

## PROFESSIONAL NEWSLETTER – ISSUE 2

### ASSET PROTECTION AND LONG TERM CARE CAPITAL DISREGARDS: TREATMENT OF INVESTMENT BONDS

The National Assistance (Assessment of Resources) Regulations 1992<sup>1</sup> provides that the surrender value of any life assurance is a capital asset which is disregarded by a local authority when undertaking a financial assessment of a resident's ability to pay for his or her accommodation charges.

The thinking behind the introduction of the disregard was to ensure that residents in care homes did not have to cash in life policies which had been taken out to protect their families and cause undue hardship in the long run. However, the Regulations are unclear and has led to confusion both with professional advisers and their clients. Particularly in relation to investment bonds which include an element of life cover.

The Charging for Residential Accommodation Guide (CRAG)<sup>2</sup> has been amended to clarify the position with regard to investment bonds and to make it clear to those local authorities that attempt to bring them into account as 'assessable capital' when assessing the residents ability to pay for accommodation charges is an unlawful practice. Investment bonds fall within the definition of a policy of insurance and should be disregarded in an assessment. If the bond has been taken into account the decision should be challenged and any care home fees paid recovered with interest.

The use of an investment bond is a very useful tool when advising on sheltering assets from being taken into account as assessable capital by a local authority, however, solicitors embarking on giving this advice should engage the services of an independent financial adviser qualified in dealing with elder client issues, and should also be aware of the rules relating to deprivation of capital.

Engaging a qualified independent financial adviser is essential to ensure that the correct investment bond is chosen and will not be treated as capital by a local authority. The CRAG guidance acknowledges the complexity of the matter.

CRAG Para 6.002A states "The treatment of investment bonds in the financial assessment is complex because, in part, of the differing products that are on offer. For this reason councils should seek the advice of their legal departments when they arise. However it is possible to offer some general advice and councils are referred to the Social Security Commissioners decision R (IS) 7/98."

CRAG Para 6.002B states "Councils are advised that if an investment bond is written as one or more life insurance policies that contain cashing-in rights by way of options for total or partial surrender, the value of those rights has to be disregarded as a capital asset in the financial assessment for residential accommodation .....In contrast, the surrender value of an investment bond without life assurance is taken into account."

Provision is made in CRAG for the treatment of income or capital payments received from the investment bond. Although income from the bond will be taken into account,

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<sup>1</sup> Schedule 4, Paragraph 13 National Assistance (Assessment of Resources) Regulations 1992

<sup>2</sup> Paragraph 6.002A – C CRAG. Current amendment to CRAG is LAC(DH)(2007)4 available at: [www.dh.gov.uk/en/PublicationsandStatistics](http://www.dh.gov.uk/en/PublicationsandStatistics)

advice from a qualified independent financial adviser should be sought on drawdown of capital, particularly if a local authority is trying to assess a residents ability to draw down as an asset that is 'available' to the resident and assessable as such. A local authority has no power to take into account a residents potential to draw down on the investment, and may only take into account, in certain circumstances, capital actually withdrawn.

CRAG Para 6.002C states "Income from investment bonds, with or without life assurance, is taken into account in the financial assessment for residential accommodation. Actual payments of capital by periodic instalments from investment bonds, with or without life assurance, are treated as income and taken into account provided that such payments are outstanding on the first day that the resident becomes liable to pay for his accommodation and the aggregate of the outstanding instalment, and any other capital sum not disregarded, exceed £16,000."<sup>3</sup>

Although placing a capital sum into an investment bond can be seen as legitimate asset protection when sheltering assets of the elderly from being taken into account in a local authority financial assessment, timing is an important consideration if the investment is not to be caught by the deprivation rules in Regulation 25 of the National Assistance (Assessment of Resources) Regulations 1992 which states "A 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...."

If caught by Regulation 25, the resident may be deemed to still possess the capital ('notional capital') in a financial assessment and charged for the accommodation. This issue is expanded upon in examples give in CRAG.

CRAG Para 6.061 states that deprivation of capital may occur where "Capital has been used to purchase an investment bond with life insurance. Councils will wish to give consideration, in respect of each case, to whether deprivation of assets has occurred i.e. did the individual place his capital in such an investment bond so that it would be disregarded for the purpose of the Assessment of Resources Regulation."

A detailed analysis of the deprivation rules in relation to investments, the implications of them being treated as notional capital, and the associated problems for both the resident and the professional adviser, are beyond the scope of this newsletter.

*I am your local Symponia member - Symponia is a national network of independent financial advisers with expertise in elder client issues, including investments, care fees planning, equity release and mitigating inheritance tax.*

To help your clients to comply with the supervision requirements of the Office of the Public Guardian, I can:

- Undertake a financial assessment to include advice on tax and welfare benefits
- Prepare a detailed report and recommendations on an investment strategy
- Assist the Deputy in keeping a record of any decisions made in dealing with the investments to show how a decision was reached, what facts were taken into account and who was consulted.

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<sup>3</sup> Although £16,000 is stated in CRAG Para 6.002C, it is suspected that the correct figure should be the upper capital limit applicable at the time.

- Assist the Deputy in completing the annual or periodic report for the Public Guardian
- Assist the Deputy in completing an HM Revenue & Customs annual tax return for the person lacking capacity.

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