COURT OF PROTECTION **No. 99328848**

MENTAL CAPACITY ACT 2005

In the matter of
MARK REEVES

This is an application by Mark Reeves' deputy for property and affairs, Eric Morris, for "directions in relation to the application currently before St Helens Council for state aided funding for Mark Reeves' care costs and if and to what extent and upon what terms and conditions, if any, that application should be pursued." It has arisen as a result of the recent decision of the Court of Appeal in *Peters v East Midlands Strategic Health Authority & Others* [2009] EWCA Civ 145, [2009] P.I.Q.R. Q1 and, in particular, the observations made by Lord Justice Dyson regarding double recovery in personal injury proceedings. At paragraphs 64 and 65 of the judgment, he said:

> Mrs Miles has offered an undertaking to this court in her capacity as Deputy for the claimant that she would (i) notify the senior judge of the Court of Protection of the outcome of these proceedings and supply to him copies of the judgment of this court and that of Butterfield J; and (ii) seek from the Court of Protection (a) a limit on the authority of the claimant's Deputy whereby no application for public funding of the claimant's care under section 21 of the NAA can be made without further order, direction or authority from the Court of Protection and (b) provision for the defendants to be notified of any application to obtain authority to apply for public finding of the claimant's care under section 21 of the NAA and be given the opportunity to make representations in relation thereto.
>
> In our judgment, this is an effective way of dealing with the risk of double recovery in cases where the affairs of the claimant are being administered by the Court of Protection. It places the control over the Deputy's ability to make an application for the provision of a claimant's care and accommodation at public expense in the hands of a court. If a Deputy wishes to apply for public provision even where damages have been awarded on the basis that no public provision will be sought, the requirement that the defendant is to be notified of any such application will enable a defendant who wishes to do so to seek to persuade that the Court of Protection should not allow the application to be made because it is unnecessary and contrary to the intendment of the assessment of damages. The court accordingly accepts the undertaking that has been offered.

The background to this application

Mark Anthony Reeves was born on 28 October 1967, and suffered a traumatic brain injury in a road traffic accident on 31 October 1985, three days after his eighteenth birthday. He was a pillion passenger on a motorbike being driven by Paul Perry in Aldridge, in the West Midlands, which collided with a vehicle being driven in the opposite direction by David Bunce.

He sued David Bunce and the administrator of the estate of Paul Perry deceased for negligence. After various changes in the solicitors and counsel representing him, he was ultimately represented by Eric Morris of Osborne Morris & Morgan, Solicitors, Leighton Buzzard, and Michael Tillett QC of 39 Essex Street. Eric Morris was appointed as his receiver on 21 May 2003, and subsequently became his deputy for property and affairs after the Mental Capacity Act 2005 came into force.

The personal injury claim went to trial in April 2003 and the judge, His Honour Judge Oliver-Jones QC, awarded damages of £2,529,630 net of interest, or £2,644,271 including interest, which was £20,000 less than the payment into court made by the defendants. Accordingly, Mark Reeves had to pay both sides' costs in respect of the trial. On the advice of Frenkel Topping, financial advisers,

£1,000,000 of the award was used to purchase a Windsor Life with profits structured settlement annuity, which initially produced an annual income of £41,196, and was guaranteed for twenty years.

Since 7 March 1994 Mark has been a resident at the Transitional Rehabilitation Unit (TRU), Lyme House, Grange Road, Haydock WA11 0XF, where he is in receipt of twenty four hour care. Having considered a wide range of expert opinion, His Honour Judge Oliver-Jones concluded that Mark's future care would be best met at TRU rather than in his own home. An award of £1,455,871.18 was made in respect of his future care.

On 4 December 2006 Eric Morris initially approached St Helen's Council to ascertain whether it was potentially responsible to contribute towards the costs of Mark's care at TRU: St Helen's being the local authority district in which TRU is located. On 14 July 2009 St Helens Council wrote to Eric Morris 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 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 enquiries made to secure suitable accommodation nearer his family in line with his stated wishes. There is 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.

Eric Morris duly made the application on 17 August 2009.

The hearing

The hearing of the application took place on Wednesday, 9 December 2009, and was attended by:

- Simon Wheatley (counsel, 7 Bedford Row) and Eric Morris; and
- Adam Fullwood (counsel, Kings Chambers) for St Helen's Council.

Counsel's submissions

In his skeleton argument, Mr Simon Wheatley of counsel made the following submissions:

(A) Does the Deputy have to apply to the Court of Protection for permission to seek funding from the local authority?

On behalf of the Deputy it is submitted that it does not.

As noted above, at the time of the judgment in 2003 of HHJ Oliver Jones QC the issues considered were fundamentally different to those considered by the Court of Appeal in *Peters* in 2009. The primary submission is that *Peters* does not establish a retrospective process whereby a Deputy has to apply to the Court of Protection before making an application to the local authority in every case.

The Court should not impose conditions on the actions of the Deputy retrospectively. In general, the parties to litigation cannot seek to reopen the decision of the court retrospectively. For instance, those claimants whose claims were settled or determined on a multiplier liked to RPI are not entitled to return to the Court now seeking to amend to an ASHE inflator, following *Thompstone*.

HHJ Oliver Jones did not place a restriction on the actions of the Receiver/Deputy. Mrs Miles, the Receiver in Peters would be required to make application to the Court of Protection if she sought public funding from the local authority, because that was the basis on which judgment was given.

The Deputy for Mark Reeves gave no undertaking to HHJ Oliver Jones, and was not required to do so. Accordingly, his actions are unfettered and not subject to the restrictions placed on Mrs Miles in the *Peters* case.

The present stance of the local authority (namely to require the Deputy to seek the approval of the Court of Protection) is effectively to apply the order made in *Peters* to the present case. That is fundamentally wrong. More particularly, the order in *Peters* does not have universal applicability, not least because there are cases where a "reverse indemnity" is still an appropriate way of dealing with the potential for double recovery.

The application for funding in the present case was made on 04.12.06. The decision of the Court of Appeal in *Peters* was not given until March 2009. The present suggestion by the local authority that permission has to be sought from the Court of Protection wasn't available when the application for funding was made, and accordingly should not be introduced at a later stage.

Whilst it is accepted that this is not binding on the Court, it is worth noting that the OPG has continued to advise Deputies that *Peters* is not retrospective, *viz*: "The *Peters* case does not affect the situation in which a damages award including the costs of future care was made in the past without any undertaking of the kind just described above being given."

(B) If the Deputy does have to apply for permission then such permission is sought in the present application.

The accommodation/care calculation adopted by HHJ Oliver Jones made no provision for inflation. "The annual cost will, from 2nd June 2003, rise to … £58,240 per annum." As noted by the Deputy, a substantial sum had to be deducted from the settlement monies on account of costs. Accordingly, it is submitted that the Court should make a declaration that the Deputy in the present case does not require the approval of the Court to pursue his duties

as a Deputy in seeking funding from the Respondent. Alternatively, the Court is requested to give such approval to the Deputy as necessary.

In his skeleton argument, counsel for St Helen's Council, Mr Adam Fullwood of counsel submitted as follows:

> In conclusion, the Council's position is as follows:
>
> (1) Mr Morris does not have a duty or general 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.
>
> (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 interests 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.

Decision

Essentially, I agree with Mr Wheatley's submissions. 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 Reeves'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.

In most cases, since the Mental Capacity Act 2005 came into force, the Court of Protection's order appointing a deputy for property and affairs confers on the deputy general authority to take possession or control of all of the protected beneficiary's property and financial affairs and to exercise the same powers of management and investment as he has as the beneficial owner, subject to any restrictions or conditions set out in the order. Accordingly, 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. It was implicit in the judgment in *Peters* that a deputy has such authority, and the purpose of the undertaking in *Peters* was "to place the control over the deputy's ability to make an application for the provision of a claimant's care and accommodation in the hands of a court."

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.

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 no 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 had 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 claimants. Additionally, the court no longer supervises deputies: that is one of the functions of the Office of the Public Guardian.

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.

For these reasons, therefore, I dismiss the application.

The law relating to costs

I must now deal with the costs of these proceedings.

Sections 55 and 56 of the Mental Capacity Act 2005 state as follows:

55. Costs

(1) Subject to Court of Protection Rules, the costs of an incidental to all proceedings in the court are at its discretion.
(2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives.
(3) The court has full power to determine by whom and to what extent the costs are to be paid.
(4) The court may, in any proceedings –
    (a) disallow, or
    (b) order the legal or other representatives concerned to meet,
    the whole of any wasted costs or such part of them as may be determined in accordance with the rules.
(5) "Legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience to conduct litigation on his behalf.
(6) "Wasted costs" means any costs incurred by a party -
    (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
    (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

56. Fees and costs: supplementary

(1) Court of Protection Rules may make provision -.
    (a) as to the way in which, and funds from which, fees and costs are to be paid;
    (b) for charging fees and costs upon the estate of the person to whom the proceedings relate;

(c) for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings.

(2) A charge on the estate of a person created by virtue of subsection (1)(b) does not cause any interest of the person in any property to fail or determine or to be prevented from recommencing..

The secondary sources of law relating to costs in the Court of Protection are:

- Part 19 (rules 155 to 158) of The Court of Protection Rules 2007 (Statutory Instrument 2007 No. 1744 (L. 12)); and
- two practice directions – 19A and 19B – which supplement Part 19 of the Court of Protection Rules.

Two particular rules are relevant in this case: namely, rules 156 and 159, which provide as follows:

Property and affairs – the general rule

156. 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.

Departing from the general rule

159. – (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.

The practice directions are not of any assistance on this occasion. Practice Direction 19A is concerned primarily with modifications to the Civil Procedure Rules 1998, and Practice Direction 19B is about fixed costs.

Prior to the Mental Capacity Act 2005, the leading case on Court of Protection costs in property and affairs cases was *Re Cathcart* [1892] 1 Ch 549, which established the following principles, and formed the basis of the general rule in rule 156, and to some extent the exceptions to the general rule set out in rule 159: -

1. Unlike proceedings in other civil courts, costs in the Court of Protection do not necessarily follow the event.

2. Where an application is made in good faith, supported by medical evidence (where appropriate), in the best interests of the donor, and without any personal motive, the applicant is generally entitled to his costs from the donor's estate, even if he is unsuccessful.

3. The court has an unlimited discretion to make whatever order for costs it considers that the justice of the case requires.

4. In exercising its discretion the court must have regard to all the circumstances of the case, including, though not confined to, the relationship between the parties, their conduct, their respective means, and the amount of costs involved.

5. Where a person places himself in a hostile position to the donor, or where his conduct results in the costs of the proceedings being more expensive than they might otherwise have been, the court may consider it appropriate to penalise him as to costs.

Decision on costs

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 Helen's 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 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.

DENZIL LUSH
Senior Judge
5 January 2010