

The Ombudsman's final decision

Summary: The Council is not at fault for Mrs D's initial move to a care home. The Council is at fault however for failing to properly consider whether it was in her best interests to remain at the care home. To remedy the complaint the Council should pay Mr C money in recognition of the uncertainty its actions have caused him. It should also remind staff about how and when to complete best interest decisions.

The complaint

1. The complainant who I call Mr C complains the Council moved his late mother, who I call Mrs D, without his knowledge, without considering more cost effective options, NHS Continuing Healthcare, and her best interests.
2. Mr C does not consider his mother's estate should be liable for all the outstanding care fees as Mrs D was not in a care home of her choice or liking.

The Ombudsman's role and powers

3. 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*)
4. 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*)

How I considered this complaint

5. I spoke with Mr C and considered written information he provided. I made enquiries of the Council and considered its response. This included:-
 - Care Act 2014 and the associated Care and Support Statutory Guidance;
 - Council's safeguarding investigation and communication records.
6. Mr C and the Council had an opportunity to comment on my draft decision. I considered any comments received before making a final decision.

What I found

Background information

7. Mrs D was living independently in the community. Mrs D went into hospital and then into care home, X, for a social care assessment. COVID-19 funds paid for this stay.

What should have happened

Making decisions and the Mental Capacity Act 2005

8. 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.
9. 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 term 'best interests' is not defined in the Act, however it does set out a checklist of common factors that must always be considered:
 - the person's past and present wishes and feelings (and, in particular, any relevant written statement made by her/him when he had capacity);
 - the beliefs and values that would be likely to influence her/his decision if he/she had capacity; and
 - the other factors that he would be likely to consider if he/she were able to do so.
10. Councils must, if it is practicable and appropriate, consult them and:-
 - anyone named by the person as someone to be consulted on the matter in question;
 - or anyone engaged in caring for the person or interested in his welfare.

Deprivation of Liberty Safeguards

11. The Deprivation of Liberty Safeguards (DoLS) provide protection for people who lack the capacity to decide about their accommodation. When an authorisation is granted the best interests assessor will be able, in most cases, to recommend a family member or friend to act as the Relevant Person's Representative (RPR). The RPR must have the necessary skills to represent the person properly. If not the supervisory body can appoint a paid RPR.

Paying for care

12. Where a council arranges care and support to meet a person's needs, it may charge the adult, except where the council must arrange care and support free. If the person lives in a care home and has over £23,250 capital, known as the upper capital limit, they must pay the full costs of their care. This includes property capital.
13. A council can disregard a person's property under some circumstances. These include if the property is occupied by a relative who is aged 60 or over or is incapacitated. In these cases, it must be the relative's main residence and they must have lived there in the time prior to the person going into a care home.

NHS Continuing Healthcare Assessments

14. NHS CHC is a package of ongoing care arranged and funded solely by the NHS where the individual has been found to have a 'primary health need' as set out in

the National Framework for NHS Continuing Healthcare and NHS-Funded Nursing Care.

What happened

15. Due to Mrs D's behaviour X could not continue to care for her. Mr C told the Council Mrs D had previously stayed at care home, Z, and was a preferred choice as Mrs D's ex long term partner lived at Z. The Council considered a move to Z, but Z had a COVID-19 outbreak and was not taking new residents. It also appears Mrs D had COVID-19 at the time. Mrs D needed a care home urgently, so had to move.
16. The Council moved Mrs D to Y as it had a vacancy and could meet Mrs D's needs. Mr C says he was not part of the decision making process as he was in hospital at the time. The Council notes on 22 May 2020, "Telephone call to son to confirm that *Mrs D* will be going to *Y*. *Mr C* said that he will be having surgery tomorrow so will be unable to offer his Mum any support for several weeks."
17. Mrs D moved into Y the next day and COVID-19 funding continued. In June Mr C raised concerns about Mrs D having frequent falls at Y. The Council opened a safeguarding referral.
18. Over the next couple of months there was further assessment from the Council about whether Mrs D could return home with a package of care. This was Mr C's preferred choice. On 11 July 2020 the Council completed a Deprivation of Liberties Safeguarding (DoLS) assessment and decided it was in Mrs D's best interests to remain living in a care home. The DoLS assessor sought Mr C's views at the time who agreed with the decision. Mr C also agreed to be Mrs D's Relevant Person's Representative (RPR). The authorisation was made until 23 November 2020.
19. The Council reviewed the DoLS authorisation in October 2020. The assessor felt at this point Mrs D would benefit from a paid RPR. This was because Mrs D was saying she wanted to go home and therefore needed someone with specialist knowledge to represent her. The records say, "*Mr C* acknowledged and agreed to the recommendation of an independent advocate to support his mother through her objections".
20. In January 2021 Mr C complained to the Council that he had not been able to see Mrs D since June 2020. He wanted Mrs D to move to Z where her ex-partner lived. He felt Z provided better quality of care, they were allowing family visits, and £500 a month less expensive. Mr C also felt Y was not providing Mrs D with the one to one care she needed. Nor was it co-operating with him in completing Court of Protection paperwork. The Council agreed to complete a review of Mrs D's needs. This coincided with a safeguarding investigation about an alleged physical assault on Mrs D the previous year.
21. On 18 February 2021 Mr C contacted the Council to say Z had a vacancy and he wanted to move Mrs D by the end of the following week. He had visited Y that day and said the staff's behaviour was unacceptable. The Council contacted Z who said it could take Mrs D and could meet her needs.
22. Y told the Council it had a 28 day notice period. Y told the Council it should complete a best interest assessment to decide whether it was in Mrs D's best interests to move care home. The Council completed a best interest assessment on 22 February 2021. Mr C was present for part of the meeting but left early.

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23. The Council records Mr C left early because of a “lack of appreciation that the pandemic was mostly contributing to the dissatisfaction of the care and support provided to his mother”. Mr C says he told the Council at the meeting he wanted to move his mother.
 24. The Council reached the decision that it was in Mrs D’s best interests to stay at Y for the following reasons:-
 - Mrs D was at an advanced stage of dementia and transferring her to another care home might impact on her health and wellbeing;
 - Y had employed a new care home manager and most of the issues raised were related to the previous manager.
 25. On 2 March 2021 Y completed a yearly review of Mrs D’s health needs and did not identify a need for NHS CHC.
 26. The Council agreed a further DoLS authorisation on 24 May 2021. The DoLS assessor again sought the views of Mr C. He expressed his dissatisfaction at the care provided by Y, but agreed it was in Mrs D’s best interest to remain living there. At this point the Council reinstated Mr C as RPR as it considered he could represent Mrs D’s views properly. On 21 January 2022 Mrs D met the criteria for fully funded nursing care.
 27. Mrs D has now passed away and over £41,000 of fees remain outstanding. Mr C says his daughter was living in the property before Mrs D went into hospital and the Council should disregard the value of Mrs D’s property in the financial assessment. He also says had Mrs D moved to Z she would have saved £500 per month in fees and received better care. Mr C says the Council should take this into account and reduce the outstanding balance accordingly.

Is there fault causing injustice?

Move to X

28. The Council is not at fault for failing to tell Mr C about a move to Y. There is a clear record that it discussed this with him. While I understand Mr C disputes this, I cannot on balance say the Council did not have a conversation with Mr C as this is recorded.

Move to Z

29. The Council is not at fault for not initially moving Mrs D to Z. Z had an outbreak of COVID-19 which prevented it from taking new residents.
30. Following safeguarding concerns and issues Mr C raised about Mrs D’s care; the Council completed a best interest assessment about whether Mrs D should remain at Y. I consider there was fault in the way the Council made this decision. This is because the assessor based their decision on Mrs D’s advanced dementia. However there was no analysis about how her dementia would be affected by a move and whether there were any positives about a move to Z. There was no consideration of Mrs D’s past feelings and wishes or other specific factors relevant to her as set out at paragraph 9 above.
31. The best interest meeting was to decide whether it was in Mrs D’s best interest to move to Z. However the assessor’s focus was on the care Mrs D received at Y. While this may have been part of the decision making, the Council has not clearly evidenced why it was in Mrs D’s best interests to remain at Y.
32. Mrs D has passed away and the Council cannot now complete a best interest assessment. Due to the lack of information I am unable to say on balance, but for

the faults identified, Mrs D would have moved to Z. Mr C does however have the uncertainty of not knowing whether, had the Council acted properly it would have reached a different decision.

Changes in the RPR

33. There is no fault in the way the Council made changes to the RPR. For a short period of time the Council considered Mrs D needed a skilled paid RPR which it obtained. This was a professional judgement made at the time. The Ombudsman cannot challenge the merits of a properly made decision.
34. The Council records it told Mr C of the decision explaining its reasons. There is no record of Mr C objecting at the time. Although not in the DoLS procedures the Council may in future want to consider confirming major changes in writing.

Failing to apply a property disregard and applying for NHS Continuing Health Care

35. I find no fault in the Council not applying a property disregard to Mrs D property as part of the financial assessment. The Council was not aware Mrs D's granddaughter was living at the property at the time of the financial assessment. Mr C can provide supporting information to the Council now if he believes the property disregard criteria are met.
36. Mr C complains the Council should have reviewed eligibility for NHS CHC for Mrs D. There is nothing to suggest the Council was aware about Mrs D's need for NHS CHC or due to review the placement. It appears Y took action to fast track an application in January 2022. If Mr C considers Mrs D would have been eligible earlier he can make a retrospective application.

Agreed action

37. I consider there was fault in the Council's actions which have caused Mr C and Mrs D injustice. Mrs D has now died, and I cannot remedy her personal injustice. The agreed actions are therefore to remedy Mr C's injustice and to improve future practice:-
38. within one month of the final decision the Council should:-
 - apologise to Mr C and pay him £300 in recognition of the time, trouble and uncertainty the Council's failures have caused him.
39. within three months of the final decision:-
 - remind staff, and if necessary provide training about completing and recording best interest decisions especially when there are several parties with competing interests.
40. The Council should provide us with evidence it has complied with the above actions.

Final decision

41. I have found fault in the Council's actions which has caused Mr C and Mrs D injustice. I consider the agreed actions above are suitable to remedy the complaint. I have completed my investigation and closed the complaint on this basis.

Investigator's decision on behalf of the Ombudsman