

Local Government &
Social Care
OMBUDSMAN

Deprivation of Capital



*Guidance for
practitioners*

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Deprivation of Capital: guidance for adult social care practitioners

Introduction

We have developed this guide to share learning from our investigations on deprivations of capital. It sets out how councils should apply the regulations and the Care and Support Statutory Guidance (which we will refer to as ‘the guidance’). It is not our role to say whether the decisions councils make are correct. Our focus is on the decision-making process: where we find fault in the process, we may ask the council to reconsider its decision.

This guide highlights some of the issues we see based on the approximately 40 complaints a year we investigate in detail. However, it cannot address every scenario a council may face, especially given that sometimes complex financial arrangements are involved.

We set out below our general approach to complaints and proceed to look at some case studies grouped into the following themes.

Cases where councils have:

- > not followed law and the guidance by considering the motivation or intent behind why someone has deprived themselves of an asset
- > wrongly applied the guidance on the personal expenses allowance to people funding their own care
- > treated all gifts as deprivation
- > failed to calculate notional capital correctly
- > failed to explain the reasoning behind decisions and/or not properly recorded how a decision was reached

We also provide a good practice section setting out the key matters to consider when making decisions on deprivation of capital.



What is Deprivation of Capital?

Deprivation of capital is when someone knowingly reduces the value of an asset they hold for financial benefit. The term is commonly used in the administration of welfare benefits, but in this guide we consider its application in the field of adult social care.

The law allows councils to charge for care and support services they provide or arrange (see [Section 14 of the Care Act 2014](#)), and requires councils to charge the full cost if a person has assets above the upper capital limit and is a permanent resident in a care home.

Charges are means tested based on a person's financial resources; including any income or capital they have. This means that when the council arranges care and support it will usually undertake a financial assessment, that asks people what income or capital they have. The term 'capital' includes things such as savings and investments, and can include the value of assets such as second homes and in the case of a permanent care home resident the house they previously lived in (although in some cases this may be disregarded).

Regulations say a council can treat someone as 'possessing capital' if they find that person has 'deprived themselves' of it, 'for the purpose of decreasing the amount they may be liable to pay towards the cost of meeting their needs for care and support' ([Care and Support \(Charging and Assessment of Resources\) Regulations 2014, Regulation 22](#)).

The value of the capital the person has deprived themselves of is called 'notional capital'.

For a council to treat someone as possessing notional capital it must therefore be satisfied both that they have:

- > deprived themselves of an asset, and;
- > have done so with the intent of reducing what they have to pay towards the cost of their care and support.



Our approach to investigating complaints

The complaints we receive will usually be from users of services, or their representatives, who consider a council has unfairly decided to include 'notional capital' when deciding how much they should pay towards their care costs.

The starting point for our investigations is to note the legal definition provided above and then to consider how the council has applied itself to the guidance on this subject (see [Annex E of the Care and Support Statutory Guidance](#)).

The guidance says if deprivation comes to light when a council completes a financial assessment then it must treat the issue "with sensitivity and care". Although councils have a duty to protect the public purse from fraud, the guidance warns against assuming someone has deprived themselves of an asset with the intent of reducing what they should pay towards their care and support. It says there may be valid reasons why someone no longer owns an asset and councils should "fully explore this first".

We expect councils to make enquiries including obtaining a version of events from the user of services or their representative before making decisions on deprivation of capital. The council may also reasonably ask that person to provide supporting evidence for their account.

The guidance next goes on to give councils advice on how they should decide if deprivation has taken place with the intent of reducing care charges. There are three factors the guidance suggests a council must consider as part of its decision-making.

- > **The council should consider if the user of services 'must have known that they needed care and support'.**

This will be a case specific judgment. For example, many people live with chronic long-term health conditions but may never need care and support. While others may have conditions that will degenerate and where it is anticipated such needs will arise.

- > **The person must have had a 'reasonable expectation' they may need to pay towards that care and support at the time of the deprivation.**

We do not consider this means the user of services must have detailed knowledge of the law underpinning the charges a council can make for contributions. The knowledge could be quite general in nature. For example, the Courts have held that someone would not need to know of the exact upper capital limit beyond which a council does not have to fund care (see *Yule v South Lanarkshire Council* [2000]). But the user of services could not have deprived themselves of capital unless they knew they 'might' be liable to contribute to care charges. (see *R (Beeson) v Dorset County Council* [2001]).

- > **The council should consider the timing of the disposal of an asset. This can help inform a decision about the person's motivation for disposing of the asset.**

The guidance tells a council to ask itself if, "at the point the capital was disposed of could the person have a reasonable expectation of the need for care and support?". In addition, "did the person have a reasonable expectation of needing to contribute to the cost of their eligible care needs?" at that time.



We expect to see councils apply themselves rigorously to this guidance. But the fact that an individual may have existing care and support needs, or know in general terms that they may be expected to pay for care, may not solely be sufficient grounds to demonstrate there was an intent to benefit from deprivation. The council will still need to consider the individual's motivation in disposing of an asset and explain the reasons for its decision.

It is unlikely anyone deliberately setting out to deprive themselves of capital to reduce their care charges will be willing to say so or have left anything in writing confirming the fact. So, while a council must explore with the user of services (or their representative), their reasons for depriving themselves of capital, it can still draw inferences on motivation in line with the guidance set out above, including taking account of the timing of the disposal of an asset.

There is no time limit on how far back a council can go in exploring if a disposal of an asset was done with the intent to avoid care charges. It is a common misconception that assets disposed of more than seven years ago will not be taken into account for social care financial assessments, as is the case with such disposals for inheritance tax purposes. However, a council should be cautious if going far back in time to consider the disposal of an asset. Because for this to amount to an intent to avoid care charges, it will need evidence to show that person would have known of a future need for care (and the need to pay for it) at the time of the disposal.

Individual cases can also raise issues about how a council has considered other parts of the law or statutory guidance around financial assessments. For example, how it assesses the value of assets jointly held where it decides one person has deprived themselves intentionally of their share of the asset. Or, as in a case study highlighted below, how a council has considered the guidance on the personal expenses

allowance (a minimum weekly sum that all users of services in residential care, whose care is funded by a local authority, should retain to meet expenses not covered by their care provider).

The following case studies also highlight the importance of basic good administrative practice when it comes to keeping records of decisions and providing an explanation to users of services. While there are cases on our website where we have not found fault with councils, most of the learning comes from cases where we have found fault. This is reflected in the case studies we have included in this guidance.

And finally, we expect to see councils offering a right of review or appeal to any decision where it believes someone has intentionally deprived themselves of capital. This can be a stand-alone process or councils can consider any representations through complaint procedures. However it chooses to review its decision, the council should ensure it carries out a robust investigation where someone disagrees with its decision.



Key Issues and learning points

Not considering all relevant factors or making proper enquiries

Councils must consider three factors:

- > could the person have had a reasonable expectation of needing care?
- > did the person have a reasonable expectation of the need to contribute towards the costs of that care? And;
- > was avoiding care costs a significant motivation in the timing of disposing of the asset?

Properly considering the factors: case reference [20 004 128](#)

Mrs Y moved out of her house into sheltered accommodation. A year later the property was sold. Mrs Y's family said she had told them to sell the house and split the money between them.

Mrs Y moved into a nursing home some 18 months later, following a hospital stay. After it became clear Mrs Y was not eligible for Continuing Health Care funding, the council carried out a financial assessment. It decided the transfer of the property was a deprivation of an asset and explained its reasons, which included:

- > Mrs Y knew she may need care and support, which was recorded in case notes. She had been experiencing memory loss and increasing frailty, and was diagnosed with dementia shortly before the house was sold;
- > Mrs Y and her family had a reasonable expectation of needing to contribute to the cost of care because Mrs Y's partner had received chargeable residential care and the costs were managed by the family;
- > It considered Mrs Y's motivation but concluded a transfer of assets to the family could have been achieved through a will.

What we found

In this case we found no fault in the council's decision-making process. It considered all the information available when reaching its decision and acted in line with the guidance.



However, in some cases such as below, we find councils can jump to the conclusion that there is a deprivation of capital without making proper enquiries or without considering all the available evidence.

Not properly considering the factors: case reference [19 004 207](#)

The council decided a payment to an adult child to extend their lease amounted to a deprivation. We found it had not considered the three factors set out in the guidance and had not made any enquiries with the family about it. The Council later considered these factors and decided the payment was not a deprivation.

Putting things right

The council agreed to pay the family £500 for the avoidable distress caused, and the time and trouble in pursuing the matter. The council had changed its processes by the time we made our decision.

Unclear on how decisions were made: case reference [19 001 435](#)

The council treated gifts of £4,000 Mrs Y gave to her children as a deprivation of assets without considering the motivation for making those gifts. While the decision on deprivation is one for the council to make, we said it should be clear how it reached its view on the motivation for the disposal.

Putting things right

The council agreed to reconsider its decision following the proper processes.



Wrongly applying the Personal Expenses Allowance to people funding their own care

We have seen cases where councils work on the basis that self-funders (someone with capital over £23,250) in residential care should keep their personal expenditure within the Personal Expenses Allowance (currently £26.65 a week and may include a savings disregard of up to £5.90). This has led to those councils treating expenditure above the Personal Expenses Allowance as deliberate deprivation of capital to avoid care costs

The Personal Expenses Allowance only applies to people being charged by a council for their residential care.

There is therefore no basis to say someone funding their own care should keep their expenditure within the Personal Expenses Allowance.

Applying personal expense limits to self-funder: case reference [19 014 633](#)

When Mr C moved into residential care the council told him he should pay for his own care because he owned a second property. Mr C sold the property and paid for his own care.

He contacted the council again when his capital fell to £23,250. The council told Mr C he should still have the money to pay for his care. Among other things, it told him gifts, clothing and other expenses (including maintenance of the home his wife still lived in), should have come from his Personal Expenses Allowance.

The council paid Mr C's care home fees, to prevent him from being evicted, but said he owed it more than £31,000 because it decided he had deprived himself of capital by spending more than the Personal Expenses Allowance.

What we found

We found the council at fault for telling Mr C he should have kept his personal expenditure within the Personal Expenses Allowance.

Putting things right

The council agreed to correct its faults by reassessing Mr C's finances.



Treating all gifts as deprivation

Gifts can include giving money to someone, buying them something or transferring ownership of property. Sometimes councils treat all gifts as deprivation of capital. That is not necessarily the case.

Councils need to avoid taking a blanket approach to gifting. Before deciding whether someone has made gifts with the intention of depriving themselves of capital to avoid care costs, councils need to consider issues such as:

- > how much money someone had when they made the gifts;
- > the size of gifts relative to their overall capital;
- > the purpose of the gifts (for example, were they for a birthday, an anniversary, another significant event or random gestures?);
- > historic patterns of gifting (has gifting increased or is it a continuation of what someone has always done?); and
- > the person's life expectancy when the gifts were made.

The Office of the Public Guardian (OPG) has issued guidance on gifting:

- > [PN7](#) - Giving gifts: a guide to the legal background for deputies and attorneys: and
- > [OPG2](#) – Giving gifts for someone else

These will be relevant to anyone appointed by the Court of Protection as a Deputy to manage the property and affairs of someone who lacks the mental capacity to do this for themselves, and anyone given Power of Attorney by someone who has now lost the capacity to do this for themselves.

The OPG guidance does not apply to people who are still managing their own property and affairs.

OPG2 says: "Gifts must always be well within what the person can comfortably afford. 'Affordable' varies a lot from person to person. A £200 gift has a bigger impact on someone with £9,000 than someone with £90,000".

PN7 says, unless permission has been granted by the Court of Protection, to be lawful, gifts must be:

1. "given on a customary occasion for making gifts within families or among friends and associates (for example, births, birthdays, weddings or civil partnerships, Christmas, Eid, Diwali, Hanukkah and Chinese new year)";
2. "to someone related or connected to the person or (if not a person) to a charity the person supported or might have supported";
3. "of reasonable value, taking into account the circumstances in each case and, in particular, the size of the person's estate."



Not properly following guidance on gifts: case reference [19 020 372](#)

Mrs Y paid for her own residential care for three years before her capital fell below £23,250. When she asked the council to help fund her care it decided she had notional capital of more than £33,000 relating to cash withdrawals, some of which her family said had been used for gifts.

What we found

We found the council at fault because, although it referred to the OPG guidance, it had not followed it and had effectively treated all the gifts as deprivation of capital.

Putting things right

The council agreed to reconsider its decision. It also updated its internal guidance on assessing self-funders and deprivation of capital.

Not considering the pattern of gifting: case reference [16 006 552](#)

Mrs Z paid for her own residential care for more than seven years after selling her home. During this time she made regular gifts to her family which came to £74,250. When her family asked the council for help funding her placement, it said Mrs Z had deprived herself of capital by making the gifts.

Although the council accepted there was a pattern of gifting before Mrs Z moved to the care home, it said the gifts amounted to deprivation because they increased in value after she moved to the care home.

What we found

We found the council at fault because there was no evidence it considered whether the gifts had been made with the intention of avoiding care charges. It had failed to take account of all the relevant factors, including:

- > the gifts had been made over a long time (with no haste to reduce Mrs Z's capital);
- > Mrs Z had spent 70% of her capital on care home fees; and
- > the increased scale of gifting reflected the fact Mrs Z did not have substantial capital before selling her home.

Putting things right

The council agreed to reconsider its decision on deprivation of capital.



Failing to calculate notional capital correctly

We have seen examples of councils making mistakes in this area, including asking people to provide evidence which is not available to them, as in the case below, or failing to properly consider jointly owned property.

Under the guidance, councils can only assess the finances of the person receiving care and

support. They have no right to ask for information about anyone else's finances.

When dealing with jointly owned resources (for example bank accounts, property and investments) councils should usually take 50% into account, unless there is evidence of unequal ownership.

Demanding inappropriate information on jointly owned assets: case reference [19 012 152](#)

Mr M had dementia and the council had arranged support to meet his care needs. His daughter, Mrs P, had power of attorney to manage his property and affairs. When the council assessed his finances to see how much he could afford to pay towards the cost of his care, it decided he could pay the full cost because he had an investment bond with his wife worth £85,000.

Mrs P told the council the investment bond was solely owned by her mother, Mrs M, so should not be included in her father's financial assessment and provided evidence of this. The council questioned whether Mr M had given his wife money to help buy the investment bond. It told Mrs P, if that was the case, Mr M would have deprived himself of capital to avoid care costs. It asked for additional evidence, which Mrs P's mother refused to provide.

What we found

We found the council at fault for asking Mrs P to provide information about her mother's finances when it was assessing her father's finances.

Putting things right

The council agreed to reconsider the matter by requesting further information about Mr M's finances.



Not properly considering joint assets: case reference [18 017 678](#)

Mr & Mrs C moved into an annex attached to their daughter's (Mrs B's) home so she could help look after her father. Mr & Mrs B had bought a property with an annex so they could convert it into an accessible home for her parents.

Mr & Mrs B paid £69,402 for this work. Before selling their own home, Mr & Mrs C put it into a trust which provided for 90% of the proceeds to go to Mrs B and 10% to Mr & Mrs C. When the sale went through Mrs B received £78,893 and Mr & Mrs C received £8,765.

When the council started providing help to meet Mr C's care needs, it assessed his finances to see how much he could afford to contribute. It decided he had deliberately deprived himself of capital when putting his home into the trust. It treated the money paid to his daughter as his notional capital.

What we found

We found the council at fault for failing to take account of the fact Mr & Mrs C had jointly owned their home when they put it into the trust. That meant the council could only treat half the money from the sale as Mr C's notional capital. We also found the council had not considered whether the costs associated with converting the annex should have been deducted from Mr C's notional capital.

Putting things right

The council agreed to reassess Mr C's finances to correct its faults.



Not giving reasons for deciding there was a deprivation in decision letters and/or not having a proper record of how the decision was reached

It is important councils keep a proper record of the reasons for their decisions.

Councils should explain the reasons for deciding there was a deprivation in writing. This gives families the information to challenge the decision, where appropriate.

Councils should either have an appeal process or consider a challenge to deprivation through its complaints process.

Poorly explaining a decision: case reference [19 012 728](#)

What we found

We found the council was at fault for not explaining its reasons for deciding that two gifts amounted to a deprivation. The family challenged the decision and the council explained its reasons in its appeal decision.

Putting things right

The council agreed to review its process to ensure it gave proper reasons for deciding there was a deprivation.

Poor complaint handling: case reference [19 015 446](#)

What we found

The council had considered all the information provided by the family and explained its reasons for deciding there was a deprivation. We found no fault in its decision-making. However, it was at fault for not signposting the family to its complaint process if they wished to challenge its decision.

Putting things right

The council agreed to change its process.



Good practice for councils

- > **Carefully consider what capital belongs to the person needing care and therefore can be taken into account** when deciding what they should pay towards their care costs, including obtaining evidence of ownership where appropriate.
- > **Carefully consider the value of the capital**, including obtaining an independent valuation where the value of an asset included as notional capital is disputed.
- > **Make enquiries about any disposals** What were the reasons for the disposal? Ask the family to provide relevant evidence, including any evidence of the person's intentions at the time of the disposal.
- > **Ensure there is a clear record of the factors considered** and, where appropriate, the weight given to evidence provided and/or the reasons for not accepting the family's account about the motivation for the disposal.
- > **Provide a written decision, including the reasons for deciding there was a deprivation**, and explain how the decision can be challenged (for example, details of any appeal process or signposting to the complaints process, as appropriate)

Reminder about the Ombudsman's role

Our focus in investigating complaints about deprivation of capital is to check whether the council has followed a proper decision-making process.

If there is no fault in the decision-making process, we will not comment on the decision reached.

If we find fault in the decision-making process, we may ask the council to reconsider the decision and may recommend other action to remedy any injustice caused.



Local Government and Social Care Ombudsman

PO Box 4771

Coventry

CV4 0EH

Phone: 0300 061 0614

Web: www.lgo.org.uk

Twitter: [@LGOmbudsman](https://twitter.com/LGOmbudsman)