

Guidance Note – NHS Continuing Healthcare (NHS CHC) –Requests for a retrospective assessment or a request for a review of a previously unassessed period of care establishing the appropriate authority to act and sharing information

1. This Guidance Note sets out some of the issues to consider with regard to

- Establishing appropriate authority to act and
- sharing information

in relation to requests for either an assessment for a previously unassessed period of care or a retrospective review of a previous decision on eligibility for NHS CHC when the individual concerned is deceased. This Guidance Note cannot cover all scenarios, therefore it is still important that each case should be considered on its own merits and circumstances.

Key Principles if no documentation is provided

2. The NHS CHC team should indicate that it would be unable to provide any health information concerning the Deceased, or discuss the matter with the Applicant unless satisfied that the Applicant is a Personal Representative / Administrator or that they can demonstrate that they are someone who has a legitimate claim arising from the Deceased's death in this context.
3. The NHS CHC team should ask the Applicant to confirm that he or she accepts that no information may be shared with them regarding the review or payment made to them unless satisfied that the Applicant is a Personal Representative/Administrator or can demonstrate that they have a legitimate claim.
4. Where the request is from a solicitor, the Trust should ask the Applicant for proof of consent to act before they can enter into any dialogue regarding the review.

Sharing of Records of the Deceased

5. The NHS CHC team will need to consider the extent which it can share medical information with the person requesting the review. The records of the Deceased are still confidential, even after death. The access to those records is covered by the Access to Health Records Act 1990.
6. This allows access to:
 - the deceased's Personal Representative (both Executors or Administrators) to enable them to carry out their duties; or
 - anyone who has a claim arising from the death.

For example – This could be a close relative, potential beneficiary or a “Next of Kin” who is dealing with a small value Estate and has therefore not sought letters of administration where the Deceased has died intestate.

In effect this would be a “claim” for retrospective review needing to be dealt with to settle the Estate by that individual.

Evidence required for Sharing of the Deceased's Records

Personal Representative

7. Where a Personal Representative seeks access to records, evidence of their right to ask for the records should be requested. Where there is a will, this can be a copy of that document showing the individual named as an Executor. Alternatively the Probate Court known as the Probate Registry issues a legal document called a Grant of Probate.

Administrator

8. Alternatively where the Deceased has died intestate, and the value of the Deceased's estate exceeds £5,000 the Probate Registry will issue a letter from the Court known as "Letters of Administration" which will enable a named individual to carry out duties to settle the estate.

Persons indicating that there is a Claim arising from the death

9. When an individual is seeking access to records on the basis that there is a claim arising from the Deceased death, it should be considered:
 - Who is making the claim / needs to see the information and why?
 - Is there a genuine reason why this person may need to have access to the records?
 - What is the nature of the claim?
 - Which records are relevant and why?
 - Is sharing information with this particular individual reasonable and proportionate in the current circumstances?
10. This will allow the team to take a decision as to the disclosure of **relevant** records to the individual in line with the scope of the potential claim indicated, and to allow the claim to be dealt with.
11. It is important that the decision making process around disclosure of records is captured and recorded. This is what offers protection to the NHS
12. **It is important to note that sometimes an individual will indicate that they are acting in relation to a Deceased's Estate under a Lasting Power of Attorney document or similar. A LPA, EPA, Attorney document or Deputyship ceases on death and will not provide the nominated individual with authority to deal with the Estate. Individuals appointed under a LPA and as Personal Representatives under a Will for example could be different people.**

Redaction of Information

13. Even where somebody is entitled to the Deceased's records, it is not a general right of access. The same protections apply to information contained within records of the Deceased as to living individuals.
Therefore before information is shared the NHS CHC team will need to review the information to determine whether there are any reasons for certain information to be redacted.

(i) Third Party Information

14. Before information is disclosed, you should consider whether the information to be released contains Third Party information – i.e. information that relates to any other person other than the Deceased.
15. Where information identifies another person it will be that person's data, even if the data was recorded by a professional. The key issue is assessing who the information relates to, not who recorded it.
16. If the information contains any data identifying a Third Party it should be redacted unless that information can be reasonably provided.
17. Access should not be given to any part of a record which discloses information relating to a Third Party who can be identified from that information unless:
 - (a) that other individual is a professional involved in the patient's (Deceased's) care (**the identity of professionals should not be redacted**), or
 - (b) the other individual has consented to the disclosure, or
 - (c) it is reasonable to disclose the records in all the circumstances without the other individual's consent. In deciding whether it is reasonable, consideration should be given to:
 - (i) any duty of confidentiality owed to the other individual;
 - (ii) any steps taken to seek the other individual's consent;
 - (iii) whether the other individual is able to give consent;
 - (iv) any express refusal of consent by the other individual.

If in doubt, it is better to err on the side of caution and redact identifying Third Party information.

(ii) Information held on the express understanding of confidence

18. There may be circumstances where a patient has expressly stated that certain information contained within medical records is not to be shared with any other person. This continues after death. Consequently if there is evidence that the Deceased did not wish for any part of their medical information to be disclosed, it should remain confidential even after death. You should respect these wishes regardless of who is requesting access unless there is a Court Order to the contrary.

(iii) Information which would cause harm to physical or mental health.

19. It must also be considered whether disclosure of any information could lead to any person (which can include a professional) being put at risk of serious harm. Before any disclosure takes place, the information should be reviewed closely to determine this. Harm would include physical or mental harm.
20. The test for serious harm has a high threshold, and should be considered by the key clinician responsible for the clinical care of the patient when he / she was alive should there be any concern about this point. Where this exemption is used, you must be prepared to defend the decision making rationale if challenged to the Information Commissioner or in Court.

Understanding the NHS CHC Decision Making

21. Where records of the Deceased are to be considered as part of the review process, it will be appropriate to share certain information with relatives to allow them to understand the decision made.

Payment of Redress monies

22. NHS CHC teams will need to consider whether probate documents are then needed in order to make a payment.
23. The documentation required would depend on whether there was a will or not, and the size of the estate. As such it is worth advising the family / individual requesting the review at the start of the process that the Trust will not be able to make any payment without the required documentation, or without completion of the form at **Appendix 1** (where the estate is under £5,000 including any reimbursement sum due from the Trust).

Small Estate - less than £5000

24. When the estate is less than £5,000 and the Deceased has died intestate (ie without a will) the family or individual settling that estate would have been unlikely to apply for a grant of Letters of Administration. This is not a legal requirement for settling estates under this value.
25. Consequently where the sum due to the Deceased's estate by the Trust is under £5,000 and the individual requesting the review indicates that they do not have a copy will or Grant of Probate (as the individual did not have a will), nor do they have Letters of Administration (because the estate was under the value of £5,000); the Trust does not have to insist on having a copy will, Grant of Probate or Letters of Administration to make the payment out.
26. However **before payment is made** to anyone purporting to be settling a small estate without authority by way of a Grant of Probate or Letters of Administration, then **the Trust should request that the individual to whom money is to be paid signs the indemnity form at Appendix 1**. This indemnifies the Trust in respect of any future claims that the monies were paid to the wrong person.
27. It also places an obligation on the individual to confirm that the estate remains below £5,000 (including any sum due from the Trust) and as such there is no obligation for that individual in settling the estate to apply for a grant of Letters of Administration, and provide this document to the Trust.

Estate over the value of £5,000

28. For the Trust to make payment where the settlement due and / or value of the estate is over £5,000 then the individual will need to provide proof by way of a Grant of Probate or grant of Letters of Administration that they are appropriately authorised to deal with the estate.
29. Where the estate was small, but the monies due from the Trust tip it above the £5,000 threshold, it will not be possible for the Trust to make the settlement payment until a Grant of Probate (if there is a will) or Grant of Letters of Administration (if there is no will) is obtained. This can be applied for at any point following death.

Dealing with requests to fund costs of obtaining Grant of Probate or Letters of Administration

30. The Trust is not obliged to fund any individual's costs in obtaining a Grant of Probate or Letters of Administration at any stage of the review process.

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Appendix 2

Appendix 1

NHS Continuing Healthcare Redress in relation to [INSERT NAME]

Statutory Declaration by Individual for a Small Estate

I, _____ do solemnly and sincerely declare that:

1. I am the _____ of the late [INSERT] ("the deceased") who died intestate on [INSERT DATE] , and that I am the only person entitled to the estate of the deceased.
2. The total value of the estate of the deceased in the United Kingdom (which includes the money due from [] PCT does not exceed £5,000
3. No inheritance tax is payable in respect of the estate of the deceased.
4. I do not intend nor, to the best of my knowledge, does any other person intend to apply for a grant of administration of the estate of the deceased.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1835.

Declared at
the _____ day of
two thousand and [INSERT]

Before me

(signature of commissioner for oaths or solicitor empowered to administer oaths)

Indemnity by Individual for a Small Estate

In consideration of [] PCT (the "PCT") recognising me as the sole administrator of the estate of the deceased person named in the declaration (above) ("the deceased") without the production to the PCT of a grant of administration of the estate of the deceased, I hereby agree to indemnify the PCT from and against any and all claims, demands, losses, damages, costs, charges and expenses which may arise at any time as a result of the payment by the PCT.

Dated this _____ day of _____ 201[]

Signature

Print name in full
Address