

Judicial Communications Office

Monday 7 March 2011

COURT IDENTIFIES GAP IN CARE PAYMENTS LEGISLATION

Summary of Judgment

The Divisional Court today highlighted a gap in the legislation in NI in that it does not permit the making of direct payments for care to a person who does not have the mental capacity to consent to the making of such an arrangement.

The judicial review application was brought by the brother of PF, a disabled person, challenging decisions made by the South Easter Health and Social Care Trust in relation to the level of direct payments for care being provided to him.

PF suffers from a large range of disabilities. It is believed these are attributable to his contracting meningitis at the age of 6 months. PF was cared for by his mother and father until he went to live with his brother JF in England some 15 years ago. They returned to Northern Ireland in 2002. JF and his partner provide 24 hour round the clock care of PF. The Court heard that PF's needs are considerable. He requires the availability of a high level of adult assistance in his physical care and a high degree of adult supervision throughout the day and on occasion at night. Lord Justice Girvan, who delivered the judgment of the Court, said that it is clearly in his interests to be cared for at home by JF and his partner "who are providing excellent care in a safe and secure environment".

The Carers and Direct Payments Act 2002 provides for the making of direct payments, with the consent of the person who requires the care, to pay towards securing a service to meet that person's assessed needs. It thus enables the person to effectively buy in care. Direct payments are not intended to replace existing support networks within families and communities. They support independent living and should not be used to pay for permanent residential accommodation.

The application brought on behalf of PF was that the Trust had breached its legal duty under the legislation by failing to adequately assess PF's needs and to award direct payments at a level which was less than his assessed needs.

Judicial Communications Office

Lord Justice Girvan reviewed the legislation and said that it provides that the payment of direct payments can only be made “with that person’s consent”. The clear aim of the legislation is therefore “to recognise the personal autonomy of the person and to ensure that he is a willing participant in the financial package between himself and the relevant authority”. Lord Justice Girvan concluded that the contracts between PF and the Trust in this case were “a legal fiction” as PF did not have the necessary mental capacity to consent to the making of a contract for direct payments:

“The reality is that the Trust should have known that the payments were going directly to JF. They were in effect a form of recompense for JF and his partner in connection with the care they were clearly providing and providing effectively. The contracts were never really intended to operate as contracts between the patient and the Trust. The allegedly contractual but in fact fictional basis of the arrangements provided a false legal foundation for the payments made.”

Lord Justice Girvan said that a similar difficulty in the law in England and Wales had been resolved by the Health and Social Care Act 2008 which permits payment to a suitable representative of a patient with a disability which deprived him of the power to consent. He said that it was “somewhat surprising that the Department in this jurisdiction was apparently unaware of the English amendment or the need to amend section 8 to lay a proper legal basis for a direct payments scheme entered into directly with a carer in the case of a person under mental disability”.

Lord Justice Girvan concluded that there was therefore no underlying legal basis for a direct payment scheme in relation to PF who had no mental capacity to enter into such an arrangement. He said that the Trust must therefore reconsider the position in light of the fact that any funding of care must be provided on a different legal basis.

The Court went on to set out the guiding principles which would inform any fresh decision in order to assist the parties to avoid further judicial review proceedings. Lord Justice Girvan suggested that a controller could be appointed by the Court under the Mental Health (NI) Order 1986. The controller would have the power to deal with the property and affairs of the patient in accordance with the direction of the court. The court could then authorise direct payment arrangements with the Trust and the making of payments to buy in care from carers. This would enable the Trust to make appropriate payments to enable PF, with the approval of the court, to enter into an agreement with JF and his partner to pay for the care provided.

Judicial Communications Office

Lord Justice Girvan said that the next step will be for the Trust to identify and assess the actual needs of PF. Having assessed the needs it must then make arrangements to meet those needs. The needs could be adequately met by a relative or the Trust could make the necessary arrangements. In determining how a direct payment should be calculated the Trust is entitled to consider whether some of the care could reasonably be provided outside the home by the Trust or agents funded by the Trust: "The Trust's duty is to ensure that PF's needs are catered for."

Lord Justice Girvan concluded that he hoped that the Trust and JF can work out suitable arrangements without the need to litigate further.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

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