

# MLC TechConnect

28 August 2023

## When family fund aged care fees

There are many reasons why family members might look to fund aged care fees for their elderly relatives. However, there are some important issues to consider and discuss when providing advice.

### Overview

Aged care costs can be considerable. It is increasingly common for adult children and other close relatives to consider providing assistance with funding aged care costs. Often, this might occur because:

- there is a preference for a particular facility, which may not otherwise be affordable
- the preferred room in a facility is only accessible to a self-funded resident
- there is a desire to retain the family home, which may limit access to capital, or
- there is a delay in selling down assets to fund either upfront or ongoing costs.

While conceptually, an offer to help pay aged care fees might seem straightforward, there are a number of critical issues that are likely to be overlooked without advice and guidance from a qualified professional.

Moving into aged care is an emotionally charged time, and the interaction between social security, aged care, tax and estate planning law is complex. Given the wide scope of advice needed, this also provides an opportunity to work with your referral network.

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Key considerations include:

- whether to provide assistance with the accommodation payment as a lump sum, daily payment or combination
- the impact of a lump sum accommodation payment on the means-tested fee (MTF)
- where the former home is occupied by family, whether rent is paid or aged care fees are paid in lieu
- important timing requirements where the person would otherwise be a supported resident, but wishes to move into a dedicated self-funded room
- how the fees would be funded if circumstances changed, for example, where an adult child funding fees loses their job or is divorced
- how a refundable lump sum is dealt with upon death, and
- estate planning issues.

In this article, we address some of the most common assumptions that clients make and critical points to consider when providing advice in circumstances where family wish to fund aged care costs. This can help you navigate potential issues and demonstrate the value of advice in this area.

### The value of advice

Advice in this area has the potential to add significant value – both financial and non-financial. Value can be added by:

- ensuring all parties understand the implications of the arrangement
- highlighting the need for and value of specialist legal advice and potentially independent financial advice
- advising on the most efficient option for paying fees, and
- taking into consideration any potential change in circumstances after entry into care, and the impact on fees and cashflow.

All of the above go beyond the guidance and advice that could be provided by aged care staff and Centrelink Financial Information Service (FIS) officers.

**Important note:** In cases where adult children are seeking advice both on behalf of their elderly parents (in the capacity of an Enduring Power of Attorney (EPOA)) as well as in their own right (in funding aged care costs) advisers should carefully consider any compliance issues and applicable licensee guidance. In certain cases all parties may need to obtain independent advice.

### Advice tip

It is important to consider who else might be involved in providing assistance across all the advice areas relating to aged care. Often, other professionals, such as lawyers and accountants, may be involved in providing specific advice in their areas of expertise.

In some cases, guidance might be provided by individuals such as Financial Information Service (FIS) Officers at Centrelink or staff at an aged care facility. While they may have discussions with clients that involve the disclosure of personal information, the guidance they provide is general information only and is likely to be narrow in scope.

It is important that clients understand the difference between general and personal advice, and the extraordinary value of the latter.

## Refund of lump sums upon death and estate planning

### “I’ll pay the lump sum and it will be refunded back to me”

Let’s start with one of the most important issues of all – how is a lump sum accommodation payment dealt with upon the death of the resident or departure from a facility?

A refundable accommodation deposit (RAD) paid to a facility must be refunded to the care receiver (ie resident) upon departure from a facility<sup>1</sup> or to the estate of the resident care receiver upon their death. Even where a lump sum was paid directly by a person other than the resident care receiver, the facility cannot return the lump sum to this person or any third party.

Where an adult child is the executor of the deceased estate, they must receive the funds only in this capacity. As executor, they are legally required to deal with the proceeds as part of the estate with distribution as per the terms of a valid will or state-based laws of intestacy.

In vanilla cases where the person funding the aged care fees is the sole beneficiary of the estate, potential issues may not be significant. However, when an adult child funding fees has siblings or there are other beneficiaries of the estate, legal advice is highly recommended prior to the payment of any fees. This is essential if the child who has provided the funding wishes to have that amount ultimately returned.

In the event of the death of a resident care recipient, where a lump sum funded by one adult child is returned to the estate, this means that:

- the lump sum is an estate asset to be administered in accordance with the last valid will, or
- where the person dies without a valid will, the lump sum is dealt with according to the laws of intestacy.

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<sup>1</sup> Aged Care Act 52P-2(2). The ‘person who paid the deposit’ is expressly defined as the ‘care recipient’.

Additional care should be taken if there is the likelihood of any debt in the estate which must be repaid prior to the distribution of the residue of the estate. Another situation where the lump sum may not be returned in full may be where the facility has allowed the resident to meet their daily accommodation instalments (DAC/DAC) or daily means tested fees from their lump sums paid (RAD/RAC). Unless specific arrangements are made, these scenarios may lead to the lump sum not being returned in full to the person who funded the expense.

In all cases, specific legal advice is required to ensure the most appropriate course of action is taken based on the family's circumstances. Some options to address these issues include:

- a loan agreement, or
- changing the Will to reflect the arrangement to ensure the funds are returned to the right person.

#### 1. Consider a loan agreement

A loan agreement could be established between parties. This would ensure that lump sum fees paid on behalf of the resident care receiver are ultimately repaid to the person who provided the funds. This is because the loan is a liability of the estate and must be discharged first. A loan could also require repayment of the funds where the person departs the facility for other reasons (for example a change in facility).

#### **Advice tip**

A RAD is assessed as an asset for the MTF<sup>2</sup>. See 'Lump sum or daily fee?' It is important to note that even where a loan has been provided to pay the fee and is secured against the RAD, the loan will not offset the value of the RAD for the purposes of calculating the MTF<sup>3</sup>. Consider that while lending the resident funds to pay an upfront RAD may save them from paying the ongoing DAC/DAP, it may also lead to an increase in the MTF (as the RAD is fully assessed as an asset for the means tested amount (MTA) and there is no offset or reduction of the RAD when the loan is secured against the RAD).

Care should be taken if security is proposed to be taken over another of the resident's assets, particularly where there are capacity issues. Legal guidance should be sought. In addition to legal implications, estate planning outcomes should be carefully considered.

#### 2. Amend the Will

The resident could amend their Will to ensure that funds paid for aged care expenses are returned to the contributor upon their death. This option may also be appropriate to compensate a person for any non-refundable daily fees paid in addition to facilitating the return of lump sum aged care fees paid. Care should be taken as this is likely to result in an unequal distribution of the estate to eligible beneficiaries. Even though there is a basis or reason for the inequity, this could still result in a contest of the estate.

#### **Advice considerations**

##### Does the person have legal capacity?

To enter into a loan agreement, a person needs legal capacity. Similarly, testamentary capacity is required to make valid amendments to a Will or to execute a new Will.

It is estimated that around 68%<sup>4</sup> of aged care residents have moderate to severe cognitive impairment. Not every person with dementia necessarily lacks legal capacity, given it is a degenerative disease that may be mild in its onset. However, depending on the individual's specific health and circumstances, capacity may need to be assessed by a specialist medical practitioner, and further evaluated by a lawyer. It is important to ensure that the person understands the nature and implications of executing an EPoA or Will.

In the event that an estate is contested, the validity of EPoAs and the Will itself may be challenged based on health and mental capacity of the testator at the time of execution. Therefore, clear and comprehensive records are critical. Specialist legal advice should always be recommended in such cases.

Those holding the EPoA should also ensure that they do not enter into conflicted transactions or operate outside their power – either specified in legislation or the EPoA itself.

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<sup>2</sup> Exempt for social security purposes.

<sup>3</sup> Subsidy Principles 2014, s47(2A)

<sup>4</sup> <https://www.dementia.org.au/statistics>

## Gifting issues

Well documented arrangements may help to avoid social security gifting issues when advising members of a couple. For example, where basic reciprocal Wills have been executed in favour of the surviving spouse, all assets are to transfer to that person.

If this occurs and the surviving spouse then returns a refunded lump sum fee to person who funded the cost, they may need to substantiate that this is not a gift, but the return of a loan previously provided to the deceased. The implications of this being assessed as a gift may be an impact on social security entitlements, and an increase in aged care or home care fees should the surviving spouse receive these services.

While technically Centrelink have no formal requirement that these arrangements be documented in writing, it is suggested that they are as best practice.

## Timing considerations

### **‘I’ll give Mum the money so she can have the room she wants’**

Where an adult child intends to pay for care so that a parent who would otherwise be fully or partially supported could be placed in a full fee-paying room (ie treated as self-funded resident), an important issue arises in relation to the fee assessment process and resident categorisation. Care should be exercised to ensure that the desired outcome is achieved.

#### Means at the time of entry

For the purposes of the accommodation payment, a resident is classified as either self-funded or supported, based on their means at the time of entry to care.<sup>5</sup>

Those of limited means are not denied access to residential care. Additional subsidies are payable from the Government to facilities which are required to maintain a certain number of beds for supported residents. In some cases, certain rooms in a facility may also be specifically maintained as being for self-funded residents. For example, this might include rooms with:

- single beds
- a private ensuite
- preferable views, or
- other particular features and benefits.

At any given time, there may only be rooms available in a facility for either a supported or self-funded resident where rooms are dedicated to a particular resident category. This because rooms available to fully supported residents are currently occupied.

A person who is assessed as a self-funded resident at the time of entry to care pays the ‘published rate’ of accommodation payment. This is referred to as a ‘RAD’ or a ‘DAP’<sup>6</sup>. A person cannot be charged a RAD or DAP if their means at the date of entry to care<sup>7</sup> are below certain thresholds. This rule applies regardless of whether a third party is willing to pay the published rate of accommodation fee to access a preferred room.

Where the assessment is completed after the person enters care, they will need to note on the form their asset and income position at the date of entry and provide documentation to substantiate this information.

### **Advice tip**

In some cases, there may be flexibility provided by a facility, and it might be possible to negotiate to secure the preferred room as a supported resident. This won’t always be the case, but could be explored first. Under this scenario, however, if they are subsequently required to relocate to another room (more suited for supported residents once it becomes available), the resident will need to be ready and flexible about this.

#### Level of assets at which a person becomes self-supported

Both income and assets are used to determine if a resident is classified as self-funded. Ignoring income, the level of assets at which a resident becomes self-supported is equal to the capped home value (\$193,219.20 as at 20 March 2023). Members of an illness separated couple are assessed based on 50% of combined assets. This means that the couple’s combined assets would need to be at least two times the home cap or \$386,438.40 (based on 20 March 2023 threshold).

<sup>5</sup> Assessment can take place up to 120 days before entry to care, however if circumstances change, Centrelink must be updated within 14 days and fees may be reassessed. If assessment is completed after entry the person must indicate their position at the date of entry

<sup>6</sup> Refundable accommodation deposit (RAD) or a Daily accommodation payment (DAP).

<sup>7</sup> Or the date of assessment if this occurs prior to entry and circumstances do not change before permanent residential care commences

**Note:** The actual level of assets at which a person is self-supported is less than this threshold where the person (and/or their partner) has income that exceeds the income threshold. This is because the assessment is based on the assessment of both income and assets.

#### Supported resident wants the self-funded room

Where a family member has capacity to pay a lump sum accommodation payment and wishes for an otherwise supported resident to be classified as self-funded to secure the preferred room, an amount may need to be deposited into the resident's care receiver's bank account prior to entry to care.

The purpose of this is so that at the time of fee assessment, their level of assets exceeds the threshold above which they will be assessed as self-funded.<sup>8</sup> The facility will then be permitted to charge the published rate.

An alternative to this may be direct payment of the RAD. This is because a RAD paid is assessed as an asset of the resident care receiver. However, this would need to be paid before or on the day of entry to care, as the fee assessment requires the resident to substantiate their level of assets at the date of entry, even where the assessment form is completed and lodged at a later date.

Where the family member doesn't have the ability to provide any lump sum amount to pay at least part of the accommodation payment as a lump sum, this strategy will not provide the desired outcome. Regular gifts from an immediate family member are not assessed as income for social security purposes, and neither therefore for the purpose of aged care fee assessment.

#### Practical considerations

A resident person receiving an income support payment does not need to complete the full '[Residential Aged Care Calculation of your cost of care' form](#) (SA457 – is for self funded retirees who choose to disclose their means). The reason for this is that Centrelink already has sufficient information about the person's income and assets. These individuals may only be required to fill out [the 'Residential Aged Care Property details for Centrelink and DVA customers' form](#) (SA485) if they are homeowners. No form is required to be completed by an income support recipient who is also not a homeowner.

Therefore, if funds are deposited into a resident's person's bank account, Centrelink/DVA should be updated within 14 days and prior to assessing aged care fees so that they correctly calculate the MTF, and in the process, categorise the person as a self-supported resident.

#### **Advice tip**

Care should be taken where the resident care receiver is a social security recipient. While a lump sum accommodation fee paid to a facility is an exempt asset for social security purposes, funds held in a bank account are subject to assessment and may impact the resident person's social security entitlements.

A change of circumstances must be notified within 14 days. It is not always clear at a given point in time how long it takes for a fee assessment to occur from the date that the form is submitted. Practically, this could mean that the person has a reduced or loss of income support entitlement for a period. The extent of the reduction depends on their overall asset and income position. Advice could consider the benefit of transferring an amount less than the full RAD to the resident care receiver, or timing any transfer of funds to occur close to entry date followed by immediate payment of the RAD so that:

- the person is assessed as self-funded, and
- their income support entitlement is maintained

As at 20 March 2023, the assets test shade out threshold was \$504,500 for a single non-homeowner, \$643,500 for non-homeowner couple (combined) and \$419,000 for homeowner couples (combined).

The home cap is equal to the value of assets that determines a person as being self-funded. Most singles homeowners are classified as self-funded. For couples, the home is an exempt asset where one spouse remains at home. The home is also exempt if a 'protected person'<sup>9</sup> remains in the home.

<sup>8</sup> Income also impacts the resident category, and where income is sufficiently high, it might on its own qualify someone as self-funded.

<sup>9</sup> Protected person is an immediate family member who has been living in the home for five years prior to entry and is entitled to an income support payment, or a carer who has lived in the home for two years prior to entry, and is also entitled to an income support payment.



### **Example: Supported to self-funded status**

Lucy is single and moving out of her current rental accommodation into a residential care facility. Her only asset is \$20,000 cash and her income is the full rate of Age Pension.

If Centrelink completed her cost of care assessment today, she would be assessed as a supported resident and could not be charged an accommodation payment.

Lucy would like to move into a particular nursing home that is located a short distance from each of her adult children. This facility has a long waiting list for Government supported residents but has immediate availability for self-funded resident people in single rooms with an ensuite. Lucy's eldest daughter, Eliza, is prepared to fund the published rate of RAD of \$350,000.

Regardless of the fact that Eliza is willing to pay Lucy's fees, the facility could not charge Lucy the published rate of accommodation payment based on her means today.

They asked the facility whether Lucy's preferred room could be made available if she were a supported resident, and they are not willing to offer her this room on this basis.

### **If Eliza was prepared to pay a lump sum accommodation payment**

Assuming Eliza had sufficient assets to pay a lump sum RAD for Lucy, she would need to:

- transfer funds to Lucy's bank account before Lucy enters care, or
- arrange payment of the RAD before Lucy enters the facility, but no later than her date of entry to care.

If Eliza transferred the total amount of \$350,000 to Lucy's bank account and reported this to Centrelink, Lucy's Age Pension wouldn't reduce under the assets test (as her total assets would still be below the lower non-homeowner threshold). However, there would be a reduction under the income test due to deeming on the higher bank account balance. Eliza could consider transferring a reduced amount so that Lucy will still be assessed as a self-funded resident person but won't have her Age Pension reduced.

If Eliza paid the RAD directly to the facility by the date of entry, there would be no impact on Lucy's Age Pension as a RAD is an exempt asset. However, it is important that Eliza understands that Lucy will only have the RAD assessed as her asset for the purposes of being a self-funded if it is paid no later than her date of entry to care.

### **If Eliza can't pay the lump sum accommodation payment but wishes to pay the DAP instead.**

Again, unless Lucy is assessed as a self-funded resident, she cannot be charged a RAD or DAP.

### **Advice considerations**

Lucy last updated her Will 10 years ago when she executed an EPoA (jointly and severally) in favour of Eliza and one of her sons, Patrick. Lucy, while of sound mind, has been relatively immobile for a number of years, and so the EPoA was made effective on the date it was signed. Eliza and Patrick don't see eye to eye after a falling out over Patrick's drinking problem three years ago and don't speak often.

Lucy wants to ensure that Eliza's interests are protected. Before accepting the funds from Eliza, she discusses the situation with a lawyer who suggests that:

- Eliza and Lucy enter into a loan agreement to ensure that when Lucy leaves the facility (be it upon death or transfer to another facility) that the funds be returned to Eliza in full, and
- Lucy revoke the EPoA that exists currently in favour of Patrick due to the concerns she has about his drinking and other behaviour which suggests that he may not be able to perform his duties.

## **Lump sum or daily fee?**

### **"Is there a best way to help pay?"**

Certain aged care fees are calculated and charged as daily amounts and are payable on a regular basis.<sup>10</sup> However, the accommodation fee can be paid as either:

- a lump sum
- an equivalent daily payment, or
- any combination of the above.

When a decision has been made to fund another person's aged care accommodation fee, the next question may be how the fee should be funded. In some cases, the person paying the fee won't have access to capital to pay the lump sum in part or in full.

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<sup>10</sup> Aged Care Act 1997 52C-2(2)(b)

However, where there is capacity for an adult child to pay a lump sum and advice is sought to determine an appropriate option, key considerations include:

- the lump sum is assessed as an asset of the resident for MTF purposes, increasing this fee <sup>11</sup>
- while the lump sum is fully refundable, the daily payment is not (note that daily accommodation payments do not count towards the annual and lifetime cap which are applicable for MTFs)
- the resident's life expectancy in care
- any costs involved with obtaining the funds (eg interest expenses, lost investment earnings, capital gains tax and other transaction costs)
- whether the resident has capacity to enter into a loan arrangement or amend the terms of their Will to protect the person funding the fees, and
- potential gifting issues where the adult child is themselves a social security recipient.
- If paying accommodation costs via instalments, the interest rate (MPIR) is set at time of entry/or when the resident agreed to the room price, and this interest rate does not change during their residency.

#### Impact of a lump sum on the MTF

One of the first things to consider is the impact of a lump sum accommodation fee on the MTF. A lump sum paid to the facility is assessed as an asset of the resident for MTF fee purposes, it is exempt for social security purposes. This applies even where someone other than the resident has provided the funds. If a loan is provided to fund a lump sum accommodation fee, there is no reduction in the asset value <sup>12</sup>when calculating the MTF where the loan is:

- unsecured, or
- is secured against the lump sum deposit.

#### **Advice tip**

If the family member provides a loan and security is taken over an assessable asset of the resident other than the RAD, then this may lead to a reduction in the assessable asset value. However, keep in mind that:

- the family home is fully exempt for two years for social security purposes (meaning a loan secured against the home has no impact on social security entitlements for two years, as the asset value is zero), and
- the family home is only assessed up to a cap for the MTF, and
- if the resident in care doesn't have legal capacity, they won't be able to enter into a loan agreement.

If registering a caveat against the resident's assets as an EPoA, legal advice should strongly be considered.

#### **Example: impact of RAD on MTF**

George is widowed and needs to move into residential care. His assets and income are as follows:

- \$650,000 family home
- \$5,000 contents
- \$50,000 cash
- \$30,000 shares, and
- full Age Pension of \$27,664<sup>13</sup>pa.

He has chosen a room with a published rate of RAD of \$400,000 and would prefer not to sell his home as his only son Michael would like to keep the home in the family. Michael offers to help George with his fees.

#### **Option 1: Pay RAD**

If Michael was to pay the full RAD of \$400,000, George's MTF would be \$19.16pd, or \$268.24pf. This is because the RAD paid would be assessed as an asset when calculating George's MTF. Let's assume Michael had these funds in his mortgage offset account and his interest rate for the year was 4% pa. The interest expense of approximately \$615.38 (ie \$400,000 x 4% / 26) per fortnight should be considered along with any other opportunity costs. Michael would also need to consider whether he has capacity to pay the increased MTF and should discuss this with George.

<sup>11</sup> A RAD or RAC is assessed as an asset for the MTF but is not deemed for this purpose. It is fully exempt for social security purposes.

<sup>12</sup> Subsidy Principles 2014 s47(2A)

<sup>13</sup> Age Pension rate as at 20 March 2023. For MTF calculations, the Energy Supplement and Minimum Pension Supplement are disregarded when calculating income (currently \$1,463.80 pa)

## Option 2: Pay DAP

If Michael instead pays the accommodation payment as a DAP, based on George's means today, his MTF would be \$2.34 per day or \$32.76 per fortnight. The DAP would be equal to \$81.75pd or \$1,147.69pf based on the rates and thresholds at the time of entry.<sup>14</sup>

In addition, he avoids additional expenses such as additional interest incurred where drawing down on his home loan (ignoring any impact to the term of his loan which may be impacted also if surplus cashflow is being diverted from loan repayments to the DAP), however, the DAP is non-refundable.

## Preference not to sell family home

### “I’ll rent your home to help you pay your fees”

In some cases, the resident's family home might be occupied by adult children, grandchildren or other relatives. While selling the home might create sufficient liquidity to fund upfront and ongoing aged care fees, it may not be a desirable option when the home is providing accommodation for other family members.

#### Advice tip

There may also be social security benefits to retaining the home as it is an exempt asset for up to two years after a resident moves into care. During the exemption period the resident continues to be assessed as a homeowner. An indefinite exemption only applies while a spouse remains in the home.<sup>15</sup> An agreement may be reached for the family to stay in the home and in return assist with paying aged care costs to compensate, or to at least make the arrangement sustainable for all parties.

#### Rent or gift?

Net rental income is assessed as income for both social security purposes and calculation of the MTF. Regular financial gifts received from immediate family members are not assessed as income for social security or aged care fee calculations. It may therefore be worth considering whether instead of paying the resident rent, the person instead:

- directly pays for aged care costs and other agreed expenses, or
- provides periodic amounts to the resident as a loan.<sup>16</sup>

#### Advice considerations

While on the surface it may seem that providing regular gifts may derive a better financial outcome, there are some important considerations that should be discussed with clients, including:

- whether any of the terms ordinarily found in a rental agreement are important to be formalised (in which case rent might be more appropriate)
- an agreement as to how fees would be paid if circumstances change and the arrangement ceases
- if the arrangement ceases and the property needs to be let to an unrelated party, whether the home is in an appropriate condition to rent (eg repairs or other improvements required), and how fees would be paid if there was a delay in finding a suitable tenant, and
- liability for other household and maintenance expenses.

Also, it is important to ensure that the strategy implemented isn't for the purpose of avoiding tax.

#### Family home and rent exemption

Previously, concessions applied where a family home was retained and rented. Eligibility for these concessions is based on a resident's date of entry to care. When providing advice to these existing care residents, there may be a benefit to receive rent rather than gifts. Rent does not need to be at commercial rates for this purpose but will be taxable income. Depending on their date of entry to care:

- an indefinite exemption may apply to the family home for social security purposes
- an income test exemption on the rental income might apply for income support purposes and/or the MTF.

For more information see 'Aged care and the family home' article.

<sup>14</sup> Based on the Maximum Permissible Interest rate of 7.46 % as at the date of publication. Calculated as (Unpaid RAD x MPIR)/365.

<sup>15</sup> This treatment differs to assessment of the home for aged care fee purposes. Also, for entrants to care prior to 1 January 2016, the home may be exempt indefinitely where the person pays a daily accommodation fee *and* rents the family home.

<sup>16</sup> If the person providing the loan is a social security recipient themselves, they will need to consider the implications of gifting, where amounts above the threshold are assessed as financial assets for 5 years. The outstanding balance of a loan provided to another person is also assessed as a financial investments.



## Conclusion

While on the face of it, assisting elderly family members with aged care fees might seem like a straight-forward decision, there are clearly many important considerations that should be discussed before financial support is provided. While in most cases, parties enter these agreements with the best of intentions, financial advice can help to:

- ensure preferable financial outcomes
- identify the need for legal advice
- provide protection for all parties involved
- ensure that arrangements are sustainable, and
- provide peace of mind to ageing clients and their families at an emotional and often overwhelming time.

## Contact details

For further information, please contact TechConnect on **1800 645 597**

### Important information and disclaimer

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