

# COMMUNITY CARE

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## Care home top-up fees

### Local Government Ombudsman gets tough on top ups

In September 2015, the Local Government Ombudsman (**LGO**) published a Focus Report on the issue of the topping up by relatives of council support for care (Counting the cost of care: the council's role in informing public choices about care homes). The LGO usually writes a Focus Report when it has identified a common problem from the complaints that it receives suggesting a more general non compliance with the law.



#### What is the law on choice of accommodation?<sup>1</sup>

The Care Act 2014 was implemented in England on April 1st 2015. Regulations made under the Act<sup>2</sup> provide that in so far as a council assesses that an adult needs to live in a care home, supported living accommodation or in a shared lives scheme, the adult has a free choice of where they will stay provided certain conditions are met.

There are 2 sets of conditions.

#### 1. The first set of conditions applies both to the type of accommodation in which the adult wants to stay and also to where this is located.

Having completed an assessment identifying that the adult has needs which the council must meet, a social worker should discuss with the adult and their carers how best to meet those needs. The adult and the carer may have a preference as to how needs should be met. For example where the adult is living in their own home but can no longer get sufficient support there, moving into a care home may be one option. But the adult may have a strong feeling against such a move. A tenancy in a housing unit with care support may be sufficient to meet their needs. If so, the council should usually support this choice. There is some quite complex law around the obligation of the council

to support the choice of an adult when their preference may expose them to risks to their physical safety. Adults in this situation should obtain legal advice.

The adult may wish to move to a care home in a different area of the country, often to be nearer to relatives who have moved away. Again such a choice should be respected. Subject to means testing, it is usually the council from where they are moving which is responsible for paying the cost of the home in the different area.<sup>3</sup>

The council must be satisfied that the new accommodation meets the adult's needs and that a placement is available.



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## 2. The second set of conditions concerns the additional costs of the adult's accommodation preference.

Local authorities determine a price that they expect to pay for accommodation for adults who have particular categories of need. The price varies according to needs, so the needs of an adult requiring nursing care will be more expensive than a person requiring residential care without nursing.

If accommodation which meets the adult's needs is available at the price the council expects to pay, then the council is not obliged to pay the difference if the adult expresses a preference for more expensive accommodation elsewhere.

The adult can choose to pay the additional cost in two circumstances:

1. The first is that the council has agreed to enter a "deferred payment agreement". In practice this means that the adult is self funding but does not want to sell their house to pay for their care costs. Therefore the council pays their care costs and these are to be repaid to the council from the proceeds of sale of the house when the adult no longer needs the care accommodation (usually when they die). There must be enough equity in the property to meet the anticipated costs.
2. The second circumstance is during the first 12 weeks of permanent care home residence.

If neither of these apply, only another person can pay the top up using their own money. They are required to enter an agreement with the council that they will do so.

These regulations are substantially the same as the law and guidance that applied before the Care Act came into force. Although quite straightforward in principle, they have given rise to significant problems in practice. The main reason for this is that councils have delegated the identification of suitable care home accommodation almost entirely to concerned relatives. A relative takes the initiative in identifying the placement and they are simply told that it does or does not cost more than the council's expected rate. Unfortunately, this is often not accompanied by information about currently available placements at the council's rate.

This was the problem in the complaint against Solihull (see Case 1)



### Case 1 Solihull council – (LGO reference 14014177)

When her father (Mr D) moved into a nursing home in 2007, Mrs Q paid a top up of £38 per week for 3 years.

Mr D was looked after by Mrs D at home but had stayed at various nursing homes for respite. When Mrs D went into hospital, Mr D went into respite care at nursing home B. This was one of only 2 homes identified by the council as available. The fees for both of these homes were higher than the council's rate. Mrs Q agreed to pay the difference. Mrs D became unable to care for Mr D and the placement was made permanent. Mrs Q continued to pay the top up but eventually queried this with the council. In June 2010 the council identified a home that did not require a top up and on that basis refused to pay the higher fee for Mr D's current placement.

**Decision:** The council should have paid the top up throughout. No homes were identified originally with a placement at the council's rate. In 2010, Mr D could not be moved without a risk assessment identifying that this was safe, which was not done. If the council had dealt with the placement properly originally, the issue of moving him in 2010 would never have arisen.

Another common problem is where a care home resident or their representative does not express a preference for more expensive accommodation because they are already living in the home when the council becomes responsible for the cost of their care. This was the situation in the complaint against the London Borough of Havering.

In such circumstances, when the council becomes responsible for providing financial support, the council may want the resident to move to cheaper accommodation. However this must meet the following conditions:

- There is a care home placement elsewhere at the council's expected rate at the relevant time.
- The placement will meet the resident's needs.
- A risk assessment identifies that it is safe to move the resident.

## Case 2 London Borough of Havering – (LGO reference 15003775)

Mrs N was assessed as requiring residential care. Her family were provided with a directory of care homes by the council. This contained a description of top ups but as Mrs N would be self funding, this was not relevant to her circumstances. She went into the care home in June 2013. She became eligible for council support a year later and in July 2014, the council wrote to Mrs N setting out her financial contribution and stating that:

"You should be aware that the resident's assessed contribution is in addition to any third party 'top-up' amount your relatives may pay to the home. This 'top-up' will have been agreed with the Care Home and the Council, to meet charges in excess of our ceiling rates."

The daughter, Miss N said she did not receive this. Mrs N then had to move to a new home following a safeguarding report. The council later sent a placement agreement to the home specifying that a top up of £275.73 would be required. The agreement did not name any individual as the paying third party.

**Decision:** The council was at fault because:

The council had not satisfied itself that anyone was willing or able to pay the top-up for the duration of Mrs N's placement.

The council had imposed and not agreed the arrangement that the top up would be paid to the home.

The LGO found that if the Council had dealt with Mrs N's placement properly she would have been living in an affordable care home and Miss N would not have had to pay a top-up. The LGO provided the following remedy:

- Refund Miss N for the top-up she has paid;
- Continue to pay the top-up at least until an assessment of Mrs N's needs confirms whether they can be met elsewhere;
- If not, the Council will have to fund the top-up indefinitely;
- If Mrs N's needs can be met elsewhere, the Council will have to see if anyone else is willing and able to pay the top-up;
- If no one is willing or able to do this, the Council will have to arrange for Mrs N's needs to be met in an affordable care home.



The council should pay the full rate until the relevant conditions have been met. It is only when these conditions have been met AND the adult then expresses a preference to stay where they are AND a third party is identified who will pay the top up, that the top up is payable. It is not sufficient on its own for the adult to express a preference to stay where they are.

This problem also occurs where a resident has been paid for by the NHS but no longer qualifies for that support and where there is a change in the fees of the care home which the local authority has not agreed to pay. There is no obligation upon a third party to pay an increased care home charge where the council are funding the placement.

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A further common problem is a lack of clarity leading to misunderstandings about the responsibility of third parties for payments. The LGO identified that this had occurred when looking at a complaint against Staffordshire Council.

Hopefully the requirement which now exists in the regulations for the third party to sign an agreement specifying all of the relevant matters will help to avoid such confusion.

It is unclear in the regulations the extent to which councils can backdate liability for third party payments to a period prior to the completion of all of the relevant regulatory requirements including the signing of the agreement by the third party. It is Wrigleys position that they cannot backdate liability as a matter of routine. It is very likely that many councils will seek to backdate such liabilities and those affected may wish to seek legal advice.



### Case 3 Staffordshire County Council – (LGO reference 14017806)

When in March 2014 her husband moved to a new home with nursing provision, Mrs X understood from a conversation with the social worker that she had agreed to pay a top up fee of £97 per week. The social worker recorded having doubts about whether Mrs X could afford it. The council did not provide any written confirmation of the top up arrangement including figures until 10th July 2014. Nor was Mrs X provided with an invoice for the top up by the nursing home until July 2014. This invoice was for a top up of £316.12 per week amounting to £6,593.36.

**Decision:** The LGO found fault on the following grounds:

- Failure to specify the top up arrangements in writing including specific reference to the amount payable.
- Failure to satisfy itself that Mrs X could pay the top up.

The LGO did not accept that the council could rely on the Mrs X's alleged misunderstanding of what the social worker had said when it was required to put the matter in writing which would have clarified any misunderstandings.

### Moving a resident

Where a council wants to move a resident to cheaper accommodation, the LGO says that:

"The council must carry out a risk assessment for the resident before an alternative placement can be arranged. This assessment must take account of the need to promote the resident's wellbeing when considering, for instance, the location of the placement and how close it is to family, or indeed whether any move would be detrimental to their health and wellbeing."<sup>4</sup>

A person who has been detained in a hospital under section 3 of the Mental Health Act 1983 is entitled to free aftercare. They have similar rights to choose accommodation as other residents although the number of providers who can meet their needs may be less. Such a person or another person on their behalf can pay a top up to secure more expensive accommodation provided that certain conditions are met, principally that the preferred care provision is suitable to meet their needs and an agreement to pay the top up is signed with the council. After care in these circumstances is a joint responsibility of the NHS and the local authority.



#### Sources:

1. This is Wrigleys account of the law, not that of the Local Government Ombudsman.
2. The Care and Support and After-care (Choice of Accommodation) Regulations 2014
3. If a self funding resident moves to another area and subsequently applies for council support it may well then be the council in which the home is located that is responsible.
4. LGO: "Counting the cost of care: the council's role in informing public choices about care homes" page 3. Available at the LGO website [www.lgo.org.uk](http://www.lgo.org.uk)

**Disclaimer:** The case reports are Wrigleys' summary of the LGO cases. This newsletter represents an interpretation of the law and is provided in good faith for the general education of readers. It is not intended as legal advice to be used in a particular case and Wrigleys Solicitors LLP does not accept any duty of care to users of this information. Readers dealing with real cases are advised to obtain their own legal advice.

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If you are having difficulties with top ups, the LGO guide has more information.  
Alternatively you can contact **Austin Thornton** on: **0114 267 5588**



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