

Personal Experience of Trying to obtain Justice in Scotland

I was a full-time carer for my mother who was diagnosed with dementia in 2010. I defended legal actions started in court by the local authority under the Adults with Incapacity Act 2000 and the Mental Health (Care & Treatment) Act 2003. These actions took place 2013-2016 with the purpose of forcing my mother into institutional care, against her and my wishes.

Legal Aid was available to me as Named Person without means-testing, in order to defend the action started before the Mental Health Tribunal (April-June 2014) and the subsequent appeals I made to the Sheriff Principal (July 2014) and the Court of Session (January 2015). However, this was of little use to me because the solicitors whom I approached were unwilling to represent me without a favourable independent psychiatric report, and the independent psychiatrists were unwilling to engage with me and consider evidence that I was capable of caring for my mother safely. Consequently I had to undertake the whole of my defence myself, from Tribunal through to Court of Session.

Legal Aid was not available without means testing to defend against the Local Authority's application for a Guardianship Order (February 2013-January 2016), despite the substantial overlap in issues with the Mental Health case, especially the deprivation of human rights involved in awarding Guardianship to the state against the wishes of my mother, my sister and myself.

The two solicitors whom I engaged differed in their opinions as to whether I or my mother should be means-tested. I had no regular income, and my savings rose above the threshold during this period. After both solicitors withdrew from the case I was unable to afford a solicitor without legal aid.

Despite providing sound legal arguments and evidence, I lost both cases, probably because I lacked a legal representative who could command respect in court. My mother died in hospital where she had been confined for the last two years of her life by the social and health services.

During 2014 I had also contemplated applying for Judicial Review in the Court of Session. A solicitor-advocate at Brodies advised me that I could expect to incur expenses of at least £75k excluding costs if awarded against me. This would require me to mortgage my house, which might be difficult without a source of income.

In 2014 and 2015 I applied unsuccessfully for assistance from the Free Legal Services Unit at the Faculty of Advocates, to take my case to the Court of Session. Despite the requirement that applicants must not be eligible for legal aid, the fact that I had savings above the threshold was cited as a reason for not accepting my applications.

Recommendations

1. Legal Aid should be available without means-testing to anyone defending a person against state interference with their human rights under the Adults with Incapacity Act 2000, as it is to the Named Person defending the same person under the Mental Health Act 2003. With vastly superior funds at the public expense, the state already has an enormous advantage by being able to engage the most eminent solicitors and advocates.
2. Where means-testing is required, it should include income as well as savings, so that people who are living off savings as an alternative to claiming benefits are not unfairly penalised.
3. The threshold for Legal Aid should be gradual not abrupt, so that those who are above the threshold but not "well off" are not disproportionately affected. Those with savings above threshold should receive a decreasing state contribution towards their legal costs on a sliding scale, up to an upper limit of savings of say about £50k.
4. Litigants should be able to apply the state contribution towards the fees of any solicitor of their choice, making up the difference themselves. This will increase access to expertise in specialist areas of law in which there are few good legal aid solicitors.
5. The Scottish Government should seriously consider making Alternative Dispute Resolution a mandatory pre-requisite when the state intends to interfere with the human rights of citizens, such as by Deprivation of Liberty, Compulsory Treatment and State Guardianship under the Mental Health Act and Adults with Incapacity Act. The Mental Health Tribunal is biased towards fellow professionals in psychiatry and social work, and the courts - including the Court of Session - are unwilling to question medical opinions which extend beyond diagnosis. Had the local authority been required to co-operate with my mother's wishes to remain in the community instead of abusing its powers by confining her in hospital solely for personal care which I was able to provide, it is my belief that she would be alive today.
6. The Scottish Government should seriously consider reviewing the remits of the Scottish Human Rights and the Mental Welfare Commissions so that, instead of merely developing policies and commenting on practices, they play an active role in challenging abuses of human rights by the state by taking cases to court and by helping individuals defend themselves against unlawful interference by the state.