

Factsheet 40w ● June 2018

# Deprivation of assets in the means test for care home provision in Wales



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# 1 Information about this factsheet

This factsheet looks at the rules regarding deprivation of assets in the local authority means test for care home provision.

It focuses on capital, but the same principles exist for income.

It should be read in conjunction with Age Cymru's other factsheets on care home funding, particularly Factsheet 10w *Paying for a permanent care home placement in Wales*.

Deprivation of assets may **also** become an issue for:

- non-residential care and/or
- means-tested welfare benefits.

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**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 12 for their contact details.

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## 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.

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## 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](http://www.gov.wales/topics/localgovernment/unitary-authorities)

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### '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 11 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 homes<sup>1</sup>;
- 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 Background – obtaining help from your local authority and the financial means test for care home provision

This section provides a basic background to care home charging in general, before focussing – in the subsequent sections – on the specific issue of deprivation of assets and the potential effects of this in relation to the means test for permanent care home provision.

For information on the charging procedures as a whole, see Age Cymru's Factsheet 10w *Paying for a permanent care home placement in Wales*.

### 2.1 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.**

**The authority must use national eligibility criteria to make this decision.**

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<sup>1</sup> 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

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*.

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**Note:** 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.

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

Most people who have been assessed as needing a care home will be expected to pay something towards the costs of their accommodation and personal care. Your **income**, **savings** and other **capital or assets** will generally be taken into account in determining how much you should contribute<sup>2</sup>.

When conducting a financial assessment of 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](http://www.socialcare.wales/hub/sswbact-codes)**

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<sup>2</sup> 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. For information on disregards (for either income or capital), see Age Cymru's Factsheet 10w *Paying for a permanent care home placement in Wales* and 38w *Treatment of property in the means test for permanent care home provision in Wales*

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**Note:** The above guidance – in section 2 of Annex F – **also** contains the information for local authorities in regard to deprivation of assets, including identifying possible deprivation and the processes to be followed where deprivation has occurred.

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## 2.3 The capital limit

There is a ‘capital limit’ in regard to the assessment of assets and/or savings in the local authority means test. This will determine whether or not someone will be expected to meet the **full cost** of their care home placement.

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 would be able to get assistance towards your care home fees from your local authority<sup>3</sup>.**

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<sup>3</sup> It should be noted that although you do not have to make any contribution towards care home fees from your capital below £40,000, you will *still* be expected to contribute from your day to day income – for example, your State Pension, or occupational/private pension. After doing so, you will be able to keep a small amount of money for spending on personal items that are not part of your care and support package (known as the ‘minimum income amount’) - Age Cymru’s Factsheet 10w *Paying for a permanent care home placement in Wales* has further information.



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**Note:** If you own your own home it will often be included as capital in the means test for a permanent care home placement. Whether or not it will be can be depend on who – if anyone – will remain living there once you have moved into a care home. For example, the value of the property will be disregarded in the means test if it will continue to be occupied by your partner, though there are also other potential disregards, be they mandatory ones that the local authority has to offer, or discretionary disregards – see Age Cymru’s Factsheet 38w *Treatment of property in the means test for permanent care home provision in Wales* for further details.

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## 2.4 Local authority duties in regard to information & advice and advocacy

The *Social Services and Well-being (Wales) Act 2014* placed new duties on local authorities to provide “information, advice and assistance...relating to care and support”<sup>4</sup>. This would include information and advice on various issues around arranging and paying for care.

The Act also contains new 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 in regard to discussions on services to be provided and how you will be charged, then an advocacy service may be of help. In many instances, the duties that fall on the local authority will be to make people aware of the availability of advocacy support, should they wish to utilise this. Alternatively, in other situations the authority will have a specific duty to “arrange an independent professional advocate” for someone<sup>5</sup>.

Age Cymru’s other factsheets, 41w *Social care assessments for older people with care needs in Wales* and 10w *Paying for a permanent care home placement in Wales*, have further information on this topic.

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<sup>4</sup> Social Services and Well-being (Wales) Act 2014: Part 2 Code of Practice (General Functions), Welsh Government

<sup>5</sup> Social Services and Well-being (Wales) Act 2014: Part 10 Code of Practice (Advocacy), Welsh Government

## 3 Deprivation of assets and the financial means test for care home provision

### 3.1 Introduction

You may want to pass on savings or other capital to children or others during your lifetime – however you should be aware that it can affect:

- your eligibility for local authority assistance towards the cost of care fees; plus
- your eligibility for means tested welfare benefits, such as Pension Credit.

When assessing a resident's eligibility for assistance with their care home costs, the local authority can look for evidence of deliberate/intentional deprivation of capital or assets (such as a property).

Transferring an asset, savings or money out of your name (or otherwise disposing of them by a different method), does not necessarily mean that they won't be taken into account in a means test – i.e. the local authority may be able to assess you **as if you still have the assets**.

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**Note:** The Department for Work and Pensions (DWP) will also be able to do this in regard to determining whether you are eligible for means tested welfare benefits.

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### 3.2 What is deprivation of assets?

**Deliberate deprivation occurs when an individual transfers an asset out of his/her possession (or otherwise disposes of it) in order to put themselves in a better position regarding the means test for care home accommodation – i.e. to make it more likely that they will qualify for local authority assistance towards the costs.**

Again, in regard to means tested benefits, the situation is very similar: deliberate deprivation may occur where an individual gives up an asset in order to make it more likely they will qualify for the benefit.

'Deliberate' is emphasised above, as there can be *other* reasons for transferring or disposing of an asset, savings or money, that are not motivated by an intention to avoid care charges – see section 4 and 5 below.

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

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### 3.3 Deprivation of income?

The main focus of this factsheet is on possible deprivation of **capital**. However, the Code of Practice charging guidance (see section 2.2 above) *also* allows a local authority to use its discretion to assess whether eligible **income** has been deliberately removed from the reach of the means test.

For example, someone "could give away or sell the right to an income from an occupational pension"<sup>6</sup>.

Also see section 8 below for further information.

## 4 The Code of Practice guidance and deprivation of assets

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**Note:** References to the 'Code of Practice' in this, and the following sections of the factsheet, should be read to mean the *Social Services and Well-being (Wales) Act 2014: Part 4 and 5 Code of Practice (Charging and Financial Assessment) (version 3 – April 2018)*.

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### 4.1 Examples in the Code of Practice

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

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<sup>6</sup> 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)

- A lump-sum payment, such as a gift, has been made to someone else.
- Transferring the title deeds of a property to someone else.
- Putting money/assets into a trust that cannot be revoked.
- Converting money into another form that is usually disregarded from the means test – for example, expensive personal possessions.
- Reducing capital through “living extravagantly” – for example, substantial expenditure on items such as luxury holidays, “buying an expensive sports car”, or by generally following a much higher standard of living than the person would normally have been able to afford (for example, “substantial expenditure has been incurred suddenly and is out of character with previous spending”).
- In some instances, the use of capital “to purchase an investment bond with life insurance”<sup>7</sup>.

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**Note:** Other courses of action, such as selling an asset for less than its true value, may also be seen as deprivation. The list provided in the Code of Practice guidance is not an exhaustive one.

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## 4.2 Repayments of debts

The Code of Practice guidance provides the following advice in regard to paying off debts and deliberate deprivation of capital:

“Where an asset has been used by a person to meet any debt that would otherwise remain, even if that is not immediately due, this **must not** be considered as deprivation but as a normal use of financial resources by a person to meet expenses”<sup>8</sup>.

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<sup>7</sup> Ibid

<sup>8</sup> Ibid

## 4.3 Other reasons for disposing of assets?

Disposal of assets is not necessarily carried out to avoid a charge for accommodation or to gain assistance sooner than would otherwise have been the case. The local authority has to show that this **intention** was there before it can take transferred capital into account<sup>9</sup> – see section 4.4 below.

The Code of Practice recognises that, generally, people with care and support needs are “free to spend their income and use their capital assets as they see fit, including making gifts to friends and family [and this can be] important for promoting their well-being and enabling them to live independent lives”.

However, it is then stressed that “**while this is the case it should not be done deliberately to avoid charges all together or to reduce their liability for charges due to reduced financial means**” (emphasis added)<sup>10</sup>.

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**Note:** The guidance doesn't specify what would be a legitimate gift to, say, a family member and not amount to deprivation, but it could be that this would be gifts of relatively low value for someone's birthday, for example – whereas, a large lump sum would be a lot more likely to be viewed as a deliberate attempt to avoid, or reduce, care fees.

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## 4.4 When is deprivation deliberate – the question of ‘intention’, ‘motive’, ‘timing’ and ‘foreseeability’

The Welsh Government guidance to local authorities suggests that the *timing* and *motive* behind a transfer of assets by a care home resident (or prospective resident) should be taken into account – for example, as discussed above, there could be other motives for transferring an asset, so 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.

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<sup>9</sup> The same would also be the case in regard to means tested welfare benefits and decision makers at the Department for Work and Pensions (DWP)

<sup>10</sup> 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 **timing** of a particular action is likely to be a big factor in establishing the **intention** and/or  **motive**. For example, at the point that 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”<sup>11</sup> (in other words could it be said that it was obviously **foreseeable** to the person that they were going to require care in the near future).

In addition to the above, the Code of Practice stresses that local authorities would also need to consider whether “the person [would] have had a reasonable expectation of *needing to contribute towards the cost* of this [care] either now or at some future point” (emphasis added). In other words, did the person make “a conscious decision to [transfer or dispose of an asset] *in the knowledge that to do so would have such an effect [of reducing] their charge*” (emphasis added).

The Code of Practice guidance to local authorities concludes that “**it would be unreasonable to decide that deprivation had occurred where if at the time the disposal took place they were fit and healthy and could not have foreseen any need for care and support in the foreseeable future**”<sup>12</sup>.

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**Note:** There are **no set time limits** beyond which a local authority has to ignore transfers of assets. However, it may be more difficult for a local authority to argue that deliberate deprivation has occurred the further back a transaction took place – for example, would someone have *foreseen* their need for care if the action took place quite a long time in the past. However, it is not a black and white issue and, depending on circumstances, the local authority may still believe that the *intention* was to reduce care costs in the future. The authority would need to view each case on an individual basis.

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<sup>11</sup> Ibid

<sup>12</sup> Ibid

## 5 Examples of where a local authority may find deliberate deprivation has taken place

The Welsh Government's Code of Practice does not contain any hypothetical examples of situations where deprivation of assets would be suspected by a local authority. However, equivalent guidance for authorities in England contains the following two examples (although care home charging rules in England and Wales are based on different legislation – the *Care Act 2014*, rather than the *Social Services and Well-being (Wales) Act 2014* – the rules on deprivation of assets are essentially the same, so these examples should have equal validity for the situation in Wales):

- “Emma gives her daughter Imogen a painting worth £2,000 the week before she enters residential care. The local authority should not consider this as deprivation as the item is a personal possession and would not have been taken into account in [her] financial assessment. **However**, if Emma had purchased the painting *immediately prior* to entering residential care to give to her daughter with £2,000 previously in a savings account, deprivation **should** be considered” (emphasis added).
- “Mrs Kapoor has £18,000 in a building society and uses £10,500 to purchase a car. Two weeks later she enters a care home and gives the car to her daughter Juhie. If Mrs Kapoor *knew* when she purchased the car that she would be moving to a care home, then deprivation **should** be considered. However, all the circumstances must be taken into account so if Mrs Kapoor was admitted *as an emergency and had no reason to think she may need care and support when she purchased the car*, this should **not** be considered as deprivation”<sup>13</sup> (emphasis added).

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<sup>13</sup> Care and Support Statutory Guidance: Issued under the Care Act 2014, Department of Health

## 6 Case law regarding deprivation of assets

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**Note:** Case law has offered differing interpretations of what is required for local authorities to show that deliberate deprivation has occurred. It should be noted that the two cases outlined below pre-date the introduction of the *Social Services and Well-being (Wales) Act 2014* which covers care home charging in Wales (and also pre-date more recent legislation in England). The cases can still be said to be useful information in regard to the current situation, however, as the general principles on deprivation of assets have not changed with the new legislation.

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### Yule v South Lanarkshire Council (1999)

In this case, Mrs Yule had transferred her property to her granddaughter a year before any significant deterioration in her health. There was no evidence that Mrs Yule was aware of the capital limit and charging rules when the transfer was made. However, the judge came to the conclusion that it was legitimate for the local authority to make a decision based on the information available to it, and so draw a reasonable inference about the resident's intentions without necessarily having **specific evidence** about them.

In other words, the local authority was not required to have to prove Mrs Yule's exact level of knowledge on the charging system, or intention behind the transfer, as long as it seemed 'reasonable' – given the background circumstances – to conclude that avoidance of care charges must have been, at least in part, a motivation behind the actions taken. This judgement was also later upheld (though the approach was questioned in a later case – see **Beeson v Dorset County Council** below).

In the judge's summing up of the Yule case, it would appear that timing was not seen as the paramount issue – rather, the main question was whether it was likely that any other 'reasonable' council in that scenario would also be of the opinion that 'deprivation of capital' had occurred.

The judge indicated that a significant factor in allowing the council to legitimately argue that deprivation had taken place was the absence of a reasonable explanation from Mrs Yule and her family as to why the property was transferred at that specific time.



For example:

**“there was no suggestion of pressing need [to be allocated the property] on the part of Miss Yule [the granddaughter]”. Therefore, the judge took on board the council’s argument that Mrs Yule could have instead achieved the same end result – i.e. giving the property to her granddaughter – through “making a will in [her] favour”<sup>14</sup>.**

Furthermore, the Yule judgement sought to argue that deprivation of assets in regard to the care home financial assessment/charging regulations should be looked at differently to deprivation in regard to means-tested social security benefits because:

“the purpose of the individual [that is, the decision to take actions to reduce/avoid care costs] may have formed possibly some time ahead of the prospect that he or she might require to enter such residential accommodation”<sup>15</sup>.

**In conclusion, in this case, the local authority were able to take account of the value of Mrs Yule’s former property in the financial means test for her care home placement.**

### **R (Beeson) v Dorset County Council (2002)**

**It can be argued that the Yule decision, however, is inconsistent with a later decision made in the English High Court, *Beeson v Dorset County Council*.**

In this case:

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<sup>14</sup> A copy of the ruling can be found at:  
[www.scotcourts.gov.uk/search-judgments/judgment?id=6d7d87a6-8980-69d2-b500-ff0000d74aa7](http://www.scotcourts.gov.uk/search-judgments/judgment?id=6d7d87a6-8980-69d2-b500-ff0000d74aa7)

<sup>15</sup> Clements, L and Thompson, P (2011). *Community Care and the Law* (5<sup>th</sup> edition), Legal Action Group.

“Mr Beeson senior transferred his house to his son by deed of gift, his stated reason being that he wished to ensure his son had a home if he needed it following the breakdown of his marriage. He then continued to live in the house for two years before being assessed by the council as being in need of residential care. His wish had been to live at home as long as possible and to die there. He returned home after several spells in hospital and received home care. At the time of the transfer, social services had not mentioned the possibility of residential care being required, but the council took the view that residential care was an inevitability and that this was the motive in making the transfer [and therefore a deprivation of capital had occurred]”. Accordingly, the authority sought to treat “the house as notional capital”<sup>16</sup> (see section 7.1 below for further information on the concept of notional capital).

However, the authority’s decision was challenged and in the course of examining this challenge, the judge questioned the approach adopted in Yule, stating that:

**“Although the court [in the Yule case] 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 [i.e. their transaction having the purpose of avoiding care charges] unless he was aware of the possibility that he might be provided with accommodation and that he might be liable to pay for it”<sup>17</sup>.**

The judge distinguished the Beeson case to that of Yule “due to the existence of evidence from [Mr Beeson’s] family about his and their state of mind at the relevant time” which added weight to the argument that the purpose behind the transfer was not to reduce liability for care charges and, therefore, was not deliberate deprivation<sup>18</sup>. The local authority was also criticised for rejecting evidence provided by Mr Beeson’s son without sufficient explanation. The authority’s “decision was therefore quashed and had to be reconsidered”<sup>19</sup>.

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<sup>16</sup> Clements, Luke (2017). Community Care and the Law (6<sup>th</sup> edition), Legal Action Group.

<sup>17</sup> Beeson v Dorset County Council, cited in Winfield, H and Vaux, G (2009). Paying for care handbook: A guide to services, charges and welfare benefits for adults in need of care in the community or in care homes (6<sup>th</sup> edition), Child Poverty Action Group

<sup>18</sup> Ibid

<sup>19</sup> Clements, Luke (2017). Community Care and the Law (6<sup>th</sup> edition), Legal Action Group.

**Local authorities should be able to provide adequately reasoned decisions – including the justification for rejecting any evidence, particularly if other evidence *is* accepted.**

## **7 What will the local authority do if deliberate deprivation of assets is decided?**

Where deliberate deprivation has taken place, the local authority has two main options for obtaining the care fees that the care home resident should be paying:

- “Charge the person as if they were still in possession of the asset” (through the inclusion of ‘notional capital’ in their financial means test – see section 7.1 below); **or**
- “seek to recover the lost income” (from charges that the care home resident would otherwise have paid) **from the person that an asset was transferred to** – see section 7.2 below.

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**Note:** If necessary, with both of the scenarios outlined above, the local authority may be able to take legal action to obtain outstanding charges, if someone was unwilling to pay their contribution – see section 7.3 below.

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### **7.1 Inclusion of notional capital in the means test**

For the purposes of the care home charging financial means test, if you are found to have deliberately deprived yourself of capital, you will be treated as having ‘**notional capital**’ equivalent to the value of the capital which has been disposed of. Therefore, how much you should contribute towards your care fees will be assessed accordingly – that is, 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.**

The local authority would then need to decide how they will go about obtaining any care charges that they are owed. If a debt to the authority occurs as a result, it can take action to recover this – see section 7.3 below.

If the notional capital added to your *actual* capital comes to more than **£40,000**<sup>20</sup>, the local authority may assess you as being able to meet the full cost of your care (i.e. self fund<sup>21</sup>), even though your actual capital is less than the capital limit.

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**Note:** Should you want to claim a means tested welfare benefit, such as Pension Credit, the Department for Work and Pensions (DWP) may also assess you as having notional capital, in a similar way.

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### Diminishing notional capital

Having included notional capital in your finances, the local authority will apply 'diminishing notional capital rules' to work out when you should become eligible for funding in the future.

The local authority treats notional capital as reducing each week by the difference between the amount the resident has to pay for the accommodation and the amount they would have paid if they were not being treated as having notional capital.

## 7.2 Local authority powers to pursue the person to whom an asset has been transferred

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.**

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<sup>20</sup> This is the current capital limit; it tends to be reviewed annually, so may change in April 2019 – also see section 2.3 above

<sup>21</sup> It may be worth noting here, that even though they must meet all of the care costs themselves, self funders do have the right to ask the local authority to arrange their care. This right has been in place since April 2016 (previously, the local authority only had a responsibility to arrange a care home placement for someone who was in a position to fully self fund if they lacked the capacity to do so themselves).

“If the person has transferred assets to more than one transferee, each of those people is liable to pay the local authority the difference between what it would have collected and what it did collect in charges as a result of the transfer, in proportion to the amount they received”<sup>22</sup>.

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**Important:** Under previous legislation (and as detailed in the Welsh Government’s old guidance to local authorities based upon this), an authority could only pursue the third party for the costs if the transfer took place within the last six months prior to the resident’s admission to the care home (though the six-month limit only applied to this particular power of recovery – the authority could still use other routes).

In the Code of Practice guidance to support the *Social Services and Well-being (Wales) Act*, **there is no mention of any time limit in regard to pursuing the transferee.**

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### 7.3 Local authority actions to obtain care charges – powers of enforcement/recovery

#### Powers afforded by the Social Services and Well-being (Wales) Act

In situations where deliberate deprivation of assets has taken place and, as a result, outstanding care costs are owed to the local authority, the authority should at first seek to recover the costs, as outlined above, at the beginning of section 7.

Assuming that the people concerned – be it the care home resident (via notional capital arrangements), or the transferee – agree to the contributions that the authority has indicated they should make, then there should be no need for any powers of enforcement or recovery to be invoked. However, in particular circumstances this option will be available to authorities.

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<sup>22</sup> 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 Code of Practice guidance explains this issue as follows:

“As with any other debt, the local authority can ultimately use the courts to recover debts should they wish, but this **should only** be used *after* other avenues of securing the debt have been exhausted”<sup>23</sup> (emphasis added).

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**Note:** Authorities are also cautioned that they should be mindful “of the client group with which they are dealing. Unlike council tax or rent arrears debt, a local authority is not dealing with a potentially healthy general population but those with a physical or sensory impairment, or potentially older frail people”. Hence in considering potential cases of deprivation local authorities should bear in mind “the needs and characteristics of these clients given that financial assessment and charging processes can be confusing and complex. The recovery of a [resultant] 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”<sup>24</sup>.

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### Other recovery routes

As an alternative to powers within the Social Services and Well-being (Wales) Act, the Code of Practice advises that:

“Local authorities may also want to consider other options that may be available to them in the recovery of debts. For example, *Section 423* of the *Insolvency Act 1986* provides additional routes to recover debts where a person may have transferred or sold their assets to a third party at a price that is lower than the market value. This is with the intention of putting those assets out of reach or, or prejudicing the interests of, someone who may wish to bring a claim against that person. In considering such options, a local authority **should** obtain its own legal advice”<sup>25</sup>.

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<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> Ibid

## 8 What will the local authority do if deliberate deprivation of income is decided?

Similarly to notional capital – as outlined in section 7.1 above – if a local authority “considers that a person [has] deprived themselves of income, they may treat them as possessing notional income for the purposes of a financial assessment”<sup>26</sup>.

The Code of Practice guidance also advises local authorities that “in some circumstances...income may have been converted into capital”. Therefore they “should consider the level of the capital limit and whether the subsequent change made a material change to the charge which was imposed for the person’s care and support”<sup>27</sup>.

## 9 Other issues regarding transfers of assets – additional issues beyond care home funding, including potential unintended consequences of making a transfer

The nature of the rules on deliberate deprivation of assets means that it is **not** possible to predict with certainty whether the local authority will raise the issue during any future financial means test; also, they will not usually advise you *beforehand* how they might treat a particular transfer at a later time<sup>28</sup>.

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<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> The same will also be the case in regard to the Department for Work and Pensions (DWP) and means tested benefits, such as Pension Credit

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### Note: Legal advice

It is advisable to seek legal and financial advice before transferring an asset. Age Cymru cannot provide advice about this area of law. The *Law Society* produces guidance for solicitors on gifts of property and the implications for long-term care which you can view at the following link. If you consult a solicitor **you may wish to establish that they are aware of these guidelines:**

[www.lawsociety.org.uk/support-services/advice/practice-notes/making-gifts-of-assets](http://www.lawsociety.org.uk/support-services/advice/practice-notes/making-gifts-of-assets)

The Law Society website also contains a database where you can search for solicitors based on specialist areas of expertise and location – see section 11 below for contact details.

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## 9.1 Issues for the present owner to consider

Many older people do not require long-term care in a care home. Quite apart from the issues surrounding care home funding discussed above, **transferring assets to another person could potentially have significant consequences even if you do not subsequently need to enter a care home.**

Some potential issues below apply specifically if you are considering whether to transfer your home. Others apply to the transfer of *any* capital asset. For example:



- Once an asset has been transferred out of your name you no longer have any control over it and it is not always possible to rely on the new owner acting in accordance with your wishes.
- You would also need to consider how you might be affected if disagreements arise in the future (for example disputes amongst family members), or if circumstances change unexpectedly (such as by marriage, the birth of a child, divorce or death).
- You may at some point want to move from your current property to somewhere more suitable (perhaps for health reasons, or to a smaller property that is easier to maintain). 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, dies or uses the property as security for a loan, your position may be affected.

## 9.2 Issues affecting the new owner of an asset

There may also be issues for a potential new owner/s to consider:

- 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 at the outset.
- Any means-tested benefits the new owner receives, such as Income-based Jobseekers Allowance, Income-related Employment and Support Allowance, Pension Credit, Housing Benefit or an award from the local authority's Council Tax Reduction Scheme, 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.

## 10 Disputing a decision / making a complaint

If you do not agree with a decision made by a local authority about deprivation of assets, you can request to have the decision reviewed and, if necessary, use the **local authority complaints procedure**. Details of this procedure should be available on request from the local authority.

Ultimately, you could take your complaint to the *Public Services Ombudsman for Wales* (see section 11 below for contact details) if you have used the local authority's complaints procedure, but still remain unhappy with the response received.

For further information, Age Cymru's Factsheet 41w *Social care assessments for older people with care needs in Wales* contains a section on making complaints.

## 11 Useful organisations

### Age Cymru organisations (local)

Your local Age Cymru may be able to provide advice and support on various issues around care home accommodation. They may also operate an advocacy service. For the contact details of your local Age Cymru:

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

### Care Inspectorate Wales (CIW)

CIW inspects and regulates care and social services in Wales.

Tel: 0300 7900 126

E-mail: [ciw@gov.wales](mailto:ciw@gov.wales)

Website: [www.careinspectorate.wales](http://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](http://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](http://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](mailto:info@firststopadvice.org.uk)

Website: [www.eac.org.uk](http://www.eac.org.uk)

## **Law Society (The)**

The representative body of solicitors in England and Wales. The Law Society cannot help with legal problems but has produced extensive guidelines for solicitors on gifting assets and funding long-term care. You can use the Law Society's database to search for legal firms based on their location and areas of law covered. This is available at:

<http://solicitors.lawsociety.org.uk>

Tel: 020 7320 5650

## **Older People's Commissioner for Wales**

Independent champion for older people across Wales.

Tel: 03442 640670

E-mail: [ask@olderpeoplewales.com](mailto:ask@olderpeoplewales.com)

Website: [www.olderpeoplewales.com](http://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](http://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](mailto:info@relres.org)

Website: [www.relres.org](http://www.relres.org)

## Welsh Government

The devolved government for Wales.

Tel: 0300 060 4400

E-mail: [customerhelp@gov.wales](mailto:customerhelp@gov.wales)

Website: [www.wales.gov.uk](http://www.wales.gov.uk)

## 12 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.**

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## 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](http://www.ageuk.org.uk))

**Age NI** (Age NI Advice: 0808 808 7575; website: [www.ageni.org](http://www.ageni.org))

**Age Scotland** (Tel: 0845 833 0200; website: [www.agescotland.org.uk](http://www.agescotland.org.uk))

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## 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](mailto:advice@agecymru.org.uk)**

**Website: [www.agecymru.org.uk](http://www.agecymru.org.uk)**



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**[www.twitter.com/agecymru](http://www.twitter.com/agecymru)**



**[www.youtube.com/agecymru](http://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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