

# NEIGHBOURHOOD WATCH

Budget cuts and an ageing population mean that local authorities are increasingly looking to offset care fees with revenue raised from the sale of family homes, warns **LYNNE BRADEY** and **AUSTIN THORNTON**



○wning our own home is often our greatest achievement when it comes to accumulating personal wealth. But this jewel in the crown of the working lifetime of the person of moderate means is one that is increasingly likely to be prized equally by the coffers of the local authority as it grapples with the twin pressures of rising care costs due to an ageing population and a reducing budget.

As budget cuts cause local authorities in England to maximise their recovery of assets from those requiring residential care, the looming threat to the former home cannot be ignored.

**Duty of care**

Section 21 of the National Assistance Act 1948 provides that, subject to directions from the secretary of state, the local authority shall make arrangements for providing residential accommodation for persons aged 18 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. Section 22 provides that the local authority will recover the full cost from the resident unless s/he is unable to pay it.

Accommodation will usually be “otherwise available to them” if they have the means to provide it, but when applying this test the resident must be able to make care arrangements themselves or have someone to make arrangements for them. If not, the authority retains their duty under section 21. A person will have sufficient income to pay for their accommodation if this exceeds the standard fee plus a weekly prescribed amount for their personal needs. If their income is below this figure, they will still not qualify for support if their capital exceeds an upper limit, currently £23,250.

The relevant regulations are the National Assistance (Assessment of Resources) Regulations 1992. There is important accompanying guidance (Charging for Residential Accommodation Guide – CRAG) which is updated annually. The value of a person’s share in their former home is taken into account. The regulations identify a number of situations where this will be disregarded (see box).

**Added value**

Valuing a house when the resident is the sole owner is straightforward as it can be sold with vacant possession, but problems can arise when there are joint owners. The occupation rights of a co-owner are an incumbrance on the property that must be taken into account on valuation.

When will there be enforceable occupation rights? It was established in *Jones v Challenger* [1961 QB 176] that in a trust for sale where there is a duty to sell and a power to postpone, an order for sale will usually be granted unless a collateral purpose to the trust granted occupation rights. Trusts for sale were abolished by Trust of Land and Appointment of Trustees Act 1996 (ToLATA). Is the subsequent position different?

Section 15 of the ToLATA provides that in considering an application for an order for sale the matters the court should have regard to include:

- ◆ the intentions of the persons who created the trust;
- ◆ the purposes for which the property subject to the trust is held;

- ◆ the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home.

However, the court can make such order as it sees fit and take into account any relevant factor. In *Wilkinson v CAO* [2000] EWCA Civ 88, an income support claim straddled the abolition of trusts for sale and the introduction of the new Act. A majority of the Court of Appeal rejected the family’s evidence that occupation rights had been established and, influenced by *Jones*, had no difficulty in finding that a court would have made an order for sale against the co-owner. In a dissenting judgment, Evans LJ, accepting the family’s evidence, noted that in his view, “the collateral purpose identified by Devlin LJ (in *Jones*) does not have to be an express or implied term of the trust”. The judgment cannot fairly be said to decide the point as it was a decision on the facts.

Therefore it remains arguable that the test under ToLATA is less restrictive than in *Jones* and a court may not grant an order for sale in a case where all the circumstances suggest this is an unreasonable course of action, even if there is no clear evidence that a trust created occupation rights.

CRAG states: “Where an interest in a property is beneficially shared between relatives, the value of the resident’s interest will be heavily influenced by the possibility of a market amongst his fellow beneficiaries.” If no other relative is willing to buy the resident’s interest, the result may be that the resident’s share has a nil or nominal value.

In light of the approach of the court in *Wilkinson*, this guidance appears mainly relevant where occupation or other rights provide a defence to an application for sale.

There are reports of local authorities stating that they are willing to buy the property themselves. This is an attempt to demonstrate that there is a market. Even if it is true that the authority would buy the property, it is highly questionable whether this would be a lawful use of public funds. If there is no other market than the authority, it would be buying an asset it couldn’t sell and therefore be worthless.

**Taking it down**

The regulations provide safeguards against the deliberate deprivation of assets. The test is that a “significant purpose” of the disposal by gift or at an undervalue was to avoid or reduce liability for care home fees.

It was held in a Scottish case, *Yule v South Lanarkshire* (2000, Extra Division, Inner House, Court of Session) that in the absence of sufficient evidence it was not necessary for the authority to prove the state of knowledge of the resident making the disposition. Rather, it must have material “from which it can reasonably be inferred that the deprivation of capital took place deliberately and with a purpose of the nature specified”.

Mrs Yule disposed of her home to a life interest trust in 1995. An assessment was carried out in May 1996. The family had argued that Mrs Yule was in good health when she disposed of the property, but this was contradicted by the son’s evidence in court. No good explanation was provided as to why the life interest trust was necessary when a will would have achieved the same effect.

### HOME HELP

Local authorities take into account the value of a person's home when assessing their entitlement to assistance with care fees. However, the National Assistance (Assessment of Resources) Regulations 1992 identify a number of situations where this will be disregarded. These are:

- Where the admission is temporary and the resident intends to return to live there or to sell and use the proceeds to live somewhere else.
- Where the house remains occupied by the resident's partner (unless they are estranged or divorced) or relative (or, in most cases, the relative's partner) and that person is 60 or over, a minor child of the resident or "incapacitated". This applies to informal couples and same-sex relationships.
- The first 12 weeks of a permanent stay as a person provided for under section 21. If the person was previously in the home as a self-funder, they are entitled to 12 weeks from when the local authority starts paying for their care. If a person leaves before their 12 weeks is up, but enters permanent care again within 52 weeks, the house is disregarded for the balance of the 12 weeks. If they return more than a year after they left, a further 12 week disregard is applied.
- Where a person buys a property intending to move into it, the value will be disregarded for 26 weeks from the date they first take steps to take up occupation or such longer period as is reasonable.

There is discretion to disregard the property to protect the interests of another person living in it. CRAG gives an example of the former carer of the resident who gave up their own home to perform the caring role "when residential care cannot be anticipated". The intention of this qualification is presumably to prevent the use of this as a ruse to avoid the charges but, in reality, anyone who requires a live-in-carer is unlikely to be able to care on their own, so a need for care at some point is foreseeable. This contradiction may suggest that "cannot be anticipated" means simply that the care arrangements made were robust.

The authority was held to be entitled to draw the inference that it was a deliberate deprivation. As presented in the judgment, the inference in *Yule* appears to have been straightforward.

CRAG states that: "It would be unreasonable to decide that a resident had disposed of an asset in order to reduce his charge for accommodation when the disposal took place at a time when he was fit and healthy and could not have foreseen the need to move to residential accommodation."

As everyone of any age can foresee that they may eventually need residential care, it is arguable that "foresee" means something like "a real possibility given the particular

circumstances of the person at the time". This interpretation gains some support from the CRAG guidance, which can be read as stating that in determining whether there is a real possibility, the person's health is a key issue.

Not being private client lawyers, local authority officials may find it very hard to understand why anyone might give away property in their old age other than with the intent of avoiding care home fees. Good explanations may be treated with an unwarranted scepticism. In *Beeson (Beeson, R v Dorset County Council)* [2001] EWHC (Admin) 986 the decision of the social services department to treat a disposition as a deliberate deprivation was quashed in part on the basis that it had failed to say why it rejected the explanation given.

### Comfort zone

Local authority powers to recover charges become increasingly difficult for them to pursue as time goes by. If the resident has no other assets recoverable by a civil action, then after the six months allowed by Health and Social Services and Social Security Adjudication 1993 (HASSASSA) have elapsed, their only recourse is the Insolvency Act 1986. After either two or five years, depending on solvency at the time, only section 423 is available, under which the authority must prove that the disposition was made to avoid a future creditor. Arguably, this is a more difficult legal test than that applied by the original authority panel and is made harder to prove by the elapse of time. At present, these proceedings are far less common than those taken under HASSASSA, with which local authorities appear far more comfortable.

If the authority decides that the resident has disposed of capital in order to avoid or reduce the charge payable, it will need to decide whether to treat the resident as having the capital. There is no guidance on the use of that discretion, but a key question must be whether that capital is recoverable. Where the resident is not mentally capable, the existence of unrecoverable notional capital over the limit does not discharge the authority's duty towards them as they still cannot make their own arrangements (see above). The authority still has to contract with the home.

In other cases, where notional capital cannot be recovered, it is difficult to see what benefit an authority will have in treating the resident as able to pay, save that depriving the resident of assistance may be seen as a deterrent. In the current political and media environment in which the care-fees system is widely seen as unfair, the eviction of vulnerable people may do nothing but bring the authority into disrepute.

With the emergency budget indicating that councils may face budget cuts of 25 per cent, it seems inevitable that the number of disputes will rise as councils seek to avoid paying for care costs. Clients and their advisers should not accept adverse decisions at face value. Councils must act reasonably and lawfully and, in testing times, it is for us as professional advisers to hold them to this standard. ALNSR

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