

PROFESSIONAL NEWSLETTER – ISSUE 3

CARE HOME FEES - THIRD PARTY TOP-UPS

Local authorities have a duty to provide residential accommodation for the elderly and infirm. Section 21 of the National Assistance Act 1948, as amended by the National Health Service and Community Care Act 1990, requires local authorities to arrange residential accommodation for *persons who by reason of age, illness, disability or other circumstances are in need of care and attention which is not otherwise available to them.*

Most people needing residential care with capital in excess of the upper capital limit for local authority funding (£22,250 2008/09: England), will be regarded as self-funding and will be told by the local authority to make their own arrangements, unless a successful application is made for a deferred payment agreement under the provisions in the Health and Social Care Act 2001.

Where a resident has not entered in to a deferred payment agreement and is selling their former home, the local authority will arrange the placement and fund the accommodation charges until the property is sold at which time the resident will become self-funding and the local authority will terminate the contract with the care home leaving residents to make their own arrangements direct.

This will undoubtedly be more expensive than the contractual arrangement made between the local authority and the care home. In such circumstances, where the local authority has been funding the care, it will protect its position through an undertaking from the solicitor acting in the sale or registering a charge against the property under section 22 of the Health and Social Services and Social Security Adjudications Act 1983.

Residents who are self-funding have complete freedom to choose their own accommodation and negotiate terms direct with the care home.

Residents who are unable to fund the cost of their care and apply to the local authority for financial assistance can, in theory, choose their own accommodation subject to the provisions of the National Assistance Act 1948 (Choice of Accommodation) Directions 1992:

- A place must be available in the chosen care home;
- The accommodation is suitable to meets the residents assessed needs;
- It does not cost the local authority more than usual for accommodation for someone with those assessed needs; and
- The home agrees to comply with the terms and conditions set by the local authority.

Most local authorities publish lists of care homes which they are prepared to recommend to residents. However, the list can be restricted. The underlying factor being the cost to the local authority. Local authorities cannot put a ceiling on what it is prepared to pay for the accommodation, and must pay a figure appropriate to the resident's assessed needs.

Local authorities should not ask residents to pay more towards their accommodation because there are insufficient places available at the usual cost. Only when a resident has asked for more expensive accommodation should a top-up be considered. Guidance has been provided to local authorities on this specific issue (see LAC (98) 8 and LAC (2004) 20)

Problems arise where residents choose a care home where the cost is greater than the amount the local authority is prepared to pay, but there is a third-party willing to contribute towards the cost.

- The local authority will need to ensure that the third party will be able to maintain the top-up and, although it cannot carry out a full means assessment, it can make reasonable enquiries to satisfy itself that the third-party has sufficient resources to sustain the top-up in the future. It may require the third-party to enter in to a top-up contract with the local authority.
- Local authorities cannot use top-ups as a means of reducing their own costs by setting an arbitrary limit on the amount they are willing to contribute towards the cost of the resident's accommodation charges. They must be able to show that their standard fees are reasonable to provide the assessed service without the top-up.
- There is no limitation on who can provide the top-up. (A spouse making a liable relative contribution was not permitted to enter into a top-up arrangement. The liable relative rule has been repealed under section 146 of the Health and Social Care Act 2008).
- Resident's, generally, cannot top-up themselves from their own resources which have been disregarded in a financial assessment. (see *R v East Sussex County Council, ex parte Ward* [2000] 3CCL: LAC(2004) 20 and CRAG 8.018).

However, there are now certain circumstances in which residents can top-up themselves. From 1 October 2001 residents may top-up from their own resources where the resident is subject to the 12 week disregard or has entered into a deferred payment agreement with the local authority. (s54 Health and Social Care Act 2001).

I am your local Symponia member - Symponia is a national network of independent financial advisers with expertise in elder client issues, including investments, care fees planning, equity release and mitigating inheritance tax.

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