

Factsheet 40

Deprivation of assets in social care

September 2019

About this factsheet

This factsheet looks at deprivation of assets, which can be an issue when a local authority carries out a financial assessment in relation to providing care services. A local authority can look at whether you have removed your assets from its reach to avoid paying a contribution towards social care services being provided, for example by giving them to another person. If it concludes this has taken place, it has powers to treat you as if you still possess them.

You may find it helpful to read Age UK's other factsheets on care funding, particularly factsheet 10, *Paying for permanent residential care* and factsheet 46, *Paying for care and support at home*.

This factsheet is not relevant if a local authority is not funding your care and support needs, for example because your savings or income are too high. However, it may apply if you subsequently need to apply to the local authority for help with funding.

The information in this factsheet is correct for the period September 2019 to August 2020.

The information in this factsheet is applicable to England. Please contact Age Cymru, Age Scotland or Age NI for their version of this factsheet. Contact details are 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 Sources and terminology

Care Act 2014, charging regulations and statutory guidance

The information in this factsheet is based on the *Care Act 2014* ('the Act'). Supporting regulations are the *Care and Support (Charging and Assessment of Resources) Regulations 2014* ('the charging regulations').

The other main reference source is the *Care and Support Statutory Guidance* ('the guidance'). Section 8, deals with 'Charging and financial assessment', and Annexes include:

Annex B: Treatment of capital

Annex C: Treatment of income

Annex D: Recovery of Debts

Annex E: Deprivation of assets

Care homes and nursing homes

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

Nursing homes are care homes where a nurse must be present to provide or supervise medical-type care alongside the basic personal care.

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

Local authority

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

Assets

In this factsheet, 'assets' refers to capital such as savings and property or income such as an occupational pension. Section 70 of the Act, 'Transfer of assets to avoid charges', defines an asset as 'anything which may be taken into account' by the local authority for the purposes of your financial assessment.

2 What is deprivation of assets?

Deprivation of assets means you have intentionally decreased your overall assets in order to reduce the amount you contribute towards the cost of care services provided by the local authority.

The local authority must show that you knew you may need care and support in the future when you carried out this action. It is therefore an evidence based test of both foreseeability and intention.

Inheritance Tax gifting rules do not apply to social care. Any past disposal of assets can be considered as possible deprivation.

Other reasons for deprivation of assets

Annex E of the guidance states that deliberate deprivation should not be automatically assumed because *'there may be valid reasons why someone no longer has an asset and a local authority should ensure it fully explores this first'*.

For example, if you pay off a debt that is not immediately due, this must not be considered as deprivation. This is why a local authority must consider explanations and any supporting evidence in each case before it makes its decision.

3 Deprivation and the financial assessment

A local authority can choose whether or not to charge you for meeting your assessed needs under the Act. They may provide services in your own home or elsewhere such as a day centre or you may need to live in supported accommodation such as a care home or sheltered housing.

If a local authority arranges your services, you are usually financially assessed to see if you must contribute towards your care costs. The local authority calculates this contribution using your income, savings and other capital. There is a general charging system under the Act for both residential and non-residential care but it has some differences depending on the type of service you receive.

Annex E of the guidance states:

People should be treated with dignity and respect and be able to spend the money they have saved as they wish – it is their money after all...[but] it is important that people pay the contribution to their care costs that they are responsible for. This is key to the overall affordability of the care and support system. A local authority should therefore ensure that people are not rewarded for trying to avoid paying their assessed contribution.

You may want to pass on savings or other capital to your children or others during your lifetime, but it can affect your eligibility for local authority funding assistance with care fees, as well as means tested benefits such as Pension Credit.

Unpredictable consequences of your actions

The nature of the rules on deliberate deprivation of assets mean it is not possible to predict with certainty whether the local authority will raise the issue during a future financial assessment. An authority will not usually advise you beforehand how it might treat a particular transfer at a later time. The rules relate to the moment your financial assessment happens.

4 Deprivation of capital

Deliberate deprivation takes place if you transfer an asset out of your name or otherwise dispose of an asset to reduce care charges.

In the financial assessment, a local authority can look for evidence of deprivation of capital such as savings or property. This principle also applies if you claim certain benefits, such as Pension Credit.

Transferring a capital asset does not necessarily mean it is not taken into account in your financial assessment. It can still be '*notionally*' included in the calculation. '*Notionally*' means that, even though you may not have that capital asset anymore, you are treated as if you do still possess it. See section 7.2.1 for more information about notional capital.

Deprivation covers a broad range of ways you might transfer a capital asset out of your possession. Annex E of the guidance provides the following examples that may be deemed to be deprivation of capital:

- a lump-sum payment to someone else, for example as a gift
- substantial expenditure has been incurred suddenly and is out of character with previous spending
- the title deeds of a property have been transferred to someone else
- assets put in to a trust that cannot be revoked
- assets converted into another form that are disregarded in the financial assessment, for example personal possessions
- assets reduced by living extravagantly, for example gambling
- assets used to purchase an investment bond with life insurance.

Other courses of action, such as selling an asset for less than its true value, may also be seen as deprivation. The onus is on you to prove you no longer possess an asset.

Annex E has examples of acceptable evidence to show you no longer possess a capital asset:

- a trust deed
- deed of gift
- receipts for expenditure
- proof that debts have been repaid.

5 Deprivation of income

It is possible to deliberately deprive yourself of income. For example, if you give away or sell the right to income from an occupational pension. If the local authority considers you have deliberately deprived yourself of income, they may treat you as possessing notional income, meaning it is still included in your financial assessment. See section 7.2.2 for more information about notional income.

The local authority must determine whether deliberate deprivation of income has occurred. The guidance states they should consider:

- was it your income?
- what was the purpose of the disposal of the income?
- the timing of the disposal - when the income was disposed of, could you have a reasonable expectation of the need for care and support?

As income can be converted into capital, deliberate deprivation can relate to the tariff income calculation in the financial assessment. The local authority can consider whether doing this has had the effect of reducing what you are charged.

6 When is deprivation deliberate?

The guidance advises local authorities to understand that avoiding your assessed care charges may not be the only motive behind the disposal of eligible capital or income ahead of your financial assessment. There may be justifiable reasons, so the local authority must show why it has come to a deliberate deprivation conclusion.

Intention

Your intention to avoid your care charges must be a **significant factor, or the only reason**, you have transferred an asset elsewhere, in order to be found to have deprived yourself. The local authority must justify their decision if they intend to take a transferred asset into account.

Foreseeability

Annex E of the guidance confirms it is unreasonable to decide you have disposed of an asset to reduce the level of care charges payable if, at the time of the disposal, you were fit and healthy and could not have foreseen a need for care and support.

Discretion

The local authority must use discretion and genuinely take all relevant facts and explanations into account and clearly explain their decision. You can challenge the decision if you disagree with it.

Local authority investigations

The local authority may conduct its own investigations into whether deprivation of assets has occurred, rather than relying solely on information you provide.

Annex E of the guidance lists factors they should take into account:

- whether avoiding care and support charges was a significant motivation
- timing of the disposal. When the asset was disposed of, could you have a reasonable expectation of the need for care and support?
- did you have a reasonable expectation of needing to contribute to the cost of your eligible care needs?

Case study examples from Annex E of the guidance

Example of where deprivation has not occurred:

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 to reduce his care home charges.

Example of where deprivation of assets may be considered:

Emma gives her daughter Imogen a painting worth £2,000 the week before she enters care home. 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 a care home to give to her daughter with £2,000 previously in a savings account, deprivation should be considered.

Example of where deprivation of assets may be considered:

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.

7 The consequences of deliberate deprivation

7.1 What is notional capital and income?

If deliberate deprivation is found, the local authority can decide to treat you as if you still possess the asset for the purpose of the financial assessment. This means treating you as having '*notional*' capital or income, even if you no longer actually possess it.

If you deprive yourself of an actual resource and convert it into something of lesser value, you are treated as notionally possessing the difference between the value of the new resource and the one replaced. For example, if the value of personal possessions acquired is less than the sum spent on them, the difference is treated as notional capital.

7.2 Local authority duties and deprivation

Annex E of the guidance states '*the overall principle should be that when a person has tried to deprive themselves of assets, this should not affect the amount of local authority support they receive*'. This seems to mean an authority should still provide services even if deprivation has been established. In this situation, they may seek to recover the extra costs they have paid towards care and support services as a debt from you or from the person who now possesses the assets. See section 8 for more on debt recovery powers.

The rules for care home funding work differently. If you have deprived yourself of assets and are treated as having notional capital above the upper threshold, the local authority do not have a duty to arrange your care, unless you have lost mental capacity and have no one to assist you. If you have mental capacity but cannot arrange your own care and have no one to help you, the local authority should use its discretion to ensure your needs are met and you are not put at risk.

7.2.1 Notional capital

Annex B of the guidance states this may be capital:

- available to you if you applied for it
- that has been paid to a third party
- you have deprived yourself of to reduce how much you pay for care services.

Your capital is the total of your actual and notional capital. Like other capital, there may be circumstances where it must be disregarded.

Whilst you are receiving care services, the amount of notional capital goes down over time by the difference between the amount you actually have to pay and the amount you would have paid if you were not treated as having notional capital.

7.2.2 Notional income and pensions freedoms

Similarly, you may be treated as having notional income. It can include income:

- available on application but you have not applied for it
- that is due but you have not received it
- you have deliberately deprived yourself of for the purpose of reducing the amount you must pay for care services.

In all cases, the local authority must satisfy itself the income would, or should, have been available to you. Notional income should be treated like other income meaning there may be circumstances where it must be disregarded.

Notional income should be calculated from the date it could be expected to be acquired if an application was made. The guidance states that when doing this '*a local authority should assume the application was made when it first became aware of the possibility and take account of any time limits which may limit the period of arrears*'.

In April 2015, flexibility in terms of how you can access defined contribution pensions was introduced, including enabling you to access your full pension pot as a cash sum. Notional income can be applied if you reach State Pension age and have a pension pot but have not purchased an annuity or arranged to draw down the equivalent maximum annuity income that would be available.

When applying notional income to a pension pot, the guidance advises local authorities to calculate this '*as the maximum income that would be available if the person had taken out an annuity*'. The guidance states '*estimates of the notional income can be received from the pension provider or from estimates provided by the Government Actuary's Department*'.

The following case example illustrates how a pension pot can be treated:

Ben has a pension fund worth £30,000. He has taken the opportunity to access this flexibly and as a result is only drawing down £5 a week as income at the point he begins to receive care and support. The equivalent maximum annuity income would be £120 per week. For the purposes of the financial assessment, the local authority can assume an income £120 per week.

If applying maximum notional income, any actual income should be disregarded to avoid double counting.

The guidance advises that if you draw down an income higher than the maximum available under an annuity product, the actual income that is drawn down should be taken into account. If you have removed the funds and placed them in another product or savings account, they should be treated according to the rules for that product.

See factsheet 91, *Pension freedom and benefits*, for further information.

7.3 Recovering charges from a third-party

If you transfer an asset to another person (a third-party) to avoid a charge prior to the financial assessment, the third party may be liable to pay the local authority the difference between what you would have been charged and what you were charged at the time of the assessment. However, a third-party is not liable to pay anything exceeding the benefit they received from the transfer of the asset.

If you transfer funds to more than one third-party, each is liable to pay the local authority the difference between what it would have charged or did charge you for receiving care, in proportion to the amount they received. When pursuing the recovery of charges from a third party, a local authority must have regard to Annex D of the guidance, 'Recovery of debts'. See section 8 for more information.

Annex E of the guidance provides an example of the appropriate treatment of third-party liability:

Mrs Tong has £23,250 in her savings account. This is the total of her assets. One week before entering care she gives her daughters Louisa and Jenny and her son Frank £7,750 each. This was with the sole intention of avoiding care and support charges.

Had Mrs Tong not given the money away, the first £14,250 would have been disregarded and she would have been charged a tariff income on her assets between £14,250 and £23,250. Assuming £1 for every £250 of assets, this means Mrs Tong should have paid £36 per week towards the cost of her care.

After 10 weeks of care, Mrs Tong should have contributed £360. This means Louisa, Jenny and Frank are each liable for £120 towards the cost of their mother's care.

7.4 Possible consequences of asset transfers

Apart from issues about the financial assessment, transferring assets to another person may have significant consequences. Once an asset is transferred out of your name, you no longer have control over it and it is not always possible to rely on the new owner acting in accordance with your wishes. You should consider how you might be affected if disagreements arise in the future.

Legal advice

It is advisable to seek legal and financial advice before transferring an asset. Age UK cannot give advice on this area of law.

The Law Society produces guidance for solicitors on gifts of property and the implications for long-term care
www.lawsociety.org.uk/support-services/advice/practice-notes/making-gifts-of-assets/

Issues to consider

- You may want to move from your current property to somewhere more suitable. If the property has been transferred, you need the new owner's agreement to do this.
- If you no longer own your home, you cannot raise income or capital against the equity in it.
- If you retain the right to live rent free in your former home, this may be treated as a '*gift with a reservation*' for inheritance tax purposes and the property included in your estate.
- If the new owner marries, divorces or uses the property as security for a loan, your position may be affected.

Issues affecting the new owner of an asset

- The new owner may become responsible for the upkeep and maintenance of the property. To avoid possible disputes, it must be made clear who is responsible for these tasks.
- Any means-tested benefits the new owner receives 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.

8 Local authority recovery of debts

If a local authority decides you have deprived yourself of capital or income and you do not pay the amount of charges they expect you to make, you may end up owing them money.

The local authority has powers to pursue unpaid debts for services it has provided to you. Annex D of the guidance notes these powers provide '*...equal protection to both the local authority and the person.*' This refers to an approach that maximises opportunities to seek alternative means of repayment and recognises the difficulties you may be experiencing.

Debt recovery period

The maximum debt recovery period is six years. After this period, the debt must be written off.

Deferred payments agreement

As a first port of call, a local authority must offer you the option of a deferred payment agreement, if possible. They can only make an application to the County Court if you have refused this option. For more information, see factsheet 38, *Property and paying for residential care*.

The full range of options

A local authority can start County Court proceedings to recover debts if you do not pay or misrepresent information relevant to your financial assessment. This can result in having a legal charge placed on your property, which ensures they receive the outstanding funds when it is sold.

However, a local authority should only use this power after all other reasonable alternatives for recovering the debt have been exhausted. This requires appropriate engagement with you or your representatives to find out why the debt has accrued.

The local authority can no longer unilaterally decide to place a charge on your property in the way that it could under previous legislation.

The following options are recommended in guidance before proceeding to County Court.

Negotiate an agreement. This can be through dealing directly with you or your representative to broker a solution. This can be instigated by the local authority, but in some circumstances, it may be better led by an independent person such as an advisor or solicitor. In some cases, local authorities must involve an independent advocate to support you to understand the options available.

Mediation. An independent third party assists you and the local authority to reach an agreement. This could be carried out by a professional mediation service, but can be carried out by anyone not involved in the issue, such as an independent social worker or a local voluntary organisation. It is important to understand it is you and the local authority, not the mediator, who decide the course of action.

Arbitration. This involves an independent arbitrator hearing both sides of the issue and making a decision that resolves the issue. Local authorities should be aware that arbitration is usually binding on both sides and therefore they cannot usually take the case to court after the arbitrator has made a decision.

The duty to act reasonably

Local authorities are bound by the public law principle of acting reasonably at all times and must also act in accordance with human rights legislation and the wellbeing principle in the Act. In most cases, especially where a failure to pay the correct charges was inadvertent, there are other simpler routes to follow.

This could be agreeing a repayment plan allowing for recovery over time in a way that is affordable and manageable for you and your family. Even if there is a debt, they need to consider whether it is appropriate to recover it. There may be many complex issues to take into account.

In deciding how to recover a debt, the local authority should consider all the circumstances of the case before deciding a course of action. For example, was it deliberate avoidance of payment or due to circumstances beyond your control? This could be because you have developed cognitive difficulties leading to a lack of mental capacity.

A local authority must have the expertise to properly assess your situation. For example, if you lack mental capacity, it must act in accordance with the requirements of the *Mental Capacity Act 2005* and its Code of Practice.

The authority may wish to concentrate on how to avoid you getting into debt in the first place. For example, by helping you to obtain independent financial advice and giving you clear, written, information on your responsibilities to pay for care and support. The local authority has a duty to maintain adequate records relating to any debt and any recovery action they take.

9 The information and advice duty

The local authority is required to provide an information and advice service suitable for local residents with care and support needs.

At the least, the service must provide information and advice on the following:

- the local care and support system and how it operates
- the choice of types of care and support
- the choice of providers available to you
- how to access the care and support available
- how to access independent financial advice on matters relevant to the meeting of needs for care and support, and
- how to raise concerns about the safety or wellbeing of someone who has needs for care and support.

'*Independent financial advice*' means financial advice provided by a qualified person who is independent of the local authority in question.

For example, someone regulated by the Financial Conduct Authority to give complex financial advice.

10 Challenging local authority deprivation decisions

If you disagree with a decision by a local authority about deprivation of assets, there is a complaints procedure you can follow. Ask the local authority for details of its procedure.

Your complaint should explain any reasons why the disposal of assets in question was unconnected with avoiding care costs. Be clear and specific as you can about your motives, pointing out to the authority that it must show that you were significantly motivated by avoiding care costs. Refer to any evidence you have, for example bank statements showing you spent money in a particular way before you had needs for care and support.

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

Carers UK

www.carersuk.org

Telephone 0808 808 7777 (Mondays and Tuesdays 10am–4 pm)

Provides information and support for carers, including information about benefits.

Citizens Advice

www.citizensadvice.org.uk

Telephone 0344 411 1444

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

Equality Advisory Support Service (EASS)

www.equalityadvisoryservice.com

Telephone helpline 0808 800 0082

Funded by the Equality and Human Rights Commission, the helpline provides information and advice about the *Equality Act 2010* and human rights.

Local Government and Social Care Ombudsman

www.lgo.org.uk

Telephone 0300 061 0614

Final stage for complaints about local authorities. It is a free service.

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 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

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

0800 022 3444

In Northern Ireland contact

Age NI

www.ageni.org

0808 808 7575

In Scotland contact

Age Scotland

www.agescotland.org.uk

0800 124 4222

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The evidence sources used to create this factsheet are available on request. Contact resources@ageuk.org.uk

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