

Welcome to the October edition of our newsletter.

The team is busy preparing for our annual conference in November, which is now fully booked. The increasingly contentious nature of care is leading to more court and ombudsman decisions so there is plenty to update you on! Current care laws and regulations are being scrutinised as never before in an effort to save money which means our biggest problem for the conference is deciding what to include and what to leave out.

One year, no fear!

October marks the one year anniversary of our legal aid contract, and what a year it has been.

Sonal has led the charge – taking cases to courts across the Midlands, challenging local authority decisions affecting vulnerable adults, often at extremely short notice. Cases have included disputes about where an adult with support needs should live, the extent and type of care packages clients receive and ultimately whether local authorities are fulfilling their legal duties under the Care Act.

Like all disputes involving care, cases are emotionally charged. Clients are understandably distraught at the thought of having to move to a different care home, or having to change care provider for care services at home. It is more than a 'change of provider'. Care workers and fellow residents may be the only friends and regular contact that someone has. Plans to move clients to cheaper services disregards the time that existing providers have spent getting to know their clients and understand their needs – something that can be difficult and requires trust on both sides.

Sonal has been fearless in tackling these issues, keeping a level head when facing hostility from local authority representatives and ensuring that the vulnerable person's needs are the focus, rather than local authority budgetary concerns.



Rarely do matters go straight to court – we make every effort to work with local authorities to encourage them to comply with their legal duties and there will have been detailed discussions with them before taking the decision to issue proceedings. However, the current reality is that local authority responses are (more often than not) subject to delay and an unwillingness to compromise and that the immediate pressures facing clients means that sometimes court is the only option.



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Legal Aid matters

Our first year of holding a community care contract certainly has had lots of highs and has highlighted the vital importance of legal aid in providing access to justice for those on limited income and with little or no savings.

Clients often tell us that they felt ignored and dismissed by social workers and others until they were able to get legal representation when, often for the first time, professionals seem to 'take notice'. It seems unfair that due to the strict eligibility criteria for legal aid many vulnerable people can't afford to seek legal advice about how to challenge decisions about their care. The cuts to legal aid over the past seven years have been far reaching, effectively barring access to justice for some of those in the greatest need.

One of the ways we try and tackle this is by delivering free legal update seminars and training to information officers, support workers and advocates in the voluntary sector so that they raise awareness about legal aid and provide up to date support to clients.

If you are working with a client and are not sure if they are eligible for legal aid, please do get in contact.

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How likely are you to get NHS continuing healthcare funding...?

I frequently receive enquiries and indeed take on cases relating not only to appeals of non-eligible decisions, but also requesting that I attend and participate in the CHC process.



More often than not the client has concerns that they have been told their loved one may no longer meet the criteria at the next assessment or that they are aware that a number of other residents in the same care home as their loved one have had their funding pulled after receiving funding for many years.



Therefore an increasing perception and indeed reduced trust in the actual process is becoming more apparent in my dealings with the public.

It was with the above in mind that I decided to take a look at the national data produced by NHS England for NHS Continuing healthcare.

The figures show how many people over the age of 18 are found eligible via the standard assessment route as well as the fast track assessment, including those eligible for the funded Nursing care contribution.

The focus of my interest is to look at the figures for the Midlands and then take a comparative look at the individual Clinical Commissioning Groups (CCG) to see whether or not there is a significant disparity in the numbers of people being found eligible.

The figures are based on GP practice populations which provide a consistent method and which are unlikely to significantly change. As such variable demographics such as age across the population are not taken into account; however, they are an important factor when considering the results.

According to NHS England's Quarter 3 report 2018-19 the number of people found eligible nationally for NHS Continuing healthcare funding from April 1st 2018 – 31st December 2018 is 131,258.

Of this number 50,773 were found eligible via the standard Decision Support Tool (DST) assessment, with 80,485 being found eligible via the fast track assessment process.

Considering the perception of some of my clients I reviewed the cumulative data collection released by NHS England on the 19th August 2019. The intention being to exclude those found eligible via the fast track process and to only consider those found eligible using only the standard assessment. The data shows that nationally from January 2017 – March 2019 there has been a significant decline in the number of people found eligible for NHS continuing healthcare funding. On closer examination of the figures, the number of people found not eligible using the standard assessment increased consistently per quarter (3 months) between January 2017 and June 2018, peaking at 12,311 for the period April - June 2018, only for the number of people found not eligible to fall marginally between October 2018 and June 2019. By comparison the data regarding those actually found eligible, showed a consistent downward trend.

Midlands

Across the Midlands as a whole for the period April – June 2019 the number of people found eligible for Continuing healthcare funding is 7,592.

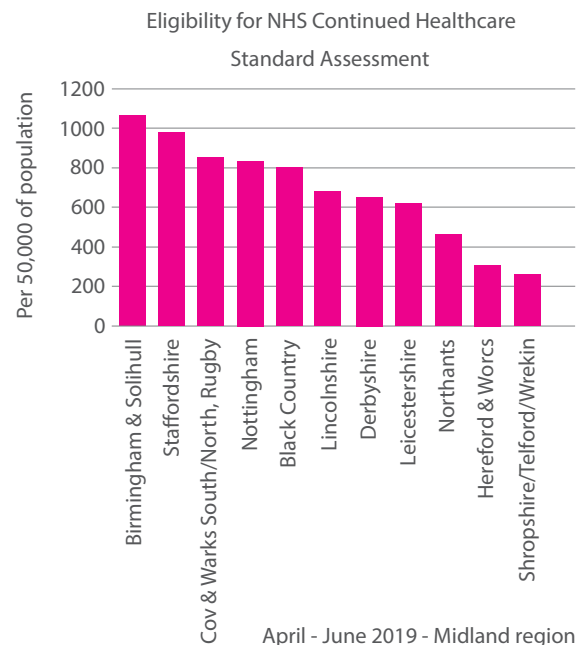
Individual CCG data does show that if you live in Birmingham/Solihull you are more likely to be found eligible, with Staffordshire coming in at a close second, but less so in Shropshire, Telford and Wrekin.

The number of people found eligible for NHS continuing healthcare funding within our 3 local CCG's shows that throughout the period April 2018 – June 2019 Warwickshire North CCG figures have remained consistently below those of South Warwickshire and Coventry/Rugby CCGs.

The number found eligible by South Warwickshire CCG for the same period shows a steady increase, with a marginal fall for the period April – June 2019, compared to Coventry & Rugby CCG whose figures throughout the period show a consistent increase in those being found eligible for NHS funding.

Therefore our client's perception of those who get funding, and those that do not would appear to hold some weight. The numbers do not lie, but confirm that nationally there is a downward trajectory in awarding NHS continuing healthcare. Correspondingly the number of people being found eligible across the Midlands is also following this trajectory.

Should you or your clients require assistance with NHS continuing healthcare funding, including appeals of not eligible decisions please contact our clinical advisor.



Where has all the discretion gone?

We are seeing a worrying increase in the number of cases coming to us about financial assessments for care.

There are two main problems:

1. Items not counted as Disability Related Expenditure
2. Contributions to care not being affordable

Both of these areas are notable in that guidance and regulations give local authorities discretion – discretion to consider what counts as a disability related expense, and discretion to waive some (or all) of the costs of care, if the assessed contribution is unaffordable.

Recent cases have shown an overwhelming reluctance by local authorities to use this discretion with the preference being to stick to rigidly applying the letter of the statutory guidance. Comments we have received have suggested that as far as some local authorities are concerned, this is all correct and proper. However, not considering and applying discretion when appropriate, is still a failing – what's the point of being given the power to apply discretion if you then don't use it?



Court judgment emphasises the link between gifting and best interests.

In a recent case before the Court of Protection Judge Hilder provided an excellent analysis of the relationship between gifting and best interests. The case, rather unexcitingly called *In the matter of various lasting powers of attorney*, was brought by the Office of the Public Guardian, who asked the court to consider whether instructions and preferences set out in eleven lasting powers of attorney, to benefit someone other than the donor (the person who made the lasting power of attorney) were lawful. The judgment acknowledges that 'best interests' means more than personal self interest, and that for many this includes looking after the welfare of other family members. However, the powers given to attorneys to provide for others on the donors behalf are still limited by the Mental Capacity Act.

The judgment concluded that any instructions or preferences in a lasting power of attorney that are incompatible with the law should be struck out, before the power of attorney can be registered. It also provided a useful flowchart governing the rules of gifting, which we have expanded slightly and which will be freely available to those attending our annual conference.

Making a Lasting Power of Attorney is vitally important in ensuring wishes will be respected should an accident or ill health prevent a person from making decisions in the future.

ANNUAL CARE CONFERENCE

21st November 2019

Due to popular demand the conference will now take place at

Macdonald Ansty Hall, Orantery Suite, Main Road, Ansty, Nr Coventry, Warwickshire, CV7 9HZ

www.macdonaldhotels.co.uk/our-hotels/the-midlands-wales/coventry/macdonald-ansty-hall

There will be time for questions at the end of each topic and during networking.



9:30am
Registration

- 9:45-11:30am**
- Capacity and Inherent Jurisdiction
 - Judicial Review
 - Safeguarding

Break

- 11:45-1:15pm**
- Court of Protection (property)
 - Care Act (assessments)
 - Care Act (finances)

Buffet Lunch – Shilton Restaurant

- 2:00-3:30pm**
- Continuing healthcare funding
 - Court of Protection (welfare)
 - Liberty Protection Safeguards

3:30-4:00pm
Networking

In the News

The latest annual review from the Local Government and Social Care Ombudsman is now available, and it provides a stark warning to local authorities that the law still applies, even when resources are tight.

Of the complaints that they investigated 66% found fault compared to 43% back in 2010, with complaints about charging for care and transport seeing the biggest increase.

The Ombudsman is finding that the complaints they are dealing with are more serious, and this is certainly reflected in the issues that our clients bring to us which are also taking much longer to resolve.

The review focuses on how the Ombudsman can provide wider service improvements alongside individual remedies. One example of the 559 recommendations for service improvements required a local authority to contact service users who had received a reablement service since April 2015 and refund their charges – one complaint had provided a remedy for many others who had been unaware of their rights.

The review also includes figures for the percentage of complaints that are upheld against individual local authorities. Local 'upheld' rates include: Birmingham City Council 64%, Worcester 67%, Northampton 67%, Leicester 56% and Warwickshire a worrying 75%. Top marks for Coventry City Council who had no complaints about them upheld.

In other Ombudsman news, the Parliamentary and Health Service Ombudsman's (PHSO) most recent quarterly review shows that 46% of health complaints are upheld. And the PHSO is not immune to judicial review – the latest annual review shows that there were 24 pre-action letters and 12 applications for judicial review.

Increase in Deprivation of Liberty (DoLS) applications to the Court

The latest court statistics show an increase in the number of DoLS applications to the Court of Protection. In the second quarter of 2019 (April to June) there were 1,372 applications up by 18% on the number made in the same quarter last year.

Other areas also show a year on year increase, with applications under the Mental Capacity Act 2005, for example to appoint a property and affairs deputy, up by 9%.

These increases may explain the current long delays in obtaining court orders...

Office of the Public Guardian **Increase in investigations by the Office of the Public Guardian (OPG)**

The OPG – which is responsible for maintaining the register of powers of attorney, providing information and advice to donors and attorneys and supervising court appointed deputies – has seen an increase in the number of investigations it conducts.

These investigations examine the conduct of attorneys and deputies when concerns have been triggered by a safeguarding referral, complaint or through the OPG's own scrutiny.

25% of investigations result in court action, 59% in no further action and in 16% of cases further support or supervision is provided to get the attorney or deputy back on track.

Whilst the figure has increased from 1871 in 2017/18 to 2883 in 2018/19, investigations account for only 0.07% of all registered powers of attorney and deputyship orders.

In recognition of its increasing work and profile, the OPG launched a new safeguarding strategy earlier this year with the following goals:

1. Help our safeguarding partners understand more about what we do
2. Work closely with safeguarding partners
3. 'No wrong door' approach for all safeguarding concerns
4. Working culture which puts the safeguarding needs of the user first
5. Greater support for our users

They will be researching how the policy is being implemented between 2020 and 2021 and it will be interesting to see whether raised awareness about the role of the OPG will lead to more investigations.

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