

The Ombudsman's final decision

Summary: Mrs X complained the Council decided her mother deprived herself of assets before her death. Mrs X also complained the Council took two years from her mother's death to chase her, and her sister, for her mother's care home fees. The Ombudsman does not find fault with the Council's decision that Mrs X's mother deprived herself of assets. But, the Ombudsman does find fault with the Council's clarity and transparency over its decision and delays causing Mrs X frustration and uncertainty. The Council agreed to the Ombudsman's recommendation to apologise to Mrs X and reduce the outstanding balance owed by £400. The Council has already provided training to its staff.

The complaint

1. Mrs X complained the Council decided her mother deprived herself of assets before her death. Mrs X says her mother did not deprive herself of assets but made a genuine gift of funds to her and her sister.
2. Mrs X also complained the Council took two years from her mother's death to chase her, and her sister, for her mother's care home fees.

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this statement, I have used the word fault to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. I refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)
4. We cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. We must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3), as amended*)
5. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)

How I considered this complaint

6. I have considered all the information Mrs X provided. I have also asked the Council questions and requested information, and in turn have considered the Council's response.
7. I considered comments from Mrs X and the Council before making my final decision.

What I found

Deprivation of assets

8. The charging rules for residential care are set out in the "Care and Support (Charging and Assessment of Resources) Regulations 2014" (the regulations), and the "Care and Support Statutory Guidance 2014" (CSSG). When the Council arranges a care home placement, it must follow these rules when completing a financial assessment to decide how much a person must pay towards the costs of their residential care.
9. The rules state that people who have over the upper capital limit, £23,250, should pay for the full cost of their residential care home fees. However, once their capital has reduced to less than the upper capital limit, they only have to pay an assessed contribution towards their fees.
10. Regulation 22 says councils must treat people as still having capital they have deprived themselves of for the purpose of reducing the amount they need to contribute to the costs of their care. Capital treated this way is often called 'notional capital'.
11. However, the CSSG says councils should not automatically assume deprivation. It says there may be valid reasons someone no longer has an asset and councils should ensure they fully explore this first.
12. Annex E of the CSSG says that when deciding if someone has deprived themselves of assets, councils should consider:
 - a) *Whether avoiding the care and support charge was a significant motivation;*
 - b) *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?; and*
 - c) *Did the person have a reasonable expectation of needing to contribute to the cost of their eligible care needs?*

Council Deprivation of Assets Guidance

13. The Council's guidance on Deprivation of Assets outlines how it will consider potential deprivation of asset instances.
14. The Council's guidance says it will start by confirming what assets a person no longer holds. It will do this to assess whether a person deprived themselves of these assets to reduce the amount the Council charges for their care. The Council's guidance says there are certain removals of assets that do not form deprivation and provides examples of these and outlines how staff should consider these.
15. The Council's guidance says that once it has established if a transfer of an asset could be considered deprivation, it must consider the relevant questions about

whether it was. The Council's guidance highlights the three questions outlined in the Care and Support Statutory Guidance under the Care Act 2014.

16. The Council's guidance provides details of how it should assess each of these questions. The Council's guidance says that when it has decided a person has deprived themselves of assets it should provide a "*full written explanation specifying the reason/s for the decision*" to the person.

What happened

17. In 2009, Mrs X's mother had Chronic Obstructive Pulmonary Disease (COPD) and mild arthritis. Mrs X's father passed away in 2010.
18. Mrs X's mother gifted both Mrs X and her sister £50,000 each in 2011. Mrs X's mother also broke her leg in 2011 and received acute care for this. The notes with from the Council at this time confirm Mrs X's mother's chronic illnesses had not worsened since 2009 and the care it proposed to provide was for her broken leg. The Council confirmed with Mrs X's mother that since she had savings of more than £23,250 she would be a self-funder for any care the Council arranged.
19. Mrs X's mother moved in with Mrs X in 2012. In 2014, Mrs X's mother sold her house and gifted £98,000 to Mrs X for an extension at Mrs X's property to enable her to live there permanently.
20. Mrs X says her mother's mental health worsened during her time living with her. In May 2015, Mrs X made a referral to the Council for a care needs assessment for her mother. The Council attended in June 2015 and completed a care assessment. The Council noted Mrs X's mother's health had worsened and that she qualified for Council support. The Council confirmed Mrs X's mother would be a self-funder and proposed a care package of support. Mrs X decided to proceed with an independent care agency.
21. The Council completed a further care assessment in June 2016 with Mrs X's mother spending some time in respite care in a residential care home in March 2016.
22. Mrs X arranged for her mother to move into rented accommodation in June 2016 because of a deteriorating living situation with Mrs X and her family. Mrs X's mother had a fall and went into hospital before moving into the rental accommodation. The hospital discharged Mrs X's mother in August 2016 with a care plan for four carers a day to help with rehabilitation.
23. Mrs X applied to the Council for a full care assessment on 8 November 2016 because her mother's health had not improved through rehabilitation support. The Council completed a care assessment and engaged with Mrs X for completion of a financial assessment.
24. On 20 January 2017, Mrs X completed the financial assessment forms with her mother. Mrs X said her mother gifted £100,000 in 2011 and £98,000 in 2014. Mrs X said that when her mother gifted these funds she could live alone but moved in with her because she was lonely. Mrs X said her mother's health worsened following the move in with her.
25. The Council wrote to Mrs X on 13 March 2017 to advise Mrs X would need to contribute to the full cost of her care because it considered the gifted funds were notional capital. The Council did not explain its reasoning.
26. Mrs X contacted the Council on 13 April 2017 to dispute its decision about deprivation of assets. Mrs X provided details of her mother's health and living

history and disputed that gifting the funds was motivated by avoiding care costs. Mrs X said her mother's funds were now below the £23,250 threshold.

27. The Council reconsidered its decision about deprivation of assets and wrote to Mrs X on 26 July 2017. The Council said:
- It did not consider the £100,000 gift in 2011 was deprivation of assets. The Council reached this decision because Mrs X's mother did not have reasonable expectation of needing to contribute to the cost of her care needs at this time because she did not have care needs.
 - The gift of £98,000 in 2014 was a deprivation of assets. The Council said it reached this decision because Mrs X's mother had "*considerable care and support needs*" when she gifted these funds. The Council also said Mrs X's mother was aware of the cost of care and support and the need to contribute towards the charges.
 - Mrs X should provide all invoices and receipts for Mrs X's mother's personal care and support from December 2015 so the Council could use this to depreciate the notional capital amount of £98,000.
28. Mrs X met with the Council on 22 September 2017 to discuss its decision about deprivation of assets. Mrs X told the Council her mother's funds were rapidly reducing and she now only had £4,000 left.
29. The Council reconsidered its decision on Mrs X's mother's deprivation of assets again following the meeting. The Council wrote to Mrs X on 27 October 2017. The Council said:
- When Mrs X's mother gifted the £98,000 in 2014, she had reasonable expectation of needing to contribute towards the cost of her care needs in the future.
 - The reason Mrs X's mother would have this expectation is because of her worsening health conditions.
 - It had further considered the reason for Mrs X's mother's disposal of her assets and had decided it could reduce the £98,000 notional capital. The Council said it would reduce the notional capital by the amount Mrs X, and her mother, spent on Mrs X's property extensions to make comfortable accommodation for her mother.
 - It could also reduce the notional capital for any amount spent on personal care and support needs.
 - It would recalculate the notional capital on receiving invoices and receipts from Mrs X.
30. Mrs X's mother moved into an Extra Care Living unit in January 2018 following a reassessment of her care needs.
31. The Council completed its review of the invoices and receipts Mrs X provided on 6 March 2018. The Council told Mrs X it had reduced her mother's notional capital from £98,000 to £25,907.51. The Council said based on the most recent financial information it had for Mrs X's mother she was still above the threshold for Council support.
32. Mrs X's mother began to incur a debt for unpaid costs at the Extra Care Living unit. Mrs X entered into discussions with the Council about the care costs and made a complaint on 14 August 2018 about its decision over the deprivation of assets.

-
33. The Council provided its complaint response on 26 October 2018. The Council referred to its decision on 15 June 2017 about the deprivation of assets and said Mrs X's mother was liable for the full cost of her care.
34. Mrs X continued to dispute the Council's decision about deprivation of assets. The Council provided a formal response on 22 March 2019. The Council said it maintained its decision over the deprivation of assets. The Council said that while Mrs X's mother's funds may now have depleted she was still above the notional capital level. The Council directed Mrs X to the Local Government and Social Care Ombudsman (the Ombudsman).
35. Mrs X's mother passed away and Mrs X told the Council. The Council sent a letter to Mrs X on 29 April 2019 advising it would send a final bill for Mrs X's mother's care costs within the next four weeks.
36. On 30 May 2019, the Council wrote to Mrs X to advise Mrs X's mother's estate owed £12,006.61 for care costs. The Council advised it would contact again after 14 June 2019 if it had not heard from the family. The Council sent a reminder letter to Mrs X on 26 June 2019 for the care costs and warned of recovery action.
37. Mrs X contacted the Council and asked to meet to discuss the deprivation of assets. The Council responded to Mrs X to advise it could not add anything further to the discussion of deprivation of asset so would not meet with Mrs X. The Council directed Mrs X back to the Ombudsman.
38. On 16 March 2021, the Council wrote to Mrs X about the debt of £12,006.61 owed for her mother's care costs. The Council asked Mrs X to respond by 31 March 2021 to discuss payment of the debt. Mrs X told the Council she disputed the debt on 1 April 2021 and requested a meeting to discuss the deprivation of assets.
39. The Council responded to Mrs X on 19 August 2021 to advise it had completed its complaints process and had fully considered the deprivation of assets issue. The Council directed Mrs X back to the Ombudsman.

Analysis

40. Mrs X complained about the Council's decision that Mrs X's mother's transfer of £98,000 was a deprivation of assets.
41. There is no dispute that Mrs X's mother gifted funds amounting to £98,000 in 2014 to her daughters. Mrs X says her mother transferred these funds to Mrs X and her sister without any intention to avoid care charges.
42. The dispute centres over the Council's decision that Mrs X's mother transferred the funds to deliberately avoid care costs. The Ombudsman is not an appeal body. The Ombudsman's role is to consider the process followed by the Council, whether it followed the guidance and whether there was fault in the way it reached its decision. If the Council considered the information properly and followed the relevant legislation and guidance, the Ombudsman cannot find fault just because a person disagrees with the decision.
43. The Council should consider the three questions outlined in Annex E of the CSSG when deciding if a person has deprived themselves of assets.
44. When the Council made its first decision about deprivation of assets, in March 2017, the Council failed to demonstrate consideration of the three criteria in Annex E of the CSSG. When the Council wrote to Mrs X to provide its decision it failed to provide a full written explanation as outlined in its guidance. This was fault.

-
45. The Council reconsidered the deprivation of assets in July 2017 following an appeal from Mrs X.
 46. The Council considered Mrs X's mother's health in 2009 and decided she did not have care needs that would have given her a reasonable expectation of needing care. The Council used this to decide the £100,000 Mrs X gave away in 2011 was not a deprivation of assets.
 47. The Council then considered Mrs X's mother's health and increased care needs in 2015 and Mrs X's comments that her mother's health had been declining since 2012. The Council used this to decide that Mrs X's mother would have had a reasonable expectation of needing care in 2014 when she gave away £98,000.
 48. The Council met with Mrs X's mother in 2011 following her broken leg. The Council provided an explanation of care costs to Mrs X and explained that Mrs X would be a self-funder because of her savings. The Council recorded this in Mrs X's mother's care records.
 49. The Council considered the information it provided to Mrs X's mother in 2011 would have given her reasonable expectation of needing to contribute to the cost of care when she gave away £98,000 in 2014.
 50. The Council's decision followed questions b) and c) of Annex E of the CSSG by asking the relevant questions. The Council detailed its consideration of question b) and c) in its letter of 26 July 2017. The Council considered the relevant information available and reached an appropriate decision in line with these questions.
 51. The Council did not show any consideration of what Mrs X's mother's motivation was in disposing of the assets in the letter of 26 July 2017. The Council failed to consider all three criteria when reaching its decision in July 2017. This is fault.
 52. When Mrs X appealed the Council's decision further, the Council met with Mrs X to discuss the matter and provided further consideration of its decision on 27 October 2017.
 53. The letter of 27 October 2017 directly considered both questions b) and c) of Annex E of the CSSG again. In the letter of 27 October 2017, the Council included the statement "*I have further considered the reason for the disposal*" of the asset within the letter of 27 October 2017. This shows the Council has considered Mrs X's mother's motivation for disposal of the assets in this instance.
 54. The Council's presentation of its rationale for consideration of question a) demonstrated fault in how the Council approached consideration of deprivation of assets. However, this does not present fault in its ultimate conclusion of a deprivation of assets.
 55. In March and July 2017, the Council treated the gift of funds from 2014 as a deprivation of assets without questioning the motivation to do so. This is fault because the Council's starting point was that a gift of funds was a deprivation of assets. The Council should have started from the assumption the gift was not a deprivation and then asked if the motivation behind the gift was to avoid care charges.
 56. In October 2017, the Council asked in what ways the gift of £98,000 in 2014 "*was not*" motivated to avoid care charges as opposed to why it "*was*" motivated to avoid care charges. While the Council used the wrong starting point in asking the question, the Council did consider Mrs X's mother's motivation in October 2017.

By considering Mrs X's mother's motivation, the Council concluded it could reduce the notional capital and ultimately did so to £25,907.51.

57. By October 2017, the Council considered all three questions and reached a decision that Mrs X's mother deprived herself of assets to avoid care charges. The Council considered the relevant guidance and information available. The Ombudsman cannot find fault with the Council's decision.
58. While the Council has considered the relevant factors in reaching its decision, its written explanations to Mrs X in March 2017, July 2017 and October 2017 were lacking. The Council did not provide suitable clarity about its consideration of the relevant questions in Annex E of the CSSG.
59. Since October 2017, Mrs X has disputed the Council's decision over deprivation of assets on four occasions. The Council has not provided further clarity to Mrs X on any of these occasions.
60. The Council's records also do not provide any additional clarity on its contemporaneous thinking or decision making about the deprivation of assets. This lack of clarity from the Council has presented avoidable uncertainty about the Council's consideration of the question of motivation. This lack of clarity has resulted in Mrs X returning to the Council repeatedly over a four-year period to continue to dispute the Council's decision. This has caused Mrs X frustration and stress.
61. Mrs X also complained the Council took two years, from August 2019 to March 2021, in following up payment of the outstanding care charges.
62. The Council has admitted that this delay was fault and explained it was caused by work pressures on its staff. While this delay was fault, Mrs X was aware of the Council's position in August 2019 about the outstanding balance. Neither the Council's position nor the balance owed changed from August 2019 to March 2021. This delay will have caused Mrs X frustration but this is mitigated by the Council confirming its position with Mrs X in May 2019 and maintaining this in March 2021.

Agreed action

63. Within one month of the Ombudsman's final decision the Council should:
- Apologise to Mrs X and apply a reduction to the outstanding balance owed of £400 for the uncertainty, frustration, inconvenience and stress caused through the delays and lack of clarity.

Final decision

64. There was fault by the Council as the Council has agreed to my recommendation I have completed my investigation.

Investigator's decision on behalf of the Ombudsman