

Welcome to the first 2018 edition of our newsletter.

Issue 9 - January 2018

In this issue we will be looking at what the year ahead will bring regarding legal issues around care.

There is no doubt that health and social care issues will continue to be in the headlines in the coming year. But, whilst we wait for policy announcements on the bigger picture, it is individuals and their families that are bearing the costs, financially and emotionally, of the current pressures.

According to recent reports, there are now 400,000 fewer adults receiving financial assistance from their local authority and the hours of unpaid care continues to rise. It is more important than ever that individuals, carers and families have access to up to date information about the choices available to them, yet time and again people are handed a leaflet and left to get on with it themselves, or worse, given incorrect advice and pressured into rushed decisions. The recent decision by the Local Government and Social Care Ombudsman (January 2018) against Lincolnshire Council is just one example of this: here, a family was not given vital information about choosing and paying for a care home and were left struggling to meet a £60 per week top up.

There are plenty of obligations on health and social care providers to offer accurate information and advice, but it often ends up being provided in a rush (for example, during hospital discharge) with no time to discuss the options properly before you are pressured into making a decision. Here's where we can help.

Our dedicated Care Team can offer impartial, up to date advice and representation, based on case law, legislation and local provision that considers YOUR needs and circumstances in their entirety rather than on a decision by decision basis we give you reassurance to make the best choices for YOU. Other professionals may give you a piece of the puzzle, we can complete the picture.



Clients told

- You are not eligible for NHS continuing healthcare as you have no behavioural needs
- You can't move to a different care home
- You are not eligible for a direct payment or personal health budget
- There is no point in you having a social care assessment as you have too much money

All of these statements are wrong! We provide advice and representation on your legal rights and how to use them to secure the care you need.



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Forthcoming announcements: the year ahead

Winter 2018 - Guidance for Care Homes

Following its report on the state of the care home market last November, the Competition and Markets Authority will be taking further steps to improve consumer confidence in care home provision. The first of these actions will be an enforcement statement, expected early 2018, that will set out the circumstances of when charges can be made after the death of a resident. This statement is issued to tackle the practice by some providers of charging for a room for up to four weeks after death and/or seeking to recover additional fees.

If you are a care home provider, look out for further information on our website and twitter as you will be expected to amend your contracts to bring them into line with the new guidance.

Contact



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The Budget

Will adult social care ever get mentioned in a budget?

Given that information on proposed reforms is not due until the summer, it seems unlikely that social care will get a mention in the spring budget unless winter pressures in the NHS finally do launch it off the cliff edge that it currently hangs on. Social care remains the Cinderella service to the NHS and for some reason the very reasonable arguments for more funding made by the likes of ADASS continue to fall on deaf ears. Legal challenges to service and funding cuts using the Care Act 2014 have so far been unsuccessful (see the provider section for more information on the recent care funding case).



Spring 2018 - Will changes to the DOLS regime finally be put into place?

Deprivation of Liberty Safeguards (DOLS)

The DOLS scheme, launched back in 2007 (as an amendment to the Mental Capacity Act 2005), aimed to provide a framework under which the detention of an adult in a care home or hospital, who lacked mental capacity to consent to such a detention, would have to be authorised by a supervisory body.

The scheme provides checks and balances against such adults being placed in a care home and effectively forgotten, and gives individuals or their representatives a clear legal route to challenge such decisions. However, from the outset there were concerns that the DOLS scheme was too complex and unwieldy and this, coupled with a massive increase in the number of DOLS applications since the Cheshire West case, has created a backlog and a huge financial strain on local authorities. The Law Commission's review proposed a simpler system whilst still protecting vulnerable individuals. Published last March, their report set out a more straightforward system of Liberty Protection Safeguards.

The Government provided an interim response in October 2017 and an announcement on whether - and how - the Government intends to implement the recommendations is due in Spring, but there are two possible spanners in the works which mean that any announcement may be delayed yet again; the review of the Mental Health Act 1983 and (sorry to mention this...) Brexit.

Autumn 2018 – A modern Mental Health Act?

The Autumn should see the publication of recommendations coming from the review of the Mental Health Act 1983. With rising detentions under the Act, and those from Black and Minority Ethnic groups being disproportionately detained, the review will present recommendations (developed in conjunction with service users and carers) on how to deliver a Mental Health Act fit for purpose.



Summer 2018

Green Paper on social care and older people

Here we go again. For those of you who followed the consultation that took place prior to the introduction of the Care Act 2014, this will feel like Groundhog Day. The years of work that led to the introduction of the Care Act cost well over a million pounds and provided, if not a perfect solution, at least some certainty for families with the proposed 'care cap'. But as the Government recently announced that the cap is now shelved for good, all hopes are pinned on the proposals in this forthcoming paper. It cannot come soon enough for those who pay for their own care as they increasingly subsidise the rates paid by local authorities and health providers.

Provider update

Care England launched a legal challenge against Essex Council regarding the increase in some of the fees it paid for care provision. At the heart of its challenge was the claim that the council had breached the Care Act 2014 requirement for local authorities to ensure the sustainability of the local care market and not followed the relevant guidance in arriving

at its current fee levels. Care England's case did not succeed, not least because the Court found that the council had given due regard to a range of factors before reaching its decision. The judgment is essential reading for other providers who may be considering a similar challenge. Speak to a member of our team for further advice on **01926 491181**.

NHS continuing healthcare – a grey area of law

NHS continuing healthcare funding continues to remain a contentious area of care provision. This is not surprising when you consider that a decision that someone is eligible can save them thousands of pounds per month in care fees. It is concerning then that the guidance around eligibility is perhaps the 'greyest' of all health and social care guidance, fuelling myths about 'the rules of eligibility' and adding to stress and worry for many families.

The boundary between eligibility for health and social care is set out in section 22, Care Act 2014 and comes from the most famous Court case in this area, commonly known as the Coughlan case. In effect, if your nursing needs are more than 'incidental or ancillary' to other services which the local authority could be legally expected to provide, you have a 'primary health need' and should be funded by NHS continuing healthcare. The wording of section 22, and the guidance in the National Framework, leave the door open for a great deal of interpretation. This is reflected in the findings of the National Audit Office



Further cuts planned to the NHS continuing healthcare budget

Report (July 2017) into NHS continuing healthcare funding, which noted that; "There is significant variation between Clinical Commissioning Groups in both the number and proportion of people assessed as eligible for continuing healthcare".

Whilst the report notes that more people than ever are being assessed for this funding, the reality is that if you are referred for an assessment through the standard process (rather than Fast Track), you will probably not be found eligible (only 29 per cent of those referred for a full assessment were found eligible). Our team, who support and represent people at assessments and appeals, have found the eligibility criteria being squeezed; the continuing healthcare assessor's

often rigid interpretation of each sentence relating to need or eligibility leads to 'line by line' haggling over the framework at the expense of looking at someone's needs as a whole. There are plans to review the Framework, possibly issuing new guidance, but we fear this will make things more difficult for service users. To add to these concerns, NHS England has funding cuts firmly in its sights and proposes cuts of £855 million to the continuing healthcare budget by 2020-21. The best chance to secure funding requires collaboration with care providers, analysis of care needs and an in depth understanding of the framework - don't miss out, speak to a member of our team today!

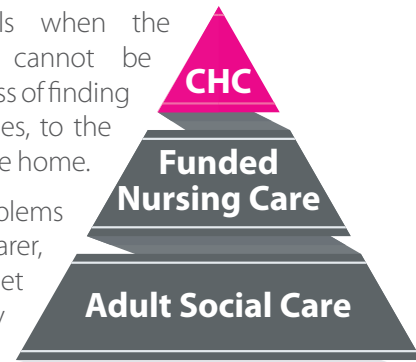
Having Funded Nursing Care problems?

Eligibility for the Funded Nursing Care contribution (FNC) used to be, in our experience, a non-contentious process. However, we are attending an increasing number of assessments and reviews where this funding is being withdrawn without, we believe, a proper consideration of an individual's nursing care needs. In light of the NHS England target to cut the continuing healthcare and funded nursing care budget by £855 million by 2020-21 it is perhaps not surprising that funded nursing care payments are coming under increasing scrutiny.

The key to eligibility is that an individual must require the services of a registered nurse as part of their care in a nursing home. Disputes about eligibility often come down to defining nursing care, where in our experience, tasks that have historically been considered 'nursing' are now seen as part of non-nursing care. Two key points seems to be glossed over: first, the vital skill and expertise that registered nurses have in managing and responding to health needs and secondly, FNC funding is not dependent on a registered nurse delivering the care, as the NHS's own FNC guidance states their role includes "...either the provision of care or the planning, supervision or delegation of the provision of care" (para 6, 2013 guidance).

The impact on individuals when the FNC contribution is cut cannot be underestimated; from the stress of finding extra money to meet care fees, to the very real risk of having to move home.

If you are experiencing problems with FNC as a family, carer, support worker or provider, get in touch with our team today on **01926 491181**.



What is Funded Nursing Care contribution?

Also known as 'Registered Nursing Care Contribution' or FNC, it is a payment made by the NHS to nursing homes for the element of care provided by a registered nurse. Eligibility for NHS continuing healthcare **MUST** always be considered first.

Payments are currently £155.05 per week and are not means tested, making this available for people paying privately for their nursing home place. This contribution could reduce your weekly fees, depending on the wording in your care home contract.

Covert medication: are you following the law?

We were reminded through a couple of cases recently that there is still uncertainty among some professionals about the procedures that should be followed regarding covert medication. This is an important area for family members and carers to be aware of too as they should be involved in any decisions about the use of covert medication.

The decision as to whether to administer medicines covertly should never be taken without following the principles set out in the Mental Capacity Act 2005: section 4 of the Act relates to making a 'best interest' decision.

What is covert medication?

Giving an individual medication without their knowledge or consent.

Covert medication should **NEVER** be given to an individual who has the mental capacity to make decisions about their care.

A 2016 case in the Court of Protection highlighted the importance of both the Mental Capacity Act AND the relationship with a Deprivation of Liberty Safeguard (DOLS) authorisation and echoed the NICE guidance in this area. We have drawn together a handy flowchart for professionals and families, available on our website. If you are concerned about this issue, please contact a member of our Health and Community Care Team on **01926 491181**.

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