

COMMUNITY CARE

NEWSLETTER | Edition 3 - October 2014

Holding local authorities to account in care fees charging - Walford v Worcestershire



This looks at the High Court case referred to in the recent Daily Mail claim that 10,000 families pay care home bills unnecessarily. Following the Daily Mail article first published on Friday 13 June 2014, several readers have contacted our office referring to the article. So, what did the High Court in the Walford case actually say?

When is a house a home?

The payment of residential care fees is the responsibility of the resident unless they can demonstrate to the local authority that they have insufficient means to pay, or unless the majority or main aspects of their care needs are for health in which case care should be provided free by the NHS.

The legal point at the heart of Walford was the question of when it can be said that a person is living in a property so that, where this property belongs to a relative who has gone into care, the property will be disregarded in the relative's care fees means test.

The rules on means testing for residential care are set out in the National Assistance (Assessment of Resources) Regulation 1992.

Schedule 4 paragraph 2 provides (emphasis added) that:

The value of any premises-

- (a) omitted here
- (b) occupied in whole or in part as their home by the resident's-
 - (i) partner,
 - (ii) other family member or relative who is aged 60 or over or is incapacitated, or
 - (iii) child.

What then does it mean for a person to live in a property "as their home"?

The court judgement records that Miss Walford was brought up in the property, known as "Sunnydene", which was rented by her parents from her grandmother. She travelled extensively abroad in her career as a theatre director. She had an office in the house and kept her

belongings there. She intended to retire there, but she also maintained a flat in London where she was registered for council tax. She put significant funds into renovation and maintenance for the house. Originally the council decided to disregard the property but later reversed that decision.

In doing so the council explained that:

"It is the view of Worcestershire County Council that your wish to retain ownership of Sunnydene does not equate to you currently occupying the house and regarding it as your sole residence." (paragraph 10)

This was appealed and there was a further investigation. The council then found that during a renovation which lasted some 5 years, Miss Walford had not occupied the property but rather stayed with neighbours and friends in the area and that:

"Taken together the Council considers that this is very cogent evidence to refute Miss Walford's claim that she was actually occupying Sunnydene as her home at the relevant time when Mary Walford went into full time care at Astley Hall." (paragraph 12)

Miss Walford then submitted a complaint providing further evidence that she treated Sunnydene as her home. The report of the Investigating Officer contained the following statement:

"The Benefits and Contributions Manager said the issue is whether Miss Walford was a resident at Sunnydene when her mother went into residential care in 2006. Under the Charging for Residential Accommodation Guide (CRAG) section 7, there is an automatic disregard but she does not accept that Miss Walford was permanently resident at the property at the time her mother entered long term care."

The Investigating Officer concluded that:

"There is no evidence prior to Mrs Walford's move into residential accommodation that Miss Walford was occupying the property as her home"

The council's solicitor then wrote to Miss Walford's solicitor stating:

"Please find attached a copy of that report which re-confirms the initial position of Worcestershire County Council that Sunnysdene was not your client's only or main home during the period when Mrs Walford was assessed and admitted to her present care home..." (paragraph 16)

In her witness statement, the Benefits and Contributions Manager commented on her final decision and concluded that:

"Miss Walford was not occupying Sunnysdene as her main home at the relevant time." (paragraph 17).

It can be seen then that the council considered it important that Miss Walford occupied Sunnysdene as her "main" home but that they expressed the legal test rather differently in different documents and with different effect. Secondly the council considered it a requirement that she so occupied it at the time her grandmother went into residential care.

The Secretary of State intervened in this case arguing that the statutory purpose of the legislation was to ensure that the whole of a person's capital was taken into account in the means test but to provide disregards where that would have "undesirable consequences." This was supported by the fact that the class of relatives who could take advantage was narrowly defined. His Honour Judge Supperstone accepted this argument stating that the class of relatives defined were those "family members who would be most likely to be vulnerable if they have nowhere else to live." (Paragraph 49)

He concluded that the word "home" should be construed as "only or main home". (Paragraph 51)

Referring to the various different formulations that the council had used when describing the legal test it had applied, the Judge held that the council had not applied the correct test and the decision was therefore unlawful.

The Judge held further that when reviewing the matter, Worcestershire were wrong to consider only the circumstances that existed prior to Mrs Walford senior entering residential care. He stated that:

"In my view there is no basis for limiting the power of review to the circumstances prevailing at the time of the original assessment. I accept the submissions made on behalf of the Secretary of State and the Claimant that a decision whether or not to disregard property can be reviewed whenever there is a change in circumstances. The opening words of section 7.003 of CRAG require the focus of the inquiry to be on the present, not the past, position." (paragraph 54)

Therefore had Miss Walford come to occupy Sunnysdene as her only or main home after her grandmother went into residential care, the disregard would have applied. It is clear enough that both the disregard and the relevant CRAG guidance at 7.003 refer to the situation pertaining at the present time and therefore changes of circumstances occurring after the resident has gone into residential care must be considered. The council were wrong to restrict their reviews to the circumstances pertaining at a particular time.

It followed that the council also acted unlawfully when it declined to consider evidence submitted by Miss Walford as to the circumstances of her occupation pertaining at a later date.



Comment

It is the experience of Wrigleys Community Care team that council charging departments are often very imprecise when defining what is the question they have to answer when addressing legal issues in care fees charging and therefore the evidence they must gather.

This may have the unfortunate consequence that the legal test adapts to the evidence gathered rather than the reverse. This lack of clarity can have serious consequences for residents and their families.

As well as the application of income and asset disregards, other problem areas are those where it is determined that a resident has deprived themselves of assets in order to reduce their care fees liability, and cases where the council values property that is jointly owned.

In these times of austerity, it is clear that councils have a strong vested interest in these decisions. There is a need for a robust appeals mechanism that can also determine these important points of law and hold councils to account. This will be especially important with the forthcoming implementation of the new Care Act 2014, which will inevitably throw up many points of legal interpretation.

We recommend that residents and their families affected by significant decisions involving their finances get legal advice to ensure it is correct.

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Austin Thornton is head of the community care department at Wrigleys LLP and a joint author of *Coldrick on Care Home Fees 2nd edition* (2012 – Ark).

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