



MOORE BLATCH

# NEWS

Community care - edition one



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# WELCOME TO THE FIRST EDITION OF COMMUNITY CARE NEWS

We are delighted to introduce our new quarterly e-newsletter aimed at professionals in the health and social care sector. We hope to tackle issues that affect individuals who are in receipt of care and support from the NHS or Local Authority and help you, as professionals in this field, to add value to the individuals who rely on you for care, support or guidance.

If you would like to sign up for future editions of this e-newsletter please click [here](#).

In addition, we would welcome your thoughts and comments on these articles as well as details of any matters or questions you would like us to address in future issues. Please do not hesitate to contact me with your suggestions.



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## BEST INTERESTS AND MENTAL CAPACITY

The Mental Capacity Act 2005 (MCA) is a defining piece of legislation designed to protect and empower vulnerable people who lack capacity to make their own decisions. The Act and Code of Practice should be followed at all times to ensure that vulnerable people are supported as far as possible when making decisions in their best interests.

### The principles

Before any best interest decision is contemplated, everyone must first consider the core principles of the MCA as set out in Section 1. They are that:

- A person must be assumed to have capacity unless it is established that they lack capacity;
- A person is not to be treated as unable to make decisions unless all practicable steps to help them to do so have been taken without success;
- A person is not to be treated as unable to make a decision merely because they make an unwise decision;
- An act or decision under the MCA for, or on behalf of, a person who lacks capacity must be done, or made, in their best interests;
- Before the act is done, or the decision is made, the decision makers must consider whether there is an alternative option that is less restrictive on the person's rights and freedom of action.

If a decision is to be made in someone's best interests (for example, a change of accommodation) and that person has been confirmed as lacking capacity for that specific decision, those making the decision must consider the best interest checklist under section 4 of the MCA.

### The best interest "checklist"

The MCA does not tell someone what is in a person's best interests but instead sets out what factors should be considered before reaching a best interest decision. The key factors are:

- Someone making a best interest determination must not make it merely on the basis of a person's age, appearance or condition, or an aspect of behaviour which lead others to make assumptions about what is in that person's best interests;

- The decision maker must consider all relevant circumstances and take the following steps:
  - Consider whether it is likely that the person will regain capacity in relation to the matter in question, and if it appears likely that they will, when that will be;
  - So far as practicable, encourage the person to participate as fully as possible in any act done for them and any decision affecting them;
  - They must also try to obtain:
    - The person's past and present wishes and feelings
    - The beliefs and values that would be likely to influence the person's decision if they had capacity; and
    - If they were able to do so, what other factors would the person like considered.
  - The decision maker must take into account (if appropriate to consult them) the views of:
    - Anyone named by the person as someone to be consulted on the matter in question;
    - Anyone engaged in caring for the person or interested in their welfare;
    - The donee of a lasting power of attorney granted by the person; and
    - Any deputy appointed for the person

These principles show that best interest decisions cannot be made without careful consideration of the person at the heart of the decision.

Decision makers are required to make active enquiries with the person themselves (if possible), family members and carers in order to try and establish how the person would have acted if they had capacity and, taking the views of those close to the person into account, whether the decision would be in their best interests.

This can be difficult, but is required to safeguard a vulnerable person before a life changing decision is made. The Code of Practice recommends that when faced with a significant decision, a Best Interest Meeting (BIM) should be convened. This brings together all the key individuals involved in the person's life and provides an open forum for their views to be discussed and considered.

Decision makers should be encouraged to speak openly, based on their own experiences with the person, weighing up the advantages and disadvantages of each possible option being considered. A successful BIM will adopt this 'balance-sheet approach' with all participants, evidencing which options were considered together with the views on the likely outcomes.

Only then, when all of these factors and options have been properly considered, taking into account the above principles, can a best interest decision be made on behalf of someone lacking capacity.

At Moore Blatch we often represent family members at a BIM to ensure that their views are properly considered during what can be an emotional and difficult time.



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## GDPR

The General Data Protection Regulation comes into force on 25 May 2018.

The largest ever overhaul of data protection legislation will be implemented by the GDPR.

Our commercial team is on hand to assist with your queries on the GDPR and what you need to be doing to prepare. Businesses must comply with the changes or risk severe financial penalties.

For more information please click [here](#) or if you would like to discuss potential issues that may affect your business as a result of the GDPR, please do contact us.



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# BEWARE OF ANNUAL REVIEWS

Anyone who receives a financial contribution towards their care fees, either as a result of NHS Continuing Healthcare funding, or as a result of a financial assessment undertaken by the Local Authority, ought to have their needs assessed regularly.

While legislation governing the assessment process and entitlement to these types of funding differs, the basic principle is the same – where an individual is assessed as being eligible for support, the NHS or Local Authority are responsible for meeting the identified needs of that person.

Regular reviews, usually on an annual basis, are required not only to ensure that the person remains eligible for funding, but to make sure that the care and support they are receiving remains adequate and appropriate. Unfortunately, we are seeing more and more examples of an annual review being used as an opportunity for the person's care provision to be cut, without evidence to support this. In some cases, we are even aware of the individual or their representatives being told, in advance of the review, that the purpose of the meeting is to reduce the level of support available.

This, of course, can have devastating effects. If an individual who has been receiving NHS Continuing Healthcare funding (a fully funded package of care for individuals who have a “primary health need”) is told that they are no longer eligible for this funding, they will suddenly find themselves responsible for their own care fees. They may be entitled to a contribution from the Local Authority, depending on their means, but if they have assets in excess of the threshold (currently £23,250) then they will have to meet the cost of their care in full. These individuals are likely to have substantial packages of home care or be in a residential or nursing home setting due to the complex nature of their care needs. Therefore, the fees are likely to be significant. Individuals often have to sell their home to pay for care fees which can be very upsetting for them and their family.

Where an individual remains eligible for funding, either from the NHS or Local Authority, but on review is told that they are not entitled to the same level of support they have previously been receiving, the effects can be just as significant. Without appropriate support in place, individuals may struggle to perform activities of daily living, or be unable to participate in all the activities that they previously enjoyed, relying more heavily on family and friends to “fill in the gaps” and provide the additional support they require. In the most extreme cases, individuals can be left with unsafe packages of care that significantly increase their risk of harm.

It is essential to remember that neither the NHS nor the Local Authority are entitled to cut a person's support simply because they have been told to make cuts or save money on an expensive package of care. There is a statutory duty on both of these public bodies to meet the identified needs of an individual where it is shown that the person is eligible for their support. This means that unless the package of care provided is suitable and sufficient to meet the assessed needs, the body responsible is acting unlawfully and may be subject to legal proceedings.

In a recent report by the Local Government and Social Care Ombudsman, Wiltshire County Council were criticised for cutting an individual's care package following a review. In the summary of the assessment it stated “all support needs are being met – no change required..., ‘Mrs N is happy to continue as Mr P's main carer and

for him to reside in the family home (respite, day care and transport arrangements need to remain unchanged to continue to support)’. However, Wiltshire County Council then took steps to reduce the respite and transport provision, claiming that what the family were receiving was in excess of the maximum he should be receiving based on his needs. The Ombudsman did not accept this and criticised the Council for failing to act in accordance with the Care Act. The Council have agreed to review their policies.

Individuals should always be reminded that they do not simply have to accept the outcome of these assessments. In the first instance their concerns ought to be raised with the responsible body so that there is an opportunity to resolve the dispute at local level. Where this is unsuccessful and there are no justifiable grounds for the changes, an individual can ask the court to review the decision and make a determination as to its lawfulness. This is known as a Judicial Review.

While court proceedings can be expensive, it is reassuring for clients to know that Legal Aid funding is available for these most severe cases, and Moore Blatch hold a contract with the Legal Aid Agency for this type of work.

There are strict time limits for issuing a Judicial Review and it is essential that expert legal advice is sought at the earliest opportunity. We have detailed knowledge of both the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care and the Care Act 2014 and the responsibilities of the public bodies involved. We can provide advice on the merits of a challenge or Judicial Review entirely free of charge and with no obligation to the client.



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# THE HEALTH AND SOCIAL CARE CRISIS

The Care Funding crisis has been a topic of debate for quite some time. Despite the government's commitment to 'put the state-funded system on a more secure and sustainable footing', extensive media coverage and various reports, effective progress towards tackling our overburdened health and social care system remains to be seen.

The pressure is caused by:

- **The rise in patients seeking treatment for mental health issues.** Waiting time for an appointment with children's and young people's community services has risen from 11 weeks in 2012/13 to 26 weeks in 2015/16. The total number of annual Mental Health Act 1983 detentions has risen by 26% between 2012/13 to 2015/16.
- **An ageing population.** Worryingly Age UK estimates that 1.2 million older people are left to struggle each day without care and support. The number of people aged 85 or over in England is set to more than double over the next two decades.
- **The number of working-age adults with long-term needs has increased.**
- **Difficulty in recruiting and retaining staff to care for people.** In 2016/17, the overall staff vacancy rate across the adult social care sector was 6.6%, rising to 10.4% for domiciliary care staff. The staff turnover rate in 2016/17 was 27.8% (an increase on 4.7% since 2012/13).

The Care Quality Commission has warned that 'the entire health and social care system is at full stretch' adding that 'The impact on people is particularly noticeable and social care is approaching a 'tipping point' where deterioration in quality will outpace improvement and there would be a substantial increase in people whose needs are not being met'.

Similar concerns have been raised by the House of Lords Select Committee on the Long-term Sustainability of the NHS and Adult Social Care. 'Our NHS, our 'national religion', is in crisis and the adult social care system is on the brink of collapse'. 'Is the NHS and adult social care system sustainable? Yes, it is. Is it sustainable as it is today? No, it is not. Things need to change'. The Sustainability Committee identified an urgent need to rethink the current approach, indicating that in the long term, the focus must be on the delivery of an integrated health and social care system.

A huge problem is caused by the 'over-reliance on the acute sector. [...] A&E Departments and their facilities are being overwhelmed by patients with long-term care needs that are not being met by Community services'.

Often patients with long-term care needs, such as assistance with daily living activities, management of complex healthcare needs, or mental health aftercare support needs, are admitted to Hospital for treatment and their discharge is subject to significant delay.

In 2016/17, the national daily average rate of delayed transfers of care was 14.9%. The largest increase was seen in delays due to patients awaiting residential home placement or availability, increasing by 68% from 2015/16.



The transfer of care is delayed because of:

1. **Disputes over funding.** Many patients are not routinely assessed for NHS Continuing Healthcare, Care Act 2014 or s.117 Mental Health Act 1983 aftercare funding in contradiction to the applicable guidance. Those who are assessed, routinely find assessment processes are fundamentally flawed and funding is often not awarded to patients who are in fact eligible.
2. **Difficulties with the negotiation of and agreement to a care package.** Clinical Commissioning Groups and/or Local Authorities often do not engage in the care and support planning process effectively, and patients often struggle to achieve a care package which meets all their identified needs.
3. **The lack of available social and nursing placements.** The Government has committed to the publication of a Green Paper on 'Care and Support for Older People' by summer 2018. It is doubtful, however, that this will result in the urgent action required to tackle the severity of the current crisis.

As officials continue to debate the long-term sustainability of the NHS and Adult Social Care system, individuals and their families should be aware of their rights throughout the Hospital Discharge and Care Planning process. The eligibility criteria to qualify for NHS Continuing Healthcare, Care Act 2014 and s.117 Mental Health Act 1983 funding, and the processes which should be followed to determine eligibility are clearly detailed in a complex web of legislation.

The ability to obtain care and support will increasingly require detailed knowledge of complex legislation, the logical presentation of evidence to demonstrate a person's care needs against the eligibility criteria, and experience of how to navigate various assessment processes.

We specialise in assisting individuals or their representatives with all aspects of health and social care matters to ensure that they are not left without appropriate care and support.



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