Investigation into a complaint against
North Yorkshire County Council
(reference number: 16 006 552)

17 January 2018
The Ombudsman’s role

For 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

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

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

Mrs Y  service user
Mrs X  her daughter, complaining on behalf of Mrs Y
Report summary

Adult Social Care
Mrs X complains on behalf of her mother, Mrs Y, the Council’s financial assessment is wrong because it should not treat gifted money as deprivation of assets.

Finding
Fault found causing injustice and recommendations made.

Recommendations
To remedy the injustice identified in this report, the Council should;

• apologise to Mrs X for its failure to complete a financial assessment in 2015 and its failure to evidence why it considers the gifted money to have been done with the intention of avoiding care charges;
• pay Mrs Y £250 to recognise the distress caused;
• complete a financial assessment for Mrs Y based on her circumstances in January 2015 including whether any deprivation of capital has occurred and repay any monies resulting from this reconsideration;
• review Mrs Y’s current financial position and look at how Mrs Y’s current debt to the care home can be reduced/settled to avoid her placement being put at risk; and
• review its current procedures and guidance for staff on how to deal with cases where deprivation of capital may have occurred.

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)
The complaint
1. Mrs X complains on behalf of her mother, Mrs Y, the Council’s financial assessment is wrong because it should not treat gifted money as deprivation of assets.

Legal and administrative background

The Ombudsman’s role
2. 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)

3. When the capital of a care home resident paying for her own care runs out, she can approach the council for financial assistance. The Council will first assess the suitability of the care home to meet the person’s needs and will then complete a financial assessment. The Council may ask the family to pay a “top up” fee if the cost of the care home is higher than its standard local authority rate.

The Care Act and the Charging for Residential Accommodation Guide
4. When Mrs Y moved into the care home in 2007, the applicable guidance was the Charging for Residential Accommodation Guide (CRAG). This guidance applied for the period when the majority of gifts were made.

5. The Council’s decision not to provide financial assistance was made after April 2015 when the Care Act was the applicable legislation.

Deprivation of Capital
6. CRAG states a local authority may consider that a resident has deprived herself of a capital asset to reduce her accommodation charge.

7. It also states there may be more than one purpose for disposing of a capital asset only one of which is to avoid a charge for accommodation. Avoiding the charge need not be the resident’s main motive but it must be a significant one.

8. Applicable from April 2015, The Care Act 2014, Care and Support statutory guidance annex E covers issues relating to the deprivation of capital. The guidance states the following:

   • When undertaking or reviewing a financial assessment a local authority may identify circumstances that suggest that a person may have deliberately deprived themselves of assets to reduce the level of the contribution towards the cost of their care.

   • People should be treated with dignity and respect and be able to spend the money they have saved as they wish – it is their money after all. Whilst the Care Act 2014 represents an important step forward in redefining the partnership between the state and the individual, it is important that people pay the contribution to their care costs that they are responsible for. This is important to the overall affordability of the care and support system. A local authority should therefore ensure that people are not rewarded for trying to avoid paying their assessed contribution.
• But 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.

• Deprivation of assets means where 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 to reduce the contribution they are asked to make towards the cost of that care and support.

• A person can deprive themselves of capital in many ways, but common approaches may be: (a) a lump-sum payment to someone else, for example as a gift; (b) substantial expenditure has been incurred suddenly and is out of character with previous spending.

9. Paragraph 8.27 of the Care and support statutory guidance states “People with care and support needs are free to spend their income and assets as they see fit, including making gifts to friends and family. This is important for promoting their wellbeing and enabling them to live fulfilling and independent lives. However, it is also important that people pay their fair contribution towards their care and support costs”.

How we considered this complaint
10. We have produced this report following the examination of relevant files and documents and discussions with the complainant.

11. We gave the complainant and the Council a confidential draft of this report and invited comments. The comments received were taken into account before the report was finalised.

What we found
12. Mrs Y suffered a stroke aged 80 and was hospitalised in 2007. Mrs Y was unable to return home so Mrs X and other family members found a place in a residential care home. Mrs Y moved from the hospital to the care home.

13. Mrs Y’s home was sold leaving her with capital of around £250,000. The family sought advice from a financial adviser. They paid him for his advice on how to invest Mrs Y’s money. Mrs X says he gave the family advice about making gifts saying they could gift up to £3,000 per person per year. However, there is no documentary record of the advice provided.

14. The Council accepts Mrs Y regularly made gifts to family members before she moved to the care home of about £20 to £30 for birthdays and Christmas. Between 2007 and 2014 members of Mrs Y’s family including her son, daughter, son in law, daughter in law and grandchildren received gifts of between £250 and £3,000 per year.

15. The family did not approach the Council for any financial assistance and paid the full cost of the care home from 2007 until January 2015. Mrs X contacted the Council in January 2015 to seek assistance with funding of Mrs Y’s care home placement as Mrs Y’s capital had reduced to about £23,000.

16. The Council completed an assessment and found it was appropriate for Mrs Y to remain in that care home. Pending completion of a financial assessment, the Council entered into a contract to pay Mrs Y’s fees and began paying the care home fees from January 2015. The home charged a higher rate than the standard
local authority rate. However due to the number of years Mrs Y had been resident and because the family said they could not afford to contribute, the Council agreed to pay this “top up”.

17. The Council met Mrs X to complete the financial assessment on 8 February 2015. During this meeting Mrs X advised the family had received payments from Mrs Y since she had been resident in the home. Mrs X provided information about the amounts paid to each family member since 2007. She says the payments ended in 2014 and the total paid was £74,250.

18. The Council took the view this gifting was deprivation of capital. On 27 April 2015 it terminated the contract with the care home and stopped making payments. It issued an invoice to Mrs X asking her to repay £6864.45 which was the amount it had paid for care since January 2015. The family has settled this invoice with the Council.

19. Mrs Y remains in the care home, now aged 90. All of Mrs Y’s monthly income is paid to the home but this does not cover the full amount charged. The care home has recently written to Mrs Y saying she owes it over £30,000 and it will take further action if this is not paid. Mrs X says there is no money to pay the debt and is worried the home will evict her mother.

Conclusions

The Council did not complete a full financial assessment for Mrs Y. Once Mrs X disclosed the level of gifting, the Council took the view deprivation of capital had occurred and treated the amount gifted as notional capital. It considered Mrs Y remained above the capital limits and so not eligible for financial assistance.

21. The Council calculated Mrs Y deprived herself of around £96,000. After we made enquiries the Council revised this to £77,000. Neither figure matches the amounts disclosed by Mrs X and the Council has provided no evidence to show how it calculated either figure. The Council should be ensuring it uses actual figures in any financial assessment.

22. CRAG and the care and support statutory guidance states that gifts to family can be treated as deprivation of capital. However, any deprivation must be with the intention of reducing the amount they are charged for their care. The Council accepts there was a pattern of gifting before Mrs Y went into the care home. It says it has treated the gifts as deprivation of capital because of the increased amounts gifted.

23. The Council has not provided any other evidence to show how it considered the gifts were made with the intention of avoiding care charges. The gifts were made over a number of years and there is no evidence of any haste by the family to dispose of Mrs Y’s assets. Mrs X argues there are other factors affecting the gifting. She says the financial adviser advised her to make the gifts. The Council states in a letter the advisor was no longer being recommended by the high street bank Mrs Y used due to “financial irregularities”. Mrs Y paid the full amount of her care from 2007 to 2016 and over 70% of her capital has been paid on care home fees. Mrs X says this clearly shows the gifts were not made with the intention of avoiding paying because she has actually paid for so long. Mrs Y was 80 years old when she moved into the care home. She had suffered a stroke and her prognosis was poor. Mrs X says no-one could predict how long Mrs Y would live and so it cannot be said the money was gifted with the intention of avoiding care charges nine years later.
24. The care and support statutory guidance says people can spend their money as they wish. There is evidence of a gifting pattern before Mrs Y was aware that she might need residential care. However, the Council has calculated the full value of all gifts made since Mrs Y entered care to be deprivation. Mrs Y did not have capital at her disposal before she sold her house. The Council’s decision to treat the full amount as deprivation does not take account of Mrs Y’s right to continue to make gifts. The Council has failed to demonstrate that it has taken proper account of all the relevant facts and circumstances when making its decision. The Council’s decision to treat the full amount of all gifts as deprivation, without supporting evidence, is fault.

**Recommended action**

25. To remedy the injustice indentified in this report we recommend the Council should:

- apologise to Mrs X for its failure to complete a financial assessment in 2015 and its failure to evidence why it considers the gifted money to have been done with the intention of avoiding care charges;
- pay Mrs Y £250 to recognise the distress caused;
- complete a financial assessment for Mrs Y based on her circumstances in January 2015 including whether any deprivation of capital has occurred and repay any monies resulting from this reconsideration;
- review Mrs Y’s current financial position and look at how Mrs Y’s current debt to the care home can be reduced/settled to avoid her placement being put at risk; and
- review its current procedures and guidance for staff on how to deal with cases where deprivation of capital may have occurred.

26. 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*)

**Decision**

27. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mrs X and Mrs Y. The Council should take the action identified in paragraph 25 to remedy that injustice.