



SOLICITORS

**IS YOUR RELATIVE ABOUT TO
ENTER A CARE HOME?**

**SHOULD YOU PAY A
THIRD PARTY TOP UP?**

SHOULD YOU PAY A THIRD PARTY TOP-UP?

- Is your relative about to be, or are they already funded by the Local Authority?
- Is your relative about to enter a home which is considered to be more expensive than the Local Authority fixed rate for such a place, or are you now being invited to pay an increased top-up in a home where your relative has been for some time and from which they may be evicted?
- Should you pay the third party top-up which you are being invited to pay?

There are important factors to take into account with regards to the way in which care and support is charged for by Local Authorities, which in England stem from the *Care Act 2014* (came into force in April 2015) and in Wales the *Social Services and Well-being (Wales) Act 2014* (came into force April 2016), and which refers specifically to people's "genuine choice of accommodation":

- Whilst it is acceptable for Local Authorities to set an amount they will pay for the needs of people in certain "bands" (such as Residential or Nursing care) these should only ever be used as a guide and not be inflexible.
- An individual's care and support needs should be fully assessed and eligible needs arising from such an assessment must be met by the Local Authority without the need for a 'top up' from a relative.
- Local Authorities have a **DUTY** to pay **MORE** than the fixed level if someone's eligible care and support needs warrant this and there are no other less expensive places available which **FULLY** meet that person's needs.

Care and Support Assessments should take into account:

- **Physical** care needs;
- **Social** needs;
- **Psychological** needs (*R v Avon CC ex p M [1999]*) found that the strongly held preference of a man with learning disabilities to remain in the home of his

choice amounted to a psychological need);

- **Religious** needs;
- **Cultural** or ethnic needs – for instance, where staff or residents speak the individual's first language or the person can remain in close contact with friends and family, or they have a specific problem such as hearing or visual impairment in a home specifically geared to meet those needs.

If these needs can only be met in a more expensive care home the Local Authority should pay the **FULL** amount of the fees (of course, subject to the usual income contribution expected from the patient themselves).

Other factors to bear in mind:-

- Local Authorities **MUST** explain to patients and their relatives/carers/representatives what the Statutory Guidance on choice of accommodation provide. Have you had any explanation?
- If there are not sufficient places available within the Council's budget to meet your relative's eligible care and support needs it **MUST** arrange and fund a placement in more expensive accommodation.
- The Local Authority should **NOT** set arbitrary ceilings on the amount they expect to pay for an individual's residential care.
- Residents and third parties should **NOT** routinely be required to make up the difference between what the Local Authority will pay and the actual fees of the care home.
- Local Authorities have a statutory duty to provide residents with a level of service they could expect if the possibility of resident and third party contributions did not exist.

- Following the implementation of the *Care Act 2014*, patients are now able to top-up from their own resources (known as “First Party Top Up”) where they still retain a property and have clearly exercised their choice to access more expensive accommodation. However, due consideration should be given to their ability to do so, based upon their remaining limited capital (with majority of income already being paid to the Council in the resident’s assessed contribution) and whether a real “choice” of accommodation has been provided by Social Services.

CHANGES TO SOCIAL CARE IN LIGHT OF COVID 19

Emergency legislation, in the form of the Coronavirus Act 2020, and subsequent ‘Care Act Easements’ Guidance (issued by the Secretary of State for Health & Social Care) were published at the end of March 2020, in order to deal with situations arising from the global pandemic.

As a result of the above, Local Authorities are permitted to lawfully prioritise whose needs, and what type of needs, it will meet, rather than being required to meet **all** eligible assessed need. There will be no duty to carry out assessments of individuals’ needs nor to review care plans.

There is only a **duty** to provide services to disabled adults, if the failure to do so would be a breach of the European Convention on Human Rights (ECHR).

However, in order to establish whether there could be a potential breach, it is expected that any Local Authority permitted to utilise the easements will still be required to undertake some form of assessment – it remains a public law duty to make ‘reasonable enquiries’. The Guidance also requires Local Authorities to “clearly record” such enquiries.

Please note that Social Services should only take a decision to begin exercising the Care Act easements, “when the workforce is significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable for it to comply with its Care Act duties and where to continue to try to do so is likely to result in urgent or acute needs not being met, potentially risking life.”

**For more information or to arrange an appointment please contact
our Elderly Client & Care Funding Team on 01743 280 100**