

Adult Social Care

Deprivation of Assets

(relating to the means tested financial
assessment for care and support)

Practice Guidance

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1	New practice guidance to supplement Chapter B3 in the Charging Policy and Procedures for a Residential and Nursing Care Home Placements

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Section A

1 Legislative Context

- 1.1 Under the Care Act 2014, Kent County Council (KCC) has chosen to charge people for care and support, except where KCC is required to provide it free of charge. In doing so, KCC will undertake a means tested financial assessment to determine the charge (see the County Council's Charging Policy) and to ensure that a person is not charged more than it is reasonably practicable for them to pay.
- 1.2 [The Care and Support Statutory Guidance](#) issued with the Care Act sets out how local authorities should work out how much a person should pay for services. Under those rules, people with capital above the upper limits, must meet the full costs of care services.
- 1.3 Annex E (Deprivation of assets) of the statutory guidance states:
“Deprivation of assets means where a person has intentionally deprived or decreased their overall assets in order to reduce the amount they are charged towards their care. This means that they must have known that they needed care and support and have reduced their assets in order to reduce the contribution they are asked to make towards the cost of that care and support”.
“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. Whilst the Care Act 2014 represents an important step forward in redefining the partnership between the state and the individual, it is important that people pay the contribution to their care costs that they are responsible for. This is important 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”
- 1.4 Paragraph 8.27 of the statutory guidance states:
“People with care and support needs are free to spend their income and assets as they see fit, including making gifts to friends and family. This is important for promoting their wellbeing and enabling them to live fulfilling and independent lives. However, it is also important that people pay their fair contribution towards their care and support costs”.

2 Policy Statement

- 2.1 This practice guidance aims to support the means tested financial assessment process, making charging fair and consistent for all people in receipt of care and support in accordance with guidelines.
- 2.2 KCC must comply with the Department of Health's Care and Support Statutory Guidance, issued under the Care Act, ensuring that there is

equitable charging, taking into consideration a person's assets; this may be their capital and/or income.

- 2.3 When undertaking a means tested financial assessment, KCC may identify circumstances that may suggest a person (which would include someone with proper legal authority for property and financial affairs i.e. lasting power attorney or deputyship under the Court of Protection to act on their behalf) may have **deliberately** deprived themselves of assets in order to reduce the level of contribution they make towards their care and support, or secure assistance in paying for their care and support from KCC.
- 2.4 This includes someone who has been self-funding their care and have deliberately deprived/decreased their assets to be eligible for support sooner than expected.
- 2.5 Where KCC considers that deliberate deprivation **may** have occurred, KCC will have regard to this practice guidance which is written in accordance with [section 70 of the Care Act](#), Annex E of the Department of Health Care and Support Statutory Guidance, issued under the Care Act.
- 2.6 KCC will consider the specific circumstances of each person and take all available evidence into account.
- 2.7 When conversations indicate potential financial abuse may occurred at the time the assets reduced e.g. unexplained withdrawals from an account or unexplained loss/misplacement of financial documents, the practitioner (if allocated), in conjunction with Client Financial Services (CFS), will have a consultation with the safeguarding team in the first instance.. It may be necessary to raise an alert under the Multi-Agency Safeguarding Adults Policy Protocols and Guidance for Kent and Medway.

Section B: Practice Guidance

3. What is a deprivation of assets?

- 3.1 There are cases where a person or someone with proper legal authority for property and financial affairs to act on their behalf, has tried to deliberately avoid paying for care and support costs through depriving themselves of assets – capital or income.
- 3.2 A person can reduce their assets in many ways both income and capital, for example:
 - a lump-sum payment such as a gift¹ or to pay off a debt
 - transferring the title deeds of property/ to someone else
 - putting money into a trust that cannot be revoked

¹ Gifts (and made without application of the HM Revenue and Customs rules about the making of such gifts)

- converting assets into another form that must be disregarded from the means tested financial assessment e.g. personal possessions.
- assets have been used to purchase an investment bond with life insurance such that the intended recipient of the bond is another person
- reducing capital through substantial expenditure at short notice on items such as expensive holidays or a cash purchase for a new car
- substantial expenditure has been incurred suddenly and is out of character with the previous spending
- selling assets for less than the true market value
- giving away or selling the right to an income from an occupational pension

3.3 However, in some cases, these will not be a deliberate deprivation of assets to avoid paying for care and support costs. Questions of deprivation therefore will only be considered where the person ceases to possess assets that would have otherwise been taken into account for the purposes of the means tested financial assessment or has turned the asset into one that is now disregarded.

3.4 We will not automatically assume that deliberate deprivation has occurred where someone no longer has an asset(s) as there may be valid reasons why someone no longer has the asset. We will ensure that the reasons are fully explored before making a decision that someone has deprived themselves of assets with the intention of reducing care charges.

3.5 It is up to the person to prove to us that they no longer have the asset. If they are not able to, we will assess them as if they still had the asset.

3.6 Deprivation of capital or income.

3.6.1 Transferring a capital asset does not necessarily mean it is not taken into account in the means tested financial assessment. It can still be 'notionally' included in the calculation. 'Notionally' means that, even though a person may not have that capital asset anymore, it is treated as if the person still possess it and charged accordingly.

Read paragraph 4 for more information about notional capital.

3.6.2 It is possible for a person to deliberately deprive themselves of income. For example, if the person gives away or sell the right to income from an occupational pension. If we consider a person has deliberately deprived themselves of income, we may treat the person as possessing notional income, meaning it is still included in the means tested financial assessment.

Read paragraph 4 for more information about notional income.

3.6.3 In order to determine whether deliberate deprivation of capital or income has occurred, consider:

- was it the persons income?
- what was the purpose of the disposal of the income?

- the timing of the disposal – when the income was disposed of, could the person have a reasonable expectation of the need for care and support?

3.6.4 As income can be converted into capital, deliberate deprivation can relate to the tariff income calculation in the means tested financial assessment. We will consider whether doing this has had the effect of reducing what the person is charged. See Appendix B for an example of tariff income.

4 What is notional capital and income?

4.1 If deliberate deprivation is found, we will decide to treat the person as if they still possess the asset for the purpose of the means tested financial assessment. This means treating the person as having ‘notional’ capital or income, even if they no longer actually possess it.

4.2 If the person in depriving themselves of an actual resource has converted that resource into another of lesser value, the person will be treated as notionally possessing the difference between the value of the new resources and the one which it replaced.

4.3 For example, if the value of personal possessions acquired is less than the sum spent on them, the difference will be treated as notional capital.

5 How is deprivation of assets assessed?

5.1 We undertake a means tested financial assessment to determine what a person can afford to contribute towards their care. Considering the many ways, a person can deprive/dispose themselves of assets, we will consider the specific circumstances of each person and take all available evidence into account when considering whether a deliberate deprivation of assets has occurred.

Therefore, there is no exact test.

5.2 The evidence must prove two elements:

Fig 1

At the time of disposal consider whether avoiding the care and support charge was a significant motivation in the timing of the disposal of the asset.	
1	<p>Foreseeability Could the person (which would include someone with legal authority for property and financial affairs to act on their behalf) reasonably foreseen their need for care and support at the time of the transfer and had ‘a reasonable expectation’ of needing to contribute to the cost of any eligible care needs?</p> <p>This means that they must have known that they needed care and support and have reduced their assets.</p>

		The evidence assessment is likely to focus on medical/social care reports and the persons own understanding of their care needs and/or medical diagnosis at the time that the transfer was made.
2	Intention	<p>Was the transfer for the sole or main purpose of avoiding a contribution towards their care and support?</p> <p>This element of the assessment requires evidence that there was not another reason for the transfer of assets. The evidence for this element will therefore focus largely on the circumstances of the person at the time and must take into account all available evidence, including any legal advice sought and given to the person at the time.</p>

5.3 Only if these two elements can be evidenced, we will treat the person as still owning the value of the asset for the purposes of the means tested financial assessment.

5.4 To decide if this is the case, individual circumstances must be fully explored and recorded in Client Record System file.

5.5 **It would be unreasonable to decide that a person had disposed of an asset in order to reduce the level of charges for their care and support needs if, at the time the disposal took place, they were fit and healthy and could not have foreseen the need for care and support.**

6 The investigation process

6.1 It is up to the person (or someone with proper legal authority for property and financial affairs to act on their behalf) to prove to us that they no longer have the asset(s) and the reason they no longer have it. If this is not forthcoming, we will undertake a means tested financial assessment of the person on the basis that they have the asset(s).

6.2 For deprivation of capital assets, acceptable evidence of disposal is considered as:

- a trust deed
- a deed of gift
- receipts for expenditure, and/or bank statements etc
- official records for proof that debts have been repaid

6.3 The process of investigating deprivation of assets is complex and can take a considerable length of time. Client Financial Services (CFS) will take the investigative lead in conjunction with a Senior Operational Manager.

6.4 There is no time limit on how far back we can look when deciding whether a person has deliberately deprived themselves of assets. There is no “7-year rule” See Appendix C for explanation about “7-year rule”.

6.5 Questions to be asked to determine a deprivation of assets- how to obtain the facts.

6.5.1 The following applies equally when seeking answers from someone with legal authority for property and financial affairs, acting on the persons behalf or the person. Note “you” relates to the person requiring care and support. The questions are not exhaustive or in any order.

Fig 2

Where you in reasonable health at the time of the transfer- had no idea they would need future care, no medical diagnosis?
What previously owned assets did you have, not just those that are owned currently?
Did you solely own the asset?
When did the disposal/transfer happen?
What was the reason/purpose of the disposal/transfer?
Did you obtain legal advice?
Was the selling of the asset true market value? How much?
Did you consent to the transfer/disposal?
Did you or your representative know about KCC Adult Social Care charging for care and support?
Have you, or your representative made or continue to make regular gifting? How much? How often and to whom?
Was the gift a significant amount that make a difference to your capital?

6.5.2 Where information comes to the attention of, or if acting on a “*gut feeling*,” any member of staff undertaking a Care Act assessment or means tested financial assessment, the relevant information needs to be collated and passed to the relevant operational team manager and team manager for CFS as soon as possible for their consideration and escalation as appropriate.

If at any time the practitioner/social worker thinks there may have been a deprivation of assets, the worker will tell the person/ representative that CFS will seek more information when they undertake the means tested financial assessment. The worker must inform CFS of their reasoning to think there may have been a deliberate deprivation.

- 6.5.3 The case will be escalated to a Senior Operational Manager and the CFS Team Manager who will discuss the facts and agree at their bi-weekly meeting
- whether the information does indicate a deliberate deprivation of assets, or
 - decide if more information needed, and
 - decide when a planning meeting to be convened, and
 - who needs to be invited to the planning meeting?
 - is there a safeguarding concern requiring immediate action?
- 6.5.4 Where it appears to be a complex matter and requires a legal steer to move it forward, CFS will seek advice from t Invicta Law.
- 6.5.5 A case specific planning meeting will be convened by the CFS Team Manager and Senior Operational Manager, inviting the practitioner/social worker and Invicta Law and/or safeguarding team manager (if appropriate).
- 6.5.6 The planning meeting will discuss:
- all individual circumstances
 - the relevant facts
 - explanations given by the person
 - any mitigating circumstances?
 - any safeguarding concerns?
 - any reason to doubt mental capacity?
 - whether avoiding the care and support charge was a significant motivation in the timing of the disposal of the asset?
 - at the point the capital was disposed of could the person have a reasonable expectation of the need for care and support?
 - did the person have a reasonable expectation of needing to contribute to the cost of their eligible care needs?
 - any further information required?.

An action plan will be agreed by those present and recorded by CFS Team Manager.

- 6.5.7 If further information is required about the nature of any deprivation of assets, or more evidence needed to be collected to inform the decision, the CFS Team Manager will liaise with the person or representative or Independent Mental Capacity Advocate (IMCA). This will not delay the contribution towards the cost of care and support being charged. See paragraph 7.2 for further details.
- 6.5.8 The person/representative will be informed of the decision in writing by the Senior Operational Manager in Adult Social Care - who will take into consideration any advice from Invicta Law and be clear in the correspondence the evidence on which such a decision is based.
- 6.5.9 The Senior Operational Manager in Adult Social Care will record the decision on the Client Record System or delegate the case recording to the practitioner/social worker. Client records must be a complete and

comprehensive record of all decision-making and information used to inform such decisions.

6.5.10 The contribution to care and support charges will be identified and the person informed in writing in line with normal business processes.

7 What happens if it is decided that deliberate deprivation has occurred?

7.1 If the Senior Operational Manager decides that a person has deliberately deprived themselves of assets, we will decide whether to treat that person as still having the asset for the purposes of the means tested financial assessment and charge them accordingly.

7.2 As a first step, we will seek to charge the person as if the deprivation had not occurred. This means assuming they still own the asset and treating it as 'notional capital' or 'notional income'. See paragraph 4 for more details about notional capital and income and Appendix A for Notional Capital example.

8 Recovering charges from a third party

8.1 Where the person has transferred the asset to someone else, that person, is liable to pay us the difference between what we **would** have charged and **did** charge the person receiving care and support at the time of the means tested financial assessment.

8.2 However, the person is not liable to pay any more than the benefit that they have received from the transfer. See Fig 3 below

8.3 If the person has transferred funds to more than one person, each of those people is liable to pay us the difference between what we would have charged or did charge the person in proportion to the amount they received.

8.4 When contacting and seeking payment from a third party in such circumstances, all staff must follow the [Information Governance Management framework](#) process, seeking advice from the relevant divisional lead if required.

Fig 3

If the person transferred their home to their son, the son is liable to pay KCC the difference between what it would have charged, had the transfer not been made. However, the son would not be liable to pay anything which exceeds the benefit they have received from the transfer. In other words, if the person's care fees came to £100,000 and the home was only worth £50,000, the son would only be liable for £50,000. If the person transferred their home to three of their children, each would be liable for a third of the difference.

9 KCC recovery of debts²

Fig 4

KCC has powers to pursue unpaid debts for services it has provided.

Recovery of charges, Transfer of assets: Sections 69-70 allow local authorities to recover debt incurred providing care services.

[Section 70 of the Care Act](#) (Transfer of assets to avoid charges)

9.1 Acting reasonably

In deciding how to recover a debt, we have a duty to act reasonable, considering all the circumstances of the person, before deciding a course of action.

For example:

- was it a deliberate avoidance of payment or
- due to circumstances beyond their control? This could be because the person has developed cognitive difficulties leading to a lack of mental capacity.

Wherever possible we will negotiate with the person, legal representative and/or their family, taking into consideration the specific circumstances of the person, before court proceedings are contemplated. The person should be advised to obtain legal advice and it necessary, their capacity to make decisions must be considered.

10 Disagreement against decision made by the Council

- 10.1 If a person disagrees with our decision, the person can make a complaint to KCC. This must be in writing.
- 10.2 Charges for care and support will not be suspended during the complaint process and the person must continue to make all payments that are due.
- 10.3 When the means tested financial assessment, by including the asset/s, resulted in the person having over the upper capital threshold, consideration is given, using a risk based approach, as to whether or not we continue funding the care and support in the case of a deprivation of assets dispute. In these circumstances, a decision required from the Senior Operational Manager in Adult Social Care. We may fund and charge the person full cost.
- 10.4 When the complaint is in relation to the charge/debt associated with the deprivation of assets decision, the Investigating Manager may decide to suspend the debt recovery pending the outcome of the complaint.

² Consult KCC's Debt Management policy and Annex D of the Care Act statutory guidance on debt recovery. Legal advice maybe required.

- 10.5 Once a person has complained, we will review the decision and normally respond within 20 working days. If we are unable to respond within that timescale, we will let the person know and explain why. If the person is unhappy with the outcome of the complaint, the person can take the matter to the Local Government Social Care Ombudsman to review the way KCC have dealt with the complaint.

Section C: Examples of deprivation of assets, FAQ's and three case studies.

11.1 Is it a deliberate deprivation of assets?

Not a deliberate deprivation of assets	Would be considered a deliberate deprivation of assets	Likely to be considered a deliberate deprivation of assets	Would not be considered a deliberate deprivation of assets
<p>Mr Andrews and Mrs Andrews own their home as Joint Tenants in Common in equal shares. They make Wills leaving their respective shares of the property to each other in trust for life, and then to their two children. Mr Andrews passes away. Later, Mrs Andrews requires residential care. As she does not own Mr Andrew's share of the property (she only has a 'life interest'), it is not taken into account when performing a means test. Mr Andrew's share is safe and will go to the children when Mrs Andrews passes away. This is not deprivation of assets.</p>	<p>Mr and Mrs Arnold transfer their house to an 'Asset Protection Trust'³ to protect it from care fees. The trust cannot be revoked. They continue to live in the property. Later, Mr Arnold needs care. The Local Authority would consider deliberate deprivation of assets.</p> <hr/> <p>Mrs Wells was funding her own care, sold her house whilst doing so then gave the money away, Mrs Wells admits the reason was to avoid paying care fees. The Local Authority pursue the beneficiaries under section 70 of the Care Act and Care and Support Statutory Guidance.</p>	<p>Mrs Smith gives her daughter a ring worth £5,000 the week before moving into residential care. The Local Authority would not consider this as deprivation of assets as the item is a personal possession. However, if Mrs Smith purchased the ring with £5,000 of her savings just before entering residential care, the Local Authority are likely to consider whether deprivation of assets has occurred.</p> <hr/> <p>In 2015, Lucile was diagnosed with vascular dementia. In March 2016, she moved into her sons home due to her future care needs. Some building works were carried out in the sons' home, paid for from her house sale. The works costs £40,000. Lucile had a mini stroke. After her</p>	<p>Mr Jones has £20,000 in savings and uses £15,000 to buy a car. Three weeks later he enters a care home and gives the car to his son. The question here is whether Mr Jones knew he would be moving into residential care. If so, the Local Authority would consider deliberate deprivation as a possibility. However, if Mr Jones had no idea he would need care – for example, he was admitted in an emergency – then this would not be considered deliberate deprivation of assets.</p> <hr/> <p>Mrs Ellis has moved into a care home. She has a 50% interest in a property that is occupied by her husband, Mr Ellis. Because Mr Ellis still occupies the family home, the value of the property is disregarded for means testing. However, Mr Ellis wants to move to a smaller property. He sells the home to fund this. When he sells the home Mrs Ellis' share could be taken into account for means testing, but to ensure her husband can afford the new property, she makes these</p>

³ Lifetime trusts are often known as property protection trusts or asset protection trusts. Unlike will trusts, which come into being on a persons' death, lifetime trusts are established straight away. The person home is gifted to the trust, which allows him/her to carry on living in it. The risk is that these actions may be regarded as deliberate or intentional 'deprivation of assets'.

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		health declined and needs increased. Her son moved her into a care home in November 2016. Son made an application to the local authority for financial assistance towards the cost of the placement.	funds available to him. In these circumstances a Local Authority would not consider that Mrs Ellis has deliberately deprived herself of capital to reduce her care home charges as long as the new property is bought in joint names to protect the Mrs Ellis share in the future should there be a change of circumstances.
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11.2 FAQs: Reference: adapted from the Social Care Funding & Deprivation of Assets (Community Care Law solicitors answer frequently asked questions about Social Care funding and deprivation of assets)

Question	Answer
<p>1. Depriving oneself of the value of a property.</p> <p>My wife and I combined our assets with my disabled father's assets to buy a house that we could all live in together, to care for him. Our new house had to be put in mine and my wife's name to get a mortgage. The Council have said that my father has 'deprived himself' of the value of his old property and that he must pay for his care fees. He pays £500 per week for agency I to visit him while I am at work and cannot afford these fees alone. How can I get the Council to overturn a deprivation decision?</p>	<p>The Council believe that your father's decision to sell his house and invest the proceeds in a property that is not in his name was an 'intentional deprivation of assets'.</p> <p>However, as your father is living in the property and as you are providing his care when you are not at work, this deprivation decision seems unfair, as if he was still living in his own house, his equity would be ignored. Also, your father retains an interest in the property although it is not in his name.</p> <p>Your father has a right to challenge the Council's decision through their complaint process. He will need to give a detailed explanation of the circumstances in which he didn't put his name on the legal title.</p> <p>There are some complicated trust law arguments that you could use, so you should seek independent legal advice to show the Council that this is not a deprivation of assets.</p>
<p>2. Transfer of home ownership</p> <p>My mother and father are retired and in reasonable health for their age. I am their only child. They recently attended an asset protection seminar. They want to transfer their house into my name for tax purposes and keep a 'life interest' in the house so they can remain living there. Their house is worth £400,000. Could they be accused of deprivation of assets if one of them becomes unwell and has to go into care?</p>	<p>If one or both parents ask the Council for help paying their care fees in the future, an Adult Social Care financial assessment will look at their assets. Despite the explanation that they are doing this for tax purposes, the Council may be suspicious and believe that your parents' real motivation is to avoid paying care fees in the future.</p> <p>If your parents keep their home in their own names and one of them did need to go into a care home, provided the other one was still living at home, the value of their property would be disregarded in full under Adult Social Care financial assessment rules.</p> <p>However, if the title is transferred to you, then at best, there will be a costly</p>

	<p>and long dispute with Adult Social Care who are likely to make a deprivation allegation.</p> <p>Paying for care fees can be complex and difficult to navigate, so we recommend seeking advice to help your parents make an informed decision, including understanding the risks.</p>
<p>3. Investing savings and sale proceeds of home</p> <p>My Aunt is waiting to be discharged from hospital after a bad fall. She needs a rehab or temporary Nursing Home placement until she is well enough to return home. She cannot pay for her care because a year ago, she invested all her savings and the sale proceeds of her home in a scheme that turned out to be a scam. Will Adult Social Care accuse my aunt of deprivation of assets if she has been scammed?</p>	<p>It is possible that Adult Social Care will decide that your aunt has deprived herself of assets, because some Local Authority Financial Assessment teams do so whenever a large amount of money has been spent or given away.</p> <p>However, in your aunt's case, it would be hard for the Local Authority to show that the legal test for deprivation is met. Your aunt's decision to invest everything she owned was unwise, but her motivation was not to avoid paying for her future care and support needs.</p>
<p>4. Motivated to avoid care costs?</p> <p>I am Deputy for Property and Finance for my sister. She was severely injured in a road traffic accident in which her husband died. Their sons were 16 and 18 at the time. I have used some of the income and capital that my sister inherited from her husband to pay my nephews' university living costs and other expenses that I have considered my sister would have wanted to fund. I have had Court of Protection permission for this. Can I continue to use my sister's money as Deputy to support her children without Adult</p>	<p>Adult Social Care might say this is deprivation because your sister had a need for care and support when the payments to her son began. They could say you should have kept her money to pay for her care.</p> <p>However, Adult Social Care will have to show that her motivation was to avoid care costs. As your sister's Deputy, your motivation was to support her sons through a difficult period to ensure they could continue their education after their parents' accident. The Court of Protection permission may be helpful evidence if the Council makes a deprivation decision.</p> <p>It is important to obtain specialist advice to protect your position as Deputy</p>

Social Care alleging deprivation?	
<p>5a. Gifting</p> <p>I am property and finance Attorney for my aunt who pays for her own care and currently has savings of £100,000. I have used some of her savings to give my two siblings £3,000 a year for the past five years because they are unwell and to make use of the Inheritance Tax rules. I plan to do the same this year. Could I be accused by the Council of deprivation of assets?</p>	<p>Even though your aunt has enough money to pay for her care fees, it won't be long before her savings fall below the 'upper capital limit' of £23,250. As her Attorney, you will then need to ask for a Social Services financial assessment to help pay for her care fees.</p> <p>Because you have gifted money that your aunt would otherwise have had available to pay for her care, Adult Social Care may consider this a 'deprivation.' This may mean that your aunt has to keep paying for her care from the value of the money that was given to your siblings, even though she does not have it.</p> <p>Rules about paying for care differ from Inheritance Tax Planning rules. You should not make any further gifts of £3,000 to your siblings until you have taken advice.</p>
<p>5b. Gifting</p> <p>Eight years ago, after my husband died, I sold our house and gifted the sale proceeds to my children to help them buy their own property. I moved into rented accommodation and have been using my savings to pay for a care agency to help me at home. My memory is declining and I've been told to move into a care home. The Council did a financial assessment and say that the gifts to my children were a deprivation and that I will have to pay for my care home fees or get the money back from my children. Are gifts ignored by Adult Social Care under the Inheritance Tax Rules after seven years?</p>	<p>The rules governing gifting and local authority financial assessments are not the same as the Inheritance Tax rules.</p> <p>Unfortunately, there is no "7-year rule" when it comes to paying for care and the Council can go back as far as they wish when investigating deprivation of assets.</p> <p>However, from what you have said, the Council may have failed to apply the correct legal test about deliberate deprivation. This test should look at your health at the time and what your intentions were.</p>

11.3 Case study 1

“Regular cash gifts did not prove deliberate deprivation of assets”

“The Local Government and Social Care Ombudsman has criticised a local authority that refused to pay for an elderly woman's residential care fees, after it learned that she had made regular cash gifts to her family after being admitted to the care home”.

[Click here for full report](#) Investigation into a complaint against North Yorkshire County Council (reference number:16 006 552) 17 January 2018.

The woman, referred to as Mrs Y, suffered a stroke in 2007 and, aged 80, had to go into residential care. At the time, she had assets of about £250,000, including her home, so was not eligible for local authority financial assistance under the then so-called Charging for Residential Accommodation Guide (CRAG) rules⁴. Mrs Y's daughter sold her mother's house and used the proceeds to pay her care home fees.

By January 2015, it had nearly all been used up, and Mrs Y's assets had fallen to the £23,250 threshold for local authority assistance in England. Her daughter duly applied to North Yorkshire County Council for financial help, and was granted it, pending completion of a full financial assessment. Consequently, North Yorks began paying the care home fees from January 2015, including a special extra rate charged by the home on top of the standard local authority rate.

But when the council came to do the full assessment, Mrs Y's daughter revealed that she, and other family members, had been receiving annual cash gifts from her mother since her admission to the care home until 2014, when her money ran out. The gifts – which she said were recommended by an independent financial advisor – amounted to nearly £75,000 in total.

The council took the view that this was deliberate deprivation of capital under the CRAG rules, which state that gifts to family can be treated as deprivation of capital if they are made with the intention of reducing the amount the person is charged for their care. It immediately stopped paying Mrs Y's care home fees and demanded repayment of the nearly £7,000 it had already paid. Mrs Y's family paid this back but complained to the ombudsman about the council's behaviour.

The Ombudsman's office has now issued its findings. It decided that North Yorks took its actions without ever completing a full financial assessment, simply assuming without cause that the gifts were deliberate deprivation of capital. Moreover, its calculations on the amount of deprived capital were not backed up by any evidence, and it did not properly take into account the proven fact that there was already a pattern of gifting before Mrs Y went into the care home, with no evidence of any haste to dispose of her assets. Although the amount of the gifts increased after she went into care, the council did not provide any other evidence to show why it had

⁴ Charging for Residential Accommodation Guide (CRAG) was cancelled and replaced by The Care and Support Statutory Guidance issued with the Care Act 2014 and The Care and Support (Charging and Assessment of Resources) Regulations 2014

decided the gifts were made with the intention of avoiding care charges. Mrs Y had paid the full amount of her care for nine years, and more than 70 per cent of her money has been spent on care home fees.

The ombudsman has now ordered the council to apologise, reassess Mrs Y's situation properly, and repay her any fees to which she is entitled.

“While I appreciate councils need to make difficult, nuanced decisions about whether people have deliberately reduced their assets, the guidance does state people with care needs are free to spend their money as they see fit” commented Michael King, the Local Government Ombudsman.

“Just because someone might be living in a care home, it does not mean they should not be able to spend their money on things other than their care, and this includes continuing to give gifts to friends and family”.

“Given Mrs Y's prognosis when she entered the home, and after paying for her care for nine years, it is hard to see how the council concluded every penny she gave away was done with poor intentions”, he added.

Mrs Y is still in the same care home, and pays all her monthly income towards the fees, but cannot cover the full cost. She now owes £30,000 to the home, which has said it will take 'further action' if the debt is not paid.

11.4 Case study 2.

Lincolnshire County Council not at fault for finding a deprivation of assets.

LGSCO Decision Date: 11th October 2019

What Happened

Mr X complained on behalf of his late mother, Mrs X. He complained that the Council wrongly decided that there had been a deliberate deprivation of her assets to avoid care charges.

Mrs X had been self-funding her care since September 2014. A year later the Council assessed her capital as £23,232.45 and decided it should make a contribution to her care costs.

Mrs X's care costs were paid by the NHS on account of her qualifying for Continuing Healthcare (CHC) from 15 July 2016 to 4 December 2017.

The Council said that Mr and Mrs X 'would' have been aware that funding could be subject to change in the future, because one can of course lose one's CHC status, but Mr X said he was not.

On 21 October 2017 the CHC reviewed Mrs X's case and said she was no longer eligible for funding, and it would stop in December.

As Mrs X now needed financial support from the Council, the Council assessed what her contribution to her care should be. Mr X completed a financial assessment form in November 2017.

The Council said that because Mrs X did not have to make any contribution towards her care during this period, she would have accrued £22,418.04 from her income and benefits.

But, in December 2017, Mrs X's assets reduced to just over £9000.

In March 2018 the Council queried some of the information provided by Mr X in his mother's financial assessment form. It asked him to explain why a number of withdrawals had been made from Mrs X's account during a period when she was receiving care.

The Council referred to payments and withdrawals amounting to over £18,000 over an eighteen-month period.

Mr X responded to the Council in April 2018. He said that he had bought his father a car before his Dad died, so that they could both care for Mrs X. He also said that it was his father's dying wish that this, 'should carry on after he had gone.'

Mrs X died in August 2018.

The Council responded to Mr X in September 2018 saying that it had found that there had been a deprivation of £19,372.82 by way of 'unreasonable expenditure and gifting' while Mrs X had been in care.

It said Mrs X should have paid the full cost of her care for a period of 224 days. It arranged to send Mr X a revised bill.

Mr X contacted the Council, disputing its findings.

The Council responded again in late September 2018 with a breakdown of the expenses it considered were over and above what was 'allowable'. It said, in summary;

They were made up of cash gifts, large items purchased and gifted, and running and upkeep of a car that was not Mrs X's car.

It noted that there were a number of taxi fares for Mrs X and queried why these would be necessary if Mr X was using his car with the purpose of caring for his mother.

It had given consideration to the responsibilities of a person acting with Lasting Power of Attorney and that consideration had been given to the Office of Public Guardians guide to gifting.

It said the gifts made were not of a reasonable value. It said they were therefore "unlawful" and constituted Mrs X's depriving herself of assets or being deprived of assets.

The Council allowed for a certain amount of gifting. It accepted that Mrs X would have wanted to provide birthday gifts to relatives. It allowed for money to be spent on an anniversary gift, on a birthday gift for Mr X's wife and it allowed some Christmas gifts, among other things.

Mr X responded in October 2018. He went through the Council's calculations in detail, explaining that any money that had been spent was spent either to fulfil his father's death-bed wishes or because his mother wanted to spend this money on her family.

There were a few payments that he accepted could be viewed as a deprivation of assets, such as the tumble-dryer and flooring, among others (they were bought for his use, not his mother's). He accepted the balance of £2462.48.

The Council replied in November upholding its decision. Mr X complained.

The Council replied again, in what the LGO considered to be a 'full reply', setting out its calculations and why they decided Mrs X would have to pay for her care between December 2017 and August 2018. It concluded by saying Mr X must pay an invoice for that care.

The LGO was satisfied that the Council provided sufficient evidence for its conclusions.

What was found

Overall, the LGO considered that the Council demonstrated that it considered all the information sufficiently and did so in line with its statutory duty. Therefore, the LGO did not find the Council at fault.

Mr X should have been aware that there was a possibility Mrs X would have to contribute to her care costs if she lost CHC. She had had to contribute at one point, before health funding took over for over a year. During that period, Mrs X's assets were reduced significantly, so that she was below the threshold for payment towards her care when the time came.

The Council did allow for some gifting but Mr X paid large sums of money to himself and his brothers. Two sets of these payments could not have been for birthdays or Christmas as they were double payments.

The evidence also indicated large sums of money spent on car maintenance and on a new car. While it may have been Mr X's father's dying wish that Mr X should continue to use a car to help his mother, there were also a number of taxi bills that did not suggest that the car was consistently utilised in that way. Therefore, the LGO said that the Council took a reasonable view that this constituted deprivation of assets.

The LGO concluded that the Council thoroughly considered the information Mr X provided about how Mrs X's money was spent. It considered that there was a large sum of unreasonable expenditure and gifting. It was not at fault.

The full Local Government Social Care Ombudsman report of Lincolnshire County Council's actions can be found here <https://www.lgo.org.uk/decisions/adult-care-services/charging/18-013-220>

11.5 Case study 3 – a local authority decision

The facts

- Mr Z lived in a property he jointly owned with his wife
- In September 2013 Mr Z was diagnosed with Dementia
- In November 2014 Mrs Z and Mr Z's step-daughter approached a solicitor wanting to know if Mr Z's assets could be put in Mrs Z's name (including the property) just in case Mr Z needs to go into a care home.
- Solicitor advised he could set up deed of gift and declaration of trust could be arranged, to gift Mr Z's beneficial interest to Mrs Z.
- Mr & Mrs Z went ahead with this arrangement.
- Mr Z was admitted into perm residential care in September 2017.
- Initially the value of the property was disregarded from the financial assessment as Mr Z's wife lived there.
- In September 2018 Mrs Z passed away
- The late Mrs Z left the property to her daughter (Mr Z's step-daughter) in her will - the main beneficiary of the estate.

Available evidence taken into account

There was written evidence in the form of a letter and attendance note of the Solicitors that the motivation behind entering into the Declaration of Trust was because Mr and Mrs Z were concerned about their estates being “eaten up” by care fees.

Mr Z had recently been diagnosed with Dementia prior to signing the Declaration of Trust but was considered to have sufficient capacity to give instructions at the time by his solicitors.

The local authority sought legal advice.

Decision.

1. Was the avoidance of care charges a significant motivation?

Yes. In view of the solicitor's comments in their letter and the contents of the attendance note of the conversation between them and Mr Z & Mrs Z's daughter.

2. At the time of the disposal, did the individual have a reasonable expectation that he would need care and support from the LA (for example, was he fit and healthy)?

Yes. Mr Z was not fit and healthy. He had received a diagnosis of Dementia a few months ago. He also had a number of other health problems.

3. Did the individual have a reasonable expectation that he would be assessed as having to contribute towards the cost of those care needs?

Yes. The fear of having their estate “eaten up” by care fees was the primary motivation for Mr and Mrs Z to enter into the Declaration of Trust according to the solicitors.

Outcome:

The local authority charged Mr Z (now deceased) for his contribution towards his care based on his incomes which has been paid by his son.

The local authority charged the late Mrs Z's daughter (the third party⁵) the difference between what it charged Mr Z based on his incomes and the full cost of the placement.

Mrs Z's step- daughter accepted the local authority decision and has agreed for a Legal Settlement Order to be placed on the property to ensure the local authority receive the money owing once the property is sold.

⁵ Where there has been deliberate deprivation of assets which have been transferred to a third party, the third party can be held liable to pay the local authority for the difference between what it would have charged, and the actual charge to, the individual receiving the care (section 70, Care Act 2014).

Appendix

A) Notional capital: an example

P transfers the title to their house to the only son and carried on living in it. The house is worth £100,000 at the time of the transfer. This leaves P with capital assets of just £20,000.

After four years, P needs care and the Local Authority performs a means tested financial assessment. They note that P had transferred their house to the son, and that its current value is £130,000. After an investigation, they decide that there is no reasonable explanation for P making this transfer, except for avoiding having to pay for care. The Local Authority will therefore treat P as if the total capital is the current value of the house plus P's remaining assets – i.e. £150,000 – even though P no longer technically owns the property.

P will therefore be expected to pay for the full cost of their own care. The £20,000 P retained will be used in full initially (as P deemed to have £150,000, not £20,000) but after this is gone, with the title transferred to the son, P won't be able to sell their home. At this stage, the Local Authority have an obligation to provide care but they can seek recovery of the payment of care fees using powers under s70 the Care Act and the Care and Support Statutory Guidance Annex E Deprivation of assets

B) Tariff Income: an example

When a person has between the lower and upper capital limit, in addition to the weekly income, if a person has capital between £14,250 and £23,250, we will add the weekly income to an assumed income of £1 per week for every £250 (or part of £250) over £14,250. (This is called a tariff income).

Example:

Janice has £17,250

(£17,250 - £14,250 = £2,750 divided by £250 = £12.00 per week)

Janice receives a weekly income of £300.00 per week made up from her State Retirement Pension and an Occupational Pension.

KCC would add a further £12.00 per week to Janice's income bringing her weekly income for assessment purposes to £312.00 per week.

C) The myth of the 7 year rule

Many people believe that if they transfer their assets and then survive for 7 years, this is not deliberate deprivation of assets. This so called '7 year rule' is a complete myth. There is a 7 year rule that relates to inheritance tax and not relevant to Adult Social Care funding or how we treat deprivation of assets. .

. As noted by the court in *Yule v South Lanarkshire Council*, the Local Authority can go back as far as they like when considering whether a gift transferred constitutes deliberate deprivation. Even a gift made 20 or 30 years ago could be considered.

D) Gifting.

Many people believe that if they give away £3,000 worth of gifts each tax year (known as your 'annual exemption'), this is not deliberate deprivation of assets. This relates to inheritance tax and not relevant to Adult Social Care funding or how we treat deprivation of assets i.e. gifting made with the intention of reducing the amount the person is charged for their care.