

Factsheet 38w ● June 2018

Treatment of property in the means test for permanent care home provision in Wales



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1 Information about this factsheet

This factsheet explains how property is dealt with in the local authority financial means test for the provision of care home accommodation in Wales.

It covers a *specific* part of the overall residential care charging rules and should be read in conjunction with Age Cymru's other factsheets on care home charging, particularly Factsheet 10w *Paying for a permanent care home placement in Wales*.

Note: The information given in this factsheet is applicable in Wales. Different rules may apply in England, Northern Ireland and Scotland. Contact Age UK, Age NI and Age Scotland respectively for further information – see section 15 for their contact details.

1.1 Definitions and terminology

Local authority social services departments

In this factsheet references to the '**local authority**' or '**council**' will refer to the *adult social services department* of the local authority. The relevant social services department may be referred to as the following, or similar variations:

- social care department;
- adult social services;
- older persons' department;
- older persons' team.

Adult social services teams are responsible, among other duties, for assessing people's need for 'care and support' or 'social care' services and deciding whether those needs meet the eligibility criteria.

Note: Finding contact details for the local authority's social services department

Contact details for your local authority should be available in your local telephone directory; from your town hall, local council offices; or a local Age Cymru or Citizens Advice Bureau should be able to provide them. If you have internet access, a list of all the local authorities in Wales, together with links to their individual contact details, can be found on the Welsh Government's website at:

www.gov.wales/topics/localgovernment/unitary-authorities

'Care homes'

The term 'care home' covers any establishment providing accommodation with either:

- just personal care; *or*
- personal care together with nursing care.

Sometimes the terms 'residential care home' and 'nursing care home' might be used to differentiate between the two types of home.

All care homes must be registered as 'service providers' with the regulator, the Care Inspectorate Wales (CIW), who are responsible for the inspection and registration of homes – see section 14 below for contact details for CIW. There are private sector care homes which are run for profit by private organisations or individual proprietors; voluntary sector homes (non-profit making and run by bodies such as registered charities, religious organisations or housing associations); or homes that are still run directly by the social services department of the local authority.

1.2 The Social Services and Well-being (Wales) Act 2014 and accompanying Code of Practice guidance – relevance to the social care system in Wales

This Act was fully implemented in April 2016 and is the main legislation that covers the social care system in Wales, including:

- the social care assessment process;
- related rules in regard to arranging and paying for residential care homes and nursing care homes¹;
- the guidance documents that local authorities must use when assessing needs; and
- the guidance documents that local authorities must use when means testing people who may need to pay towards their services.

Many of the sections in this factsheet (and other Age Cymru factsheets on social care topics) will use this Act, and the Welsh Government Code of Practice guidance for local authorities which accompanies it, as a main source of information. References will be provided in the text where relevant.

2 The local authority financial means test for care home provision – introduction

Note: Assessment of needs and eligibility for services

Your local authority must carry out an assessment of your care and support needs to establish that you require a care home *before* it can assist you with the cost of the placement. This particular issue is not covered in any detail in this factsheet, but further information can be found in Age Cymru's Factsheet 41w *Social care assessments for older people with care needs in Wales* and Factsheet 10w *Paying for a permanent care home placement in Wales*.

Under the *Social Services and Well-being (Wales) Act 2014* a local authority has a legal duty to carry out an assessment of anyone living in its area who *may* need community care services, once it becomes aware of this need.

Also, someone's right to have their needs assessment is not affected by the level of their financial resources or other circumstances.

¹ The Act also affects the rules in regard to arranging and paying for care at home/non-residential services, though that issue is not covered in this particular factsheet

2.1 The Welsh Government's guidance for local authorities on the financial means test

When conducting a financial assessment for someone who needs to go into a care home and subsequently working out what charge a service user should pay, all local authorities in Wales will need to comply with the following Welsh Government guidance document:

Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment) (version 3 – April 2018)

The Social Care Wales website has links to this – and other – Code of Practice guidance documents at:

www.socialcare.wales/hub/sswbact-codes

Most people who have been assessed as needing residential care will be expected to pay something towards the costs of their accommodation and personal care. Your income, savings and other capital assets will generally be taken into account in determining how much you should contribute.

Property is one of the capital assets listed in the Code of Practice guidance as potentially being eligible for inclusion in the residential care means test.

Other forms of capital would include savings and investments.

Note: There are certain types of capital and income that can be disregarded in the financial means test; or certain *situations* where they should be disregarded.

Disregards that should be applied to property will be covered within this factsheet.

For information on *other* types of disregard (for either income or capital), see Age Cymru's Factsheet 10w *Paying for a permanent care home placement in Wales*.

2.2 The capital limit

Since April 2018 the capital limit in Wales for the care home charging means test has been **£40,000**.

The capital limit may be increased again from April 2019.

Capital and savings of £40,000 and above

If you have capital assets and/or savings of £40,000 or more you will be expected to meet the **full cost** of your care home placement.

Capital and savings below £40,000

If your capital is worth less than £40,000 in total, it will be fully disregarded in the local authority means test for care home provision. **As such, you should be able to get assistance towards your care home fees from your local authority.**

2.3 Property and the capital limit

If you own a property, unless there is a specific reason in the charging rules for it to be disregarded, then its value will count towards the capital limit.

However, as touched upon above, it will be important to establish whether there are any grounds for the property to be disregarded (either on a mandatory basis, where the local authority has to apply a disregard; or where a case can be made for a discretionary disregard to be applied) – see section 3 below.

If someone does qualify for their property to be disregarded, then obviously this could have a significant impact on whether they will qualify for local authority assistance towards their care fees.

Note: Where property disregards exist in the charging guidance, they apply to the “value of the person’s main or only home” – i.e. any other property that you own in addition to this will be taken into account in the means test.

2.4 Valuation of property

In all cases where the value of someone’s property is included in the means test, its value will be assessed as per its **present market value**, less:

- any mortgage or loan secured on it; and
- less **10%** of its value where there would be expenses involved in selling it.

Note: The 10% rule is only for calculating the value of a property *before* its sale. Once the property has been sold the resident will be treated as having the actual share of the sale proceeds he or she receives once any secured debts and the actual expenses of sale have been paid.

2.5 Provision of information & advice and advocacy for people assessed as needing a care home

Information and advice

Section 17 in Part 2 of the *Social Services and Well-being (Wales) Act 2014* places duties on local authorities to provide “information, advice and assistance...relating to care and support”, including – as a minimum – “publication of information...on how the care and support system operates in the local authority area...the types of care and support available [and] how to access [this]”². This, of course, would include information and advice on care home provision and paying for care.

Advocacy

The *Social Services and Well-being (Wales) Act* also contains duties for local authorities in regard to advocacy services. If you have difficulty in expressing your views and needs and feel that this would be excessively difficult within the assessment process, then an advocacy service may be of help to you. The Act has strengthened people’s rights to advocacy support in relation to the social care assessment process.

In many instances, the requirement on the local authority will be to make people aware of the availability of advocacy support, should they wish to utilise this; in others the authority will have a *specific duty* to “arrange an independent professional advocate” for someone³:

² Social Services and Well-being (Wales) Act 2014: Part 2 Code of Practice (General Functions), Welsh Government

³ Social Services and Well-being (Wales) Act 2014: Part 10 Code of Practice (Advocacy), Welsh Government

● General advocacy duty

The Welsh Government has produced a Code of Practice specifically on the subject of advocacy in the context of the *Social Services and Well-being (Wales) Act* which states that, in all cases:

“To have voice and control, an individual must be able to feel that they are a genuinely equal partner in their interactions with professionals. It is, therefore open to any individual to exercise choice and to **invite any advocate** to support them in expressing their views, wishes and feelings”⁴ (emphasis added).

In this context, you could ask a family member or friend to act as an informal advocate for you, or you could contact an organisation that operates a formal advocacy service. Alternatively, a local Age Cymru organisation, or other charitable or voluntary group may offer such a service – see section 14 below for details about contacting your local Age Cymru. If they don’t run one themselves, they may be able to provide contact details for a similar service in your area.

● The appointment of an ‘independent professional advocate’

Local authorities are advised in the guidance that they “**must** arrange for the provision of an independent professional advocate when a person can only overcome the barrier(s) to **participate fully in the assessment, care and support planning, review and safeguarding processes** with assistance from an appropriate individual, **but there is no appropriate individual available**”⁵.

In other words, this would be where an individual is finding it difficult to express their views in the assessment process, but there are no immediate, or suitable, family or friends to help them, nor is the individual able to independently access, for example, an advocacy service provided by a voluntary organisation.

⁴ Ibid

⁵ Ibid

3 Property that is not included in the means test

3.1 Temporary care home stays

The value of your home is **not** included in the means test for any temporary stay in a care home⁶.

This is on the basis that you intend to return to the property to live, following your temporary care home stay, so it would be unfair to include its value as capital in the means test.

3.2 Mandatory disregards

The value of your former home will be **disregarded (ignored)** in the means test if it is occupied “in part or whole as their main or only home”⁷ by any of the following:

- Your partner (husband, wife, civil partner or someone you live with as though you are married or civil partners)⁸.
- A relative who is 60 years old or over (see ‘definitions’ below).
- A younger relative who is ‘incapacitated’ (see ‘definitions’ below).
- A former partner who is divorced or estranged from you, but who is a lone parent with a dependent child.
- A child under 18 years who you are liable to maintain.

Important: The above disregards only apply “**where [the] property has been continuously occupied since before the person went into a care home**”⁹ (emphasis added).

⁶ See Age Cymru’s Factsheet 58w *Paying for temporary care in a care home in Wales* for further information about short-term and temporary care home placements.

⁷ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

⁸ The disregard also applies to a “former partner or civil partner, except where they are estranged or divorced” (the disregard can only apply to a person’s estranged or divorced partner if they are “a lone parent with a dependent child”) – Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

⁹ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

Definitions

The term '**relative**' includes:

- parent (including an adoptive parent);
- parent-in-law;
- son (including an adoptive son);
- son-in-law;
- daughter (including an adoptive daughter);
- daughter-in-law;
- step-parent;
- step-son;
- step-daughter;
- brother or sister;
- the spouse, civil partner or unmarried partner of any of those listed above;

or a:

- grandparent;
- grandchild;
- aunt or uncle;
- niece or nephew.

The term '**incapacitated**' is not specifically defined in the Welsh Government's Code of Practice guidance. However, it states that "it will be reasonable to conclude that a relative is incapacitated if either of the following conditions apply:

(a) the relative is receiving one (or more) of the following welfare benefits":

- Attendance Allowance;
- Disability Living Allowance;
- Personal Independence Payment;
- Incapacity Benefit;
- Severe Disablement Allowance;
- Armed Forces Independence Payment; or

➤ “a similar benefit”¹⁰.

(b) “the relative does not receive any disability related benefit but their degree of incapacity is equivalent to that required to qualify for such a benefit. Medical or other evidence may be needed on this before a decision is reached on whether to apply [the disregard]”¹¹.

Questions and considerations in regard to whether a property is genuinely occupied by the relative

As noted above, the property disregards for certain relatives living in a care home resident’s property only apply if they have been continuously living there *before* the person needed to go into a care home.

The term ‘occupied’ in the context of these disregards is not specifically defined in the Code of Practice guidance. It does offer the following advice to local authorities, however:

“In most cases it will be obvious whether or not the property is occupied by a qualifying relative as their main or only home. However, there will be some cases where this may not be clear and the local authority should undertake a factual inquiry weighing up all relevant factors in order to reach a decision. **An emotional attachment to the property alone is not sufficient for the disregard to apply**” (emphasis added).

“Circumstances where it may be unclear might include where a qualifying relative has to live elsewhere for a particular reason; for example for the purposes of their employment or due to them serving a prison sentence”.

¹⁰ For further information on the benefits listed here, see the following Age UK Factsheets: 56 Benefits for people under Pension Credit age; 87 Personal Independence Payment and Disability Living Allowance; and 34 Attendance Allowance

¹¹ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

In this type of scenario, “whilst they live elsewhere in order to undertake [for example] their employment...the property remains their main or only home. It would not be reasonable to regard their temporary accommodation as the person’s main or only home as they may well intend to return to the property in question in the future. Essentially in such circumstances the qualifying relative is occupying the property [even though they are] not physically present”¹².

If one of the relatives listed above, who would qualify for the mandatory disregard, were to move into the property *after* the resident goes into a care home, then generally the local authority may well view this as an attempt to avoid the house being taken into account in the means test (with it not genuinely being the relative’s home). However, the guidance does stress to authorities that this would not *always* be the case:

In certain situations “a property may be disregarded when a qualifying relative moves into [it] after the resident enters a care home”.

“Factors such as the **timing and purpose** of the move may be relevant to establishing if the property is the relative’s main or only home. The purpose of the disregard in these circumstances is to *safeguard certain categories of people from the risk of homelessness*”.

“The local authority should consider if the principle reason for the move is that it is necessary to ensure the relative has somewhere to live as their main or only home”.

“A disregard would **not** be appropriate, for example, where a person moves into a property *solely to protect the family inheritance*. Local authorities need to ensure that people are not financially supported at public expense inappropriately” (emphasis added)¹³.

¹² Ibid

¹³ Ibid

Note: Equivalent guidance for local authorities in England provides additional questions that authorities may need to consider when making a disregard decision (although different legislation applies in England – the *Care Act 2014*, rather than the *Social Services and Well-being (Wales) Act 2014* – the rules in regard to property disregards and means testing for care home placements are very similar, so the following may still be useful for reference purposes)¹⁴:

- *Does your relative currently occupy another property?*
 - *If your relative has somewhere else to live do they own or rent the property (i.e. how secure/permanent is it?).*
 - *If your relative is not physically present, is there evidence of a firm intention to return to or live in the property?*
 - *Where does your relative pay council tax; where are they registered to vote; where is your relative registered with a doctor?*
 - *Are your relative's belongings located in the property?*
 - *Is there evidence that your relative has a physical connection with the property”?*
-

3.3 Discretionary disregards

The local authority also has additional **discretionary** powers to disregard the value of a care home resident's property in certain situations, other than the mandatory disregards outlined above.

For example, the discretionary power may be appropriate where:

¹⁴ Care and Support Statutory Guidance 2014, cited in Age UK's equivalent factsheet to this one, for use in England – Factsheet 38 *Treatment of property in the means test for permanent care home provision*

- The property is the “sole residence of someone who has given up their own home in order to become a carer for the person who is now in a care home” (i.e. this could be a relative *under* 60 – so the mandatory disregard wouldn’t apply in their case)¹⁵.
- The property is occupied by a “companion of the person” (perhaps someone of a similar age who has given up their own home to live with their friend)¹⁶.

As it does with regard to whether a situation qualifies for a mandatory disregard, the Code of Practice guidance emphasises again that authorities will need to ensure that a “**person’s assets are not maintained at public expense**” and use of their discretionary powers must be balanced against this.

The authority should give individual consideration to requests to apply a discretionary disregard.

Note: The following is an example of how a local authority might use their discretionary disregard power:

Jayne has the early signs of dementia, but wishes to continue living in her own home. At the time, a local authority care needs assessment shows that she does not have care needs of a sufficient level that require her to need services from them, but would benefit from some occasional support. Her best friend Penny gives up her own home to move in with Jayne. At this point, there is no suggestion that Jayne may need care in a care home. After 5 years Jayne’s dementia has reached the point where she needs a far greater level of care and support and following a new care needs assessment it is agreed that she is eligible for local authority assistance. It is decided that her needs would best be met in a care home. On moving into the care home, the authority uses its discretion to apply the property disregard as this has now become Penny’s main or only home¹⁷.

¹⁵ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

¹⁶ Ibid

¹⁷ This example is taken from Age UK’s version of Factsheet 38 for use in England. The example originates from statutory guidance for local authorities in England (the general principles covered in the example will be equally relevant to the situation in Wales, however).

4 Disregarded property and changes of circumstances

4.1 Property disregarded on account of the partner of the care home resident continuing to live there: what will happen if the partner wishes, or needs, to move elsewhere?

Where a spouse, partner or other relative lives in a disregarded property, they may at some point wish to move, perhaps to somewhere smaller and more manageable (or they may need to move into a care home themselves).

However, the disregard **only applies to the property itself** – therefore, once the partner has moved out, the resident's share of the capital in the property could potentially start to be taken into account in their financial assessment.

Note: Previous government guidance indicated that it was acceptable practice for the care home resident to make part of their share of the proceeds from a sale of the property available to their spouse or civil partner, so long as this was to enable them to purchase a more suitable home for themselves¹⁸.

Furthermore, authorities were advised that it would *not* be reasonable for them to treat a resident as having deprived themselves of capital on purpose if they used their funds from the sale in this way (see section 12 below for further information on deprivation of capital in regard to care home charging).

The current charging guidance – *Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment) (version 3 – April 2018)* – does **not** appear to comment on this issue, though you can suggest to the authority that similar principles should continue to be followed¹⁹.

4.2 What will happen upon the death of the person who has attracted the disregard?

Again, as stated above, the disregard applies specifically to the property, so if the person who was continuing to live there (following the resident entering a care home) passes away, then the local authority will be able to begin taking account of the value of the property for means testing purposes for the care home resident²⁰.

This would be the case, *unless* the property should be disregarded for any other reason.

¹⁸ Unmarried partners and other relatives on whose account the original property had been disregarded could also ask to be treated in the same way as a spouse by the authority if they wished to move.

¹⁹ The current – and previous – guidance also doesn't address related issues, such as how any funds left over after the purchase should be apportioned (between the resident and their partner), or whose name the new property should be put into.

²⁰ This will be the case whoever the person was who attracted the disregard – be it the resident's spouse or another relative, whereby the mandatory disregard applied; or someone where the authority agreed to a discretionary disregard.

Even if there is no other reason for the property to be disregarded at this point, the local authority may have to provide the care home resident with a standard *12 week property disregard* following the change in circumstances – see section 5 below for further information on this.

5 The 12 week property disregard

5.1 Permanent care home placements and the 12 week property disregard

When the local authority is providing assistance with your care home placement, it should disregard the value of your property for the first 12 weeks of being a permanent resident in the care home.

Following the 12 week period it is likely that you would then need to fully self fund your care, as the value of your property will start to be taken into account in the means test (and count towards the capital limit of £40,000).

Note: The Code of Practice guidance confirms that the 12 week disregard applies to the *“value of a person’s main or only home”*.

As such, if you own any other property – for example that you rent out – this will be taken into account straight away and would not be disregarded for 12 weeks.

Also, the disregard only applies where the value of the resident’s **“other capital is below the capital limit”** – i.e. if, even without the capital value of your home being taken into account, you’d still have over the capital limit due to other savings or assets, the 12-week property disregard would not be applied.

If your property is sold within the 12 week period

In this situation, the disregard **ceases to have effect** from the date of sale and the proceeds will be counted as capital.

5.2 The 12 week property disregard where a care home placement was initially on a temporary basis

If your stay was initially temporary, the 12 weeks will run from the date it is decided your care is permanent.

5.3 When a property that previously qualified for a different type of disregard begins to be taken into account – the 12 week property disregard

The Code of Practice guidance advises that:

“When a property disregard based on a qualifying relative unexpectedly ends because [for example] the qualifying relative has died or moved into a care home”, the standard 12 week property disregard must be applied at that point, following the change of circumstances.

Note: When the guidance refers to a disregard in relation to a ‘qualifying relative’, it is referring to the mandatory and discretionary property disregards in relation to specific people occupying a care home resident’s property, as outlined in sections 3.2 and 3.3 above.

5.4 Local authority discretion to apply the 12 week property disregard in other circumstances

The Welsh Government’s Code of Practice guidance advises that:

Local authorities have discretion to “choose to apply the 12-week disregard when there is a sudden and unexpected change in the person’s financial circumstances. In deciding whether to do so, the local authority will want to consider the individual circumstances of the case. **Such circumstances might include a fall in share prices or an unanticipated debt**”²¹ (emphasis added).

²¹ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

5.5 People who initially fully self fund their care home placement – does the 12 week property disregard apply later on?

Previous Welsh Government guidance, which pre-dated the implementation of the *Social Services and Well-being (Wales) Act 2014*²², had clarified that the 12 week disregard included self-funding residents who have been permanently in a care home for more than 12 weeks already and who subsequently found that they needed local authority assistance because of their financial situation.

For example, this would mean that if you entered permanent care and **paid your full care fees from the beginning, without local authority assistance** – i.e. due to having sufficient 'liquid' capital to take you over the capital limit, even without taking into account the value of your home – the 12 week disregard should be applied from the date you *subsequently qualified* for local authority assistance with the care home fees (i.e. because your liquid capital had been used up to the extent that it was now falling to the capital limit level).

The current guidance – *Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment) (version 3 – April 2018)* – would appear to no longer recognise the offer of the 12 week property disregard in these circumstances (the guidance only addresses the scenarios outlined above in sections 5.1 to 5.4).

5.6 Making top-up payments and the 12 week property disregard

Whilst your property is subjected to the 12-week property disregard you can top-up your residential care payments from certain resources of your own, if this is necessary because you have chosen to enter more expensive care home accommodation than the local authority would usually expect to pay towards.

The following Age Cymru factsheets have further information on top-ups (both third party top-ups and self top-ups):

²² The old guidance was called the Charging for residential accommodation guide (CRAG)

- Factsheet 10w *Paying for a permanent care home placement in Wales*;
- Factsheet 60w *Care homes in Wales: choice of accommodation when the local authority is assisting with funding*.

6 Issues to do with ownership of property and care home charging – including the valuation of jointly owned property and the potential impact of beneficial interest in the financial means test

6.1 Ownership of property

It is possible to be a legal owner or a beneficial owner of property²³.

The **legal owner/s** of property are the people listed on the title deeds – legal documents which show who officially owns a property – that are registered with the Land Registry.

A **beneficial owner** of property can be someone who doesn't legally own any stake in the property (i.e. they are not on the title deeds), but would be entitled to a share of the proceeds if it were sold – this is known as having a 'beneficial interest' in the property. The Welsh Government's charging guidance explains this issue as follows:

“Beneficial ownership is where a person enjoys the benefits of ownership, even though the title of the asset is held by someone else, or where they directly or indirectly have the power to vote or influence a transaction regarding a particular asset”²⁴.

²³ This is under the law as it applies to England, Wales and Northern Ireland. The situation is different in Scotland.

²⁴ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

“In most cases...the legal and beneficial owner [or owners]” will be the **same** person/people – that is, the legal owner/s also own all of the beneficial interest in the property²⁵. For example, a couple who bought a property, both contributed equally to the mortgage, both are on the title deeds, and no one else has ever been involved in contributing financially towards the property.

However, instances where there may be differences between the legal and beneficial ownership (and therefore where beneficial interest might be established) include where there is evidence that someone who is **not** a legal owner has:

- Contributed towards the purchase price of the property.
- Paid all of the mortgage on the property in the past (but the property is perhaps now owned by a relative/s, such as a son or daughter).
- Contributed towards the purchase price of the property, or towards paying the mortgage on the property (either towards the monthly instalments, or paying a lump sum off the outstanding mortgage).
- Paid for significant repairs or alterations to the property.

In the local authority financial assessment for care home fees, beneficial interest in a property can become important – see sections 6.2 to 6.5 below.

Note: If a property was purchased under the council house ‘right to buy’ scheme at a discounted price, the person who attracted the discount may be treated as having a beneficial interest equivalent to the discount obtained, even if he or she did not contribute any money towards the purchase.

²⁵ Ibid

6.2 The valuation of jointly owned property – the rules outlined in Welsh Government regulations and accompanying Code of Practice documents

Note: As mentioned at the beginning of this factsheet, the *Social Services and Well-being (Wales) Act 2014* is the legislation in Wales which provides the foundations for care home financial means testing rules. All local authorities must abide by these. There are also a range of regulations made under the Act. (“Regulations are secondary legislation to be used where more detail or prescription is needed in implementing an Act”²⁶).

As is common practice with many pieces of legislation, the *Social Services and Well-being (Wales) Act* also has accompanying **guidance documents** (in the case of this particular legislation, they have been called ‘Code of Practice’ documents).

These Codes of Practice are backed by law, to help individuals, professionals and organisations to comply with the Act and its accompanying regulations.

Sometimes, case law precedents will also further clarify how legislation and guidance should be interpreted in specific circumstances.

The Care and Support (Financial Assessment) (Wales) Regulations 2015; and The Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment) (version 3 – April 2018)

The Code of Practice guidance advises that:

²⁶ Social care legislation in Wales: Information and Learning Hub – ‘Regulations’, Social Care Wales website: <https://socialcare.wales/hub/sswbact-regulations> (last accessed 6 June 2018)

Generally, “where a person has joint beneficial ownership of capital...the total value should be **divided equally between the joint owners** and [therefore the care home resident] should be treated as owning an equal share” for the purposes of the financial means test.

This will be the case “**except [in instances] where there is evidence that the person owns an unequal share**” (emphasis added).

If so, then the regulations state that it will be the resident’s *actual share* of the total value of the property – “which is less than or, as the case may be, more than an equal [50/50] share” – that will be included as capital in the means test for the care home resident²⁷.

In regard to the valuation that should be attached to the resident’s share of the property, the Code of Practice advises that “**the current market value will be the price a willing buyer would pay**”, though this wording in the guidance is referring to all types of assets (and not specifically property).

As such the guidance goes on to state that the way this “**market value is obtained will depend on the type of asset held**”, as well as, potentially, the way it is owned – see below.

Note: Local authorities are advised that “where a precise valuation is required”, including a market value calculation for a resident’s stake in a jointly owned property, “a professional valuer” must be asked by the authority to provide this valuation²⁸ – also see sections 6.3 to 6.5 below.

²⁷ 2015 No. 1844 (W. 272) SOCIAL CARE, WALES: The Care and Support (Financial Assessment) (Wales) Regulations 2015, Welsh Government

²⁸ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

6.3 The reason for a property being jointly owned and the potential relevance of this in regard to the financial means test for care home charging

The intentions of the people who ‘created a trust’

Important: Age Cymru **cannot** offer legal advice on property or trusts law, so information in this section should only be seen as general principles and not treated as definitive legal advice.

When property is jointly owned, it is effectively owned ‘**in trust**’ in legal terms – i.e. each owner holds it in trust for the other owners. As such, in this section of the factsheet the word ‘trust’ should be read in the context of this legal term.

Therefore, where legislation mentions the intentions of people who ‘created a trust’ – as will be discussed below – it means the **intentions** of those who made the legal arrangement to jointly own the property.

For your beneficial interest in a jointly owned property to have a value to a willing buyer on the open market (i.e. a ‘market value’), you must be able to *realise* this value.

Note: The wording under older Welsh Government guidance (since superseded in April 2016 by the Code of Practice documents referred to in this factsheet) addressed the issue of beneficial interest in the context of a property that is shared amongst relatives. It suggested that the value of a care home resident's share of a jointly owned property could 'effectively be nil' for the purposes of the financial means test, given that it would be unlikely that an 'outsider' would want to buy a stake in a property in such circumstances.

*However, many local authorities disputed this interpretation, arguing that "the assertion in [previous guidance] that it may be 'highly unlikely that any 'outsider' would be willing to buy' [into the property] is open to challenge"*²⁹.

The present regulations and Code of Practice guidance do not appear to make any reference to the above hypothetical example regarding beneficial interest and properties owned amongst family members; the potential for a 'nil' valuation; or any references to the differing interpretations of the old guidance and relevant case law. The current Code of Practice simply advises local authorities as outlined above in section 6.2 (*"the current market value will be the price a willing buyer would pay"*; the way *"market value is obtained will depend on the type of asset held"* and where *"a precise valuation is required...a professional valuer"* must be asked by the authority to provide this).

Case law which was previously established in this area – **relating to the current market value to a willing buyer of someone's stake in jointly owned property** – presumably continues to be relevant, and this is outlined below.

²⁹ *Clements, L and Thompson, P (2011). Community Care and the Law (5th edition), Legal Action Group.* The previous guidance was called the Charging for Residential Accommodation Guide (CRAG). The guidance – and the challenges to its interpretation – were also the same in England and it was not a situation unique to Wales. The full quote from CRAG in regard to where beneficial interest in a property is shared amongst relatives went as follows: *"the value of the [care home] resident's interest will be heavily influenced by the possibility of a market amongst his fellow beneficiaries [the other people with an interest in the property]. If no other relative is willing to buy the resident's interest, it is highly unlikely that any 'outsider' would be willing to buy into the property unless the financial advantages far outweighed the risks and limitations involved. The value of the interest, even to a willing buyer, could in such circumstances effectively be nil"*. In other words, in many cases a relative is the only likely buyer and if none of them wishes to buy the resident's interest, it could be argued that in reality there is no potential buyer and as such the resident's share is worth very little – or effectively nothing – for the purposes of the financial means test. The value of someone's interest depends on whether they could sell it and whether anyone would actually want to buy it.

Case law relevant to jointly owned property and whether a care home resident's share can be included in the means test

As mentioned above, local authorities have previously argued that it would be possible for a care home resident to realise the value of their stake in a jointly owned property. This is on the basis that:

“almost invariably there [could] be a willing buyer, on the grounds that a reasonably informed buyer would be aware that after purchase he or she will have rights as a co-owner, which include the right [through the *Trusts of Land and Appointment of Trustees Act 1996*] to apply to the court for a sale [of the property]”³⁰.

If such a co-owner existed and they sought to enforce a sale, the court would examine a number of factors including:

- a.)

“the intentions of the person or persons (if any) who created the trust [at the date of purchase of the home]” and

- b.)

“the purposes for which the property subject to the trust is held”³¹.

Point ‘b’ above relates to the purpose for which the trust was set up. Whether this purpose is still **subsisting** (i.e. it still exists and continues) at the time of the financial means test is central to the attribution of value to the resident's beneficial interest. This is because it may create an impediment to an intended enforced sale once purchased.

³⁰ Clements, L and Thompson, P (2011). *Community Care and the Law* (5th edition), Legal Action Group.

³¹ Section 15 (1) of the *Trusts of Land and Appointment of Trustees Act 1996*, cited in Clements, Luke (2017). *Community Care and the Law* (Sixth edition), Legal Action Group.

“The ease with which the value of the asset (i.e. the share in the property) may be realised in the future is largely dependent on the circumstances in which the joint beneficial interest has arisen. For example, there is a difference between those situations where [the] purpose of the joint purchase of the property is to provide a home for the joint beneficial owners (e.g. a parent purchasing a property with an adult child, both of whom live in the property) and those where the joint ownership arises because, for example, the property was inherited by some of the co-owners on the death of a relative. This is particularly the case where the property remains empty once the person moves into a care home”³².

Two leading legal cases – *Palfrey* and *Wilson* – that provide guidance on this point for the purposes of residential care charging are discussed overleaf:

³² Clements, Luke (2017). *Community Care and the Law* (Sixth edition), Legal Action Group.

Legal case: Chief Adjudication Officer v Palfrey

Key issues: Was the property purchased to provide a home for the joint owners – does one of the joint owners continue to live there?

In the legal case of *Chief Adjudication Officer v Palfrey*, a joint property owner, Mr Palfrey, had gone into residential care, but the other joint owner (his daughter) continued to live in the property. The question arose as to how his share in the family home should be valued for the purpose of assessing his entitlement to Income Support.

The house had been acquired by him and his daughter as beneficial joint tenants. Hobhouse LJ concluded that, even though Mr Palfrey was no longer present:

“Where the capital asset is a jointly owned dwelling house held for the purpose of accommodating the joint owners and that purpose is [still] subsisting [i.e. one of the joint owners continues to live in the house], there is nothing obscure or abstruse in the conclusion that the amount of capital which the applicant’s joint possession of that dwelling house represents may fall, for the time being, to be quantified in a nominal amount [for the purposes of the means test]”³³.

Therefore in this sort of scenario it would seem unlikely that any co-owner could force a sale (and thus no potential for the resident to realise the value of their share).

Though it should be noted that, based on this reasoning, the ‘subsisting’ purpose would disappear if the joint owner living in the property were to vacate it at some future point.

³³ Chief Adjudication Officer v Palfrey (1995), cited in Clements, Luke (2017). Community Care and the Law (Sixth edition), Legal Action Group.

Legal case: Wilkinson v Chief Adjudication Officer

Key issues: Did the joint ownership arise through a reason other than to provide a home for the joint owners – for example did one of the owners acquire their share in the property through inheritance?

In the legal case of *Wilkinson v Chief Adjudication Officer*, Mrs Wilkinson's share in a jointly owned property came to her as an inheritance on her mother's death. It was an absolute gift to Mrs Wilkinson and her sister, in equal shares, with no restriction or other intended purpose.

The property was not given to them in order to provide a home. Here Mummery LJ decided that:

“Palfrey was not a relevant authority and that a sale could [theoretically] be enforced [by a co-owner]”, thus creating a market value for Mrs Wilkinson's beneficial interest³⁴.

Therefore, on the basis of this case law, if someone's situation appears to be similar to the Wilkinson case, the local authority may well seek to treat the care home resident as if they had capital for the means test based on the value of their share of the jointly owned property (given that – the local authority would argue – there is the potential for the resident to realise the value of their share).

Note: If it has not already done so, you can request that the local authority obtain a **professional valuation** if you dispute the way they have reached their decision; their interpretation of the regulations and/or guidance; or relevant case law – see section 6.4 below.

³⁴ Clements, Luke (2017). *Community Care and the Law* (Sixth edition), Legal Action Group.

6.4 The need for a professional property valuation

As discussed above, the Code of Practice guidance to local authorities is clear that “where a precise valuation is required, a professional valuer must be asked to provide a current market valuation”.

The guidance also advises that:

“Where a property is being taken into account in a financial assessment and the value of this is disputed, the aim should be to resolve this as quickly as possible. Local authorities should try to obtain an independent valuation of the person’s beneficial share of the property within the 12-week [property] disregard period...where a person has entered a care home on a permanent basis. This will enable local authorities to work out what charges a person should pay, or determine whether they are liable to meet the full costs of their care, before this disregard ends”³⁵ (see section 5 above for information on the 12-week disregard).

As confirmed in the above quote, the valuation should be carried out by someone totally **independent** from the local authority. The professional valuation will be carried out by a chartered surveyor.

Important: Given the case law precedents discussed above, it is essential that the chartered surveyor is suitably experienced in the field of valuing beneficial interest, is familiar with the concepts outlined in the case law **and** has awareness of the Code of Practice guidance and *Social Services and Well-being (Wales) Act 2014* regulations. This will be required so that they can clearly explain their reasoning. You could contact the Royal Institute of Chartered Surveyors (RICS) for further information.

The surveyor will determine what the market value is – if any – for the resident’s share of the property. The local authority could then use this figure in terms of working out how much capital they would treat the care home resident as having for the means test.

³⁵ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

The authority should always “take into account...all of the relevant factors and should also provide proper reasons for its decision[s]” in cases such as these³⁶.

6.5 Specialist advice on jointly owned property and the value of someone’s beneficial interest

You could consider obtaining specialist legal advice on this potentially complex issue, though do ask about fees at the outset, to get an idea of whether this option will be affordable for you.

You would need to ensure that any solicitor you choose has specialist knowledge in regard to community care law and/or property law.

Age UK’s Factsheet 43 *Getting legal advice* has further information on finding a solicitor, including organisations where you may be able to get some initial free advice.

7 Going into a care home when you own a property – affect/s on Pension Credit

If you receive Pension Credit (PC), the value of your home is ignored in the means test for this benefit for periods of *temporary* residential care.

If you are a **permanent** care home resident, the value of your property can be ignored for up to 26 weeks (or longer if reasonable) as long as steps are being taken to sell it. You can still receive PC during this period if you qualify based on your income and capital other than your former home.

If you are in permanent care but your house is not up for sale, the value of your interest in your former home will generally be included in the means test for PC, *unless* your former home will remain inhabited by a partner or relative. In this instance, the property will be disregarded by the Pension Service under similar rules to those used by the local authority (though, significantly, there is no discretionary disregard under the Pension Service rules – therefore, if the local authority has used its discretion to ignore the value of your home or arranged for a deferred payment, it will still be taken into account for PC).

³⁶ Clements, Luke (2017). *Community Care and the Law* (Sixth edition), Legal Action Group.

See Age UK's Factsheet 48 *Pension Credit* for further information.

8 Business assets and the financial means test

Prior to April 2016, the local authority charging rules for care home provision were contained in the *Charging for Residential Accommodation Guide (CRAG)*. This advised local authorities that in the means test they should use discretion to disregard for a 'reasonable period' of time the capital value of business assets, providing steps are being taken to realise the capital value. They were further advised that if no immediate intention to realise the capital value in the business assets is demonstrated, then their value could be taken into account in the means test straight away.

The current guidance – *Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment)* – doesn't appear to specifically address this issue, though presumably the same principle would still apply: i.e. a local authority should operate a temporary disregard for the business assets, so long as the person is taking appropriate steps to realise the capital value.

Note: There is a disregard listed in the current guidance of at least 26 weeks for assets of any business owned (or part-owned) by a new care home resident who has had to stop self-employed work due to illness or disablement. However, this is in the short-term where **the intention is to take up work again in the future when the person is able** – therefore, the disregard will apply in this scenario only and not to permanent residents.

9 Park homes / mobile homes

It can be difficult to know whether certain types of property, such as park homes (also called mobile homes), should be included within the residential care means test. There is a general presumption in the Code of Practice that all eligible capital assets should be included alongside eligible income.

However, there are also exceptions in certain circumstances, such as for the property disregards discussed above; or personal possessions (“chattel”) which cannot be included in the means test³⁷.

HM Revenue and Customs produces a document entitled *SDLTM 10023 – Mobile Homes, Caravans and Houseboats*³⁸.

This document provides a useful summary of how these types of home are dealt with in a similar context and this may also help inform their consideration in an adult social care situation.

It shows that there is a spectrum of ownership status, as well as a number of other complexities in each case – for example regarding the division of ownership between the park/mobile home itself and the ground it stands upon. In some cases it may “constitute moveable property (a ‘chattel’)”³⁹.

As a result, each case must be considered individually by the local authority.

Note: Deferred payment agreements and park homes

It may be possible to agree a deferred payment on this type of property where it is someone’s permanent and only home, depending on the ownership arrangements. The question the local authority must ask is:

Does the park home owner have a beneficial interest in the property and land which can be used to secure payment of the future care home fees?

If the answer is no, the only possible type of deferral could be in terms of a short-term arrangement where efforts are being made to sell the park home. Age UK’s Factsheet 71 *Park homes* includes details of organisations that may have expertise regarding the issues discussed above.

³⁷ This is provided eligible capital is not used to purchase the personal possessions with the intention of avoiding paying assessed care charges – see section 12 below

³⁸ www.hmrc.gov.uk/manuals/sdlmanual/sdlm10023.htm

³⁹ ‘HMRC internal manual: Stamp Duty Land Tax Manual – Mobile Homes, Caravans and Houseboats: Mobile Homes (‘Park Homes’)', HMRC Website: www.gov.uk/hmrc-internal-manuals/stamp-duty-land-tax-manual/sdlm10023

10 Renting out your property

You may want to rent out your property and put the income generated towards your care home fees. Anyone considering this may wish to seek legal and financial advice.

The **capital value** of an interest in a property that has been rented out is *still* taken into account in the means test by the local authority.

Rental income

Your share of the **rental income** will also be **included** in the assessment of your eligibility for local authority assistance with care home fees.

Note: The Code of Practice guidance advises that “if a person decides to rent out their property during the course of [a deferred payment] agreement, a local authority should permit the person to retain a percentage of any rental income they secure.” See section 11 below for further information on deferred payment agreements.

11 Deferred payment agreements – for people who are unable, or do not want, to sell their property to release capital to pay their care home fees

Where you have capital above the £40,000 capital limit and are expected to pay the full care home fee, this may be a problem if your capital is held in the value of the property you were living in as your home, prior to needing to go into the care home.

Therefore, if you have less than £40,000 in *readily available capital*, you will be able to ask the local authority to enter into a deferred payment agreement with you (prior to this you would also be able to benefit from the 12 week property disregard – see section 5 above).

11.1 Welsh Government guidance on deferred payment agreements

The guidance for local authorities on deferred payment agreements is contained within the same Code of Practice as the charging and financial assessment guidance. It advises that:

“By entering into a deferred payment agreement a person, whose property is taken into account in their financial assessment, can defer or delay paying some or all of their care costs until a later date so as to not be required to sell their property immediately upon entering a care home [or following the 12 week property disregard]. Deferring payment of these costs can help a person to delay the need to sell their home at a time that can be challenging (or even a crisis point) for them and their family as they make the transition into residential care”⁴⁰. The agreements can also help those that are trying to sell their home, but are finding it difficult to find a buyer.

Local authorities should suggest to people that they may **“want to consider taking independent financial advice prior to entering into a deferred payment agreement”**⁴¹.

Note: Information and advice regarding deferred payment agreements

As mentioned above in section 2.5, the *Social Services and Well-being (Wales) Act 2014* places duties on local authorities to provide information and advice services relating to care and support. This includes the provision of information “in relation to the availability of deferred payment agreement[s]”.

The authority must advise people “who may benefit from or be eligible for a deferred payment agreement...about [how the] agreements operate”; “set out clearly which care costs would be deferred and make clear that they must still be repaid at a later date”⁴².

If someone is considering entering into a deferred payment agreement, local authorities should also draw their attention to considerations such as, how will they “plan to use, maintain and insure their property [during the course of the agreement]; that is whether they wish to rent it out, prepare it for sale, or leave it vacant for a period”. Additionally, the authority “should advise if it intends to place conditions on how the property is maintained or used whilst any agreement is in place”⁴³.

⁴⁰ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

11.2 How the deferred payment agreement will work

When entering into a deferred payment agreement, the local authority will calculate how much you would be able to contribute towards the cost of your care, as if your property didn't exist (or was disregarded in the means test) – i.e. the authority would work out how much you could afford to pay towards the overall care home fee, based on your level of readily available income, such as your State and/or private pensions (this is usually referred to as someone's 'assessed contribution'⁴⁴).

The local authority will then make up the difference between your assessed contribution and the contract price it has agreed with the home for your care. Thus, it will be all of these weekly/monthly contributions from the local authority added together – that they would not otherwise have had to make, had the capital from your property been available to you – that will need to be repaid at a later date when your property is sold.

The local authority must provide a hardcopy of the deferred payment agreement to any service user that decides to enter into such an agreement.

Placing a charge on the property

With your agreement, the local authority will usually place a legal charge on your property for the purpose of securing repayment of the deferred amount at a later date.

Note: “In cases where there are more than one owner, the authority must seek such consent (and agreement) from all owners [in regard to placing a charge on the property]. All owners will then need to be signatories to the charge agreement and where there are co-owners, they will need to agree not to object to the sale of the property for the purpose of repaying the required amount”⁴⁵.

⁴⁴ See Age Cymru's Factsheet 10w *Paying for a permanent care home placement in Wales* for general information on how local authorities work out assessed contributions for service users.

⁴⁵ Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment), Welsh Government (version 3 – April 2018)

Making sure that the care home resident is allowed to retain capital that they are entitled to

Local authorities must ensure that the person does not use up too much of their capital and are not left with less than the charging regulations specify they are allowed to keep – i.e. capital up to the level of the capital limit, which the Code of Practice guidance confirms should not be put towards care home fees:

Authorities must “reassess the value of the...property used as security once the amount deferred exceeds 50% of the security (and periodically thereafter), and consider this amount against the level of the capital limit so as to ensure a person is left with at least the level of the capital limit equity in their property⁴⁶.

11.3 Interest charged on deferred payment agreements

Since April 2016, local authorities have been able to charge interest throughout the **whole period** of a deferred payment agreement. The Welsh Government’s guidance advises that:

“Deferred payment agreements are intended to operate on a cost-neutral basis, with local authorities able to recover the costs associated with deferring a person’s care costs by charging interest should they wish to do so”. This is “to cover the cost of the agreement and the financial risks to local authorities associated with lending”⁴⁷.

Interest cannot exceed a certain amount

Where local authorities charge interest, it cannot exceed a certain amount (the hardcopy of the deferred payment agreement which service users are provided with – see above – should provide details about the interest charged). The Welsh Government’s regulations explain that:

⁴⁶ Ibid

⁴⁷ Ibid

“The national maximum interest rate an authority can charge is 0.15% above the “relevant rate”. The relevant rate will change every six months on 1st January and 1st July to track the market gilts rate specified in the most recently published report by the Office of Budget Responsibility. The market gilts rate is currently published in the “Economic and fiscal outlook”, which is usually [released] twice-yearly on the Office of Budget Responsibility’s website: <http://budgetresponsibility.org.uk/>”.

“The market gilts rate is shown near the bottom of the table entitled “Determinants of the fiscal forecast” included in each published outlook. Local authorities **must** ensure that any changes to the national maximum rate are applied to any agreements they have entered into (unless they are already charging less than the national maximum). Individual agreements must also contain adequate terms and conditions to ensure that the interest rate within any given agreement does not exceed the nationally-set maximum”⁴⁸.

11.4 Can the local authority refuse to offer a deferred payment agreement?

Generally speaking, the authority should offer a deferred payment agreement to anyone who has been assessed as requiring a care home placement to meet their needs and who doesn’t have other financial resources over and above the value of their property which would be sufficient to allow them to meet the full care home fee.

However, there are some instances where the local authority will be justified in refusing a deferred payment request, such as:

⁴⁸ Ibid

- Where an authority “is unable to secure the consent of another person with an interest in the property to placing a charge on it”.
- As mentioned above, where “a person’s capital, other than the value of the property, is above the capital limit” – or where they have a particularly high weekly income – “so that they are able to afford the full cost of the residential accommodation without the need for an agreement”.
- A care home resident will “not agree to the terms and conditions of the deferred payment agreement [as presented to them by the authority]. This might be, for example, failing to meet a condition that the person insures and maintains the property in good order”⁴⁹.

11.5 Deferred payment agreements and ‘First party additional cost payments’

Note: If you have chosen a care home that is more expensive than the local authority would normally pay for someone with your assessed needs, it must still make the arrangements for you in that home as long as someone else can make up the difference between that figure and the home’s fee by making a third party contribution (also known as ‘top-ups’).

In certain circumstances, however, the care home resident themselves can make up the difference – essentially a ‘self top-up’, though the Welsh Government’s guidance refers to them as a ‘first party additional cost payment’. One of the scenarios where self top-ups are permitted is where the care home resident has entered into a ‘deferred payment agreement’ – see below.

Age Cymru’s Factsheet 10w *Paying for a permanent care home placement in Wales* and 60w *Care homes in Wales: choice of accommodation when the local authority is assisting with funding* have more information, in general, on top-ups.

A self top up can be made where you have signed up to a deferred payment agreement with the authority, using disregarded earnings, income and capital.

⁴⁹ Ibid

You may also be able to use the value of the property that is subject to the deferred payments agreement, with the proviso that you must be left with total capital resources to the value of the capital limit and that where the value of the property is used as “collateral” for top-ups, the amount of the top-up is added to your deferred contributions.

The local authority has discretion over whether a deferred self top-up can be allowed in your circumstances.

Usually it will consider whether you are likely to be able to meet the full cost, including the top-up, for the duration of your placement from your income and capital (including the value of your property) without needing to turn to the local authority for financial assistance in the future (or as the Code of Practice guidance puts it, “the local authority [will] consider whether the total amount being requested as a deferred payment agreement is appropriate for the value of the security to be used for the agreement”).

11.6 If the care home resident dies whilst the deferred payment agreement is in operation

The Code of Practice guidance contains advice on this issue, as follows:

“If the deferred payment is terminated due to the person’s death, the amount due to the local authority must be either paid from the estate or paid by a third party. A person’s family or a third party can settle the debt to the local authority by other means of repayment if they wish, so as to avoid selling the property against which the deferred payment agreement had been secured. Where they do, the local authority **must** accept an alternative means of payment in this case, provided this payment covers the full amount due to the local authority. The executor of the will or Administrator of the Estate can decide how the amount due is to be paid”⁵⁰.

⁵⁰ Ibid

12 ‘Deprivation of assets’ and the financial means test for care home charging

What is meant by deprivation of assets?

If you give away assets, or otherwise dispose of them, in order to put yourself into a more favourable position to get local authority assistance with your care home fees, the local authority may be able to assess you as if you still have the assets.

Welsh Government guidance to local authorities suggests that the **timing and motive** behind the transfer should be taken into account – for example, there could be other motives for transferring an asset and in order for it to amount to deliberate deprivation, the intention to avoid accommodation charges must be a significant part of the reason for taking this action.

In relation to this, the timing is likely to be a big factor in establishing a motive because – for example:

“At the point the capital was [transferred or] disposed of could the person have had a reasonable expectation of the need for care and support, even if at this point they were not yet receiving this”. Also, would “the person have had a reasonable expectation of needing to contribute towards the cost of this either now or at some future point”? Authorities are advised that it would be unreasonable for them “to decide that deprivation had occurred where if at the time the disposal took place [the care home resident] were fit and healthy and could not have foreseen any need for care and support in the foreseeable future”⁵¹.

Note: The local social security office can **also** consider whether assets were disposed of deliberately to qualify for means-tested benefits such as Pension Credit.

⁵¹ Ibid

If the local authority determines that deprivation of assets has occurred

If the authority, having taken into account the other possible reasons for the transfer of an asset, determines that deprivation of assets has occurred, then – as touched upon above – it will “treat the asset as notional capital...in the person’s financial assessment **as if the deprivation had not occurred**” (emphasis added)⁵².

As such, the resident will be expected to contribute towards their care fees in line with what they would have been assessed as being able to pay, had they still actually been in possession of the asset. If a debt to the authority occurs as a result, it can take action to recover this.

Under the *Social Services and Well-being (Wales) Act*, where someone has transferred an asset to a third party (a ‘transferee’) as an act of deliberate deprivation, the **transferee will be liable** to pay the local authority the difference between the fees it has received from the care home resident and what the resident would have paid in total had the transfer not taken place.

Note: Deprivation can also occur in regard to **income**. For example, someone “could give away or sell the right to an income from an occupational pension”⁵³.

Further information about intentional deprivation and the impact which this could have on you, or the person(s) to whom you have given assets, is contained in Age Cymru’s Factsheet 40w *Deprivation of assets in the means test for care home provision in Wales*.

13 Local authority powers to collect debts

If you are unwilling to pay your assessed contribution either now or in the future – and own a property that is not eligible to be disregarded – the local authority can take court action, so as to create a ‘legal charge’ against the value of the property. By doing this, they can reclaim the money when the property is sold.

⁵² Ibid

⁵³ Ibid

Note: The above relates to scenarios where a person is knowingly **unwilling** to pay their assessed contribution to their care home fees. The Welsh Government’s guidance does stress to local authorities that this might not always be the reason for a debt accruing:

“Where a person accrues a debt the local authority should take all reasonable steps to ascertain the reason this has occurred and must not assume that the person is deliberately not meeting a charge imposed for care and support [and] only where it is clear that it is as a result of a person’s deliberate non-payment should they consider [formal] debt recovery [routes]”.

Also, “when designing its system for debt recovery, local authorities should be aware of the client group with which they are dealing”. For example, this may be people “with a physical or sensory impairment [and/or] older frail people. All debt recovery systems must therefore be designed with a full understanding of the needs and characteristics of these clients given that financial assessment and charging processes can be confusing and complex. The recovery of debt from those in this situation is therefore a sensitive issue given their potential vulnerability and a local authority’s ultimate responsibility to meet needs”⁵⁴.

14 Useful organisations

Age Cymru organisations (local)

Your local Age Cymru may be able to provide advice and support on various issues around care home provision. They may also operate an advocacy service.

- Telephone Age Cymru Advice on **08000 223 444**;
- E-mail: **advice@agecymru.org.uk**; or
- visit the Age Cymru website: **www.agecymru.org.uk**

⁵⁴ Ibid

Care Inspectorate Wales (CIW)

CIW inspects and regulates care and social services in Wales.

Tel: 0300 7900 126

E-mail: ciw@gov.wales

Website: www.careinspectorate.wales

Carers UK

A national charity providing information, advice and practical and emotional support for carers.

Advice Line: 0808 808 7777

Carers Wales: 029 20 811370

Website: www.carerswales.org

Citizens Advice Bureaus (CABs)

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

Tel: 03444 77 20 20

Details of your nearest CAB can be found at: www.citizensadvice.org.uk

Elderly Accommodation Counsel (EAC)

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

EAC FirstStop Advice: 0800 377 7070

E-mail: info@firststopadvice.org.uk

Website: www.eac.org.uk

Older People's Commissioner for Wales

Independent champion for older people across Wales.

Tel: 03442 640670

E-mail: ask@olderpeoplewales.com

Website: www.olderpeoplewales.com

Public Services Ombudsman for Wales

The Ombudsman looks to see whether people have been treated unfairly or have received a bad service from a public body, such as the NHS or local authority social services department.

Tel: 0300 790 0203

Website: www.ombudsman-wales.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

E-mail: info@relres.org

Website: www.relres.org

Welsh Government

The devolved government for Wales.

Tel: 0300 060 4400

E-mail: customerhelp@gov.wales

Website: www.wales.gov.uk

15 Further information about Age Cymru

Age Cymru is the leading charity for all older people in Wales. We campaign, we research and we fundraise to make sure we build a better life for all older people. We ensure older people's voices are heard, we challenge and change attitudes, we fight discrimination wherever we find it and we tackle elder abuse in all its forms. Together with our local Age Cymru partners we provide vital services in communities across Wales.

The Age UK family

Along with Age UK, Age Scotland and Age NI, Age Cymru is a member of the Age UK family.

Age UK (Age UK Advice: 0800 169 65 65; website: www.ageuk.org.uk)

Age NI (Age NI Advice: 0808 808 7575; website: www.ageni.org)

Age Scotland (Tel: 0845 833 0200; website: www.agescotland.org.uk)

Our information materials

Age Cymru and Age UK publish a large number of free Information Guides and Factsheets on a range of subjects, including money and benefits, health, social care and housing. Some resources, such as this factsheet, are produced 'in-house' by Age Cymru, whilst others are branded Age UK and – depending on the subject matter – contain either information which is applicable in England and Wales, or for the whole of the UK.

Contact details

Age Cymru Advice

Tel: 08000 223 444

E-mail: advice@agecymru.org.uk

Website: www.agecymru.org.uk



www.facebook.com/agecymru



www.twitter.com/agecymru



www.youtube.com/agecymru

Contact us if you would like:

- To order copies of any factsheets or information guides.
- Further advice if you cannot find the information you need in this factsheet.
- Details of your nearest local Age Cymru organisation.

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Can you help Age Cymru?

Please complete this donation form with a gift of whatever you can afford and return to: Age Cymru, FREEPOST RLTL-KJTR-BYTT, 13/14 Neptune Court, Vanguard Way, Cardiff CF24 5PJ. Alternatively, you can phone 029 2043 1555 Monday to Friday 9am – 5pm or visit www.agecymru.org.uk/donate. Thank you.

Personal details

Title:	Initials:	Surname:
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Tel:	Email:
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I wish to pay by (please tick) MasterCard Visa CAF CharityCard

Maestro American Express

(Maestro only)

<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	Signature X
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(please tick) Yes, I want Age Cymru to treat all donations I have made for the four years prior to this year, and all donations I make from the date of this declaration until I notify you otherwise, as Gift Aid donations. I confirm I pay an amount of income tax/capital gains tax to cover the amount that all charities and Community Amateur Sports Clubs will reclaim on my donations in the tax year. Date: ___/___/___
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