

## Appendix B: Lessons Learnt

### A briefing note for all staff in the County Council's Children, Families and Adults Directorate

#### IMPORTANT INFORMATION

Please read

#### Background

The Local Government Ombudsman was asked to carry out an investigation of a family who has complained to them that social workers at Cambridgeshire County Council compelled their father, who has dementia, to move into a care home.

The elderly man was moved to a nursing home some 14 miles away from his marital home after his needs increased considerably in June 2013 which was done against both the man and the family's wishes who wanted the placement to be closer to home. This meant that his wife had to take two buses there and back to visit him.

The investigation found that although the social care staff had concluded that the man had 'no capacity to make decisions' which was discussed during meetings to assess his care needs, **there were no completed records of the capacity assessments when he was moved to the home.**

The man's wife, daughter and brother were also told that the police would be called if they tried to move him from the home. As the man and his family have made repeated requests for him to return home, the council's Deprivation of Liberty Safeguarding (DoLs) team should have been contacted but this did not take place.

Following the investigation, the LGO has found that the council failed to consider properly whether the man's placement in the nursing home amounted to a deprivation of liberty and his family were never given information about how they could appeal the decision with the Court of Protection.

- The LGO recommended that within three months of the issue of the report, Cambridgeshire County Council should:
- Apologise to the family and to accept responsibility for the faults, to acknowledge the impact these had on them and to assure them that the situation will not happen again.
- Set a timetable for refresher training for social care staff on mental capacity assessments, best interest decisions, deprivation of liberty and the role of the Court of Protection and how to advise the public on their rights. This may involve the council reviewing the current status of residents who may be deprived of their liberty without proper authorisation.
- Pay Mrs N £750 in recognition of the distress caused by the failings identified and the time and trouble she had expended in making her complaint.



## **Under what practice circumstances should legal advice be sought:**

All staff should be aware that **the only legal authority to remove an incapacitated person who is objecting or/and the family is also objecting from their own home into residential care, is through an application to the Court of Protection.**

The practice consideration here is one of balancing risks with rights and avoiding the “we know best attitude” or just seeing the world through the prism of safeguarding rather than the rights of individuals - particularly to liberty and family life. For such cases in future, legal advice should be sought.

## **Practice issues to be taken into consideration when supporting decision making:**

The Mental Capacity Act 2005 is only applicable when a person is deemed unable to give valid consent to a specific decision and when used, practitioners must be reminded that **they will have to justify their actions or inactions against the Five Principles of the Act through their recorded documentation.**

The starting point for any social care staff involvement regarding life changing decisions should be the establishment of capacity. For example, if the involvement is to do with a change of accommodation then it is essential to determine whether the person concerned is able to give valid consent for the move or not. This must then be recorded in the ASC 1708. If the person is deemed not able to give valid consent to this specified decision, the recording on the ASC 1708 must reflect as to how the person's impairment or disturbance of their mind and/or brain has affected any or all of the functional tests (i.e. understanding, retention, using or weighing and communicating).

In working out what is in someone else's best interests, the ASC 1708 was designed to enable practitioners to be compliant with the requirements of the Act through the statutory checklist. In particular, the seeking of the views of the person concerned and that of anyone engaged in caring or interested in the person's welfare.

The MCA's Code of Practice has acknowledged that whilst it is important the best interests' principle and the statutory checklist are flexible, but at times, this flexibility could lead to problems in reaching a conclusion about a person's best interests. When this happens, it is essential the disagreements are recorded in the ASC 1708.

Ultimately, if all attempts to resolve the disagreements have failed, such as involving an advocate, getting a second opinion, holding a best interests case conference, the Court might then need to be asked to decide what is in the person's best interests.

On completion of the ASC 1708, it must be signed by the decision maker and the Senior/Line Manager as this will encourage supportive case management through the supervision process.

## **Advising people of their rights and the role of the Court of Protection**

As a general rule, potential applicants must get permission of the Court of Protection before making an application (Section 50 of the MCA). However the Act allows the following group of people to make an application without permission:-



- A person who lacks capacity or is alleged to lack capacity in relation to a specific decision or action
- The donor of the LPA or their attorney
- A Deputy as appointed by the Court to act for the person concerned
- A person named in an existing Court Order
- The relevant person and their representative under a DoLS granted by the Local Authority under Schedule A1 of the MCA

Section 15 of the MCA provides the Court with powers to make a declaration/ruling on specific issues such as whether a person has capacity to make a particular decision or give consent for a particular action or to decide on the lawfulness of an act relating to a person's care and treatment (as in this case, the removal of the person into residential care).

### **Understanding the interface between Safeguarding and Deprivation of liberty Safeguards (DoLS) in practice:**

Safeguarding teams may be required, at times, to consider matters of contact between a person lacking capacity and somebody that may be at risk of harm or abuse from.

However, the Deprivation of Liberty Safeguards (DoLS) should not be used if the main reason is to restrict contact with individuals who may cause the person harm. If it is believed to be in a person's best interests to limit contact, an application should be made to the Court of Protection.

Therefore, if there is a dispute about where a person should stay, an authorisation does not resolve the dispute. The Code of Practice of the Mental Capacity Act in 8.28 clearly states that unresolved disputes about residence, including the person themselves disagreeing, should be referred to the Court of Protection.

Case law judgements, to date, indicate that preventing contact with somebody who presents a risk of harm or abuse to a person lacking capacity does not on its own amount to a deprivation of their liberty. An authorisation should not therefore be recommended nor granted on these grounds alone. In other words, it is inappropriate to use the DoLS solely to "legitimise" safeguarding concerns.

### **Our response to the LGO's recommendations**

We are in the process of planning more in-depth training for staff as part of meeting the recommendations from the LGO but in the meantime, if you have any queries that you wish to raise ahead of the training, please contact Zorica Louis-Fernand (Mental Capacity Act Training and Development Manager) or Joseph Yow (MCA/DoLS Manager).

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