

CONSULTATION ON DRAFT PROPOSALS ON LEGAL AID MEANS TESTING FOR ORDERS UNDER THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

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4. Summary of Proposals

l). The main proposal can be summarised as, in respect of orders under sections 53, 57, 60, 62 or 63 of the 2000 Act:

- **continuing to have no legal aid means test for welfare-only orders**

Comment

- The table contained within the initial consultation paper outlining data provided by the Office of the Public Guardian (OPG) suggests that there has been a 43% increase in welfare orders between 2006/07 and 2013/14. Whilst this figure reportedly only represents 40.3% of all orders compared to 51% made in 2006/07 there nonetheless is an apparent and continuous need to apply for legal powers and authority in order to intervene and protect the welfare of individuals who suffer from incapacity regarding their decision making.
- Given the realities, demographics, aging population and expected increases in people living longer with dementia the decision to maintain the status quo by "continuing to have no legal aid means test for welfare-only orders" is welcomed as promoting inclusivity and encouraging individuals with an interest over another adult with incapacity issues to be involved and help safeguard and address welfare considerations longer-term.
- We therefore agree that the status quo should remain in respect of no means test for applications for welfare only powers. Likewise status quo should remain where there is a means test for application for financial powers only.

- **continuing to have a legal aid means test, based on the resources of the adult in respect of whom the order is sought, for financial-only orders**

Comment

- The proposal to "continue to have a legal aid test, based on the resources of the adult in respect of whom the order is sought, for financial-only orders" appears to be reasonable and offers consistency/alignment with current processes.
- In practice, it is understood where there has been an assessment of an adult's resources concluding a contribution is due and in certain scenarios payable by the applicant/proposed guardian practice readily acknowledges that it is common to incorporate a power within the guardianship application to recoup such a payment from the incapable adult's personal resources/estate.
- The added benefit with this approach/proposal is to avoid deterring individuals from applying for financial guardianship which might otherwise happen or be prohibitive dependant on their own finances if the proposed applicant were to be solely responsible for legal aid costs as opposed to the incapable adult.

- **extending that legal aid means test to combined orders**

Comment

- The consultation paper offers some strong grounds for "extending legal aid means test to combined orders", particularly in view of the suggestion that financial-only orders are in decline due to the current financial means test for civil legal aid. Whereas the increase in and/or preference for combined orders appears to be driven by the fact that there is no current financial means test for civil legal aid due to the associated welfare component being included.
- Significantly, it is accepted that in accordance with the general principles of the 2000 Act that the type of order likely to be required should depend on how the lack of capacity impacts on decision making in an area of an individual's life.
- There is recognition that the introduction of legal aid means tests for combined orders may ultimately act as a deterrent for more restrictive powers being sought and as such ensure that only applications are made for orders that will determine actions taken on the basis of most benefit and least restrictive to the adult.
- Furthermore, it is observed in some scenarios whereby there is likely to be agreement about the use of Section 13ZA under the Social Work (Scotland) Act 1968 that an intervention and/or guardianship order may not always be necessary where someone lacks capacity in an area of their life. In contrast, there is also appreciation that the Supreme Court decision in *P v Cheshire West and Chester Council* [2014] may precipitate uncertainty and actually lead to an increase in orders encompassing welfare powers to ensure compatibility with Article 5 and the European Convention on Human Rights Regulations.
- As set out in paragraph 15 of the proposal paper, the analysis of the trend in relation to part 6 order application reaches somewhat tentative conclusions, namely that the figures "may suggest" that unnecessary welfare powers are being sought in order to avoid the means test, which applies in respect of financial only powers.
- In this respect, there are already checks and balances in place. The medical assessments are conducted in relation to the powers being sought, therefore at that stage, it would be evident at that point and thereafter the MHO also has to report on the need for the power and that that are in line with the principles of the legislation, being the least restrictive measure. These are robust processes, which should ensure that only relevant required powers are applied for. We agree that it seems a sensible proposal otherwise.

II). The potential modifications to that proposal can be summarised as:

- **deferring the means test to the point at which the court makes its decision in respect of the order where only partial information on the resources of the adult in respect of whom the order is sought is available**

Comment

- Deferring the means test on the basis of the reasons put forward within the consultation paper would seem to be sensible especially in recognition of the fact that financial information is not always available or easily accessible prior to an application for a legal order being made or determined at court.
- Given the time scales involved deferring the means test as suggested above is likely to help safeguard the adult's rights by avoiding unnecessary delay and subsequently enable the guardian/intervener on granting of the order to fully inform the means test and address any contribution from the resources of the adult, accordingly.
- It seems sensible to avoid delay and allow a full assessment to be made on the means of the adult when the position is clearer to the extent of the adult's finances.
- **basing the means test on the resources of the applicant where an application for financial powers (whether through a financial-only or combined order) is unsuccessful**
 - The rationale for the suggestion is appreciated, especially if the approach ultimately helps to mitigate against spiralling legal aid costs. However, similar to the comments made above regarding support for legal aid means tests to be based on the resources of the adult in respect of whom the order is sought rather than the applicant remain the preferred option. Essentially, there is a certain degree of concern and anxiety about would-be applicants being deterred from applying for orders if a) personal finances have to be discussed; and b) they are likely to be liable for legal aid costs when/if applications are unsuccessful.
 - We acknowledge that the application could be unsuccessful for various reasons. The applicant could have acted in entirely good faith, a Safeguarder may be appointed, challenge the medical evidence, be successful as the adult is seen not to lack capacity and the order is not granted. The applicant should not be penalised financially for acting in good faith.
 - The risks of this may deter any applications for necessary financial or combined orders as in paragraph 30, which could leave vulnerable adults exposed to harm.

Comment

- **basing the means test on the resources of the applicant where the court makes adverse comment about how they have chosen to conduct the case**

Comment

- It would seem only right and proper that the applicant is held responsible for any wrongdoing on their part with managing the adult's assets. Whilst it is acknowledged that some potential applicant's might be off put by the prospect of their finances being means tested rather than those of the adult when there is impropriety there is also an appreciation that the approach proposed might act as a deterrent against financial exploitation and/or abuse in the future.
- We would be concerned as to how this would operate, who would be responsible, how adverse would the comment be before action was taken , bearing in mind that each Sheriff determines the process of the hearing, and who would monitor the thresholds re adverse comments.

Final Comments/Observations

- The reference to Self-directed Support or Direct Payments being exempt from any means test is welcomed in view of the fact that any such award is already likely to have been subject to financial assessment by the host or local authority and granted specifically for care and support.
- The fact that the paper does not consider applications made under Part 6 to vary, recall or terminate existing orders is somewhat surprising given such applications will similarly incur associated legal costs. However, it is appreciated that such applications are likely to be less in number and frequency.
- Our overall comment is that the earlier intervention by using Powers of Attorney- Welfare and / or Financial is less costly and also involves the adult at a stage when they still retain capacity and still maintain control in decisions welfare and finances. We believe that the public need to be made more aware of the use of POA and what powers can be put in place to protect them when they are no longer able. We also believe that there is still much education to be delivered to those who hold Powers of Attorney in relation to their role and what the powers allow them to do or not do on behalf of the adult.

Community Care Standing Committee
Wednesday 1st October 2014