

Factsheet 40 ● April 2013

Deprivation of assets in the means test for care home provision

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 on capital but the same principles exist for income. It should be read in conjunction with 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 2013 – March 2014 but rules and figures sometimes change during the year.

This factsheet describes the situation in England. There are differences in the rules for funding care in a care home in Northern Ireland, Scotland and Wales. Readers in these nations should contact their respective national offices for information specific to where they live – see section 9 for details.

For details of how to order our other factsheets and information materials mentioned inside go to section 9.

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1 Recent developments

- In February 2013, the Government set out a plan for adult social care funding reform, to be implemented in 2016, based on the Dilnot Commission recommendations. The plan includes: a cap on the amount an individual will have to pay to meet their assessed social care needs of £72,000 during their lifetime; guaranteed access to deferred payments arrangements (with interest and other charges included); an increased capital threshold of £118,000 for the residential care means test with retention of the lower capital limit at £14,000 and a tariff income system between the two figures; and separate 'hotel costs' capped at £12,000.
- The draft *Care and Support Bill* (Draft Bill) was published in July 2012 along with a White Paper entitled *Caring for our future: reforming care and support*. The new legislation is intended to simplify and modernise the statutory basis for adult social care and it adds certain new duties for local authorities. It also introduces the promotion of 'wellbeing' as a new overarching principle for social care. At the time of writing (March 2013), the Draft Bill is moving through its Parliamentary Committee scrutiny stage.
- The *Health and Social Care Act* became law in March 2012. This consists of a plan for a major reorganisation of the NHS and elements of adult social care, much of it by April 2013. Examples of this include: the abolition of primary care trusts and their replacement with local clinical commissioning groups; the formation of new bodies such as local Healthwatch; the creation of the regulator Monitor to oversee competition in service provision with a duty to protect and promote the interests of patients; and the creation of new local authority based public health duties via health and wellbeing boards.
- There are major planned welfare benefits reforms, some of which commence from April 2013. This factsheet will include any that are relevant to the residential care means test between April 2013 and March 2014. Age UK has a series of factsheets on this subject, which can be accessed on our website.

Terminology

In this factsheet references to the '**local authority**' or '**council**' will refer to the adult social services department of the local authority or council. The relevant social services department may be called the 'adult social services' or 'older persons' department or 'team'. We will use the term 'local authority' in this factsheet to describe this type of service. However, generally, the term 'local authority' can also describe: a county council in England, a district council for an area in England for which there is no county council, a London borough council, or the Common Council of the City of London.

The term '**care home**' is used to mean any home that is registered with the Care Quality Commission to provide this service. It includes local authority homes and independent homes, some of which provide nursing care as well as personal care. These are all regulated and inspected by the Care Quality Commission.

The term '**resident**' is used to mean a person who enters, or needs to enter a care home.

2 Introduction

If a local authority arranges for you to enter a care home on a permanent basis you will be means tested to see whether you should make a contribution towards the cost of your care. The local authority calculates this contribution using your income, savings and other capital according to national rules issued by the Department of Health. Your income may include benefits such as Pension Credit, which is administered by the Pension Service, part of the Department for Work and Pensions.

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

Note: National charging rules are contained in a Department of Health document called the *Charging for residential accommodation guide (CRAG) 2013*, which is written in support of *The National Assistance (Assessment of Resources) Regulations 1992 (S.I. 1992/2977)*. CRAG is updated each April. It can be viewed and downloaded from the Department of Health website at:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_125831

The information in this factsheet is based on the statutory guidance set down in CRAG.

3 Deliberate deprivation of capital

Transferring an asset out of your name does not necessarily mean that it will not be taken into account in a means test. Both the local authority and the Pension Service can, when assessing a resident's eligibility for assistance, look for evidence of deliberate, or intentional, deprivation of capital such as a property. Deliberate deprivation occurs when an individual transfers an asset out of his or her possession to put him or herself in a better position regarding the means test for care home accommodation.

Note: This factsheet focuses on possible deprivation of capital. However, CRAG also allows a local authority to use its discretion to assess whether eligible **income** has been deliberately removed from the reach of the means test. CRAG has guidance on both of these elements of the means test.

3.1 What is deprivation of capital?

The term deprivation covers a broad range of ways in which the owner of an asset might transfer it out of his or her possession. CRAG gives the following examples:

- a lump-sum payment such as a gift or to pay off a debt
- transferring the title deeds of a property to someone else
- putting money into a trust that cannot be revoked

- converting money into another form that has to be disregarded from the means test, eg personal possessions, investment bonds with life insurance
- reducing capital through substantial expenditure on items such as expensive holidays or by extravagant living.

Other courses of action, such as selling an asset for less than its true value, may also be seen as deprivation.

The rules for Pension Credit are largely the same but with a more relaxed view of repaying debts. For further information see our Age UK's Factsheet 48, *Pension Credit*.

Disposal of assets is not necessarily carried out to avoid a charge for accommodation or to gain assistance sooner than would otherwise have been the case. The local authority or Pension Service has to show that this intention was there before it can take transferred capital into account.

3.2 **When is deprivation 'deliberate'?**

CRAG advises local authorities that avoiding accommodation charges does not have to be the only motive behind a transfer of eligible capital ahead of the means test. For the transfer to amount to deliberate deprivation, the intention to avoid accommodation charges must be a significant part of the reason for acting in this way.

3.3 **Timing and foreseeability**

The timing of the transfer of eligible capital may be important evidence in establishing the motivation behind the transfer. CRAG, at paragraph 6.070, provides the following guidance to local authorities:

The timing of the disposal should be taken into account when considering the purpose of the disposal. It would be unreasonable to decide that a resident had disposed of an asset in order to reduce his charge for accommodation when the disposal took place at a time when he was fit and healthy and could not have foreseen the need for a move to residential accommodation.

Case law

Case law has offered differing interpretations of what is required for local authorities to show that deliberate deprivation has occurred.

In *Yule v South Lanarkshire* (1999), a judgement later upheld in Scotland's appeal court, it was found that the local authority could make a decision based on the information available to it, and so draw a reasonable inference about the resident's intentions without necessarily having specific evidence about them. Mrs Yule had transferred her property a year before any significant deterioration in her health and there was no evidence that she was aware of the charging rules.

It can be argued that this decision was inconsistent with the Department of Health's guidance and in a later decision in the English High Court, *Beeson v Dorset County Council* (2001), the approach adopted in Yule was questioned by the judge:

Although the court held that it is not necessary for the claimant to know of the capital limit and that 'no specific finding is required as to the exact state of knowledge or intention of the applicant, I do not see how an applicant could be found to have the relevant purpose unless he was aware of the possibility that he might be provided with accommodation and that he might be liable to pay for it'.

The local authority was also criticised for rejecting evidence provided by Mr Beeson's son without sufficient explanation.

The Court of Appeal later upheld these parts of the judgement.

Following this decision, local authorities should follow the guidance and apply the correct subjective test to the details of individual residents' cases. They should also give adequate reasons for rejecting any evidence, particularly if other evidence is accepted.

3.4 Notional capital

If you are found to have deliberately deprived yourself of capital you can be treated as having 'notional capital' to the value of the capital you disposed of for the purpose of the means test. If the notional capital added to your actual capital comes to more than £23,250, the local authority may assess you as being able to meet the full cost of your care, even though your actual capital is less than the upper limit. The inclusion of notional capital in your total can also affect your eligibility for Pension Credit.

Where part of an asset has been given away, or an asset has been sold for less than its true value, you may be treated as having a mixture of actual and notional capital. The remaining interest in the asset or the sale proceeds is actual capital. You may then be treated as having notional capital to the value of the part of the asset that has been given away or the difference between the sale price and the asset's true value.

Having included notional capital in your finances, the local authority and the Pension Service apply 'diminishing notional capital rules' to work out when you should become eligible for funding or benefits. The local authority treats notional capital as diminishing each week by the difference between the amount the resident has to pay for the accommodation and the amount they would have paid if they were not being treated as having notional capital. The Pension Service will treat notional capital as diminishing by an amount equal to the Pension Credit that you would have received if you did not have the notional capital.

The 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 being applied. Guidance first issued in *Local Authority Circular LAC (98)19* instructs authorities that they have a responsibility to make arrangements for residents who have more than the upper capital limit if the resident is unable to do so and there is no one else who is 'willing and able' to do so.

Case law

A Scottish case, *Robertson v Fife Council* (2002), confirmed that 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 (see below).

Note: CRAG also allows for the possibility of the local authority concluding that you have notional income.

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*.

4 Powers of recovery

Under section 21 of the *Health and Social Services and Social Security Adjudications (HASSASSA) Act 1983*, where a resident has deliberately deprived himself or herself of an asset the local authority can recover any sums it consequently has to pay towards the resident's care costs from the person who the asset was transferred to, as long as the deliberate deprivation occurred within six months of the resident approaching the local authority for funding. If the transfer was made more than six months before the local authority cannot use this section.

Although the six-month limit only applies to the particular power of recovery, the Assessment of Resources Regulations place no set time limit beyond which the local authority has to ignore transfers of assets. If a transfer occurred more than six months before the resident applies for assistance the local authority can still treat him or her as having deliberately deprived themselves of that capital under the charging regulations. They may initially refuse to fund the resident, necessitating a challenge or if they do provide funding in these circumstances they may treat the assistance provided as an accruing debt owed by the resident to the local authority.

The local authority could make use of the *Insolvency Act 1986* to pursue a debt of this kind and it is possible that a court might order a transfer to be set aside if it had been carried out with the intention of defrauding existing or future creditors. To date there are few known examples of local authorities making use of this legislation but this may change. Local authorities have had considerable budget cuts in the last spending review, and because of this are likely to look closely at cases where they consider deprivation of assets may have taken place.

5 Things to think about – consequences of transfers

Most older people do not require long-term care in a care home. Quite apart from the issues surrounding care home funding discussed above, transferring assets to another person will have significant consequences if you do not subsequently need to enter a care home. Once an asset has been transferred out of your name you no longer have control over it. 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 proper legal and financial advice before proceeding with any transfer. We are not able to give this advice. The Law Society has produced detailed guidelines for solicitors on gifts of property and their implications for long-term care. If you consult a solicitor you might wish to establish that he or she is aware of these guidelines.

The nature of the rules on deliberate deprivation of assets means that it is not possible to predict with certainty whether the local authority (or Pension Service) will raise the issue during any future means test. Local authorities and the Pension Service will not usually advise you beforehand how they might treat a particular transfer at a later time.

5.1 Other points for you to consider

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

- You may at some point want to move from your current property to somewhere more suitable. If the property has been transferred you will require the new owner's agreement to do this.
- If you no longer own your home you will not be able to 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.

5.2 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 should be made clear who is responsible for these tasks.
- Any means-tested benefits the new owner receives, such as Income Support, Pension Credit, Housing Benefit or Council Tax Benefit, 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.

6 Querying a decision and making a complaint

If you do not agree with a decision made by a local authority about deprivation of assets, you can request to have the decision reviewed and also instigate the local authority complaints procedure. If you wish to appeal against a decision a local advice agency may be able to help you with challenging a social security or local authority decision. You may wish to seek legal advice if you want to judicially review the decision.

Details of the complaints procedure should be available on request from the local authority. Further information on complaints can be accessed in Age UK's Factsheet 59, *How to resolve problems and make a complaint about the local authority*.

7 Further reading

Age UK continues to work to clarify the rules about deprivation of assets and give information about how the rules are put into practice. The following factsheets may be relevant:

- Age UK's Factsheet 10, *Paying for permanent residential care*
- Age UK's Factsheet 20, *NHS continuing healthcare, NHS-funded nursing care and intermediate care*
- Age UK's Factsheet 38, *Treatment of property in the means test for permanent care home provision.*

8 Useful organisations

Care Quality Commission (The)

The independent regulator of adult health and social care services in England, whether provided by the NHS, local authorities, private companies or voluntary organisations. Also protects the rights of people detained under the Mental Health Act.

Tel: 03000 616 161 (free call)

Website: www.cqc.org.uk

Carers UK

National charity working on behalf of carers. Offers wide range of information on carers' rights and sources of help and contact details for local carers' support groups.

20 Great Dover Street, London, WE1 4LX

Tel: 0808 808 7777 (free call)

Website: www.carersuk.org

Citizens Advice Bureau

National network of free advice centres. Depending on available resources may offer benefits check and help filling forms.

Tel: 020 7833 2181 (for local contact details only – not telephone advice)

Tel: 08444 70 20 20 (Wales)

Website: www.adviceguide.org.uk

Department of Health

Government department with overall responsibility for social care including residential care homes.

Tel: 020 7210 4850

Website: www.dh.gov.uk

Elderly Accommodation Counsel

Provides information on all forms of accommodation, support and care for older people.

Tel: 020 7820 1343

Website: www.housingcare.org

Equality Advisory and Support Service

A new service, funded by the Government Equality Office, called the Equality Advisory and Support Service began operation on 1st October 2012. The new service replaces the helpline run by the Equality and Human Rights Commission.

FREEPOST Equality Advisory Support Service FPN4431

Tel: 0800 444 205

Textphone: 0800 444 206

Website <http://www.equalityadvisoryservice.com/>

Independent Age

A charity that provides free and impartial advice on home care, care homes, NHS services, housing and other issues advice for older people, their families and professionals on community care.

Tel: 0845 262 1863 (lo-call rate)

Website: <http://www.independentage.org/>

The Law Society

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.

Website: www.lawsociety.org.uk

Local Government Ombudsman

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.

Tel: 0300 061 0614 or 0845 602 1983

Website: www.lgo.org.uk

Relatives & Residents Association (The)

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

Tel: 020 7359 8136

Website: www.relres.org

Veterans UK

Website bringing together services for veterans including advice on pensions, compensation and welfare services.

Tel: 0800 169 22 77

Website: www.veterans-uk.info

9 Further information from Age UK

Age UK Information Materials

Age UK publishes a large number of free Information Guides and Factsheets on a range of subjects including money and benefits, health, social care, consumer issues, end of life, legal, issues employment and equality issues.

Whether you need information for yourself, a relative or a client our information guides will help you find the answers you are looking for and useful organisations who may be able to help. You can order as many copies of guides as you need and organisations can place bulk orders.

Our factsheets provide detailed information if you are an adviser or you have a specific problem.

Age UK Advice

Visit the Age UK website, www.ageuk.org.uk, or call Age UK Advice free on 0800 169 65 65 if you would like:

- further information about our full range of information products
- to order copies of any of our information materials
- to request information in large print and audio
- expert advice if you cannot find the information you need in this factsheet
- contact details for your nearest local Age UK

Age UK

Age UK is the new force combining Age Concern and Help the Aged. We provide advice and information for people in later life through our publications, online or by calling Age UK Advice.

Age UK Advice: 0800 169 65 65

Website: www.ageuk.org.uk

In Wales, contact:

Age Cymru: 0800 022 3444

Website: www.agecymru.org.uk

In Scotland, contact:

Age Scotland: 0845 125 9732

Website: www.agescotland.org.uk

In Northern Ireland, contact:

Age NI: 0808 808 7575

Website: www.ageni.org.uk

Support our work

Age UK is the largest provider of services to older people in the UK after the NHS. We make a difference to the lives of thousands of older people through local resources such as our befriending schemes, day centres and lunch clubs; by distributing free information materials; and taking calls at Age UK Advice on 0800 169 65 65.

If you would like to support our work by making a donation please call Supporter Services on 0800 169 87 87 (8.30 am–5.30 pm) or visit www.ageuk.org.uk/donate

Legal statement

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