



Following on from our recent Care Team Legal Update which can be found on our website (click here), in this issue we provide information on top ups and financing care, the proposed Public Service Ombudsman, a DOLS update, useful resources for advocacy, a recent decision by the Financial Services Ombudsman in relation to investment advice provided to a gentleman with Alzheimer's disease and (pewh!) news about our forthcoming seminar.

What you should know about 'top ups'

'Top ups' are probably not something you will have heard of - until, that is, you are asked to pay one.

They were introduced as a voluntary payment that family members could make to give their loved one a greater choice of care homes by 'topping up' the amount that the local authority pays for a care home.

However, as local authorities have effectively capped their contribution for years, the gap between what they pay and the true cost of a care home place has widened, leading to top ups becoming presented as a necessity rather than a choice.



You should be offered a home without a top up first

This is the part that seems to be getting missed, as many people we work with are only offered homes that need a top up, despite the statutory guidance being clear that you MUST be offered at least one home that does not need one.

There are parts of Warwickshire and the West Midlands where there simply are no placements available at the local authority rate, leaving families feeling pressured into paying because they believe they have no choice. But again, the guidance is clear: 'A person must not

be asked to pay a 'top up' towards the cost of their accommodation because of market inadequacies or commissioning failures and must ensure there is genuine choice' (Care Act Statutory Guidance, Annex A, paragraph 12).

So, what happens then? Well, if there are no vacancies at the local authority's usual rate then they must increase the amount they pay: 'In such circumstances, the local authority must not ask for the payment of a 'top-up' fee. Only when a person has chosen a more expensive accommodation can a 'top-up' payment be sought' (Care Act Statutory Guidance, Annex A, paragraph 12).

Sound Familiar?

Following David's recent stay in hospital after a fall, his family were told that David needed to move to a care home. John, his son, was given a list of homes to have a look at. Beside their contact details were figures, ranging between £50 and £400, described as the weekly top up. When John asked what this meant he was told that the top up will need to be paid for by family members in addition to the amount paid by David himself.

John was really worried about whether he could afford this and made an appointment to come and see us.

Paul's wife Eileen has suffered from Parkinson's disease and dementia for three years. As her health needs became more complex, Paul and Eileen took the difficult decision that Eileen would move into a nursing home. Despite their fears, Eileen settled in very well and has made friends with staff and fellow residents. For the past two years Paul and Eileen have been paying privately for the care, but Eileen's savings have now reduced and they have asked the local authority for support.

The social worker has told Paul that if he wants Eileen to stay at her current home he will need to pay £200 per week towards the cost of Eileen's care, from his own money. Paul is devastated as he cannot afford this as he now has to pay for help at home himself.

The person who needs the care cannot pay their own top up - EXCEPT in limited circumstances

This often catches family members out, as they sign the top up agreement thinking they can use the income and savings of the person who needs the care to pay the top up.

There are only three circumstances when an individual can 'top up' their own care:

1. During the 12 week property disregard
2. When the top up is going to be paid through their Deferred Payment Agreement
3. Where someone is funded under section 117 aftercare (after being detained under the Mental Health Act 1983).



Running out of money, and the threat of a move

Families ask the local authority to help once their loved one has spent all their own savings on their care and their capital is down to £23,250. It comes as a shock when the local authority tells them that they limit the amount they pay to care homes and ask them to start paying a top up. If families can't pay they are told that their loved one will need to move to a cheaper home, which can have devastating consequences. This is a complex area, particularly if this scenario involves someone who lacks mental capacity to decide where they want to live themselves. If this is you, or one of your clients, seek advice before you act to make sure you know the options available to you.

PLEASE: DO NOT sign a top up agreement until you have taken legal advice

Remember it is a legally binding contract that will have financial implications for you. It is far easier to give legal advice before you sign on the dotted line, rather than try and unravel an agreement afterwards.

The local authority has a duty to give you information before you sign, to ensure that you are 'willing and able' to enter into the agreement. This should include:

- How much you will have to pay each week
- Who you will be making the payments to
 - How/when the top up agreement can be reviewed
 - What will happen if the top up payments stop
 - What happens if your financial circumstances change
 - Who pays the increase when the care home provider raises their fees

The Law

The rules about top ups are set out in:

Care Act 2014

Care and Support and After-care (Choice of Accommodation) Regulations 2014

Care and Support Statutory Guidance



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Prepare for care

If you are in the process of choosing a care home now, there are some things you can do to try and avoid the thorny issue of top ups in the future:

1. Ask the care home whether they will accept the local authority rate when your savings run out. Homes are getting better at checking that their care is affordable for you - they have regulations to follow from the Care Quality Commission about the information they should give you regarding their charges. They may not be able to guarantee their answer, but it will help you make up your mind.
2. Do your sums - we always sit down with clients and work out how long their money will last in their preferred care home. This is an opportunity to check any benefit entitlements and even negotiate the cost with the home.
3. Read the contract - and understand it. There are often additional fees to pay at the start of the placement, and rules about how much you will have to pay whilst in hospital. Check the notice period too - if you want or need to move, this could have an impact on the money you have left.
4. When your savings start to run low, act quickly. Do not wait until you are at, or below the threshold of £23,250. The local authority can take time to complete their assessments, by which time you may have run out of money AND have to deal with the problem of a top up.

Deprivation of Liberty Safeguards (DOLS) - Update

Whilst this is an update, don't hold your breath on anything changing just yet! The Law Commission have now published their recommendations, which follow an extensive period of consultation and review, and we are now waiting for the response from the Government. The Commission has proposed a new system of Liberty Protection Safeguards, and you can read more about it by clicking here.

In the News

Social care, so long in the shadows of the NHS, is now one of the key election issues. Proposals in the Conservative manifesto, to introduce a £100,000 threshold and include someone's property in financial calculations for home care have caused a stir. Deferred payments would be key to making this proposal work, but there is still some way to go in improving the current system. Check out our recent article covering some of the current problems with deferred payments here.

Our next - post general election issue - will look at the future of care and the legal implications that will undoubtedly unfold...



Another step closer to a Public Service Ombudsman?

December saw the Government publish its draft bill to establish a Public Service Ombudsman ([click here](#))

The aim of the bill is to:

- Merge existing Ombudsman services such as the Local Government Ombudsman (which deals with social care complaints) and the Parliamentary and Health Service Ombudsman (which tackles health service complaints)
- Broader powers to promote effect complaint handling

The bill is clear in confirming that, like now, the complaints investigation remit will focus on maladministration, i.e. whether something has gone wrong in the process, rather than the decision itself. It will be unable therefore to challenge decisions where an authority has exercised its discretion appropriately...





Financial Advice and the vulnerable client

A recent decision by the Financial Ombudsman Service concerning investment advice to a gentleman with dementia provides.

The Financial Ombudsman Service has recently published a decision regarding financial advice provided to a gentleman, resident in a care home, and suffering from Alzheimer's disease (click here for more information). The complaint was brought by his attorney who was concerned about advice given to transfer an ISA investment, that was provided without actually involving the attorney.

The report is an interesting read, and whilst making no comment about the gentleman's capacity, it does consider it prudent to involve an attorney in the decision making process - perhaps not surprising when the investment report runs to 37 pages...



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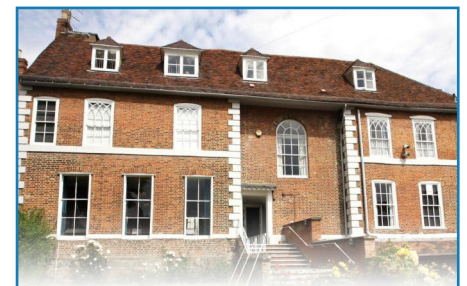
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Interested in Advocacy?

The Care Act 2014 introduced statutory advocacy...

Since the Act was introduced in 2015 there has been lower than expected take up of the new statutory advocacy provision, and a great deal of variation in take up across the country. The Social Care Institute for Excellence (SCIE) teamed up with the universities of Birmingham and Central Lancashire to find out more and have produced a number of useful resources.

If you are part of an Advocacy service, or commission services, then take a look at the resources available here.



Do you work with attorneys?

Are you an attorney?

We will be holding a free session focusing on how attorneys can meet their legal duties and provide the most appropriate care and support to those who have trusted them with this vitally important role.

LIMITED SPACES AVAILABLE

To book please email:
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or call 01926 491181 and
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