

By: Graham Gibbens, Cabinet Member for Adult Social Care and Public Health

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To: Adult Social Care and Public Health Policy Overview and Scrutiny Committee – 30 March 2012

Subject: **THE TREATMENT OF JOINTLY-OWNED PROPERTY IN THE RESIDENTIAL CHARGING ASSESSMENT**

Classification: Unrestricted

Summary: A decision is needed to provide clarification to decision 10/01553 taken on 18 January 2011. Decision 10/01553 allowed for a change to the treatment of jointly-owned property in the residential charging assessment. That decision applied only to new service users (ie from 6 June 2011), the rationale being that people previously told their property was being disregarded because it was jointly-owned, could not then be told it was being taken into account. People who had their property disregarded for other reasons (which no longer apply) do not fall into this category but the wording of decision 10/01553 prevents us taking their property into account if they entered residential care before 6 June 2011. A further decision should rectify this problem.

FOR COMMENT

Introduction

1. (1) Until decision 10/01553 was taken it had been the custom and practice for several years to ignore a resident's share of any jointly-owned property as capital for the purposes of assessing their contribution to the cost of residential care. This was because previous legal advice had been that a part share often had very little, if any, value.

(2) Following extensive research and in consultation with Legal Services, it was decided to adopt a tougher and more nuanced approach to this issue (see section 2 (4) below for details). It was also decided that, although a formal decision had never been made to ignore these properties, any change to practice had to involve a decision by the then SMT and the relevant Cabinet Member.

(3) As recommended to him, the Cabinet Member's decision was that the new policy should only apply to new service users. However, since the decision was implemented, operational staff have reported a problem that needs addressing, hence this request for a new decision.

Policy Context

2. (1) **The National Assistance Act 1948** is the primary Act of Parliament governing residential placements. The main relevant sections for this issue are:

Section 21 (1) – this imposes a duty to provide or arrange accommodation for people aged 18 or above who “by reason of age, illness, disability or any other circumstance are in need of care and attention which is not otherwise available to them”.

Section 21 (2A) – this states that in determining whether care and attention are “otherwise available” the local authority shall disregard “so much of the person’s resources as may be specified (ie the capital threshold, currently £23,250).

Section 22 – this enables the local authority to charge for most residential placements arranged by the local authority.

(2) **The National Assistance (Assessment of Resources) Regulations 1992** contains the detailed rules governing how a person’s contribution to their charge is worked out. Detailed guidance on the application of these regulations is laid out in the Charging for Residential Accommodation Guide (CRAG) which is issued by the Department of Health and updated every April.

(3) The above legislation allows for people who have in excess of the upper capital limit (currently £23,250) to either be advised that they must make their own arrangements for residential care or be charged the full cost if the placement is arranged by the local authority.

(4) On 18 January 2011 the Cabinet Member for Adult Social Care and Public Health took a decision (10/01553) to change the way KCC treats jointly-owned property in the residential charging assessment. This decision was to have been implemented from 4 April 2011, but due to a high level complaint this was delayed until 6 June 2011 to give time for a further legal review. In the event the decision was implemented in the way it had been originally planned.

(5) The above decision stated that for new service users the following will apply:

- A resident’s interest in any jointly-owned property will be taken into account in the charging assessment for permanent residential care.
- The starting point for valuing this interest will be to calculate the resident’s percentage share of the market value of the whole property.
- If the above valuation is disputed by the resident (or their representative) then the case will be referred for an expert valuation to determine the value of the resident’s share taking into account all relevant factors.

Further decision required

3. (1) A further decision is needed to provided clarification to decision 10/01553 taken on 18 January 2011. This decision allowed for a change in the treatment of jointly-owned property in the residential charging assessment for new service users (i.e. new residents who approach KCC for assistance after 4 April 2011, although only implemented from 6 June 2011).

(2) The reasoning behind restricting the policy to new residents was that if someone had been told explicitly that their property was going to be disregarded because it was jointly-owned, it would not be right to tell them at a later stage that it was going to be

taken into account. The resident and their relatives may have made important decisions based on the earlier decision.

(3) Since the decision was implemented it has been reported by operational staff that the decision, as currently worded, prevents them taking the former home into account for a specific group of people that would otherwise have their property taken into account. These are people who entered residential care before 6 June 2011 but whose property was disregarded, not because it was jointly-owned, but because it was subject to one of the mandatory disregards. That is, it was still occupied by certain persons including the resident's spouse or partner. See Appendix 1 for the full list of mandatory disregards. In normal circumstances if the person still occupying the property dies then the property does start to be taken into account (ie in the assessment in the future).

(4) The most common scenario is when the resident's spouse dies leaving the property empty. In most cases when this happens the deceased partner's share passes automatically to the surviving spouse because the property is held as "Joint Tenants". However in some cases the property is held as "Tenants in Common" and the deceased partner has willed their share to someone other than their partner, for example their son or daughter. If this happens the resident only owns a part share of the property. If they only became a resident who approached KCC for assistance after 6 June 2011 KCC is able to take their share into account, subject to the rules (as per decision 10/01553). However, even if the change of circumstances occurred after 6 June 2011, if the resident entered residential care funded by KCC before 6 June 2011, then the wording of decision 10/01553 means the property has to continue to be disregarded. People in this situation were not told that their property was being disregarded because it was jointly-owned but because their spouse/partner still lived in it. Thus, they would expect it to be taken into account if that person died.

(5) The problem identified above would be solved if the Cabinet Member made the following decision: regardless of when they entered residential care, if a mandatory disregard of a resident's property ceases to have effect after the date of the Cabinet Member's decision (i.e. the new decision) then (subject to the normal rules) that property can be taken into account, including if it is jointly-owned, according to the principles set out in decision 10/01553.

(6) It is not clear how many people will be affected by this situation. Most couples do not hold their property as tenants in common and even if they do, if the resident only enters residential care after 6 June 2011 they will be covered by decision 10/01553. However there are significant numbers of people who entered residential care before 6 June 2011 and whose former home is currently disregarded because their spouse/partner still lives in it. If they were to change the nature of their ownership to tenants in common their property may continue to be ignored even where their spouse/partner to die.

Financial Implications

4. (1) The impact on the Council's budget can only be positive if the proposals are implemented. However it is not possible to put any figure to this as the information needed to predict this is not available. We do not know how many residents are currently subject to a mandatory disregard on their property and, of these, how many hold this property as Tenants in Common.

Legal Implications

5. (1) Legal Advice from KCC Legal Services is that recommendations should be made to change the policy as suggested in this report.

(2) Advice from Democratic Services is that a new decision is needed and that any new policy on this will only apply from the date of that decision. They advised against trying to revisit the original decision so that the clarification could be applied retrospectively.

Equality Impact Assessment

6. (1) A full Customer Impact Assessment was carried out on the original decision (10/01553). This is in the process of being updated to include the potential impact of the further decision proposed in this report. However, as stated in point 3 (1) above, we do not know the number of people this may potentially affect. It can only affect people who became residents funded by KCC before 6 June 2011, as those who entered residential care after this date are already covered by decision 10/01553. Furthermore, of the former category, it will only affect those who own their property as Tenants in Common as others will already be covered.

(2) It could be argued that the proposal will make the treatment of all residents with a property more equitable as the table below attempts to demonstrate.

Issue	Property solely owned	Property jointly owned
Client in permanent residential care after 6 June 2011 and former home is still occupied by spouse, partner etc	Property is ignored	Property is ignored
As above but then spouse/partner dies leaving the property empty	Property taken into account based on 100% ownership	Property taken into account based on % share owned by client (as decision 10/01553 covers these residents)
Client starts in permanent residential care <u>pre</u> 6 June 2011 and former home is still occupied by spouse, partner etc	Property is ignored	Property is ignored

As above but then spouse/partner dies leaving the property empty	Property taken into account based on 100% ownership	We cannot currently take into account the resident's share as the policy decision (no. 10/01553) states that the new procedure (i.e. where jointly-owned property is taken into account) "will apply only to new service users". If a new decision is made, residents in this situation can have their share of the property taken into account, but only if this circumstance arises <u>after</u> the date of the decision (i.e. the new decision).
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(3) If the above proposal in section 3 (5) is agreed, the only residents that will not be covered are as follows:

- Those who entered residential care (funded by KCC) before 6 June 2011, were subject to a mandatory disregard (e.g their spouse lived in the property) and they lost this mandatory disregard between 6 June 2011 and the date of the new decision.

Recommendations

7. (1) The Adult Social Care and Public Health Policy Overview and Scrutiny Committee is asked to COMMENT on the proposed policy change as outlined in section 3 (5) above

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Background documents: The Treatment of Jointly-owned Property in the Residential Charging Assessment (Decision number: 10/01553).

Mandatory Property Disregards for Residential Care Financial Assessment

Where the resident no longer occupies a dwelling as his home, its value should still be disregarded where it is occupied in whole or in part by:

- the resident's partner, former partner or civil partner (except where the resident is estranged or divorced from the partner, former partner or civil partner)
- a lone parent who is the claimant's estranged or divorced partner
- a relative of the resident or member of the residents family who
 - is aged 60 or over, or
 - is a child of the resident aged under 18, or
 - is incapacitated.