



BRACKNELL FOREST COUNCIL

DEFERRED PAYMENTS & LEGAL CHARGES

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Deferred Payments and Legal Charges

1. Definitions & Abbreviations

Assessed Contribution – the amount that the Individual is required to pay towards the cost of their residential accommodation

CRAG - Charging for Residential Accommodation Guide

Deferred Payment Agreement (DPA) – DPAs are offered and operate under Section 55 of the Health and Social Care Act 2001. DPAs are a consensual agreement between the Individual and the Council that enables the Individual to defer payment of that portion of their assessed charge that relates to the value of the property, i.e. they cannot defer the portion of the charge that they are deemed liable to pay due to other capital and income. The documentation consists of a DPA Application Form and a Written Agreement, which is registered as a legal charge.

Deferred Payment Application – this is the form the Individual completes in order to apply for a Deferred Payment

HASSASSA – Health and Social Services and Social Security Adjudication Act 1983

Individual – means the individual receiving the service, and where appropriate, the term ‘individual’ shall also include reference to any person who has power of attorney, acts as next of kin, friend or is entitled to act on behalf of the individual

Legal Charge (LC) – A legal charge is applied to a property when someone other than the registered owner has a financial interest in the property. The legal charge prevents the property being sold without that financial interest being repaid. A legal charge can be invoked without the Individual’s consent in order to secure monies owed to the Council for residential services provided where the Individual won’t pay. It cannot be applied where the debt has accrued because of non-payment of assessed charges, other than related to care home provision. The Council cannot force someone to sell their property but it does mean that when the property is next sold the Council have registered a financial interest in the proceeds of the sale.

Written Agreement – The written agreement is the document signed by the Individual and sealed on behalf of the Council and registered against the Individual’s property as a legal charge. It does not come to an end until 56 days after the death of the Individual or until the date of a termination notice from the Individual to the Council. The Council cannot terminate a DPA.

2. Purpose

This guidance will affect those Individuals who are assessed as needing residential care and are either:-

Unable to pay their assessed contribution because property that they own or have a legal interest in and which must be taken into account, has not been sold

Or

Unwilling, or have otherwise failed, to pay their assessed contribution, and have property which they own, or have a legal interest in, that the Council can register a financial claim on as part of usual debt recovery procedures

3. Scope

This policy applies to staff involved in dealing with the deferred payment and legal charge processes

4. Eligibility

4.1 Who the local authority may offer a DPA to:-

- The Individual must have received a community care assessment that confirms their eligibility to have their needs met in a long term residential care home, with or without nursing care, and
- The Individual must have insufficient income and other assets, other than the value of their property, to meet the cost of their care (see CRAG for mandatory and discretionary disregards), and
- The Individual does not wish, is unwilling, or is unable, to sell the property quickly enough to meet the full cost of their care, and
- The Individual must own the property and the value of the property, together with other income and assets, after discharge of any existing mortgage, is sufficient to meet the criteria for self-funding.
- DPAs are discretionary. The Council will only assist applicants with mortgages if they have sufficient equity and funds to discharge both their commitment to the mortgage and have sufficient equity or resources to also discharge their DPA liabilities. Individuals must be able to establish to the Council's satisfaction that they are able to meet the commitments for both
- The Council will take into account the size of any DPA. A high level of a DPA in any individual case may limit the Council's ability to enter into other DP arrangements. The Council's aim is to assist as many people as they can with DPAs, however, the Council's ability to finance DPAs cannot be permitted to have an adverse effect on its ability to discharge its other Community Care functions
- A DPA will not be offered to Individual's entering residential accommodation for respite or a temporary period. Any temporary placement that becomes a permanent arrangement may be offered a DPA at the point that a decision is taken to remain on a permanent basis
- DPAs will not be used where other disregards set out in CRAG apply
- DPAs will only be offered following a financial assessment by the Finance Team

- If the property is jointly owned as joint tenants or tenants in common, and is not disregarded, the Council will only offer a DPA if all joint tenants and tenants in common (owners) sign the DPA and agree to be bound by the arrangement to discharge the debt when it falls to be repaid. This requirement is necessary because the Council believes that the use of Notices on the Charges Register and Restrictions on the Proprietorship Register do not protect the Council's debt. The reason why they are of this opinion is because under Land Law joint tenants do not have a divisible share of the property, they all jointly own the whole of the property. On the death of one joint tenant the deceased tenant's share passes by survivorship to the remaining surviving joint tenant/s leaving no asset from which the DPA can be discharged. The use of notices and restrictions only seek to protect minor interests and can be cleared off the title, under procedures operated by the Land Registry.

As DPAs are discretionary the Council reserves the right to suspend consideration of any new applications for DPAs temporarily, to avoid getting into financial difficulties. The Council's ability to finance DPAs cannot be permitted to have an adverse effect on its ability to discharge its other Community Care functions.

5 Legal Context

- The Health and Social Care Act 2001 (Section 55) enables local authorities to operate DPAs to allow Individuals to defer the sale of their home where that home will be needed to fund care home fees and where both parties agree to enter into a DPA
- It also allows a DPA to be offered to Individuals who decide to sell their home, but are unlikely to achieve a sale quickly enough to meet the full cost of the care home fees where the Individual is willing to enter into a DPA
- The power of the Council to offer Deferred Payments is a discretionary one, and as the cost of funding them comes from the Adult Social Care budget, all requests must be considered by panel. The panel consists of the Chief Officer: Older People and Long Term Conditions, the Principal Accountant and the Contracts Manager
- The power of local authorities to place a LC is under section 22 of HASSASSA and can be invoked when a debt, relating to non-payment of assessed charges for residential care, has accrued and all other debt recovery procedures have not resolved the issue. This is a procedure that is entirely separate to the DPA because a DPA is only possible where entered into by agreement by both parties
- Local authorities have the power to charge for services under various legislation.
- Residential accommodation provided under Section 21 of the National Assistance Act 1948 is subject to charging. The charging procedure is governed by the rules in the National Assistance Act 1948, the National Assistance (Assessment of resources) Regulations 1992 and the Charging For Residential Accommodation Guidance commonly referred to as C.R.A.G. The regulations often refer to and cross reference with the Income Support (general) regulations 1987. Section 22 of the National Assistance Act 1948 states that a persons ability to pay is assessed at either the standard rate being the total cost to the Local Authority or the lower rate depending on a persons resources.

6 Procedures

- 6.1 Care Manager will carry out a community care assessment to confirm whether the Individual has needs that are appropriately met by a long term placement in residential accommodation. Where this is the case, the Care Manager will request a financial assessment. The Care Manager will inform the Financial Assessment Team whether or not the Individual has capacity under the Mental Capacity Act
- 6.2 Subject to the Individual's availability, the Finance Team (Financial Assessment Section) will aim to carry out a financial assessment within two weeks of notification from the Care Manager that a financial assessment is required, to ascertain after the 12 week disregard period has elapsed, whether:-
- the Individual has sufficient capital excluding the property to be a self funder (in which case the Individual would not be eligible for a DPA at this time)
 - the Individual will not have the funds to pay for their place in long-term care without the proceeds of the sale of their property
 - what the assessed charge is, pending sale of the property
- 6.3 Where the Individual will not have the means to pay for their place in long-term residential care without the proceeds of the sale of their property, the Financial Assessment Section will discuss the option of DPA with the Individual, and leave an information leaflet and Deferred Payment Application Form. The DPA will advise the Individual in writing to seek independent legal, financial and benefits advice before proceeding. The Financial Assessment Section will inform Exchequer Team, Care Manager and Contracts Team of this action and inform the Contracts Team whether the Individual has capacity or not. Contracts Team to update the register. The Financial Assessment Team will complete the financial assessments up to the end date of the 12 week disregard period. Following assessments will be dependant on the return of the DPA. This will be monitored by the Financial Assessment Team to ensure continuity.
- 6.4 The Contracts Team will note that the DPA has been left with the Individual, and will make contact with the Individual regularly until either the DPA is received, or the Individual informs the Contracts Team that they will not be making an application. If the Individual wishes to enter into a DPA the expectation is that the DPA should be in place so that it commences at the end of the 12 week disregard period. The Care Manager will be kept informed
- 6.5 Where an Individual does not have capacity and an application to register an Enduring Power of Attorney (EPA) or Lasting Power of Attorney (LPA) has not been made to the Court of Protection, or is in the process of being made, the Contracts Team will make contact with the EPA or LPA regularly to request an update on progress. The Contracts Team will obtain evidence to confirm that the EPA or LPA has been registered. The Care Manager will be kept informed
- 6.6 On receipt of a complete DPA, the Contracts Team will:-

- check that the form is fully completed and follow up any outstanding information or documentation
 - check by applying to the Office of Public Guardian whether an EPA or LPA has been registered with the Court of Protection where the Individual does not have capacity
 - Prepare the DPA to go to panel
- 6.7 Panel to consider the request and inform the Contracts Team of the outcome. The Contracts Team will record and maintain a record of Panel decisions and inform the Financial Assessments and Exchequer Teams of all decisions.
- 6.8 Where a request for a DPA is refused, the Contracts Team will write to the Individual to inform them of the refusal and the reason why. Refusal could include:-
- The Council does not have sufficient funds to bear the cost
 - The equity in the Individuals property is insufficient to maintain them in their placement for more than one year
 - The cost of the DPA would be disproportionately excessive
 - The property is jointly owned and the joint owner/s refuse to join into the DPA

An Individual may appeal against a refusal for a DPA by stating their case in writing to the Director: Adult Social Care and Health. The appeal will be considered by the Director: Adult Social Care and Health and the Head of Departmental Finance within 2 weeks of receiving notification of the refusal

- 6.9 Where a request for a DPA is eligible and the request has been approved, the Contracts Team will send the Individual a Written Agreement for signature and return (within two weeks), an invoice for £350.00 along with a covering letter. The £350.00 is a contribution towards the cost of legal expenses and to cover the cost of the Land Registry Search. Payment must be received before the formal DPA process commences. The Council is unable to agree to add this cost to the accruing debt. The letter will request a valuation of the property, and will advise the Individual to seek independent legal, financial and benefits advice before proceeding. The Contracts Team will be responsible for contacting the Individual regularly for an update until either the Written Agreement is signed and returned, or the Individual advises that they will not be proceeding with the DPA
- 6.10 The Individual will be required to establish the approximate value of their property in writing to the Council's satisfaction. This could be achieved in a number of ways, which could include:-
- From an Estate Agent if the property has been put on the market
 - From professional land valuers
 - From a web site that gives an indication of house prices e.g. nethouseprices.com or Upmystreett
 - From the land registry website to find out what a similar property in the street was last sold for
- 6.11 Upon confirmation from Exchequer Team of payment of invoice, Contracts Team will send a copy of the signed DPA and Written Agreement to Legal, who will:-

- Undertake all the necessary searches against the property
 - Arrange for the Written Agreement to be signed on behalf of the Council
 - Arrange for the legal charge to be placed on the property
 - Prepare and send the Written Agreement/charge to the Contracts Team
 - Write to the Individual to inform them that a legal charge has been placed on the property
- 6.12 The Contracts Team will forward the Written Agreement to the Individual, or alternatively, if there is a solicitor, to the solicitor for execution
- 6.13 The Contracts Team will maintain a register of DPAs. This should include the value of the property subject to the agreement. The DPAs will be stored by Legal Services in the Legal Deeds Registry.
- 6.14 The Contracts Team should ask for a review of the property value annually, or as determined by the annual review completed by the Care Manager
- 6.15 The Financial Assessment Section will complete and maintain a depletion schedule, recording the value of the assessed contribution that is to accrue, and estimated time that the DPA will last for and other relevant data.
- 6.16 The Exchequer Section will be responsible for updating the register after each 4 weekly billing cycle to reflect accruing debt against the value of the property.
- 6.17 The Exchequer Section will send annual financial statements to all individuals in receipt of a DPA detailing the current level of the outstanding debt and an estimation of its rate of growth.
- 6.18 All sections (Contracts and Finance Teams) will be responsible for monitoring that the amount of debt can be covered by the remaining equity, especially where as a result of changes in property value or assessed contributions impact on the rate the debt is increasing beyond that originally calculated. A Deferred Payments monitoring meeting will be held every two months between all teams
- 6.19 When the depletion schedule indicates that less than six months remains before the debt exceeds the value of the property for self-funding clients, the Financial Assessment Section will arrange a re-assessment of the Individual contribution. This will be carried out under CRAG. The Individual will be informed of this revised contribution and be advised that this charge must be settled on an on-going basis. Welfare Benefits advice will be given at this point

7 Process in the absence of a DPA

- 7.1 Should the Individual decline to accept a DPA or, having indicated their willingness to enter into a DPA, not complete and returned the DPA within the 12 week disregard period, unless there are exceptional circumstances which are explained to the Council's satisfaction, then the Individual will be invoiced the full cost of the care plus any associated legal costs actually incurred. Should these invoices not be paid in accordance with the Council's normal

payment terms a LC under section 22 of HASSASSA will be placed on the property

- 7.2 Should the Council be unable to offer a DPA then the Individual will be invoiced the full cost of the care. Should these invoices not be paid in accordance with the Councils normal payment terms a LC under section 22 of HASSASSA will be placed on the property. Contracts Team to notify Legal Team of this requirement and to update register.

8 Top-ups

Third party contributions are additional payments over and above the amount the Council considers appropriate to pay.

8.1 Formal Agreements/Contracts

Third party contributions are allowed, provided the person making them records the details on the Individual Service Contract and has entered into a DPA. It must be made clear to the home that the third party contribution and any subsequent change of the amount must be notified to the Council. It must also be made clear to the third party, and the Individual, that failure to pay an agreed top-up may lead to the Individual having to move to alternative accommodation at the local authorities agreed rate, where one is available.

8.2 Individuals making Top-ups

Individuals are able to make top-up contributions during the 12 week disregard period, or if they have entered into a DPA. This is so someone who is, in effect, self funding, has the right to exercise personal choice by choosing to use their own resources, to pay for a place which is above the rate the Council would normally expect to pay for the appropriate level of care. However, the top-up can only be made from funds that are disregarded under CRAG. These include the disregarded capital amount (£23,000 as at 1st April 2009). This does not affect the tariff income derived from that Capital amount. Hence the tariff income derived from capital between lower (£14,000 as at 1st April 2009) and higher rate (£23,000 as at 1st April 2009) will not be reduced even though this capital diminishes through making top-ups.

- 8.3 The Individual can use other capital resources, e.g. savings in a building society and pay the top-up directly.

Failure to made Top-Ups

Individuals making their own top-up and any person making a third-party contribution must be advised by the Care Manager that failure to maintain these additional contributions may result in the Individual being required to move to residential accommodation at a lower appropriate cost that meets the assessed needs and is available

9 Ongoing Administration

9.1 Ongoing maintenance of the property

- The reasonable costs associated with securing, insuring and maintaining the property must be met by the Individual. Where appropriate the financial assessment may be adjusted by these costs by adjusting the personal expenditure allowance.

- The effect of this adjustment will be to reduce the assessed contribution the Individual is required to pay immediately but increase the amount invoiced which is payable when the property is sold
- The Individual is responsible for ensuring that there is up to date insurance on the property at all times, and provide a copy of the policy if requested by the Council

9.2 Property Updates

In any review of Individuals needs the Care Manager must ensure that property matters are considered. This includes checking that it is still owned by the Individual or whether any income is derived from rent. Notification of any change must be communicated to the Financial Assessment Team

9.3 Deprivation of Assets

- Anyone who transfers property or savings to another person at a time when they know, or ought to have known, that they will be in need of residential care, in order to qualify for financial help from the local authority, is likely to be the subject of the “deprivation of assets” rule.
- If any member of staff suspects that an Individual has deliberately given away assets in order to reduce or avoid care home fees, they must commence investigations to establish the facts and present their findings to Legal Team for a decision. If Legal Team agree, then the Council has the power to treat the Individual as if they still have those assets – known as notional capital
- There is no set time limit within which giving away property or savings is treated as deprivation of capital. The most significant factor is to establish the intention behind the transfer. If a “significant” reason, not necessarily the main reason, was to avoid paying for care fees the Council have the right of further investigation. To proceed with a claim consider whether:-
 - i. the transfer took place up to six months before the Individual moved permanently into residential care or while the Individual is in residential care. If so, the Council could claim fees from the person whom assets have been given to
or
 - ii. the transfer took place more than six months before the Individual moved into the care home. If so, the Council could consider whether it is possible to recover the fees from the Individual personally. This means that the Council could issue a bill for care home fees, and commence debt recovery procedures if they remain unpaid

CRAG allows for the recovery of the assessed charge from the Individual or if the Individual is unable to pay to recover from the person to whom the asset was transferred. After the six month period the Council can still take legal action to recover assessed charges from the person to whom the asset was transferred.

These procedures can also be applied in situations where assets that would have been treated as capital have been converted into those that are not.

10 Letting the Property

- 10.1 The circumstances in which this might be considered would be where the Individual does not want the property sold during their lifetime and the property would otherwise be empty. The rental income generated (along with any other income), less any reasonable expenses of letting the property, must be paid to the Council in order to reduce the accruing debt
- 10.2 Individuals should be advised that no letting agreement should be entered into or keys given to a prospective tenant before the DPA and LC has been entered into
- 10.3 A copy of any proposed tenancy agreement must, in all cases, be approved by the Council's Legal Team. The property may only be let on an assured short hold tenancy if it is to be subject to a DPA
- 10.4 If the property is already let, legal advice should be sought before proceeding any further with the DPA

11 Sale of Property or Death of Individual

- 11.1 If the property is sold during the placement, Legal Team to notify Contracts Team of the completion date and value realised. Contracts Team to update register and notify; Exchequer Team in order to calculate the accrued debt which must be re-paid in full from the sale proceeds; Financial Assessments; and Care Manager.
Exchequer Team to notify Contracts Team once the debt has been repaid who will inform Legal team that the DPA or LC can be removed from the Individual's title.
If the debt is not repaid immediately then interest will be payable immediately at 2% per annum above Lloyds TSB base lending rate.
- 11.2 If the sale proceeds during the placement and there is sufficient funds for the Individual to be a self funder, there will be a new contract between the Individual and the home
- 11.3 If the Individual dies during the placement then compound interest will accrue on the outstanding debt until repayment as follows:-
 - DPA – 56 days after the Individual dies at a rate of 2% per annum above Lloyds TSB base lending rate
 - LC – day after the Individual dies at a rate of 2% per annum above Lloyds TSB base lending interest
- 11.4 The Finance Team are responsible for calculating the amount owed and sending out relevant invoices once Legal Team have advised them that the property has been sold (this information should also be copied to the Care Manager) or that the Individual has died
- 11.5 The Finance Team should send the invoice to the legal representative or the Executor of the Individuals estate, with the following information:-

- Actual or provisional debt, broken down to show:-
 - i. amount derived from payment of fees
 - ii. other associated costs (listed by item)
- Rate of interest to be charged and date of effect

This should be sent within 14 days of receiving notice of death. If the notified amount is provisional, an actual amount should be confirmed in writing no later than 6 weeks from the death of the Individual

11.6 If the DPA or LC has not been cleared within 4 weeks of the date interest started to accrue, a reminder will be sent by the Debt Recovery Team as per the Debt Recovery Procedures.

11.7 If the Individual remains self-funding, after repayment of any debts from the proceeds of the property sale, the Care Manager must consider how able, or well supported, the Individual is to handle their own financial affairs. Wherever possible a relative or friend is the preferred option for undertaking Receivership responsibilities or the Individual can appoint a solicitor as Receiver. If no one suitable can be identified, the Care Manager can make a referral to the Receivership Team

12 Monitoring and Review

This policy will be reviewed in 12 months unless prioritised as requiring one earlier