

'Professional deputies are expected to delegate work to the appropriate level of fee earner. That means routine GM activities such as paying bills or checking bank statements should be carried out by an administrative assistant or a Grade D fee earner at best. The deputy will need to justify any bill where a higher grade of fee earner is claimed.'

This approach is being extended beyond general management and there is inconsistency as to the appropriate grade of fee earner, for example, in a statutory will application, the Costs Officer decided that a Will for P whose estate was over £1million should be drafted by a Grade D fee earner. The deputy's professional judgement as to the skills required is undermined by the SCCO. The SCCO will reduce costs because either it believes it could have been done at a lower rate or quicker.

Agreeing which grade of fee earner is the most appropriate for each activity, when the practice does not have the fee earners at the appropriate grade due to recruitment difficulties limits the deputy's profitability.

7. Expectations of the deputy : Level of fees recoverable is insufficient

A professional deputy is entitled to general management costs which are reasonable and proportionate to the total value of P's estate, the amount of work done (the standard basis) and that any work done should be done by the appropriate fee earner (Paragraph 6, PD19B).

SD5 requires the professional deputy to:

- Maintain a clear and transparent fee levying policy that operates in the most cost-effective manner for the client (Standard 3a (9))
- Carry out regular billing of deputy's costs in line with the fixed costs practice direction (Standard 3a (10))

The OPG will ask professional deputies to submit a breakdown of the costs involved in their care as well as an estimate for the following year on professional fees insert (OPG105).

SD9, headed 'Submitting form OPG105 to OPG and the SCCO' states:

'The OPG105 will be due alongside the deputyship report (OPG102/OPG103) at the end of the reporting period. The completion and submission of OPG105 should not require any further information gathering activity by the deputy and is not anticipated to add any further cost burden to the client. Completing the form should take no longer than 30 minutes.'

SD9 headed 'Good Practice' provides:

'OPG expects a professional deputy to take a balanced approach when dealing with the client's affairs and exercise professional judgement in all aspects of their role, in particular where the client's funds are concerned. This includes considering the amount of involvement they expect to have in the client's affairs in the next deputyship year and how much the professional deputy fees are likely to cost the client's estate.'

If the estimate given in the previous year, which covers the current reporting period is underestimated by 20%, the deputy must explain why their costs have increased. The estimate is particularly challenging and time consuming as it requires details of the name and role of each fee earner, a breakdown of what time will be spent in contact with P, their family, care providers and others, and what documents are to be drafted.

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Inadequacy of PD19B

There is an expectation that most professional deputies will accept fixed costs, in accordance with PD19B. The SCCO Costs Guidance at 27.4 states:

'In most straightforward or routine cases, solicitor deputies will usually opt to take fixed costs because they can be paid quickly and easily'.

The first PD19B was published on the commencement of the MCA 2005 in 2007, updated in 2009, 2011 and in 2017 to coincide with the revision of the Court of Protection Rules 2017. However, the categories of costs and remuneration are based on a pre- MCA 2005 Practice Note which was published by the former Court of Protection where the rates were agreed between the then Master of the Court of Protection and the Law Society, which reflected real life practice at that time.

Although, the PD19B is in the process of being updated with rates uplifted to reflect inflation, they are based on activities that were undertaken prior to the commencement of the MCA 2005, which did not require the same level of engagement with P and others. Fixed costs under PD19B have always been insufficient. The rates are too low to merit any professional accepting fixed costs in any case other than the simplest, for example, where P lives in a care home, has no significant capital assets, their care is stable, and there are few significant decisions to be made. And even in those cases, the lack of regular uplifting of fixed costs rates means that over a short period of time, the professional deputy will soon be running a simple case at a financial loss to their practice.

PD19B fails to take into account the level of work that is required to meet the OPG professional standards, and the requirement of the MCA 2005, even if everything were undertaken by a Grade D fee earner.

The professional deputy has little alternative than to seek assessed costs.

Difficulties of recovering costs at the Guideline Hourly Rates (GHR)

The guideline hourly rates will increase from 1 January 2024 in line with the services producer price index (SPPI) as recommended by The Civil Justice Council in May 2023. Although the Master of the Rolls intends to establish a working group to establish the methodology underpinning future guideline hourly rates, the situation remains uncertain as they do not reflect commercial reality.

Recovering costs at the GHR is difficult as assessments can be very inconsistent between Costs Officers, but overall costs are on average reduced by 15%. This is largely based on either the SCCO taking the view that the work was undertaken by the wrong grade fee earner or the time spent was too long for the particular task.

Delays at the SCCO in getting final costs orders

There are considerable delays in getting a file assessed from the SCCO, despite the introduction of electronic filing. It typically takes 13 months for the bill to be assessed following the submission of the bill, 2 months for the filing to be accepted and 2 weeks for a Final Costs Certificate to be issued. This means a professional deputy will typically have to wait 2 years to bill work previously done.

Although PD19 allows the professional deputy to take 75% of their estimated costs in each management year, it still results in 25% of work in progress waiting to be billed by the deputy. It is not possible to take money on account of costs in relation to other applications, such as statutory wills, unless it is specifically requested and authorised by the Court. This requires a tailored application adding to the time spent by the deputy and adds to P's costs, with no certainty of it being granted.

For firms that have Court of Protection teams undertaking significant amount of applications, the overall work in progress for all deputyship clients which cannot be promptly billed can be significant and impacts on the financial viability of the team.

Non recoverable work

The OPG's deputy standard 8(a) requires professional '*deputies must make sure that processes are in place for regular internal audits of case files. If any actions are needed as a result, these must be completed as soon as possible.*'

These internal audits, research, reading incoming routine correspondence, internal communication and supervision are taken to be included into the deputy's overheads, except in exceptional circumstances.

The OPG uses assurance visits as a means of supervising and supporting professional deputies. They are conducted by the Court of Protection Visitors who look to see whether the deputy is meeting the deputy standards. They take place at least once every three years. Assurance visits look at specific cases selected for review and how a deputy ensures the proper management and administration of their deputyship caseload. At least 2 years' worth of records will be looked at, and in particular will usually want to see the following:

- The deputy's fee invoices
- Evidence of contact, consultation, and accountability
- General correspondence
- Financial statements and certificates

The visit takes about half a day, but preparing for them can take a full day, as all staff must be prepared and available to be spoken to. This is a cost to the practice and is also non recoverable.

Averting a crisis

Recoverable costs are insufficient to make a profit, with the risk that many professional deputies will choose to retire from their position, or their firms decide to stop doing Court of Protection work. This will create a crisis for P. The Professional Deputies Forum should engage with the OPG, SCCO, the Court, the Ministry of Justice who has responsibility for the Courts & Tribunal Service to find solutions to avert this crisis.

Recommendations

1. The OPG and SCCO update their guidance on costs with input from the PDF and the Court of Protection to reflect practice and Court undertakings.
2. PD19 rates should be uplifted annually by inflation.
3. Investment in The Court of Protection is needed to increase staffing and IT, building on the on-line process for financial deputyship.
4. The Court's internal processes should be changed to ensure orders can be dispatched within days of the order being made.
5. The template deputyship order should be altered to automatically permit the deputy to obtain a deferred payment agreement where it is in P's best interests and the Court should engage with the PDF as to what other authority could be included as standard to reduce the need to make subsequent applications.
6. Investment should be made in the SCCO so there are adequate costs officers to bring down the time frame to have a bill assessed.
7. The SCCO should address inconsistencies in which grade of fee earner is expected to carry out the activity and the expected time frame to undertake the activity should be based on real world understanding.
8. Professional deputies outside of public authorities should be limited to those who hold a relevant legal qualification and are regulated by a professional body to safeguard Ps.

The Professional Deputies Forum, is the voice of nearly 70% of professional deputies:
<https://www.deputiesforum.co.uk/>

This paper was written by Caroline Bielanka, Solicitor TEP, Independent Consultant on PDFs
 behalf on 22 November 2023