

## Factsheet 38

# Property and paying for residential care

August 2018

### About this factsheet

This factsheet explains how your property is treated in the local authority financial assessment if you go to live permanently in a residential care home. It covers the possibility of retaining your home via a deferred payments arrangement.

Other factsheets cover different aspects of the charging system if you are placed by a local authority, for example factsheet 10, *Paying for permanent residential care*. Factsheet 58, *Paying for short term and temporary care in a care home*, covers short-term circumstances such as respite care.

The information in this factsheet is correct for the period August 2018 to July 2019, but rules and figures sometimes change during the year.

The information in this factsheet is applicable in England. If you are in Scotland, Wales or Northern Ireland, please contact Age Scotland, Age Cymru or Age NI for their version of this factsheet. Contact details can be found at the back of this factsheet.

Contact details for any organisation mentioned in this factsheet can be found in the *Useful Organisations* section.

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## 1 Recent developments

- *Local Authority Circular (DH)(2018)1*, published in January 2018, kept all rates and financial thresholds for charging for care and support at the same levels as the previous financial year.
- Deferred payments regulations were amended with effect from 5 February 2018 to allow self-funders to have a right to deferred payments.

## 2 Terminology and sources used in this factsheet

### Care homes and nursing homes

This factsheet provides information about residential care, meaning 'care homes' and 'nursing homes'. These are the two standard terms used by the Care Quality Commission, the industry standards regulator.

Nursing homes are care homes where a nurse must be present to provide or supervise medical-type care alongside basic personal care. The NHS directly funds this for each nursing home resident.

The term 'care home' is used in the text to cover both homes, unless 'nursing home' is specifically required.

'Financial assessment' and 'means test' describe how a local authority takes your assets into account when deciding how, or whether, to fund services it is arranging to meet your needs.

### Charging regulations and statutory guidance

There are references to charging regulations and statutory guidance that support the *Care Act 2014* ('the Act') throughout this text. These set out in detail how a local authority must administer adult social care.

The most relevant are:

- *Care and Support (Charging and Assessment of Resources) Regulations 2014* ('the charging regulations')
- *Care and Support (Deferred Payments) Regulations 2014* ('the deferred payments regulations')

The other reference source is the *Care and Support Statutory Guidance 2014* ('the guidance'). Section 8 covers 'Charging and financial assessment', section 9 'Deferred payments agreements', annex B covers treatment of capital, and annex C covers treatment of income.

### Local authority

In this factsheet, references to a 'local authority' refers to the adult social services or social care department of the local authority or council. It is used to describe similar departments within: a county council, a district council for an area in which there is no county council, a London borough council, or the Common Council of the City of London.

### 3 Property and the local authority means test

#### Local authority arranged residential care

If you ask for local authority support to arrange residential care, they carry out an assessment of your needs. They decide if you meet the eligibility criteria and if residential care is the best way to meet your needs. They must consider all other options that might allow you to remain at home. The care home recommendation must be in a care and support plan agreed with you.

A financial assessment ('means test') is made to see if you must pay something towards the care home fees. In some cases, you must pay the full amount. Your income and capital is included in the assessment, although some is disregarded. Capital includes savings, investments and property. Income includes pensions and welfare benefits

The local authority has a legal duty to ensure your needs are met, if these are found to be eligible needs and, following the financial assessment, you are entitled to local authority funding. The local authority must also ensure your eligible needs are met if you do not qualify for funding but cannot arrange care for yourself, and have no one who is willing and able to do it for you,

As part of this process, a local authority must give you a personal budget figure sufficient to ensure your eligible needs can be met and that provides you with a choice of care homes.

#### Note

In 2018/2019, if you have capital over £23,250, you must meet the full cost of your care home fees. This is called being a self-funder.

For information about getting a needs assessment, see factsheet 41, *How to get care and support*.

#### Valuation of capital in the form of property

If a property is taken into account in your means test, it is at its present market value, less any mortgage or loan secured on it and less 10 per cent where there would be expenses involved in selling it.

The 10 per cent rule is only for calculating the value of a property before its sale. Once your property is sold, you are treated as having the actual share of the sale proceeds you are entitled to after any secured debts and the actual expenses of sale have been paid.

## No need for a precise valuation

If you and the financial assessor agree that, after deducting any relevant amounts, the total value of your property is significantly more than the upper capital limit of £23,250, it is not necessary to obtain a precise valuation. However, the local authority should bear in mind how close you are to the upper capital limit when deciding whether to obtain a precise valuation and tell you about options such as deferred payments.

## Disputes over valuation

If there is a dispute over the value of your property, the guidance requires an independent valuation to be arranged by your local authority within the 12-week property disregard period (see section 4.4). This should be undertaken by a professional valuer who must provide a current market valuation.

Annex B of the guidance states the '*aim should be to resolve this as quickly as possible*' to '*enable local authorities to work out what charges a person should pay and enable the person, or their representative, to consider whether to seek a deferred payment agreement.*'

## 3.1 Ownership of property

There is legal and beneficial ownership of property, with most people having both. You have a beneficial interest if you are entitled to a share of the proceeds of its sale. This is what can be taken into account in your local authority financial assessment.

If you contribute towards the purchase price of a property, or otherwise contribute towards it later on, you may be able to establish a beneficial interest in the property, even if it is legally owned by someone else.

If a property was purchased under the '*right to buy*' scheme at a discount, the person who attracted the discount may be treated as having a beneficial interest equal to the discount obtained, even if he or she did not contribute towards the purchase.

If the beneficial interests in a property are disputed, it may be necessary to consult a solicitor. If more than one person has a beneficial interest, a property is valued as if it is jointly owned (see section 5).

### Ownership disputed

The guidance states that if ownership is disputed, a local authority should seek written evidence to prove where the ownership lies. If a person states they are holding capital for someone else, the local authority should obtain evidence of the arrangement, the origin of the capital and intentions for its future use and return to its rightful owner.

## 4 Disregarded property

### 4.1 Mandatory disregards

If you enter a care home permanently, any interest you have in your existing '*main or only*' home is usually taken into account as capital. However, the value is disregarded from the means test if any of the following people occupy the home. It applies if you no longer occupy the home but it is occupied, in part or whole, as their main or only home by:

- your spouse, partner, former partner or civil partner, except where you are estranged
- a lone parent who is your estranged or divorced partner
- a relative of yours, or member of your family, who is:
  - aged 60 or over, or
  - a child of yours aged under 18, or
  - incapacitated.

They must have been occupying the property before you went into the care home. The disregard lasts until this changes, at which time it may become an eligible capital asset.

#### What '*occupy*' means

It is usually obvious if a property is occupied by a qualifying relative as their main or only home. However, this may not be clear in some cases. Guidance tells local authorities to undertake a factual inquiry weighing up all relevant factors to reach a decision. It confirms an emotional attachment to a property is not sufficient for the disregard to apply.

#### What '*relative*' means

Relative are defined as including: (a) parent (including an adoptive parent); (b) parent-in-law; (c) son (including an adoptive son); (d) son-in-law; (e) daughter (including an adoptive daughter); (f) daughter-in-law; (g) step-parent; (h) step-son; (i) step-daughter; (j) brother; (k) sister; (l) grandparent; (m) grandchild; (n) uncle; (o) aunt; (p) nephew; (q) niece; (r) or the spouse, civil partner or unmarried partner of (a) to (k) inclusive.

#### What '*incapacitated*' means

Someone is incapacitated if they receive any of these benefits: armed forces independence payment, attendance allowance, constant attendance allowance, disability living allowance, incapacity benefit, personal independence payment, severe disablement allowance, or a similar benefit. If they do not receive these benefits but their degree of incapacity is equivalent to that required to qualify for such a benefit, they also qualify. Medical or other evidence may be needed for a decision.

## 4.2 Circumstances where it may be unclear

It may be unclear if a qualifying relative occupies your main or only home, for example, they partly live elsewhere for employment as a member of the armed forces or diplomatic services. Whilst they live elsewhere to undertake employment, the property remains their main or only home. The qualifying relative is therefore occupying the property but is not physically present out of necessity.

A local authority should take account of the individual circumstances of each case and be able to give reasons for its final decision. Statutory guidance has a list of factors to consider:

- Do they currently occupy another property?
- If they have somewhere else to live, do they own or rent the property?
- If they are not physically present, is there evidence of a firm intention to return to or live in the property?
- Where do they pay council tax?
- Where are they registered to vote?
- Where are they registered with a doctor?
- Are their belongings located in the property?
- Is there evidence they have a physical connection with the property?

The Court of Appeal, in *Walford v Worcestershire County Council [2015] EWCA Civ 22*, confirmed the moment you actually enter a care home is the key time to take the types of evidence listed above into account.

## 4.3 Discretion to disregard

The guidance gives local authorities discretion to disregard the value of your property if someone living there does not qualify for a mandatory disregard. It does not have to exercise this power but should give full consideration to a request to do so. An example given is:

*Jayne has the early signs of dementia but wishes to continue living in her own home. She is not assessed as having eligible needs, 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 an assessment, it is agreed her needs would best be met in a care home. On moving into the care home, the local authority uses its discretion to apply the property disregard as this has now become Penny's main or only home.*



## After you enter the care home

If a relative moves into your property after you enter a care home, the guidance instructs authorities to consider all relevant factors about why this has happened. They have a discretion to disregard the value of a property to avoid the risk of certain categories of people from becoming homeless. The guidance advises this should not be allowed if the move is solely to protect a family inheritance. They must consider all facts and explanations for actions before deciding how to act.

### 4.4 The 12-week property disregard

A local authority must disregard your property from the financial assessment for the first 12 weeks after you become a permanent care homes resident, if they provide assistance with your placement. If your property is sold in the 12-week period, the disregard ceases to apply from the date of sale and the proceeds are counted as eligible capital. It may be advisable to consider arranging a deferred payments agreement during this time to ensure a smooth transition after 12 weeks.

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

#### Unexpected changes

A local authority must allow a 12 week disregard if another property disregard unexpectedly ends, for example a previously qualifying relative dies, or moves into a care home. This is to give time to make new arrangements regarding the property.

Additionally, the local authority has discretion to choose to apply a disregard if there is a sudden and unexpected change in your financial circumstances. In deciding this, they must consider your individual circumstances. The guidance mentions a fall in share prices or an unanticipated debt and provides an example:

*Harry is a widower who owns his own home. 10 months ago he moved into a care home as a self-funder. He has been meeting the bulk of his costs from shares he received as part of his redundancy package. Due to an unexpected event, the value of his shares is suddenly reduced by half, meaning he is unable to meet the cost of his care.*

*Although already in a care home and likely to remain responsible for paying for this care, Harry approaches the local authority for assistance and to seek a Deferred Payment Agreement.*

*During the financial assessment the local authority agrees that the circumstances could not have been foreseen and uses its discretion to disregard the value of his property for the first 12 weeks. This provides Harry with the space he needs to make arrangements for the Deferred Payment Agreement to be put in place and enable him to continue to meet the cost of his care.*

## Top-up and the 12 week property disregard

During the 12 week property disregard period, you can top-up any additional residential care payments from your own resources. This is if you choose to enter a care home costing more than a local authority will pay to meet your needs. For more information, see factsheet 29, *Finding, choosing and funding a care home*.

### 4.5 Moving from a disregarded property

If your spouse, partner or other relative lives in a disregarded property, they may decide to move somewhere smaller or more manageable. The existing disregard only applies to your original property and once it is sold, your share of the proceeds of sale can be taken into account as capital in your financial assessment.

Annex E of the guidance has an example of a local authority disregarding part of the proceeds of sale to meet a spouse or civil partner's downsizing need:

*Max has moved into a care home and has a 50% interest in a property that continues to be occupied by his civil partner, David. The value of the property is disregarded whilst David lives there, but he decides to move to a smaller property that he can better manage and so sells their shared home to fund this.*

*At the time the property is sold, Max's 50% share of the proceeds could be taken into account in the financial assessment, but, in order to ensure that David is able to purchase the smaller property, Max makes part of his share of the proceeds from the sale available.*

*In such circumstance, it would not be reasonable to treat Max as having deprived himself of capital in order to reduce his care home charges.*

Unmarried partners and other relatives can ask the authority to be treated in the same way as a spouse or civil partner if they wish to move. The guidance does not cover some issues, such as how any funds left over after the purchase should be apportioned or whose name the new property should be put into.

## 5 Valuation of jointly owned property

The value of most jointly owned assets is calculated by dividing the overall value of the asset by the number of owners. Thus if there are two owners of an asset, the value for one owner is calculated as if they own 50 per cent of it. For three owners, each individual owner is apportioned 33 per cent of the total value.

The rules on jointly owned property and land work differently. In these cases, it is the '*beneficial interest*' of each owner that should be taken into account. Beneficial interest means your right to the proceeds of sale.

The charging regulations confirm '*land*' is not to be treated as each owner having an equal share in a capital asset. Under property law, the definition of '*land*' includes '*buildings and parts of buildings*'.

The regulations state where a local authority is satisfied you are beneficially entitled in possession to a share which is less than or, as the case may be, more than an equal share of the whole beneficial estate, your share of the whole beneficial interest is your actual share.

The guidance says that if you jointly own property or land, the local authority must base its valuation on the sale value of your beneficial interest to a '*willing buyer*', on the open market, at the time of your financial assessment.

They should not simply assess the value of your property as a whole (or equivalent properties), divide up the shares owned and say this is the true value of your beneficial interest. The value of your beneficial interest depends on how attractive it is to purchase. This can include a nil value.

### **The joint property ownership trust purpose**

When property is jointly owned, it is owned in trust in legal terms – each owner holds it in trust for the other owners. For your beneficial interest in a jointly owned property to have a value to a willing buyer on the open market, they must be able to realise its value. This relates to their potential ability to apply to a Court to enforce sale of the whole property.

#### **Point of law**

Age UK cannot advise on property or trusts law, so information in this section only covers general principles and should not be treated as definitive legal advice.

It may be necessary to obtain expert legal advice if you wish to dispute a local authority valuation.

If faced with an enforced sale request, a Court must have regard to section 14 of the *Trusts of Land and Appointment of Trustees Act 1996*, which requires the following considerations:

- the intentions of the persons (if any) who created the trust [jointly owned property] at the date of purchase of the home
- the purposes for which the property subject to the trust is held.

These relate to the purpose for which the trust was set up. Whether that purpose still exists at the time of your financial assessment is central to the valuation of your beneficial interest. This is because it may create an impediment to an intended enforced sale once purchased by a willing buyer. There are two legal cases that provide guidance on this point.

## Palfrey case

In the case of *Chief Adjudication Officer v Palfrey* [1995] 11LS Gaz R39, [1995] Times, 17 February, Mr Palfrey, a joint property owner, had gone into residential care and a question arose about how his share in the family home should be valued when assessing entitlement to Income Support. The house had been acquired by him and his daughter as beneficial joint tenants.

The Judge ruled that, although Mr Palfrey was no longer present, where a capital asset is a jointly owned property held for the purpose of accommodating the joint owners and that purpose is on-going, the sale of the house could not be enforced. Mr Palfrey's beneficial interest might at that time only have a nominal value. Based on this reasoning, the ongoing purpose would disappear if the joint owner vacated the property at some future point.

## Wilkinson case

In the case of *Wilkinson v CAO* [2000] EWCA civ 88, the purpose of a gift of property was not to provide a family home. 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 brother, in equal shares, with no restriction or other intended purpose. The Judges decided by majority that a sale of the whole property could subsequently be enforced thus creating a market value for Mrs Wilkinson's beneficial interest.

You should seek advice if you are told that your beneficial property interest has a value for the following reasons:

- the local authority takes the value of your property and divides it by the number of joint owners
- the local authority offers to be the willing buyer, or any willing buyer would be able to force a sale.

## 6 Pension Credit and property

For Pension Credit, the value of your home is ignored for periods of temporary residential care. If you are a permanent resident, the value of your property can be ignored for up to 26 weeks (or longer if reasonable) as long as steps are taken to sell it. If you are in permanent residential care but your house is not up for sale, the value of your interest in your former home is usually included in the means test for Pension Credit.

A former home inhabited by a partner or relative is disregarded under similar rules to those used by the local authority. There is no discretionary disregard of a property however, so a local authority can use discretion to ignore the value of your home or arrange for a deferred payment but it may still be taken into account for Pension Credit. See factsheet 48, *Pension Credit*, for more information.

## 7 Giving away your assets and deprivation

It may seem an attractive option to transfer property out of your name, for example to children or into a trust, so you do not have to use its value to meet the costs of your care. Caution is strongly advised before taking this action.

A local authority can look at such a transfer and if they think it was carried out to reduce your contribution to care home fees, they can assess you as if you still have the transferred property. For more information, see factsheet 40, *Deprivation of assets in social care*.

## 8 Business assets disregard

The guidance allows a 26 week (or longer) disregard of business assets owned (or part-owned) by a new care home resident who has stopped self-employed work due to illness or disablement. This is a short-term disregard if the intention is to take up work again in the future.

For permanent residents, a local authority has discretion to disregard the capital value of business assets for a reasonable period of time, providing steps are being taken to realise the capital value. If no immediate intention to realise the value of the assets is demonstrated, the local authority can take their value into account in the means test.

The local authority should obtain information about:

- the nature and resident's share of the business asset
- an estimate of the length of time necessary to realise the asset
- what steps have been taken to realise the assets, and what is intended in the near future, and
- any other relevant evidence, for example your health, receivership, liquidation or estate agent confirms placing property on the market.

## 9 Paying for yourself

If your property is not sold during the 12-week property disregard period and the local authority refuses a deferred payment agreement, it is likely the authority's contract with the care home will end, so you must make your own contract.

The guidance says having capital above the upper limit does not by itself mean you should be expected to make your own arrangements. The local authority must be satisfied you are able to make your own arrangements, or have others who are willing and able to do so for you. If there is no one, they should make arrangements.

## 10 Park/mobile homes

It is not always clear whether property such as park or mobile homes should be included in the financial assessment. Personal possessions (chattel) cannot be included in the assessment, provided eligible capital is not used to purchase them to avoid paying assessed service charges.

There is a spectrum of ownership status from long-term lease to a license, which is more like rental. Other aspects include the landlord's right of entry. There may be other complexities, for example the division of ownership between the park or mobile home itself and the ground it stands upon. Each case must be considered individually.

HMRC guidance *SDLTM 10023 – Mobile Homes, Caravans and Houseboats* has a summary of how these homes are dealt with and may help inform their consideration in care funding.

### Deferred payments agreements

You can agree a deferred payment agreement on this type of property if it is your permanent and only home, depending on ownership arrangements. The local authority should consider if you, as the park or mobile home owner, have a beneficial interest in the property and land that can be used to secure payment of future care home fees. If not, the only possible type of deferral is a short-term arrangement while efforts are made to sell the park/mobile home. For more information, see factsheet 71, *Park homes*.

## 11 Deferred payment agreements

The intention of deferred payments is that you should not to be forced to sell your home in your lifetime if you need to pay for residential care. By entering into a deferred payments agreement (DPA), you delay paying your care costs until a later date by having a legal charge placed on your property. You effectively borrow money towards your care home fees. Each local authority must have a DPA scheme.

Payment is deferred, not '*written off*' – your care home costs have to be repaid by you (or a third party on your behalf) at a later date.

You may be charged administration costs and you must pay interest on the accruing amount. Often, a person arranges deferred payments when they move into residential care and their property is sold to repay the accrued debt to the local authority upon their death.

Regulations requires the creation of a signed DPA. You must be given appropriate information on your care funding options, how deferred payments work and the consequences of making an agreement. The local authority has a duty to provide you with information and advice about a DPA. You may wish to seek independent financial advice before proceeding with a DPA to ensure it is the best option for you.

## 11.1 The basic eligibility criteria

Eligibility requires meeting all the following criteria:

- your care needs are met through the provision of care in a care home, whether funded and arranged by the local authority or not, providing they agree this is a reasonable way to meet your eligible needs, and
- you have less than or equal to £23,250 in assets, excluding the value of your home, and
- your home is not disregarded in the financial assessment; and
- you have adequate security in your home to pay back the deferred payments and accrued interest; and
- you agree to the conditions in the deferred payments agreement.

The regulations confirm this can only be where you have a legal or beneficial interest in a property that is your '*main or only home*'. If you self-fund your care home place, the local authority has a duty to offer you a DPA if you meet the above criteria. You effectively take out a loan as a self-funder, see sections 11.4 and 11.15 for more information.

If you are self-funder, the local authority must agree a care home place is a suitable option for meeting your needs, even if they have not carried out a needs assessment. This does not mean they are under a duty to help you arrange and manage your contract with the care home, unless you lack capacity and have no-one else who can help you with this.

The authority must discuss the option of deferred payments with you if you meet the eligibility criteria. They must ensure adequate financial security is in place for the amount to be deferred so it can be confident you can repay in future. It has to project forward and estimate the overall cost of the care home arrangement.

You must request a DPA - they cannot be forced upon you. The local authority must consider your request and decide if the arrangement is viable before agreeing to it. They have a power to refuse a DPA once it has considered your situation. This can be, for example, if it is unable to secure a first charge on your property or you do not agree to the terms and conditions of the agreement.

If you lack mental capacity to agree to a DPA, it is possible for someone acting on your behalf to arrange one, for example someone with a Lasting Power of Attorney for finances, or a Deputy appointed by the Court of Protection. In the latter case, this might be the local authority.

### Supported living accommodation

A local authority can enter into a DPA if you move into supported living accommodation, such as '*sheltered housing*', '*extra care sheltered housing*' or '*warden controlled accommodation*'. You cannot arrange a DPA to finance mortgage payments in this accommodation. See factsheet 64, *Specialist housing for older people*, for more information.

## 11.2 Local authority discretion to agree

Local authorities can choose to offer a DPA if you do not meet all the criteria above. They can take into account:

- whether meeting care costs leaves you with very few accessible assets, including assets which cannot quickly/easily be converted to cash
- if you would like to use funds tied up in your home to fund more than just your core care costs and purchase affordable top-ups
- whether you have any other accessible means to help you meet the cost of your care and support, and/or
- if you are narrowly not eligible, for example, assets are slightly too high.

## 11.3 Estimating care costs and top-ups

Before considering in detail how much can be deferred, you must agree a rough idea of likely care costs. You may wish to vary your care package (or any top-ups you are considering) following consideration of what you can afford within a basic DPA. Approach the process with an approximate idea of what your care costs are likely to be.

As a minimum, the local authority must allow you to defer your 'core' care costs - that is, the cost the local authority considers is necessary to meet your eligible needs. It can consider a request for a top-up, whilst retaining discretion over whether to agree in a specific case. However, it should accept any top-up deemed to be reasonable given considerations of affordability, sustainability and available equity.

## 11.4 How much can be deferred?

By entering into a deferred payment agreement, a local authority agrees to:

- defer the payment of charges due to it from you for the costs of meeting needs in a care home or supported living accommodation, or
- defer the repayment of a loan to you in instalments to cover the costs of care and support in a care home or supported living accommodation.

In principle, the amount that can be deferred should be capable of covering the whole of your care costs. In certain circumstances, your local authority may require a contribution from your income.

The local authority should consider whether you can provide adequate security for the DPA, usually in the form of your property, before it agrees to the arrangement.

If you consider a top-up to enter a higher cost care home, they should consider whether the amount of the deferral requested is sustainable, given the equity available from your chosen form of security.



Three elements dictate how much you can defer:

- amount of equity (value) available in your chosen form of security
- amount you contribute to care costs from other sources, including income, contribution from savings, financial products or a third-party, and
- total care costs you face, including any top-ups you are seeking.

### The equity limit

Your equity is the amount of money available from your chosen form of security. The local authority must set out an '*equity limit*' which is the total amount that can be deferred and ensure the amount actually deferred does not rise above this. The equity limit can vary over time.

The equity limit calculation must ensure there is a buffer to cover subsequent interest accruals and provide a small '*cushion*' in case of variations in the value of your chosen security, for example a fall in house prices. When calculating progress towards the equity limit, the local authority must include interest accrued and fees to be deferred.

Local authorities must not allow additional amounts to be deferred beyond the equity limit and must refuse to defer care costs beyond this. However, interest can accrue beyond this point and administrative charges can be deferred. £14,250 of your capital must be disregarded in your residential care means test. This is known as the lower capital limit, so this must also be factored into the final equity limit calculation.

### The equity limit review trigger

When 70 per cent of the value of your security is deferred, the authority should review the cost of your care, discuss when you might be eligible for means tested support, the implications for current top-up payments and consider whether a DPA is still the best way to meet these costs.

## 11.5 Sustainability of the arrangement

When deciding on the amount to be deferred in a DPA (particularly when considering top-ups), you and your local authority should consider a range of factors to ensure an arrangement is sustainable:

- likely period you want a DPA for (if intended for use as a '*bridging loan*')
- equity available
- sustainability of your contributions from savings, if you make one
- flexibility to meet future care needs, and
- period of time you are able to defer your care costs for.

The local authority should discuss with you the predicted limit of what your equity could cover, given your projected care costs and how they might change over time.

You should consider together the length of time your intended contribution to care costs from savings will last, if you intend to contribute to your care costs from income or savings. This includes consideration of the impact on your care if your savings are depleted (normally this involves increasing the amount deferred).

An important factor in DPA sustainability is the future care and support needs you may face. A local authority should consider the possible escalations of your needs, in deciding how much you can defer. When agreement is reached as to how much you want to defer, they must ensure this is clearly and unambiguously set out in your DPA.

### Regular review

The amount being deferred should be reviewed on a regular basis to ensure the deferred amount does not exceed the equity limit. Your local authority should have particular regard to the amount deferred as it approaches the equity limit.

## 11.6 Obtaining adequate security

A local authority must have adequate security in place when entering into a DPA with you. The amount of money available must be able to cover your estimated future care costs, interest charges throughout and any administration fees. The Act suggests adequate security can include:

- a legal charge placed on your property by the local authority giving them the right to recoup your accrued care costs on its sale at a future date
- a guarantee from another person to pay your deferred amount.

The guidance recommends securing a '*first legal mortgage*' charge against a property on the Land Register. This type of security *must* be accepted by your local authority as adequate security, whereas other forms of security *may* be accepted. A '*charge*' is like a mortgage, where another party has a right to the proceeds of sale to cover an outstanding unpaid debt, with the information placed in Land Registry documents.

### What else may constitute '*adequate security*'?

A local authority must consider if another type of security can be provided if you cannot place a legal charge on your property. The guidance requires publication of a publicly-accessible policy setting out other types of security it will consider. Examples include:

- third-party guarantor, subject offering an appropriate form of security
- solicitor's undertaking letter
- valuable object such as a painting or other piece of art, or
- agreement to repay deferred amount from proceeds of life assurance policy.

The security should be revalued when the amount deferred equals or exceeds 50 per cent of the value of the security to assess any potential change in its value and consequently your '*equity limit*' should be reassessed. After this revaluation, local authorities should revalue the security periodically to monitor potential further changes in value. If in either case there is a substantial change, the local authority should review the amount being deferred.

## 11.7 Property valuation

If you intend to secure your DPA with a property, your local authority must obtain a valuation of the property. You may request an independent assessment of your property's value (as well as the local authority valuation). If an independent assessment finds a substantially different value to the local authority's valuation, you should discuss this and agree an appropriate valuation prior to proceeding with the agreement.

A property-related equity limit should be set at the value of the property minus ten per cent and minus the amount of any encumbrances (legal claims by another party) already secured on it, for example a mortgage.

### Jointly owned property

For jointly-owned property, local authorities must seek all the owners' consent and agreement to a charge being placed on the property. All the owners need to be signatories to the DPA. The co-owners must agree not to object to the sale of the property for the purpose of repaying the debt to the local authority, in the same way as for sole owners.

## 11.8 Financial contributions from other sources

You can meet the costs of your care from a combination of four primary sources: income, including pension income; savings or other assets including third party contributions; financial product designed to pay for long-term care, or a DPA. The share of care costs you defer depends on the amount you pay from other sources.

### Renting out your property

If you rent out your property during the course of a DPA, the local authority should allow you to retain a percentage of rental income. The local authority may offer other incentives to encourage rental of properties. However, the decision as to whether to rent out your property must be yours alone.

It is advisable to get independent financial advice, for example about possible tax and welfare benefits implications and to speak to a letting agent to find out what the rental market is like in your area before making the decision. You must consider the practical requirements involved such as security, maintenance, insurance and the possibility of periods when your property may be empty.

## Third party contributions, savings and financial products

A third party may contribute to your care cost (including contributions from a financial product) or from their savings. Contributing to care costs from another source can be beneficial as it reduces the amount you defer and your overall debt to the local authority. A local authority must not force you to contribute to the deferral from these sources.

### 11.9 Disposable Income Allowance

Your local authority may require a contribution towards care costs from your income, but the guidance lets you retain a proportion of this, called Disposable Income Allowance (DIA).

The DIA is up to £144 a week. Your local authority can require you to contribute the rest of your income, but must allow you to retain as much of your DIA as you want.

### 11.10 Interest and administration charges

Administration charges and interest can be added to the total amount deferred as they accrue, although you can request to pay these separately. The DPA must make clear that all fees deferred and any interest and administrative charges incurred must be repaid by you in full. Your local authority must notify you in writing whenever you are liable for an administration charge.

#### The interest rate

Your local authority must inform you before making the agreement whether interest will be charged, what the interest rate is currently set at, and when it is likely to change. If interest is charged, it must not exceed the maximum amount specified in the deferred payment regulations.

This is a rate that *'does not exceed the relevant rate for the relevant period plus 0.15%'*. The national maximum interest rate is published by the Government and changes every six months, on 1st January and 1st June.

The local authority must ensure any change to the national maximum rate is applied to your DPA agreement, unless it charges less than the national maximum. Your agreement must contain a term ensuring that the interest rate does not exceed the national maximum.

#### Compound interest

A local authority must ensure you understand that interest charged accrues in a compound way throughout the agreement. It is calculated at various set periods based on the increased amounts owed over time. For example, a 2 per cent interest figure may remain the same, but if this is initially based on £100 and later on £200, the actual amount owed is larger even though the percentage figure is unchanged.

The local authority can choose how frequently it applies the interest calculation and this must be agreed at the outset as part of your DPA contract. It can either compound interest on a daily basis or when deferred care fees accrue, either weekly, fortnightly, four-weekly or monthly.

Interest can accrue on the amount deferred, even if you reach the 'equity limit'. It can accrue after someone has died until the deferred amount is repaid to the local authority. If a local authority cannot recover the accrued debt and seeks to pursue this through the County Court system, it may charge the higher County Court rate of interest.

### **The administration charge**

Your local authority must set its administration charges at a reasonable level. This must not be more than the actual costs it incurs for providing a DPA scheme. Your local authority should maintain a publicly-available list of administration charges you may be liable to pay. The deferred payments regulations provide details of the types of administrative costs that can be included:

- registering a legal charge with the Land Registry against the title of your property, including Land Registry search charges and identity checks
- relevant postage, printing and telecommunications
- costs of time spent by those providing the service
- cost of valuation and re-valuation of your property
- costs for removal of charges against your property
- overheads, including, where appropriate, (shares of) payroll, audit, management costs, legal service.

## **11.11 Your written agreement and its contents**

If you choose to enter into a DPA, the local authority should aim to have the agreement finalised and in place by the end of your 12-week property disregard period. Decisions on your care and support package, the amount you intend to defer, the security you intend to use, and the terms of your agreement should only be taken following discussion between you and your local authority.

Once an agreement in principle has been reached, it is the local authority's responsibility to write the details agreed into your DPA, taking the legal form of a contract between you and your local authority.

The local authority should provide you with a hard copy of your DPA and you must be given reasonable time to read and consider it, including time to query any clauses and to further discuss the agreement if necessary. The DPA must clearly set out all terms, conditions and information necessary to enable you to understand your rights and obligations under it.

This must include:

- a clear explanation of the consequences of taking out a DPA for you and your property, including anybody who lives in the property
- the equity limit (the amount you can defer) of your security and the scope for this to change upon its possible revaluation
- how interest is calculated and if it is compound
- administrative costs you are liable for, the value of accrued costs, and where possible, a breakdown of the calculation
- how to end the DPA, including the process, consequences and notice period
- the circumstances when the local authority may refuse to defer fees
- how the local authority is securing the debt
- a requirement for the authority to provide a written statement every six months or within 28 days of request, saying how much is owed and the cost of repaying the debt
- that the local authority must give 30 days' written notice of the date on which you are likely to reach your equity limit
- that you need to obtain the consent of the local authority for any person to occupy your deferred property
- an explanation that the authority will stop deferring charges or making advances if you stop receiving care in a care home or supported living accommodation, or if it no longer considers your needs should be met in such accommodation
- the means of redress if either party feels the other has broken the DPA terms
- your responsibilities regarding maintenance and insurance of your home
- your responsibility to notify the local authority of any change to your income, home or care and support
- your responsibility to notify the local authority if you intend to rent or sell your property and if someone has gained or may gain a beneficial interest in your property
- the local authority's responsibility to give you 30 days written notice if it intends to cease to defer charges, or make loan instalments
- the process for varying any part of the agreement, and
- the process by which the local authority can require a re-valuation of your chosen form of security.

DPA's are subject to the *Unfair Terms in Consumer Contracts Regulations 1999* and the *Consumer Protection from Unfair Trading Regulations 2008*, so the terms must be written in plain, intelligible English and will not be binding if they are unfair to you.

## 11.12 Responsibilities while the agreement is in place

The DPA sets out various contractual requirements both on you and the local authority. The guidance states the local authority must, at a minimum, provide you with six-monthly written updates of the amount of fees deferred, interest and administrative charges accrued and the total amount due and equity remaining.

The local authority should provide you with a statement on request within 28 days. The update should set out the amount deferred during the previous period, as well as the total amount deferred to date and also include a projection of how quickly you might deplete all equity remaining in your chosen form of security up to your equity limit.

It should reassess the value of your chosen form of security once the amount deferred exceeds 50 per cent of the security (and periodically thereafter) and adjust the equity limit; and review the amount deferred if the value changes. If your local authority exercises the right to require you to make contributions from your income, it should include provisions requiring you to notify the local authority of any changes in your income.

The agreement should contain provisions requiring you to notify the local authority of changes in your need for care and support, if those changes mean that the authority must, or is entitled to stop, making further instalments under the agreement or to alter the amount of instalments.

The agreement should require you to ensure appropriate regular maintenance arrangements for your home are made whilst you are in residential care. They can require you to have adequate insurance for your property. If your home is empty for an extended period of time, you must ensure your insurance covers this adequately and any terms required by the insurer are met.

The agreement must require you to obtain the authority's consent before allowing someone to move into your property after the agreement has been made. In these circumstances, the local authority may (if it is reasonable to do so) require written consent from you placing the debt owed to your local authority above any beneficial interest another person may obtain in your property.

## 11.13 Local authority powers to stop the arrangement

Examples of circumstances in guidance when a local authority may refuse to defer more charges when an active DPA in place include:

- your total assets, including your property, fall below the upper capital threshold (£23,250) and you become eligible for local authority funding
- you no longer need care in a care home
- you breach the agreed terms of your DP, or
- your property becomes disregarded in your financial assessment for any reason and you now qualify for local authority funding.

## Notice period and support

The local authority should give a minimum 30 days' notice that further deferrals will cease and give you with an indication of how your care costs will be met in future. Depending on your circumstances, you may receive local authority funding to meet care costs or be required to meet the full costs yourself. Local authorities exercising the power to cease DPA's should consider their decision taking into account your circumstances and their overarching duties under the Act's wellbeing principle.

## 11.14 Termination of agreement

A DPA can be terminated in three ways:

1. at any time by you, or someone acting on your behalf, repaying the full amount due
2. when your property (or security) is sold and the authority is repaid, or
3. you die and the amount is repaid to the local authority from your estate.

On termination, the full amount due (including care costs, interest accrued and administrative or legal fees) must be repaid.

If you decide to sell your home, you should notify the local authority during the sale process. You must pay the amount due to the local authority from the proceeds of the sale and the local authority is required to relinquish the charge on your property.

You may decide to repay the amount due from another source, or a third party may elect to repay the amount due on your behalf. In either case, the local authority should be notified of the intention in writing and they must relinquish the charge on the property on receipt of the full amount.

### What happens if you die?

If your DPA is terminated due to your death, the amount due to the local authority must be either paid out of your estate or by a third party. Your family or a third party may wish to settle the debt to the local authority by other means if they want to avoid selling the property or security. Your local authority must accept an alternative means of payment, provided it covers the full amount due.

The executor of your will or Administrator of your Estate can decide how the amount due is to be paid; either from your estate (usually via the sale of the house or a life assurance policy) or from a third party source.

A local authority should wait at least two weeks following your death before approaching the executor with a full breakdown of the total amount deferred. A family member or the executor can approach the local authority to resolve the outstanding amount due prior to this point. Responsibility for arranging repayment of the amount due (in the case of payment from the estate) falls to the executor of the will.



Interest accrues on the amount owed after someone's death until the amount due to the local authority is repaid in full.

If terminated through your death, the amount owed falls due 90 days after the date of death. After this period, if a local authority decide active steps to repay the debt are not being taken, for example if the sale is not progressing, they can take legal proceedings to reclaim the amount due

Once the amount has been repaid, the local authority should provide confirmation the agreement has been concluded and confirm (where appropriate) the charge against the property has been removed.

In whatever circumstance an agreement is terminated, the person (or a third party) must be provided with a full breakdown of how the amount due has been calculated.

### 11.15 A 'loan'–style deferred payments agreement

Government wants local authorities to offer deferred payments more widely than before. The guidance states that '*A deferral can last until death, however, many people choose to use a deferred payment agreement as a 'bridging loan' to give them time and flexibility to sell their home when they choose to do so. This is entirely up to the individual to decide.*'

This is different to the deferral of charges due to the local authority. In these cases, the agreement must make clear:

- the authority will make advances of the loan to the adult in instalments
- the purpose of the loan is to pay for care home costs or supported living accommodation. This should explain the consequences of any failure by you to pay care costs, and
- the adult must inform the local authority if he or she no longer receives or intends to receive care in such accommodation.

## 12 Information and advice

Local authorities have a duty to provide information and advice about people's care and support needs, including deferred payment schemes.

To make well-informed choices, it is essential you can access appropriate information and advice before taking out a DPA. It is important you are kept informed throughout the course of a DPA and that you (and the executor of your estate where appropriate) receive the necessary information upon termination of the agreement.

Your local authority must provide appropriate information, advice and support if you have lost mental capacity or may do in the future, and act in your '*best interests*' as defined by *the Mental Capacity Act 2005*.

Most areas of information that must be provided by your local authority are covered above.

Other areas include:

- explaining the implications that a DPA may have on your income, benefit entitlements, and charging
- give an overview of potential advantages and disadvantages of taking out a DPA and explain other options for paying for care to consider
- the existence of the 12-week property disregard, which gives additional time to consider options in paying for care, and
- taking independent financial advice (including regulated financial advice), in line with chapter 3 of the guidance.

Local authorities must provide easy to read information about how the local scheme works in formats compliant with the *Equality Act 2010*. This must be provided at the earliest appropriate opportunity during the 12-week property disregard.

### Specifically relating to your property

The local authority should advise you it needs to consider how you plan to use, maintain and insure your property. They should advise whether they intend to place conditions on how the property is maintained whilst the DPA is in place. It usually includes requirements for you to maintain and insure your home within the terms and conditions of a DPA.

The local authority should give general information for homeowners on how you may choose to use your property when you enter residential care. For example, information on renting your property and the potential impact on other people living in the property if a sale is required after your death. They should give advice and signpost you to more specialist organisations who can provide further advice, including information about the legal responsibilities of landlords and obligations to tenants.

### The independent advocacy duty

There is a right to independent advocacy if you struggle to understand or make decisions about your care and have no 'appropriate person' to help you engage in the process (Section 67 of *the Act*). This builds on what already exists under the *Mental Capacity Act 2005* for people with significant mental impairment, but has a wider reach. You are entitled to the support of an independent advocate in your dealings with the local authority if you have 'substantial difficulty' in doing any of the following:

- understanding relevant information (about social care and health issues)
- retaining that information
- using or weighing up the information
- communicating their views, wishes or feelings.

If you care for an older person, they may not be entitled to an advocate, as you are deemed to be an 'appropriate person'.

### 13 Challenging local authority decisions

If you disagree with a decision by your local authority or are not satisfied with the quality of the service provided, there is a complaints procedure you can follow. Ask the local authority for details of its procedure. If you are not satisfied with the outcome of your complaint you can take it to the Local Government and Social Care Ombudsman.

For information see factsheet 59, *How to resolve problems and complain about social care*.

## Useful organisations

### Care Quality Commission

[www.cqc.org.uk](http://www.cqc.org.uk)

Telephone 03000 616 161 (free call)

Independent regulator of adult health and social care services in England, covering NHS, local authorities, private companies or voluntary organisations and people detained under the *Mental Health Act*.

### Department of Health

[www.gov.uk/government/organisations/department-of-health](http://www.gov.uk/government/organisations/department-of-health)

Telephone 020 7210 4850

Government department with overall responsibility for social care.

### Equality Advisory Support Service

[www.equalityadvisoryservice.com](http://www.equalityadvisoryservice.com)

Telephone helpline 0808 800 0082 Mon-Fri 9am-7pm, Sat 10am-2pm

Funded by the Equality and Human Rights Commission, the EASS Helpline provides information and advice about the *Equality Act 2010*.

### Local Government and Social Care Ombudsman

[www.lgo.org.uk](http://www.lgo.org.uk)

Telephone 0300 061 0614 Mon-Fri 8:30am-5pm

The LGO is the final stage for local authority complaints if they can't be resolved locally. It also deals with complaints about care providers when services are being privately purchased.

## Age UK

Age UK provides advice and information for people in later life through our Age UK Advice line, publications and online. Call Age UK Advice or Age Cymru Advice to find out whether there is a local Age UK near you, and to order free copies of our information guides and factsheets.

### Age UK Advice

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

0800 169 65 65

Lines are open seven days a week from 8.00am to 7.00pm

### In Wales contact

#### Age Cymru Advice

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

0800 022 3444

### In Northern Ireland contact

#### Age NI

[www.ageni.org](http://www.ageni.org)

0808 808 7575

### In Scotland contact

#### Age Scotland

[www.agescotland.org.uk](http://www.agescotland.org.uk)

0800 124 4222

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