

Trusts and Anti-Avoidance under the Care Act 2014

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☞ Adult social care; Anti-avoidance; Anti-deprivation principle; Care expenses; Notional capital; Notional income; Third party claims; Trusts

Introduction

The ageing English population¹ is likely to generate increased demand for social care,² which “supports people of all ages with certain physical, cognitive or age-related conditions in carrying out personal care or domestic routines”.³ Local authorities can seek contributions from capable individuals towards the direct costs of social care by assessing relevant capital and income,⁴ which

“can give rise to heated social and political debate about the scope of the ‘Welfare State’ and the extent to which it was expected to provide free care from the cradle to the grave.”⁵

The Care Act 2014 sought, inter alia, to limit the amount that one person can be expected to contribute towards his or her lifetime care costs,⁶ albeit that a £72,000 cap due in April 2016⁷ has been delayed until April 2020.⁸ Despite the Care Act’s reforms, many individuals will be expected to contribute a significant sum towards care costs once its funding provisions have fully commenced, even if such costs are ultimately borne by their estates after death.⁹ While the threshold below which

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¹ Office for National Statistics, “Older People’s Day 2011” (London: ONS, 2011), p.1.

² See, e.g. Department of Health, *Caring for our Future: Consultation on Reforming what and how People pay for their Care and Support* (Crown, September 2013), para.11.

³ Commission on Funding of Care and Support, *Fairer Care Funding: The Report of the Commission on Funding of Care and Support* (July 2011), p.4; cf. National Health Service Act 2006 s.1(4).

⁴ Care and Support (Charging and Assessment of Resources) Regulations 2014 (SI 2014/2672) (CS(CAR)R 2014). See B. Sloan, “Adult social care and property rights” (2016) 36 O.J.L.S. (forthcoming); *University of Cambridge Faculty of Law Research Paper* No.24/2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600043 [Accessed November 2, 2015].

⁵ *Robertson v Fife Council* 2001 S.C. 849; 2001 S.L.T. 708 CSIH at [3] of Lord Bonomy’s judgment. See now Community Care and Health (Scotland) Act 2002; and, e.g. S. Main and A. Bissett-Johnson, “The Community Care and Health (Scotland) Act 2002 and *Robertson v Fife Council*” (2002) 34 S.L.T. 279.

⁶ Care Act 2014 (CA 2014) s.15; see, generally, N. Hopkins and E. Laurie, “Social citizenship, housing wealth and the cost of social care: is the Care Act 2014 ‘fair’?” (2015) 78 M.L.R. 112.

⁷ Department of Health, *The Care Act 2014: Consultation on Draft Regulations and Guidance to Implement the Cap on Care Costs and Policy Proposals for a New Appeals System for Care and Support* (Crown, February 2015).

⁸ Department of Health, “Letter from Rt Hon Alistair Burt MP: Delay in the Implementation of the Cap on Care Costs” (July 17, 2015), available at <https://www.gov.uk/government/publications/delay-in-the-implementation-of-the-cap-on-care-costs> [Accessed November 2, 2015].

⁹ CA 2014 s.34.

means-tested help is provided was to increase to £118,000 from £23,250 in April 2016,¹⁰ there were a number of significant limitations on the cap's effect even before the delay was announced.¹¹

This continuing potential liability is likely to lead to attempts to shield assets, including via declarations of trust, from local authorities in order to provide for dependants and others (including informal carers)¹² who would have a legitimate claim to the care recipient's estate.¹³ This article's aim is to evaluate the Care Act 2014's anti-avoidance provisions, particularly whether the Act achieves an adequate balance between ensuring that the costs of necessary care are equitably distributed and protecting the property-related interests of care recipients and those who would otherwise be the beneficial recipients of their assets. It includes an analysis of those provisions in light of similar mechanisms in other areas of the law applicable to individuals in a familial context.¹⁴

Whatever the inherent difficulties in a doctrinal legal scholar's questioning the structure and funding model of a social care system,¹⁵ this article will argue that the anti-avoidance provisions in the Care Act 2014 are very broadly drawn, and that the Act over-relies on discretion and statutory guidance to ensure that local authorities exercise anti-avoidance powers in a nuanced manner. It demonstrates that incorporating care fee avoidance into financial planning risks being both ineffectual and expensive.

Anti-avoidance and the Care Act 2014

The Government's statutory guidance on the Care Act 2014 states that "[p]eople with care and support needs are free to spend their income and assets as they see fit, including making gifts to friends and family", which it acknowledges "is important for promoting their wellbeing and enabling them to live fulfilling and independent lives".¹⁶ It is also anxious that "[p]eople should be treated with dignity and respect and be able to spend the money they have saved as they wish", on the basis that "it is their money after all".¹⁷

The guidance then counters such notions, however, by stating that "it is also important that people pay their fair contribution towards their care and support costs",¹⁸ which is "key to the overall affordability of the care and support system".¹⁹ It emphasises the need to "ensure that people are not rewarded for trying to avoid paying their assessed contribution".²⁰ This demonstrates the fundamental tension that the Act's funding (including anti-avoidance) provisions inevitably reflect. Whatever one's view of the Act's model, it is also true that (to borrow Sawyer and

¹⁰ Department of Health, *The Care Act 2014* (2015), para.9.7. The figure was to be £27,000 when a person's home was not included.

¹¹ See, further, e.g. Sloan, "Adult social care and property rights" (2016) 36 O.J.L.S. (forthcoming).

¹² B. Sloan, *Informal Carers and Private Law* (Oxford: Hart Publishing, 2013).

¹³ A.R. Barr, "Bridging the care gap: Robertson v Fife Council and paying for residential care" (2003) 7 Edin. L.R. 118, 123 (footnote omitted).

¹⁴ See also, e.g. A. Keay, "Transactions defrauding creditors: the problem of purpose under section 423 of the Insolvency Act" [2003] 67 Conv. 272.

¹⁵ Cf. Sloan, "Adult social care and property rights" (2016) 36 O.J.L.S. (forthcoming).

¹⁶ Department of Health, *Care and Support Statutory Guidance: Issued under the Care Act 2014* (Crown, June 2014) para.8.27.

¹⁷ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.4.

¹⁸ Department of Health, *Care and Support Statutory Guidance* (2014), para.8.27.

¹⁹ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.4.

²⁰ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.4.

Spero's phrase from the context of inheritance tax) the declaring of trusts in an attempt to avoid care fees "should not be allowed to become a fetish".²¹ A would-be settlor will need to ensure that he or she has enough to live on at least unless and until he or she requires care, and a sufficiently wealthy individual is likely to want to make "top-up" payments to secure a high standard of accommodation when the need arises.²²

While this article focuses on the ability to assess a care recipient as still possessing "notional" property of which he or she has in fact deprived himself or herself,²³ and the power to claim the value of at least part of the property from a third party recipient,²⁴ a care recipient's qualifying relative could move into the recipient's home immediately before that recipient enters residential care in order to benefit from the relevant "disregard",²⁵ and local authorities could find mechanisms outside the Act to counter anti-avoidance.²⁶

Notional capital and income

Notional capital and income are important alternatives to undertaking the potentially difficult process of claiming the value of property of which a care recipient has disposed from a third party under s.70 of the Care Act 2014, particularly if (for example) a device such as a discretionary trust has been used. The guidance regards it as a "first step" for a local authority to use the notional property provisions.²⁷ It is highly significant that, whatever the complexity of the avoiding trust, the trust beneficiaries' status or the ultimate fate of the trust's property, the notional property provisions in principle allow the effect of the trust to be nullified on the basis that at least some of the beneficial interest has left the care recipient.

Under the pre-Care Act 2014 law, notional capital was dealt with under reg.25 of the National Assistance (Assessment of Resources) Regulations 1992, which was judicially confirmed to be an "anti-avoidance provision".²⁸ It apparently remains in force as of September 2015, presumably for transitional reasons. By virtue of reg.25,

"A [care home] resident may be treated as possessing actual capital of which he has deprived himself for the purpose of decreasing the amount that he may be liable to pay for his accommodation."²⁹

²¹ C. Sawyer and M. Spero, *Succession, Wills and Probate*, 3rd edn (Abingdon: Routledge, 2015), p.289.

²² See, e.g. Department of Health, *Care and Support Statutory Guidance* (2014), Annex A.

²³ CS(CAR)R 2014 regs 22 and 17; Department of Health, *Care and Support Statutory Guidance* (2014), Annex E paras [19]–[20].

²⁴ CA 2014 s.70. A local authority could conduct an investigation, which would be regulated by the Regulation of Investigatory Powers Act 2000: Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.17.

²⁵ CS(CAR)R 2014 Sch.2 para.4; *R. (on the application of Walford) v Worcestershire CC* [2015] EWCA Civ 22; [2015] B.L.G.R. 133 at [24] fn.2, per Underhill LJ. Cf. Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.10. While couples could structure wills such that a surviving possible care recipient never receives certain property, this might be caught e.g. by CS(CAR)R 2014 regs 17(2) and 22(2).

²⁶ See, e.g. Insolvency Act 1986 s.423, discussed in T. Spencer-Lane, *Care Act Manual* (London: Sweet & Maxwell, 2014), para.1-689 and successfully invoked in *Derbyshire CC v Akrill* [2005] EWCA Civ 308; (2005) 8 C.C.L. Rep. 173.

²⁷ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.19.

²⁸ *Cunningham v East Lothian Council* [2011] CSOH 185; 2011 G.W.D. 39-792 at [19] (Lord Pentland).

²⁹ National Assistance (Assessment of Resources) Regulations 1992 (SI 1992/2977) (NA(AR)R 1992) reg.25(1).

There are exceptions relating to personal injury compensation trusts and payments,³⁰ and a reduction for any amount that is paid towards care by the resident.³¹ There is specific reference to notional capital that would be treated as such for an income support claimant,³² with some finessing.³³ The regulation confirms that

“Where a resident is treated as possessing notional [capital under its provisions] the foregoing provisions of this Part shall apply for the purposes of calculating its amount as if it were actual capital which he does possess.”³⁴

There are equivalent provisions for notional income.³⁵

In *Derbyshire CC v Akrill* Latham LJ held that reg.25 inter alia

“make it clear that, insofar as [a care recipient] had or could be treated as having the value of ... [a residential] property [that had been the subject of a deed of gift to his son and daughter], then that could and should ... be taken into account [in the local authority’s financial assessment].”³⁶

On the facts, the local authority had initially purported not to invoke reg.25 (apparently due to an error on the deed’s date) but then changed its mind. The Court of Appeal remitted the case for a re-evaluation of that change of mind in the particular public law context. The “subjective purpose” of the care recipient was held to be the relevant factor under the old regulations in *R. (on the application of Beeson) v Dorset CC*.³⁷

Under the Care Act 2014 and its Care and Support (Charging and Assessment of Resources) Regulations 2014, a person “is to be”³⁸ assessed on the basis of his or her actual and notional capital, including, inter alia,

“capital of which the adult has deprived themselves for the purpose of decreasing the amount that they may be liable to pay towards the cost of meeting their needs for care and support.”

There is a cross-reference (as in the 1992 Regulations) to income support.³⁹ The value of notional capital is reduced by the difference between the weekly amount the person pays towards care and the amount he or she would pay if the notional capital did not apply.⁴⁰ Notional income is treated similarly to notional capital,⁴¹ although there are exceptions.⁴² The consequence of being assessed as having relevant notional property could include that a person has to use property that formally should be subject to a disregard to fund care in order to compensate for the property that he or she is regarded as beneficially owning, but in fact does not;

³⁰ NA(AR)R 1992 reg.25(1)(a), (c).

³¹ NA(AR)R 1992 regs 25(1)(b) and 26.

³² NA(AR)R 1992 reg.25(2).

³³ NA(AR)R 1992 reg.25(3).

³⁴ NA(AR)R 1992 reg.25(5).

³⁵ NA(AR)R 1992 reg.17.

³⁶ *Derbyshire CC v Akrill* [2005] EWCA Civ 308; (2005) 8 C.C.L. Rep. 173 at [23].

³⁷ *R. (on the application of Beeson) v Dorset CC* [2002] EWCA Civ 1812; [2003] H.R.L.R. 11 at [13] (Laws LJ giving the judgment of the Court).

³⁸ CS(CAR)R 2014 reg.22(1).

³⁹ CS(CAR)R 2014 reg.22; Department of Health, *Care and Support Statutory Guidance* (2014), Annex B paras 28–36.

⁴⁰ CS(CAR)R 2014 reg.23.

⁴¹ CS(CAR)R 2014 reg.17; Department of Health, *Care and Support Statutory Guidance* (2014), Annex C paras 32–35.

⁴² Department of Health, *Care and Support Statutory Guidance* (2014), Annex C para.36.

or to continue paying for care due to notional capital even if his or her actual capital alone places him or her below the lower capital limit.

The notional property provisions will be affected by the bringing into line of provisions on residential and non-residential care by the Act, i.e. when local authorities will have a discretion as regards charging in both contexts,⁴³ rather than an obligation to charge for residential care⁴⁴ and a discretion to charge for non-residential care.⁴⁵ Previously, the obligation in principle to charge for residential care *and* the ability to assess notional capital was particularly harsh, and a local authority could mitigate the effect of the notional property provisions by deciding not to charge for residential care in the first place under the 2014 Regulations. Conversely, it is significant that non-residential care was not within the ambit of the old reg.25, and indeed the pre-Care Act 2014 guidance for such care does not apparently cover anti-avoidance,⁴⁶ whereas both types of care are included within the new Regulations.

It is arguable that the ability to take into account notional property was a matter of some discretion under the 1992 Regulations (signalled by the phrase “may be”), whereas the phrase “is to be” in the new Regulations implies an obligation, although Latham LJ’s phrasing of “could *and should*” (emphasis added) suggests that he regarded reg.25 as imposing an obligation. In any case, the law in this respect has not apparently been subjected to a significant change by the 2014 Act and its secondary legislation, beyond the consistency applied to residential and non-residential care.

Lord Bonyon noted in *Fife Council v Robertson* that a deprivation of assets for the purposes of “notional capital” was “a much wider concept than that of transferring assets to some other person or persons”,⁴⁷ which will be considered in the next sub-section of this article. The fact that the regulations affecting notional capital do not encompass claims against third parties was, in his view, “consistent with the much wider ambit of the regulations”.⁴⁸ It is significant, for example, that neither regs 17 or 25 of the 1992 Regulations nor regs 17 or 22 of the 2014 Regulations appear to be subject to a formal time limit as regards when a disposition of (ultimately) notional property took place. On Lord Philip’s analysis in *Yule v South Lanarkshire Council (No.1)*,

“accordingly, so long as the deprivation was made for the purpose of decreasing the amount that the resident might be liable to pay, he may [under reg.25] be treated as possessing the capital disposed of, whenever the disposal took place.”⁴⁹

⁴³ Department of Health, *Impact Assessment: The Care Act 2014* (2014) IA No.6107, para.1.116.

⁴⁴ National Assistance Act 1948 s.22; CS(CAR)R 2014 reg.12(1).

⁴⁵ Health and Social Services and Social Security Adjudications Act 1983 (HSSSSAA 1983), Pt VII; CS(CAR)R 2014 reg.12(2).

⁴⁶ Department of Health, *Fairer Charging Policies for Home Care and other Non-Residential Social Services* (Crown, June 2013); see also Local Authority Circular LAC(2001)32, but cf. Department of Health, *Charging for Residential Accommodation Guide (CRAG): In support of The National Assistance (Assessment of Resources) Regulations 1992 (S.I. 1992/2977)* (Crown, 2014).

⁴⁷ *Robertson v Fife Council* 2001 S.C. 849; 2001 S.L.T. 708 at [11] of Lord Bonyon’s judgment. It should be noted that the substantive decision was overturned ([2002] UKHL 35; 2002 S.C. (H.L.) 145) on the basis that the local authority in question erred in taking into account the care recipient’s capital when assessing her needs.

⁴⁸ *Robertson v Fife Council* 2001 S.C. 849; 2001 S.L.T. 708 at [11] of Lord Bonyon’s judgment.

⁴⁹ *Yule v South Lanarkshire Council (No.1)* 1998 S.L.T. 490; (1997–98) 1 C.C.L. Rep. 571 CSOH at 493; see also, e.g. *Robertson v Fife Council* 2001 S.C. 849; 2001 S.L.T. 708 at [24] (Lord President (Roger)).

This in principle means that a person who deprives himself or herself of property in order (and not necessarily solely in order) to avoid care fees but long before the care is actually required or provided is within the scope of the notional property rules. It is particularly significant that, unlike a claim against a third party, a local authority's decision to include a particular piece of notional property would usually be scrutinised by a court only if proceedings are brought by the care recipient himself or herself.

It will be seen, however, that the notional property and recovery from third parties provisions may be closer to each other under the Care Act 2014 because of the doubt over whether s.70 is subject to a substantive time limit. In any case, the 2014 Regulations on notional property are very broad, and it will become clear that the social care funding system effectively relies on discretion and statutory guidance to ensure that they are not applied too harshly.

Claims against third parties

Under s.70 of the Care Act 2014, certain below-market-value “transfers” can give rise to a debt between the third party transferee and the relevant local authority, which can be recovered under s.69. Section 70 is expressed to apply where “an adult’s needs have been or are being met by a local authority under sections 18 to 20”.⁵⁰ In such circumstances, the local authority’s recovery powers are exercisable where “the adult has transferred an asset to another person” (the “transferee”),⁵¹ “the transfer was undertaken with the intention of avoiding charges for having the adult’s needs met”,⁵² and either there was no consideration for the transfer or “the consideration for the transfer was less than the value of the asset”.⁵³ An “asset” is “anything which may be taken into account for the purposes of a financial assessment”,⁵⁴ and its “value” (where it is not 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 some allowances.⁵⁵

Where the above requirements are met, s.70(2) makes the transferee “liable to pay to the local authority an amount equal to the difference” between what it would have charged the adult (had it not been for the transfer) and what it did charge the adult.⁵⁶ The liability is expressed not to include “an amount which exceeds the benefit accruing to the transferee from the transfer”,⁵⁷ and is “in proportion to the benefit accruing to [each] transferee” where there is more than one.⁵⁸ Section 70 leaves open the possibility that “[r]egulations may specify cases or circumstances in which liability under subsection (2) does not arise”,⁵⁹ but *Halsbury’s Annotations* confirm that no such regulations have been made.

The documentation relating to the Draft Care and Support Bill stated that what is now s.70 “replaces section 21 of the Health and Social Services and Social

⁵⁰ CA 2014 s.70(1).

⁵¹ CA 2014 s.70(1)(a).

⁵² CA 2014 s.70(1)(b).

⁵³ CA 2014 s.70(1)(c).

⁵⁴ CA 2014 s.70(5).

⁵⁵ CA 2014 s.70(6).

⁵⁶ CA 2014 s.70(2).

⁵⁷ CA 2014 s.70(3).

⁵⁸ CA 2014 s.70(4).

⁵⁹ CA 2014 s.70(7); cf. HSSSSAA 1983 s.21(3A).

Security Adjudications Act 1983”.⁶⁰ The Care Act’s impact assessment did not “expect the new powers for debt recovery to change individuals’ behaviour, because they replicate the current powers and definition of what is and is not a debt”.⁶¹ Section 21 of the 1983 Act (again, still apparently in force as of September 2015, presumably for transitional reasons), however, applies only to residential accommodation (as with the notional property provisions). This again potentially brings more types of care within the scope of anti-avoidance provisions, although it has been seen that charging for both residential and non-residential care in the first place will ultimately be subject to discretion.

Specifically, s.21 applies to a person who “avails himself of Part III accommodation”.⁶² Where such a person “knowingly and with the intention of avoiding charges for the accommodation”,⁶³ “has transferred any [relevant] asset ... to some other person or persons not more than six months before the date on which he begins to reside in such accommodation”,⁶⁴ or did so “while residing in the accommodation”,⁶⁵ and the consideration was either non-existent⁶⁶ or less than the value of the asset, “the person or persons to whom the asset is transferred ... shall be liable to pay to the local authority ... the difference between the amount assessed as due to be paid for the accommodation ... and the amount which the local authority receive from him.”⁶⁷ Consistently with the Care Act 2014, the s.21 liability applies in respect of “cash and any other asset which falls to be taken into account for the purpose of assessing” the accommodated person’s ability to pay for it,⁶⁸ to the extent of the benefit received by the transferee⁶⁹ and in proportion to that benefit for each of multiple transferees.⁷⁰ The value of a relevant asset other than cash is similarly “the amount ... which would have been realised for it if it had been sold on the open market by a willing seller at the time of the transfer”,⁷¹ again with some allowances.⁷²

There are very clear similarities between s.21 of the 1983 Act and s.70 of the 2014 Act, though there are significant questions of timing. It is unclear whether the transfer must happen *while* “an adult’s needs have been or are being met by a local authority” under s.70, even though those are the criteria for the section’s applicability. The reference to the transfer is in the past tense, and no particular period is specified during which it must have taken place. The phrasing in s.21 of the 1983 Act is both clearer and less onerous in specifying that the relevant transfer must take place either while the transferee is being accommodated or within a period of six months beforehand, even though transferred property could still be treated as notional capital if it fell outside that limit.

⁶⁰ HM Government, *Draft Care and Support Bill* (TSO, 2012), Cm.8386, para.75; see also Local Government Association, “Care Act Clause Analysis” (2015), available at http://www.local.gov.uk/care-support-reform/-/journal_content/56/10180/5761381/ARTICLE [Accessed November 2, 2015].

⁶¹ Department of Health, *Impact Assessment: The Care Act 2014* (2014), para.1.133.

⁶² HSSSSAA 1983 s.21(1)(a); see further, HSSSSAA 1983 s.21(8); NAA, s.21–26.

⁶³ HSSSSAA 1983 s.21(1)(b).

⁶⁴ HSSSSAA 1983 s.21(1)(b)(i).

⁶⁵ HSSSSAA 1983 s.21(1)(b)(ii). Where a person leaves and then returns to accommodation, the six-month period is treated as referring to that before the return: s.21(3).

⁶⁶ HSSSSAA 1983 s.21(1)(c)(i).

⁶⁷ HSSSSAA 1983 s.21(1).

⁶⁸ HSSSSAA 1983 s.21(2).

⁶⁹ HSSSSAA 1983 s.21(5).

⁷⁰ HSSSSAA 1983 s.21(4).

⁷¹ HSSSSAA 1983 s.21(6).

⁷² HSSSSAA 1983 s.21(7).

The omission of a time limit from s.70 might be remedied by the fact that the ability to recover the debt per se, contained in s.69, is subject to a prima facie limit of six years,⁷³ although a difficulty remains. Section 69's limit relates to "the date the sum becomes due".⁷⁴ A sum transferred to avoid care charges, however, surely does not become a debt "due" to the local authority until it has conducted relevant needs and financial assessments and decided to charge. If no care was ever required, and no assessments carried out, the sum would never be "due".

If the author's interpretation is correct, s.70 imposes no time limit between the date of the transfer and the date of the financial assessment. As with the notional property provisions, in principle s.70 encompasses transfers made for the purposes of avoiding care charges years before care was provided and before it was clear that such care would be needed. It may be arguable that it is impossible to have an "intention of avoiding charges for having ... needs met"⁷⁵ unless the adult concerned knows or strongly suspects that his or her needs will have to be met under the Care Act 2014. This is not, however, consistent with Lord Phillip's reference to "the purpose of decreasing the amount that the resident *might* be liable to pay" when describing the relevant intention under the 1992 Regulations,⁷⁶ even if it is (as will be seen in the next sub-section) consistent with the statutory guidance.

It is now necessary to consider the recovery of the debt once established. The Draft Care and Support Bill documentation asserted that the provisions in what became s.69 "consolidate various powers".⁷⁷ Section 22 of the 1983 Act nevertheless familiarly applied only to residential care and allowed the local authority to create a charge over land in which a person who "fails to pay any sum assessed as due to be paid by him for the accommodation"⁷⁸ has a beneficial interest. The statutory guidance claims that s.69 "provides equal protection to both the local authority and the person", in contrast to the "unilateral" powers under the 1983 Act that did not provide the debtor with an alternative means of payment.⁷⁹

Section 69 expressly provides that "[a]ny sum due to a local authority under [Part 1 of the Act] is recoverable by the authority as a debt due to it",⁸⁰ and the cost of (at least attempting) to recover the debt can be added to it.⁸¹ This is set out without regard to whether the relevant care is residential. The local authority is required to offer a Deferred Payment Agreement (DPA) where possible,⁸² and can apply to court to enforce a debt only where a DPA is not possible or is refused by the debtor. The Care Act 2014 has, however, doubled the length of time (from three to six years) in which a debt can be recovered.⁸³ Provided proceedings have been issued within six years, the debt can still be recovered, but otherwise it must

⁷³ CA 2014 s.69(3).

⁷⁴ CA 2014 s.69(3).

⁷⁵ CA 2014 s.70(1)(b).

⁷⁶ *Yule v South Lanarkshire Council (No.1)* 1998 S.L.T. 490; (1997–98) 1 C.C.L. Rep. 571 at 493 (emphasis added); see also, e.g. *Robertson v Fife Council* 2001 S.C. 849; 2001 S.L.T. 708 at [24] (Lord President (Roger)).

⁷⁷ H.M. Government, *Draft Care and Support Bill* (2012) para.74; see National Assistance Act 1948 s.45; CA 2014 s.69(4); and Spencer-Lane, *Care Act Manual* (2014), para.1-685 on misrepresentation-related debts.

⁷⁸ HSSSSAA 1983 s.22(1)(a).

⁷⁹ Department of Health, *Care and Support Statutory Guidance* (2014), Annex D para.2.

⁸⁰ CA 2014 s.69(1).

⁸¹ CA 2014 s.69(5).

⁸² CA 2014 s.69(2).

⁸³ CA 2014 s.69(3).

be written off.⁸⁴ While there is a specific power for the Secretary of State to make regulations regarding the time a sum is due, when it is not recoverable and the charging of interest,⁸⁵ as with s.70, *Halsbury's Annotations* claim that no regulations have been made under s.69.

The guidance emphasises the importance of considering the vulnerabilities of the population sub-set with which local authorities are dealing when devising internal debt enforcement policies. There is an emphasis on discussion, agreement, reasonable action and consideration of the Act's overall wellbeing duty.⁸⁶ It should be remembered, however, that the defendant in cases involving s.70 will be a third party and not the relevant care recipient.

It seems that the local authority therefore has a choice between assessing the adult's capital as though he or she still had the beneficial interest in the alienated asset, or pursuing the transferee for the value of the asset. If it decides to charge the adult in full after assessing him or her on the basis of notional capital, the "difference" for the purposes of s.70(2) would be zero, and no claim would be feasible. This is the correct approach, since otherwise the local authority would surely be unjustly enriched.

We have seen that notional property is considered the first resort where deprivation has occurred, and it may seem fairer for a knowing care recipient to be more directly penalised for an avoiding transaction than a third party recipient who may not have known of the purpose behind it. It should be remembered, however, that the care recipient will be inherently vulnerable at the time of a decision to charge, and that a third party at risk of a s.70 claim will by definition not have given full consideration for the property concerned. In any case, the holder of a beneficial interest in relevant property may voluntarily surrender his or her interest on learning that it has been treated as notional capital in respect of the transferor's assessment, although this will depend upon the personal relationship between the transferor and the beneficiary at the time.

This article has put forward a bleak interpretation of s.70 from the perspective of those who might be tempted to make dispositions to alleviate liability to pay for care and the putative beneficiaries of those dispositions, even well in advance of care needs arising. Such beneficiaries may be at a particular disadvantage compared to those subject to the old s.21, and it is noteworthy that s.70 can effectively impose strict receipt-based personal liability.⁸⁷ The next sub-section, however, shows that the statutory guidance purports to mitigate the harshness of the interpretation put forward by the author.

Statutory guidance on "deprivation of assets"

Deprivation of assets is addressed in Annex E of the Care Act 2014's guidance, covering both assessment of notional capital/income (to some extent)⁸⁸ and claims against third party recipients, but apparently applying the same principles to the two mechanisms. The deprivation guidance is similar to that immediately pre-dating

⁸⁴ Department of Health, *Care and Support Statutory Guidance* (2014), Annex D para.11.

⁸⁵ CA 2014 s.69(6).

⁸⁶ CA 2014 s.1; Department of Health, *Care and Support Statutory Guidance* (2014), Annex D para.10.

⁸⁷ Cf. e.g. G. Virgo and P.S. Davies, *Equity and Trusts: Text, Cases and Materials* (Oxford: OUP, 2013), pp.907-918.

⁸⁸ Cf. e.g. Department of Health, *Care and Support Statutory Guidance* (2014), Annexes B and C.

the Care Act 2014,⁸⁹ albeit more detailed. The new guidance emphasises that local authorities “should treat this issue with sensitivity and care”,⁹⁰ and that “deprivation should not be automatically assumed”, since “there may be valid reasons why someone no longer has an asset”.⁹¹ Moreover,

“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.”⁹²

The guidance defines “deprivation” as “where a person has *intentionally* deprived or decreased their overall assets in order to reduce the amount they are charged towards their care”,⁹³ meaning 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 [it]”,⁹⁴ even though (as demonstrated in the last sub-section) this is not necessarily obvious from the legislation itself.

Somewhat less sympathetically, the guidance claims (without reference to specific authority) that it is for the relevant adult to prove that he or she no longer has the asset or income in question.⁹⁵ Regarding the explanation for a transaction, in *Yule v South Lanarkshire Council (No.2)* it was at least held that

“the local authority ... must have material before it from which it can be reasonably inferred that the deprivation ... took place deliberately and with a purpose of the nature specified.”⁹⁶

The guidance is generally quite nuanced, and emphasises the importance of whether the asset in question would have been included in a financial assessment in the first place.⁹⁷ Relevant considerations specified are: “[w]hether avoiding the care and support charge was a significant motivation”; “[t]he timing of the disposal of the asset”; and in particular whether “the person ha[d] a reasonable expectation of needing to contribute to the cost of their eligible care needs”.⁹⁸ It is specifically reiterated to 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 ... if at the time ... they were fit and healthy and could not have foreseen the need for care and support.”⁹⁹

There are therefore respects in which the guidance appears more sensitive to the difficulties faced by a care recipient than the primary and secondary legislation itself, and this is welcome. It is interesting that while the guidance (like the regulations) implies an obligation as to consideration of notional property in the

⁸⁹ Department of Health, *Charging for Residential Accommodation Guide* (2014), paras 6.055–6.074, 8.061–8.085.

⁹⁰ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.3.

⁹¹ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.3.

⁹² Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.5. See, e.g. *Robertson v Fife CC* [2002] UKHL 35; 2002 S.C. (H.L.) 145.

⁹³ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.6.

⁹⁴ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.6.

⁹⁵ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E paras 8, 14.

⁹⁶ *Yule v South Lanarkshire Council (No.2)* 2001 S.C. 203; 2000 S.L.T. 1249 CSIH at [28] (Lord Philip).

⁹⁷ Department of Health, *Care and Support Statutory Guidance* (2014), p.449; CS(CAR)R 2014 Sch.2 para.13.

⁹⁸ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.[11].

⁹⁹ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.[12].

context of asset deprivation,¹⁰⁰ the decision-making process outlined by the guidance might produce a somewhat discretionary approach.

The Act expressly imposes an obligation on local authorities to

“act under the general guidance of the Secretary of State in the exercise of functions given to it by [the relevant] Part [of the Act] or ... regulations under [it].”¹⁰¹

According to the Act’s Explanatory Notes, that provision was intended to have the “same legal effect” as s.7 of the Local Authority Social Services Act 1970,¹⁰² interpreted as requiring local authorities

“to follow the path charted by the ... guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.”¹⁰³

It has been said that “the guidance does not have the binding effect of secondary legislation and a local authority is free to depart from it, even ‘substantially’”, albeit that “it is difficult to envisage circumstances in which mere disagreement with the guidance could amount to a cogent reason for departing from it”.¹⁰⁴

In any case, it is arguably detrimental to the rule of law and the individual’s legitimate interest in knowing precisely what he or she may or may not do with his or her own property for the Care Act 2014’s deprivation guidance (which can be reissued without much difficulty) and local authority discretion to be apparently crucial. The author may be unduly pessimistic in his reading of the relevant provisions. It is nevertheless significant that even the guidance does not specify a time limit for avoiding dispositions, and the risk is that a very well-organised individual might waste money in a failed attempt to avoid hypothetical care charges.

Anti-avoidance in other areas

This section further evaluates the Care Act 2014’s anti-avoidance provisions by comparing them to those found in other areas of the law.

Matrimonial Causes Act 1973

The broad equivalent to s.70 of the Care Act 2014 in the Matrimonial Causes Act 1973 is s.37. Where it is satisfied that a party to financial relief proceedings (generally relating to divorce or dissolution of a civil partnership)¹⁰⁵ is about to “make any disposition or to transfer out of the jurisdiction or otherwise deal with any property”,¹⁰⁶ or “made a reviewable disposition”,¹⁰⁷ “with the intention of defeating the claim for financial relief”, the court can inter alia restrain the intended

¹⁰⁰ Department of Health, *Care and Support Statutory Guidance* (2014), Annex E para.[8]; cf. Department of Health, *Charging for Residential Accommodation Guidance* (2014), para.[6.062].

¹⁰¹ CA 2014 s.78(1).

¹⁰² Explanatory Notes to the Care Act 2014, para.[472].

¹⁰³ *R. v Islington LBC Ex p. Rixon* [1997] E.L.R. 66; (1997–98) 1 C.C.L. Rep. 119 QBD at 71, per Sedley J.

¹⁰⁴ *R. (on the application of X) v Tower Hamlets LBC* [2013] EWHC 480 (Admin); [2013] 3 All E.R. 157 at [35], per Males J; affirmed on appeal by Maurice Kay LJ: [2013] EWCA Civ 904; [2013] 4 All E.R. 237 at [28].

¹⁰⁵ See Civil Partnership Act 2004 Sch.5 paras 74–75.

¹⁰⁶ Matrimonial Causes Act 1973 (MCA 1973) s.37(2)(a).

¹⁰⁷ MCA 1973 s.37(2)(b). Section 37(2)(c) makes specific provision for cases where a financial order has been made.

disposition¹⁰⁸ or set it aside.¹⁰⁹ A “disposition” is expressed not to “include any provision contained in a will or codicil”, but otherwise “includes any conveyance, assurance or gift of property of any description”.¹¹⁰ It is “reviewable”

“unless it was made for valuable consideration (other than marriage) to a person who, at the time ..., acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant’s claim.”¹¹¹

Where the relevant disposition or dealing has not yet occurred or occurred less than three years before the s.37 application, an intention to defeat the claim is presumed if the court is satisfied that it would have, or has had, that consequence.¹¹²

This presumption seems harsher than the position under the Care Act 2014, even if a care recipient can be prejudiced by a presumption that he or she still has an asset and at least the notional property provisions will often be applied without court supervision. On the other hand, it is notable that the 1973 Act is more generous to the transferee in requiring notice (interpreted as including constructive notice)¹¹³ as compared to the 2014 Act, and that the exercise of the s.37 power (as distinct from the decision to enforce a debt inevitably created by the 2014 Act) is discretionary.

Under the 1973 Act, consistently with the Care Act 2014, there are two principal mechanisms as regards anti-avoidance.¹¹⁴ Where the s.37 power is not used, the court can in principle take the disposition into account when dividing the assets as relevant conduct under s.25(2)(g) of the Act.¹¹⁵ In *Le Foe v Le Foe*, however, Mostyn QC did not consider it “fair” for the full consequence of the husband’s fraudulent mortgaging of the matrimonial home to be imposed upon him.¹¹⁶ The extent of the judicial discretion under s.25 of the Matrimonial Causes Act 1973 might make anti-avoidance outside s.37 even more uncertain than under the Care Act 2014.

Inheritance (Provision for Family and Dependants) Act 1975

The 1975 Act allows a court to make provision out of a deceased person’s estate where any will and/or the intestacy rules do not make “reasonable financial provision” for a number of categories of applicant.¹¹⁷ The anti-avoidance provisions are ss.10 and 11, which Borkowski considers “radical”.¹¹⁸

Under s.10, where a court is satisfied that “less than six years before the date of ... death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition”,¹¹⁹ that

¹⁰⁸ MCA 1973 s.37(2)(a).

¹⁰⁹ MCA 1973 s.37(2)(b), (c).

¹¹⁰ MCA 1973 s.37(6).

¹¹¹ MCA 1973 s.37(4).

¹¹² MCA 1973 s.37(5).

¹¹³ *Kemmis v Kemmis (Welland intervening)* [1988] 1 W.L.R. 1307; [1988] 2 F.L.R. 223 CA (Civ Div).

¹¹⁴ See also *Charman v Charman* [2007] EWCA Civ 503; [2007] 1 F.L.R. 1246 on the limited extent to which an interest under a discretionary trust can be treated as a relevant resource of a party to ancillary relief proceedings.

¹¹⁵ See, e.g. *US v SR* [2014] EWHC 175 (Fam) at [63], per Judge Roberts QC.

¹¹⁶ *Le Foe v Le Foe* [2001] 2 F.L.R. 970; [2002] 1 F.C.R. 107 Fam. Div. at [88].

¹¹⁷ Inheritance (Provision for Family and Dependants) Act 1975 (I(PFD)A 1975) s.1.

¹¹⁸ A. Borkowski, *Textbook on Succession*, 2nd edn (Oxford: OUP, 2002), p.303.

¹¹⁹ I(PFD)A 1975 s.10(2)(a).

“valuable consideration for that disposition was not given by” anyone,¹²⁰ and that exercising its powers would “facilitate the making of financial provision for the applicant”,¹²¹ it may order the donee to supply money or other property for the purposes of making such provision,¹²² provided that an amount of money or property specified in the order does not exceed the value received.¹²³ Where an order has been made under s.10, the donee or an applicant for financial provision may seek a similar order in respect of other dispositions.¹²⁴ When deciding whether to exercise its s.10 power, the court is instructed to consider

“the circumstances in which any disposition was made and any valuable consideration which was given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.”¹²⁵

A disposition covered by s.10 is expressed to *exclude* one in a will, a nomination according to an enactment,¹²⁶ a donatio mortis causa¹²⁷ or in exercise of a special power of appointment.¹²⁸ Conversely, it is expressed otherwise to *include* “any payment of money ... and any conveyance, assurance, appointment or gift of property of any description”.¹²⁹ There is clearly a lot of discretion involved in s.10 applications, but at least there is a limitation in scope caused by the six-year time limit as compared to both the 2014 and 1973 Acts.¹³⁰

Under s.11 of the 1975 Act, where the court is satisfied that “with the intention of defeating an application for financial provision”¹³¹ the deceased at any time before death (unlike s.10) made “a contract by which he agreed to leave by his will a sum of money or other property or ... agreed that ... money or other property would be paid or transferred to any person out of his estate”,¹³² that “when the contract was made full valuable consideration ... was not given or promised” by anyone and that exercising its powers would facilitate a claim,¹³³ the court may make a range of orders.¹³⁴ The court may exercise its power only to the extent that the relevant transfer exceeds any consideration given,¹³⁵ and the relevant factors are otherwise comparable to those under s.10.¹³⁶ The ability to enforce or recover damages or other relief in respect of the contract survives only to the extent that they are consistent with the terms of the order.¹³⁷

A relevant “intention” for the purposes of ss.10 and 11 is present if “the court is of the opinion that, on a balance of probabilities, the intention of the deceased

¹²⁰ I(PFD)A 1975 s.10(2)(b).

¹²¹ I(PFD)A 1975 s.10(2)(c).

¹²² I(PFD)A 1975 s.10(2).

¹²³ I(PFD)A 1975 s.10(3)–(4).

¹²⁴ I(PFD)A 1975 s.10(5).

¹²⁵ I(PFD)A 1975 s.10(6).

¹²⁶ I(PFD)A 1975 s.8(1).

¹²⁷ I(PFD)A 1975 s.10(7)(a).

¹²⁸ I(PFD)A 1975 s.10(7)(b).

¹²⁹ I(PFD)A 1975 s.10(7).

¹³⁰ See, e.g. *AC v DC* [2012] EWHC 2032 (Fam); [2013] 2 F.L.R. 1483 for a comparison between s.10 of the 1975 Act and s.37 of the 1973 Act.

¹³¹ I(PFD)A 1975 s.11(2)(b).

¹³² I(PFD)A 1975 s.11(2)(a).

¹³³ I(PFD)A 1975 s.11(2)(c).

¹³⁴ I(PFD)A 1975 s.11(2).

¹³⁵ I(PFD)A 1975 s.11(3).

¹³⁶ I(PFD)A 1975 s.11(4).

¹³⁷ I(PFD)A 1975 s.11(5).

(though not necessarily his sole intention) in making the disposition or contract¹³⁷ was to prevent or reduce provision made under the Act.¹³⁸ The intention is presumed to be present for the purposes of s.11 if no valuable consideration was given or promised.¹³⁹

As with s.37 of the 1973 Act, the presumption of intention appears more onerous than the anti-avoidance position under the Care Act 2014, and it is significant that (like the Care Act but unlike s.10 of the 1975 Act), there is no time limit for conclusion of contracts falling foul of s.11 of the 1975 Act. It should be borne in mind, however, that a contract falling within s.11 will not take effect until death, and (unlike dispositions covered by both the 2014 Act and s.10) the transferor will have the benefit of the property in question until that point.¹⁴⁰

Inheritance Tax Act 1984

Inheritance tax, governed by the Inheritance Tax Act 1984 and applied to estates following death,¹⁴¹ is potentially a more useful comparator for anti-avoidance under the Care Act 2014. Unlike the 1973 or 1975 Acts, inheritance tax is a liability owed to the state, as with liability to pay for social care. It is nevertheless true that paying for care confers some direct benefit on a particular individual, whereas inheritance tax in principle benefits only society as a whole. Both social care costs and inheritance tax are likely to be a concern for older people who engage in financial planning, although it is claimed that only around half of social care expenditure occurs in respect of those over 65.¹⁴²

It should be noted that many estates are exempt from inheritance tax,¹⁴³ and that specific exemptions are granted to spouses and civil partners and the beneficiaries of their estates.¹⁴⁴ It is possible, however, for people to avoid the tax where it would in general otherwise be due (at 40 per cent over £325,000) through various inter vivos gifts,¹⁴⁵ subject to the general anti-abuse rule in the Finance Act 2013.¹⁴⁶ It has in fact been claimed that the current system of inheritance tax “encourages the wealthy to give property away” during their lives.¹⁴⁷ For example, the 1984 Act actively provides that a transfer of value “made seven years or more before the death of the transferor” can be exempt from inheritance tax altogether,¹⁴⁸ with “taper relief” available if the donor dies before that,¹⁴⁹ even if that tax avoidance is the very reason for the transfer. People can also make additional small gifts of certain maximum amounts during their lifetimes without those gifts later being

¹³⁸ I(PFD)A 1975 s.12(1).

¹³⁹ I(PFD)A 1975 s.12(2).

¹⁴⁰ See, e.g. Borkowski, *Textbook on Succession* (2002), p.306 for discussion.

¹⁴¹ See, e.g. Sawyer and Spero, *Succession, Wills and Probate* (2015), Ch.14 for a general discussion of tax and tax planning in the context of succession law.

¹⁴² King’s Fund, *A New Settlement for Health and Social Care: Final Report* (2014), p.4

¹⁴³ See now HM Revenue and Customs, “Inheritance Tax: main residence nil-rate band and the existing nil-rate band” (July 8, 2015), available at <https://www.gov.uk/government/publications/inheritance-tax-main-residence-nil-rate-band-and-the-existing-nil-rate-band/inheritance-tax-main-residence-nil-rate-band-and-the-existing-nil-rate-band> [Accessed November 2, 2015].

¹⁴⁴ Sawyer and Spero, *Succession, Wills and Probate* (2015), §14.20.

¹⁴⁵ Inheritance Tax Act 1984 s.10; inheritance tax applies to most lifetime trusts: see Sawyer and Spero, *Succession, Wills and Probate* (2015), §14.8.

¹⁴⁶ Finance Act 2013 Pt.5.

¹⁴⁷ Sawyer and Spero, *Succession, Wills and Probate* (2015), p.286.

¹⁴⁸ Inheritance Tax Act 1984 (IHTA 1984) s.3A(4).

¹⁴⁹ IHTA 1984 s.7(4).

subject to inheritance tax in certain circumstances.¹⁵⁰ It is significant that, in contrast to the Care Act 2014, the seven-year rule is inherently subject to a time limit under the Inheritance Tax Act 1984 and the rules are in general certain and predictable.

Conclusion

This article has illustrated the risks of declarations of trusts and similar dispositions designed to evade liability under the Care Act 2014, which are not remotely guaranteed to succeed. While its anti-avoidance provisions are not unequivocally the most onerous considered in this article, even people who plan well in advance may have to rely on influential but not fully binding guidance, the inevitable limitations on local authorities' ability to discover dispositions and to establish intention, or the benevolent exercise of discretion by local authorities to have their arrangements for their dependants given effect. On the one hand, limitations on contributions by the wealthy to the social care system may prejudice its ability to provide care to those who genuinely cannot afford it.¹⁵¹ On the other, some of the most organised and honest people who try to make provision for the genuinely needy in the shadow of possible care fees may be most likely to be disadvantaged by the Care Act's anti-avoidance provisions, in the context of a stark but somewhat arbitrary distinction between health and social care. Whatever one's view of the propriety of the system's funding arrangements and the extent to which it should be possible to avoid liability to pay for care, it would surely be preferable to have clear rules on the matter written into the legislation, perhaps consistent with the guidance's rhetoric on the property rights of individuals.

Predicting matters such as the time of one's death and the extent of one's care needs inevitably carries considerable difficulties. Inheritance tax liability can nevertheless be incorporated into estate planning discussions because (for example) the seven-year rule is relatively certain. The success of mechanisms to avoid liability for care fees cannot, by contrast, be subject to comparatively safe predictions.

¹⁵⁰ IHTA 1984 ss.11, 19–22.

¹⁵¹ See, e.g. Sloan, "Adult social care and property rights" (2016) 36 O.J.L.S. (forthcoming).