

Scottish Parliament Region: Mid Scotland and Fife

Case 200601620: Clackmannanshire Council

Summary of Investigation

Category

Local government: Free Personal Care Payments; Ordinary Residence and Adults with Incapacity

Overview

The complainant (Mrs C) complained that Clackmannanshire Council (Council 1) failed to continue Free Personal Care (FPC) payments for her aunt (Miss A) following her move to a new residential home (Care Home 2) in Fife. Mrs C also complained that Council 1 adopted a very aggressive and bullying attitude to family members when they had requested that Miss A be moved to residential care nearer to her family (in Fife).

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) Council 1 failed to provide Free Personal Care payments for Miss A following her move to Fife (*not upheld but see recommendation*); and
- (b) Council 1 failed to properly administer arrangements for Miss A's move (*not upheld*).

Redress and recommendations

The Ombudsman recommends that Council 1 and Fife Council (Council 2), as a matter of urgency, prepare and submit an appeal for determination of the ordinary residence of Miss A by the Scottish Ministers in terms of sec 28 of Circular No. SWSG 1/96. Following such a determination appropriate payments should be made to Miss A and (if necessary) Council 2 so that all parties are returned to the position they should have been in from 22 December 2005. The appropriate Council should then take ongoing responsibility for Miss A's FPC payments.

Council 1 and Council 2 have both accepted this recommendation and will take the necessary steps to request a review by the Scottish Ministers.

Further Action

This and other complaints to the Ombudsman indicate a need to review the guidance on the application of the FPC policy issued by the Scottish Executive¹ Health Department (SEHD) as well as the guidance on the determination of ordinary residence also issued by the SEHD. This is not a matter which any individual Council is able to address so cannot be resolved within this report. The Ombudsman will instead draw this matter to the attention of the SEHD.

¹ On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive

Main Investigation Report

Introduction

1. On 19 November 2006 the Ombudsman received a complaint from Mrs C complaining on behalf of her aunt (Miss A). Mrs C had first contacted the Ombudsman's office on 4 September 2006 while in the process of making her complaint to Clackmannanshire Council (Council 1) as she felt she was being passed from one Council to the other without making any progress. Mrs C completed Council 1's complaint process and complained that Council 1 failed to continue Free Personal Care (FPC) payments for Miss A following her move to a new residential home (Care Home 2) in Fife in December 2005. Mrs C also complained about the attitude and actions of Council staff towards family members when they had requested that Miss A be moved from her current residence (Care Home 1) to residential care in Care Home 2, nearer to her family in Fife. Mrs C complained to Council 1 and raised the matter with Fife Council (Council 2) through her MP (MP 1). She also sought the assistance of the Scottish Executive Health Department (SEHD) who advised her to make a complaint to the Ombudsman's office. Neither Mrs C nor MP 1 was able to resolve the matter and Miss A continued to receive no FPC payments. Following receipt of the complaint in this office Council 2 agreed to act as the Council 'of the moment' (see paragraph 5) although they did not consider that they were under any obligation to make such payments. Council 2 undertook to make payments for Miss A from June 2006 (the date at which they received a formal application for funding on Miss A's behalf). Miss A has not received any payments for the period from December 2005 to June 2006 and Mrs C persists in her view that Council 1 remained responsible throughout these events for Miss A's FPC payments.

2. The complaints from Mrs C which I have investigated are that:
- (a) Council 1 failed to provide Free Personal Care payments for Miss A following her move to Fife; and
 - (b) Council 1 failed to properly administer arrangements for Miss A's move.

3. This and other complaints to the Ombudsman indicate a need to review the guidance on the application of the FPC policy issued by the SEHD as well as the guidance on the determination of ordinary residence also issued by the SEHD (see paragraphs 4 and 5). This is not a matter which any individual Council is able to address so cannot be resolved within this report. The Ombudsman will instead draw this matter to the attention of the SEHD. This

matter was previously drawn to the attention of the former First Minister on 6 April 2004 following consideration of a previous (unreported) complaint to his office.

Background Legislation and Guidance

4. The SEHD issued guidance on the operation of Free Personal and Nursing Care payments in July 2003; Circular No. CCD5/2003. This guidance sets out guidance on a number of actions required to implement the Scottish Executive's policy from 1 July 2002. Section 5 g) sets out the residency qualifications as:

'g) Residency Rules. In order for local authorities to make payments on behalf of individuals, they will need to satisfy themselves that the individuals qualify on the basis of 'ordinary residence' in their area. Current legislation does not provide for residency qualifications to be imposed beyond those implied by 'ordinary residence' as set out in Circular No SWSG 1/96. The Executive will be reviewing this guidance in the coming months in consultation with CoSLA (Confederation of Scottish Local Authorities).'

5. Circular No SWSG 1/96 notes that there is no legal definition of ordinary residence but makes reference to a number of issues that are relevant to this complaint and in particular:

'People Who Are Placed in Accommodation in the Area of Another Local Authority

11. Where, following an assessment, a local authority arranges a placement in a private or voluntary home in another authority's area or in a home provided by another local authority the placing authority will normally retain for that person the same responsibility that it has for someone living in its own area. The person so placed will not as a general rule become ordinarily resident in the other local authority's area. If the person subsequently moves, without local authority involvement, he will usually become ordinarily resident in the area of the local authority where he has chosen to live ...

People who Move to Residential Accommodation of their own Volition

14. When an individual arranges to go into permanent residential or nursing home care in a new area, without any local authority having taken responsibility for the arrangements, he becomes ordinarily resident in the new area. If subsequently social work help is sought the person will look

to the authority where the residential accommodation is situated. The local authority in the original area may become aware of the arrangements the individual is making and, with the permission of the person concerned, they may inform the local authority for the new area, particularly if it seems possible that social work help may later be required.'

This circular also makes arrangements for resolution of a dispute between two authorities regarding the ordinary residence of individuals who may require social work services; paragraph 26 states that section 86(2) of the Social Work (Scotland) Act 1968 provides that any question arising as to the ordinary residence of a person shall be determined by the Secretary of State (now Scottish Ministers). The circular makes provision for the authority where the individual resides to act as authority 'of the moment' and accept working responsibility for the assessment and provision of care services. However, section 86(2) of the Social Work (Scotland) Act 1968 provides only for determination of a question of ordinary residence arising under section 86, a section which deals specifically with recovery of expenditure (see complaint (a) for impact on this case).

6. At the time of writing this report the review of the 'ordinary residence' definition referred to in Circular No. CCD5/2003 (paragraph 4 above) has not yet been completed and I understand that it may be some-time before this occurs.

Investigation

7. Investigation of this complaint involved reviewing Mrs C's correspondence and the relevant correspondence files of Council 1 and Council 2. I sought comments from Council 1 and Council 2 and spoke with members of staff in both Councils. I have also discussed the issues with Mrs C. I have reviewed relevant policies and procedures. A summary of abbreviations used is contained in Annex 1. A list and detailed summary of the Scottish legislation, policies and reports considered in this report is at Annex 2. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mrs C, Council 1 and Council 2 were given an opportunity to comment on a draft of this report.

Background Events to this Complaint

8. Miss A was admitted to Care Home 1 on 14 May 2005. In October 2005 Mrs C advised Council 1 that she wanted to move her aunt to a care home

nearer to her in Fife as the distances involved in visiting her combined with Mrs C's commitments as principal carer for her severely disabled daughter were making it difficult to visit as frequently as she would like. Mrs C told Council 1 that she had hoped more of her aunt's former work associates and neighbours would visit her but this had not happened. Staff questioned whether the home identified by Mrs C (Care Home 2) was suitable for Miss A as she required a specialist dementia unit. The Care Commission inspection reports for Care Home 2 were requested by Council 1.

9. A member of Council 1 staff visited Miss A on 27 October 2005 and noted that she had responded to the suggestion of a move closer to her niece saying she did not want to move and that she had maintained this position when asked the question again. Mrs C was unhappy about this visit and pointed out to Council 1 staff that her aunt still believed she was living in her previous sheltered accommodation and would always say she wanted to stay where she was no matter where she was actually living. Mrs C felt her aunt lacked the mental capacity to make such a decision for herself. Mrs C also raised a number of other concerns about Care Home 1 and was supported in this by a telephone call to Council 1 from Mrs D (Miss A's sister who lives in England). A meeting was arranged for 1 November 2005 to discuss this but was cancelled by Mrs C who could not attend at the time planned.

10. On 7 November Council 1 received a letter from Mrs C's solicitors enclosing a power of attorney held by Mrs D which they consider entitled them to move Miss A. Council 1 took the view (following consultation with a consultant psychiatrist) that the power of attorney was not sufficient on its own and required proof that Miss A lacked the capacity to make her own decisions. A number of discussions took place over the next few weeks including a request from Mrs C to send Council 1 files on Miss A to the social work department at Council 2 on 21 November 2005. Mrs C and Mrs D finally agreed to a psychiatric assessment of Miss A on 6 December 2005. The psychiatrist reported that Miss A did lack capacity and that the power of attorney held by Mrs D was, therefore, effective.

11. On 19 December 2005 Care Home 1 received a call from Mrs D stating that Miss A would be moved to Care home 2 the following day. In the event this did not happen and a later move was arranged for 22 December 2005 with Miss A being collected by Mrs C and the manager of Care Home 2. Miss A had not been assessed by Care Home 2 before this point.

(a) Council 1 failed to provide Free Personal Care Payments for Miss A following her move to Fife

12. Council 1 took the view that they had not been involved in the decision to move Miss A and were not the 'placing authority'. In effect they deemed that Miss A's ordinary residence in terms of Circular No. SWSG 1/96 had been changed by virtue of section 14 (voluntary move) rather than section 11 (moved by the Council) and they were no longer responsible for her FPC payments from the date of her move on 22 December 2005.

13. Mrs C complained to Council 1 that the family were entitled to move Miss A and that they had no grounds for opposing her move and could not argue she had been moved without the Council retaining responsibility for her FPC. Mrs C noted that they had obtained reports on Care Home 2 for that purpose. Council 1 noted that they had not considered the move to be in Miss A's best interests and felt it was necessary to have a psychiatric assessment of her capacity to make decisions before any decision on a move was reached (see complaint (b)).

14. Mrs C also sought to arrange FPC payments on her aunt's behalf from Council 2 (although she remains of the view that Council 1 are responsible) and was told by them that they would not take on responsibility for such payments as they regarded Miss A as still ordinarily resident in Council 1's area. In response to my enquiries Council 2 explained that in their view Council 1 knew of Miss A's intended move and knew it had no authority not to allow this to happen. In a similar situation where a resident of Council 2 sought to move closer to relatives elsewhere Council 2 would continue to make payments for their FPC and considered that this was in accordance with the spirit of the guidance in Circular No. SWSG 1/96 and Circular No. CCD5/2003. Council 2 also sought to rely on a letter dated 22 August 2002 (which precedes Circular No. CCD5/2003) to the Chief Executive of CoSLA (the CoSLA letter) from the SEHD clarifying the rules on ordinary residence. The CoSLA letter states:

'... the local authority that carries out the assessment and determines the level of public sector support ...will normally retain the same responsibility that it has for someone living in its own area.'

Council 2 felt that this view supported their own stance but noted that there was confusion around the continuing responsibility following assessment. Council 2 did agree to take over responsibility for payments as the Council 'of the moment' although they did not accept any responsibility beyond this. Council 2

began making payments from June 2006 (leaving a 'shortfall' of some 5 to 6 months of payments for Miss A).

(a) Conclusion

15. The dispute which has arisen between Council 1 and Council 2 about the correct application of circulars SWSG 1/96 and CCD5/2003 requires a decision to be taken as to Miss A's 'ordinary residence'. This is a legal term which has no specific definition but which should be decided upon by reference to the guidance in Circular SWSG 1/96. This circular contains provision for action to be taken in cases of dispute where the authority 'of the moment' assumes responsibility subject to the dispute being ultimately decided on by the Scottish Ministers. However, this mechanism was not invoked here for two reasons.

16. Firstly, both Councils concentrated on the interpretation of the FPC guidance CCD5/2003 and the CoSLA letter (see paragraph 14) as the immediate issue was who was responsible for the FPC payments. This led to a debate about whether or not Miss A had been placed by Council 1 or moved voluntarily. There is very little dispute between Council 1 and Council 2 as to the facts of this case, they disagree only about the implications of the facts. There are two opposing views of how the guidance should be interpreted in cases such as this and this dispute can only be clarified by further guidance from the SEHD as to the intent of the Scottish Parliament.

17. Secondly, at the point this complaint was received by the Ombudsman's office, I took the view that reference to the Scottish Ministers for determination of Miss A's ordinary residence was not applicable. Such action is only competent in terms of the Social Work (Scotland) Act 1968 (and thence sec 28 of Circular No. SWSG 1/96) when an authority is seeking to recover expenditure. In the case of the complaint made to me neither authority had incurred expenditure for the period from 22 December 2005 and no reference could, therefore, be made under the provisions of that Act. However, since then Council 2 have incurred a potential recoverable expense, and as a result such a referral is now possible.

18. I conclude that more than one interpretation of the guidance is possible and this can only be resolved by clarification from SEHD. Both Council 1 and Council 2 were operating to the best of their knowledge and understanding of the guidance and neither can be regarded as responsible for any lack of clarity in the guidance. I do, however, consider it would have been of considerable

assistance to Mrs C and Miss A had both Councils agreed to enact the dispute resolution process laid out in Circular No. SWSG 1/96 and not left a vulnerable individual to bare the brunt of their dispute. Overall I do not consider that any ambiguity in the guidance is the responsibility of either Council and conclude that Council 1 acted without maladministration. I do not uphold this aspect of the complaint.

(a) Recommendation

19. The Ombudsman's office is not able to determine a question of 'ordinary residence' as this is a legal concept and, therefore, cannot make a ruling on which council has responsibility for Miss A's FPC payments. This leaves an unremedied injustice which this office will refer to the SEHD for consideration. In light of the conclusion the Ombudsman recommends that Council 1 and Council 2, as a matter of urgency, prepare and submit an appeal for determination of the ordinary residence of Miss A by the Scottish Ministers in terms of sec 28 of Circular No. SWSG 1/96. Following such a determination appropriate payments should be made to Miss A and (if necessary) Council 2 so that all parties are returned to the position they should have been in from 22 December 2005. The appropriate Council should then take ongoing responsibility for Miss A's FPC payments.

(b) Council 1 failed to properly administer arrangements for Miss A's move

20. Mrs C complained that staff at Council 1 had been very obstructive and had failed to give appropriate assistance to her and Mrs D in making arrangements for Miss A's move. Mrs C complained that they had been forced into getting (and paying for) a psychiatric assessment to prove her dementia when she had already been diagnosed and could not have 'recovered' to any extent as it was a condition which could only ever get worse. Mrs C was of the view that the family had the right under the power of attorney to move Miss A and the Council had no right to oppose such a move.

21. Council 1 told me that as Miss A had expressed the view that she did not want to move and appeared to be happy and settled in Care Home 1, they had a duty to her to ensure that the power of attorney was properly invoked and that this could only happen if she was shown to lack the capacity to make her own decisions. Council 1 told me that they regarded it as usual in these circumstances for the family seeking to rely on the power of attorney to instruct

the medical report which confirmed incapacity and thus triggered the power of attorney.

(b) Conclusion

22. I acknowledge the frustration of Mrs C in trying to do what she considered to be in her aunt's best interests and with an awareness of her aunt's lack of capacity. However, Council 1 had a duty to Miss A to ensure that any action taken apparently against her own wishes was legally competent and I do not consider that there was any maladministration in seeking to do this. The power of attorney only became effective once Miss A's lack of competence was proved and this had not happened prior to these events. I do not uphold this aspect of the complaint but note that the dispute over responsibility for the FPC payments added considerably to the irritation felt by Mrs C in his case.

19 September 2007

Explanation of abbreviations used

Mrs C	The complainant
Miss A	The aggrieved
Council 1	Clackmannanshire Council
FPC	Free Personal Care
Care Home 2	The care home where Miss A now resides
Care Home 1	The care home where Miss A resided until 22 December 2005
Council 2	Fife Council
MP 1	Mrs C's MP
SEHD	Scottish Executive Health Department
Council 'of the moment'	The Council in whose area a person physically resides
Mrs D	Miss A's sister who holds power of attorney on Miss A's behalf
The CoSLA letter	Letter dated 22 August 2002 from SEHD to the Chief Executive of CoSLA.

List of legislation and policies considered

Circular No. CCD5/2003	Guidance issued by SEHD on the application of the FPC policy
Circular No. SWSG 1/96	Guidance issued by SEHD on the determination of 'ordinary residence' under the Social Work (Scotland) Act 1968
FPC	Free Personal Care
CoSLA Letter	Letter sent to the Convention of Scottish Local Authorities by the SEHD on 22 August 2002 regarding the application of ordinary residence rules and FPC