

## **Briefing Note:**

### **Deputy's Power to Pursue Local Authority Funding**

On 5<sup>th</sup> January 2010 Senior Judge Lush at the Court of Protection delivered Judgment in the matter of Mark Anthony Reeves.

This is a matter with which I have been assisting Eric Morris, of Osborne Morris and Morgan, for some time, with regard to securing residential care funding under Section 21 of the National Assistance Act 1948 from St Helens Council.

Mark was awarded damages in 2003, in the form of a conventional lump sum and a 'With Profits' Structured Settlement annuity. Unfortunately, due to unexpected changes in his needs, care costs have increased above the escalation rate of the annuity along with a deduction for costs following trial. Therefore there is a real risk that Mark's damages will be insufficient to meet his ongoing needs. The result of this is that whilst his annuity cannot run out, it is now insufficient to meet his care costs, therefore the conventional lump sum element will soon be fully exhausted.

Consequently, I was instructed to help Mr Morris maximise Mark's financial entitlement to care under Section 21 of the National Assistance Act. Given that an award of damages for personal injury, any income thereon and any periodical payments are disregarded for residential care if held in trust or under the Order of the Court, as is the case here, I expected this to be quite straightforward.

However, following tortuous correspondence, St Helens Council wrote to Mr Morris on 14<sup>th</sup> July 2009 in the following terms:

*I am writing following recent correspondence between ourselves and Mr Hurst at PFP in which he maintains that this Authority should pay the cost of Mark Reeves' care.*

*I understand that Mr Reeves received a personal injury award which was made expressly on the basis that he would be paying for the cost of his future care himself – that is not at the public expense. I formally invite you to apply to the Court of Protection for authority to make such a request. This is the appropriate step to make envisaged by the Court of Appeal in Peters v. East Midlands SHA and Others.*

*If you fail to make such an application the Authority will be forced to make the application and reserve such rights to show this letter to the Court on the issue of costs.*

*I also formally invite you to set out your position in relation to Mr Reeves moving away from TRU to be nearer to his family in Walsall. This has been his stated desire for some time now and there does not appear to having been any enquires made to secure suitable accommodation nearer his family in line with his stated wishes. There is a concern about this as his present care is very expensive, more than envisaged by the Court settlement, and you are under a continuing duty to act in his best interest as his Financial Deputy/Receiver.*

*Should I not receive confirmation from you within seven days that you will make an application to the Court of Protection dealing with:-*

- (a) the request for public funding for his future care; and*
  - (b) the issue of where he should live*
- the authority will have no choice but to make the application itself.*

Mr Morris duly made the application on 17<sup>th</sup> August 2009 and for the avoidance of any doubt TRU remains the most appropriate place for Mark to receive care.

At the hearing on 9<sup>th</sup> December 2009, St Helens Council submitted the following arguments:

1. Mr Morris does not have a duty or obligation, as Deputy, to seek funding to meet Mark's care needs where he has previously received damages to meet all of his care needs privately.
2. If it is necessary or otherwise appropriate to make such a request (which is denied) it is appropriate to seek the authority of the Court of Protection before doing so on notice to the Defendant in the personal injury litigation (which, for the avoidance of any doubt, was not St Helens Council).
3. The rule against double recovery prevents Mark seeking the cost of his care from the Council (or NHS) without an adjustment being made to his damages previously awarded.
4. It would not be in Mark's best interest to pursue the cost of and/or provision of care from the Council where he already has his needs met privately by damages previously awarded.

Counsel acting for Mark submitted that the Deputy does not have to apply to the Court of Protection to seek permission for funding from the local authority. This would be retrospectively applying the *Peters* solution to a case which settled six years before the Court of Appeal heard *Peters*. The Court in Mark's case did not place a restriction on the actions of the Receiver/Deputy, nor does his Receivership/Deputyship Order.

It was further argued that even if the Deputy did have to apply for permission, such permission should be granted.

The Judgment of Senior Judge Lush states:

*This application was misconceived in seeking to apply the decision in Peters v East Midlands Strategic Health Authority retrospectively to a personal injury claim that had been settled six years before the Court of Appeal handed down its judgment in Peters.*

*As Mark Reeve's deputy, Eric Morris has a duty to act in his best interests, and this duty includes claiming all the state benefits to which Mr Reeves may be entitled and, if appropriate to do so, applying to a local authority under the National Assistance Act 1948.*

*... a deputy for property and affairs on whom this general authority has been conferred can apply for social security benefits and to a local authority for a care needs assessment without having to obtain specific authorisation from the court to do these things.*

*The undertaking given to the Court of Appeal by Susan Miles, the deputy for the claimant in Peters, was specific to that particular case and, if I recall correctly, as a courtesy, Ms Miles sought my permission to enter into the undertaking giving it. In Mark Reeves' case no such undertaking was given to judge in the personal injury proceedings, and there is no obligation upon the Court of Protection to adjudicate as between the claimant and the defendant, or the claimant and the local authority on the issue of double recovery.*

...

*In the absence of any order of the court of Protection restricting the authority of a claimant's deputy from applying for public funding of the claimant's care under section 21 of the National Assistance Act, the correct procedure would seem to be for the deputy to apply to the local authority and, if he is dissatisfied with the response he receives, to consider the merits of an application for judicial review.*

It is interesting to note that Senior Judge Lush went on to state the following about the Court of Protection's involvement in such matters:

*Notwithstanding the undertaking that was approved in Peters and other undertakings of a similar nature, I am of the view that the Court of Protection is not longer really the appropriate forum to adjudicate on matters of this kind. Its primary function is to act in the best interests of a protected beneficiary and, even though it would strive to be impartial, there may be a perception of bias for this reason. Furthermore, the close links which the court has with personal injury litigants generally were effectively severed when the Mental Capacity Act 2005 came into force on 1 October 2007, and the court's approval was no longer required in cases involving settlements out of court on behalf of incapacitated claimant. Additionally, the court no longer supervises deputies; that is one of the functions of the Office of the Public Guardian.*

In respect of costs, Senior Judge Lush ordered that there be a departure from the usual rule that "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 proceeding that concerns P's property and affairs, shall be paid by P or charged to his estate". The Judgment states:

*In my judgment, a departure from the general rule is warranted in this case. Although the application was made by the deputy, he was compelled to make it by St Helens Council and, as I have said above, the application was misconceived in seeking to apply the decision in Peters v East Midlands Strategic Health Authority retrospectively. Accordingly, in the view of the Council's conduct before, as well as during, the proceedings, I order that the costs of both parties be paid by the Council.*

Our experience is that the terms of settlement and the basis for them are not a blueprint for how the Claimant's life will turn out. Whilst ASHE 6115-linked periodical payments provide a certain and secure level of future income and are most certainly a step in the right direction, it is important not to fall into the trap of thinking that they will be 'right' and meet all of the Claimant's needs for life.

Consequently, unless the Claimant, or the Claimant's Deputy, has been restricted, either by way of a 'Peters promise' or 'reverse indemnity', from being able to benefit from statutory funded care, we will continue to apply our knowledge to maximise our clients' entitlement to such funding.

We only hope that Local Authorities will now more quickly accept the law in respect of the specific disregards granted to personal injury damages so that unnecessary costs and delays can be avoided.

Mike Hurst  
10<sup>th</sup> February 2010

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