Guide to Care Funding Issues
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1 Background to Farley Dwek and the Guide

At Farley Dwek Solicitors we have established ourselves as a specialist provider of legal services in relation to issues arising around the funding of Care provision. We were one of the first firms to tackle the growing issue of unfair Care Home Funding and are dealing with hundreds of claims for Care Home Refunds on behalf of families throughout the country.*

The issues surrounding Care Funding are wide ranging and Farley Dwek is able to provide specialist legal advice in a number of areas. Whether you need legal advice in relation to your own (or your relative's) Care Funding will depend on your individual circumstances.

It is possible to address issues around Care Funding yourself without the need for legal advice and this Guide is designed to highlight some of the main issues, to help you to decide whether you need legal advice and to provide you with some useful tips to deal with Care Funding yourself.

Care Funding is an exhaustive subject and it would be almost impossible to provide you with all the detail. However, the Guide also points you in the direction of other resources which may be of help.

We’ve tried to make this Guide as helpful as possible for anyone looking for general guidance about Care Funding issues. It may be that you are thinking about your own care requirements in the future, or more likely, it may be that you are thinking about a relative or friend who may need care, or who may already be in care.

So, we talk in the Guide about “your relative’s care”, but this can equally be read in relation to your own care.

(i) Legal Disclaimer

As a firm of solicitors, we have a duty of care to provide our clients with the best advice in relation to their individual circumstances. This Guide is intended to provide some general advice and guidance around the broad subject of Care Funding. We do not provide financial advice. Any information provided within the Guide should be treated as general advice and can not be taken as legal advice. For specific legal advice on your relative's individual circumstances, please contact us directly.

Whilst we have made every reasonable effort to ensure the accuracy of the information contained within the Guide, we cannot be held responsible for any consequences arising from actions taken in relation to the general advice and guidance set out in the Guide.

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*Please note that this Guide ONLY relates to NHS Continuing Healthcare Funding in England and Wales. The funding system and rules in Scotland and Northern Ireland are different and are not covered in this Guide. Unfortunately, we DO NOT provide any services to patients whose care is being funded or provided in Scotland and Northern Ireland.
The requirement for long term care can arise at any time and for any variety of reasons. In most cases care is required as a result of the ageing process, often combined with one or more medical conditions. However, the requirement for care is not just associated with the ageing process; anyone may require care as a result of a disability, serious illness, progressive medical condition, or even an accident.

Regardless of your relative’s age, there are two distinct types of care they may require either - Healthcare or Social Care.

Of course, often they will require a mixture of both types of care and that’s what leads to uncertainty about who should pay for the care your relative receives.

This distinction between Healthcare needs and Social Care needs is absolutely critical to the Care Funding your relative may be entitled to.

Healthcare is provided by the NHS and is FREE to everyone at the point of use.

Social Care is provided by the Local Authority (through Social Services) and is means tested, which means your relative may have to pay for their Social Care.

You can therefore see the importance of the distinction - Healthcare is FREE - Social Care is PAID FOR BY YOUR RELATIVE

In terms of funding for your relative’s care therefore, the first and most important aspect is to have their Healthcare needs assessed first.

If your relative has "a Primary Health Need" then their care should be paid for in FULL by the NHS.

As you can imagine, this is why there are often issues surrounding payment for care – because it’s all about money.

Farley Dwek is constantly campaigning to raise the profile of Care Funding issues to the general public, we have recently been featured in articles and news stories in:

DAILY EXPRESS  the guardian
DAILY Mirror  The Daily Telegraph
BBC RADIO  Daily Mail

Farley Dwek – The Care Funding Specialists
(i) **What are Social Care needs?**

There is no formal definition of Social Care, but it’s often described as dealing with the “activities of daily living” i.e. needing help with day to day activities like feeding, washing and dressing, mobility, using the toilet etc., but it also includes requiring help in terms of maintaining independence, social interaction, protection from vulnerable situations and help in managing complex relationships.

(ii) **What are Healthcare needs?**

There is more (although not absolute) clarity in terms of the definition of Healthcare needs.

A Healthcare need is one related to the treatment, control or prevention of a disease, illness, injury or disability and the aftercare of a person with these needs.

Whilst not defined in law, this definition of Healthcare needs is set out in the National Framework for NHS Continuing Healthcare and NHS Funded Nursing Care (November 2012 Revised).

Although this does not form part of any Primary Legislation, sections of the National Health Service Act 2006 require the provision of health services, which taken together with the requirements of Local Authority Legislation, effectively require the NHS to provide NHS Continuing Healthcare (Funding), i.e. the obligation of the NHS to pay for care FREE of charge.

The National Framework sets out a “**Primary Health Needs Approach**” which is binding on the NHS.

The National Framework establishes that where the primary need for care is a health need, then the responsibility for providing for that health need lies with the NHS, even if the individual is in a Local Authority care home, or in a private nursing home, or receiving care at home. It is the health need which is the important factor, not the place where the care is provided.

There have been various rulings in the Courts, including the landmark “Coughlan Case” in the Court of Appeal. This case established that only if someone’s health needs are incidental to their overall care needs should the responsibility for care be passed to the Local Authority.

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**So, in simple terms, if your relative has a Primary Healthcare Need, the NHS should provide and pay for their care – all of it – 100% - including their care or residential home fees – and this is done through what is known as NHS Continuing Healthcare (Funding).**


For more information call us today on **0800 011 4136** or **0161 272 5222**, or visit our website [www.farleydwek.com](http://www.farleydwek.com)
Why is the Funding of Care such an issue?

The simple answer is… because it costs money.

If the NHS can show that your relative doesn’t have primary health needs, then they can pass the responsibility for their care to the Local Authority and they will have to pay for their care instead – or more often your relative does, subject to means testing. This is where the fight lies in terms of who pays for your relative’s care.

Unfortunately, despite having paid Income Tax and National Insurance contributions all their life to fund the NHS, at the point your relative needs long term care, the NHS will, by and large, do everything in its power to deny them the right to that care. This is not a political point—it’s a fact borne out by the hundreds of claims we deal with on behalf of individuals who have been wrongly assessed in terms of their healthcare needs and forced to pay for their own healthcare. What we see is the tip of the iceberg.

It is estimated that over 100,000 people in the UK are incorrectly paying for their care. It’s a national scandal and yet it doesn’t seem to make the news. At Farley Dwek, we campaign tirelessly to bring this issue into the mainstream news agenda. We’ve had some success with the national media, but there’s no doubt much more needs to be done to bring this issue to light.

It is a ticking time bomb for the nation’s finances and no wonder no Government, of whatever persuasion, wants to tackle it head on.

The issue of “unfair assessments” has been going on for years. As far back as February 2003, the Parliamentary and Health Services Ombudsman produced a report on “NHS Funding for Long Term Care”, in response to the conduct of the NHS, stretching back to 1996. When this wasn’t acted on, the Ombudsmen produced another report in March 2007 on “Retrospective Continuing Care Funding and Redress” which again criticised the NHS’s approach to the funding assessment issues.

Whilst the NHS responded with the National Framework to guide Primary Care Trust’s (PCT’s) [now called Clinical Commissioning Groups (CCG’s)] on the provision of a consistent service, with the needs of the individual at the centre, we continue to see examples day after day where the procedures haven’t been properly followed or implemented.

However, the politics of the issues are not really relevant to you as an individual. The issue for you is how your relative’s circumstances affect them in terms of whether they have to pay for their care and how you can ensure that your relative receives funding if they are entitled to it.

(i) Facts and Figures

- The average fee for a single room in a private residential care home is £27,872 per annum – in a private nursing home it is £38,376 per annum.
- To date, it is estimated that more than 1 million homes have been sold by pensioners to pay for the soaring costs of care and that another 2 million pensioners have had to use their savings to pay for care.
- In the last quarter of 2013 the NHS confirmed that only 58,000 people in the UK received NHS Continuing Healthcare Funding.
- The Government knows it’s got this wrong – CCG’s estimated liabilities for NHS Continuing Healthcare Funding rose from £134 million in 2011/12 to £764m in 2012/13 – that’s just based on the increased number of claims in the last year.
- There are over 400,000 elderly and disabled people living in residential care – 95% of whom are over 65.

Of course it’s important to note that not everyone requiring care has primary healthcare needs. It may be that your relative’s healthcare needs are incidental to their social care needs. If that’s the case, then their care need will be assessed and means tested by the Local Authority and they may well have to pay for some or all of their care.

However, first and foremost, you must NOT make any assumptions that you do not have primary healthcare needs, or allow anyone (either in the NHS or in the Local Authority/Social Services) to tell you or your relative that this is the case, without the NHS having first conducted a Continuing Healthcare Assessment.
Your “right” to NHS Continuing Healthcare Funding and what you should do

Your relative has a “right” to an Assessment for Continuing Healthcare, where you or they reasonably believe that they have a Primary Healthcare need, and this must be done before passing them to the Local Authority to deal with their care needs.

Although we feel that this is a right, the NHS is not under a legal obligation in the strictest sense to undertake an assessment. However, it is under an obligation to undertake an assessment in all cases where it “appears that there may be a need for such care” – this is the key.

This is where all the cases we deal with start, because of either a) a failure by the NHS to undertake a Continuing Healthcare Assessment, either before your relative was placed into care, or at a stage in their care when it was clear that their medical condition had deteriorated to a point where their primary healthcare needs had over taken their social care needs or b) where the NHS has conducted an incorrect assessment.

However, very often, staff within the NHS will not advise you or your relative of their “right” to an NHS Continuing Healthcare Assessment. Whether this is due to a lack of understanding and training on their part, or part of a wider strategy to avoid the costs of Continuing Healthcare Funding is open to debate. The important point is that you and your relative must understand your “rights”.

In many circumstances, we hear from clients, that staff within the NHS often give misleading or false statements when asked about Continuing Healthcare Funding. For example:

• “People with Dementia don’t qualify for funding”
• “Your relative won’t qualify”
• “Your relative has to pay for care”
• “Your relative doesn’t appear to have any health needs, etc”.

In other circumstances, we hear that people are told that an assessment has already been done, or for example:

• “Your relative has been continually assessed whilst they’ve been in hospital, so we don’t need to do any more checks”
• “Your relative has already been assessed and they don’t qualify”
• “Your relative will have to pay for an assessment”
• “An assessment will take too long. Your relative will have to pay for care until we can arrange one”

Again, statements along these lines are not correct. If you and your relative consider that they may have Primary Healthcare Needs, then your relative is entitled to an Assessment and one should be done.

Social Services will often start to ask your relative questions straight away about their financial circumstances and whether they are self funding. **This is against the NHS Framework advice**, which specifically states that financial issues should not be considered when undertaking an Assessment. They cannot ask your relative about funding until the initial Checklist Assessment for Continuing Healthcare Funding has taken place when your relative must make it clear that they understand their rights and expect the legal process to be followed.
So what happens if the NHS tries to “fob off” you or your relative in terms of undertaking a Checklist Assessment?

As we’ve already said, The NHS Framework is vague on the specific right to an Assessment. It states that Assessments should be undertaken “in all cases where it appears that there may be a need for such care”. Use of the vague term, “appears”, would seem to put the onus on the NHS to decide. However, the Framework goes on to say that the “threshold at this stage of the process has intentionally been set low in order to ensure that all those who require a full consideration of their needs have this opportunity”.

It is important that you know your relative’s “rights” and the NHS’s obligation in this respect. If you believe that your relative has a Primary Health Need then you need to make that clear, and set out – in as clear terms as possible – why you believe that is the case.

If the NHS refuses or fails to arrange an Assessment, you or your relative must put your complaint and request in writing. Start with the Care Home Manager, but also copy in all the relevant Heads of Department within your local NHS and Local Authority structure. Each NHS area (now governed by Clinical Commissioning Groups (CCG’s)), has a Continuing Healthcare Funding Department, who are responsible for undertaking the Assessments. They cannot ignore or deny your relative's request for an Assessment – as long as your relative has reasonable grounds to request one. If they continue to refuse, you and your relative probably do need legal advice and support.

Please note: your relative will need support.

It is vital that your relative doesn’t face this process alone. They must ask you or another representative (which could be a solicitor) to get involved in the process to support them. (The person helping your relative, either you or a solicitor, is referred to in the NHS as an “advocate”). The process is made doubly difficult if your relative doesn’t have an advocate to support them through the process.

That support needs to be comprehensive in terms of recording the process. In other words, what’s happened and when. Both your relative and their advocate are entitled (under the NHS Framework), “to understand the process and receive advice and information that will maximise your ability to participate in informed decisions about your relative’s future care”.

However, before any Assessment takes place, your relative will need to provide their consent, which includes sharing their personal information with different organisations involved in their care and, of course, sharing information with their advocate.

Your relative can give their consent as long as they have the mental capacity to do so. If it is deemed that your relative isn’t fit under the Mental Capacity Act 2005 to provide their consent, then their advocate will have to go through a legal process to achieve this consent. [More about this later in Section 11 - Lasting Power of Attorney].

Keeping a record of what has happened is absolutely vital to ensure that the correct process is being followed, especially if you and your relative subsequently disagree with any decisions and want to appeal.
As we've said, the NHS is under an obligation to undertake a Continuing Healthcare Assessment which will determine whether your relative is eligible for NHS Continuing Healthcare Funding.

This Assessment is carried out in two stages.

The first stage is called a Checklist Assessment. If this Assessment is successful, the second stage is a Full Assessment using what is called the “Decision Support Tool” (DST). There is also a Fast Track Pathway Assessment, for cases relating to acute conditions, often in so called "end of life" scenarios.

The Checklist Assessment should be performed within 14 days of it being requested (although timescales are rarely met). Your relative can ask for a Checklist Assessment at any time during their care. However, if they are about to be admitted into care, usually after a period in hospital, for example, as a result of illness or a fall, the NHS should undertake the Checklist Assessment before they are given the Section 2 Discharge Notice, which is sent to the Local Authority/Social Services to pass their care responsibilities over to them.

However, it's often the case that after a period of treatment in hospital, the NHS will provide your relative with an interim package of further support, which may include rehabilitation as one example. The NHS Framework recommends that where this is the case, any Assessment of your relative's Continuing Healthcare Funding eligibility should be deferred until the package of support measures has taken effect. This is to determine whether it improves their long term prognosis.

(i) The Checklist Assessment

The Checklist Assessment can be carried out by any Healthcare Professional, a hospital doctor, GP, District Nurse or a Social Worker etc, but they must be trained and qualified to do the Assessment.

Your relative is entitled to have their advocate in attendance when the Assessment is done. We strongly recommend that you do not allow this to go ahead unless they are present.

The Checklist looks at 11 criteria called Care Domains, which are:

- Behaviour*
- Cognition
- Physical/Emotional needs
- Communication
- Mobility
- Nutrition
- Continence
- Skin Integrity
- Breathing*
- Drugs/Mediation/Symptom Control*
- Altered states of consciousness*

The Assessment considers your relative's healthcare requirements in each of these domains and is scored according to the severity of their needs in each area. A = High Needs, B = Some Needs C = Low Needs.

Generally speaking, in order to proceed to the next stage of Assessment, called the Full Assessment, including the Decision Support Tool, your relative's Checklist Assessment will need to score 2 or more As, or 5 or more Bs (it could be 4 B's and an A), or one A in any domain with an * (but that's not always the case).

Preparation is key: it is important that your relative and their advocate prepare as fully as possible ahead of the Checklist Assessment. Remember, the person doing the Assessment might never have met your relative. Your relative and their advocate are the ones who know the most about their healthcare needs. Your relative should think about all their healthcare needs in each domain and be ready to put their views across during the Assessment.
Once completed, your relative must be given a written copy of the Checklist. The Checklist score may mean that your relative automatically progresses through to the Full Assessment stage; or their score may mean that they fall short, but they should also be given information about the appeal process.

As we’ve said, it may be after the Checklist Assessment has taken place, that you and your relative agree that their care needs are not primarily healthcare needs. This will be the case for many people.

In this situation your relative will move from the care of the NHS into the care of the Local Authority/Social Services [more about this later]. Nevertheless, once a proper Checklist Assessment has been undertaken, this will form the benchmark or baseline for any future assessments. Knowing your relative’s score and the areas in which they have healthcare needs means that you have a start point to assess any deterioration of their healthcare needs over time. This can then form the basis of a request for re-assessment.

You should be aware that, in some circumstances, your relative’s healthcare needs will be so obvious that a Checklist Assessment is not required, and the NHS advise that your relative is going straight through to a Full Assessment.


(ii) Full Assessment

If your relative’s Checklist Assessment is successful, they will progress to a Full Assessment using the Decision Support Tool. The Full Assessment should happen within 28 days of the Checklist Assessment taking place. However, these timescales are rarely met.

The Full Assessment is carried out by a Multi Disciplinary Team (MDT). This team must consist of at least two people, one Healthcare Professional and one Social Services Professional, but may well include more Healthcare Professionals depending on your relative's condition. A co-ordinator will be appointed to lead the Assessment process.

Your relative will be advised when the Full Assessment is taking place and their advocate should be entitled to attend. In fact, we recommend you insist that they attend.

Prior to the Full Assessment the MDT are required to review all the relevant medical and care notes in relation to your relative’s needs.

The Full Assessment follows a similar process to the Checklist Assessment and uses the same domains, plus one further domain for “Other” requirements.

In the same way as the Checklist Assessment, it is vital that you prepare your thoughts and views in advance.

The Review Meeting, when all the members of the MDT meet with your relative’s advocate, is your chance to hear what they have to say in their assessment of your relative’s needs, and of course, put your own point of view across. It’s likely to be a daunting experience being surrounded by the various health and social care professionals, but this is your relative’s health that's being assessed and if you or your advocate don’t agree with them, you must say so. You must ensure that your points of view are noted in the Assessment, and you should keep your own notes to check against the subsequent Assessment that you are required to be given in writing. This will give you the opportunity to Appeal if you disagree with aspects of the Full Assessment, and to say why you disagree.

Clients often say that these Full Assessment meetings are intimidating and that the MDT often uses tactics to position what’s being said to their own advantage – so you must remain vigilant and resolute in terms of getting your points across.
Whilst the scoring system isn't scientific by any means, generally speaking your relative should qualify for Continuing Healthcare Funding if they score Priority in any of the * domains or Severe in two or more domains.

However, they could still qualify if their scores aren't as clear cut as this. It is also worth noting that the NHS Guidelines state that if there is any uncertainty or disagreement within the MDT about what score to allocate, then the higher of the scores should be applied. This is important to understand when you are putting your case across.

Once the Full Assessment has been completed, the report is sent to the CCG in your area, who make the final decision on whether your relative qualifies for NHS Continuing Healthcare Funding or not. It is not the MDT who makes the decision, although they will make a recommendation.

If your relative’s Full Assessment is successful they will qualify for Continuing Healthcare Funding and it is then the responsibility of the NHS to pay for 100% of their care.

However, your relative should be aware, that the NHS will undertake another Full Assessment after three months and thereafter annually, at which point your relative's funding may be withdrawn. Your relative will be advised when any further Assessments are going to take place and they and their advocate will have to prepare for the process in exactly the same way.

It is probably useful to read the NHS Guidelines on the Full Assessment which you can download from the internet at web address: https://www.gov.uk/government/publications/national-framework-for-nhs-continuing-healthcare-and-nhs-funded-nursing-care

As before, if you disagree with the decision, the Appeals process must be explained to your relative when they are provided with a copy of the Full Assessment. If you disagree, you have the right to Appeal the Assessment.

As we’ve outlined, it may be in some cases after the Full Assessment has taken place, that you and your relative agree that their care needs are not primarily healthcare needs. In that situation your relative will move from the care of the NHS into the care of the Local Authority/Social Services.

Nevertheless, once a Full Assessment has been undertaken, that will form the baseline for any future assessments. Knowing their score and the areas in which they have healthcare needs means that you have a start point to assess any deterioration of their healthcare needs over time. This can then form the basis of a request for re-assessment.
(iii) The Fast Track Tool

The NHS Framework sets out further guidelines for the assessment of Continuing Healthcare Funding using the “Fast Track Tool”.

This process for assessment of eligibility for funding is used where your relative has a rapidly deteriorating condition, which may mean that they are entering a terminal phase. In these circumstances the same Decision Support Tool is used but the NHS is under an obligation to make the assessment for eligibility much more quickly, in conjunction with the provision of care in line with End of Life Care Strategy’s set out by the NHS. If your relative requires a Fast Track Tool assessment it is highly likely that they will have a Primary Health Care need and should qualify for Continuing Healthcare Funding, but this will not always be the case. In any event the same principles apply to a Fast Track Assessment as to the normal Checklist and Full Assessment, in terms of your relative’s “rights”.

(iv) What happens next?

If your relative is successful, then a discussion should follow allowing them the choice of care homes, but usually they will require Nursing Home care as a result of their care needs. Choosing the right care home, or even choosing Care at Home, is a whole other subject in itself and not one that we cover in detail in the Guide.

Of course, securing NHS Continuing Healthcare Funding – and having your relative’s care provided for free – is not the end of the process. At the same time the NHS takes responsibility to provide your relative with a Care Package to manage their health needs, which may be in conjunction with the Local Authority.

How that care is provided and in what environment – whether in a care home or in your relative’s own home, should always take account of their preference for care.

It is worth noting that from April 2014 the Government introduced Personal Health Budgets which are designed to give individuals more choice about how their health and care needs are met. Individuals qualifying for NHS Continuing Healthcare Funding will be amongst the first to receive information about Personal Health Budgets, so your relative needs to be aware of these changes and use the opportunity to ensure that they are being given the choice about how their care is structured.

If your relative chooses to have their care provided in their own home, they should be aware that there are rules within the Framework stating what NHS Continuing Healthcare Funding will cover. For example, they wouldn’t receive funding for rent/mortgage costs, food and utility bills. Major refurbishments may be eligible for Disability Funding Grants, but these are means tested.

It is probably useful to read the NHS Guidelines on the Full Assessment which you can download from the internet at web address: https://www.gov.uk/government/publications/national-framework-for-nhs-continuing-healthcare-and-nhs-funded-nursing-care

If your relative’s Full Assessment is unsuccessful, they will be passed over to Social Services who will then assess their financial circumstances and whether they have to pay some, or all, of their social care costs themselves.

It should be borne in mind that in many circumstances your relative will already have been paying for care because their Continuing Healthcare Funding eligibility was not properly assessed at the outset. In some circumstances you may only realise once your relative has passed away that they were not previously properly assessed.

All is not lost in these circumstances. You can bring a retrospective claim for a refund of the Care Costs your relative has previously paid. Indeed, we represent hundreds of clients who are recovering Care Costs in exactly these circumstances.

The process for recovering a refund of Care Costs in these circumstances is similar in many ways to the process of Full Assessment already described, save for the fact that the assessment is done on a retrospective basis, based on the care and medical notes available for the period over which the claim is made.

Claims are registered with the CCG, who should undertake a retrospective assessment of the merits of your relative’s claim via a Panel Meeting. The same Appeals process applies.
This Guide provides you with the information you need about your relative’s “rights” regarding Care Funding. It gives you an outline of the process, along with some tips to help you to ensure that your relative’s Care Funding entitlement is properly assessed. You now have two options:

To undertake the whole process on your own (though not straightforward and quite complex).

To use our expert legal services to help you thorough the process.

There are obvious advantages to having expert legal representation throughout this process, but of course there is a charge for our legal services which we are happy to discuss with you.

Whilst the NHS Framework suggests that individuals do not “in their opinion” need legal representation during the Continuing Healthcare eligibility process, the Framework specifically states that individuals are “free to choose whether they have an advocate present and who that advocate is”. Where the individual chooses a legally qualified person to act as their advocate, that person would be acting with the same status as any another advocate nominated by the individual i.e. a relative or friend.

We offer a number of services to assist clients to secure NHS Continuing Healthcare Funding including:

(i) Free Initial Assessment

Whether you need help with a current Assessment, or need help to recover previously paid care home fees, we can help.

The first step in either process is for us to undertake a FREE initial assessment of your relative’s circumstances which we will do over the telephone.

If, after your FREE initial assessment, we don’t think that your relative will qualify for Funding at this stage, it’s by no means the end of the line. An individual’s health condition and health care requirements can change very quickly. We will be able to advise you on what to look out for in terms of your relative’s health and you can contact us to discuss their condition as often as necessary and our advice will always be free of charge.

If, after your free initial assessment, we feel that your relative may be eligible for Funding, then we will ask you to complete our Questionnaire, which will provide us with more detail about your relative’s care requirements.

Once you have completed and returned this to us, we will review the information you have provided and will call you to discuss our initial opinion on the potential eligibility of your relative to receive NHS Continuing Healthcare Funding. Depending on the information provided, we will discuss the potential services we can offer you and your relative.

(ii) Checklist Review Service

Often, even with the further information you have provided about your relative’s care requirements in the Questionnaire, it may still be difficult for us to determine whether your relative is eligible for funding or not.

In these circumstances we may offer to undertake our Checklist Review Service for you.

If you proceed with our Checklist Review Service, we will send one of our experienced NHS Healthcare Funding specialist nurses to meet you and your relative, to carry out an independent assessment of their care needs, face to face.

Following the assessment meeting, our nurse will produce a detailed report which we will send to you setting out our nurse’s assessment of your relative’s care needs. This report follows the same format used by the NHS in determining a patient’s eligibility for NHS Continuing Healthcare Funding.

The report will help you to understand whether we feel there is any realistic prospect of arguing that your relative should qualify for NHS Continuing Healthcare Funding.
If the report concludes that your relative may not currently qualify for funding, it will be a useful tool in the future to monitor important changes in your relative’s condition, which may mean that they will meet the funding criteria at that point. Furthermore, the report will also give you the reassurance of knowing that the matter has been assessed objectively by a skilled nurse with a wealth of experience in this field, and who is completely independent of the NHS.

If, following the assessment, we believe that your relative could potentially qualify for NHS Continuing Healthcare Funding, we can offer you further services to assist and guide you through the process of applying for the funding. Or, you can use the report to help you to apply for funding, yourself.

The Checklist Review Service is provided on a fixed cost basis.

**Case Study**

Barry Pritchard is an ex-police officer from Salisbury. Without getting lawyers involved he says his father probably wouldn’t have received the NHS Continuing Healthcare Funding he was entitled to all along…

My father became ill with dementia and was gradually getting worse. At first, we arranged for some help from social services in his own home but it soon became clear that his needs were greater than the daily 15 minute visits allocated to him. One day my sister went round to his house only to find him injured on the floor. He had slipped and hurt himself quite badly. We took him to hospital at the Queen Alexander Hospital in Cosham, Portsmouth where he stayed for two months.

During this time I requested that he was assessed for full NHS Continuing Healthcare Funding but was flatly denied the funding following a brief, cursory assessment by a consultant.

I wasn’t satisfied with this and my financial adviser forwarded me a press article about NHS Continuing Healthcare Funding featuring Farley Dwek and the more I read, the more I felt my father met the criteria laid down in the ‘checklist’ set out by the NHS.

This time I took no chances and hired Farley Dwek who ensured we passed the ‘checklist’ with flying colours and then sent an experienced nurse along to the full assessment alongside our family.

At first the NHS wanted to do the assessment with just three days’ notice and made it, quite frankly, difficult to get transparency on my father’s paperwork and assessment process. However, my legal team and I pushed hard and we secured the funding with the assessors confirming my father was well above and beyond the minimum criteria needed to get the funding.

With care costs averaging more than £1,000 a week in the South of England this funding is essential to ensuring my father gets the best care that he is entitled to without financially crippling the family.

It’s unfair that such a ‘postcode lottery’ exists and families have to fight so hard to get the funding. The process should be more transparent and simpler. Until then, I’d recommend anyone who feels they should be getting the funding to use a specialist law firm like Farley Dwek. That way you stand the strongest chance of getting the funding and are less likely to have the wool pulled over your eyes or suffer from mistakes made by well-meaning but misinformed NHS staff.

Andrew Farley of Farley Dwek said:

“It is unfortunate that so many families get wrongly rejected for NHS Continuing Care Funding when they clearly meet the criteria laid down in the NHS’s own guidelines. Too many people take ‘no’ for an answer and Mr Pritchard’s case proves that if you’ve got the tenacity and meet the criteria you can overturn the decision and avoid thousands of pounds a year on care home fees for your parents which they are perfectly entitled to.

“It is important to remember that it doesn’t matter where you live or what assets you have this funding is not means tested and people should not be misled about the qualifying criteria. Our evidence is that there is a ‘postcode lottery’ for this funding and depending on where you live there is a massive difference on who avoids care home fees and who doesn’t.”
(iii) Advisory Service

Under our Advisory Service, we will act on your behalf as your relative’s advocate, to support you through the NHS Continuing Healthcare Funding assessment process, from start to finish. We may offer to provide you with this service based on the information provided by you in the initial Questionnaire, if we believe that your relative is likely to be eligible; or it may be that we offer to provide you with this service based on the outcome of the Checklist Review Service we have already provided to you.

You and your relative will have access to our specialist legal knowledge of the Assessment process at all times. You will also have access to our specialist clinical advice. Whilst we understand the legal requirements, our experienced team of nurses understand the clinical basis of the Assessment process.

In terms of our Advisory Service, the first step will be to arrange a Checklist Assessment date. This is arranged through your care home. If the Checklist Assessment is positive, your relative will be referred for a Full Assessment. If the Checklist Assessment is negative, you will need to send us a copy of the Checklist which we will review.

Once we have a Full Assessment date, one of our nurses will attend the Assessment with you and your relative. If we have not provided you with a Checklist Review Service, one of our nurses will come to see you and your relative ahead of the Full Assessment, to check if anything has changed since you completed the Questionnaire, and to get to know your relative’s condition in more detail.

If we have already provided you with our Checklist Review Service there will be no need for a further meeting with one of our nurses, because, at this stage, we already believe that your relative will be eligible.

The Full Assessment meeting is the key. Our experienced nurses will ask the NHS Assessor to go through each of the Care Domains and explain the “score” they intend to allocate to each Care Domain. If our nurse disagrees with the NHS Assessor about the “score” being allocated, they will put across their alternative view, based on their clinical assessment of your relative’s condition, and their view of what the “score” should be. In other words, they will fight your corner.

The advantage you have, is that all our nurses have years of experience in the Assessment process and know exactly how the other side works and thinks. It’s our nurse’s job to convince the NHS Assessor to revise their assessment in line with our assessment.

Although we can never guarantee success, we have a very high success rate at Full Assessment meetings. Once the Full Assessment is complete, the NHS Assessor will make a recommendation for funding to a Multi Disciplinary Team (MDT) within the CCG, who make the ultimate decision on whether to approve funding based on the Assessment Report. You will then be sent a copy of the outcome decision, which we will review. If we disagree with the Assessment we will challenge it on your behalf.

Once funding is agreed, you will be notified by the CCG who will arrange to make payments directly to the care provider. There will usually be a review after 3 months and then every 12 months thereafter. Our nurse can attend the initial review at 3 months to ensure that the funding is continued, as part of our service.

We provide our Advisory Service on a no win/no fee basis, which means that if we are not successful in securing funding for your relative, either at the initial Assessment or on further Appeal, we will not charge you anything.

If we are successful in securing funding, we will charge you a one-off fee calculated as a percentage of the annual care costs that your relative has saved by securing funding. If we have already provided our Checklist Review Service to your relative, we will deduct the fixed fee that you have already paid for that service from our charges.

In addition, if the NHS undertakes a further Assessment of your relative within 12 months after we have secured funding, our nurses and legal team will continue to support you and your relative through the further Assessment process, at no extra cost.
Case Study

When Alice Newton (88) entered a care home five years ago she was told that she would not be eligible for any kind of funding. Five years and £158,000 spent in care home fees, her family have finally secured NHS Continuing Healthcare Funding after getting Farley Dwek involved.

The family will now save around £2,700 per month in nursing home fees, thanks to Farley Dwek.

David Newton, 65, a site supervisor at a local school, lives in Bamber Bridge, Lancashire – less than two miles from where his mother now resides in a nursing home.

He takes up the story:

"After my father died, my mother's health slowly began to decline until she was diagnosed with dementia and over time developed various other conditions including incontinence and mobility issues.

As a family we decided that the best thing to do would be to bring her to live near me and my wife in Lancashire, so we could support her better. After a period in a rest home she then entered a nursing home.

We noticed that other people in the home were getting financial support but they appeared to be in much better state of health than my mother. We were told that they may have different circumstances and that we shouldn't get concerned about that.

It seemed a little unfair to us at the time, but because we were in a position to pay the fees after we sold my mother's home in Hertfordshire, we felt we had to do so.

Whenever we approached the subject of NHS Continuing Healthcare Funding we felt like we were getting fobbed off by the system. We kept being told that my mother didn't fall into a certain category of health requirements and had assets in the form of the funding from the house sale, so we would have to pay. We were simply told, 'that's the law'.

We now know that this is not the case and that NHS Continuing Healthcare Funding is based on health needs and not how much money you've got in the bank.

After reading an article in the Daily Mirror we got in touch with Farley Dwek and they agreed to look at our case. After they reviewed our position they said we have a strong case for NHS Continuing Healthcare Funding. Then they supported us in the crucial assessment meeting with the NHS by sending one of their experienced nurses who was able to make sure the assessment criteria was applied fairly and properly. Without Farley Dwek's support we wouldn't have secured the funding.

Soon after we presented our case with Farley Dwek, we were informed by the NHS that my mother was entitled to the funding after all. It was a huge relief because the size of the care home fees can be a huge worry.

There must be many other families out there in the same position as us. I'd urge people to seek legal advice from a specialist law firm to see if they too can secure the funding they are entitled to. We're happy with the outcome knowing that the right decision was made but we're unhappy about the long drawn out process to get proper information on how and when we would be entitled to it."

Andrew Farley, of Farley Dwek, who acted for the Newton family, said:

“We're pleased that we made sure the NHS came to the right decision to grant Mrs. Newton the funding she is fully entitled to. The fact that she was rejected so many times is a worrying indictment of the current system and we will be looking into this aspect a little further.

In this particular case a very hard-working family that has paid taxes all their lives in Britain has had to sell off an inheritance asset in the form of a family home and pay more than £158,000 for care home fees. People should not feel coy about challenging the NHS over fees they have already paid, or fees they are already paying.

This isn't money being claimed from the NHS – this is money that has already been mistakenly paid over by families, ending up in the hands of private care operators. It is essential that families are assertive in claiming and reclaiming what is rightfully theirs in the first place.”
(iv) Supported Assessment Service

It may be that you have already started the process of requesting an Assessment for your relative. Or, you may have used our Free Guide to help you to start the process.

If you have already succeeded in progressing through the initial Checklist stage and are awaiting a Full Assessment date, or have a date scheduled for a Full Assessment, we can offer to assist you with our Supported Assessment Service.

By using this service, we will arrange for one of our experienced nurses to accompany you and your relative, as their advocate, at the Full Assessment meeting.

We offer our Supported Assessment Service on a fixed fee basis.

For more information call us today on 0800 011 4136 or 0161 272 5222, or visit our website www.farleydwek.com

Case Study

Edward Battersby’s 93-year old mother, Marion Wilson, was already receiving NHS Continuing Healthcare Funding but the family was called to a re-assessment of her situation and they wanted to make sure funding wasn’t removed, so they contacted Farley Dwek…

Mr. Battersby, a retired businessman, explains:

“My mother who has dementia has been in a nursing home setting for the past seven years and has received NHS Continuing Healthcare Funding for the past three. This funding is invaluable and it is an enormous financial support for our entire family.

When we were asked to attend an assessment to see if my mother was still eligible we were worried that a mistake might be made and that funding might be pulled. We’d read horror stories about families having to sell their homes and make massive financial sacrifices, and wanted to avoid that happening to us.

The assessment process for NHS Continuing Healthcare funding is complicated and we were told that the NHS didn’t always get it right. We felt more confident going into the review process with Farley Dwek on our side. After they attended the assessment meeting with us we secured the funding, and we continue to save on the astronomical care home fees that we might otherwise have had to pay.

I firmly believe there are many families out there who don’t know about this NHS Continuing Healthcare Funding, and that they should see if their loved one or loved ones are eligible. We didn’t realise we could get it ourselves until we’d spent £42,000 on care home fees. It has saved us a fortune, and it is comforting knowing that my mother is getting all the assistance she requires from the NHS after a lifetime of paying into the system.”

Andrew Farley, of Farley Dwek, said:

“It is true that the process for applying for NHS Continuing Healthcare Funding is too complex for most families to get right. The NHS will always be looking to save money and all too often it is families who are entitled to funding who pay the price. If you’ve got an assessment coming up or you know someone who has, it’s sensible to get legal advice from an experienced solicitor.”

(v) Reclaims Service

Our Reclaims Service helps families to recover care costs which have been paid incorrectly because an individual in care was wrongly assessed for their eligibility for NHS Continuing Healthcare Funding, or not even assessed at all.

In many cases, we act for the families of relatives who have passed away in care and who have often used their life savings, or had to sell their homes to pay for care unnecessarily and unfairly.

The process to recover a refund of care costs incorrectly paid, follows a similar process to the Full Assessment. However, the assessment is done on a retrospective basis, using GP, hospital and care records and any Full Assessments that may have been carried out. We use our specialist team of nurses to undertake a clinical retrospective analysis of the individual’s care needs over their period of care and our specialist solicitors present the arguments for entitlement to Continuing Healthcare Funding to the CCG’s. They will then assess the retrospective eligibility arguments through a Panel Meeting.

An overview of our Reclaims Services is outlined overleaf.
In many circumstances CCG’s agree refunds for part periods of care only and our legal team then decide whether to appeal for refunds against those periods in dispute. There are also issues of interest payments due on the care costs paid, and again, our legal team is highly skilled at working out the often complex interest calculations, to ensure that the maximum entitlement is refunded.

It should be noted that the Government imposed deadlines in England, beyond which refunds of incorrectly paid care costs cannot be reclaimed. Any retrospective claims can now only be made for care costs paid after 31st March 2012.

We offer our Reclaims Service on a no win/no fee basis.

Care costs paid before that date cannot be reclaimed.

However, if you have already made a claim before 31st March 2012, which has been unsuccessful in terms of its assessment, you can still challenge that assessment, for payments made for care dating back to 2004.

In Wales, a similar deadline was imposed limiting claims to any period after 31st July 2013. However, in Wales, the rules also state that the claim period to be considered will be no longer than 12 months from the date of the first application.

These deadlines were supposed to be well publicised but few people were aware of them. They may be subject to legal challenge as it is another obvious and cynical move by the Government to protect their budget without regard to the unfair practices the NHS often undertook in failing to properly assess individuals’ entitlement to NHS Continuing Healthcare Funding.

It seems entirely wrong to us, that individuals can have spent their life savings and sold their houses to pay for care which should have been available for FREE, and now can’t reclaim that money just because the Government has imposed an arbitrary deadline for claims being registered. Farley Dwek is again working tirelessly to bring this injustice into the national spotlight. But more needs to be done.
Case Study

Peter Shaw is a retired teacher from Pickering in North Yorkshire. He had to sell his mother’s home in order to pay for her care home fees. Then, not long after her funeral, he discovered that she should have received free funding from the NHS, and was entitled to NHS Continuing Healthcare Funding all along.

Farley Dwek was able to recover around £44,000 of fees from Powys Local Health Board which were wrongly paid when his mother, Edna, lived in her local nursing home.

Mr Shaw explains:

“In 2006, my mother fell off a stool which resulted in her breaking her hip. At the time she was nearly 87 years old and she stayed in hospital for about two and a half months before we took the decision to transfer her to a nursing home, where she lived until she passed away at the age of 88.

When you’re researching nursing homes for your mother there isn’t enough time to consider whether she may be eligible for funding. You simply want the best care and focus on making sure she’ll be happy and comfortable.

From day one, we were asked to pay the fees and we paid each bill for the 18 months that she stayed in the home. It was a huge amount of money and obviously we were forced to sell her home in order to fund the costs of her care.

After my mother’s funeral, I read something about NHS Continuing Healthcare Funding and felt I should investigate further. After doing my own research, gathering medical records and looking at my mother’s care plan, I appointed Farley Dwek to handle my case.

“Farley Dwek were exceptional and explained the process of recovering these care home fees every step of the way. Farley Dwek were able to reassure me that I had a strong case and always kept me in the picture with progress. It was a stress-free experience, and the fact the service was provided on a no-win-no-fee basis meant I could proceed with peace of mind and avoid running up expensive legal bills.

Farley Dwek are doing something unique, and have been reassuring and informative throughout the process to gain a result. They are recovering what is rightfully yours in a clear, concise and professional way. It is as far removed from other ‘no win/no fee’ legal services as you can get. It’s a specialist area of law and they know their stuff inside out.

More people should claim NHS Continuing Healthcare Funding. Getting it right in the first place will save other families the heartache of having to sell property to pay for care home fees. The system is wrong and needs looking at. It relies on naivity and ignorance from families at a time when they are vulnerable and simply want to focus on the best nursing home for their mother or father.

Too many people also want to close the book on a traumatic experience and don’t want to see if they are eligible for reclaiming care home fees. I would urge families who feel they have a case to take legal advice to see how they can recover these fees. My mother died when she was 88 and I’m sure that she’d be pleased to know that her family was eventually able to reclaim what was rightfully theirs in the first place.

If a relative of yours is going into a care home or nursing home, I’d 100% recommend you to call Farley Dwek to see if you are eligible for NHS Continuing Healthcare Funding.”

Andrew Farley, of Farley Dwek, said:

“We’re pleased we got a good result for Mr Shaw and his family and recovered the fees that were wrongly paid all those years ago. It is important that families who currently have relatives in care take action, if they feel they too may be entitled to NHS Continuing Healthcare funding. We’re proud that we are able to help families like Mr Shaw’s to recover this money which is rightfully theirs. We know that there are thousands of other families who are unaware that their mother, father or elderly relative should be receiving this funding. Hopefully, we are doing our bit to shine a light on this little-known area of NHS funding.

Mr Shaw is quite correct. The system is wrong and relies on ignorance and an unwillingness from families to look more closely into the detail of their relative's care plan and medical history.

Applying for NHS Continuing Healthcare Funding is no walk in the park. It’s confusing, emotional and complex. We’re happy that we’re providing a much-needed service for families all over the UK.”
As we’ve already outlined, it may be that on reflection after the Checklist Assessment or Full Assessment has taken place, that you agree that your relative’s care needs are not primarily healthcare needs, which will be the case for many people.

In this situation your relative will move from the care of the NHS into the care of the Local Authority/Social Services.

The Local Authority has its own statutory duties to ensure that a Care Plan is put in place to meet your relative’s Social Care needs, but they may have to pay for these services, subject to means testing.

Regardless of the outcome of the means test, a number of NHS services should always remain FREE as part of your relative’s Care Plan. These include:

- Primary healthcare
- Any assessment of healthcare (your relative should never be charged for an assessment)
- Rehabilitation which forms part of your relative’s overall care package
- Respite healthcare
- Community health services
- Palliative and End of Life healthcare

(i) Current Rules

The current rules in respect of Means Testing are set out in the Charging for Residential Accommodation Guide (April 2012) issued in support of the National Assistance (Assessment of Resources) Regulations 1992. A copy of these rules can be downloaded from the internet at web address:


If your relative has over £23,250 in capital, they will have to pay for the cost of their care in full until it falls below the threshold of £23,250.

If your relative has between £14,250 and £23,250 in capital, they will have to contribute towards the cost of their care under the Tariff Rules (which currently means that they will contribute £1 per week to the cost of their care for every £250 in capital they have and part thereof, between £14,250 and £23,250).

If your relative has over £23,250 in capital, they do not have to complete any means testing assessments for Social Services. In other words they can declare that they are Self Funding and they don’t have to disclose anything else about their financial circumstances – however, they will pay for the FULL cost of their care.

If the Local Authority is meeting the full cost of your relative’s care (because they have less than £14,250 in capital), they will pay your relative’s care home costs up to their approved rate. If the cost of your relative’s care home is above that approved rate, they will have to pay the Care Home top up fees. If they can’t pay those top-up fees, then they will probably have to move into a cheaper care home that is within the Local Authority’s approved rate. However, it is up to the Local Authority to find that suitable accommodation for your relative and ensure that the services provided are in accordance with their Care Plan.

Your relative may also qualify for NHS Funded Care, depending on their health needs. This is a flat rate payment (usually paid to their care home) for the provision of certain designated nursing requirements. This is separate from NHS Continuing Healthcare Funding and not covered in the Guide.

More information about NHS Funded Care can be downloaded from the internet at web address:


In calculating your relative’s capital, the Local Authority cannot take into account the value of their property and other Assets during the first 12 weeks of care, thus giving your relative the opportunity to deal with their finances, including their property (if that’s what they decide to do).
In any event, it is important to know that the Local Authority cannot force your relative to sell their home, or take the value of their home into consideration as capital, if:

- Your relative’s partner still lives there
- A dependent under 16 lives there
- A relative over 60 lives there
- A relative who is incapacitated lives there
- Or if someone else owns a proportion of the property [more on this later under Trusts] i.e their spouse.

Even if none of the above circumstances apply, your relative can ask the Local Authority to set up a Deferred Payment Agreement in respect of their care home fees. Under this type of arrangement, the Local Authority will pay for your relative's care but will defer payment until their property is sold at some point in time, or after they have passed away – at which point the deferred costs of their care will be recovered from the sale proceeds or their estate.

The rule is – don’t worry about being forced to sell your relative's home – this won’t happen.
However, they may have to pay from the sale proceeds at a later stage.

(ii) New Rules – The Care Act 2014 – Cap on Care Costs

The Care Act 2014 came into force in April 2015. The new Act makes significant changes to the laws governing Local Authorities’ obligations to provide care for the disabled, elderly and ill adults and their carers, through Social Services.

It is important to note that none of the new changes will have any effect on the way in which eligibility for NHS Continuing Healthcare Funding is assessed. That remains the same. If your relative is eligible for NHS Continuing Healthcare Funding, all of their care costs will continue to be paid by the NHS, including the new, so-called, “daily living costs”.

There are, however, significant changes being introduced from April 2016, in relation to the Means Testing rules formerly set out in the Charging for Residential Accommodation Guide (April 2012). These rules will be replaced by the Care and Support (Charging and Assessment of Resources) Regulations and guidance.

Capital Limits

Essentially there are two main financial changes. Firstly, the capital limits are being increased. Under the current rules, if your relative has more than £23,250 in capital, they have to pay the costs of their care in full until their capital falls below that threshold. From April 2016 it is proposed that the capital threshold is increased to £118,000 (if a house is included in the calculation), and £27,000 if there is no house included in the calculation. The lower limit will also increase from £14,250 to £17,000.

The Tariff Rules will continue to apply in the same way, which means that if your relative has between £17,000 and £118,000 in capital, they will be required to contribute £1 per week to the cost of their care for every £250 in Capital they have between the limits. For example, if your relative has £117,000 in capital, they would be required to contribute £400 a week to their care costs (£100,000 difference between their capital of £117,000 and the lower threshold of £17,000, divided by £250). In this example, your relative would still contribute £20,800 to the costs of their care annually. However, this contribution would, in part, be taken into consideration when calculating the second important change being introduced, which is a Cap on Care Costs.

Cap on Care Costs

Under the new Act, it is proposed that from April 2016, there will be a maximum cap on the costs any individual pays towards their care costs (subject to them being assessed as having Social Care needs, which need to be met in the first place). The proposed cap on care costs is £72,000.

However, the £72,000 cap will only be reached in relation to Social Care costs, after the deduction of Daily Living Costs. These are essentially the costs of food and accommodation, sometimes called the “bed and breakfast costs”, and are proposed to be set at £12,000 a year.

So, for example, if your relative is paying £25,000 a year for their care, only £13,000 a year would count towards the cap, because £12,000 a year would be deducted for Daily Living Costs. It would, therefore be almost 5 ½ years before your relative reached the £72,000 cap, at £13,000 a year. Even when the cap was reached, your relative would still have to pay £12,000 a year towards their
Daily Living Costs (as long as their capital was still above the threshold limits), but they would be saving £13,000 a year after the cap was reached. As you can see from this example, your relative would actually have paid £137,500 in Care Costs, at £25,000 a year over 5½ years, before they reached the £72,000 cap.

Care Cap Update 2015

Since the general election in May 2015, the Government has announced that the introduction of the proposed legislation will be delayed until 2020, which means that the situation will remain the same for the foreseeable future. This has been seen by many commentators as a blow to elderly savers who will continue to have to pay for their own care within the current means tested limits.

9 Mitigating your relative’s Care Costs

If your relative has capital above the maximum threshold of £23,250, they may seriously want to consider effective legal ways to mitigate their liability to pay for their care costs in the future.

However, it is important to be aware that there are strict rules in terms of what your relative can and can’t do with their capital, to mitigate the future costs of care.

Local Authorities have the power to scrutinise your relative’s financial circumstances as part of the means testing process and will look closely at their historic capital. This is to identify whether they believe they have tried to dispose of their capital in order to mitigate or avoid the cost of paying for their care. This is known as Deprivation of Capital.

However, it is also important to note that the Local Authority can only consider the capital of your relative needing care and NOT the capital of their spouse, including any joint assets.

(i) Deprivation of Capital

There are a number of rules set out in the Charging for Residential Accommodation Guide (April 2012), which allow Local Authorities to consider if your relative has disposed of capital or assets to reduce their assessment to pay for their Care Costs. If the Local Authority believes that your relative has disposed of capital specifically for this purpose, then they can disregard that disposal and treat your relative as if they still possessed the capital. In other words they will still have to pay for their care.

This probably seems like a fair process to most people.

There are a number of examples where the Local Authority might well consider that your relative has disposed of capital in order to reduce their assessment for Care Costs. If the Local Authority believes that your relative has disposed of capital specifically for this purpose, then they can disregard that disposal and treat your relative as if they still possessed the capital. In other words they will still have to pay for their care.

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This probably seems like a fair process to most people.
Even so, when assessing whether Deprivation of Capital has taken place, the Local Authority must consider when these events or measures took place.

The general rule of thumb is that, if your relative has undertaken any of these measures before they could have reasonably foreseen that they had an impending need for care, then the Local Authority may have to disregard what’s happened and consider their capital on the basis of what they had when they entered the Care Assessment process. There are no hard and fast rules, but if your relative had not had any interaction with the NHS or Social Services in terms of forming a Care Plan before they reduced their capital, they may certainly have a strong argument that they were not seeking to deprive themselves of capital.

However, if your relative does deprive themselves of capital prior to requiring care, they may be putting themselves in a precarious financial situation unnecessarily.

There are a number of ways in which your relative can effectively dispose of capital without breaching the Local Authority Guidelines, including:

- Setting up a Trust
- Repaying legitimate debts
- Producing receipts for legitimate expenditure
- Purchasing an Investment Bond with Life Cover (depending on the circumstances and timing of the investment)

However, the Local Authority has the “right” to scrutinise any arrangements which it considers may have caused the deprivation of capital, and no arrangement is guaranteed to prevent Deprivation of Capital rules being applied.

10 **Trusts**

There are ways to dispose of capital legitimately without breaching Deprivation of Capital Rules. The most common of these is to place your Assets into a Trust.

So what is a Trust and what are the benefits?

A Trust is a private legal transaction where the ownership of your Assets (property, shares, cash etc) are transferred to someone else (usually a small group of people or a trust company – called the Trustees) to look after, for the benefit of the Beneficiaries (usually yourself and your spouse, your children and any other people you may wish to benefit from the Trust in future).

In terms of planning for Care Cost liabilities, a Trust needs to be set up in advance of you or your relative having a requirement for care – to avoid the Deprivation of Capital rules. **That is why it is important to set up a Trust as soon as possible and not to delay.**

However, there is a specific 6 month rule for setting up a Trust in terms of the Deprivation of Capital rules. If the Trust is set up 6 months before your relative goes into care, then the Assets in the Trust must be disregarded. Whilst this is useful to know, it can be risky trying to plan 6 months ahead, when health and social care needs can arise very quickly – so the best advice is to set up a Trust as soon as possible.

It’s too late to think about a Trust when you or your relative is already in care, as the opportunity to protect your Assets has already passed. However, anyone looking into retrospective claims for care cost refunds, or looking at advice on paying for care, should consider setting up their own Trust as a matter of urgency.
Sometimes people are concerned about the perceived loss of control of their assets if they are transferred into a Trust. In fact, the position is quite the opposite. You can give the Trustees specific instructions about how you would like the assets to be used and, although these are not legally binding on your Trustees, they will at least have a note of your wishes. It is necessary, however, for all the Trustees to agree on any course of action in relation to the Trust property, so you will not have to move out of your home if it’s placed into a Trust. You can also sell your home at any time and re-invest the money into another property, which will still be owned by the Trust – so there's no need to worry about any loss of control.

There are a number of distinct advantages to setting up a Trust beyond the obvious saving in terms of care costs. These include:

- **Avoiding expensive Probate Costs** – when you die, even when you have made a will, your Executor will need to get a Grant of Probate. The costs of this can often be up to 3% of your estates value – so for example, a £300,000 estate could incur around £9000 in Probate costs. If you have set up a Trust you will avoid these costs.

In addition, obtaining a Grant of Probate can take months, or even years. With a Trust, the Probate requirements don't apply and the Assets within the Trust can be distributed to the Beneficiaries straight away.

- **Avoiding Sideways Disinheritance** – this is an issue which can arise that is often overlooked by families. Sideways Disinheritance can arise when one partner dies and the remaining spouse inherits the whole estate. If the remaining partner subsequently re-maries, then existing Will arrangements are often revoked. On the surviving partner’s death, the estate will then pass to the new partner, which means that children can be disinherited.

With a Trust this can be specifically prevented from happening.

- **Children inheriting at the wrong time** – this issue can arise where your estate is distributed according to your Will (often passing to your children), but the timing of the inheritance might not be right. For example, if your children are going through a divorce, the inheritance could be caught up in the divorce settlement, and therefore wouldn't pass to your child as you'd intended.

With a Trust, your assets are distributed by your Trustees, in accordance with your wishes. The Trustees can therefore withhold the distribution of assets if they believe that it would not be what you had wanted to happen at that particular time.

- **Dependant relative claims** – even if you have made a Will, and you have chosen not to pass part of your estate to a dependant relative (for whatever reason) they can still challenge it.

With a Trust any legal challenge is unlikely to succeed unless the dependant relative is a named beneficiary.

- **Incapacity** – if your mental capacity reduces to the point where it's determined that you are no longer able to make decisions about your health and finances, and you haven't set up a Lasting Power of Attorney, your family would have to apply to the Court of Protection to be granted powers, to make decisions on your behalf. This can be expensive, and it takes time.

With a Trust, a Lasting Power of Attorney is not required because the Trustees already have your authority to deal with your assets, under the terms of the Trust Deed. So there's no delay in dealing with any financial matters when you no longer have the capacity to make your own decisions.

These are all valuable reasons to set up a Trust well before you or your relative go into care, in addition to reducing your liability to pay for your social care costs.

There are few disadvantages to setting up a Trust and transferring your assets. However, one consideration is that you do transfer the legal ownership of your property to the Trust, which means that you can not use your property to secure a loan as one example.

One other potential disadvantage is that the Trust will be liable to pay immediate Inheritance Tax on assets transferred into the Trust beyond the Inheritance Tax threshold of £325,000. However, this can be mitigated with good Independent Financial Advice.

One alternative to setting up a Trust is to Gift your assets to a third party—for example, your children.
However, we don’t recommend doing this for a number of reasons. First and foremost, you lose total control over your assets. It might seem like nothing could go wrong as you have a close relationship with your children, but things can change. The most obvious example would be divorce, where your assets would be caught up in any settlement. Another situation could arise if your child died before you did, then your asset (home) would be passed to your child’s spouse, with no guarantee that they would continue to provide you with any continued support.

There are also tax implications to transferring your property as a Gift and it could be very expensive for your children.

To summarise, we believe that the most effective way to mitigate your social care costs is to set up a Trust well before you or your relative has a requirement for care.

There is a cost associated with setting up a Trust and you will need to consult a solicitor.

Please remember, Trusts are not just for the rich. A Trust will help to protect your assets no matter what their value. If your assets are worth more than the threshold of £23,250 then you should protect them.

(i) How can Farley Dwek help?

As a firm of solicitors, we have the legal resources to set up a Trust for you or your relative, along with a Will.

Given our specialist expertise in the area of Care and Care Funding, we can provide you and your relative with the right legal advice in terms of what type of Trust to set up, based on your individual circumstances. As solicitors we can also act as Professional Trustees within the Trust. It’s often a good idea to use the same firm of solicitors for your Trust as those acting for you in other matters—for example, providing a Continuing Healthcare Funding Advisory Service or Reclaims Service, as we already have a detailed understanding of your individual circumstances.

We offer a fixed cost service, which is competitively priced.

If you would like to know more about how our Trust and Wills Service works please do not hesitate to call us today on 0800 011 4136 or 0161 272 5222, or visit our website www.farleydwek.com for more information.

11

Lasting Power of Attorney

We’ve already outlined in the Guide the requirement for your relative to provide their consent both to the NHS and Local Authority to share personal information about their healthcare needs, but also to share that information with their advocate.

As long as your relative has the capacity under the Mental Capacity Act 2005, they can provide that consent either verbally, or (preferably) in writing.

However, your relative’s capacity could deteriorate very quickly and once it is determined that they don’t have the capacity to make decisions for themselves, their advocate will have to apply to the Court of Protection for a Deputyship Order in order to gain “control” over their affairs. This can be expensive, and most importantly, takes time.

If your relative sets up a Lasting Power of Attorney (LPA) whilst they still have the capacity, then this issue won’t arise.

Under an LPA, your relative grants control over their affairs to another person, usually a relative or close friend whom they trust. They can, in turn, appoint a legal advocate, to help with your relative’s Care Funding issues.
There are two types of LPA, one covering your relative’s Health and Welfare and another covering their Property and Financial affairs.

However, you should be aware that the Trustees can manage your financial affairs under the terms of the Trust Deed, but they can’t manage your health and welfare needs, unless a separate LPA is set up.

We strongly recommend that your relative sets up LPAs immediately, to help the process of managing their affairs in the future. We can think of no good reason why you or your relative should not set up an LPA.

Setting up LPAs now does not mean that control of your, or your relative’s, Health and Welfare, or Property and Financial decisions, is taken away.

As long as you or your relative continues to have the capacity to make decisions as defined by the Mental Health Act 2005, you retain control over all of your affairs.

However, if you or your relative’s mental capacity does deteriorate, then you have already made arrangements for someone to take over. So it’s a sensible way to plan forward.

If you, or your relative, don’t have LPAs in place, then the Court of Protection automatically takes over your affairs. This will significantly increase the cost of dealing with your affairs, and of course, dealing with the Court takes time.

Court of Protection

As outlined, if you, or your relative’s mental capacity deteriorates to the extent that it is determined that they are unable to make decisions for themselves, their advocate will have to apply to the Court of Protection for a Deputyship Order in order to gain “control” over their affairs.

Solicitors can charge a fixed fee of up to £850 to deal with the process of establishing a Deputyship Order through the Court of Protection, and it can often take up to six months to arrange the Order.

There are also likely to be additional costs, as the Court requires a number of medical forms and reports to be filled in, for which many doctors charge.

A Deputyship Order usually relates to a specific set of circumstances—for example, making a claim for NHS Continuing Healthcare Funding. If other decisions need to be taken, such as paying for a care home, then often you will have to go back to the Court for permission, incurring further fixed costs and solicitors’ fees.

So, you can see why we recommend that LPAs are put in place wherever possible, to reduce the cost of dealing with your, or your relative’s affairs in the future, and to be able to deal with decisions about care and other issues much more quickly.

Having an LPA in place means that your nominated Trustees can deal with all the necessary decisions without the need to involve the Court of Protection.

(i) How can Farley Dwek help?

As a firm of solicitors, we have the legal resources to set up a Lasting Powers of Attorney for you and your relative, and we often do this at the same time as setting up Trusts and Wills.

Given our specialist expertise in the area of Care and Care Funding, we can provide you and your relative with the right legal advice in terms of what type of LPA to set up, based on your individual circumstances.

We offer a fixed cost service, which is competitively priced.

If you would like to know more about how our LPA Service works, please do not hesitate to call us today on 0800 011 4136 or 0161 272 5222, or visit our website www.farleydwek.com for more information.
Almost 70% of people in the UK have not written a Will – which is a startling figure when you consider how important it is to have a Will in place.

If you die without having made a Will then your assets will be considered to be “Intestate”. That means that your family will have to apply to the Court for a Grant of Probate, which sets out how your assets are divided up.

If you are married then normally your assets would pass automatically to your spouse.

If you are not married or your spouse has passed away, then normally your assets would be divided equally between your children or other relatives. But unfortunately there can often be disputes about who is inheriting what.

There are also legal costs associated with applying for a Grant of Probate, and even more legal costs involved if there is a dispute. These costs (and potential disputes) can be easily avoided by making a Will.

There are also lots of other personal matters that you can deal with in a Will. For example:

- Provisions for the care of children
- Gifting jewellery or other possessions to specific individuals
- Arranging donations to charities
- Making provision for the care of pets
- Setting out funeral arrangements

The list goes on, all of which are good reasons to make a Will.

There are also many misconceptions about who can inherit your estate. If you haven’t made a Will, the following people can’t inherit your estate:

- Unmarried partners – no matter how long you may have been together – there is no such thing as a “common law spouse” in law.
- Relations by marriage – i.e. your brother-in-law
- Close friends
- Carers
- Same sex partners who are not in a Civil Partnership or Married

Again, the list goes on and so, makes even more sense to make a Will.

(i) How can Farley Dwek help?

As a firm of solicitors we have the resources and expertise to set up Wills for you and your relative.

We offer a FREE legal Will writing service, which includes:

- Preparing a Will for you and one other person of your choice
- Providing you with further access to our FREE legal advice helpline in the future
- Giving you a FREE telephone interview with a dedicated expert advisor to set up your FREE Will
- Producing up to 5 FREE copies of your Wills including postage.

All we ask in return is that you store your Will safely with us, in our fireproof and waterproof facility.

For peace of mind it’s important that your Will is stored in a safe place so that it can be easily accessed by your family when you pass away.

Our low cost LIFETIME storage price is only £99 + VAT.

If you would like to know more about our FREE Will writing service, please do not hesitate to call us today on 0800 011 4136 or 0161 272 5222, or visit our website www.farleydwek.com for more information.
IMPORTANT – PLEASE NOTE:

There’s a lot of information contained within the Guide which will take time to digest and understand. So to help you, we’ve stripped out some of the technical information and created a separate Quick Guide, which you can also download for FREE. The Quick Guide summarises the most important points to understand and consider.