

Factsheet 40 ● April 2010

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 (LA) means test for care home provision. It should be read in conjunction with our 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 2010 – March 2011. Capital limits and other figures are expected to increase again in April 2011 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.

Note: Many local Age Concerns are changing their name to Age UK.

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1 Recent developments

- New, revised, social care eligibility guidance was introduced in February 2010 to replace the existing *Fair access to care services* guidance, which was introduced in 2003. This incorporates the new approaches developed as part of the Government's personalisation agenda and will need to be applied from April 2010. The new guidance is called *Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care, Guidance on Eligibility Criteria for Adult Social Care*.
- From October 2010, adults who fund their own residential or non-residential social care will have access to an independent complaints review service provided by the Local Government Ombudsman. This right is included in the *Health Act 2009*, which received Royal Assent (became law) in November 2009.
- Subject to legislation, new Regulations for the registration of all regulated adult health and social care service providers will commence in April 2010. This is with the Care Quality Commission. In a staged process adult social care services will be required to register on 1 October. This means that present registration under the *Care Standards Act 2000* continues until 30 September 2010.

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 but it can affect your eligibility for local authority assistance with care fees and Pension Credit.

National charging rules are contained in a Department of Health document called the *Charging for residential accommodation guide* (CRAG), updated each April. You can access this document here:

www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_097578

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

Definitions

- The term '**care home**' is used in this factsheet to mean any home that is registered under the *Care Standards Act 2000*. It includes local authority homes and independent homes, some of which provide nursing care as well as personal care. See above for plans for the re-registration of all social care providers with the Care Quality Commission.
- The term '**resident**' is used to mean a person who enters, or needs to enter a care home.

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.

3.1 What is deprivation?

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 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 capital for it to be treated as deliberate deprivation but it must be a significant one.

The timing of the transfer may be important in establishing motivation.

Could the individual have foreseen the need for care home accommodation?

CRAG, paragraphs 6.062 and 6.064 states that:

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 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.

3.3 Notional capital

If you are found to have deliberately deprived yourself of capital you will be treated as having 'notional capital' to the value of the capital you disposed of. 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).

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.

The six-month limit only applies to that particular power of recovery. There is 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.

5 Things to think about

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. Details of the procedure should be available on request from the local authority. Further information on complaints can be accessed in 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. 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.

The following factsheets may be relevant:

- Factsheet 10, *Paying for permanent residential care*
- Factsheet 20, *NHS continuing healthcare, NHS-funded nursing care and intermediate care*
- 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: 0300 0616 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.

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)

Website: www.adviceguide.org.uk

Counsel and Care

A charity that provides advice for older people, their families and professionals on community care and other issues.

Tel: 0845 300 7585

Website: www.counselandcare.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

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

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

- to order copies of any of our information materials mentioned in this factsheet
- to request information in large print and audio
- further information about our full range of information products

- contact details for your nearest local Age UK/Age Concern.

Books from Age UK

We publish a wide range of books for older people and those who care for and work with them. The following title may be of particular interest:

Your rights to money benefits 2010–2011

All you need to know about the full range of benefits for the over 60s.
£5.99

To order this book visit www.ageuk.org.uk/bookshop or to request a free books catalogue please call our book order line 0870 44 22 120 (lo-call rate).

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 169 65 65
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 through calls to 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 80 80 (8.30 am–5.30 pm) or visit www.ageuk.org.uk/donate

Legal statement

Age UK is a registered charity (number 1128267) and company limited by guarantee (number 6825798). The registered address is 207–221 Pentonville Road, London, N1 9UZ. VAT number: 564559800. Age Concern England (charity number 261794) and Help the Aged (charity number 272786) and their trading and other associated companies merged on 1 April 2009.

Together they have formed Age UK, a single charity dedicated to improving the lives of people in later life. Age Concern and Help the Aged are brands of Age UK. The three national Age Concerns in Scotland, Northern Ireland and Wales have also merged with Help the Aged in these nations to form three registered charities: Age Scotland, Age Northern Ireland, Age Cymru.

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