WESTERN ISLES COMMUNITY CARE FORUM

The following article is reproduced verbatim, with permission, from Uist's 'Am Paipear'. This Newsletter is entirely devoted to it as we feel that there is a distinct lack of knowledge of this very important aspect of going into residential care.

"CARE COSTS CONSUMING ISLAND HOMES : COULD THIS AFFECT YOU?

Many home owners have had to sell their home to pay their care fees. Such situations are becoming more and more common in our increasingly ageing populations and, as this article will explore further, increasingly difficult to escape.

Many have spent the majority of their life working hard, paying income tax and national insurance to benefit from a free National Health Service and State pension in the hope that they will be looked after beyond retirement. However, every year this expectation is becoming somewhat of a fallacy when we consider paying for residential care.

At the moment it is estimated that half of women and a third of men over 65 will require long term care at some point which they may have to pay for – the chance being higher the older one becomes. Therefore each and every one of us must prepare ourselves for this reality. At the moment the cost of care varies and may set back each person, on average, from £500—£600 per week. If you do not qualify for free care you will have to fund it yourself which may involve having to sell your home to cover the cost. This article seeks to briefly explain the current situation and how people can help themselves before it is too late.

Paying for care

Under the National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2009 (no.72) the lower capital limit to charge for residential care is £13,750 and the upper limit is £22,500. Therefore if you own more than £22,500, which under the Charging for Residential Care Guidelines (CRAG), includes property and savings as well as stocks and shares then your Local Authority (LA) will expect you to fund the full cost of your residential care. The LA will assess your ability to pay and decide which lower limit should be charged. On the Islands most elderly people own their home which is guaranteed to be worth more than £22,500, without taking into account savings and other investments. The CRAG document outlines the most common assets included as 'capital' when assessing a person's ability to pay for care, but stresses that it's list is not exhaustive. Thus anything you own which has a significant value attached to it may be counted as capital towards paying for the cost of residential care.

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The Capital Limits

If you own more than £22,500 worth of assets then you will be required to pay the full standard price of residential care (subject to entitlement to free personal care or nursing care payments) set by your LA. At the moment the cost of care in a local authority residential home in the islands is in the region of £800-£900 per week.

If you have capital of £13,750 or less then this is disregarded and you will not have to contribute towards the cost of residential care.

If you own assets valued at less that £22,500 but more than £13,750, the ability to pay will be assessed on a weekly income basis, for example: £1 for every complete £250 or part of £250 over £13,750 which is referred to a as "tariff income."

Is there any way my house could be disregarded from counting as capital?

There are situations when your property may not be counted as capital and other times when it must be taken fully into account. The LA may also have an element of discretion when deciding whether to take the value of the property into account.

Reasons for Disregarding Property as Capital

There are some exceptions to counting property as capital when assessing an individual's ability to pay for their care fees. The value of the property may be ignored if:

- The property is disregarded for the first 12 weeks of a permanent stay in residential care. However if the house is sold within this period the disregard will cease to have effect from the date of sale. During this period if your capital limits exceeds £13,750 then you will still be required to contribute towards your care costs. If you leave residential care within 12 weeks and then return within 52 weeks you will be entitled to the remaining weeks for your property to be disregarded. If you return to residential care after 52 weeks, you will be entitled to a further 12 weeks of disregard. Again this only applies to one property.

- The property will be disregarded where you have gone into residential care and no longer occupy the property but it is still occupied whole or in part by: your partner or former partner (except divorced or estranged); a lone parent who is your estranged or divorced partner; your relative or a member of your family aged 60 or over or under 16 and is a child who you are liable to maintain or is incapacitated. In law the term relative includes mother, father, brother, sister, in addition to adoptive parents and children; step parents and children; parents-in-law, sons and daughters-in-law; and civil and unmarried partners. It does not include cousins.

- The stay in a care home is on a temporary basis and you intend to return to your property OR the stay in a care home is on a temporary basis while you take steps to dispose of the property in order to buy another which will be more suitable. Only one dwelling house can be disregarded in such circumstances. Further, if your stay was initially thought to be permanent but turns out to be only temporary, the property you normally occupied as your home should be assessed on the basis that your care needs were temporary from the outset.

- Where you have acquired the property which you intend to live in. This could be disregarded for up to 26 weeks from the date you intend to take up occupation.

Council discretion: The LA can disregard the value of the property in which a third party continues to live, for example, someone who has given up their own home to care for you or who is an elderly companion, particularly if they have given up their own home.

A greater risk for Lone Residents

If you are elderly and live alone, or know of someone, for example, whose spouse or partner has passed away, leaving them alone, there is a greater risk of them losing their home to pay for care costs in these circumstances. The full capital value of the property will be counted and in terms of being widowed the full value is passed to the surviving person, which will be assessed if they decide to move into residential care, as well as the value of all other assets.

Can My Local Authority Force Me To Sell My Home?

Your LA cannot force you to sell your home to pay for care but the fees will accrue as a debt against your name. The LA could defer your contributions as an interest free loan but this will be paid back once your property is sold (which is likely to have an additional legal charge place on it) or your estate wound up. If you do not sell your house to cover your care costs you would be expected to contribute by using up any income, savings or assets you have.

Can I sell My Home or Transfer Title to Someone else to Keep It In My family Before I Go Into Residential Care?

The grim reality is that if at any time you get rid of any assets (including your property) to avoid paying the cost of residential care then this will be a 'deprivation of capital'. Depriving yourself of assets to avoid paying for care is illegal and if this occurs, even though you no longer possess the asset, your LA may still treat you as possessing it. It is important to note that you can be accused of depriving yourself of capital to avoid paying for care at any time. To decide whether a person has deprived themselves of capital the local authority should consider the following questions:

Q1: Did the person actually own the capital?

Q2: Has deprivation occurred? The resident must prove he/she no longer has the asset, if he/she fails to do this then he/she may still be treated as possessing the capital.

An example of acceptable evidence in relation to the disposal of capital may include: receipts for expenditure or proof that debts had been repaid.

Further, possible examples of a person who has deprived themselves of capital (although not necessarily for the purposes of avoiding a charge for accommodation) may include:

- A lump-sum payment has been made to someone else (e.g. as a gift or to repay a debt).
- Substantial expenditure has been incurred (e.g. on an expensive holiday).
- The title deeds of a property have been transferred to someone else.

Capital has been reduced by living extravagantly (e.g. gambling or following a much higher standard of living than the resident could normally afford).

LAs will give consideration, in respect of each case, to whether deprivation of assets has occurred. If the deprivation such as transferring the title of your house was done for a

number of reasons, then trying to avoid paying for care must be a significant reason. For instance if you disposed of your house when you were fit and healthy and it was not foreseeable that you would end up in residential care then it would certainly be difficult for the local authority to prove deprivation of capital occurred, unless there was strong evidence to suggest otherwise. In the case of Mrs Yule (see below) a five stage test is applied to decide whether deprivation of capital has occurred, which is formally known as the 'Notional Capital Rule'.

Case Study: Yule v South Lanarkshire Council [No2] 2000 SLT 1249

Yule v South Lanarkshire Council is the main legal authority in Scotland in relation to disposing of property prior to entering into residential care.

In March 1995 Mrs Rhoda Yule aged 81 of Wishaw, Glasgow gifted her home for 'love, favour and affection' to her granddaughter, Deborah Yule. She also retained a liferent in the property and continued to live in it until her accident.

Around this time she also made a Power of Attorney in favour of her son. Mrs Yule gifted her property while she was in 'excellent health' and very independent. However 18 months after transferring her house to her granddaughter, Mrs Yule took a bad fall which had severe consequences for her physical and mental health.

Since, she was unable to look after herself and required care. Thus she moved into her local nursing home. The Social Work Department carried out a financial assessment on her in order to decide whether she was required to contribute towards the cost of her care. Her son completed the form which required him to declare all his mother's assets as well as those she had disposed of in the last 6 months. The '6 month rule' is set down in section 21 of the Health and Social Adjudication Act 1983, which means that if someone knew they may have to go into care and disposed of assets during the previous six months then this could be recovered by the LA and included in the financial assessment to pay for residential care.

However, Mrs Yule had transferred her home to her granddaughter 18 months previously, thus her son did not include the house. When the local authority later found that Mrs Yule had gifted her house, they decided that the value of the house should be included as notional capital during her financial assessment. This meant that Mrs Yule's assets would exceed the upper limit of £22,000 and therefore she would have to pay her care fees in full.

But what about the '6 month rule' under s.21? Mrs Yule argued that s.21 made no provision for assets disposed of outwith the 6 month period and it is also during this period that a person's intention to dispose of property to avoid paying for care fees was relevant. As the Council was taking into account Mrs Yule's intention outwith the 6 month period then this meant that the Council was acting ultra vires (beyond its power). This was asserted as the Council's power did not entitle it to find Mrs Yule liable to pay outwith the 6 month period.

However, the Council argued that when you take the relevant sections of the National Assistance Act 1948; The Social Work Scotland Act 1968 and the National Assistance (Assessment of Resources) and Regulations 1992, this constituted a contained scheme for assessing a person's ability to pay for residential care. Each relevant section contained in

each Act displays Parliament's intention which was to implement anti-avoidance provisions which were to include assets transferred during the previous 6 months as well as those disposed of at any time, if the disposal was intended to avoid paying care fees.

The judge agreed with this argument and that Mrs Yule's intention was not only relevant during the 6 month period but at any time. He classed this to be a 'well founded submission' and that the provision in the 1948 Act as amended by the 1968 Act and the 1992 Regulations were to be regarded together and constituted a self contained scheme for the payment of accommodation charges and for the assessment of the ability to pay. In addition, as Regulation 25 of the 1992 Act made no reference to a time limit of 6 months, none would be implied.

The Application of the Notional Capital Rule

The Court applied what is sometimes referred to as the 'Notional Capital Rule', which incorporates a 5 step criteria:

1. The local authority must not make inferences but decide on the fullest information provided as to how deprivation occurred.

2. The resident must have known the capital limits at the time of deprivation.

3. The personal circumstances of the resident will be taken into account and the length of time lapsed is relevant.

4. Reducing care fees must be a significant reason as to why deprivation occurred.

Forseeability: was the resident going into care foreseeable at the time of deprivation?

This test is highly subjective. CRAGs 6064 states that: 'It would be unreasonable to decide that a resident had disposed of an asset in order to reduce his charge for accommodation when the disposal took place at a time when he was fit and healthy and could not have foreseen the need for a move to residential accommodation....'. Thus if a person is in good health when disposing of property it would be difficult to argue that they disposed of it as they thought they would need care.

The Main Arguments Made By the Council

Mrs Yule could have achieved the same practical result (gifting her property to her granddaughter) by making a will in favour of her granddaughter. Mrs Yule gave no clear explanation why she did not do this. Instead:

Around the same time she drew up a Power of Attorney in favour of her son, which suggests that she was getting her affairs in order and perhaps required to be managed by others.

Further in 1996 her son said he had seen a gradual change in his mother's behaviour.

Mrs Yule was unable to provide a satisfactory decision as to why she gifted her property to her granddaughter while retaining for herself a liferent when this could have been achieved by drawing up a will.

He rejected that the 6 month period was the only period where Mrs Yule's intention was relevant.

The Lord Ordinary concluded, accepting the Council's position and the arguments above that there were sufficient primary facts to entitle the respondents (South Lanarkshire Council) reasonably to conclude that Mrs Yule had been deliberately determined to denude herself of her one substantial asset because by doing so she might thereby avoid the prospect that, if she was to go into residential care in her lifetime, her house would be sold and the proceeds of which, in part, may be used to pay for her care.

Mrs Yule's case went to Judicial Review where Lord Cameron of Lochbroom agreed with the Lord Ordinary that the Council was entitled to arrive at their decision that Mrs Yule was able to pay for her residential care charges at the standard rate for the reasons which they gave.

Unlikely to Succeed

John A Campbell, a solicitor in Edinburgh, has commented that Mrs Yule was always unlikely to succeed as the rules for notional capital can be invoked at any time.

Further, he stresses that at present 'the timely disposal of assets remains a valid and practical means of ensuring that the family inheritance be passed down to the next generation rather than be eroded by care costs'.

There are certainly ways to be better prepared for this reality, particularly if you are a home owner and live alone and these will be explored in next month's issue of Am Pàipear.

To conclude this on a brighter note, it is thought that the number of elderly people who do go into care is exaggerated. The reality is that most people will not face having to pay mounting care costs. Age Concern Scotland produced figures back in 1998 of those who were at 'general risk' of residential care by giving an age breakdown:

Under 65: 0.05%

65-74: 1%

75-84: 5.4%

85 or older: 24.7%

Many would be quietly shocked by these figures but the reality is not all of us will face this dilemma, but being prepared for it would certainly do no harm, in order to protect property and assets for the future generation to inherit.

ACKNOWLEDGEMENT TO AM PAIPEAR

WE ARE GRATEFUL TO 'AM PAIPEAR' FOR ALLOWING US TO PUBLISH THIS ARTICLE. THEY RAN IT OVER TWO EDITONS IN FEBRUARY AND MARCH. WE THINK IT DESERVES ISLAND WIDE CIRCULATION SO HENCE WE ARE MAKING IT AVAILABLE TO OUR READERS IN LEWIS, HARRIS & BARRA.

THE SECOND PART OF THE ARTICLE CONTINUES ON PAGE 7.

Ways to Lessen the Burden of Residential Care Fees

The second part of the article on pages 1 to 6 continues: "If you are a home owner and live alone, be it through choice or because your spouse has passed away, and were required to enter into residential care, then your Local Authority (LA) has the right to charge you, which may be as much as £600-£900 per week. In order to pay this sum of money they have the right to use your home as a capital sum and may require you to sell it to pay for your care fees.

LAs take a zero tolerance approach to those who try to escape these fees either by passing title of their home or giving it away to another family member at any time in their life. Thus it is crucial that everyone knows this reality and that each of us should be prepared for it if we wish to keep our homes for future generations to inherit.

It has been thought that in the UK up to 200 homes per week are sold from under elderly people who can no longer pay for their care. This is the harsh reality of our aging population and the fact that by 2030 the cost of paying of care is likely to amount to £30 billion per year.

Therefore paying for care seems to be inevitable . However similar to the inevitability of death and taxes, there are precautions we can take to lessen such burdens.

Paying for Care At Home?

Every person's needs and wishes are different. One person may want the best care they can afford, even if it means selling their home to get it.

However the majority of us, especially on the islands, have strong bonds between family, the land we live on and the houses we live in. Many work hard in order that our children, grandchildren or nieces/nephews will one day have the family home passed down to them to continue a family tradition. But with many young people leaving the islands in search of work or further study, passing down the family home has become more difficult.

Historically when elders became frail or too ill to help themselves, a family member would step in and care for them. Such a dynamic is becoming increasingly rare with many people being left on the island alone, or perhaps with a spouse who has since sadly passed away, leaving them alone.

Therefore before automatically thinking you (or someone you know) should go into residential care, it is important to think about the consequences of doing so and if there is a family member or a community home help who is willing to take on the role as a carer, which is likely to be less than the cost of residential care. Such options should be considered by family members if you wish to keep the family home away from being consumed by care fees.

Change of Tenancy/Evacuation of Special Destination?

A change of tenancy is Scots Law is known as an 'evacuation of special destination' Most of us who live with a partner or spouse are most likely to own our property as a "joint tenancy". Thus if your partner was to pass away and the property was owned jointly, then their half would pass on to you and you would own the property.

In care fee terms this is not favourable as that means if you alone were to go into residential care, they would assess the full value of your home as capital. Alternatively if you were to sever the tenancy, and distinctly own half each then, for example, when your partner passed away, their half would go into a trust fund and you would only own half the property. The beneficiaries of the trust fund would be expressed in the will of the deceased and is likely to be the children or grandchildren.

So your position as 'joint tenants' would become 'tenants in common'. Thus if you were to then go into residential care your amount of capital would only be half of the house rather than the full value. Of course complications could arise if for instance you needed to sell your half to pay for care but if this were the case it may result in the property having a 'nil value'. Further, it would be reasonable to think that the beneficiaries of the house would wish to buy the other half but if this was not possible problems may arise.

In addition one must be cautious when taking action to carry out an evacuation of special destination as, for example, if any of the beneficiaries went bankrupt this could leave you homeless if the house was required to repay any debts.

Time to Start Thinking about the Future…

Overall the options above are worth serious consideration because if you were required to sell the home for some reason, your beneficiaries would get a share of the property or value of the property rather than the property being consumed by care fees and your family ending up with nothing. These options are by no means exhaustive and there are many others open to you in terms of how you own your home but these are highly complex and it is recommended that you seek professional assistance, such as from your solicitor, before taking any forthright action.

This article was primarily written to start the ball rolling in terms of looking to the future and getting you, and your family, to begin thinking about the possibility of one day paying for residential care.

If you own property, no matter how old you are, it must be stressed that it is critical that you start preparing to draw up a will. If you do not and leave it too late, this may lead to unfavourable consequences. Many assume their property passes down the family automatically but this in not always the case, especially if you or a member of your family dies intestate (without a will).

Therefore, if you have not already done so, it is highly recommended that you and your family start to think about the future of your property/assets and then towards how best to protect them. Many find death and the discussion of will and preparing to write them a difficult topic. However, a will is a practicality that should not be pushed aside until it is too late, but rather an act which must be viewed as positive and one of preservation, in the name of our families and the land we call home."

We will try to answer any questions you have on this article or, if we can't we will pass it on to someone else.

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