NHS Continuing Healthcare for Financial Advisors

In the autumn, the Financial Times reported on the risk of litigation if a financial advisor fails to consider NHS Continuing Healthcare when advising on the purchase of a care fees annuity.

The risk arises because some financial advisors may not be aware of what non-means tested (i.e. free) NHS Continuing Healthcare or NHS funded care means, the eligibility criteria, the process to secure NHS funding and how to challenge health bodies where funding has been wrongfully denied.

Fully funded NHS care or NHS Continuing Healthcare means an individual has been assessed and identified to present with a 'primary health need', meaning the individual's care needs go above what a Local Authority is lawfully able to provide.

If someone is eligible for NHS Continuing Healthcare, it means the NHS must ensure any needs identified through the assessment process are met, which includes a need for care, support and accommodation.

Why should a Financial Advisor consider NHS Continuing Healthcare?

The reasons why the firms, referenced in the Financial Times article, face possible litigation are simple.

According to a report by healthcare specialists Laing & Buisson (2018), care home costs can range from:

- £27,000 to £39,000 per year for a residential care home or,
- £35,000 to £55,000 per year if nursing care is required.

Funding care is expensive. When the potential cost is vast, it is evidently essential to consider whether a client may be eligible for non-means tested, free, NHS Continuing Healthcare, in order to maximise the funds available to support their retirement.

If a financial advisor does not consider NHS Continuing Healthcare when giving advice on financial planning and, in particular, when recommending that a client purchases a care fees annuity; there is a risk that the financial

Tel: 0344 967 0793 | Email: info@LA-Law.com | www.lesteraldridge.com

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advisor may not be acting in their client's best interests.

After all, Rule 2 of the Financial Conduct Authority (FCA) Handbook requires advisors to act with due skill, care and diligence, and Rule 4 requires advisors to pay due regard to the interests of customers and treat them fairly. It seems likely that failure to identify or explore if a client may be eligible for free, non-means tested NHS Continuing Healthcare may constitute a breach Rules 2 and 4.

What is the eligibility criteria for NHS Continuing Healthcare? How is eligibility assessed?

In order to qualify for NHS Continuing Healthcare, it must be demonstrated through an evidence-based assessment process that an adult has a 'primary health need'.

In very simple terms, this means assessors are required to decide whether an individual's primary need is for healthcare (for which responsibility lies with the NHS) or for social care (for which a Local Authority has a duty to assess).

In brief, the assessment process consists of two stages. The first stage is to complete a 'Checklist Assessment', a screening tool to determine whether a fully eligibility assessment is required. The threshold to pass has been sent intentionally low. If the 'Checklist Assessment' is positive, the second stage is to complete Decision Support Tool (commonly referred to as a DST) at a Multi-Disciplinary Team meeting (MDT). The DST is divided into 12 broad areas of need, known as domains, and assessors are required to rank the level of need in each domain, before deciding whether the individual's needs are intense, complex, or unpredictable to manage, and there indicative of a primary health need.

Can NHS Continuing Healthcare funding be provided at home?

Yes. There is a huge misconception that NHS Continuing Healthcare is only available in a residential or nursing care environment.

The National Framework however is clear that NHS Continuing Healthcare can be provided in any setting. In some cases, it may be worth exploring the possibility of negotiating a Personal Health Budget to enable your client's loved ones to manage a package of care at home in a more personalised way.

Attorneys, Deputies and Lawyers have an obligation to act in a client or vulnerable person lacking capacity's best interests. The FCA's Code of Conduct places similar obligations on financial advisors. Evidently, if funding has been wrongfully denied, it is in your client's best interests to explore whether a decision of non-eligibility ought to be challenged.

More information regarding the process for challenging a refusal to award NHS Continuing Healthcare funding

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can be found by clicking here.

Is fully funded NHS care or NHS Continuing Healthcare means tested?

Fully funded NHS care or NHS Continuing Healthcare is non-means tested (i.e. it is free and must be provided without a charge).

Is Local Authority funded care means tested?

In contrast to fully funded NHS care or NHS Continuing Healthcare, Local Authority funded care is means-tested. There are complex rules.

If an adult's savings and capital are more than £23,250, they will not be eligible for Local Authority funded care, unless a capital disregard applies or eligibility for non-means tested (i.e. free) NHS Continuing Healthcare is established. A jointly funded care package or the NHS FNC may be available but will require a financial contribution.

If the adult's capital is between £14,250 and £23,250 the adult will be required to contribute £1 per week for every £250 of capital between these figures. The adult will also have to contribute all their income, minus £24.90 per week for the personal expenses allowance.

If the adult's capital is below £14,250, the adult will be entitled to maximum Local Authority support however will still be required to contribute all their income, minus the £24.90 weekly personal expenses allowance.

With this mind, it is clearly beneficial to explore whether non-means tested NHS Continuing Healthcare is a means of funding available to your client.

If NHS Continuing Healthcare funding is refused, can the decision be challenged?

Yes. It is often extremely difficult to succeed with obtaining NHS Continuing Healthcare at the first stage of the assessment process and many do not succeed until decisions are challenged.

When the average cost of residential or nursing care is so high however, there is still likely to be a huge financial benefit to challenging refusals to award the funding.

Is there a difference between fully funded NHS care or NHS Continuing Healthcare and the NHS Funded Nursing Contribution (FNC)?

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Yes. The NHS Funded Nursing Contribution (FNC) is a set, weekly rate of £165.56 which is paid directly to a provider to assist with the cost of nursing care where an individual has been assessed not to be eligible for NHS Continuing Healthcare but requires care from a registered nurse and is living in a nursing home.

FNC is not available to those who require residential care only. The weekly rate is subject to change.

Again, if you are advising a client on financial planning and how to meet the cost of their care needs, or the cost of caring for a loved one, considering how to secure the NHS FNC is essential. Every penny counts when the cost of care is so high.

If you are advising a client who has been 'kept in the dark' about NHS Continuing Healthcare, we can assist you and your client to explore both the possibility of reclaiming care costs incurred in the past if the evidence suggests these costs ought to have been paid by the NHS, and securing a current assessment of their needs with a view to securing funding for ongoing care costs.

Is it possible to retrospectively claim for NHS Continuing Healthcare?

Yes. Often many are not told that they may be eligible for NHS Continuing Healthcare which may leave people self-funding expensive packages of care, support and accommodation. Sometimes NHS Continuing Healthcare is referred to as the 'NHS' best kept secret' and so it not surprising that public awareness of what this NHS Continuing Healthcare means remains limited.

If you would like to discuss whether NHS Funded Care may be available to your client, please contact our community care solicitors by telephone on 02380 827483 or by email at communitycare@la-law.com.

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