

Continuing healthcare... Missing care records = massive impact

A recent BBC investigation found thousands of medical and care records were left unsecured in an abandoned care home in Hampshire raising serious concerns about data protection breaches.

But this is just one aspect of the many issues that missing (or abandoned) care notes pose - in my experience as both a continuing health care (CHC) assessor, and more recently in my role as a Nurse representing families through the CHC process – absent notes can mean the difference between someone being found eligible or not for this vital funding.

Written evidence demonstrating the extent and level of an individual's care needs are vital in the CHC assessment process, particularly for appeals or retrospective claims where a significant period of time has often passed since the original assessment. I see a number of CHC appeals or retrospective claims which are closed due to lack of evidence where records have been destroyed, lost or damaged. As the appeal/retrospective process is so slow families are left in despair when notified that their case is closed – a decision which the CCG may reach months or years after the family started the claim on behalf of their loved one - when a search for notes will prove fruitless.

In circumstances where I act for families who have already received the notice that their case is being closed, I have been able to challenge the CCG and revisit the decision through Local Resolution procedures without the care records. This involves me forensically analysing the information that is available about the individual to complete a clinical 'join-the-dots' which, whilst time consuming can ultimately prove successful in tackling the issue of missing information.

The best approach in the face of such delays, is to obtain copies of all care records at the beginning of the process; I do this on behalf of my clients not just to inform our written submissions for the appeal or retrospective claim but also so that I can retain them for safekeeping. This can be particularly important if people move to different care homes and notes get lost in the move.

Notes going AWOL don't need to mean the end of your claim - contact me today for a free initial telephone consultation and let's track the information together...



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Judy has over thirty years' of varied experience working as a Registered Nurse in the NHS including acting as a NHS continuing healthcare assessor and appeal co-ordinator. Judy offers clinical guidance and advice on NHS funding, hospital discharge and care to both individuals and care providers.



Mental capacity, the internet and social media

It was surely only a matter of time before the issue of mental capacity to use the internet and social media reached the Court of Protection. Two linked judgements in the Court of Protection (Re A and Re B [2019] EWCOP 2 & 3) resulted in the judge (Cobb J) giving guidance on the relevant factors that a person needs to understand, retain, weigh up and use in relation to the use of the internet and social media. If this affects you or your client, contact a member of the team today.

New tax year but no changes in financial thresholds.

With the hope of the Green Paper on adult social care languishing somewhere in the long grass, the last hope of any kind of break for those paying for care are the capital thresholds /minimum income guarantee limits that are reviewed annually. The latest local government circular "Social Care – charging for care and support" is now available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772969/Social_care_charging_for_care_and_support_-_LAC_2019.pdf but there is no need to rush as it simply keeps financial thresholds the same for another year....sigh

OMBUDSMAN NEWS

Is the PHSO stepping up?



The Parliamentary and Health Service Ombudsman (PHSO) has not been known for the breadth of its publications, but things seem to be changing. Their 2018/19 Quarter 2 report is the latest publication looking at complaints against NHS bodies – this time between July and September 2018. February also saw the PHSO publish guidance for NHS Trusts on complaint handling and claims. Both publications are available at <https://www.ombudsman.org.uk/publications?page=0> and provide a useful context to complaint handling for those of us working in this area. The complexity of legislation governing the NHS, the range of organisations providing services and the – ahem – less person centred approach to complaint handling makes this a particularly challenging area. Could we be seeing a more transparent PHSO?



Latest report from the Local Government and Social Care Ombudsman (LGSO)

Published this month, the Ombudsman's latest report focuses on 'lessons from our independent care provider investigations' (available here: <https://www.lgo.org.uk/information-centre/news/2019/mar/ombudsman-issues-good-practice-guide-for-care-providers>). Complaints have increased steadily since they were first able to tackle provider complaints in 2010/11 and in 2017/18 the LGSO received 442 complaints about private providers and upheld 69% of these complaints.

Local Government & Social Care OMBUDSMAN

UPDATES FOR CARE PROVIDERS

Are you a care provider? Read this!

The Local Government and Social Care Ombudsman (LGSO) published a report that looks at some of the recurrent themes it sees when dealing with complaints about care providers. "Caring about complaints, lessons from our independent care provider investigations", is essential reading for care providers and can provide invaluable information on how to avoid problems as diverse as contracts, billing, protecting belongings, giving notice and care planning.

The LGSO has also developed a quality matters initiative in partnership with Healthwatch England, and a toolkit for complaint handling.



Sexuality, relationships and adult social care services

The Care Quality Commission has published interesting guidance on relationships and sexuality in adult social care services (available at <https://www.cqc.org.uk/sites/default/files/20190221-Relationships-and-sexuality-in-social-care-PUBLICATION.pdf>).

It has useful information on a subject matter that causes uncertainty for adult social care providers and local authorities alike, including the questions inspectors can ask, key lines of enquiries and further resources. Another must read.



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Legal Aid makes a difference – can it benefit you or your client?

We are now six months in to delivering a legal aid contract for community care and whilst the paperwork at times seems baffling, the results we can achieve on behalf of our clients makes all the administrative tangles worthwhile.

By the time someone instructs us they, and their support worker, friend or carer have often spent many stressful weeks trying to get someone in authority to listen. One of the biggest benefits that clients have told us about when accessing legal aid is that they feel that someone 'independent' is on their side.

Part of this is because we have to really consider the details of a case to check that it 'fits' the legal aid definition of work we are permitted to do and we must believe – and be able to show – that a case has merits, in particular that it can make a difference to the individual concerned.

Community care cases are usually very time pressured as those involved are often in or facing imminent crisis: (For example, we recently had to act urgently, with less than 5 days notice to stop a significant care package being cancelled, which would have put our client at huge risk.) Contact us as soon as possible for initial guidance – we can establish whether legal aid is appropriate or discuss other options.

There are two types of legal aid available to tackle community care issues:

Legal Help: For work that focuses on legal advice and representation before a matter gets to Court. The funding available covers approximately 5½ hours of work by a solicitor. Examples of successes in this area include challenges to local authority financial assessments and cuts to care packages (under the Care Act 2014 and Section 117 of the Mental Health Act 1983) and support and representation for carers.

Legal Representation: More comprehensive than Legal Help, the funding under this level of legal aid includes taking a matter to Court. This involves many more hours of work by your solicitor and may also include instructing a barrister to represent you at Court. This has most commonly been used (by us, so far) to challenge Deprivation of Liberty Authorisations. Successes have included enabling individuals to move back to their own home or to move to a care home that is more suitable for their particular care needs.

Sonal, Debbie or Louise are available to provide advice and assistance and would always say if you are in doubt pick up the phone or email for general advice.

The 'wrong' witness and the cancelled Lasting Power of Attorneys (LPAs)

In March the Court of Protection heard a case, brought by the Public Guardian, regarding the validity of two Lasting Powers of Attorney (Finance and Welfare) executed by the donor, BGO, appointing three attorneys (including two solicitors) to act jointly and severally on her behalf.

The LPAs had been registered by the Office of the Public Guardian and the attorneys appeared to be getting on with things... until a financial institution spotted that BGO's signature had been witnessed by one of the attorneys.

Under the regulations governing the execution of Lasting Powers of Attorney, a Donee (i.e. an attorney) cannot witness the donor's (i.e. BGO's) signature. As a result, the Public Guardian applied to the Court of Protection asking it to decide whether the Powers of Attorney were usable or whether they should cancel them.

Previous cases in the Court of Protection which have considered the validity of Powers of Attorney have usually been decided in ways that favour the intention of the donor. Whilst this approach was acknowledged by the Judge, it was not to be the case here. Judge Hilder highlighted the important safeguarding functions that many of the rules around Lasting Powers of Attorney have, noting that they '...are powerful documents.' and therefore 'insistence on an independent witness to the Donor's signature is itself an important safeguard for the expression of genuinely autonomous decisions' (Para 21, OPG and PGO and Others [2019]).

The judgment directed the Public Guardian to cancel the Lasting Powers of Attorney. Sadly, BGO no longer has capacity to make fresh ones, so an application is now necessary to appoint a Property and Finance Deputy. Matters relating to health and welfare decisions are not as straightforward as the Court needs more compelling reasons to grant appoint a welfare deputy; in these circumstances BGO's wish for her attorneys to make decisions about life sustaining treatment cannot be incorporated into a welfare order (even if one were granted).

A cautionary tale that has all of us checking forms, and checking again.



Mediation for attorneys and deputies – a pilot scheme.

The Office of the Public Guardian, which has responsibility for investigating concerns about how attorneys and deputies discharge their roles, is piloting a mediation scheme that will run until summer 2019. The scheme aims to consider whether mediation can offer a meaningful way of safeguarding a person's best interests without recourse to the Court of Protection. There will always be circumstances where an application to the Court is appropriate ('clear, purposeful abuse' or where parties do not consent to mediation) but this could be a way of offering practical support to those attorneys and deputies who may have wandered away from 'best interests' to enable them to fulfil their legal duties. More information about the pilot is available at publicguardian.blog.gov.uk.

Council's continue to 'bend' the rules on charging for care.

A recent decision by the Local Government and Social Care Ombudsman (LGSO) against Barking and Dagenham council serves as a further reminder that some councils continue to be willing to 'bend' the rules to make life easier – and cheaper – for themselves, rather than the clients they serve.

In this case the Ombudsman highlighted concerns about the council's approach to paying care home fees, in particular their requirement that care homes:

- Contract directly with those responsible paying a 'third party' top up, and
- Collect the client's assessed contribution for their care.

Adopting this approach meant that the council would only have to pay the care home the difference between the client's assessed contribution and the care home rate and would not have to trouble itself at all about any third party top up.

Nice work for the council, but more work for the care home.

It also created general confusion for residents and those acting on their behalf and meant that the individual concerned was never offered a care home placement without a top-up and suffered 'avoidable confusion and distress' (paragraph 65).

Thankfully, the decision from the LGSO has meant that the council must now make significant changes to its charging processes. The care home has also been advised of what actions it should take with regards to its own contracts.

The full decision is available here.

<https://www.lgo.org.uk/decisions/adult-care-services/charging/18-002-772>



Is carers allowance worth it?

It is a widely recognised fact that without the dedication and support of unpaid carers health and social care systems would grind to a halt.

Why then, is Carers Allowance, mired in so much controversy? Last month the National Audit Office published its report into overpayments of this benefit following MP's concerns about the level of overpayments and the impact on carers when the monies are being recovered. These concerns arose after a whistle blower reported concerns that many overpayments were not being detected and that there was a significant backlog in cases. Whilst the report states that the majority of over payments are due to fraud, it also highlights the complexities around claiming Carers Allowance in the first instance, not least the impact this can have on the benefits of the cared for person. Whilst the number of people entitled to claim Carers Allowance has increased, surely there has to be an easier way to support carers?



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