

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint about
North Yorkshire County Council
(reference number: 22 013 262)**

03 October 2023

The Ombudsman's role

For almost 50 years we have independently and impartially investigated complaints about councils and other organisations in our jurisdiction. If we decide to investigate, we look at whether organisations have made decisions the right way. Where we find fault has caused injustice, we can recommend actions to put things right, which are proportionate, appropriate and reasonable based on all the facts of the complaint. We can also identify service improvements so similar problems don't happen again. Our service is free.

We cannot force organisations to follow our recommendations, but they almost always do. Some of the things we might ask an organisation to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

We publish public interest reports to raise awareness of significant issues, encourage scrutiny of local services and hold organisations to account.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mr X	The complainant
Mrs Y	The complainant's mother

Report summary

Adult Care Services – charging

Mr X complained about the Council's financial assessment for his mother, Mrs Y's residential care charges and its decision to treat monetary gifts to her children and grandchildren as notional capital. Mr X says this means Mrs Y was responsible for the full cost of her care for longer than she should have been. It resulted in significant arrears of care fees and a risk to Mrs Y's place at the care home.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (Local Government Act 1974, section 31(2), as amended)

To remedy the injustice caused, we recommend within three months of the date of this report the Council:

- Complete a financial assessment for Mrs Y based on her actual capital since 2022 and calculate when her capital would have fallen below the capital limit and what her contribution towards her care should have been from that point onwards.
- Reimburse Mrs Y any overpayments the new financial assessment shows she has made to the care home for her care since her capital fell below the capital limit. Any repayment of over £1,000 should include interest. Or, if the fees are still outstanding, the Council should calculate the sum it is responsible for and pay this directly to the care home.
- Pay Mr X £350 to recognise the distress and anxiety caused by the inclusion of the notional capital in Mrs Y's financial assessments.
- Review the financial assessments completed for other service users over the last 12 months where gifting was not deemed a deprivation of assets but was included as notional capital. The Council should make appropriate reimbursements to any service users where new financial assessments show they have overpaid for their care.
- Undertake a thorough review of its approach to deprivation of assets, gifting and notional capital, to ensure that its approach is robust and in line with the guidance.

The Council has accepted our recommendations to remedy the complaint.

The complaint

1. Mr X complained about the Council's financial assessment for his mother's residential care charges and its decision to treat monetary gifts to her children and grandchildren as notional capital. As the Council has not treated these gifts as deprivation of assets Mr X says it should not have included them as notional capital in the financial assessment.
2. Mr X says this meant Mrs Y was responsible for the full cost of her care for longer than she should have been. It resulted in significant arrears of care fees and a risk to Mrs Y's place at the care home, causing the family significant stress and anxiety.

Legal and administrative background

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this report, we 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. We 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 may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (Local Government Act 1974, section 26D and 34E, as amended)
5. We have produced [guidance](#) for practitioners about deprivation of capital setting out how we investigate complaints relating to this issue.

Charging for care

6. The Care Act 2014 and the associated Care and Support Statutory Guidance set out the rules the Council must follow when undertaking a financial assessment to decide how much a person has to pay towards the costs of residential care.
7. The guidance says people should be able to spend the money they have saved as they wish. However, it is also important people pay their fair contribution towards their care and support costs. Councils should ensure people are not rewarded for trying to avoid paying their assessed contribution. Councils must therefore assess a person to decide whether they have intentionally deprived themselves of assets to avoid paying care fees.
8. A person can deprive themselves of capital in many ways, for example by making a lump sum payment to someone else as a gift. Councils should not assume someone has intentionally deprived themselves of assets to reduce their contribution to care fees. The guidance says there may be other valid reasons.
9. In deciding whether the purpose of the deprivation was to avoid care fees, councils should consider:
 - 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?; and
 - did the person have a reasonable expectation of needing to contribute to the cost of their eligible care needs?

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10. If a council decides a person has deprived themselves of assets to avoid paying care fees, it may treat those assets as if the person still owns them (notional capital) in its financial assessment.

How we considered this complaint

11. We produced this report after examining relevant documents.
12. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

What happened here

13. Mr X's mother, Mrs Y, moved to a care home in October 2018. Mrs Y's house was put up for sale and her family entered a deferred payment agreement with the Council. In calculating Mrs Y's contribution towards her care, the Council applied a 12-week property disregard and Mrs X became responsible for the full cost of her care from January 2019.
14. When Mrs Y's property was sold in October 2019 the family settled the deferred payments with the Council and continued to pay the full cost of Mrs Y's care.
15. In April 2022 Mr X contacted the Council as Mrs Y's capital had reduced towards the upper limit of £23,250. He asked the Council to complete another financial assessment and provided the necessary documentation. Mr X then chased the Council for an update in June 2022 as Mrs Y had accrued outstanding fees at the care home.
16. The Council completed the financial assessment and wrote to Mr X in late July 2022. It calculated Mrs Y would not fall under the capital limit until 6 July 2023, and she would be responsible for the full cost of her care until that point. The calculation included the sum of £19,500 Mrs Y had gifted to her family in the previous three years and would otherwise have been available for her care.
17. Mr X disputed this calculation and provided information about Mrs Y's gifting pattern. Mr X discussed the financial assessment and Mrs Y's gifting with an officer in September 2022. The officer told Mr X they would refer the matter to their manager. Mr X chased for a response in October and early November 2022. The Council confirmed they would reduce Mrs Y's notional capital to £18,940. This would reflect the level of Mrs Y's gifting before she moved to a care home and sold her property.
18. The Council's records show it was aware Mrs Y had significant outstanding care home fees. It calculated the outstanding fees to the end of November 2022 were £20,050.90.
19. As Mr X continued to dispute the inclusion of notional capital, he made a formal complaint. Mr X told the Council Mrs Y accepted the majority of the capital from the sale of her property would go towards the cost of her care, but she also wanted to gift a proportion to her family. He said that before moving into the care home Mrs Y would give birthday and Christmas gifts to her children and grandchildren in proportion to the capital she had at her disposal.
20. He said Mrs Y's sole reason for the gifting was to help her children and grandchildren and see their pleasure while she was alive. There was never any

intention to deprive herself of assets to reduce her obligations towards the funding of the care homes.

21. Mr X referred to the statutory guidance and noted the Council had not evidenced Mrs Y had deliberately deprived herself of assets solely to reduce her contribution towards the cost of her care. Mr X also noted Mrs Y had paid around £168,000 in care home fees which equated to almost 89% of her available capital. He asserted this showed Mrs Y's commitment to paying her fair contribution towards her care home fees.
22. Mr X asked the Council to recalculate the financial assessment and view the gifting in the spirit it was intended.
23. The Council responded to Mr X's complaint and confirmed it was satisfied it had completed the financial assessment in line with national guidance and the Care Act 2014. It apologised for any confusion about the terminology used and explained it had not included any notional capital that relates to deprivation. It had included £18,940 as notional capital for gifting that was over Mrs Y's normal gifting pattern.
24. It referred Mr X to the following sections of Annex B of the statutory guidance.
 - 28) In some circumstances a person may be treated as possessing a capital asset even where they do not actually possess it. This is called notional capital.
 - 30) A person's capital should therefore be the total of both actual and notional capital. However, if a person has actual capital above the upper capital limit, it may not be necessary to consider notional capital.
 - 31) Where a person has been assessed as having notional capital, the value of this must be reduced over time. The rule is that the value of notional capital must be reduced weekly by the difference between the weekly rate the person is paying for their care and the weekly rate they would have paid if notional capital did not apply.
25. The Council accepted Mrs Y had more funds when she sold her property than at the time of the previous gifting pattern. But noted the increased gifting was based on HMRC rules for tax free gifting.
26. Mr X did not accept the Council's response and challenged its decision. He noted the financial assessment had taken 14 weeks to complete. This was an excessive period and that at no point had the Council investigated the background to the gifting. He also highlighted the statutory guidance confirmed "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".
27. In addition, Mr X questioned the Council's calculation on when Mrs Y would fall below the capital limit. Mrs Y had outstanding care home fees of £24,588.26, which she did not have the money to pay. Without the notional capital Mrs Y's capital would be significantly below the capital limit and she would not have to pay the full fees. Mr X said this was causing the family significant stress and anxiety and was putting Mrs Y's place at the home at risk. He asked the Council to take immediate action to address this.
28. The Council reviewed Mr X's complaint and apologised for the time taken to complete the financial assessment and the lack of communication. It confirmed it would review the financial assessment and confirm the date the Council would take over the funding of Mrs Y's placement and calculate her contribution.

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29. It acknowledged its communication around notional capital had fallen short. But the Council's position remained unchanged about the treatment of gifting within financial assessments. Although people could spend their income and assets as they see fit, the statutory guidance also states it is important the supported person pays their fair contribution towards the cost of their care.
30. The decision to include notional capital in the sum of £18,940 recognises that although Mrs Y was responsible for the full cost of her care, she had previously made gifts. The Council had therefore included monies gifted as part of this regular pattern totalling £560.
31. In March 2023 Mr X contacted his local councillor for help. He was concerned that Mrs Y now had outstanding care home fees of £33,586 and that she had received a letter from solicitors acting on behalf of the care home. They had requested payment of the outstanding fees within 14 days and advised Mrs Y's placement at the home was at risk.
32. The Council completed a further financial assessment. This again included notional capital of £18,940 and showed Mrs Y would have fallen below capital limits on 30 December 2022. It confirmed Mrs Y's contribution towards the cost of her care from 30 December 2022 was £390.09 a week until 27 January 2023. It then went down to £298.49 a week. The Council would contact the care home about the fees since 30 December 2022 and would account for any overpayment Mrs Y may have made.
33. Mr X continues to question the Council's calculations and argues it should not include the notional capital for gifting in Mrs Y's financial assessment.
34. In response to our enquiries the Council has again confirmed it has not included any notional capital that relates to deprivation of assets. It does not consider Mrs Y has deprived herself of capital to avoid paying for care services.
35. While it does not consider the gifting is deprivation, it considers the gifting rate increased considerably following the sale of Mrs Y's property. It notes Mrs Y previously gifted no more than £20 a gift to her family but in the two and a half years following the sale of her property she gifted £19,500.

Conclusions

36. The charging rules for residential care are set out in the Care and Support (Charging and Assessment of Resources) Regulations 2014 and councils should have regard to the Care and Support Statutory Guidance. In its complaint response, the Council referred Mr X to paragraphs 28, 30 and 31 of Annex B of the statutory guidance. It is curious, that it did not also refer him to paragraph 29.
37. Paragraph 29 states:
- Notional capital may be capital which:
- (a) would be available to the person if they applied for it
 - (b) is paid to a third party in respect of the person
 - (c) the person has deprived themselves of in order to reduce the amount of charge they have to pay for their care
38. None of these situations apply here. The Council has confirmed it does not consider Mrs Y has deliberately deprived herself of any assets but has still included £18,940 of notional capital in her financial assessment. The Council has included notional capital to reflect a change in Mrs Y's gifting pattern following the

sale of her house. But there is no provision for this in the legislation or statutory guidance.

39. There was clearly a change in Mrs Y's gifting habits following the sale of her house. When Mrs Y had more available funds, she gave her family significantly larger gifts of money. But unless the Council considered Mrs Y made these gifts to deprive herself of assets to reduce the amount she had to pay for her care, they should not be treated as notional capital.
40. Including this notional capital in Mrs Y's financial assessments is fault and it has caused Mrs Y and her family considerable distress and anxiety. It has meant that Mrs Y was responsible for the full cost of her care for longer than she should have been. This led to significant arrears of care fees and a risk to Mrs Y's place at the care home.
41. In the course of our investigation, we became aware of four other instances where the Council was satisfied a service user had not deprived themselves of assets but still included money gifted to others as notional capital in their financial assessments. The Council has since reviewed these decisions and arranged for new financial assessments to determine the point at which they fall below the capital limits.

Recommendations

42. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (**Local Government Act 1974, section 31(2), as amended**)
43. In addition to the requirements set out above, the Council has agreed to take the following action within three months of the date of this report to remedy the injustice identified.
 - Complete a financial assessment for Mrs Y based on her actual capital since 2022 and calculate when her capital would have fallen below the capital limit and what her contribution towards her care should have been from that point onwards.
 - Reimburse Mrs Y any overpayments the new financial assessment shows she has made to the care home for her care since her capital fell below the capital limit. Any repayment of over £1,000 should include interest. Or, if the fees are still outstanding, the Council should calculate the sum it is responsible for and pay this directly to the care home.
 - Pay Mr X £350 to recognise the distress and anxiety caused by the inclusion of the notional capital in Mrs Y's financial assessments.
 - Review the financial assessments completed for other service users over the last 12 months where gifting has not been deemed a deprivation of assets but has been included as notional capital. The Council should make appropriate reimbursements to any service users where new financial assessments show they have overpaid for their care.
 - Undertake a thorough review of its approach to deprivation of assets, gifting and notional capital, to ensure that its approach is robust and in line with the guidance.

Decision

44. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mrs Y and Mr X. The Council should take the action identified in paragraph 43 to remedy that injustice.