SCOTTISH CONSUMER COUNCIL

CHARGING FOR RESIDENTIAL CARE — LIABLE RELATIVES AND DELIBERATE DISPOSALS

1. INTRODUCTION

1.1 Background

Since 1 April 1993 most people who move into residential or nursing home care are financially supported by local authority social work departments which recover charges from them based on a financial assessment of their ability to pay. The framework for assessment is set by statutory instrument, by central government guidance, and by local authorities' own policies where they have discretion.

Local authorities do have some discretion as regards how they operate the financial assessment, which they must carry out for everyone entering residential or nursing home care, apart from those entering homes in the independent sector and meeting all the costs themselves. In some areas, the Scottish Office has issued guidance to local authorities, suggesting how their discretion might be exercised. This report concentrates on the operation of the rules relating to liable relatives and deliberate disposals of assets. The background to both of these issues will be explained separately.

1.2 Liable Relatives

Husbands and wives have a mutual liability financially to maintain one another, and this remains the case if one of them enters long term care (Section 42, National Assistance Act 1948). If someone entering long term care is not able to meet all the costs of that care, then the local authority will consider whether that person's spouse can pay a contribution towards the costs. Unmarried couples are not subject to this liability. However, local authorities are not given the power to demand details of a spouse's resources. Scottish Office guidance expressly advises authorities not to use a financial assessment form which requires information about a spouse's income and capital.

The Scottish Office guidance suggests the use of tact in discussing the matter with the spouse, pointing out that the best way of deciding the extent of liability would be in the light of the spouse's resources. The guidance leaves it up to the local authorities' discretion to decide whether it is worth pursuing the spouse for a contribution to charges, and also how much it would be "appropriate" for the spouse to pay by way of contribution. The guidance also states that it may not be appropriate to ask for a contribution from a spouse if this will have the effect of reducing their resources to Income Support levels. (National Assistance (Assessment of Resources) (Amendment No 2) Regulations 1993: Regulations and Guidance — Amendment 2).
1.3 Deliberate Disposals of Assets

A person moving into a residential care or nursing home must be financially assessed to establish if they will have to make a contribution towards the costs of providing the care. Both the income and the capital, which includes assets such as savings, shares, land and the family home, are assessed. At the time of our survey anyone with capital of £8,000 or more was required to meet the full cost of their care. The Social Work Department would meet the whole cost if the capital owned was less than £3,000. Between £3,000 and £8,000, applicants make a contribution to the cost of their care, which is assessed by the social work authority. Certain things are not included, such as clothes and other personal possessions, welfare benefit arrears, and the surrender value of life insurance policies. Since carrying out the survey, the financial limits have been raised. The new upper limit is £16,000 and the lower limit is £10,000.

Someone moving into residential or nursing home care who owns his/her own home has the value of the home included in his/her capital, and if this constitutes a significant part of that person’s resources, he or she would normally be expected either to sell the home or to allow the social work department to take a legal charge over the property so that it could recover the sum owing to it at some time in the future when the house is sold, for instance after the death of the resident. However, there are exceptions to this. The value of the house will not be included in the capital if any of the following people is living in the house: a spouse or partner, a relative over the age of 60 or under the age of 16, or a relative who is incapacitated or disabled. If the house is jointly owned the value of the applicant’s share will only be taken into account if there is likely to be a market for that share.

Someone moving into residential or nursing home care cannot avoid paying for his/her care by deliberately giving away assets such as a house or money. Nor can he/she spend his/her savings on personal possessions in order to reduce his/her savings. If the intention in giving away the assets or spending savings is to avoid paying for residential care, then the local authority is entitled to treat the person as if he or she still had the property or money. There is no time limit on this.

The regulations do not give directions to the local authority about the circumstances in which assets given away or spent will be deemed to be deliberate disposals, but the Scottish Office guidance suggests various factors which should be taken into account. (See Scottish Office Guidelines, National Assistance (Assessment of Resources)(Amendment No 2) Regulations 1993: Regulations and Guidance — Amendment 2). The timing of the disposal may be important. For example, if someone transferred the title in their family home to a relative a long time before they ever contemplated moving into residential care, then it is unlikely that the local authority would consider that to be a deliberate disposal.

The purpose of the disposal must also be considered. The avoidance of payment of residential fees does not have to be the only purpose, but the guidance states that it has to be a significant one. So, for example, if someone uses capital to repay a debt, careful consideration should be given to whether there was a need to repay the debt at that time. If it seems unreasonable for the debt to be repaid at that time, it may be that the purpose was to avoid making a contribution to the costs of residential care.
The regulations provide that any person to whom property is transferred for less than its real value not more than six months before the original owner moved into residential care, can be required to make a contribution towards the costs of residential care. In practice, some local authorities appear to ignore property given away more than six months before the person went into care. However, they cannot make the assumption that simply because an asset was transferred within six months of the person entering residential care, it was done for the purpose of avoiding or reducing liability to pay a charge. By the same token, disposal of capital more than six months before entering residential care can still be considered as deliberate disposal for the purpose of avoiding paying charges.

2. PURPOSE OF THE RESEARCH

We wanted to find out what local authorities’ policies and practices were in relation to the assessment of liable relatives and disposals of assets. We wanted to find out what guidance was given to staff carrying out financial assessments, and also what information was given to people considering entering residential care. This information might cover the process of financial assessment in general, or, more specifically, the position of liable relatives and disposal of assets.

A separate issue which we wanted to look at was the procedure for reviewing financial assessments. There is no right to appeal against the local authority assessment of the financial contribution a person will be required to pay. This contrasts with the assessment which is done by the Department of Social Security, where someone applying for benefits has a right to appeal to a social security appeal tribunal, and then to a social security commissioner. People wishing to challenge the local authority assessment can ask for a review of the assessment or for a reassessment, or they can complain through the social work department’s complaints procedure, but there is no formal appeal procedure as there is in social security appeals. We wanted to find out what the local authorities thought people should do if they were unhappy with their financial assessment.

A questionnaire covering all of these matters was sent out to Directors of Social Work in regional councils at the end of 1994, and we received replies from all twelve authorities. The questionnaire used is attached to the end of this report (Appendix 1).

3. ANALYSIS OF RESULTS

In our letter to Directors of Social Work accompanying the questionnaire, we asked that they or an appropriate senior member of staff complete the questionnaire. In three cases, the questionnaire was completed by an assistant director of social work; in five cases, it was completed by a senior manager, for example, regional manager, finance, or community care team manager. Two questionnaires were completed by a principal or assistant principal officer, one by an administrative officer and one by a finance officer. Some of the completed questionnaires were accompanied by helpful covering letters, explaining the situation in that particular local authority in more detail.
4. WHO CARRIES OUT FINANCIAL ASSESSMENTS?

We asked respondents if the financial assessment is normally carried out by the social worker who carried out the care assessment, and whether the financial assessment form which is completed is checked by someone with financial training. In nine local authority areas, the financial information is gathered by the social worker who conducted the care assessment. In two regions, the local authorities have dedicated financial assessment officers who conduct the assessments. One region uses "contracts officers" to carry out this work. In every local authority area except the Western Isles, the assessments are then checked by someone with financial training.

In practice, social workers usually gather the financial information at a visit to the home of the person considering residential care, and help him or her complete the financial assessment form, which asks for details about income and capital. The form is then signed and submitted to the local authority whose finance or administration section would normally decide the level of contribution payable, if any.

5. ASSESSMENT OF LIABLE RELATIVES

There appears to be considerable variation in whether any account is taken of the spouse's financial circumstances, and if so, what aspects of those circumstances are considered.

There is also a certain amount of contradiction between what respondents to the questionnaire stated, and what is contained in the assessment form. For instance one authority, in response to question 8 in the questionnaire, says that a spouse is assessed only when he or she agrees and is fully co-operative. However the explanatory notes to the assessment form state that "In the case of married couples, capital resources of both partners must be declared". On the other hand, two authorities reply that they do make an assessment of relatives but in the financial assessment form itself there are no questions about the spouse's assets, about joint bank accounts or about joint ownership of property of land. This reflects the contradiction in the legal position discussed in paragraph 1.2 above, that while husbands and wives have a mutual liability in law to maintain one another, a local authority has no power to demand details of a spouse's resources.

5.1 The Assessment Form

Scottish Office guidance is quite clear. "Local authorities should not use assessment forms which require information about the means of the spouse." What is recorded on the form should relate only to the applicant, and in assessing the extent to which a spouse may be required to maintain the applicant the local authorities must proceed by discussion and negotiation with that spouse.

One region requires information about the "capital resources of both partners" to be recorded in the form, and requires this to be listed according to whether it is the applicant's, the partner's or joint. It asks about the spouse's income but not about any houses or land owned by the partner.
Another authority, which states that it does not assess liable relatives, asks that the income and capital of the applicant and the partner be recorded as well as any joint income or capital.

A third authority asks that the capital, income and property (defined as houses or land) of the applicant and partner be recorded, as well as joint capital, income or property, but states very clearly in its guidance to social workers that this is done purely to assess whether there is any unclaimed benefit. The guidance also stresses that the spouse must be clearly told that there is no legal duty to provide this information. However, if this information is volunteered, this authority will clearly be in a much better position to assess whether a contribution could reasonably be asked from the spouse.

5.2 Informal Assessment of Spouse’s Income

Seven authorities state simply that they do not assess spouses, and do not provide any guidance to social workers in this area beyond that produced by the Scottish Office. Two authorities state that they do assess relatives, but contain no questions about this in their financial assessment form. Presumably the assessment of liable relatives is done on an informal basis. Two authorities state that to date no payments have been sought from spouses. We did not receive any information from any authority explaining how they might go about obtaining a contribution from a liable spouse.

5.3 Treatment of Joint Capital

It is quite likely that married applicants will have some joint assets with their partners, whether that is in the form of joint bank or building society accounts, or joint ownership of the family home or other land. Again, there is a wide variation in the type of information sought by the different authorities in their assessment forms.

Four authorities specifically ask for information about joint bank or savings accounts, while four ask specific questions about joint ownership of heritable property. Only two authorities ask about both, and six authorities do not ask specific questions about either in their assessment form.

While it may be the case that, in practice, whoever completes the form will check whether accounts and other property are held jointly, it would probably be better to have greater consistency about this and explicitly ask applicants for this information.

Similarly, only four authorities specifically ask whether there is any mortgage to be taken into account. One authority does not even ask who is the owner of the property.

5.4 Terminology

A further problem revealed in the survey is the vague or misleading terminology used in assessment forms. Despite the fact that in law it is only "spouses" who have any liability to maintain one another, social work authorities frequently use the word "partner" in their forms.
Similarly there is variation in the use of words like "property" and "capital". Under the legislation, "capital" comprises all the applicant's assets apart from certain exceptions, mentioned in para 1.3. However, some authorities use "capital" to refer to savings, and "property" to refer to houses or land.

5.5 Written Guidance for Social Workers

One authority provided us with examples of the written guidance provided to social workers which appeared to be comprehensive and helpful. Much of it is based on the Scottish Office guidance. However this authority states that it does not assess liable relatives, and so this guidance is not for the purpose of assessment, but to ensure that a partner is claiming his or her full benefit entitlement. Only one authority actually indicated that they issue written guidance to social workers about how to assess liable relatives, but the written guidance which they sent as an example was the Scottish Office guidance, and not produced by the social work department. One authority indicated that it intends to produce written guidance, as the existing legislation and Scottish Office guidance "give little practical help as to the level of contribution a spouse should make". Another authority said that it held in-house briefing from time to time, but suggested that it would be helpful if the Scottish Office could issue clearer guidelines.

5.6 Information for Applicants

We asked the local authorities to send us examples of leaflets produced for members of the public, about the assessment process and about the review procedures, although most of them limited this to information about making a complaint (see paragraph 8 below). However, it may be that some of the eight authorities which sent nothing else do produce additional material.

One authority, in its guidance to social workers, makes it clear applicants must be informed that information about a spouse's assets cannot be required by law. Another authority, which states that such an assessment is only done where the spouse agrees and is fully co-operative, asks in its assessment form for information about the capital resources and income of both partners, and it is not made clear that the spouse cannot be required to provide such information. This form, which was the only one which appeared to have been produced in such a way as to be intelligible to the applicant, and contains clear guidance on some points, says nothing at all about the legal rules about a spouse's assets. However, this authority did say that it is producing new publicity leaflets.

Three authorities sent us leaflets designed for service users which contained some information about charging. One of these states that a partner's details are asked for only to insure that the partner is left with sufficient income. The other two provide no information about the position of a spouse.
6. **DELIBERATE DISPOSALS OF ASSETS**

6.1 **Assessment Forms**

Only four of the social work authorities explicitly asks in the financial assessment form about whether any property or savings have been disposed of within the preceding six months. One authority does not ask but does have a heading in the form referring to capital considered as deprived.

6.2 **Written Guidance Provided for Social Workers**

It appears that, where there is no question about deliberate disposals in the assessment form, there is also no written guidance provided for social workers, although some authorities referred to the fact that such guidance was in preparation. Of the four authorities which do ask about disposals in the preceding six months, three provide guidance for the person conducting the assessment in the form of, in one case, a working note, and in the other two, written guidance for staff. One authority sent us a copy of this guidance as well as draft guidance which we assume is now in use, which provides detailed examples. The other authority which asks about disposals in the preceding six months does not provide any written guidance to social workers on how to complete this section on the form.

Authorities which do not expressly ask about disposals refer to procedures which they follow where there is any suspicion that a deliberate disposal may have been made. Social workers are advised to refer to senior staff, either administrative, legal or financial. Two authorities say that information about disposals is covered in the training of their staff, and this is an area where training or briefing is done on an ongoing basis by some authorities.

6.3 **Information for Applicants**

There appears to be a serious lack of information about the definition and effect of such disposals for people applying for residential care, or who may be doing so in the near future. Only one authority produces clear information for those considering entering residential care.

7. **MANDATES**

In this context, mandates are forms for signature by an applicant which grant permission to the local authority to get access to information about the financial and legal position of the applicant, and may be addressed to the applicant's bank, solicitor or other adviser. Six authorities sent examples of mandates which are used. Authorities were not explicitly asked about the use of mandates, and so it may well be that other authorities also use them. Some of the mandates provided were very widely drafted, giving social work departments the authority to obtain unspecified information about potential residents' financial affairs. The draft guidance about deliberate disposals produced by one authority (Central) gives detailed examples demonstrating the legal complexity of this area, which suggests that it may frequently be necessary to get information from an applicant's solicitor as well as from banks and building societies.
8. REVIEWS OF FINANCIAL ASSESSMENTS

All the social work departments state that a resident or potential resident can ask for a review of his/her assessment or for a reassessment at any time. Because people's financial circumstances change, particularly if they are meeting the cost of care themselves, many of the authorities conduct an annual reassessment. One authority said that the onus is on residents to notify it when their savings fall below the upper limit.

One authority described the process of conducting an assessment as one of reaching agreement on each aspect, and emphasised that the form would not be signed by a resident unless and until he or she had agreed to what was in it. This authority was also the one which produced the most user friendly assessment form designed to be understood by clients and with clear explanatory notes on the left hand page. In contrast, another authority's form was set out in very small print with no explanatory notes and with no requirement that the applicant should sign it. It would seem likely that, unless the person conducting the assessment is very careful about ensuring that the applicant fully understands what is being entered on the form, the potential for the applicant to be unhappy about the outcome of the assessment is greater.

All the authorities sent details of their complaints procedure, stating that anyone unhappy with his/her assessment or reassessment could use the procedure.

9. CONCLUSIONS AND RECOMMENDATIONS

This short survey of local authorities' practices in relation to the assessment of liable relatives and deliberate disposals of assets reveals wide variations in practice from one local authority to the next, and also that the situation is changing, with some local authorities reviewing their policy and the guidelines they produce for social work staff.

It is, therefore, difficult to come to firm conclusions about the present picture in Scotland, which is likely to have changed since the survey was carried out, and will no doubt continue to change in the lead up to, and following the establishment of, single tier local authorities from the end of March 1996. However, we believe that some of the practices revealed in the survey give cause for concern about the operation of the rules and the exercise of local authorities' discretion in relation to liable relative assessments and deliberate disposals of assets.

Overall, we were concerned at the lack of clarity in some of the procedures operated by social work departments to obtain information from spouses who may be liable to contribute towards residential care costs, and in deciding whether deliberate disposals of assets had taken place. We were concerned at the lack of consistency throughout Scotland, with five authorities indicating that they made some kind of formal or informal assessment of liable relatives, and the rest not. We were concerned at the lack of information available to residents, potential residents and their relatives about these matters, and at the use of mandates giving social work departments the authority to obtain unspecified information about potential residents' financial affairs. The question of how someone questions the financial assessment made is very important.
These are our recommendations:

**Recommendation 1**

The Scottish Office should issue clear guidance about the procedure to be used where the financial liability of a husband or wife is at issue. This should make clear that there are two stages involved:

- the financial assessment for residential care should only require information about the income and capital of the applicant;
- where there is a spouse, the "liable relative" procedure should only operate if the resident is unable to meet the standard charge. A local authority that decides to pursue liability should explain to the spouse (preferably also recording the information in writing or on tape):
  
  (a) the range of charges that may be payable;
  
  (b) the spouse's right not to provide financial information;
  
  (c) that only a court has the power to set and enforce a charge;
  
  (d) the possibility of negotiating a sum (which may involve asking the spouse to volunteer information about his/her resources and takes account of outgoings and other commitments); and
  
  (e) that the local authority may decide to make its own assessment of how much to ask the spouse to contribute, but that the spouse is not required to pay this amount and can seek to re-negotiate with the authority or leave it to the authority to ask the court to decide what would be a reasonable contribution.

At the time when the survey was carried out, five authorities in Scotland took some account of the ability of spouses to make a financial contribution towards the costs of residential care. The law does not give them the power to require spouses to provide them with information about their financial affairs. In practice, some local authorities appear to be requiring spouses to give this information without the legal authority to do so. In other cases, unless this information is volunteered, it can only be assumed that social workers are just forming an informal impression of the spouse's ability to contribute. We consider that this lack of consistency in approach is unfair, and the Scottish Office should consider whether it would be consistent with the power to require a spouse to maintain someone entering residential or nursing home care to require spouses to provide information about their resources.
Recommendation 2

In the meantime, local authorities should review the procedures followed in relation to carrying out financial assessments, and they should ensure that they are not giving the false impression to spouses or partners that they must provide financial information. They must also ensure that financial assessment forms clearly specify that the information sought is about the applicant's financial resources.

One or two of the local authorities in our survey are giving the impression that spouses (or even partners) must give information about their financial resources, when this is not the case. Until the legal situation changes, local authorities should ensure that their procedures and forms conform to the rules.

Recommendation 3

Local authorities should ensure that potential residents and their spouses are given clear written information about the obligations of liable relatives. This should include information about the assessment process, including information about how the amount of the spouse’s financial contribution, if any, is worked out.

Very few local authorities spell out the position for liable relatives at present. In addition, the amount to be paid by a liable relative is a matter for the local authorities’ discretion. We believe, at the very least, that residents and their spouses should be advised how the spouses’ contributions are worked out, but it may in fact be preferable for the rules relating to this to be laid down by the Scottish Office.

Recommendation 4

Local authorities should ensure that potential residents and residents are given clear written information about the rules relating to deliberate disposals of assets at the time when this information would be most useful. This information should echo the Scottish Office guidance, making it clear that a disposal will not necessarily be considered as being a deliberate attempt to reduce or avoid liability for charges simply because it was made within six months of moving into residential or nursing home care.

Only one local authority made much of an attempt to explain to applicants the consequences of deliberately disposing of assets in order to reduce or avoid liability for charges. Most others provide no guidance at all.
Recommendation 5

Local authorities should produce detailed guidance to staff responsible for gathering the information required to make financial assessments advising them how to go about gathering information about disposals of assets. Where necessary, financial assessment forms should be amended to show details of disposals of assets, and the reasons for the disposal.

In most cases, staff gathering information for financial assessments are given no guidance about the factors to be taken into account when deciding whether a disposal has been made deliberately with the intention of reducing or avoiding liability for charges. The Scottish Office has produced detailed guidance on this, and this should be made available or even expanded for the use of social work staff involved in the completion of financial assessment forms.

Recommendation 6

In carrying out financial assessments of potential residents, all local authorities should offer to carry out a benefits check to ensure that all relevant social security benefits are being claimed.

In our survey, some local authorities carry out a benefits check to ensure that the applicant is receiving all benefits to which he or she may be entitled. We consider this to be good practice, and should be done in every case.

Recommendation 7

The law should be changed to ensure that there is a statutory right to appeal against the financial assessment that has been made, and that the consumer should be informed of this right to appeal at the time the financial assessment is made.

It is unacceptable that those who disagree with the financial assessment which has been made do not have a right to appeal against it. At present, the only recourse they have is to ask for a reassessment or a review, or to use the social work department's complaints procedure. Such decisions involve potentially large amounts of money which will, in many cases, have to be met out of the depleting capital resources of the resident, and we believe that they should be subject to a proper independent appeals procedure.

Recommendation 8

Residents' financial circumstances should be subject to at least an annual reassessment, whether the resident requests it or not. Residents should be entitled to ask for additional reassessments at any time.

In most cases, annual reassessment appears to happen. We believe that this should be a requirement, and in some cases, for example, where the level of the resident's financial contribution is having a significant effect in reducing the resident's savings, more frequent reassessment may be necessary.
Recommendation 9

The use of mandates by local authorities to obtain information about potential residents' financial affairs should be reviewed by the Scottish Office.

In the course of this survey, we were concerned to note the use of mandates which were drafted very widely, which, when signed by the potential resident, gave very broad powers to local authorities to obtain information from agents of the potential resident, such as banks, building societies and solicitors. We can accept that local authorities will wish confirmation of the financial position as described to them by the potential resident, but we are concerned that some of these mandates do not define the limits of the mandate, and the type of information which will be sought. We are not clear to what extent the mandate is explained to potential residents, and what are the implications for the potential resident if he or she does not wish to sign it. This matter requires further investigation.

Scottish Consumer Council
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