

Professional BIOGRAPHY as per DNA programme

*“**Simon Brown** Crown Office Chambers, London works on a wide range of litigation matters. Simon is adept at working as part of a team, giving clear advice and guidance on all aspects of litigation including all tactical and legal issues. He is a skilled performer in court whether at interlocutory hearings or at trial. He has considerable experience of conducting settlement negotiations in mediation, at round table meetings and at without prejudice meetings.”*

Organised by **Reeta Ram**, Family Representative



CHARGING FOR CARE HOME ACCOMODATION- DEPRIVATION OF CAPITAL

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1. The obligation to provide accommodation

By section 21 of the National Assistance Act 1948:

“(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing -

(a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them”

See, Robertson v Fife Council 200 SLT 1226.

2. The LA is obliged to charge, where it can

By section 22, where a person is provided with accommodation the local authority is required to recover from him a payment in accordance with a "standard rate" which is to represent the full cost to the authority of providing that accommodation. Section 22(3) reads:

“Where a person for whom accommodation in premises managed by any local authority is provided, or proposed to be provided, under this Part of this Act satisfies the local authority that he is unable to pay therefor at the standard rate, the authority shall assess his ability to pay and accordingly determine at what lower rate he shall be liable to pay for the accommodation.”

Section 22 (3) requires means testing and section 22 (4) provides that every resident is allowed to keep a personal allowance.

Under section 22 (5) the LA is to give effect to regulations made by the Secretary of State for the purposes of the subsection: the relevant regulations are the National Assistance (Assessment of Resources) Regulations 1992 ("the 1992 Regulations"). There is also guidance in the form Charging for Residential Accommodation Guide (CRAG) but that guidance cannot affect the proper construction of the regulations.

Section 26 empowers local authorities to contract with third parties for the provision of accommodation and contains provisions corresponding to those in section 22 for the recovery of refunds from the person to whom the accommodation is provided.

“Subject to subsection (3A) below a person for whom accommodation is provided under any such arrangements shall, in lieu of being liable to make payment therefor in accordance with section 22 of this Act, refund to the local authority any payments made in respect of him under the last foregoing subsection:

Provided that where a person for whom accommodation is provided, or proposed to be provided, under any such arrangements satisfies the local authority that he is unable to make a refund at the full rate determined under that subsection, subsections (3) to (5) of section 22 of this Act shall, with the necessary modifications, apply as they apply where a person satisfies the local authority of his inability to pay at the standard rate as mentioned in the said subsection (3).”

Note that this might be read as placing a burden on the resident that he cannot pay for the charges. In any event the resident is required to co-operate and provide information to the LA. If not, the resident may be liable for the full sum.

3. How is income assessed?



See the 1992 Regulations and CRAG

4. How is capital assessed?

- capital limits
- capital disregards
- They are limited: surrender value of an insurance policy etc.
- treatment couples/civil partner
- The LA has no power to assess a couple or civil partners according to their joint resources. A resident is assessed according to their individual means.

- **property**

Value of resident's home disregarded for the first 12 weeks of a permanent stay. Also disregarded if the stay in residential care temporary.

Also disregard where the home is occupied in whole or in part by their resident's partner or former partner except where estranged or divorced (unless a lone parent) or a relative for whom the resident is treated as responsible (over the age of 60; under 18 or incapacitated)

What happens when the son moves into the property shortly after the resident has moved into the residential care?

- **joint beneficial ownership of property**

General rule is that where a resident is the jointly owns property (i.e. he or she has the right to receive of the proceeds of sale) the resident's share is valued as the amount that that interest would realise if it were sold to a willing buyer.

[NB Deferred payment scheme under the Health and Social Care Act 2001 (ss53-55) enables the LA to place a legal charge on the property to meet the costs of the residential home on death]

5. What about capital which the resident had but has now disposed of?

The 1992 Regulations, made under section 22(5) of the 1948 Act (see above), contain detailed provisions concerning the assessment of a resident's ability to pay, including the following provision at Regulation 25:

“A resident may be treated as possessing actual capital of which he has deprived himself for the purpose of decreasing the amount that he may be liable to pay for his accommodation [subject to exceptions].”

The exceptions; personal injury trusts/compensation, the diminishing notional capital rule

“Deprive” has to be given an ordinary English meaning. It is not used in any technical sense. Guidance is that *“[a]voiding the charge need not be the resident's main motive but it must be a significant one”*.

In relation to materially identical wording in regulation 51 of the Income Support (General) Regulations 1987 (*“shall be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to income support ...”*) it has been held that there has to be a deliberate intention to obtain benefit and that for there to be such an intention the claimant has to be aware of the relevant capital limit rule; it is not enough that the claimant ought to have known of the rule (decision of the Social Security Commissioner dated 11 February 1991 in Case CIS/124/1990).

The Court in *Yule v. South Lanarkshire Council* [2000] SLT 1249 gave the following guidance:

“28. ... The process of assessment, therefore, begins with the requirement for the resident or prospective resident to provide information to the local authority from which the local authority can be satisfied that he is unable to pay the standard charge for the accommodation. The local authority cannot be so satisfied if the capital, both actual and notional, exceeds the specified sum. In determining the matter of notional capital, the local authority can only proceed upon the material which is available to them either from their own sources or upon that material as supplemented by material from the applicant and from such other sources as the local authority can reasonably be expected to apply to. We agree with counsel for the petitioner that in considering whether there is notional capital to be added to the actual capital of an applicant, the local authority must look to the information before them to determine whether a purpose to the effect specified in the regulations can be deduced. But, in our opinion, this is not a matter of onus of proof. Rather, before the local authority can reach such a view, it must have material before it from which it can be reasonably inferred that the deprivation of capital took place deliberately and with a purpose of the nature specified. The local authority cannot look into the mind of the person making the disposition of capital or of others who may be concerned in the transaction. It can only look at the nature of the disposal within the context of the time at which and the circumstances in which that disposal took place

29. ...

[W]e do not consider ... that it is necessary that the claimant should know of 'the' capital limit above which, in terms of the relevant regulations applicable at the time, the local authority is bound to refuse the application, if it is a reasonable inference, looking to the transaction in the whole surrounding circumstances relating to the applicant, that it must have been a purpose of the transaction to avoid having to pay any charges in the event of becoming a resident in residential accommodation provided by the local authority. In this respect we consider that the 1992 Regulations have to be looked at in a different light to those concerned with provision for income related benefits, not least because the purpose of the individual may have formed possibly some time ahead of the prospect that he or she might require to enter such residential accommodation ...” (emphasis added).

In *R v Dorset CC ex p. Beeson* [2001] EWHC Admin 986 Richards J held that the test was one of subjective purpose. The existence of such a purpose can be established by way of reasonable inference from the primary facts. He said this:

On the particular facts of the [Yule] case, where the family "were not able to throw any further light on the purpose of the transaction" beyond what was contained in correspondence (para 30), the court held that "there were sufficient primary facts to entitle the respondent reasonably to conclude that Mrs Yule had deliberately determined to denude herself of her one substantial asset because, by doing so, she might thereby avoid the prospect that if she were to enter residential care in her lifetime, her house would require to be sold and the proceeds, at least in part, would require to be devoted to payment for that care, to the detriment of her family's interest in the succession to her estate on her death"

Finally the court stated:

"33. We agree with the Lord Ordinary that it is open to a local authority to reach a view as to the purpose of a transaction such as the present, without any specific finding as to the exact state of knowledge or intention of the applicant, so long as the primary facts are such as reasonably to lead to the inference that the purpose was at least in part that specified in reg 25(1)."

The statement read out by Mr Beeson's son referred to the fact that the council was claiming that a deliberate deprivation of assets took place in order to avoid paying for care which, in the council's view, was going to be inevitable. He took issue with that view, stating that "the one certainty in my Father's mind at the time of the transfer was that he was returning to live in and ultimately die in his home. The transfer of the property took place several weeks after his return home from hospital and at his request." He repeated what had been set out in previous material, that the reasons for the transfer were that, since the death of his mother, his father had become increasingly reliant on him in all matters of finance, correspondence, household management and property maintenance. At the time in question, his father was particularly concerned that his marriage of 24 years had recently broken up, and his father's principal motivation in making the transfer was to ensure that he had a home. At the time of transfer there had been no indication from social services that residential care and funding was under consideration or ever likely to be needed.

Other examples:

- Assisting a partner spouse to buy alternative accommodation

- Paying off debts

- Other capital purchases

6. Steps might be taken by the LA

-In general notional capital between the capital limits gives rise to an assessed tariff income which the resident is liable to pay.

-By section 21 of HASSASSAA * 1983 the LA may seek an order making the transferee of any asset at an undervalue liable for the charge if (1) the transfer occurred no more than 6 months before the date on which the resident begins to reside in the accommodation or whilst residing in accommodation; (2) the transfer was made knowingly and with the intention of avoiding the charges. Note the similar terms to reg 25 AOR regs- but a time limit applies. No time limit applies under reg 25.

-By section 423 of the Insolvency Act 1986 the Court may set aside a transaction at an undervalue made for the purpose of putting assets beyond the reach of the creditor. No time limit applies.

-Registering a charge under section 22 of HASSASSAA.

-Actions against Estates.

-Refusing accommodation, *Robertson v Fife Council* [2002] UKHL 35.

* *Health and Social Services and Social Security Adjudications Act 1983*