

## A guide to the charging of fees by Delegates, Annual Plans and Annual Reports

### Capacity and Self-Determination (Jersey) Law 2016 (the Law)

### Capacity and Self-Determination (Supervision of Delegates etc.) (Jersey) Regulations 2018

### Capacity and Self-Determination (Miscellaneous Provisions and Prescribed Fees and Forms) (Jersey) Order 2018 (the Order)

#### 1. Purpose of this Guide

The purpose of this guide is to give people who are appointed as a delegate for another person under the Law further information about the basis on which they may charge fees for acting as delegate and the way in which any fees should be calculated.

For the purpose of charging fees, the rules are different depending on whether the person is:

- acting as a delegate in a lay capacity (for example a spouse, family member or friend of the person lacking capacity ), called “**lay delegates**” in this guide; or
- a professional person acting as a delegate, such as a lawyer or accountant, referred to as “**professional delegates**” in this guide.

The guide also explains the way in which a delegate can recover any costs or expenses that they incur as a result of acting as a delegate for a person.

#### 2. Background

Delegates may be appointed by the Royal Court when a person lacks capacity to make a decision about a matter concerning their health or welfare or their property and affairs because of an impairment that affects the function of their mind or brain.

The Capacity and Self-Determination (Miscellaneous Provisions and Prescribed Fees and Forms) (Jersey) Order 2018 (the **Order**) describes the way in which delegates may charge fees for acting as a delegate.

The Order applies to persons acting as a delegate who have responsibility for making decisions about the relevant person’s property and affairs.

Please note that, in all cases, **a delegate appointed by the Court after the Law comes into force will only be able to charge fees if the Court has directed that fees may be charged.** New delegates should consider whether they wish to apply for the Court’s authority to charge fees when preparing their application to become a delegate.

Where a curator appointed under the Mental Health (Jersey) Law 1969 becomes a delegate through the transitional provisions contained in Regulation 22 of the Capacity and Self-Determination (Supervision of Delegates etc.) (Jersey) Regulations 2018 (the **Regulations**), the Order provides that they may charge fees as permitted by the Order.

At present, there is no specified method for a fee to be charged where a delegate has responsibility for making decisions relating to the person's health and welfare.

Where a delegate is appointed with responsibility for making health and welfare decisions, however, and it appears that the work involved in fulfilling these responsibilities may be substantial and/or the delegate believes that a fee is appropriate, the delegate may apply to the Court, either at the time of their appointment or on an ad hoc basis after they have been appointed, to formulate and agree a fee structure. The Court may, in these circumstances, have to consider the mechanics of payment of any fee, as the delegate may not have responsibility for or access to the person's assets. It is likely that the Court will apply similar principles as apply to the charging of fees by a property and affairs delegate (see below), that is, that the best interests of the person must always be considered and put first and the fee must be reasonable and proportionate.

### **3. Charging of fees and recovery of expenses by delegates**

#### **a. Overall approach**

The Order sets out a different approach to fees for delegates having responsibility for a person's property and affairs, depending on whether the delegate is a lay delegate, acting in their personal capacity, or is a professional delegate, that is, a professionally qualified person, acting in their professional capacity.

If any professional delegate charges fees for acting as a delegate, it must always be subject to the paramount consideration that any action they take, and consequently the amount of any fees charged to the person's assets, must be in the best interests of the person. It will be a matter for the delegate to keep appropriate (and proportionate) records to evidence this.

Lay delegates may charge a fee for acting as a delegate that is calculated by reference to the person's annual income.

In all cases, however, delegates are able to recover any reasonable out-of-pocket expenses and costs that they incur as a result of acting as a delegate, provided that the expense or cost was incurred by them in the best interest of the person.

#### **b. Lay delegates**

##### **i. Charging of fees**

As people who act as lay delegates are likely to have a close personal relationship with the person, it is possible that they will not want to charge a fee for acting as a delegate. Delegates are not obliged to charge a fee if they do not wish to do so. However, the Order provides that a fee can be charged based on the person's income.

A lay delegate may charge a fee that is no more than a percentage of the income earned by or accrued to the person during the relevant accounting year. A sliding scale applies, to take account of the fact that a big estate may not necessarily involve more work than a small one, depending on the nature of the work needed to manage the person's property. The scale set out in the Order is:

| <b>Income of the Person</b>  | <b>Percentage fee that may be charged</b> |
|--|---|
| Gross annual income does not exceed £10,000  | 5%  |
| Gross annual income exceeds £10,000 but does not exceed £25,000:<br>On first £10,000 | 5%  |
| On the balance between £10,001 and £25,000   | 3%  |
| Gross annual income exceeds £25,000:<br>On first £10,000                             | 5%  |
| On the amount between £10,000 and £25,000  | 3%  |
| On the excess over £25,000   | 2.5%                                      |

Please note that fees are calculated by reference to the **income** of the person (which will include earnings, pensions, benefits, dividends and bank interest) rather than assets (that is, the amount the person has in the bank or the value of their investments, home or other possessions).

Lay delegates can choose to charge a lower fee than is permitted by this scale. They must always consider whether their fee is reasonable and proportionate, in light of the work they have had to do in taking decisions about the person's property.

In exceptional cases, a lay delegate will be able to bring a representation to Court to ask for a bigger fee than the percentage based fee. The delegate would have to satisfy the Court that an exceptional volume of work was required in the management of the person's property and that the work involved was in the person's best interests. The Court will be able to make an order as to the payment of fees, with time limitations and other terms and conditions, as it thinks fit.

Fees based on the person's annual income should normally be calculated and paid at the end of the relevant accounting period (the **accounting period** will be a period of 12 months, starting from the date of the delegate's appointment).

The fees payable at the end of an appointment will be paid on a pro-rata basis, depending on the length of the relevant accounting period during which the delegate acted. These fees may be claimed against the person's new delegate, the person themselves or their executor or personal representative, as applicable.

The amount of the fee charged by the lay delegate must be included in the annual report submitted by the delegate to the Judicial Greffe annually (see below). The Judicial Greffe may question the calculation of the fee, if it appears to be incorrect.

Any dispute as to the amount of the lay delegate's fee will be referred to the Viscount for investigation and resolution.

## **ii. Recovery of costs and expenses**

If a lay delegate incurs expenses or costs in the management of the person's property, they are entitled to repayment of the expenses from the person's property.

Expenses should only be incurred in managing or dealing with the property **and** in the best interests of the person and must be reasonable and proportionate, taking into account the nature of the work done and the extent of the person's property. This includes legal and other professional fees, for example, incurred in pursuing legal claims on behalf of the person, selling their property and preparing complex accounts or tax returns (if the person's property and affairs justify that expense).

Expenses can be recovered during the course of the relevant accounting period. If the amount of expenses is challenged after being recovered from the person's estate, if agreement is not reached between the delegate and the Judicial Greffe, the matter will be referred to the Viscount for resolution.

## **c. Professional delegates**

### **i. Charging of fees**

The Order permits, subject to a direction from the Court, a professional delegate to charge, and be paid out of the person's estate, their usual professional fees for doing, in connection with the administration of the person's property and affairs, any work performed by them as the person's delegate.

The basic rule, that any action taken must be in the best interests of the person, also applies to (a) the work performed by the professional delegate and (b) the level of the fees to be charged. Consequently, before applying any fee, a professional delegate should satisfy themselves that the proposed fee is:

- Incurred only in the person's best interest;
- Reasonable; and
- Proportionate to the total value of the person's assets and the amount of work done.

A professional delegate must be able to demonstrate that they are acting appropriately and always considering the person's best interests, in particular, where the assets are being significantly or rapidly depleted. A professional delegate must take a balanced approach and exercise professional judgment in all aspects of the performance of their role, particularly where client funds are concerned. At all times, the interests of the person must come first.

Where appropriate, the delegate must always consider how far the person is able to make a decision about their property and affairs, either on their own or with assistance and support, and ensure that they are involved in the decision so far as they are able to do so.

The Viscount may make an application for the removal of a delegate where there is a concern that they are not acting in their client's best interests.

In addition:

- Any work should be done by an appropriate fee earner within the delegate's firm (i.e. if the professional delegate is a partner of a firm, they should arrange for work to be performed by junior lawyers or administrative staff where appropriate and not deal with routine administrative tasks personally); and
- Delegates should consider carefully whether the charge-out rates that they may apply in commercial or corporate matters are appropriate or suitable when acting as a professional delegate (i.e. the quantum of charge-out rate must be proportionate).

Generally, professional delegates are encouraged to develop greater transparency of fees and costs with both the relevant person, where appropriate, and with their family, as a matter of good practice.

Professional delegates may recover their professional fees from the assets of the person during the relevant accounting period and need not wait until the end of the period to charge their fees. The charging and recovery of fees should follow the same principles as set out above.

#### **ii. Recovery of costs and expenses**

If a professional delegate incurs expenses or costs in the management of the person's property, they are able to seek repayment of the expenses from the person's property and affairs.

Expenses should only be incurred in managing the property **and** in the best interests of the person and must be reasonable. This includes legal and other professional fees, for example, incurred in pursuing claims on behalf of the person, selling their property and preparing complex accounts or tax returns (if the person's property and affairs justify that expense). This will also include, for example, paying a fee to another member of the delegate's firm for specialist services, such as acting in the sale of immovable property belonging to the relevant person, provided that the fee is reasonable and not excessive in comparison with fees charged by other firms for similar work.

Expenses can be recovered during the course of the relevant accounting period. If the amount of expenses is challenged after being recovered from the person's estate, if agreement is not reached between the delegate and the Judicial Greffe (or other complainant), the matter will be referred to the Viscount for resolution.

#### **d. Former curators**

Where a curator appointed under the Mental Health (Jersey) Law 1969 becomes a delegate as a result of the transitional provisions in the Regulations, they may charge fees as follows:

- For any period of appointment as a curator up to 30 September 2018, fees calculated under Rule 13 of the Mental Health Rules 1971; and
- For any period of appointment as a delegate from 1 October 2018, fees calculated under the Order.

#### **4. Annual Plans and Annual Reports**

##### **a. Annual Plans**

Under the Order, all delegates appointed under the Law must file an annual plan with the Judicial Greffe. The first annual plan should be submitted within three months of the date of the delegate's appointment. An annual plan should also be submitted for each subsequent year during which the appointment continues.

The plan should include details of the work that the delegate expects they will have to do in the coming year to manage and look after the person's property and financial affairs. An annual plan is likely to include:

- Identifying assets and notifying relevant parties of their appointment (first year only)
- Preparing and lodging the inventory of the person's property and assets (first year only)
- Preparing and lodging accounts
- Managing the person's income and paying expenses
- Buying household goods, clothes and other property for the person
- Dealing with routine housekeeping
- Dealing with property or accommodation issues, such as liaising with utility companies, arranging insurance and property maintenance.

The annual plan should also include details of any major decisions that the delegate thinks will be required in the coming year, which may include:

- the sale of property
- major investments
- significant gifts.

It should also include estimates of fees and expenses for the relevant year, as well as the expected routine spend for the maintenance and benefit of the person. Estimates should be prudent, especially in the first year, but not excessive. In subsequent years, routine expenditure will be easier to estimate, based on the previous year's spending.

Estimates of legal fees to be charged by professional delegates should be calculated based on the anticipated work (as above), the likely time involved and relevant charge-out rates. Estimates should aim to be realistic and not overly cautious based on the anticipated work.

Lay delegates can estimate what they think expenses may be but it would be advisable to seek an estimate from relevant professionals, if they expect to have to incur professional fees on a significant transaction, such as the sale of a house.

The extent of the information to be provided will depend on the value and complexity of the person's property and financial affairs. It must also be reasonable and proportionate to the work involved in managing the person's property and affairs.

The Judicial Greffe will publish templates to assist delegates in the preparation of Annual Plans.

#### **b. Annual Reports**

All delegates must also provide an annual report as soon as practicable after, but in any event no later than 3 months of, the end of the first year of their appointment and at the end of each subsequent year.

The annual report should include a review of the work the delegate has actually done in the relevant accounting period and confirm the actual fees that the delegate has charged and any other expenses incurred by them and recovered (or to be recovered) from the person's property.

Again, the extent of the information to be provided will depend on the value and complexity of the person's property and financial affairs. It must also be reasonable and proportionate to the work involved in managing the person's property and affairs.

The Judicial Greffe will publish templates to assist delegates in the preparation of Annual Reports.

#### **c. Former curators**

Under the transitional provisions in the Regulations and provision made in the Order, professional curators who become professional delegates under the Law are required to comply with the new reporting procedure provided for in the Order (and explained above). Lay curators may continue submitting accounts and inventories as they do at present under the Mental Health (Jersey) Law 1969 but the Judicial Greffe will work with these curators to help them adopt the new reporting procedures.

### **5. Discrepancies in estimated and actual fees**

There are a number of reasons why estimates of fees and expenses may be incorrect. For example, the person may become unwell and unable to live in their own home, which may have to be sold to fund fees in a nursing or care home. There may also be difficulties or complexities in managing the person's property that are not obvious at the beginning of the appointment.

Where the actual fees charged, and actual expenses, as shown in the Annual Report, are significantly different from the estimates shown in the Annual Plan, the delegate should explain why the difference has arisen.

At the end of the relevant year, the Judicial Greffe will compare the actual fees incurred, as set out in the Annual Report, with the forecast contained in the Annual Plan. If the actual fees vary from the estimated fees by more than a reasonable tolerance (what is "reasonable" will depend on the circumstances of the case, including the value and extent of the person's property), the Judicial Greffe will discuss the reasons with the delegate; there may be circumstances in which legitimate costs could not have been foreseen.

If the Judicial Greffe is not satisfied with the explanation, it may notify the Viscount of the discrepancy. The Viscount may investigate and seek to resolve any dispute applying his or her Regulatory powers. If necessary, the Viscount may ask for fees of a professional delegate to be taxed by the taxation personnel in the Judicial Greffe. Where the Viscount considers it appropriate, the question of the fees charged may be referred to the Court for approval retrospectively or for an order that the fees be reduced and a repayment be made to P's estate.

## 6. The role of the Viscount

The Viscount has been appointed to supervise delegates, which will include dealing with complaints and concerns about fees as well as concerns about the conduct of a delegate generally. If a complaint or concern is raised at any time with the Viscount about the level of fees being charged by any delegate (whether by a family member of the person, the person or the Judicial Greffe), the Viscount will investigate.

The Viscount has powers to request information from the delegate and third parties. In the first instance, the Viscount will seek to resolve the complaint or concern with the delegate. Where no resolution can be reached, or if the Viscount considers it appropriate, the Viscount may refer the matter to the Royal Court.

**Note:** This Guide is intended for the assistance of delegates only. It does not constitute legal advice. If you have any concerns or questions about the fees that you are able to charge or the expenses you can recover, please read the Law, the Regulations and the Order or seek legal advice.

1 October 2018