

Briefing Note:

Statutory Instrument 2008 No. 593

The National Assistance (Sums for Personal Requirements and Assessment of Resources) Amendment (England) Regulations 2008

Mike Hurst & Richard Cropper, 12th March 2008

In 2006 the Department of Health commenced a consultation with regard to the “Cost implications for possible changes to Residential Care Charges relating to Personal Injury awards” and proposed changes to the CRAG and Regulations to be implemented from April 2007.

The consultation documents stated:

“The CRAG, and possibly the Regulations also need to be amended to take account of changes made by DWP in October 2006 in the Social Security (Miscellaneous Amendments) (No. 4) Regulations 2006 (SI No. 2006/2378) to:

- i. create a disregard for a maximum period of 52 weeks of lump sum payments made in consequence of any personal injury to a claimant or their partner;*
- ii. provide a full disregard of payments of income from voluntary and charitable sources and of income derived from personal injury trust funds/annuities; and*
- iii. to align the way in which income from personal injury awards are treated, when held in or out of court.”*

In January 2007 the Court of Appeal handed down Judgment in *Crofton*, setting out the fact that the treatment of income derived from a claim in respect of personal injury was different for home care than for residential care, in that for home care services a Local Authority may take income into account (whether generated by way of a lump sum or by way of periodical payments). Post *Crofton*, we have seen most Local Authorities across the country adopt this position when assessing a Claimant’s income.

This means that the second part of section ii above (*“provide a full disregard of payments of income ... derived from personal injury trust funds/annuities”*) had to be considered in greater depth.

As a result, no changes were implemented in April 2007 and a further round of consultation was entered into. In the meanwhile, the postcode lottery with regard to whether or not income would be assessed for home care has created problems in both pre and post-settlement cases.

In November 2007, we were told by the Department of Health that a decision with regard to these issues had been taken and that a new Statutory Instrument would be laid before Parliament for implementation in April 2008.

On 11th March 2008, Statutory Instrument 2008 No. 593 was laid before Parliament and comes into force on 7th April 2008.

It was expected that this Statutory Instrument would have a wide reaching impact on whether capital or income derived from a claim in respect of personal injury would be disregarded or not.

Practitioners have been holding their breath.

The relevant part of the Statutory Instrument states:

“5.–(1) In Part 1 of Schedule 3 to the Assessment Regulations (sums to be disregarded in the calculation of income other than earnings)–

(a) in paragraph 10(1), for “paragraphs 29 and 31, the amount specified in paragraph 15(1) of Schedule 9 to the Income Support Regulations (relevant payments) of”, substitute “paragraph 29,”; and

(b) in paragraph 28H(~~6~~)–

(i) in sub-paragraphs (1) and (2), for “£5.25”, in each place where it occurs, substitute “£5.45”, and

(ii) in sub-paragraphs (3) and (4), for “£7.85”, in each place where it occurs, substitute “£8.15”.

(2) In Part 2 of Schedule 3 to the Assessment Regulations (special provisions relating to charitable or voluntary payments and certain pensions)–

(a) omit paragraph 30; and

(b) in paragraph 31, “for paragraphs 10(1) and 11” substitute “paragraph 11”.

“6. In Schedule 4 to the Assessment Regulations (capital to be disregarded)–

(a) after paragraph 10 insert–

“(10A) Any amount which would be disregarded under paragraph 12A of Schedule 10 to the Income Support Regulations (personal injury payments) with the exception of any payment or any part of any payment that has been specifically identified by a court to deal with the cost of providing care.”; and

(b) for paragraph 19(7), substitute—

“Any amount which—
(a) falls within paragraph 44(2)(a), and would be disregarded under paragraph 44(1)(a) or (b), of Schedule 10 to the Income Support Regulations; or
(b) would be disregarded under paragraph 45(a) of that Schedule.”

With regard to Regulation 5 the Explanatory Note to the Statutory Instrument states:

“Regulations 5(1)(a) and (2) amend paragraphs 10, 30 and 31 of Schedule 3 to the Assessment Regulations in order to reflect amendments made to the Income Support (General) Regulations 1987 (S.I. 1987/1967) (“the Income Support Regulations”) by the Social Security (Miscellaneous Amendments) (No.4) Regulations 2006 (S.I. 2006/2378) (“the Social Security Regulations”), to provide that, as under the Income Support Regulations, certain charitable and voluntary payments of income are to be disregarded in full in the calculation of income other than earnings.”

With regard to Regulation 6 the Explanatory Note to the Statutory Instrument states:

“Regulation 6 amends Schedule 4 to the Assessment Regulations to reflect other amendments made to the Income Support Regulations by the Social Security Regulations. Regulation 6(a) creates, as under the Income Support Regulations, a disregard for any payment made in consequence of any personal injury to a claimant or his or her partner for a period of up to 52 weeks from the day of receipt of the first payment except where that payment is specifically intended to cover the cost of care. Regulation 6(b) enables awards of certain damages to be disregarded where those awards are held subject to the order or direction of the court.”

However, the Explanatory Memorandum to the Statutory Instrument states:

“This instrument also makes amendments to the Assessment Regulations to ensure consistency with provisions previously introduced to the Income Support Regulations by the Social Security (Miscellaneous Amendments) (No. 4) Regulations 2006, so that when assessment is being made of an individual’s ability to contribute towards the costs of residential care:

- i. certain charitable and voluntary payments of income shall be disregarded in full in the calculation of income other than earnings;
- ii. any payment made in consequence of any personal injury to a claimant or his or her partner, where that payment is specifically intended to cover the costs of care, shall for a period of up to 52 weeks from the day of receipt of the first payment be disregarded (in the calculation of capital); and

iii. awards of certain damages are also to be disregarded, not only where those awards are held by the court (as at present) but where they are held subject to the order or direction of the court (in the calculation of capital)."

You will note from the above that the two explanatory notes are contradictory with regard to whether the sum received specifically for future care is an exception to the disregard or not.

We understand from the Department of Health that the Explanatory Memorandum simply has the word "except" missing from it and steps are to be taken to rectify it.

Therefore, you can see that of the aims set out in the 2006 consultation documents, the only one that has not been addressed and implemented by this Statutory Instrument is to:

"provide a full disregard of payments of income ... derived from personal injury trust funds/annuities"

So what does this mean?

In short ... very little.

Please find below our summary:

- Certain charitable and voluntary payments of income shall be disregarded as they are for means tested benefits.
- This has little impact on most Claimants either pre or post-settlement.
- The disregard for capital held "in Court" has been widened to include capital "under the Order of the Court".
- This means that a Claimant no longer needs a Deputy's Personal Injury Trust wrapped around accounts, investments and property to ensure that the capital is disregarded for both residential and home care.
- There is now a 52 week disregard for any sums received as a consequence of a personal injury to the Claimant, **except when such sums have been specifically identified by a court to deal with the cost of providing of care.**
- However, if the sums are held in trust or held to the Order of the Court, then the capital remains disregarded for both residential and home care.
- There is no impact on the treatment or otherwise of income derived from disregarded capital or periodical payments for home care services.
- This remains a postcode lottery.

We think that it is important to note that the 52 week disregard is limited to sums other than “any payment or any part of any payment that has been specifically identified by a court to deal with the cost of providing care”.

There is a clear intention to take into account any sums that have been specifically paid to the Claimant in respect of future care.

Whilst it would be rare that in compromised post-settlement cases the amount paid for future care was specifically identified by a court (although not so when quantum was determined by the Court), this may well be a marker for the future.

If such an approach were extended, then Claimants could only fall back upon statutory care once their award of damages for future care had fallen to below the capital threshold. State funded care would again be a last resort.

Paragraph 7.8 of the Explanatory Memorandum to the Statutory Instrument states:

“However, the Department of Health intends to consult later in the year on more substantial changes to the Assessment Regulations and to the Charging for Residential Accommodation guide, following recommendations made to the Department of Health by a stakeholder group including Age Concern, Help the Aged, the Local Government Association, the National Association of Financial Assessment Officers, the Nursing Home Fees Agency, the Relatives & Residents Association, Counsel & Care and Mencap.”

Therefore, it would seem that the uncertainty surrounding whether or not Claimants, with awards of damages that produce income and or include periodical payments will, in the future, be eligible for home care services and whether or not steps will be taken to stop the potential of double recovery, will remain for some time to come.

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