

The Ombudsman's final decision

Summary: Mr B complained about the Council's decision to assess that his mother, Mrs C, gave money and transferred a property to avoid paying care charges. We find fault in the Council's decision where it concerns one transfer of money made by Mrs C several years ago. We do not find fault in its consideration around later transfers made by Mrs C, including that of her home. The fault has created uncertainty about the outcome of the Council's assessment. The Council accepts this finding and has agreed action it will take to remedy this injustice, set out at the end of this statement.

The complaint

1. I have called the complainant 'Mr B'. He complains on his own behalf and that of his mother 'Mrs C'. He complains that in assessing whether Mrs C should contribute to the cost of residential care, the Council has wrongly assessed Mrs C as having 'notional capital' available to her. In other words, the Council believes Mrs C has intentionally deprived herself of money or other assets to avoid care charges and the Council should include the value of those assets in its financial assessment. This is further to various gifts Mrs C made of money or property between 2014 and 2017.
2. We have previously investigated a complaint from Mr B about this matter and found fault in the Council's decision making. The Council agreed to make a fresh decision on whether it still considered Mrs C had intentionally deprived herself of capital. While the Council has amended its decision, it has still found Mrs C has significant 'notional capital'. So, it is this review decision about which Mr B now complains.
3. Mr B says as a result the Council is unreasonably expecting Mrs C to pay towards her care based on the value of these assets.

The Ombudsman's role and powers

4. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (*Local Government Act 1974, sections 26B and 34D, as amended*)

-
5. We investigate complaints of injustice caused by ‘maladministration’ and ‘service failure’. I have used the word ‘fault’ to refer to these. 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*)
 6. 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*)
 7. 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

8. Before issuing this draft decision statement I considered:
 - information gathered during the investigation of Mr B’s initial complaint;
 - contacts between Mr B and the Council which followed our earlier decision and which preceded the Council’s decision on review;
 - relevant law and guidance as referred to in the text below.
9. I also gave both Mr B and the Council a draft decision statement which set out my proposed findings. I took account of any comments made in response before issuing this final decision.

What I found

Relevant Law and Guidance

10. Section 14 of the Care Act 2014 allows councils to charge for care and support services they provide or arrange. Charges are means tested based on a person’s financial resources; including any income or capital they have. Capital includes such matters as savings, investments and can include the value of assets such as houses.
11. The Care and Support (Charging and Assessment of Resources) Regulations 2014 say that “*an adult is to be treated as possessing capital of which the adult has deprived themselves for the purpose of decreasing the amount they may be liable to pay towards the cost of meeting their needs for care and support, or their needs for support*”. In these circumstances the Council is to treat the adult ‘as if they still own the income they have deprived themselves of and to treat that as ‘notional capital’.
12. The Government has also produced statutory care and support guidance in support of the above Regulations. Annex E of that guidance discusses “*deprivation of assets*”. It says a council should refer to the guidance in cases where it suspects somebody has deprived themselves of capital to decrease the amount they are charged for care.
13. The guidance says:
 - deprivation may come to light when a council completes a financial assessment with a client. Authorities must “*treat this issue with sensitivity and care*” (paragraph 3);

- people are entitled to “*spend the money they have saved as they wish – it is their money after all*” (paragraph 4). So, “*deprivation should not be automatically assumed. There may be valid reasons why someone no longer has an asset and a local authority should ensure it fully explores this first.*” (paragraph 5)
- The term ‘deprivation of assets’ refers to when a person has intentionally deprived or decreased their overall assets 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*” (paragraph 6).
- It also says: “*There may be many reasons for a person depriving themselves of an asset. A local authority should therefore consider the following before deciding whether deprivation for the purpose of avoiding care and support charges has occurred:*
 - a) *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?*
 - b) *did the person have a reasonable expectation of needing to contribute to the cost of their eligible care needs?*” (paragraph 11)

Background

14. Mrs C first came to the attention of the Council’s adult social care service in April 2012. At that time, her husband, who I will refer to as ‘Mr C’, was seriously ill in hospital and he passed away the following month. Mr C expressed concern for Mrs C’s welfare. Mrs C was known to suffer from asthma and MS. She was said to be struggling with the stairs and using the shower in the family home. The Council assessed Mrs C and decided her needs did not meet the threshold where she was entitled to receive social care.
15. In March 2013 Mrs C moved to a flat in a retirement complex. She rented this, wanting to see if she enjoyed living there. She rented out the family home.
16. Sometime during 2014 Mrs C gave Mr B’s brother (who I will call Mr D) £15,000. Mrs C said in 2017 this was to support Mr D with his business, although Mr B has subsequently corrected this account saying it was to support Mr D between jobs.
17. In November 2014 Mrs C received some short-term care at home from the Council following a stay in hospital. This ended the following month. She did not have to pay for that care.
18. Around the same time Mrs C received notice that she needed to vacate her rented flat. In January 2015 Mrs C moved to another flat in the retirement complex. This was bought for her by Mr B and his wife, who I will call “Mrs B”, with their savings. Mrs C lived there rent free paying the service charge and for utilities and so on.
19. In November 2015 Mrs C transferred the ownership of the family home to Mr B and Mr D. In March 2021 Mr B told us this was to “compensate” him and Mrs B as it would be many years before they would have access to the money used to purchase her flat. Mr B said that he asked the transfer include Mr D although he did not contribute funds to the flat purchase.

-
20. In September 2015 Mrs C had another stay in hospital. The Council did not assess she had any care needs on discharge. It has a record that it gave Mrs C a booklet on 'paying for care' at this time.
 21. In March 2017 Mrs C gifted £6,000 to two daughters of Mr C (Mr B's half-siblings). She did this after receiving a pension lump sum payable in the name of Mr C. Mr B says this was in accord with Mr C's wishes before he died.
 22. In April 2017 Mrs C then gifted approximately a further £30,000, mainly to Mr B and Mr D. Mr B understands this was after an ISA matured. Mr B says the funds given to him and his brother were in recognition of money spent renovating and improving Mrs C's flat after she moved in. Mr B says he and his brother gave most of this money back to their mother. He says all the money that passed between him, his brother and Mrs C was in cash.
 23. In April 2017 Mrs C had another stay in hospital. It is recorded in the case notes that she was suffering with COPD (Chronic Obstructive Pulmonary Disease). On discharge she received some care arranged and paid for by the Council. At this point it was envisaged Mrs C would need care at home on a longer term basis.
 24. The Council therefore completed a financial assessment to see what Mrs C should contribute towards her care. It was during this assessment the three gifts of money I have referred to above came to light. The financial assessment recorded that Mrs C gave money to Mr D in 2014 to help with his business. There is no record of her providing or being asked reasons for the other gifts. It is noted on the form that Mr B owned Mrs C's flat.
 25. The Council decided all the gifts above should be treated as 'notional capital' and so Mrs C was charged for home care from late May 2017 onward. The Council says Mr B challenged this decision at the time. When he did so, it says that it asked him to provide a copy of Mr C's will but that he failed to do so. It also asked him to provide records for money spent on Mrs C's flat but he did not do so.
 26. In July 2018 Mrs C was again admitted to hospital. She was suffering from confusion and hallucinations. Mrs C returned home but the symptoms recurred in September 2018. Mrs C entered residential care around this time, initially on a short-term basis but later as a permanent resident.
 27. In November 2018 the Council therefore undertook a second financial assessment, undertaken with Mr B as he now had a power of attorney to act for Mrs C. As before the Council identified the three gifts of money as deprivation. It also considered Mrs C's transfer of her house to Mr B and Mr D was deprivation and that it would treat the value of this as notional capital also; to the value of £153,000. The Council said that at the time Mrs C transferred the house, it was unsuitable for her given her health needs, therefore she *"would have been aware that [she] may need to make financial provision for future care"*.
 28. Mr B went on to complain at this decision via a solicitor, a process which took over 12 months to complete, mainly because of a delay in the Council providing a copy of Mrs C's social care records. Mr B argued the Council should not treat the transactions as notional capital because:
 - it had provided no evidence which showed Mrs C had gifted or transferred assets to avoid care fees;
 - that all sums gifted or transferred had pre-dated the Council carrying out a financial assessment;

-
- that most of the sums gifted and the house transfer pre-dated a time when Mrs C needed any social care and she had no reasonable expectation of needing residential care; the care records provided confirmed this;
 - that gifts were made to help Mr D at a time of financial difficulty; to respect the wishes of Mr C or to recognise that Mr B and Mrs B had purchased her flat;
 - that Mrs C's asthma and MS were always mild and a letter dated June 2020 from a health practitioner confirmed this was still the case; Mrs C entered residential care because of a previously unknown mental health illness whose symptoms only presented from July 2018.
29. In its replies the Council said Government guidance allowed it to consider the timing of a disposal and whether someone had a "*reasonable expectation of needing to contribute*" towards their care needs when they made a gift. The Council suggested that all the gifts, except that made in 2014, were made "*at or around the same time*" that Mrs C began needing care and support. The Council also noted Mrs C had received Attendance Allowance for several years, in recognition that she had some disability. The Council said it would make some adjustment to the notional capital amount to take account that money was spent making Mrs C comfortable in her flat. But it was satisfied it had followed due process.
- Our initial decision**
30. In August 2021 we completed our initial investigation into this complaint. We noted the complaint was late but considered there were special reasons that justified investigation. We considered the Council was at fault in making its decision that Mrs C had intentionally deprived herself of assets and so should be treated as having around £200,000 in notional capital.
31. In summary we were satisfied the Council had raised some relevant considerations in its decision; specifically:
- that Mrs C had health problems from 2012 and was known to social care from this time; she was at that time not found to meet the threshold for social care but was having some difficulties managing her home due to health and age-related issues;
 - that Mrs C had further discussions with the Council about her health and/or care needs before May 2017; the Council had a record that Mrs C received some general information about circumstances where someone may have to pay for care;
 - that in the two months before Mrs C was assessed as having social care needs in May 2017 she had gifted £36,000 in two separate sets of transactions to family members (our decision said over £40,000 but I note this was an error).
32. However, we considered there were other relevant factors the Council had not taken account of:
- that an explanation was put forward for why Mrs C gifted £15,000 to Mr D in 2014 for reasons other than to reduce the level of care charges she should pay; this gift was at a time when Mrs C did not have any assessed social care needs; in its complaint response the Council had indicated it may no longer consider Mrs C had notional capital as a result of making this gift but it had not clarified this;
 - that an explanation was put forward for why Mrs C gifted £6,000 to Mr C's daughters in March 2017 for reasons other than to reduce the level of care

charges she should pay (our decision erroneously said this was £12,000 – the same error as highlighted in the paragraph above). The Council's decision and complaint replies did not say if it accepted this explanation and if not, why not or what evidence it might need to be persuaded otherwise;

- that an explanation was put forward for why Mrs C gifted some of the £30,000 in April 2017 to Mr B and Mr D in recognition of money they spent on her flat. The Council's response to the complaint had implied it might accept some of this explanation, but it had not clarified this; nor what difference this made to its assessment;
- that an explanation was put forward for why Mrs C gifted her home to Mr B and Mr D for reasons other than to reduce the level of care charges she should pay. The Council's decision and complaint response did not say if it accepted this explanation and if not, why not.

33. We considered the failure to consider these factors stemmed from the Council not taking a sufficiently robust approach in gathering evidence and considering all relevant Government guidance. We could not say whether but for this fault the Council would have reached a decision with the same outcome, a very different outcome or one which may have gone only slightly to Mrs C's favour. But we considered this uncertainty was an injustice to Mrs C and Mr B. So, we recommended the Council review its decision. Something which it agreed.

The Council's review

34. In January 2022 the Council made its decision on review. This followed exchanges of emails it had with Mr B during the intervening time.
35. I noted that before making its decision the Council had set out its general view on Mrs C's anticipated need for care, in the time before she moved into residential care. It said that it did not accept Mrs C would have "*no reason to expect care would be needed*". It noted she received Attendance Allowance and had MS; a condition which can lead to "*cognitive problems, infections and other symptoms*" leading to hospitalisation. Mr B responded to again point out Mrs C's MS was mild. He provided a second letter from a medical professional dated February 2021 which says this. Also, that many people live in the community with Attendance Allowance and without an expectation they may need residential care.
36. In considering each part of the review decision I noted first the Council decided to continue to treat the gift in 2014 to Mr D as a deprivation of assets to reduce care costs. The Council asked Mr B if he could provide evidence in support of statements made previously that his brother's business had been in trouble in 2014. For example, company accounts. Mr B initially gave the Council his brother's contact details. Later he provided a statement saying that at the time of the gift Mr D was not running a business but between jobs (see also paragraph 16 above).
37. In its decision the Council said that it was willing to accept the money was not given for the benefit of avoiding care charges but only if it had 'verification' for this. It was for Mr B to provide this and not for the Council to make enquiries. It suggested it would revisit this decision again if he provided evidence such as "*final business accounts*".
38. Next the Council said that it no longer considered Mrs C's gift of £6000 to Mr C's daughters in 2017 as notional capital. It accepted this money was gifted in accord with Mr C's wishes and not intended to reduce what Mrs C paid towards care.

-
39. On the third gift, that of around £30,000 in 2017 to Mr B and Mr D, the Council said that it would not regard money spent on renovating Mrs C's flat as notional capital. But that it needed 'verification' this was the case. It said this could be in the form of invoices or quotes provided for whatever work was done on the flat. I note that in reply to further enquiries about this money Mr B stated the transactions between him, his brother and his mother had all been made in cash.
40. Finally, with regard to the house transfer, the Council said that it accepted Mrs C made the house transfer to Mr B and Mr D, in recognition of Mr and Mrs B purchasing her flat. But the Council says in that case it would expect to have seen a transfer also the other way; with ownership of the flat being made over to Mrs C. It considered therefore Mrs C had a beneficial interest in the flat and said it would treat its value as notional capital, which it calculated at £94,000 (a figure which appears based on a recent sale of a flat in the same complex). It said if the flat was in Mrs C's name then it would consider making a deferred payment arrangement with her. This is an arrangement that allows the Council to pay for someone's care who has capital above the upper threshold. In effect the Council loans the money to pay for the care in return for those payments being secured against property. The value of the loan plus interest is then recovered in the future.
41. I noted that before making this decision the Council had asked Mr B more about the transfer and he had referred it back to the previous correspondence sent on his behalf by the solicitor. But he also drew attention to an email he had sent in August 2020 to the Council, around a time when Mrs C moved care homes. In this Mr B had said that he and his brother proposed transferring the house given to them by Mrs C back into her name. They proposed this could then be used as an asset against which care charges could be recovered in the future, under a deferred payment arrangement with the Council.

My findings

General approach

42. We do not make decisions on a council's behalf or provide a route of appeal against their decisions. Our role is to consider whether a council has followed the correct process in making its decision. We will therefore look at whether it has considered all relevant information, taking nothing irrelevant into account and given clear reasons for its decision.
43. I note at the outset that the Council now accepts Mrs C's reasons for gifting £6000 to Mr C's daughters in 2017. So, that no longer forms part of its consideration of Mrs C's notional capital. That means there are three parts to its decision that are still contested by Mr B which I will consider in turn.
44. In doing so, I take account of the law and government guidance which tells councils 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.
45. First, the council should ask 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 not need care and support. While others may have conditions that will degenerate quickly and where it is clearly anticipated such needs will arise. Many will lie between these extremes, and it will not be possible to say with certainty when someone will know for sure that they will need care. But a council can reach a judgement on the

balance of probabilities as to when they consider this knowledge would have arisen.

46. Second, 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. The Courts have held for example 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]).
47. Third, the council should look at 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.
48. That is not to say timing is everything. Even when an individual may have existing care and support needs or know in general terms that they may be expected to pay for care, the Council still needs to consider the individual's motivation in disposing of an asset and explain its reasons.
49. But the guidance recognises that it is unlikely that 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. This includes taking account of the timing of the disposal of an asset.

The 2014 gift of money to Mr D

50. I have some concerns with the Council's approach to this gift. First, its final response to Mr B does not appear to take account of what he stated in reply to its further enquiries about this matter. Mr B told the Council that contrary to its record of conversations with Mrs C in 2017, this money was not given to support Mr D with his business but to support him between jobs. So, I am unclear why the Council continues to want details of Mr D's business which may no longer be relevant.
51. But my concern relates more to how the Council has applied itself to the timing of Mrs C's actions. This gift was made three years before Mrs C was assessed as having social care needs and four years before she needed residential care. It was also made before the Council has any record that it gave her information on paying for care.
52. While I note the Council has set out its general view on why Mrs C may have been expected to realise a need for care, this is a factor specific to the timing of each gift. So, I do not consider the Council can fall back on a generalised assumption that someone with MS or someone who receives Attendance Allowance, will therefore have an expectation of needing social care from the date of diagnosis or when that benefit goes into payment.

-
53. In this case I find there are records in 2014 that point to Mrs C becoming older and this led her to leave the marital home. Clearly she also had some long-standing health conditions. But the Council had assessed that Mrs C did not have social care needs at that time. And I note this assessment took place before Mrs C moved to the retirement complex, where the accommodation would place fewer demands on her.
54. On balance therefore I am not persuaded the Council has made a proper decision taking account of the timing of this gift and Mrs C's knowledge at the time. So there remains uncertainty about whether this gift should be treated as notional capital for Mrs C. I set out below how I want the Council to remedy this injustice.

The 2017 gift of money to Mr B and Mr D

55. I consider the evidence shows that by the time Mrs C gifted this money, the Council can more readily point to evidence showing she would have had a realistic expectation of needing social care. This gift was made just a few weeks before Mrs C began to receive care at home following hospital admission for a chronic condition. It is also clear in the time since moving to the retirement complex Mrs C's general health had declined, as illustrated by her hospital stays.
56. In addition, by now the Council can show Mrs C had received information explaining in general terms when the Council may make charges for care.
57. I am satisfied the Council has taken account of what Mr B has said about the reason for the gifts. I also note that the cause of Mrs C ultimately entering residential care was not directly related to her previous hospital admissions. But despite these factors, I consider the Council is not at fault for still making the inference that deprivation has occurred, taking account of the timing of the disposal and the lack of supporting evidence for Mr B's account that the money was in return for decoration, furnishing or renovation of Mrs C's flat.
58. I also consider what lends weight to the Council's decision here is that it first asked Mr B in 2017 to demonstrate the payments were in return for improvements to the flat. While I do not dispute the difficulty in gaining such evidence now, it would presumably have been more likely to be available nearer the time. That the Council has indicated a willingness even now to review its decision should new evidence come to light goes to its credit. I could not expect it to offer more.
59. Consequently, I am satisfied it has reached an administratively sound decision on this disposal of assets by Mrs C.

The gifting of the house to Mr B and Mr D

60. I am also satisfied the Council has reasonably taken account of Mrs C's expectation of care and knowledge of potential care charges when looking at this gift also. I appreciate the transfer took place in 2015. At the time Mrs C was not receiving social care. But had experienced another hospital stay and received information from the Council about care charging. These are reasonable factors for the Council to take into account.
61. I also find no fault in the Council drawing attention to transaction, on its own terms, being left incomplete. Because if Mrs C transferred ownership of her home as compensation for Mr and Mrs B's purchase of her flat, then I would expect to see that flat (or at least part thereof depending on the relative values of the properties) being transferred to her.
62. I find the house is worth more than the flat. So by regarding Mrs C as having the net worth of the flat as her beneficial asset I consider the Council has approached

this matter as fairly as it can. Further it has said that if the flat transfers to Mrs C's ownership it will enter a deferred payment arrangement. I find no fault in this approach, noting that Mr B has not indicated the transfer of the house back to Mrs C's ownership, mentioned in 2020, has completed.

63. I am satisfied the Council has therefore reached an administratively sound decision therefore on this disposal also.

Agreed action

64. The Council accepts the findings I have set out above. To remedy the injustice identified it has agreed, that within 20 working days of this decision, it will:
- a) write to Mr B with a further apology accepting the findings of this investigation;
 - b) agree to reconsider again its decision on the gift of £15000 by Mrs C to Mr D in 2014 taking account of my comments above; **or** it will agree that moving forward it will no longer treat this amount as part of Mrs C's notional capital;
 - c) after its consideration of b) completes the Council will write to Mr B with a statement of what notional capital it believes Mrs C currently holds; taking account of the passage of time; her costs of care and so on. If this will not be possible without making more enquiries of Mr B then it should write to him and explain what information it needs to produce such a statement.

Final decision

65. For reasons set out above I uphold this complaint finding fault by the Council causing injustice to Mrs C. The Council accepts this finding and has agreed action that I consider will remedy that injustice. Consequently, I have completed my investigation satisfied with its response.

Investigator's decision on behalf of the Ombudsman