

Asset Protection and Long Term Care

What is the point of saving, insuring your life or buying a house if the money or house you hope to pass on to your partner or children is likely to be used in keeping you if you are admitted permanently into long-term care? The introduction of the National Health Service and Community Care Act 1990 has considerable implications for the family particularly in the funding of care as opposed to the general feeling that people wish to preserve their wealth and hand it down to their family. The risk of losing the family home and other assets to fund care at any age is far greater than the threat of Inheritance Tax for most people. In general terms, Inheritance tax will be imposed at the rate of 40% on assets over £325,000 on death - Social Services can take into account 100% of assets over £23,250 (England) during your lifetime to fund residential care.¹

- I own my house jointly with my wife - will she have to sell our home to pay my care fees?
- I sold my house three years ago and bought another house with my daughter in her name. I am now in residential care. Is it correct that the Local Authority can look to half the value of my daughter's house to fund my care fees on the ground that she holds my interest in trust?
- I live with my son and daughter-in-law. Will they have to sell or re-mortgage their home to support me?
- Can I give my house to my children now before going into residential care?
- My daughter paid for my council house by re-mortgaging her home - will she get the house if I go into a care home?
- My Solicitor has told me that if he acts for me in gifting my house to my son, both he and I would be a party to a fraudulent act. Is this correct?
- How will my partner survive if all my state and occupational pensions are used to pay for the cost of care?
- My husband is 42 and has had a stroke. A friend has told me that I must contribute to the cost of his care and if I refuse, proceedings will be brought against me in a magistrate's court. What were his National Insurance contributions paid for?
- I am 86 years of age and a retired farmer still holding an interest in the family business. I am now going into residential care and I have been told that my interest in the business will be regarded as capital in a financial assessment. Has my Accountant been negligent in not advising me, and can I make a claim against him?
- Can certain types of investments be used to protect assets, and can I insure against needing long-term care?
- My Financial Adviser told me to invest my savings in a bond, which would be disregarded by a Local Authority in a financial assessment. Is this correct and how can I find a financial adviser who has experience in this field?

¹ Wales: Single capital limit of £22,500. Northern Ireland: Lower £14,250 Upper £23,250. Scotland: Lower £14,500 Upper £23,500.

- My wife and I own a house worth £600,000, our furniture and cars are worth £65,000, we have investments of £150,000 and have joint savings of £40,000. I am about to go into residential care. Will I get funding from the local authority and how can we ring-fence our estate to mitigate inheritance tax and funding long-term care?
- I would like to make gifts to my children during my lifetime, however, my daughter has problems in her marriage and my son has encountered difficulties in his business. What can I do?
- Can our Wills and Powers of Attorney be used to protect our home and savings?
- My mother has advanced stages of dementia and is unable to make decisions for herself. What can I do to take over control of her property and financial affairs to protect the inheritance that will pass to myself and my sister?

WHAT IS COMMUNITY CARE?

One of the biggest social changes is taking place right before our eyes - a demographic time bomb. The balance of the UK population is slowly changing. The birth rate is falling and people are living longer. This is resulting in a higher age dependency ratio (i.e.) proportion of the population looking for state help expressed as a percentage of the population earning the income out of which the state help is funded. The UK has one of the highest age dependency ratios in the world.

The implications are serious - it makes planning for retirement difficult particularly from the Government's position where it cannot continue to fund long term care out of the public purse.

One solution has been to shift the responsibility for funding care services from the state to local authorities and make the person receiving the service pay, with public funds providing only a safety net.

Local Authorities are now responsible for assessing a person's needs for community care services and then arranging for those services to be implemented. The services may be provided inside the home, at a day centre or in a care home. Having assessed the need, provided or arranged the services, a local authority can then apply a means test to assess the person's ability to pay for the services.

The average cost of a place in nursing home is £693 per week (£36,036 per annum), residential home £498 (£25,896) and domiciliary care £14.00 per hour.

The gateway to the provision of health and social care services is an assessment of the person's needs. Health authorities must define their responsibilities by issuing Eligibility Criteria for continuing health care.

A copy of the assessment, care plan and eligibility criteria should be obtained to ascertain as to whether the person's needs fall within health or social care or both.

- Domiciliary Care
- NHS Continuing Health Care
- NHS Funded Nursing Care
- Social Care
- S117 Mental Health Act 1983

CHARGING FOR SERVICES

A person ("the resident") provided with residential care services arranged through, or provided by, a Local Authority will undergo a financial assessment - means test. If they have more than £23,250 in capital they will have to pay for the residential care services in full. If they have savings of between £14,250 and £23,250, the local authority's contribution will be reduced by £1 for every £250 of capital over £14,250. Full local authority support will only be available if there are savings of £14,250 or less.

Once savings have fallen to the upper capital limit, the capital value of the resident's home will be disregarded for 12 weeks, after which it will be assessed as available capital and the home will have to be sold, or a deferred payment agreement entered into, to fund the residential care

In a financial assessment, most capital is taken into account (e.g.) bank and building society accounts, savings bonds, stocks and shares, business assets, land and the resident's home. Certain capital is excluded (e.g.) the resident's home in certain circumstances, personal possessions and the surrender value of life policies

Virtually all income is taken into account including retirement and occupational pensions.

After a financial assessment has been completed and the contribution determined, the resident will be left with a Personal Expenses Allowance of £22.60 per week² for personal expenditure (e.g.) haircut, clothing, magazines. Residents in care homes are now using money they have put aside for their funeral to subsidise their daily living expenses.

PROBLEM AREAS

1. PERSONAL EXPENSES ALLOWANCE

Although the figure is reviewed each year, it is totally inadequate resulting in the resident having to use disregarded capital for daily living expenses, for example toiletries, stationery and gifts. In some cases money put aside for the resident's funeral is used to supplement income.

2. RESIDENTIAL CARE TOP UP FEES

People have the right to choose their accommodation. Residents who require accommodation in a care home, which is to be arranged by the Local Authority, have a right to choose their accommodation, provided that it does not cost more than the Local Authority would usually expect to pay for accommodation that is appropriate to meet their needs

It is possible to choose a more expensive home provided there is a third party arrangement in place, however such an arrangement must be on the understanding that, if the third party fails to meet the fees, then the resident could be moved from that home. Guidance issued to local authorities makes it clear that, except in certain circumstances, residents cannot act as their own third party in topping up fees where a resident, with agreement of the local authority, wishes to enter more expensive accommodation, the difference may only be met by a third party such as a relative or friend of the resident.

3. THE FAMILY HOME

The general principle is that, subject to certain exemptions, the resident's former home will be regarded as available capital in a local authority financial assessment.

The home will be disregarded where the resident enters a care home on a permanent basis and the home is still occupied by: Spouse, Civil Partner, Partner, Relative aged over 60 or incapacitated or a Child under 18 maintained by the resident. A local authority has discretion to disregard the value of a home when someone lives in it who does not come within the above categories, (e.g.) long term carer or housekeeper who has given up their own home to care for the resident.

If a spouse or partner is residing in the resident's former home, the capital value will be disregarded in a local authority financial assessment. However, problems will arise if the person living at home wishes to 'downsize'. All or part of the proceeds of sale may have to be used to fund the resident's care, leaving the spouse or partner in a very difficult position.

If money is not immediately available to pay fees the local authority can:

² Wales £23.00. Northern Ireland £22.60. Scotland £22.60

- Create a charge on the property. This will enable the local authority to recover the debt when the property has been sold. It can place a charge over the property without consent or court proceedings – it might do this if the resident enters a care home and refuses to pay fees or sell the property.
- Commence civil proceedings to recover the debt (e.g.) bankruptcy

4. CARERS AND PROPERTY RIGHTS

It is not uncommon for family care to be provided when the parent's home is sold and alterations or improvements made to the carer's home to facilitate the parent (e.g.) construction of a 'granny-annex', or both homes sold and the proceeds pooled in the purchase of another more suitable property.

Often, no formal advice is taken or the property lawyer may not be acquainted with the wider issues relating to care of the elderly, which can have serious implications for both the homeowner and the resident. For example, if the resident had transferred money to a son or daughter to buy a larger property or construct a 'granny-annex', the local authority could pursue the recipient of the gift, homeowner, for the full cost of the resident's care.

5. LIABILITY OF YOUR SPOUSE OR PARTNER

Unlike an assessment for income support, a local authority can only undertake a financial assessment on a person requiring care services and not their spouse or partner.

However, beware of local authorities that ask questions about the resident's spouse or partner. This is a fishing exercise and the information obtained may have implications in the future, particularly where assets have been gifted after the resident's admission into care.

6. PENSIONS

All of State and part of occupational pensions may be regarded as available income in a local authority financial assessment. This will inevitably leave the spouse or partner remaining at home with limited income and that person may have to turn to the Department for Work and Pensions (DWP) for state support and will certainly have an adverse effect on their future standard of living.

It may be possible to apply to the local authority to increase the Personal Expenses Allowance to enable the resident to release money to the spouse or partner who remains at home. This will be at the discretion of the local authority.

BUSINESS ASSETS

A local authority financial assessment will take into account a resident's interest in a business which may affect its future viability. If a resident fails to pay an assessed contribution and has a beneficial interest in land in England or Wales, a local authority may create a charge over that interest to protect its position. If it is partnership property it may register a caution at the Land Registry against the resident's interest in the partnership property.

This is an important issue for people who are in business, particularly in relation to the generous relief given for inheritance tax purposes on business and agricultural property. The impact of funding long-term care may outweigh the inheritance tax saving.

Failure to advise on this issue may give rise to an action in negligence.

DEPRIVATION OF ASSETS

It is a natural reaction for people to consider giving away their home, savings or an interest in a business to avoid payment of care fees in the future. However, if a local authority considers that assets have been given away in order to avoid payment of fees, they will treat that person as still possessing the asset when assessing their ability to contribute towards the cost of care. The local authority has wide powers to recover payment. This may cause serious problems, particularly where the person receiving a cash payment has used the money to buy into a property or business. That property or business may have to be sold to fund the resident's care.

Despite information you may receive to the contrary, there is no time limit during which a local authority can look back at the purpose of making a gift.

PRESERVING AND SHELTERING ASSETS

Although the impact of the legislation will have a considerable effect on the future distribution of wealth it is still possible to preserve and shelter assets to ensure a spouse and children inherit. Planning is essential and sound professional advice should be sought from legal and financial advisers who have knowledge of the law and finance relating to the elderly.

A plan should be implemented having regard to the following:

1.) PUTTING YOUR AFFAIRS IN ORDER

- Keep a record of personal assets
- Make a Will
- Make a Lasting Power of Attorney
- Arrange a financial health-check, including a welfare benefits assessment
- Consider a pre-arranged funeral plan

2.) MAKE A WILL

A Will is probably one of the most useful tools available to preserve and shelter assets (e.g.) the majority of Wills are of a mirror husband/wife type, whereby on first death the survivor will inherit and on second death the estate will pass to the children in equal shares. Problems can arise under this type of arrangement (e.g.) if the wife enters into a care home, on the death of the husband, his estate will pass to his wife and will be used to pay the care home fees resulting in little or nothing passing to the children. If, on the other hand, the joint tenancy (joint ownership) of the family home had been severed and the husband had changed his Will leaving his interest in the property in a Property Protection Trust and the residue of his estate to his wife or children, at least part of the family assets would have been preserved.

It is essential that Wills are reviewed periodically to ensure that the terms are relevant to current circumstances, particularly if one party is ill and is likely to require care services in the future.

The Will should be registered to ensure that relevant information is recorded and that it is located at the appropriate time.

3. JOINT ASSETS

If savings are held in a joint account, on death, the surviving joint owner will inherit the whole account which will be taken into account in a local authority financial assessment. Consideration should be given to maintaining separate accounts to preserve capital.

4. THE FAMILY HOME

Invariably the home will be the principal asset and it will be the home itself or the proceeds of sale that people wish preserve as an inheritance

- Check the title deeds to see if held as Joint Tenants or tenants in common
- Sever a joint tenancy to create a tenancy in common and make a new Will incorporating a Property Protection Trust
- Consider putting occupiers onto the title either direct or through a trust to 'devalue' the owners interest in a local authority financial assessment
- Buy-out a joint owner's interest in a property
- Take advantage of the property disregards

- Deferred Payment Agreements
- Consider placing the home into a Trust
- Establish a trust from the facts of the case
- Rent the property
- Gift the home during your lifetime, either outright or into a Asset Protection Trust
- Equity Release Schemes

5. BUSINESS ASSETS

Whilst many elder people may not necessarily consider an interest in a family business as being theirs, particularly where they regard the business as having already passed to the next generation, the local authority may have a different view.

The test adopted by the local authority is whether or not the asset would be available to the resident if he or she were to resort to it.

Beware of dangers of retention of interest in the business to qualify for Inheritance Tax relief.

Consider transfer of ownership - sale, outright gift or trust.

Restrictions incorporated into Partnership Agreement or Articles and Memorandum of Association restricting withdrawal of capital from the business in certain circumstances (e.g.) key person being admitted into residential care.

Family business funding long term care direct or through long term care insurance

6. PENSIONS AND INSURANCES

The capital value of an annuity, the capital value of a private pension and the surrender value of a life insurance policy will be disregarded in a local authority financial assessment.

Life Insurance Bonds are probably one of only two methods of potentially sheltering a liquid asset while retaining access to it - the other being a discretionary trust. A belt and braces approach may be taken by combining the two however this may be seen as deprivation.

7. INHERITANCES

If a person receives an inheritance whilst receiving local authority financial support, that person will be re-assessed financially and the inherited assets will be regarded as capital. Members of the family should periodically review their Wills.

8. TRUSTS

Consider setting up a trust for a person requiring care services which will become operational on death and last for the cared persons lifetime. The financial effect will depend on the terms of the trust and whether there is an entitlement to capital or income. There are tax advantages and disadvantages to consider and professional advice should be taken.

9. THIRD PARTY CONTRIBUTIONS

Look to family to contribute towards the cost of care services or financial products to fund such services. A search should also be made at "Charity Search" (Tel: 01179-824060) to enquire if there are any charitable grants available to the person requiring care services.

10. ANNUAL FINANCIAL HEALTH CHECK

More than ever, it is now essential that elder people undertake an annual financial health check, including welfare benefits, to take stock of income, capital and financial resources. Appropriate action should be taken to preserve assets if there has been a change in health circumstances.

11. LONG TERM CARE INSURANCE

The long-term care insurance market has consolidated during the past few years. By October 2004 most providers had withdrawn from pre-funded long-term care insurance contracts. Insurance is now focused on the immediate care market where a lump sum payment is used to purchase an income for life to top-up other income to meet the cost of care.

From 31st October 2004 long-term care insurance became regulated by the Financial Services Authority, and financial advisers must have the appropriate qualification to give advice in this area.

The next Government Report on Long Term Care is due to be published at the end of July 2011, which hopefully should shape the future of funding.

USEFUL FACTSHEETS

- Guide to making gifts of assets
- Severance of a joint tenancy
- Making a Will
- When to review your Will
- Lasting Powers of Attorney

FURTHER INFORMATION

Further information on matters referred to in this factsheet can be obtained from:

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