


PUBLIC GUARDIAN PRACTICE NOTE		
SUBJECT: Court of Protection Costs		No: 01/2011
Title:	The Public Guardian and Costs in Court of Protection Proceedings	

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1. Summary

Since the implementation of the Mental Capacity Act (MCA) in October 2007, the Public Guardian (PG) has made an increasing number of applications to the Court of Protection in pursuance of his statutory functions under the Act.

The Public Guardian has historically only sought payment of his costs in a handful of cases where he had instructed Counsel due to the complexity of the cases. In other cases, although the costs of the Public Guardian have often been low, these costs have effectively been borne by all other users of OPG services as a cross-subsidy from OPG fees.

In order to address this situation, this Practice Note sets out the future policy of the Public Guardian with regard to the costs of the OPG of making applications to the Court of Protection. This policy will also apply to applications made by other parties to which the Public Guardian has been joined.

It is important to note that the awarding of costs is at the discretion of the Court and is not within the jurisdiction or discretion of the Public Guardian. In this regard the Public Guardian is in the same position as all other Court users.

2. The Court of Protection Rules relating to Costs

Costs in the Court of Protection are governed by Part 19 of the Court of Protection Rules 2007.

Rule 156, applying to property and affairs, states:

“Where the proceedings concern P’s property and affairs the general rule is that the costs of the proceedings or of that part of the proceedings that concerns P’s property and affairs, shall be paid by P or charged to his estate”

Rule 157 sets the starting point for costs orders relating to personal welfare:

“Where the proceedings concern P’s personal welfare the general rule is that there will be no order as to the costs of the proceedings or of that part of the proceedings that concerns P’s personal welfare.”

Rule 159 sets out the circumstances in which the Court may depart from the general rules:

“(1) The court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances, including–

- (a) the conduct of the parties;*
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and*
- (c) the role of any public body involved in the proceedings.*

(2) The conduct of the parties includes–

- (a) conduct before, as well as during, the proceedings;*
- (b) whether it was reasonable for a party to raise, pursue or contest a particular issue;*
- (c) the manner in which a party has made or responded to an application or a particular issue; and*
- (d) whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response.*

(3) Without prejudice to rules 156 to 158 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.”

3. The Public Guardian as a Litigant in the Court of Protection

A person is a “litigant in person” during any stage of proceedings in court in which he or she is not represented by a solicitor or firm of solicitors. For this purpose the term “litigant in person” may include a company or other corporation, a barrister, a solicitor, a solicitor’s employee or other authorised litigator who is acting for himself¹.

¹ Senior Court Costs Office guidance

The Public Guardian is an “authorised litigator” as defined by the Senior Court Costs Office guidance because it is his statutory function to make applications to the Court of Protection. This function is set out at Regulation 43 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007:

“43. The Public Guardian has the function of making applications to the court in connection with his functions under the Act in such circumstances as he considers it necessary or appropriate to do so.”

The costs recoverable by parties in respect of periods when they are or were litigants in person are governed by the Litigants in Person (Costs and Expenses) Act 1975 and by Civil Procedure Rule 48.6 (applicable where the Court of Protection orders the costs of a litigant in person to be paid by another). The costs of litigants in person include:-

- (i) Out of pocket expenses such as court fees (although the OPG is currently exempt from payment of these), cost of travel to and from Court, witness fees/expenses and the cost of expert reports (which could include Court of Protection and Special Medical Visitor reports).
- (ii) Payments made to obtain expert assistance in connection with assessing the claim for costs.
- (iii) Costs for work done by the litigant in person which caused him or her pecuniary loss. For example, a litigant in person who is in employment might lose a day's pay through attending a court hearing or through going on a long journey to interview an essential witness. For the Public Guardian this could include, for example, paying the costs of a Special Medical Visitor for preparing a report and for attending Court if required.
- (iv) Costs for work done by a litigant in person which did not cause him or her any pecuniary loss (for example, if the work was done during leisure time).

The Public Guardian does not seek to recover salary costs of staff involved in making the application to court

4. Instructing Counsel

The Public Guardian is very mindful of Rules 3 and 4 of the Court of Protection Rules 2007 and of the need to keep costs of Court of Protection hearings to a minimum.

The general policy of the Public Guardian is that he will be represented at Court of Protection hearings by a member of OPG staff.

However, it will be the general policy of the Public Guardian to instruct Counsel in the following circumstances:-

- Where the issues involved are legally complex.
- Where the case is particularly hostile or contentious and cross-examination of witnesses is likely to be required

In such cases, the Public Guardian is entitled to seek the recovery of costs of fees paid to a barrister for advocacy, drafting and advisory work. This is referred to in Bar Council guidance on the recovery of costs in non-solicitor cases and falls generally within the out-of-pocket expenses category referred to at 3 above.

5. When will the Public Guardian Claim Costs?

The Public Guardian will consider each case on its merits and will always consider the best interests of the incapacitated person (“P”) when deciding whether to claim the OPG’s costs of a Court application.

Court applications are resource intensive and may cause the OPG to incur administrative and legal costs, and out of pocket expenses, particularly when an attended hearing takes place. However, the Public Guardian will only seek to claim costs where it is objectively fair and reasonable to do so.

Whilst it is not possible for this Practice Note to be completely prescriptive, the Public Guardian will generally seek an Order for payment of his costs, where the outcome of the application vindicates it having been made, in the following circumstances:-

- Where an application to Court is necessitated by the actions of another party - for example, a failure by a Deputy or Attorney to exercise their powers appropriately or to provide information legitimately demanded by the Public Guardian in pursuance of his statutory functions.

This is a very broad statement of policy and the Public Guardian reserves the right to adapt his course of action as circumstances and proceedings dictate.

6. Who will pay the Public Guardian’s Costs?

It is firstly important to reiterate that the awarding of costs is at the discretion of the Court of Protection and is not within the jurisdiction or discretion of the Public Guardian.

When determining who to claim costs against, the Public Guardian will take into account whether the actions of a particular party have necessitated the application and/or their conduct falls within the scope of Rule 159 – in which case he may claim costs against that particular party.

Again, this is a very broad statement of policy and the Public Guardian reserves the right to adapt his course of action as circumstances and proceedings dictate.

7. Giving Notice of Costs Applications

The Public Guardian will generally state in his originating application to the Court if he intends to seek a costs Order that varies from the usual costs provisions set out in Rule 156. However, as a case progresses the Public Guardian reserves the right to alter his original stance to take into account the provisions of Rule 159 of the Court of Protection Rules 2007, namely (i) the success, or otherwise, of his application, and (ii) the conduct of the relevant parties during the application process.

Notice of any change of position on costs will be given at the earliest possible opportunity to all parties to the application.

8. Challenging the Costs of the Public Guardian

In cases where the Public Guardian is awarded all or part of his costs of an application by the Court of Protection, the OPG will seek payment as follows:-

- (i) Where costs are awarded from P's estate, the OPG will demand payment within 28 days from the Deputy or Attorney if one is in place, and otherwise from the new Deputy when appointed.
- (ii) Where costs are awarded against another party personally the OPG will invoice that party and will demand payment within 28 days.

If any party wishes to challenge the level of costs invoiced by the OPG then that party must apply to the Court of Protection (this can be done orally at a hearing if the costs order is made in this way) for an Order that the costs of the Public Guardian should be formally assessed by the Senior Court Costs Office. Parties should be aware that this will incur the relevant assessment fee (Rule 161 CoP Rules 2007) – currently £110 if the bill does not exceed £3,000 (excluding VAT and disbursements) or £220 if it does - and that this fee may be payable by the person requesting the assessment. It is possible, although the OPG will seek to avoid this, that the OPG may also have to incur the costs of instructing a costs draftsman to prepare its file for assessment. These additional costs could also ultimately be payable by the person requesting the assessment.

If the Public Guardian incurs Counsel's costs then this aspect of the Public Guardian's bill can also be challenged by way of the assessment process set out in the paragraph above.

9. Enforcement of Costs Orders

It will be the general policy of the Public Guardian to seek to enforce all costs Orders made by the Court of Protection in his favour. Where necessary, this will include the issuing of proceedings in another Court for recovery of monies owed.



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