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Miles and Partners

By Email – AB@milesandpartners.com

Our Ref: MH/Stat-HRA
Your Ref:
Date: 20 July 2018

Dear Sirs,

The Statutory Charge, Human Rights Act Damages claims and Court of Protection proceedings

In *NCC & Anon v Lord Chancellor (via the Legal Aid Agency) [2018] EWHC 1628 (Fam)* a position statement was published which set out the LAA's position as to the application of the statutory charge in relation to care costs in human rights applications. That position statement only dealt with circumstances in which the costs of care and 'other family law proceedings' would constitute a first charge on Human Rights Act ('HRA') damages claims. 'Other family law proceedings' were defined as being proceedings under Part IV of the Children Act 1989 and Chapter 3 of the Adoption and Children Act 2002.

We understand that the Official Solicitor has requested that the LAA now confirm its approach in relation to the costs of Court of Protection proceedings on HRA damages claims and has asked if the LAA will be producing guidance in relation to that issue.

The LAA currently has no intention of producing guidance. Guidance on this issue would have to be issued by the Lord Chancellor, which would require approval at ministerial level. In the absence of proceedings (which is what led to the LAA publishing its position in relation to care and 'other family law' proceedings) the best we can do is to provide confirmation of the LAA's approach, which this letter aims to do.

The LAA's General Position on the Statutory Charge

In summary, the application of the statutory charge in respect of the legally aided costs of welfare proceedings to HRA damages can be avoided by ensuring that damages are not pursued or awarded within the welfare proceedings and by keeping the costs of pursuing the damages claim separate.

The statutory charge arises as a matter of law by Section 25 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO"). It operates to recover legal aid expenditure where property or money is recovered or preserved by a legally aided individual, but a claim for legally aided costs is maintained in relation to the proceedings or dispute. The application of Section 25(1) LASPO contains two components: (i) identification of the proceedings or

dispute in which the damages are recovered; and (ii) establishing the legal aid expenditure provided in connection with those proceedings or dispute.

This means that where damages are pursued or recovered within the Court or Protection proceedings themselves, the full legally aided costs of those proceedings will form a statutory charge on the damages awarded. Costs may of course be sought against the local authority in those circumstances in order to reduce or eliminate the effect of the statutory charge.

Judicial guidance was provided by the Honourable Mr Justice Keehan in the case of *H v NCC and LAA [2017] EWHC 282* as to the procedure to be followed where a HRA claim for damages arises during the course of care proceedings. It is the LAA's view that if that judicial guidance is followed in Court of Protection proceedings as well and HRA damages are pursued and obtained outside of the welfare proceedings (for example within separate civil Part 8 proceedings whether heard concurrently or consecutively, or by means of a settlement outside of the welfare proceedings) only the legal aid expenditure incurred in respect of pursuing the HRA claim will be treated by the LAA as provided in connection with it.

For the avoidance of doubt, legal aid expenditure in relation to the HRA claim will form a statutory charge in respect of any damages or costs recovered in the settlement of that claim, to the extent that a claim is made for costs from the LAA. This can be avoided however if the full costs of the HRA claim are recovered from the Local Authority.

The intention of this letter is to set out the LAA's position and we confirm that there is no objection to this letter being circulated more widely. We hope this will result in more consistent applications for separate HRA claims and if the process set out above is followed, it should help to alleviate any problems in this area.

Yours faithfully



**For and on behalf of the
Central Legal Team**