Tax Chambers, 15 Old Square,
Lincoln's Inn, London WC2A 3UE
T: (020)7242 2744 F: (020)7831 8095
taxchambers@15oldsquare.co.uk

CARE ACT 2014[1]

Mary Ashley[2]

1. The Care Act 2014 ("CA 2014") was given Royal Assent on 14 May 2014.

2. The implementation of CA 2014 was initially planned to be in two stages. Some changes came into force on 1 April 2015 as planned. Other changes, which were supposed to be introduced in April 2016, have now been delayed until April 2020 in response to concerns from local authorities.

Relevant Charging Legislation

3. **Old Legislation and Guidance:**
    a. National Assistance Act 1948
    b. Health and Social Services and Social Security Adjudications Act 1983
    c. National Health Service and Community Care Act 1990
    d. National Assistance (Assessment of Resources) Regulations 1992
    e. Charging for Residential Accommodation Guide

[1] Disclaimer: Neither these notes nor the talk based on them nor anything said in the discussion session constitute legal advice. They are simply an expression of the speaker's views, put forward for consideration and discussion. No action should be taken or refrained from in reliance on them but independent professional advice should be taken in every case. The speaker does not accept any legal responsibility for them.

[2] maryashley@15oldsquare.co.uk

4. **New Legislation and Guidance:**
    a. CA 2014;
    b. The Care and Support (Charging and Assessment of Resources) Regulations 2014 ("the Charging Regulations")
    c. The Care and Support and Aftercare (Choice of Accommodation) Regulations 2014
    d. The Care and Support (Deferred Payment) Regulations 2014 ("the Deferred Payment Regulations")
    e. Statutory Guidance (from October 2014) (the "Guidance")

Key Changes

5. CA 2014 brought in many changes. Some of the key changes are explained here.

Family Carers (Section 10 CA 2014)

6. Only carers who provided regular and substantial care were entitled to a carer's assessment prior to 1 April 2015.

7. Now, anyone who seems as though they may benefit from carer's support is entitled to an assessment and the eligibility for services is based on a nationally-set threshold.

8. The carer will be eligible for support from the local authority if, as a result of caring for another adult:
    a. Their physical or mental health is at risk of deteriorating, or
    b. They are unable to achieve any of a list of specified outcomes and this has a significant impact on their well-being.

9. The local authority may then provide services to meet the carer's needs including things like help with housework, leisure or gym memberships or respite services for the person needing care.

Needs Assessment (Section 9 CA 2014)

10. Previously, needs assessments assigned an individual's needs into bands of low, moderate, substantial or critical. A local authority had a discretion to set its own threshold of what level of needs it would meet.

11. From 1 April 2015, local authorities have to adhere to a national minimum eligibility threshold. This threshold is equivalent to the old substantial level and therefore reflects the existing practice of the majority of local authorities. This is the minimum threshold; therefore, local authorities are able to also meet lower levels of needs if they choose to do so.

12. A needs assessment requires a local authority to assess whether an adult has needs for care and support and what those needs are. This must be done regardless of the level of the adult's needs for care and support or the level of the adult's financial resources.

Cap on costs of care (Section 15 CA 2014)

13. The most important change is the cap on care costs which was supposed to limit them to £72,000 for the over-65s and younger adults with disabilities from April 2016; however, these changes have been delayed.

14. If the care cap is legislated as it is currently envisaged, then to be eligible, an individual must be assessed by the local authority as having very high needs. Whether care is provided in the individual's home or in a residential home, only payments up to the rate set by the local authority will count towards the cap.

15. The cap of £72,000 is misleading as it does not actually represent the amount that would be payable in care home fees before the local authority becomes responsible:
    a. The cap is based not upon the actual amount paid by the person who requires care; it is rather based upon the standard rate local authorities

pay for a bed in a care home which is lower. This could mean that a person may be required to pay £150,000 for their residential care before the government steps in.

b. The costs of the room itself, the bed, the food, and the heating are not counted towards the cap.
c. In residential care you will still be responsible for food and lodging when you hit the cap. A flat rate of £230 a week has been proposed.

Increase in upper and lower capital limits

16. It was proposed that from April 2016, the upper and lower capital limits for means tested support would be increased so that more people would become eligible for local authority financial support.

17. The upper capital limit was supposed to increase to £118,000 where a person is in a care home and the value of their property has been taken into account when working out what they can afford to pay. People in care homes whose property is disregarded and people who receive care in any setting outside a care home would have been eligible for local authority financial support when their assets were £27,000 or less.

18. The lower capital limit was due to increase to £17,000.

Top-ups

19. Regulation 5 of the Choice of Accommodation Regulations makes provision for someone to pay additional costs or a top-up. The Guidance at Annex A provides details of how this will operate.

Deferred Payment Agreements (Sections 34 – 36 CA 2014 and the Care and Support (Deferred Payment) Regulations 2014)

20. In an effort to prevent people from having to sell their family homes to pay for care, deferred payment agreements are available.

21. Before 1 April 2015, some local authorities offered deferred payment agreements. The criteria for deferred payment agreements differed by council.

22. Now, a local authority is required to offer a deferred payment agreement to those who meet certain criteria. Where the following conditions are met, the local authority must offer a deferred payment agreement:
    a. the needs are to be met by the provision of residential care;
    b. the assets excluding the value of the home are less than or equal to £23,250; and
    c. the home is not disregarded (for examples, it is not occupied by a spouse or dependant relative).

23. Local authorities also have a discretion to offer deferred payment agreements. The Guidance at chapter 9 sets out the circumstances where the local authority should consider exercising the discretion.

<u>Power to Charge</u>

24. Section 14(1)(a) CA 2014 confers the power to charge for meeting needs under sections 18-20 CA 2014 upon a local authority: a local authority "may make a charge for meeting needs under sections 18 to 20".

25. Section 18 CA 2014 addresses the circumstances in which the local authority is under a duty to meet needs for care and support. Section 19 CA 2014 identifies circumstances in which the local authority has a power to meet needs for care and support in relation to which no duty arises. Section 20 CA 2014 addresses the circumstances in which a local authority has a duty or power to meet a carer's needs for support.

26. The local authority must not charge for certain types of care and support which must be arranged for free (section 14(6) CA 2014, regulations 3 and 4 of the Charging Regulations, and 8.14 of the Guidance):

a. Immediate care, including reablement, which must be provided free of charge for up to six weeks with a discretion to offer this free of charge for longer than six weeks;
b. Community equipment (aids and minor adaptations);
c. Care and support provided to people with Creutzfeldt –Jakob Disease;
d. After-care services/support provided under section 117 Mental Health Act 1983;
e. Any service or part of service which the NHS is under duty to provide;
f. Any services which a local authority is under a duty to provide through other legislation; and
g. Assessments of needs and care planning may also not be charged for as these processes do not constitute meeting needs.

27. A charge under 14(1)(a) may cover only the cost that the local authority incurs in meeting the needs to which the charge applies (section 14(4) CA 2014). Therefore the local authority cannot make a profit where it charges (8.15 of the Guidance).

<u>Financial Assessments</u>

28. Where a local authority chooses to charge a person, section 17 CA 2014 provides for the provision of an assessment of the financial resources of the person requiring care. The local authority must assess the level of the adult's financial resources, and the amount (if any) which the adult would be likely to be able to pay towards the cost of meeting the needs for care and support.

29. By virtue of paragraph 8.2 of the Guidance, the overarching principle in relation to charging is that "people should only be required to pay what they can afford".

30. In certain circumstances, a local authority may choose to treat a person as if a financial assessment had been carried out (regulation 10 of the Charging Regulations). In order to do so, the local authority must be

satisfied on the basis of evidence provided by the person that they can afford, and will continue to be able to afford, any charges due.

31. This can be done in the following circumstances (see paragraph 8.23 the Guidance):

> a. Where a person has significant financial resources, and does not wish to undergo a full financial assessment for personal reasons, but wishes nonetheless to access local authority support in meeting their needs. In these situations the local authority may accept other evidence in lieu of carrying out the financial assessment and consider the person to have financial resources above the upper limit.
> b. Where the local authority charges a small or nominal amount for a particular service (e.g. for subsidised services) which a person is clearly able to meet and would clearly have the relevant minimum income left, and carrying out a financial assessment would be disproportionate.
> c. When an individual is in receipt of benefits which demonstrate that they would not be able to contribute towards their care and support costs. This might include income from Jobseeker's Allowance.

32. Where a light touch assessment has taken place, the authority must inform the person and let them know that they have the right to request a full financial assessment if they wish.

33. In carrying out a financial assessment, the local authority must have regard to a person's capital and income, as well as whether or not the deprivation of assets considerations are relevant. Section 14(7) and section 17 provide regulatory powers to set out the detail of how the financial assessment should be undertaken, in particular how different types of income and capital should be treated and the minimum amount of income a person must be left with after charging.

Capital

34. Regulation 12 of the Charging Regulations provide the financial limit for capital:

> "**12**.—(1) If the financial resources of an adult who is a permanent resident (in terms of capital) exceed **£23,250**, the local authority is not permitted to pay towards the cost of the provision of accommodation in a care home for that adult (a).
>
> (2) If the financial resources of an adult who has needs for care and support other than as a permanent resident (in terms of capital) exceed **£23,250**, the local authority may (but need not) pay towards the cost of that care and support.
>
> (3) If the financial resources of a carer whose needs involve the provision of support (in terms of capital) exceed **£23,250**, the local authority may (but need not) pay towards the cost of the provision of that support for the carer (b)."

35. Annex B of the Guidance covers how the local authority will treat capital when conducting a financial assessment. The treatment of capital is broadly the same whether the person receives care in their home or in a residential home.

36. In assessing what a person can afford to contribute, a local authority must apply the upper and lower capital limits (paragraph 3 to Annex B of the Guidance):
    a. Upper limit £23,250;
    b. Lower limit: £14,250.

37. Where a person is between these limits then there is a tariff income applied which requires a person to contribute £1/week towards the cost of their eligible care needs for every £250 of capital above £14,250.

38. The Guidance provides the following example of how this works in practice:

For example: If Nora has capital of £18,100. This is £3,850 above the lower capital limit of £14,250. Dividing that by £250 produces a figure of £15,40 which rounded up is £16.00. Therefore, this is a tariff income of £16/week.

39. The first question that will need to be answered is what is capital? The Guidance at paragraph 5 of Annex B provides the following:

> Capital can mean many different things and the intention is not to give a definitive definition here as a local authority will need to consult the regulations and consider the individual asset on its merits. In general it refers to financial resources available for use and tends to be from sources that are considered more durable than money in the sense that they can generate a return.

40. The Guidance then provides a non-exhaustive list of examples of capital:

a. Buildings
b. Land
c. National Savings Certificates and Ulster Savings Certificates
d. Premium Bonds
e. Stocks and shares
f. Capital held by the Court of Protection or a Deputy appointed by that Court
g. Any savings held in:
    i. Building society accounts.
    ii. Bank current accounts, deposit accounts or special investment accounts. This includes savings held in the National Savings Bank, Girobank and Trustee Savings Bank.
    iii. SAYEschemes.
    iv. Unit Trusts.
    v. Co-operatives share accounts.
    vi. Cash.
h. Trustfunds

41. The second question will be in relation to who owns an asset. The Guidance provides that it is normally held by the legal owner, however occasionally, it is possible to dispute this. If the beneficial ownership does not follow the legal ownership in relation to an asset, then it is important that this is documented as the local authority may seek written evidence to prove where ownership lies. Two examples of a capital dispute are provided in the Guidance at Annex B paragraph 11:

> Example of capital dispute:
>
> Arlene has £14,000 in a building society account in her own name. She says that £3,000 is set aside for her granddaughter's education. Unfortunately there is no deed of trust or other legal arrangement which would prevent Arlene using the whole amount herself. She is therefore treated as the beneficial owner of the whole amount.

> Example of capital dispute:
>
> Lisa has £10,000 in a bank account in her own name and shares valued at £6,500. She provides evidence to show that the shares were purchased on behalf of her son who is abroad and that they will be transferred to her son when he returns to the UK. Although Lisa is the legal owner, she is holding the shares in trust for her son who is the beneficial owner. Only the £10,000 is therefore treated as Lisa's capital.

42. Where a person has joint beneficial ownership of capital, except where there is evidence that the person has an unequal share, the total value should be divided equally between joint owners and the person should be treated as owning an equal share. Where a person has legal ownership but not beneficial ownership of property, then that amount must not be taken into account.

43. The third question will be precisely what the value of the capital asset is. Valuation must be the current market or surrender value of the capital asset (whichever is higher) minus:

a. 10% of the value if there will be any actual expenses involved in selling the asset. This must be expenses connected with the actual sale and not simply the realisation of the asset; and
b. any outstanding debts secured on the asset.

44. Where assets are held abroad and all of it can be transferred to the UK, its value in the other country should be obtained and taken into account. Where capital cannot be wholly transferred to the UK due to the rules of that country, the local authority should require evidence confirming this and it should not be taken into account.

45. In some circumstances a person may be treated as possessing a capital asset even where they do not actually possess it. This is called notional capital which is capital that:
    a. would be available to the person if they applied for it;
    b. is paid to a third party in respect of the person; or
    c. the person has deprived themselves of in order to reduce the amount of charge they have to pay for their care.

46. A person's capital is the total of both the actual and notional capital; however, if a person has actual capital above the upper capital limit, it may not be necessary to consider notional capital.

47. The Guidance at paragraph 33 of Annex B provides for where capital must be disregarded. Of particular relevance will be property in specified circumstances, any personal possessions such as paintings, antiques, unless they were purchased with the intention of reducing capital to avoid care and support charges (Schedule 2 Paragraph 13), and the value of the right to receive income under a life interest or a life-rent.

48. Property disregards are provided in paragraph 34 where it is provided that the value of the person's main or only home must be disregarded:

> (a) Where the person is receiving care in a setting that is not a care home;
> (b) If the person's stay in a care home is temporary and they:
>   (i) intend to return to that property and that property is still available to them; or
>   (ii) are taking reasonable steps to dispose of the property in order to acquire another more suitable property to return to.
> (c) Where the person no longer occupies the property but it is occupied in part or whole as their main or only home by any of the people listed below, the mandatory disregard only applies where the property has been continuously occupied since before the person went into a care home (for discretionary disregards see below):
>   (i) the persons partner, former partner or civil partner, except where they are estranged;
>   (ii) a lone parent who is the person's estranged or divorced partner;
>   (iii) a relative as defined in paragraph 35 of the person or member of the person's family who is:
>   (1) Aged 60 or over, or
>   (2) Is a child of the resident aged under 18, or
>   (3) Is incapacitated.

49. For the purposes of the disregard, the following are defined as relatives:

(a) Parent (including an adoptive parent)
(b) Parent-in-law
(c) Son (including an adoptive son)
(d) Son-in-law
(e) Daughter (including an adoptive daughter)
(f) Daughter-in-law
(g) Step-parent
(h) Step-son
(i) Step-daughter
(j) Brother
(k) Sister
(l) Grandparent
(m) Grandchild
(n) Uncle
(o) Aunt
(p) Nephew
(q) Niece
(r) The spouse, civil partner or unmarrier partner of a to k inclusive

50. The meaning of occupy is not defined. In most cases, it will be obvious whether or not the property is occupied by a qualifying relative as their main or only home. However, there will be some cases where this may not

be clear and the local authority should undertake a factual inquiry weighing up all relevant factors in order to reach a decision. An emotional attachment to the property alone is not sufficient for the disregard to apply. In making its decision, the local authority is advised to consider the following factors:

a. Does the relative currently occupy another property?
b. If the relative has somewhere else to live do they own or rent the property (i.e. how secure/ permanent is it?)
c. If the relative is not physically present is there evidence of a firm intention to return to or live in the property
d. Where does the relative pay council tax?
e. Where is the relative registered to vote?
f. Where is the relative registered with a doctor?
g. Are the relatives belongings located in the property?
h. Is there evidence that the relative has a physical connection with the property?

51. A key aim of the charging framework is to prevent people being forced to sell their home at a time of crisis. The Charging Regulations under CA 2014 therefore create space for people to make decisions as to how to meet their contribution to the cost of their eligible care needs. As a result there is a 12-week disregard, a 26-week disregard, a 52-week disregard, and a 2-year disregard which each have their own requirements.

<u>Income</u>

52. Annex C of the Guidance provides details on how to apply the Charging Regulations in relation to income. Importantly, there are differences in how income is treated in a care home and in all other settings. Where it comes to charging a person in a care home, there is a consistent national framework. In all other settings, a local authority has more discretion to enable it to take account of local practices and innovations.

53. The only income that is to be assessed is that of the cared-for person to determine if they can afford to pay for their care and support. Where there is income received as one of a couple, the starting presumption is that the cared-for person has an equal share of the income. In assessing the income, a local authority should also consider the implication for the cared-for person's partner.

54. Income is net of any National Insurance Contributions.

55. Income will always be taken into account unless it is disregarded under the Charging Regulations. Income that is disregarded will be either partially or fully disregarded.

56. Irrespective of setting, employed and self-employed earnings are fully disregarded (regulation 14 of the Charging Regulations).

57. Local authorities may take most of the benefits people receive into account. Paragraph 16 of Annex C of the Guidance lists the benefits which must be taken into account. However, in taking these into account, the local authority still needs to ensure that in addition to the minimum guaranteed income or personal expense allowance, individuals retain enough of their benefits to pay for things to meet those needs not being met by the local authority. Any income received from the following sources must be disregarded:
    a. Direct Payments;
    b. Guaranteed Income Payments made to Veterans under the Armed Forces Compensation Scheme; and
    c. The mobility component of a Disability Living allowance or of a Personal Independence Payment.

58. There are additional disregards that must considered which are found at paragraph 28 of Annex C of the Guidance including, for example, income from a discretionary trust.

59. Some income is partially disregarded. Of particular relevance will be the savings disregard which applies as follows:

For individuals

- Where a person is in receipt of qualifying income of less than £120.35 per week there will be no Savings Disregard made.
- Where a person is in receipt of qualifying income between £120.35 and £148.35 per week the savings disregard is made, which will equal the actual amount of the savings credit received or a sum of £5.75 whichever is less.
- Where a person is in receipt of qualifying income in excess of £148.35 per week, and a savings credit reward is in payment, a flat rate savings disregard of £5.75 per week is made irrespective of how much the savings credit payment is.
- Where a person has qualifying income above the limit for receiving a savings credit reward (around £190.35 but could be higher if the person is severely disabled, has caring responsibilities or certain housing costs) a flat rate savings disregard of £5.75 is made.

For couples

- Where a person is part of a couple (including a civil partnership) and is in receipt of qualifying income of less than £192.00 per week there will be no savings disregard made.
- Where a person who is part of a couple (including a civil partnership) and is in receipt of qualifying income between £192.00 and £226.50 per week the savings disregard is made, which will equal the actual amount of the savings credit received or a sum of £8.60 whichever is less.
- Where a person who is part of a couple (including a civil partnership) and is in receipt of qualifying income in excess of £226.50 per week, and a savings credit reward is in payment, a flat rate savings disregard of £8.60 per week is made irrespective of how much the savings credit payment is.
- Where a person who is part of a couple (including a civil partnership) and has qualifying income above the limit for receiving savings credit (around £278.25 but could be higher if the person is severely disabled, has caring responsibilities or certain housing costs) a flat rate savings disregard of £8.60 is made.

60. In some circumstances a person may be treated as having income that they do not actually have. This is known as notional income. Where notional

income is included in a financial assessment, it should be treated in the same way as actual income. Therefore any income that would usually be disregarded would continue to be. There are some exemptions to notional income including income payable under a discretionary trust.

61. There are specific rules which apply to those who are receiving care and support in a care home only which can be found at paragraphs 40 to 48 of Annex C to the Guidance.

<u>Capital Deprivation</u>

62. When undertaking or reviewing a financial assessment a local authority may identify circumstances that suggest that a person may have deliberately deprived themselves of assets in order to reduce the level of contribution towards the cost of their care. In such circumstances, the local authority should have regard to Annex E of the Guidance.

63. Paragraph 5 of Annex E provides that deprivation should not be automatically assumed: there may be valid reasons why someone no longer has an asset and a local authority should ensure it fully explores this first. The overall principle should be that when a person has tried to deprive themselves of assets, this should not affect the amount of local authority support they receive.

64. At paragraph 6 of the Guidance, deprivation is defined:

> Deprivation of assets means where a person has *intentionally* deprived or decreased their overall assets in order to reduce the amount they are charged towards their care. This means that they must have known that they needed care and support and have reduced their assets in order to reduce the contribution they are asked to make towards the cost of that care and support.

65. Paragraph 8 provides that it is up to an individual to prove to the local authority that they no longer have an asset. Where that is not possible, the

local authority must treat them as if they still do have it. The Guidance provides a list of what acceptable evidence of disposal would be. This includes a trust deed, a deed of gift, receipts for expenditure, or proof that debts have been repaid.

66. The Guidance further provides what is generally perceived to be common approaches to depriving oneself of assets:

> (a) A lump-sum payment to someone else, for example as a gift;
> (b) Substantial expenditure has been incurred suddenly and is out of character with previous spending;
> (c) The title deeds of a property have been transferred to someone else;
> (d) Assets have been put in to a trust that cannot be revoked;
> (e) Assets have been converted into another form that would be subject to a disregard under the financial assessment, for example personal possessions;
> (f) Assets have been reduced by living extravagantly, for example gambling;
> (g) Assets have been used to purchase an investment bond with life insurance.

67. Deprivation of assets will not be deliberate in all cases and therefore, the Guidance provides that the following should be considered before deciding whether deprivation for the purposes of avoiding care and support charges has occurred:

> (a) Whether avoiding the care and support charge was a significant motivation;
> (b) The timing of the disposal of the asset. At the point the capital was disposed of could the person have a reasonable expectation of the need for care and support?; and
> (c) Did the person have a reasonable expectation of needing to contribute to the cost of their eligible care needs?

68. At paragraph 12 of Annex E, the Guidance provides that it would be unreasonable to decide that a person had disposed of an asset in order to

reduce the level of charges for their care and support needs if at the time the disposal took place, they were fit and healthy and could not have foreseen the need for care and support.

69. In relation to establishing intention, it may be difficult for a person to give evidence as to the donor's intentions. One way to establish the intention is the foreseeability or immediacy of the need for care. There is no time limit on local authorities when deciding whether a person has deprived themselves of assets for the purposes of avoiding care fees.

70. If the local authority has decided that a person has deliberately deprived themselves of assets in order to avoid or reduce a charge for care and support, they will, in the first instance, treat the person as if they have the notional capital or notional income.

71. Where the person has transferred the asset to a third party to avoid the charge, the third party is liable to pay the local authority the difference between what it would have charged and did charge the person receiving care. However, the third party is not liable to pay anything which exceeds the benefit they received from the transfer.

Powers of local authorities to recover debts

72. Sections 69 and 70 CA 2014 provide the local authority with powers to recover debts:

    "**69 Recovery of charges, interest etc.**

    (1) Any sum due to a local authority under this Part is recoverable by the authority as a debt due to it.

    (2) But subsection (1) does not apply in a case where a deferred payment agreement could, in accordance with regulations under section 34(1), be entered into, unless—

        (a) the local authority has sought to enter into such an agreement with the adult from whom the sum is due, and

        (b) the adult has refused.

(3) A sum is recoverable under this section—

(a) in a case in which the sum becomes due to the local authority on or after the commencement of this section, within six years of the date the sum becomes due;

(b) in any other case, within three years of the date on which it becomes due.

(4) Where a person misrepresents or fails to disclose (whether fraudulently or otherwise) to a local authority any material fact in connection with the provisions of this Part, the following sums are due to the authority from the person—

(a) any expenditure incurred by the authority as a result of the misrepresentation or failure, and

(b) any sum recoverable under this section which the authority has not recovered as a result of the misrepresentation or failure.

(5) The costs incurred by a local authority in recovering or seeking to recover a sum due to it under this Part are recoverable by the authority as a debt due to it.

(6) Regulations may—

(a) make provision for determining the date on which a sum becomes due to a local authority for the purposes of this section;

(b) specify cases or circumstances in which a sum due to a local authority under this Part is not recoverable by it under this section;

(c) specify cases or circumstances in which a local authority may charge interest on a sum due to it under this Part;

(d) where interest is chargeable, provide that it—

(i) must be charged at a rate specified in or determined in accordance with the regulations, or

(ii) may not be charged at a rate that exceeds the rate specified in or determined in accordance with the regulations.

70 Transfer of assets to avoid charges

(1) This section applies in a case where an adult's needs have been or are being met by a local authority under sections 18 to 20 and where—

(a) the adult has transferred an asset to another person (a “transferee”),

(b) the transfer was undertaken with the intention of avoiding charges for having the adult's needs met, and

(c) either the consideration for the transfer was less than the value of the asset or there was no consideration for the transfer.

(2) The transferee is liable to pay to the local authority an amount equal to the difference between—

> (a) the amount the authority would have charged the adult were it not for the transfer of the asset, and
>
> (b) the amount it did in fact charge the adult.

(3) But the transferee is not liable to pay to the authority an amount which exceeds the benefit accruing to the transferee from the transfer.

(4) Where an asset has been transferred to more than one transferee, the liability of each transferee is in proportion to the benefit accruing to that transferee from the transfer.

(5) "Asset" means anything which may be taken into account for the purposes of a financial assessment.

(6) The value of an asset (other than cash) is the amount which would have been realised if it had been sold on the open market by a willing seller at the time of the transfer, with a deduction for—

> (a) the amount of any incumbrance on the asset, and
>
> (b) a reasonable amount in respect of the expenses of the sale.

(7) Regulations may specify cases or circumstances in which liability under subsection (2) does not arise."

73. The primary change in these powers as compared to the old powers under section 22 of the Health and Social Services and Social Security Act 1983 is that the powers are not unilateral. They give the person from whom recovery of the debt is being pursued the opportunity to seek alternative means for payment. The aim of this was to provide equal protection for both the local authority and the person.

74. The overall effect of the powers is that they allow the local authority to make a claim to the County Court for a judgment in order to recover the debt though a local authority must first offer a person the option of a deferred payment agreement in order to recover the debt.

75. Section 69 provides that power against the individual and section 70 provides for that power to be used against a third party.

76. Section 423 of the Insolvency Act 1986 provides an additional route to recover debts where a person may have transferred or sold their assets to a third party at a price that is lower than the market value with the intention of putting those assets out of reach or prejudicing interest of someone who may wish to bring a claim against that person.

<u>Opportunities to protect assets from care home fees</u>

77. As a basic principle one is able to do anything which one wants with one's property, and therefore one could do any of the following to lessen the amount of capital in one's possession:
    - **i.** Gifting money or expensive items to family or close friends;
    - **ii.** Putting the money into a trust or tying it up in some other way;
    - **iii.** Spending on extravagant holidays; or
    - **iv.** Gifting the house by putting it into someone else's name.

78. However, as advisors, it is important that you ensure that the person giving the property away is aware of the risks of so doing. The prime risk in lessening capital to avoid care home fees is that it will be considered deprivation of assets and therefore treated as capital in any event even where the donor does not have access to it.

79. The Law Society has provided useful guidance in association with making gifts: "Making Gifts of Assets".

<u>Making Gifts of Assets</u>

80. The Law Society produced a guideline dated 6 October 2011 which assists in advising on making gifts. The principles in the guidance still remain valid after CA 2014.

81. It is important to bear in mind when advising that your role as an advisor is more than just drawing up and registering the necessary deeds and documents to effect the making of a gift. You must ensure that the client fully understands the nature, effect, benefits, risks and foreseeable consequences of making a gift. This is the only way that the client can form a view as to the wisdom of any proposed transaction.

82. The following questions should be asked when advising your client:
    a. What are they seeking to achieve?
    b. Who do they wish to gift to?
    c. What types of assets are involved?

83. Understanding the answers to these questions can ensure that you understand the client's intentions and what they are seeking to achieve. This will allow you to ensure that they achieve what they want in the most effective way.

84. Where the primary intention of your client will be to avoid the value of their assets being taken into account for means testing, such as where they foresee the need to pay for long-term care, your advice will need to deal with the consequences of such an action, including tax implications as well as any risks in relation to deprivation of assets.

85. The Law Society has highlighted the following other issues involved in a client's decision which you should be aware of, including where:

1. Your client is infirm or disabled, and an adult child or other relative has given up a paid job or the chance of career advancement to provide full-time live-in care in the expectation of inheriting the home on their death.
2. Your client is no longer able to pay for the upkeep or improvement of their home, and their child or children have been funding these in the expectation of inheriting the property.
3. The home or other asset is a part of a family business which would no longer be viable if the asset were not included. For instance, a farm might not be able to function without the farmhouse.
4. The asset was vested in the name of your client but was funded in whole or in part by their son or daughter.

86. If the client does transfer assets to a family member or carer, then the Law Society has identified the following benefits which may result:

1. There may be savings in relation to Inheritance Tax and administration costs upon the death of the client.
2. The client may avoid the need to sell assets to pay for care fees.
3. The asset may not be taken into account if your client has to undergo means testing for benefits or publicly funded services.
4. Your client may be relieved of the burden of responsibility for the asset.
5. It may reduce delays in processing their estate on their death.
6. There may be savings in both time and expense in applying for a court order from the Court of Protection in the event your client loses mental capacity and there is no relevant power of attorney is in force.

87. However, the client will also need to be warned of the following risks:

1. The value of the home may still be taken into account for funding long-term care as there are anti-avoidance measures in relation to means-testing.
2. If your client subsequently needs to move into a home but does not have the resources to pay for their care themselves because of the gift, the local authority may only pay for the basic level of care, leaving your client to rely upon the financial support of others to enable them to move into a home of their choice.
3. The donee may not provide the support expected, resulting in suffering for your client - for example, by not topping up care fees, or by moving your client prematurely into residential care home in order to occupy or sell the family home.
4. If the donee dies or runs into financial difficulties and the donor continues to live in the gifted home, your client may be made homeless.
5. The relationship between the donor and donee, since parties can and often do fall into dispute and even become quite hostile to one another.
6. The donee may later put pressure on your client to liquidate the gifted assets.
7. If your client transfers their home, they may be deprived of opportunities to adapt to changing circumstances - for example by downsizing, or releasing equity to pay for adaptations or care at home, so the donor may be left with no option but to move into a care home.
8. The person to whom the assets have been gifted may lose their entitlement to benefits and/or services based on personal means testing.
9. If the arrangement is challenged, there could be additional legal fees.

88. There are other practical issues which ought to be brought to the attention of your clients. They related to their general approach to their future once they have transferred their assets:

f

1. What effect making the gift could have on their future standard of living?
2. If a main motivator in gifting assets was to avoid means testing for future care provision, how would your client feel if this situation didn't arise? Does the benefit outweigh the risk?
3. What effect would transferring an asset have on others who might have expected to inherit a share of it?
4. What might happen if relations between your client and the donee deteriorate?

89. In relation to gifting assets specifically to fund future care, the Law Society provides that there is no foolproof way of avoiding the value of assets being taken into account for means testing. Anti-avoidance measures in the law allow some gifts to be ignored by the authorities, and even set aside by the court. The measures are subject to periodic change, might apply retrospectively, and are pursued more vigorously by some authorities than others.

Alternative to a lifetime disposal by the person who will be requiring care

90. It should be possible to safeguard at least half of the value of a home simply by changing the way that it is owned and having an effective will.

91. Some couples will own their property as joint tenants, others as tenants in common, and others just in a sole name. Where property is held as joint tenants, on either of the deaths, the property will pass automatically to the survivor by survivorship. The survivor would then own the entirety of the property and should they go into a care home, the whole value could be used to pay their fees.

92. To prevent this result from happening, where the property is held in a joint tenancy one could first sever the joint tenancy so that each of the couple owns their share in the house as a tenant in common. Then each member of the couple can, in their will, leave their share of the property on trust to the survivor for life with the remainder to go to whomever. Life interests are not considered capital for the purposes of the financial assessment (see Paragraph 17, schedule 2 of the Charging Regulations).

93. This would effectively safeguard a half-share of the property for the next generation. This can equally be done where the property is held as tenants in common, though severance of a joint tenancy will not be required.

94. There are 3 stages in implementing this option.

   a. First, where necessary, the joint tenancy will need to be severed. This should be done by a Deed of Severance.
   b. Second, upon severing the joint tenancy, an application for a Form A restriction should be completed (this is found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449784/SEV.pdf).
   c. Third, it is then necessary to ensure that the will is updated to provide the survivor with a life interest in the house with the remainder left to a different individual. If there are significant other capital assets (which would not be disregarded capital), then you may want to consider recommending that the client give a life interest of the whole of the estate to the survivor rather than leaving it to them outright.

Key Conclusions

95. CA 2014 represents a much needed overhaul of the legislation in relation to care home fees.

96. The most important changes for an individual's resources are the changes in relation to the cap on care costs and the capital limits, though implementation has been delayed.

97. In advising clients who wish to gift assets to avoid care home fees, all of the risks in relation to so doing, particularly the risks associated with deprivation of assets must be brought to their attention.

98. Where a property is held by two or more persons either jointly or as tenants in common, the key way to avoid the entirety of the home being used for care costs is to sever the joint tenancy (where necessary) and then to create a will trust.

MARY ASHLEY

SEPTEMBER 2015