

## **The Ombudsman's final decision**

Summary: Mrs X complained about Mr Y's needs assessments and mental capacity assessment. Also, the care packages and charges for care. We found fault in the mental capacity assessment and care and support plan. We recommended the Council review its training in these areas and ensure Mr Y did not pay for two care workers. The Council has agreed to this.

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## **The complaint**

1. The complainant, whom I shall refer to as Mrs X, complains on behalf of her brother, Mr Y. She complains that the Council:
  - Did not complete an adequate needs assessment or mental capacity assessment for Mr Y.
  - Arranged care packages which included unnecessary support for which Mr Y was charged.
  - Changed a successful care package to provide additional support Mr Y did not want or need.
  - Did not explain about charging; the first correspondence on this was an invoice for well over £15,000.
  - Did not provide Mrs X with a breakdown of the charges when she asked for this several times.
2. Mrs X says the social worker never met Mr Y except in a virtual meeting. She was impatient and abrupt and did not allow time for Mr Y to process information and respond, due to his brain injury. She telephoned many times but did not allow enough time for Mr Y to reach the phone. Mrs X says the social worker insisted on increasing the care package to four calls per day although Mrs X, Mr Y and the existing care workers advised that he only needed two. Mrs X says she told the social worker that Mr Y would not cope with four visits and, as she predicted, Mr Y refused to allow the care workers in at all even when the package was reduced back to two calls per day.
3. Mrs X says these events caused much distress to Mr Y and herself. She says the Council should reconsider the charges for the unwanted and unnecessary care services and the charges incurred in the independent capacity assessment. Mrs X arranged this following an inaccurate assessment by the social worker.

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## The Ombudsman's role and powers

4. We investigate complaints of injustice caused by 'maladministration' and 'service failure'. I have used the word fault to refer to these. We consider whether there was fault in the way an organisation made its decision. If there was no fault in the decision making, we cannot question the outcome. (*Local Government Act 1974, section 34(3), as amended*)
5. If we are satisfied with an organisation's actions or proposed actions, we can complete our investigation and issue a decision statement. (*Local Government Act 1974, section 30(1B) and 34H(i), as amended*)
6. We may investigate complaints made on behalf of someone else if they have given their consent. (*Local Government Act 1974, section 26A(1), as amended*). Mr Y has given his consent for Mrs X to complain on his behalf.

## How I considered this complaint

7. I considered information from the Complainant and from the Council.
8. I sent both parties a copy of my draft decision for comment and took account of the comments I received in response.

## What I found

### Background

### Safeguarding

9. A council must make enquiries if it thinks a person may be at risk of abuse or neglect and has care and support needs which mean the person cannot protect themselves. An enquiry is the action taken by a council in response to a concern about abuse or neglect. An enquiry could range from a conversation with the person who is the subject of the concern, to a more formal multi-agency arrangement. A council must also decide whether it or another person or agency should take any action to protect the person from abuse. (*section 42, Care Act 2014*).

### Mental Capacity Act

10. The Mental Capacity Act 2005 is the framework for acting and deciding for people who lack the mental capacity to make particular decisions for themselves. The Act (and the Code of Practice 2007) describes the steps a person should take when dealing with someone who may lack capacity to make decisions for themselves. It describes when to assess a person's capacity to make a decision, how to do this, and how to make a decision on behalf of somebody who cannot do so.

### Mental capacity assessment

11. A person aged 16 or over must be presumed to have capacity to make a decision unless it is established they lack capacity. A person should not be treated as unable to make a decision:
  - because they make an unwise decision;
  - based simply on: their age; their appearance; assumptions about their condition, or any aspect of their behaviour; or
  - before all practicable steps to help the person to do so have been taken without success.

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12. The council must assess someone's ability to make a decision when that person's capacity is in doubt. How it assesses capacity may vary depending on the complexity of the decision.
  13. An assessment of someone's capacity is specific to the decision to be made at a particular time. When assessing somebody's capacity, the assessor needs to find out the following:
    - Does the person have a general understanding of what decision they need to make and why they need to make it?
    - Does the person have a general understanding of the likely effects of making, or not making, this decision?
    - Is the person able to understand, retain, use, and weigh up the information relevant to this decision?
    - Can the person communicate their decision?
  14. The person assessing an individual's capacity will usually be the person directly concerned with the individual when the decision needs to be made. More complex decisions are likely to need more formal assessments.
  15. If there is a conflict about whether a person has capacity to make a decision, and all efforts to resolve this have failed, the Court of Protection might need to decide if a person has capacity to make the decision.

### **Best interest decision making**

16. A key principle of the Mental Capacity Act 2005 is that any act done for, or any decision made on behalf of a person who lacks capacity must be in that person's best interests. The decision-maker also has to consider if there is a less restrictive choice available that can achieve the same outcome. Section 4 of the Act provides a checklist of steps decision-makers must follow to determine what is in a person's best interests.
17. If there is a conflict about what is in a person's best interests, and all efforts to resolve the dispute have failed, the Court of Protection might need to decide what is in the person's best interests.

### **The Court of Protection**

18. The Court of Protection deals with decision-making for adults who may lack capacity to make specific decisions for themselves.
19. The Court of Protection may need to become involved in difficult cases or cases where there is disagreement which cannot be resolved in any other way. The Court of Protection:
  - decides whether a person has capacity to make a particular decision for themselves;
  - makes declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions;
  - appoints deputies to make decisions for people lacking capacity to make those decisions;
  - decides whether a Lasting Power of Attorney or Enduring Power of Attorney is valid; and
  - removes deputies or attorneys who fail to carry out their duties.

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## **Lasting Power of Attorney**

20. The Mental Capacity Act 2005 introduced the “Lasting Power of Attorney (LPA)”. This replaced the Enduring Power of Attorney (EPA). An LPA is a legal document, which allows a person (‘the donor’) to choose one or more persons to make decisions for them, when they become unable to do so themselves. The ‘attorney’ or ‘donee’ is the person chosen to make a decision on the donor’s behalf. Any decision has to be in the donor’s best interests.
21. There are two types of LPA.
- **Property and Finance LPA** – this gives the attorney(s) the power to make decisions about the person’s financial and property matters, such as selling a house or managing a bank account. Unless the donor says otherwise, the attorney may make all decisions about the donor’s property and finance even when the donor still has capacity to make those decisions.
  - **Health and Welfare LPA** – this gives the attorney(s) the power to make decisions about the person’s health and personal welfare, such as day-to-day care, medical treatment, or where they should live.
22. An attorney or donor must register an LPA with the Office of the Public Guardian before the attorney can make decisions for the donor.

## **Court appointed Deputies**

23. If there is a need for continuing decision-making powers and there is no relevant EPA or LPA, the Court of Protection may appoint a deputy to make decisions for a person. It will also say what decisions the deputy has the authority to make on the person’s behalf. The Office of the Public Guardian (OPG) oversees the work of attorneys and court-appointed deputies and produces detailed guidance for them.

## **Appointeeship**

24. An appointee is responsible for making and maintaining any benefit claims on behalf of someone who cannot manage their own finances. There can only be one appointee acting on behalf of that person at any one time. An appointee can be held responsible if benefit is overpaid. The appointee must:
- tell the benefit office about any changes which affect how much the claimant gets; and
  - spend the benefit it receives in the claimant’s best interests.
25. An appointee does not have authority to deal with any other aspects of a person’s finances.

## **What happened**

26. Mr Y lived at home on his own. He had difficulties with mobility, short term memory issues and cognitive impairments. Mrs X helped Mr Y with his finances, and shopping. Following a hospital admission, he was discharged home in February 2021 with short term home care. This service, from Care Provider Q, was intended to be for a maximum of 21 days to ensure Mr Y could be discharged from hospital and a long term package put in place. These events happened during the COVID-19 crisis and the related restrictions.
27. Social worker A, from the hospital discharge team, advised Mrs X that Mr Y would need a financial assessment once the short term arrangement ended. Mrs X was not sure how much Mr Y had in his bank accounts but knew it was close to the threshold. It was possible he would be self funding. The Council was unable to

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decide whether Mr Y was self funding until it knew all his financial information, but Mrs X was not able to access it all. Although Mrs X helped him with his finances, Mr Y had no one able to deal with his finances on his behalf. Mrs X believed he had money in an overseas account but she could not check this out. Social worker A remained responsible for Mr Y while he continued to receive short term care.

28. In mid March, the Council was alerted to safeguarding concerns about Mr Y's finances and it decided to complete a section 42 enquiry. Social worker A also became aware Mr Y was not engaging with the care workers and spoke to him by phone. She suggested alternative accommodation with support, but he was not happy discussing this. He wanted to stay in his home and was very clear about that. This call appears to be the call that the social worker used to assess Mr Y's capacity around finances though there is no formal record of this. She concluded that he did not have capacity to make decisions about his finances. The Council advised Mrs X it could source a long term provider but if Mr Y was self funding, he would pay a brokerage fee as well as the full care costs. Records note Mrs X was "OK" with this. It said Mr Y would receive six weeks COVID funding and would then move to a charged service which would be Care Provider Q until it found a replacement.
29. In late April, another social worker (B) was allocated to complete the section 42 enquiry.
30. Mrs X complained to the Council as she was not happy that Mr Y was assessed by phone. She was also unhappy that Mr Y had been supported by a care worker in the phone conversation and this included discussion of his finances. She also said social worker A had called her many times from a withheld number and not left a message and was unhappy with social worker A's communication.
31. A senior practitioner spoke to Mrs X about her complaint and explained that they were trying to arrange a provider for a care package four times daily. They noted that Mrs X asked if 3 calls a day would be sufficient rather than four.
32. Social worker B spoke to Mr Y and Mrs X, separately, about Mr Y's finances. Mrs X spoke about the difficulty she was having dealing with Mr Y's bank and finding out about his overseas bank account. The bank agreed for her to get statements and cheque books. She was trying to get a lasting power of attorney arranged. Social worker B told Mrs X that social worker A had completed a mental capacity assessment and found he lacked capacity around his finances. She told Mrs X that the arrangements would now need to go through the Court of Protection. Mrs X said she thought the assessment was not done properly as it caused Mr Y much distress and irritation according to the care worker who supported him. Mrs X said social worker A had also told her she had ten days to arrange care workers to replace Care Provider Q which had caused anxiety and confusion. She had since been told that Care Provider Q would continue. Mrs X said she had already sourced a care provider who could provide two calls a day as one of the care workers had said Mr Y would probably be ok with two calls. Social worker B advised Mrs X to wait until the Council could arrange a long term care package and Mrs X agreed. Mr Y agreed that Mrs X and his sister in law Ms Z, would be best to deal with his finances. Mr Y remained unclear about his finances and Mrs X and Ms Z confirmed they were happy to apply to the Court of Protection (CoP) to be Deputies for him.
33. Social worker B also spoke to Care Provider Q who confirmed Mr Y was upset following the mental capacity assessment call and he did not like the questions

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asked. They also confirmed Mr Y's needs fluctuated and sometimes he could manage with two visits but sometimes he could do with four. Sometimes he didn't want any visits, but Care Provider Q felt three visits should be maintained even if just to check on his welfare because he was at high risk of falls and high blood pressure. They felt Mr Y might get frustrated with four visits a day. Social worker B had various conversations about how Mr Y's finances should be managed while they waited for Mrs X and Ms Z to arrange deputyship. The finance team advised that Mrs X should apply to be Mr Y's appointee in the meantime.

34. The Council struggled to find a care provider to replace the short term provider so the short term arrangement continued for some months. Mr Y and Mrs X were happy with this as Mr Y developed a good relationship with the care workers. Social worker A was still responsible for finding a long term arrangement, reviewing Mr Y's care and support, and assessing his needs. Since Mr Y's support was working well, social worker A had little involvement with Mr Y at this time. Although social worker A considered Mr Y remaining with Care Provider Q, it was not possible unless Mr Y made a private arrangement. At this stage, neither Mrs X nor the Council knew whether Mr Y was entitled to Council funding.
35. In June, Mrs X told social worker B that she had agreed with Ms Z to ask social worker B to appoint an independent Deputy as it was too onerous for them. Mrs X had begun the application but got so confused she felt it was not something she was prepared to take on. She agreed to a referral to an agency that supports people with managing their money.
36. Social worker A completed a review of Mr Y's care and support plan and increased his care package to four calls a day, from three, and with two care workers at each, rather than one. The review noted that the support from Care Provider Q had helped him a lot and he would like this increased to four calls. She also spoke to him about his finances. The review noted that Mr Y's cognition was declining and his mobility worsening. Also that the family was at breaking point with their caring role. Social worker B advised Mrs X that a long term provider, Care Provider K, had been arranged and Care Provider Q's last call would be towards the end of June. Mrs X was unhappy with that because they wanted Care Provider Q to continue. Social worker B advised this was not possible.
37. Mr Y's bank advised Mrs X that a third party Deputyship would create difficulties. She told social worker B that she would need to liaise with the third party about anything out of the ordinary and so might as well apply for Deputyship. Mrs X was not keen to apply for appointeeship as she was concerned it would affect her own finances. Social worker B said they needed to agree a plan and agreed that Mrs X would think about it over the weekend. Mrs X emailed social worker B and advised she was struggling to cope with all the things she had to deal with for Mr Y. She had had lengthy discussions with Ms Z and Mr Y's solicitor. She said she had nothing in writing to say that Mr Y did not have capacity to deal with his finances and needed that to apply to the CoP. She was also concerned about the new package of care. Social worker B said Mr Y would be receiving four calls a day initially. She acknowledged that Mrs X had reservations about this but said it was decided this would be most beneficial in the beginning. It could be reduced if necessary at the review about six to eight weeks later. She reassured Mrs X that Care Provider Q would provide a full handover to Care Provider K. Mrs X said the solicitor had suggested an independent capacity assessment for Mr Y and social worker B said it was up to her if that's what she wanted to do. She also advised Mrs X that the Council could provide her with something in writing to confirm that

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he lacked capacity. The solicitor said that Mr Y might not have capacity to manage his own finances but he felt he did have capacity to decide who should do this for him. This meant Mr Y might still be able to sign powers of attorney in favour of Mrs X and/or Ms Z.

38. In July 2021, a financial assessment found Mr Y had funds in his known bank accounts which exceeded the upper threshold. This meant he was required to self fund his care and was not eligible for Council funding. The Council still did not know what funds were in his overseas account. It could not therefore calculate the point at which he would become eligible for Council funding. The Council agreed to adjust the cost of the care in light of Mrs X's complaint about the four calls a day and waived £332.
39. At the end of August 2021, Mrs X complained to the Council again about the care provided to Mr Y and how his care was dealt with. She also complained about social worker A's decision that Mr Y lacked capacity to manage his finances and the confusion this caused with charging. She wrote again at the beginning of October. The Council responded three weeks after the second letter. It set out that she was advised in August that Mr Y would have to pay the full cost of his care because he had in excess of the threshold in his UK bank accounts. It could not calculate when he would be eligible for Council funding until it knew how much he had in his overseas account. The Council acknowledged an error in the costs of care and adjusted Mr Y's contribution to match the actual costs which resulted in a net adjustment of around £9,000. It acknowledged the difficulties that Mrs X had with social worker A and noted that the section 42 enquiry had made communication more complicated. It apologised for any distress and acknowledged that the lack of communication and tone had not helped the uncertainty and distress she experienced.
40. Mrs X was unhappy with the Council's response and asked why social worker A made the decision to add an extra call to Mr Y each day despite the concerns. The Council provided a further response in January 2022 from social worker A's manager who was satisfied that the decision for increased care was made in Mr Y's best interests at the time. Mr Y had begun to refuse care from Care Provider Q so it could not be sure that the change was the cause of this. It agreed to waive £332 of the costs and apologised that Mrs X felt calls were forced on Mr Y and any distress.
41. Mrs X made other arrangements for Mr X's care from February 2022.

**Was there fault which caused injustice?**

42. It is not my role to decide whether Mr Y had the mental capacity to decide about his finances but to decide whether the Council considered this properly.
43. No formal capacity assessment was recorded, so we cannot say whether social worker A completed the assessment properly or which specific decision they considered. However, Mr Y was referred to as lacking capacity regarding his finances before this call. A safeguarding enquiry was underway into concerns about his finances, and social worker B advised Mrs X that Mr Y did not have capacity around his finances. I am therefore satisfied, on the balance of probability, that the capacity assessment considered Mr Y's capacity to deal with his finances. The Council was fault here in the failure to record the assessment. However, given that nobody, including Mr Y, disagreed that he was unable to manage his finances, the injustice caused here was fortunately limited. However, this is concerning and in other circumstances could have caused significant injustice.

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44. The Council had to ensure Mr Y had someone to manage his money safely and, given the safeguarding concerns around this, was inclined to involving the CoP. It would have been at fault if it had not taken steps to arrange this. The Council could not just leave Mr Y without a formal and accountable arrangement in place. I found no fault in the Council's approach. If Mrs X had arranged an LPA, she would have been able to manage Mr Y's finances and access his overseas accounts. This would have enabled the Council to complete an accurate financial assessment. The Council would then have had to raise any concerns it might have through the Office of the Public Guardian.
45. Social worker A's initial needs assessment of Mr Y led to the package of care by Care Provider Q with which both Mr Y and Mrs X were very happy. The assessment happened during the COVID-19 restrictions which caused great difficulty with assessments. Mrs X did not specify in which way this assessment was not adequate, but I found no fault here.
46. The package of care from Care Provider Q was always intended to be short term and it was fortunate that it was able to continue as it did. Social worker A did not unnecessarily end it and had repeatedly advised that it would have to end. I found no fault here.
47. There are records of discussions with Mrs X about charging from early on when Mr Y was first discharged. It was clear from these discussions that Mr Y would be charged for the service and, if he was a self funder, he would have to pay the full costs. Once the Council confirmed he was a self funder, it invoiced him for the full cost of care. I found no fault here. There was an error in the invoicing which the Council corrected and apologised for before Mrs X complained to us.
48. Social worker A's review of Mr Y's care and support by phone was carried out with the support of his care workers. Mr Y was able to make his own decisions about his care and support however, he did want Mrs X involved in his care and support. At this stage, social worker A was aware that Mrs X had said that she was finding it difficult to continue with the level of support she provided to Mr Y. Mrs X had declined to apply for Deputyship and asked social worker B to find an independent Deputy. Social worker A mentioned family being "at breaking point" in the review. It seems likely, therefore, that the increased package of care and support was agreed on to help with this. When social worker B advised Mrs X about the resultant package of care, she did not note that Mrs X was strongly against the package. She said it could be changed at the review after 6-8 weeks. Mrs X says she strongly objected and told social worker B she had "repeatedly" told social worker A that Mr Y could not cope with four people calling daily and he did not need personal care or meals cooked. There is no record of these repeated conversations. Anyway, the care and support plan not only increased the number of calls but increased the number of care workers to two at each call. There was no reason provided for this. Mr Y never had two care workers at one call, for this reason, I have concluded that the increase in care support was not properly considered or evidenced. This was fault and caused stress, anxiety and uncertainty to Mrs X and Mr Y. The Council has already waived some costs relating to this and this is likely to be an appropriate remedy. However, it should ensure Mr Y was not charged for two care workers at any of these calls.
49. The Council apologised for not sending a breakdown of care costs when Mrs X asked and sent a breakdown. This is an adequate remedy and there is no outstanding injustice here.



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## **Agreed action**

50. To remedy the injustice identified above, I recommended the Council:
- Review its training around mental capacity and ensure all workers who may need to complete mental capacity assessments, are clear about how these should be completed and recorded.
  - Review its care and support planning training and ensure all care and support plans are based on evidence and an accurate needs assessment.
  - Sample twenty care and support plans with at least five by social worker A, and check for accuracy and evidence.
  - Ensure Mr Y was not charged for two workers at any of his care calls.
  - Complete these recommendations within three months of my final decision.
51. The Council has agreed to these recommendations.

## **Final decision**

52. I have completed my investigation. The Council will complete the agreed actions to remedy the injustice it caused.

## **Investigator's decision on behalf of the Ombudsman**