Factsheet 40

Deprivation of assets in the means test for care home provision

April 2016

About this factsheet

This factsheet looks at the rules for deprivation of assets in the local authority means test for care home provision. It focuses mainly on capital but the same general principles exist for income. Although the information in this factsheet concentrates mainly on residential care the same principles apply to non-residential care services provided by your local authority.

You may find it helpful to read Age UK's other factsheets on care home funding, particularly factsheet 10, *Paying for permanent residential care*.

The information in this factsheet is correct for the period April 2016–March 2017. Benefit rates are reviewed annually and take effect in April but rules and figures can sometimes change during the year.

The information in this factsheet is applicable to England. Please contact Age Cymru, Age Scotland or Age NI for their version of this factsheet. Contact details are at the back of this factsheet.

Contents

1 Recent developments

This factsheet is based on the *Care Act 2014* and supporting regulations and statutory guidance, introduced in April 2015. The Act was intended to come into force in two stages - in April 2015 and April 2016. However, in July 2015, the Government decided to delay the second stage of the changes until 2020. The delayed changes affect care funding, which means that, in practice, the funding and means-test system in April 2016 is broadly similar to the previous system before the Act was introduced.

2 Terminology and sources

Care homes and nursing homes

This factsheet provides information about residential care, meaning ‘care homes’ and ‘nursing homes’. These are the two standard terms used by the Care Quality Commission (CQC), the industry standards regulator.

Nursing homes are care homes where a nurse must be present to provide or supervise medical-type care alongside the basic personal care. The NHS directly funds this for each nursing home resident.

The term ‘care home’ is used in the text, unless ‘nursing home’ is specifically required.

Charging regulations and statutory guidance

There are references to the charging regulations and statutory guidance that support the *Care Act 2014* (‘*the Act’*) throughout this text. These set out in detail how a local authority must administer adult social care. The most significant regulations are the *Care and Support (Charging and Assessment of Resources) Regulations 2014* (*'the charging regulations'*).

The other main reference source is the *Care and Support Statutory Guidance 2014* (*'the statutory guidance'*). This has section 8, ‘Charging and financial assessment’, and a number of Annexes including:

Annex B: Treatment of capital

Annex C: Treatment of income

Annex D: Recovery of Debts

Annex E: Deprivation of assets

Local authority

In this factsheet, references to a 'local authority' refer to the adult social services department of the local authority or council. It is also used to describe similar departments within: a county council, a district council for an area in which there is no county council, a London borough council, or the Common Council of the City of London.

3 What is deprivation of assets?

Deliberate deprivation of assets is where you have intentionally decreased your overall assets, in order to reduce the amount you are charged towards your care and support.

The local authority must show that you knew that you would need care and support and that you have reduced your assets in order to reduce the contribution you are asked to make towards the cost.

The statutory guidance also states there may occasionally be other reasons for disposing of eligible assets. For example, where you pay off a debt, even if it is not immediately due, this must not be considered as deprivation.

In this factsheet 'assets' refers to either capital or income.

4 Deprivation and the financial assessment

Under the Act, your local authority can choose whether or not to charge you for meeting your assessed needs. When a local authority arranges for you to enter a care home permanently, you are usually financially assessed ('means tested') to see if you need to make a contribution towards your care costs. Your local authority calculates this contribution using your income, savings and other capital.

Annex E of the statutory guidance states:

> *People should be treated with dignity and respect and be able to spend the money they have saved as they wish – it is their money after all. Whilst the Care Act 2014 represents an important step forward in redefining the partnership between the state and the individual, it is important that people pay the contribution to their care costs that they are responsible for. This is key to the overall affordability of the care and support system. A local authority should therefore ensure that people are not rewarded for trying to avoid paying their assessed contribution.*

Your income includes benefits such as Pension Credit, as well as state and occupational pensions.

You may want to pass on savings or other capital to your children or others during your lifetime, but it can affect your eligibility for local authority funding assistance with care fees and means tested benefits such as Pension Credit.

Note
Your local authority must follow the charging rules set down in the Act, the charging regulations and the statutory guidance, for example Annex E, 'Deprivation of assets'.

5 Deprivation of capital

Deliberate deprivation is when you transfer an asset out of your name to put yourself in a better position for a local authority means test. This can also apply if you claim social security benefits, such as Pension Credit.

Transferring a capital asset does not necessarily mean it is not taken into account in a means test for residential care. Both your local authority can, when assessing your eligibility for assistance, can look for evidence of deliberate, or intentional, deprivation of capital such as savings or a property.

However, Annex E states that *'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'*. This implies that the service must generally still be provided to meet your assessed needs, even if an issue over paying for it still has to be resolved.

Deprivation covers a broad range of ways that you might transfer an asset out of your possession. Annex E of the statutory guidance provides the following examples on the disposal of capital:

- a lump-sum payment to someone else, for example as a gift
- substantial expenditure has been incurred suddenly and is out of character with previous spending
- the title deeds of a property have been transferred to someone else
- assets have been put in to a trust that cannot be revoked
- assets have been converted into another form that are disregarded in the financial assessment, for example personal possessions
- assets have been reduced by living extravagantly, for example gambling
- assets have been used to purchase an investment bond with life insurance.

Other courses of action, such as selling an asset for less than its true value, may be seen as deprivation. It is up to you to prove you no longer possess an asset. Annex E gives the following examples of acceptable evidence:

- a trust deed
- deed of gift
- receipts for expenditure
- proof that debts have been repaid.

5.1 When is deprivation ‘deliberate’?

The statutory guidance advises local authorities that avoiding accommodation and other care charges does not have to be the only motive behind a transfer of eligible capital ahead of your means test.

Intention

Your intention to avoid care and accommodation charges must be a significant factor, or the only reason, that you have transferred an asset elsewhere, in order to be found to have deprived yourself. Your local authority must prove this if they intend to take your transferred asset into account in the financial assessment.

Local authority investigations

In some cases, your local authority may conduct its own investigations into whether deprivation of assets has occurred, rather than relying solely on the information you have provided.

Annex E provides a list of factors the local authority should take into account:

- whether avoiding the care and support charge was a significant motivation
- the timing of the disposal of the asset. At the point the capital was disposed of could the person have a reasonable expectation of the need for care and support?
- did the person have a reasonable expectation of needing to contribute to the cost of their eligible care needs?

Foreseeability

The statutory guidance confirms it would be unreasonable to decide you have disposed of an asset to reduce the level of care charges if, at the time the disposal took place, you were fit and healthy and could not have foreseen the need for care and support.

Example case studies (Annex E)

Example where deprivation has not occurred:

> *Max has moved into a care home and has a 50% interest in a property that continues to be occupied by his civil partner, David. The value of the property is disregarded whilst David lives there, but he decides to move to a smaller property that he can better manage and so sells their shared home to fund this.*
>
> *At the time the property is sold, Max’s 50% share of the proceeds could be taken into account in the financial assessment, but, in order to ensure that David is able to purchase the smaller property, Max makes part of his share of the proceeds from the sale available.*

In such circumstance, it would not be reasonable to treat Max as having deprived himself of capital in order to reduce his care home charges.

Example where deprivation of assets may be considered:

Emma gives her daughter Imogen a painting worth £2,000 the week before she enters care home. The local authority should not consider this as deprivation as the item is a personal possession and would not have been taken into account in her financial assessment.

However, if Emma had purchased the painting immediately prior to entering a care home to give to her daughter with £2,000 previously in a savings account, deprivation should be considered.

Example where deprivation of assets may be considered:

Mrs Kapoor has £18,000 in a building society and uses £10,500 to purchase a car. Two weeks later she enters a care home and gives the car to her daughter Juhie.

If Mrs Kapoor knew when she purchased the car that she would be moving to a care home, then deprivation should be considered. However, all the circumstances must be taken into account so if Mrs Kapoor was admitted as an emergency and had no reason to think she may need care and support when she purchased the car, this should not be considered as deprivation.

Discretion

Your local authority must use discretion when considering deprivation issues in your financial assessment. This means they must genuinely take all relevant facts into account and clearly explain why they have reached their decision. Based on this clear reasoning, you can then challenge the decision if you disagree with it.

6 Deprivation of income

It is possible to deliberately deprive yourself of income. For example, you could give away or sell the right to income from an occupational pension. As with capital, you have to prove to the local authority that you no longer have this income. If the local authority considers you have deprived yourself of income, they may treat you as possessing notional income, meaning that it is still included in the means test.

The local authority must determine whether deliberate deprivation of income has occurred. They should consider:

- was it your income?
- what was the purpose of the disposal of the income?

- the timing of the disposal - when the income was disposed of, could you have a reasonable expectation of the need for care and support?

  Income can be converted into capital, so deliberate deprivation can affect the tariff income calculation in your financial assessment. See Factsheet 10, *Paying for permanent residential care* for more on this.

7 The consequences of deliberate deprivation

Annex E of the statutory guidance provides local authorities with advice about how they should act if deliberate deprivation has happened.

7.1 Notional capital or income

Your local authority first needs to decide whether to treat you as still possessing the asset in the financial assessment and charge you accordingly. This means treating it as notional (theoretical) capital or notional income.

If you deprive yourself of an actual resource and convert it into something of lesser value, you are treated as notionally possessing the difference between the value of the new resource and the one it replaced. For example, if the value of personal possessions acquired is less than the sum spent on them, the difference is treated as a notional resource.

The local authority apply diminishing notional capital rules to work out when you may become eligible for funding support. It treats notional capital as reducing each week by the difference between the amount you actually have to pay and the amount they would have paid if you were not treated as having notional capital.

Your local authority may still have a duty to arrange care in a care home for you even if it has assessed you as able to meet the full cost of care because of notional capital or income. For example, if you are unable to arrange this yourself and have no one to assist you.

Case law

Local authorities should not take the level of a person's capital into account in deciding whether to provide accommodation, only when assessing how much should be contributed towards the cost. If the local authority does have to pay towards accommodation which it has assessed you as being able to meet the full cost of, it may seek to recover that money using powers of recovery. *Robertson v Fife Council (2002).*

Note
Deprivation guidance in the context of residential care charging should not be confused with inheritance tax guidance and legislation. Further information about inheritance tax can be found in factsheet 12, *Planning your retirement: money and tax*.

7.2 Recovering charges from a third-party

If you transfer an asset to another person (a third-party) to avoid a charge prior to the means test, they may be liable to pay the local authority the difference between what you would have been charged you what you were charged at the time of the financial assessment. However, the third-party is not liable to pay anything exceeding the benefit they received from the transfer of the asset (Section 70 of the Act).

If you transfer funds to more than one third-party, each of those people is liable to pay the local authority the difference between what it would have charged or did charge you for receiving care in proportion to the amount they received.

When pursing the recovery of charges from a third party, a local authority must have regard to Annex D of the statutory guidance - see section 8.

Annex E of the statutory guidance provides an example of the appropriate treatment of third-party liability:

> *Mrs Tong has £23,250 in her savings account. This is the total of her assets. One week before entering care she gives her daughters Louisa and Jenny and her son Frank £7,750 each. This was with the sole intention of avoiding care and support charges.*
>
> *Had Mrs Tong not given the money away, the first £14,250 would have been disregarded and she would have been charged a tariff income on her assets between £14,250 and £23,250. Assuming £1 for every £250 of assets, this means Mrs Tong should have paid £36 per week towards the cost of her care. After 10 weeks of care, Mrs Tong should have contributed £360. This means Louisa, Jenny and Frank are each liable for £120 towards the cost of their mother's care.*

7.3 The possible consequences of asset transfers

Apart from issues about the financial assessment, transferring assets to another person may have significant consequences if you do not subsequently need care and support services. Once an asset has been transferred out of your name, you no longer have control over it and it is not always possible to rely on the new owner acting in accordance with your wishes. You should consider how you might be affected if disagreements arise in the future.

Legal advice

It is advisable to seek legal and financial advice before transferring an asset. Age UK cannot provide advice about this area of law. The Law Society produces guidance for solicitors on gifts of property and the implications for long-term care www.lawsociety.org.uk/support-services/advice/practice-notes/making-gifts-of-assets/

Unpredictable consequences of your actions

The nature of the rules on deliberate deprivation of assets mean it is not possible to predict with certainty whether the local authority will raise the issue during any future financial assessment. Also, a local authority will not usually advise you beforehand how it might treat a particular transfer at a later time. The rules relate to the moment of your means test.

Other points to consider

Some suggestions below apply specifically if you are considering whether to transfer your home. Others apply to the transfer of any capital asset.

- You may want to move from your current property to somewhere more suitable. If the property has been transferred, you need the new owner's agreement to do this.
- If you no longer own your home you cannot raise income or capital against the equity in it.
- If you retain the right to live rent free in your former home, this may be treated as a 'gift with a reservation' for inheritance tax purposes and the property included in your estate.
- If the new owner marries, divorces or uses the property as security for a loan, your position may be affected.

Issues affecting the new owner of an asset

- The new owner may become responsible for the upkeep and maintenance of the property. To avoid possible disputes, it must be made clear who is responsible for these tasks.
- Any means-tested benefits the new owner receives may be affected by taking possession of a property or other assets.
- The new owner may become liable for Capital Gains Tax at some point in the future.

8 Local authority recovery of debts

If your local authority decides that you have deprived yourself of capital and/or income and you do not pay the level of charges they expect you to make, you may end up owing them money.

The local authority has powers to pursue unarranged and unpaid debts for services it has provided to you. Annex D notes these powers supersede the old ones, which are revoked and that they now provide '…*equal protection to both the local authority and the person*.'

This refers to an approach that maximises opportunities to seek alternative means of repayment and also recognises the difficulties that you may be experiencing.

Debt recovery period

The maximum debt recovery period has been extended to six years since 1 April 2015. After this period, the debt must be written off.

The full range of options

Your local authority can start County Court proceedings to recover debts if you do not pay or misrepresent information relevant to your financial assessment. This can result in having a legal charge placed on your property, which ensures they receive the outstanding funds when sold.

However, your local authority should only use this power after all other reasonable alternatives for recovering the debt have been exhausted. This requires appropriate engagement with you or your representatives to find out why the debt has accrued. The following options are recommended before proceeding to County Court.

Negotiate an agreement. This could be through dealing directly with you or your representative to broker a solution. This can be done by the local authority, but in some circumstances, it may be better led by an independent person such as an advisor or solicitor. In some cases, local authorities must involve an independent advocate to support you to understand the options available to you.

Mediation. This is where an independent third party assists you and the local authority to reach an agreement. This could be carried out by a professional mediation service, but can be carried out by anyone not involved in the issue, such as an independent social worker or a local voluntary organisation. It is important to understand that it is you and the local authority, not the mediator, who decide the course of action.

Arbitration. This involves an independent arbitrator hearing both sides of the issue and making a decision that resolves the issue. Local authorities should be aware that arbitration is usually binding on both sides and therefore they cannot usually take the case to court after the arbitrator has made a decision.

Deferred payments agreement

As a first port of call, your local authority must offer you the option of a deferred payment agreement (DPA), if possible. They can only make an application to the County Court if you have refused this option.

For more information see factsheet 38, *Treatment of property in the means test for permanent care home provision*.

The duty to act reasonably

Local authorities are bound by the public law principle of acting reasonably at all times and must also act in accordance with human rights legislation and the Act's wellbeing principle. In most cases, especially where the failure to pay the correct charges was inadvertent, there will be other simpler routes to follow.

This could be agreeing a repayment plan allowing for recovery over time in a way that is affordable and manageable for you and your family. Even if there is a debt, the local authority needs to consider whether it is appropriate to recover it. There may be many complex issues to take into account.

In deciding how to recover a debt, the local authority should consider all the circumstances of the case before deciding a course of action. For example, was it deliberate avoidance of payment or due to circumstances beyond your control? This could be because you have developed cognitive difficulties leading to a lack of mental capacity.

Your local authority must have the expertise to properly assess your situation. For example, if you lack mental capacity, it must act in accordance with the requirements of the *Mental Capacity Act 2005* and its Code of Practice.

Your local authority may wish to concentrate on how to avoid you getting into debt in the first place. For example, by helping you to obtain independent financial advice and giving you clear, written, information on your responsibilities to pay for care and support. The local authority also has a duty to maintain adequate records relating to any debt and any recovery action that they pursue from you.

For more information on general debt recovery principles see factsheet 75, *Debt advice*.

9 The information and advice duty

Your local authority is required to provide an information and advice service suitable for local residents with care and support needs. At the least, the service must provide information and advice on the following:

- the local care and support system and how it operates
- the choice of types of care and support
- the choice of providers available to you

- how to access the care and support available
- how to access independent financial advice on matters relevant to the meeting of needs for care and support and
- how to raise concerns about the safety or wellbeing of someone who has needs for care and support.

This general local authority duty is distinct from the assessment process and links with many of the reforms introduced by the Act.

'Independent financial advice' means financial advice provided by a qualified person who is independent of the local authority in question. For example, someone regulated by the Financial Conduct Authority to give complex financial advice.

10 Useful organisations

Care Quality Commission
www.cqc.org.uk
Telephone 03000 616 161 (free call)

Independent regulator of adult health and social care services in England, covering NHS, local authorities, private companies or voluntary organisations and people detained under the *Mental Health Act*.

Carers Trust
www.carers.org
Telephone 0844 800 4361

Offers practical help and assistance to carers.

Carers UK
www.carersuk.org
Telephone 0808 808 7777

Provides information and support for carers, including information about benefits.

Citizens Advice
www.citizensadvice.org.uk
Telephone 0344 411 1444 (England)

National network of advice centres offering free, confidential, independent advice, face to face or by telephone.

Department of Health
www.gov.uk/government/organisations/department-of-health
Telephone 020 7210 4850

Government department with overall responsibility for social care.

EAC FirstStop Advice
www.firststopcareadvice.org.uk
Telephone helpline 0800 377 7070 Mon 8am–7pm, Tues– Fri 8am–6pm

Provide information on housing options for older people and signposts to relevant advice organisations.

Equality Advisory Support Service
www.equalityadvisoryservice.com
Telephone helpline 0808 800 0082 Mon-Fri 9am-8pm, Sat 10am-2pm

Funded by the Equality and Human Rights Commission, the EASS Helpline provides information and advice about the *Equality Act 2010.*

Independent Age
www.independentage.org
Telephone helpline 0800 319 6789 Mon-Fri 9am-4.30pm

A charity providing free impartial advice on home care, care homes, NHS services, and housing for older people, their families and professionals.

Law Society (The)
www.lawsociety.org.uk/
Telephone 020 7320 5650 (Monday to Friday from 09:00 to 17:30)

The representative body of solicitors in England and Wales. The Law Society cannot help with legal problems but has produced extensive guidelines for solicitors on gifting assets to fund long-term care.

Local Government Ombudsman (LGO)
www.lgo.org.uk
Telephone 0300 061 0614

The Local Government Ombudsman looks at complaints about councils and some other authorities. It is a free service; their job is to investigate complaints in a fair and independent way.

Relatives & Residents Association (The)
www.relres.org
Telephone 020 7359 8136

The Relatives & Residents Association gives advice and support to older people in care homes, their relatives and friends.

Veterans UK
www.gov.uk/government/organisations/veterans-uk
Telephone 0800 1914 218

Administers the armed forces pension schemes and compensation payments for those injured or bereaved through service.

Age UK

Age UK provides advice and information for people in later life through our Age UK Advice line, publications and online. Call Age UK Advice to find out whether there is a local Age UK near you, and to order free copies of our information guides and factsheets.

Age UK Advice
www.ageuk.org.uk
0800 169 65 65
Lines are open seven days a week from 8.00am to 7.00pm

In Wales contact

Age Cymru
www.agecymru.org.uk
0800 022 3444

In Northern Ireland, contact

Age NI
www.ageni.org
0808 808 7575

In Scotland, contact Age Scotland by calling

Silver Line Scotland
www.agescotland.org.uk
0800 470 8090
(This is a partnership between The Silver Line and Age Scotland)

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The evidence sources used to create this factsheet are available on request. Contact *resources@ageuk.org.uk*