

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Nottinghamshire County Council
(reference number: 19 015 363)**

27 January 2021

The Ombudsman's role

For more than 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

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|-------|--------------------------------------|
| Ms B | The complainant |
| Mrs D | Her mother |
| Mr D | Her father (the user of the service) |

Report summary

Adult social care

Ms B complained the Council delayed assessing her father's (Mr D) care needs, delayed assessing his mental capacity to decide where to live, and delayed making a decision in his best interests. We have upheld these complaints. This meant Mr D stayed at a care home longer than necessary and has a debt of over £15,000, for care fees which he cannot afford to pay because the Council failed to act in his best interests. The Council's actions also had an impact on Ms B's mother (Mrs D) at a time she was suffering carer crisis. The Care Provider has pursued her for the fees, including threatening bailiff action, which has been distressing.

Finding

We found fault causing injustice and made recommendations.

Recommendations

To remedy the injustice caused, the Council will take the following action, within three months of the date of this report.

- Apologise to Mr D, Mrs D and Ms B for:
 - its delay completing an assessment of Mr D's care and support needs;
 - its delay completing an assessment of Mr D's mental capacity;
 - its delay completing a best interests decision for Mr D;
 - failing to consider whether it was necessary and proportionate for Mr D to remain away from home, given his human right to enjoy his home peacefully; and
 - failing to adequately support Mrs D at a time of carer crisis.
- The Council has told the Care Provider it will take over responsibility for the outstanding care fees, so it should stop pursuing Mrs D. The Council will pay the outstanding care fees.
- Pay Mrs D £500 to acknowledge the distress caused by the pursuance of the care fees over the last year, and the distress caused by not having a clear plan for Mr D's care and support from April to October at a time of carer crisis.
- Pay Ms B £250 to acknowledge her time and trouble pursuing the complaint and supporting her parents at a time there was no clear plan for Mr D's care and support.
- Review the reasons for the delays in this case and implement any identified improvements to service.
- Give relevant staff training on applying the Human Rights Act 1998 to adult social care cases. So that staff are aware when the Articles of the Act might be engaged, and what is required of them to ensure individuals' rights are not unlawfully interfered with. And that the Council documents any consideration it has to the Human Rights Act 1998 in individual cases.

The Council has wholeheartedly accepted our recommendations, is committed to improve, and has already started acting on the recommendations. The Council has started improvement work by reviewing its Mental Capacity Act documentation, making necessary changes to it, and issuing guidance to staff. We welcome the Council's commitment to learning from past mistakes.

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The complaint

1. Ms B complained on behalf of Mr D that the Council:
 - delayed assessing Mr D's care needs, did not assess his mental capacity and failed to hold a best interests meeting;
 - failed to inform Mr D's family about charges for care; and
 - wrongly applied charges for a period when Mr D was in a care home and wrongly pursued the family for these charges.
2. Mr D now has a large debt which he cannot afford to pay back. The Care Provider has pursued Mr D's wife, Mrs D, for over a year for care charges which now stand at over £15,000. Mrs D is very distressed, especially when threatened with bailiff action. Ms B has spent a lot of time trying to resolve the issues and support her parents.

Legal and administrative background

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)

Relevant law and guidance

The Care Act 2014

4. A council must carry out an assessment for any adult with an appearance of need for care and support, applying national criteria to decide if a person is eligible for care. (*Care Act 2014, section 9*)
5. If a council decides a person is eligible for care, it should prepare a care and support plan which specifies the needs identified in the assessment, says whether and to what extent the needs meet the eligibility criteria and specifies the needs the council is going to meet and how this will be done. The council should give a copy of the care and support plan to the person. (*Care Act 2014, sections 24 and 25*)

The Mental Capacity Act 2005 and Code of Practice to the Mental Capacity Act

6. A person lacks mental capacity to make a decision if they have a temporary or permanent impairment or disturbance of the brain or mind and they cannot make a specific decision because they are unable to:
 - understand and retain relevant information;
 - weigh that information as part of the decision-making process; or
 - communicate the decision (whether by talking using sign language or other means.) (*Mental Capacity Act, 2005 section 3*)
7. The Code of Practice to the Mental Capacity Act (the Code) is statutory guidance which councils must have regard to. The Code sets out the principles for making decisions for adults who lack mental capacity. An assessment of a person's

mental capacity is required where their capacity is in doubt. (*Code of Practice paragraph 4.34*)

8. Decisions taken for a person lacking mental capacity must be in their best interests. The Mental Capacity Act and the Code provide a checklist of factors decision-makers must work through when deciding what is in a person's best interests.
 - Take into account all relevant circumstances.
 - If faced with a particularly difficult or contentious decision, practitioners should adopt a 'balance sheet' approach.
 - Involve the individual as fully as possible.
 - Take into account the individual's past and present wishes and feelings, and any beliefs and values likely to have a bearing on the decision.
 - Consult as far and as widely as possible.
 - Record the best interests decision. Not only is this good professional practice, but decision-makers will need an objective record should the decision or decision-making processes later be challenged.
9. A decision-maker should consider the least restrictive option. This means before a person acts or makes a decision for someone who lacks capacity, they should consider if the purpose can be achieved in a way that is less restrictive of the person's rights and freedoms. (*Mental Capacity Act 2005, section 1*)

The Human Rights Act 1998

10. The Human Rights Act 1998 brought the rights in the European Convention on human rights into UK law. Public bodies, including councils, must act in a way to respect and protect human rights. It is unlawful for a public body to act in a way which is incompatible with a human right. (*Human Rights Act 1998, section 6*)
11. It is not our role to decide whether a person's human rights have been breached. This is for the courts. We decide whether there has been fault causing injustice. Where relevant, we consider whether a council has acted in line with legal obligations in section 6 of the Human Rights Act. We may find fault where a council cannot evidence it had regard to a person's human rights or if it cannot justify an interference with a qualified right.
12. The Act sets out the fundamental rights and freedoms that everyone in the UK is entitled to. Article 8 protects your right to respect for your private life, family life, your home and your correspondence. You have a right to enjoy your existing home peacefully. Public authorities should not stop you entering or living in your home without very good reason.
13. Article 8 is qualified which means it may need to be balanced against other people's rights or those of the wider public. A qualified right can be interfered with only if the interference is designed to pursue a legitimate aim, is a proportionate interference and is necessary. Legitimate aims include:
 - the protection of other people's rights;
 - national security;
 - public safety;
 - the prevention of crime; or
 - the protection of health.

How we considered this complaint

14. We produced this report after examining relevant documents and speaking to the complainant.
15. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

16. Mr D lived at home with his wife; he has dementia. Their son had terminal cancer; Mrs D was finding it hard to cope with caring for her husband and her son's illness. Ms B and Mrs D placed Mr D in a residential care home for a respite stay in April 2019. They contacted the Council and explained that Mrs D was struggling to cope with Mr D at home, so he was currently in a care home. Mrs D initially told the Council in February that she was struggling, and Mr D had a week stay in a care home to give her respite then, which the Council funded. The Council said it would fund a two-week stay in April, but anything after that would be funded privately by the family.
17. Mr D stayed at the care home after the two-week respite ended, as Mrs D felt she could not cope with him at home. The Council was aware of this.
18. The Council's view throughout was that Mr D was entitled to return to his home, that he did not need residential care, and that his needs could be met with additional care calls at home to take some pressure off Mrs D. The Council had not completed a review or assessment at this time despite Mr D's change of circumstances, to establish Mr D's care and support needs and whether these could be met in the community without Mrs D's support. The Council had not completed any carer review or reassessment, to assess the support Mrs D needed.
19. The Council's responsibility was to complete a review or assessment of Mr D's care and support needs given his change of circumstances. The Council also needed to complete a mental capacity assessment with Mr D to assess whether he could understand his current situation, make a decision regarding his care and support, and consent to remain in the care home and incur the fees. If Mr D did not have mental capacity to make decisions about his care and support and/or finances, then the Council needed to make a decision in his best interests in accordance with the Mental Capacity Act 2005.
20. The Council did not take any action between April and July. It then tried to complete a care needs assessment and mental capacity assessment but could not do so because Mr D had an infection which can cause confusion.
21. The Council completed an assessment of Mr D's care and support needs in September and assessed his care needs could be met in the community with a package of support. The Council completed a mental capacity assessment which assessed Mr D did not have the capacity to decide where to live or make decisions about his finances.
22. The Council agreed short term funding to pay for the care home from the date of its assessment, until Mr D moved to a unit for further assessment and consideration of where to live long term. Mr D moved to the assessment unit in October.

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23. The care home has pursued Mrs D for over a year for outstanding fees for Mr D's stay from April to October. This is ongoing and currently stands at over £15,000.
 24. A note from the Council's safeguarding team says "Despite [Mrs D] refusing to have [Mr D] back home from [the care home], the property is in joint names, and if [Mr D] did not have eligible needs for 24 hour care, it is in my professional opinion that [Mr D] should have been supported to return home, as he has remained in 24 hour care without giving consent for this and is not liable for a large bill."

Conclusions

25. The Council failed to act promptly to complete an assessment of Mr D's care and support needs and his mental capacity when it knew he had moved from home into a residential care home. The Council's own records acknowledge it allowed this case to drift. This was fault.
26. Mrs D had told the Council she could not cope with Mr D at home. The Council should not expect family members to act as carers unless they are willing and able to do so. The Council did not complete an assessment of Mr D's needs and how they would be met until he had been away from home for five months and it did not assess Mrs D's needs as a carer. This was fault.
27. Because of the Council's delay Mr D remained away from his home without the Council establishing and recording a good reason. Mr D had a right under Article 8 to respect for his family life and home, and to enjoy his existing home peacefully. The Council did not consider Mr D's Article 8 right and whether it was necessary and proportionate for him to be away from his home. This was fault.
28. The Council failed to act in Mr D's best interests, as someone lacking capacity under the Mental Capacity Act to make decisions about his care and finances. The Council's delay meant a large bill for residential care has accrued. The Council's own records say Mr D remained in 24-hour care without giving consent and is not liable for the bill. This was fault.
29. Mr D did not have mental capacity to agree to the care home fees, and nobody held power of attorney for finances to make that decision on his behalf. The onus was on the Council to decide in his best interests, in accordance with the Mental Capacity Act 2005. It delayed doing that, and this was fault.
30. Following the Council's assessment in September it agreed to fund the care home fees until Mr D moved. This was because the Council was concerned about mismanagement of his finances given no-one was paying the care home fees. If the Council had completed the required assessments sooner, this issue could have been identified and resolved sooner. This indicates had the Council completed the required assessments without delay, it would then have agreed responsibility for the funding, Mr D would have moved from the care home sooner, and he would not have incurred the outstanding fees.
31. Despite this the Council has, until our investigation, failed to acknowledge its errors and the impact that has caused. The Council knew Mrs D was struggling to cope with looking after Mr D and the death of her son; she was going through carer crisis. The Council knew the Care Provider was pursuing Mrs D for care fees, and she was finding that distressing as the family cannot afford the fees. The family did offer a repayment plan, which the Care Provider turned down as the monthly amounts were too small. The Council's delay has added to Mrs D's distress. Ms B has had time and trouble trying to resolve the issues and support her parents.

Recommendations

32. To acknowledge the injustice caused by its fault, and to prevent future failings, the Council will take the following action.
- Apologise to Mr D, Mrs D and Ms B for:
 - its delay completing an assessment of Mr D's care and support needs;
 - its delay completing an assessment of Mr D's mental capacity;
 - its delay completing a best interests decision for Mr D;
 - failing to consider whether it was necessary and proportionate for Mr D to remain away from home, given his human right to enjoy his home peacefully; and
 - failing to adequately support Mrs D at a time of carer crisis.
 - The Council has told the Care Provider it will take over responsibility for the outstanding care fees, so it should stop pursuing Mrs D. The Council will pay the outstanding care fees.
 - Pay Mrs D £500 to acknowledge the distress caused by the pursuance of the care fees over the last year, and the distress caused by not having a clear plan for Mr D's care and support from April to October at a time of carer crisis.
 - Pay Ms B £250 to acknowledge her time and trouble pursuing the complaint and supporting her parents at a time there was no clear plan for Mr D's care and support.
 - Review the reasons for the delays in this case and implement any identified improvements to service.
 - Give relevant staff training on applying the Human Rights Act 1998 to adult social care cases. So that staff are aware when the Articles of the Act might be engaged, and what is required of them to ensure individuals' rights are not unlawfully interfered with. And that the Council documents any consideration it has to the Human Rights Act 1998 in individual cases.
33. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)
34. The Council has already confirmed agreement to all the above, has started acting on the recommendations, and making improvements to its service. We are pleased to see the Council's proactive approach and willingness to learn and improve.

Decision

35. We have upheld Ms B's complaint the Council delayed assessing Mr D's care needs, delayed assessing his mental capacity and delayed making a decision in his best interests. This meant Mr D accrued care home fees which was not in his best interests. The Council will take the actions identified in paragraph 32 to remedy that injustice.