



May 2008

Key Points:

- Replaces previous version dated June 2007

Transfer of assets, and paying for care in a care home

This factsheet is aimed at people aged 60 and over. It gives information about transferring your assets, particularly in relation to the amount you may have to pay towards the costs of care in a care home from your income and savings.

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 Age Concern offices for information specific to where they live.

Contact details for other national Age Concerns are:

The Scottish Helpline for Older People – Age Concern

Scotland, tel: 0845 125 9732 (local call rates) Monday to Friday, 10am – 4pm; website: www.olderpeoplescotland.co.uk;

Age Concern Cymru,

tel: 029 2043 1555 (national call rate); website: www.accymru.org.uk;

Age Concern Northern Ireland,

tel: 028 9032 5055 (national call rate), Monday - Friday, 10am - 12pm and 2pm - 4pm, website: www.ageconcernni.org.

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Introduction

Assistance with care home fees from the local authority social services department is usually means tested, the means test following an assessment of your care needs. Once you have been assessed as needing care in a care home, you will be expected to pay the full cost of care if you have more than £22,250 in capital. Capital includes property, savings and other investments. If your capital is less than £22,250 the local authority may contribute towards the cost of your care. The upper capital limit may change in April 2009.

This factsheet does not go into detail about the system for state funding for those in care homes, or the responsibilities of the NHS and local authorities for arranging such care. Further information on these subjects can be found in:

- Factsheet 10 *Local authority charging procedures for care homes;*
- Factsheet 20 *NHS continuing healthcare, NHS-funded nursing care and intermediate care;*
- Factsheet 38 *Treatment of the former home as capital for people in care homes.*

Most residents make some contribution towards the cost of their care. The local authority calculates this contribution based on your income and savings, using 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 of Work and Pensions.

It is common to want to pass on savings or other capital to children or others. However transferring assets can affect your eligibility for both local authority assistance with care fees and Pension Credit. This factsheet explains how your eligibility for assistance may be affected if you have previously transferred assets out of your name.

The term 'resident' is used in this factsheet to mean a person who enters, or needs to enter a care home and 'care home' to mean any registered care home which provides personal and/or nursing care.

1. 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 a resident transfers an asset out of his or her possession in order to put him or herself in a better position to obtain assistance. Where a disposal of assets is treated as deliberate deprivation, the local authority will include 'notional capital' to the value of those assets in its assessment of your means.

1.1 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. The Department of Health's *Charging for Residential Accommodation Guide (CRAG)* gives the following examples of deprivation:

- 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.

These are suggested as examples. Other courses of action may also be seen as deprivation, such as selling an asset for less than its true value. The rules for Pension Credit are largely the same but a more relaxed view is taken in respect of repaying debts.

Deprivation of capital does not necessarily occur for the purposes of avoiding a charge for accommodation or getting 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.

1.2 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 in order for it to be treated as deliberate deprivation. It must, however, be a significant one.

The timing of the transfer may be important in establishing whether the required motivation was present:

'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'.
(*CRAG*, paras. 6.062 and 6.064).

Case law has offered differing interpretations of what is required for the local authority 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 upon 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.

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.

These parts of the judgement were later upheld by the Court of Appeal. Following this decision local authorities should follow the guidance and apply the correct subjective test looking at the details of individual residents' cases. Authorities should give adequate reasons for rejecting any evidence provided, particularly if other evidence is accepted.

1.3 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 £22,250, 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 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 are actual capital. You may then be treated as having notional capital to the value of the part of the asset which 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 which the resident has to pay for the accommodation and the amount which would have been paid if the resident was 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.

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 the resident should contribute towards the cost of that care. 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 the powers discussed below.

1.4 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 of an asset the local authority can recover any sums which it consequently has to pay towards the resident's care costs from the person who the asset was transferred to. This power can only be used if 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 resident requires local authority funding the local authority cannot use this section.

The six month limit only applies to the particular power of recovery contained in section 21 of *HASSASSA*. There is no set time limit beyond which the local authority has to ignore transfers of assets. If a transfer has 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. The authority may initially refuse to fund the resident, necessitating a challenge using the arguments set out in the preceding section of this factsheet. If the authority does provide funding in these circumstances it may treat the assistance provided as an accruing debt owed to it by the resident. 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 in the future.

2. If you disagree with the decision that you have deprived yourself of capital

2.1 Decision by the local authority

If you disagree with a decision by the local authority that you have deliberately deprived yourself of capital to reduce your charge, you can use the local authority's three stage complaints procedure to challenge it. The first stage is informal discussions with the section dealing with your application. If this does not resolve matters you can make a formal complaint in writing which the authority must investigate and respond to within 28 days (unless there is good reason for the authority to take longer). If you are still unhappy, then you can take your complaint to a review panel. The review panel consists of three people and at least one member of the panel should be independent of the local authority. Each authority should have a designated Complaints Officer who should be able to provide details of that authority's procedure.

2.2 Decision by the Pension Service

If the Pension Service refuses a claim for Pension Credit you will be told in the letter notifying you of the decision what you can do if you are unhappy with it. You can ask for the decision to be revised (please note there are strict time limits) and you should send in any additional material that might help. If you are not satisfied with the decision you can appeal (again, there are strict time limits). The appeal tribunal is independent of the Pension Service.

3. Considerations to be taken into account - for you

Most older people do not require long term care in a care home. As well as 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 will no longer have control over it. It is not always possible to rely upon the new owner acting in accordance with your wishes. You should consider how you might be affected if disagreements arise in the future.

It is advisable to *seek proper legal and financial advice before proceeding with any transfer*. Age Concern England is not able to give *this advice*. The adviser should act in your best interests. 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 give advice in advance on how they might treat a particular transfer at a later time.

3.1 Other points for you to consider

Some of the suggestions made below are of specific concern when considering whether to transfer your home.

Others apply to the transfer of any capital asset:

- you may at some point in the future want to move from your current property to somewhere more suitable for your needs at that time. 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;

3.2 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 which 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.

4. Further information from Age Concern

It is difficult to predict how a particular transfer of assets will be regarded and you may need to seek legal and financial advice if you are considering transferring assets. *Age Concern England is unable to give financial or legal advice.*

Age Concern continues to work to clarify the rules in this respect 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	<i>Local authority charging procedures for care homes;</i>
Factsheet 20	<i>NHS continuing healthcare, NHS-funded nursing care and intermediate care;</i>
Factsheet 38	<i>Treatment of the former home as capital for people in care homes.</i>

If you would like

- to find your nearest Age Concern
- any additional factsheets mentioned above (up to a maximum of 5 will be sent free of charge)
- a full list of factsheets and/or a book catalogue
- to receive this information in large print

phone 0800 00 99 66 (free call) or write to Age Concern FREEPOST (SWB 30375), Ashburton, Devon, TQ13 7ZZ. For people with hearing loss who have access to a textphone, calls can be made by Typetalk, which relays conversations between text and voice via an operator.

Age Concern factsheets and other information materials can be downloaded free from our website at: www.ageconcern.org.uk. To receive a free e-mail notification when new and updated factsheets are published, please either contact the Factsheet Subscription Service on tel: 020 8765 7200 by email: factsheet.subscriptions@ace.org.uk, or sign up on-line.

Age Concern provides factsheets free to older people, their families and people who work with them. If you would like to make a donation to our work, you can send a cheque or postal order (made payable to Age Concern England) to the Personal Fundraising Department, ACE Freepost CN1794, London SW16 4BR.

Find out more about Age Concern England online on www.ageconcern.org.uk.

Please note that the inclusion of named agencies, companies, products, services or publications in this factsheet does not constitute a recommendation or endorsement by Age Concern. Whilst every effort is made to ensure accuracy, Age Concern cannot be held responsible for errors or omissions.

No factsheet can ever be a complete guide to the law, which also changes from time to time. Therefore please ensure that you have an up to date factsheet and that it clearly applies to your situation. Legal advice should always be taken if you are in doubt. *Age Concern England does not give legal or financial advice.*

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