

elderly client issues

Introduction

As you get older you want to make life easier for yourself and your relatives. There are a wide range of legal issues affecting elderly people – not just probate, wills and tax planning but also issues surrounding capacity, delegated decision making and long term care. Powells are committed to ensuring that older people, their families and carers have access to high quality legal advice on these very issues. This Fact Sheet details those areas where we can offer the benefit of our experience and knowledge.

Advance Directives / Living Wills

When you are ill you can usually discuss treatment options with your doctor and then jointly reach a decision about your future care. However you may be admitted to hospital when unconscious or unable, on a temporary or permanent basis, to make decisions about your treatment or communicate your wishes e.g. if you have a stroke or develop dementia. In such situations (where you lack capacity) doctors have a legal and ethical obligation to act in your best interests. One exception to this is if you have made an advance decision refusing treatment. If this decision is valid and applicable to the circumstances, medical professionals providing your care are bound to follow it – whether or not they think it is in your best interests. The term “living will” has no legal meaning but is generally used to refer to an advance decision or statement about healthcare. An advance decision offers the opportunity to express your views, in particular, to refuse certain types of treatment, including life-sustaining treatment. It is also possible for you to make a Lasting Power of Attorney for health and welfare matters if you wish to give someone else or more than one person the power to make decisions about your care and treatment if you are not able to do so yourself. Your attorney must take your advance decision/statement into account when deciding what is in your best interests.

Appointing someone to act for you

Access to your Bank account

You may simply require some assistance with your financial affairs or wish to make your financial dealings easier. The most common way of allowing other people access to your money is through **direct debits** and **standing orders**. Many Banks and Building Societies offer an easy to use basic bank account. Your pensions and benefits can be paid directly into these accounts. With the most basic accounts you can also set up direct debits (e.g. to pay regular bills) and standing orders (e.g. to make a regular payment of the same amount to someone).

Joint accounts give you and the joint account holder the authority to withdraw all money. You do not need to set up any

specific instructions but you do need to be sure that you trust the other account holder. If one joint account holder loses capacity the bank/building society should freeze the account.

A **Third Party Mandate** is an instruction to your Bank or Building Society to provide access to your account for another person. The Mandate gives details of exactly what authority you are giving the person so you are able to specify how much access you give them. This option may suit you if it is a long term arrangement and you can trust the person who will have the Mandate. Mental incapacity terminates the Mandate.

If you are temporarily unable to draw money from your account e.g. you are housebound following an operation, Banks and Building Societies may accept a **letter of authority** which requests a third party to withdraw money on your behalf on a one off basis. There is a high risk of fraud, so many banks or building societies don't offer this option.

If you have a **Post Office Card Account** you can apply for another person to have permanent access to your account. They will be issued with their own card and P.I.N. number and you must be able to trust the person in this role.

Appointeeship

If your income is solely made up of benefit income (social security benefits / state pension) and you have not created a Lasting Power of Attorney or Enduring Power of Attorney, you can have an “appointee” to deal with your benefit claims and the payments made. This method should only be used if you are unable to act for yourself due to mental incapacity. If you are capable of managing your financial affairs an appointee is unlikely to be suitable and you should consider other alternatives.

Powers of Attorney

Whilst you are able to make decisions you may wish to consider how you would want your affairs dealt with if you become unable to manage owing to ill health or lack of capacity. By setting up a Power of Attorney you can appoint one or more people to assist you with your financial affairs, your health and welfare or to sign documents for you. There are different types of Power of Attorney - Ordinary, Lasting and Enduring.

An Ordinary Power of Attorney is only valid whilst you still have mental capacity to make your own decisions and is likely to be most appropriate in the following situations:

- You wish someone to act for you temporarily e.g. whilst on holiday
- You wish someone to act for you whilst you are able to supervise their decisions

If you wish someone to act for you when you lose capacity to make your own decisions and when you can no longer supervise their actions you need a Lasting Power of Attorney (LPA) which gives the attorney authority to make decisions

about your property and financial affairs (and which can (if you wish) be used whilst you still have mental capacity) and a Personal Welfare LPA which gives the attorney authority to make decisions about your healthcare and personal welfare and which can only be used when you have lost the capacity to make the relevant decisions yourself. Both types must be registered at the Office of the Public Guardian before the attorney can act.

No new Enduring Powers of Attorney (EPA's) can be created but pre-existing ones made prior to 1st October 2007 are still valid. Attorneys acting under EPAs do not need to register the document at the Office of the Public Guardian unless the donor of the Power has become or is becoming mentally incapable of managing their affairs.

Care Homes

As time passes you may find that you need more support and assistance with your daily tasks. The time may come when you can no longer continue to live in your current home, even with care and support there (see further on for alternative [Housing Options](#)). Eventually you may, as a result of your own decision or an assessment, decide to move into a care home, either for short periods or permanently.

Types of Care Home

The term "care home" is used to cover any home that offers accommodation and personal care. Some homes also provide nursing care. There are also homes that provide care for other people who require extra care and support, often due to dementia. These are sometimes known as EMI (elderly mentally infirm) homes. Care homes are owned and run by Local Authorities, private operators (both chains and independents) and the voluntary sector. Each care home has to be registered with the national regulatory body responsible for inspecting homes to see that they meet the essential standards of quality and safety and equality and care required for this type of accommodation. In England this is the Care Quality Commission (CQC). It is illegal for a home to provide care for which it is not registered.

Choosing the home that is best for you

It is vital to choose the right type of home. If it cannot offer the right level of support you need it will not be suitable. In a home that looks after people with more intense needs than yours you may feel out of place.

The Local Authority (LA) social services department has a duty to assess anyone who might need its services. If you are thinking of moving into a care home, you are almost certainly entitled to an assessment. The LA will then suggest what level of care you require. The LA, CQC and charities such as the Elderly Accommodation Council should all have lists of homes in your preferred area. Age Concern Information line has a free care home check list booklet with all the questions to ask when looking round a home.

Fees and Contracts

Once you have found a home check that the fees and contract terms are acceptable to you and, if you are being assisted with the cost, to the LA. If you are funding your own care, you should be given a written contract. If the LA is assisting with the cost, it will make the contract but you should receive a written statement of terms and conditions. We are happy to advise you on the contract, which should cover as a minimum:

- The fee and what it covers.
- What services are charged for.
- The amount of any deposit required
- The amount of notice required before leaving and
- Any charges made after the resident's death.

Should the NHS pay my fees?

The NHS is responsible for meeting the full cost of care in a care home for residents whose primary need for being there is health based. This is called NHS continuing healthcare and is often described as fully funded care. It is very important to check that you have been properly assessed for NHS continuing healthcare, especially if you are moving into residential accommodation that provides nursing care. The local Primary Care Trust (PCT) is responsible for carrying out the assessment.

Nursing Care and other NHS services

In England and Wales the NHS is responsible for meeting the registered nursing costs of all residents in care homes that provide nursing care. Nursing Care is the care given by a registered nurse in providing, planning and supervising your care in a nursing home. It does not include time spent by any other staff involved in your care. Responsibility for meeting the costs of your nursing care lies with the local PCT. There is a single weekly payment rate for nursing care which is set by the Department of Health.

You may also qualify for NHS community health services such as chiropody, continence advice and physiotherapy. Eligibility requirements for these services are set locally. Check that you are not being charged for any services that you could be provided with for free.

Assistance with Care Home costs

The rules governing financial eligibility for assistance with care home costs are set nationally by the Government and guidance has been produced for LAs. The LA should look at your finances after it has assessed your needs. If your savings and other assets, such as property or shares, amount to a certain level, the LA will treat you as able to meet the full cost of your care. The capital limit changes each year from April onwards. Some assets are left out of the means test, including your personal possessions, some funds held in trust and some property. You have to tell the LA about all of your assets: they then discount any that should be left out of the assessment or "disregarded." If you own assets jointly, you will usually be treated as having an equal share with the other owners. The LA may also be entitled to take into account assets which you have given away (see also further on [Deprivation of Assets](#)).

Is my home included in the means test?

As a general rule, the value of your home is included as part of your capital. It should be disregarded if your spouse or partner lives there, or another relative who is either over 60 or receiving a disability benefit. Your home is also ignored if you enter a care home for a temporary stay. If your property is taken into account you will generally have more than the limit for getting LA assistance. The LA may still assist you under a "deferred payment agreement." The LA pays towards your care on a loan basis and this money is repaid when the property is later sold. There are special rules for the valuation of jointly owned property. In some cases even if your interest in a property is not disregarded, it may be treated as having a low value and so not affect the funding that you qualify for.

What about my income?

Most of your income will be included in the means test with certain exceptions. If you have a spouse or civil partner still living at home you can pass 50% of any private or occupational pension back to them. You will be treated as having income deriving from any capital above a certain limit. The LA will assume that you are receiving any benefits that you qualify for, so make sure you have made all relevant claims.

Having worked out the total of your income, less an disregarded amounts, the LA has to allow you to keep a set amount each week. This personal expenses allowance should be used for any extra expenses you have that are not covered by the home's basic fees. The remainder of your income will be your contribution.

Moving to another care home

If your needs increase you may have to move to another home. Ask the LA to reassess your needs to identify the level of care you now need.

You may be asked to move homes for financial reasons, particularly if your home costs more than the LA limit. If this is suggested ask the LA to assess the risks involved in moving you. If the move will affect your well-being the LA may have to pay extra to keep you where you are.

Third-party contributions

If your preferred care home would cost more than the LA would normally pay for accommodation for someone with your assessed needs and you are eligible for LA assistance, the LA must still make arrangements for you in that home provided:

- it appears suitable for your assessed needs
- it is available (i.e. it has a vacancy)
- the provider of the home and the LA agree to enter into a contract for your placement subject to the LA's usual terms and conditions of such care
- someone else can make up the difference between the amount the LA would normally pay and the home's fee by making a "third party contribution."

The third party will need to show the LA that they can reasonably expect to contribute for so long as the arrangement lasts. If the third party payments cannot be continued you may have to move to another less expensive home - subject to the LA assessing the risks involved to you in taking this action.

Deputyship

The system of Court-appointed Deputies was introduced by the Mental Capacity Act 2005 to replace the previous system of Receivers. The Court of Protection exists to protect the property and financial affairs of people who lack mental capacity and to make decisions relating to their welfare. The court can make a declaration as to whether someone has mental capacity to make a particular decision and, where the individual does not, can make decisions and orders on financial and welfare matters affecting that individual. If there is an ongoing need for decisions to be made on behalf of a person without capacity the court can appoint a Deputy to make those decisions if there is no Lasting Power of attorney or Enduring Power of attorney in place. The Deputy must be trustworthy and have the necessary skills to carry out his duties. It would normally be a family member or friend, if they are willing to take on the role, but the

court can appoint an independent professional Deputy (such as e.g. a solicitor or an officer from the social services department of the Local Authority) if this is considered to be in the person's best interests. Two or more Deputies can be appointed either to work jointly (in which case they would have to act together on all decisions) or jointly and severally (where they could act separately or jointly on any particular decision).

Deprivation of Assets

If you are giving away assets or otherwise dispose of them in order to put yourself into a more favourable position to get Local Authority assistance with care home fees, the Local Authority may be able to assess you as if you still have the assets.

Local Social Security officers can also consider whether assets were disposed of deliberately to qualify for means tested benefits such as Pension Credit.

Deprivation of Liberty Safeguards

New measures came into force in April 2009 relating to people who lack mental capacity to make decisions on, or give consent to, the arrangements for their care and treatment and who are deprived of their liberty in a care home or hospital. The new legislation aims to provide safeguards to ensure people are only deprived of their liberty where this is necessary for their own safety, and to provide the care and treatment that they need, and where lawful procedure has been followed to authorise this. It also provides people with access to a court to challenge their decisions.

Disputed Wills and Estates

Disputes, challenges or claims usually centre around either the validity of the will itself, or around the belief by the claimant that he or she has not received proper provision under the terms of the will as it stands. Disputes can also arise over the administration of the deceased person's estate by his or her Executors where one or more of the beneficiaries feel that the Executors are not doing a proper job. If you have any concerns we will be able to advise you whether your concerns are justified and any case you may wish to bring has merit.

Employment

Older people at work (provided they are employees and not self employed) have certain statutory rights e. g. the right to a minimum number of days holiday. [See also our Employment fact sheet]. If a contract of employment provides less generous terms than the basic statutory protection it will be unlawful and then the basic statutory minimum will apply. Apart from some limited exceptions, your employer cannot persuade you to give up your rights. Some rights depend upon an employee having been employed for a certain period (e.g. entitlement to a statutory Redundancy Payment only arises after 2 years service). Others will be available even before employment begins or after it ends e.g. the right not to be discriminated against.

Age Discrimination

The Equality Act, 2010 provides protection against age discrimination in employment, education and training for people of all ages. The main rights under the legislation are:

- Protection against being treated less favourably because of your age (with some significant exceptions),
- The right not to be forced to retire before age 65 years (unless the employer can objectively justify this),
- The right to request to continue working after an employer's suggested retirement date,
- The removal of the upper age limit of 65 years for unfair dismissal and redundancy claims.

Protection for the over 65s is limited as employers are permitted to force someone to retire at the default retirement age of 65 and linked to this is an exception that allows employers to refuse to recruit anyone aged 65 or over. This will change from 1st October 2011 when the default retirement age of 65 is scrapped. Employers will no longer be allowed to issue notices of retirement after April 2011.

Retirement

There is a state pension age (this was 60 for women and 65 for men but is gradually being equalised to 66 for both between 2010 and 2020) at which you can draw your pension, but employees do not have to retire at this age. You can defer drawing your state pension and either take a lump sum or higher state pension when you do retire.

Housing Options

As you get older you may find that you are having increasing difficulty coping at home. It may simply be a case of downsizing to a more manageable property or, if you do not wish to move, raising income or capital to fund additional help and assistance (see later – [Raising Income/Capital](#)).

Moving in with children / other relations

This arrangement can work very well but it is important that everyone has a realistic understanding of what will be involved particularly if you may need increasing levels of care in the future. If your children or other relatives offer you accommodation but you do not want to live with them, you should not feel obliged to accept out of politeness.

Retirement / Sheltered Housing

Retirement / sheltered housing is intended for older people - residents usually need to be at least 55 or 60 years of age. Most retirement housing is sold on a leasehold basis. This means you have a long lease on the property and usually pay a small ground rent to the freeholder. The rights and obligations of leaseholders are different from those of freeholders and you should seek legal advice about them. The facilities and services in retirement housing vary from scheme to scheme. Before purchasing you should check what is available, and who will be responsible for the day to day management of the scheme, ensuring that the necessary services are provided and setting the service charges.

Sharing your home

You may be living alone in a property that is bigger than you need or can easily manage but do not want to move. One solution might be to have someone come to live with you. Before doing anything else you should consider what you hope to get from someone living with you. It is important that all parties are clear about the nature of any arrangement from the outset. If you require a high level of domestic help or personal care then this may be more appropriately provided by a professional care worker.

Income Tax

Income tax is a tax charged on your taxable income. Your taxable income has to be over a certain level to be taxed. There are allowances and reliefs that you may be entitled to claim to reduce your income tax bill. Some forms of income are not taxable and are not taken into account e.g. attendance allowance, disability living allowance, incapacity benefit (for the first 28 weeks of incapacity), pension credit, winter fuel payments, council tax / housing benefit, war disablement pension, war widow's / widower's pension, interest received on ISA's. Your tax allowance represents the amount of income that you can receive without paying tax. Everyone is entitled to a personal allowance, which is a higher amount for people over 65 (but this higher amount may be reduced or lost if your gross income exceeds the Government limit set for the age related allowance), for married couples, and blind persons. Income from savings and investments may be paid gross (that is without tax deducted), or it may be paid with tax already deducted at the basic rate), or in some cases may be tax free. When income is paid gross you will be due to pay tax (unless your income is too low to make you a taxpayer). If you receive income from savings with tax already deducted you may be able to claim some or all of this tax back if you have not used all your tax allowance. Regular payments to charities under "Gift Aid" will also reduce the level of your income when calculating the age related personal allowance. Parties to a marriage or civil partnership could consider transferring some or all of their savings to the other partner to reduce the overall tax bill if e.g. one party has insufficient income to use up his/her personal allowance, or one party has so much income that he/she loses the additional age allowance. There could be possible disadvantages, however, e.g. if the transferee subsequently entered a care home the transferred savings could affect the financial help he/she would receive.

Independent Mental Capacity advocates

The Mental Capacity Act, 2005 created a new service called the Independent Mental Capacity Advocates (IMCA) Service. This Service is to support and represent people who lack capacity to make important health and welfare decisions themselves and who have no family or friends who are willing and able to be consulted about decisions. The role of the IMCA is:

- to support and represent the person who lacks capacity when it is being decided what is in their best interests,
- find information to help assess what is in their best interests, and
- challenge decisions which may not be in their best interests.

If someone has family or friends who are willing to be consulted, or has set up a health and welfare Lasting Power of Attorney, or has a Court appointed Deputy it would not be necessary for an IMCA to be appointed.

Inheritance Tax

Inheritance Tax (IHT) is payable upon estates where the value exceeds a certain amount. The IHT threshold is generally referred to as "the nil-rate band." If not all the nil rate band allowance is used, the unused portion can be transferred to the deceased person's spouse or civil partner when the spouse or civil partner dies. The unused portion will be added to their own nil rate band allowance. It does not matter when the first death occurred. No tax free allowance applied in respect of transfers between spouses until 21st March 1972, so where the earlier

death is before that date part or all of the individual's tax free band could have been used up by the transfer to the surviving spouse. If someone outlives more than one spouse or civil partner, the unused allowances for more than one can be transferred up to a maximum of 100% of the allowance applicable at the time of their deaths. The transfer should be claimed within 2 years of the death of the surviving spouse or civil partner by his/her personal representatives. There are various exemptions from IHT - gifting within the amount of the permitted annual allowance, small gifts to individuals, wedding gifts, gifts to charities established in the UK, to political parties, to housing associations or for national purposes e.g. to a museum or a university. The value of any non-exempt gifts made within the last 7 years of the person's lifetime may be taken into account in whole or part dependent upon how recently the gift was made - this is to prevent people avoiding IHT by giving away their estate before they die. If the person's death results from wounds inflicted, accident occurring or disease contracted while a member of the Armed Forces and engaged in active service against an enemy; or from a disease contracted at some previous time, the death being due or hastened by the aggravation of the disease and the circumstances meet the conditions set out in Section 154 of the Inheritance Tax Act, 1984 the estate may be exempt.

Intermediate Care

If your place in a care home has been arranged as part of a package of intermediate care, where you are having short term therapy or treatment either following some time in hospital, or to avoid having to go into hospital, it will be free. Such care does not normally last longer than 6 weeks.

Intestacy

If you die without making a will, there will be an intestacy. Your property will be divided according to the Administration of Estates Act. This means your property may not go to the people you expected or wanted it to. The way the rules apply to your estate depends upon which relatives survive you.

Generally, Intestacy is best avoided.

Mental Capacity Act, 2005

The Mental Capacity Act, 2005 aims to protect people who may not be able to make certain decisions for themselves and to empower them to make their own decisions where possible.

The Act establishes the following principles about mental capacity:

- every person must be assumed to have capacity unless it is shown otherwise.
- all practical steps must be taken to help a person make their own decisions before anyone concludes that they are unable to do so.
- a person is not to be treated as unable to make a decision simply because the decision they make is seen as unwise.
- any decision made or action taken on behalf of people without capacity must be in their best interests.
- anyone making a decision for or on behalf of a person without capacity should consider all effective alternatives and choose the one least restrictive of the person's basic rights and freedoms.

People appointed to manage the finances and property of an older person, or to make health and welfare decisions for them, if they are unable to do so for themselves, must apply these principles when making decisions on their behalf.

Office of the Public Guardian

The Office of the Public Guardian supports and promotes decision making for those who lack capacity or would like to plan for their future within the framework of the Mental Capacity Act. The OPG publish helpful guidance booklets for people taking on the role of an Attorney, certificate providers and witnesses.

Pre-paid Funeral Plans

With these types of schemes, people choose the kind of funeral they would prefer and pay for it in advance. At the time of death the funeral expenses, however much they may have increased, should be paid for through the scheme. All schemes should be checked carefully as some are unsuitable, overpriced and oversold.

Probate

Probate is the term commonly used to describe the process of dealing with the affairs of someone who has died. For more information see **Probate and Estates administration** in our list of **Services**.

Raising Income / Capital

If you are a homeowner there are various equity release schemes designed to raise income or a lump sum of money. It is imperative that you get advice from an independent adviser with specialist knowledge of equity release before you decide to take out one of these schemes. You should consider all your options before you make a decision.

e.g.

- have you other investments or assets that could boost your income or give you the capital you need?
- you may be entitled to state benefits such as pension credit, income support, council tax benefit / attendance allowance.
- consider moving to a less expensive, smaller property.
- if you are struggling to pay off debts, get advice from your local Citizens Advice Bureau, local Age Concern or National Debtline.
- if you need help with repairs, improvements or adaptations to your home find out if you can get help from the Local Authority or some other Agency.

Equity Release

Equity Release is a term that refers to the various ways in which older homeowners can use their houses to generate income or lump sums, either with a loan secured on their home or by selling their property (or a part of their property) but continuing to live in it during their lifetime. You should always get independent and legal advice before taking out an equity release plan.

Respite Care

Respite care usually consists of extra services provided for a limited period of time to allow a cared-for person, or their carer, to have a break from their usual routine. It may take the form of increased support in the home, or of a stay in a care home. It could be for one night, one day or a longer period. Further information for and about carers is available from Carers UK 0808 808 777 (free call) www.carersuk.org.uk.

Statutory Wills

Anyone over the age of 18 years can make a will provided that they have what is called "testamentary capacity". In general terms this means the person making the will must understand the nature of the document they are signing, what they own and roughly what it is worth, and the claims of those to be benefited by or excluded from the will. If someone lacks the mental capacity to make a will themselves, an application can be made to the Court of Protection for a will to be made on their behalf. A will made this way is called a statutory will. Even if a Deputy is already in place then he/she has no authority to sign a will on behalf of the person whose affairs they manage, so an application is still necessary. If only minor changes to an existing will are required then the application can be made to sign a statutory codicil.

Trusts

A trust is a private legal arrangement where the ownership of someone's assets (which might include property shares or cash) is transferred to someone else (usually in practice not just one person but a small group of people or a trust company) to look after and use to benefit a third person (or group of people). The person giving the asset is known as "the Settlor," the people asked to look after the assets are known as "trustees" and the person who benefits from the trust is called "the beneficiary." The details of the arrangement are usually laid out in a "Trust Deed" and the assets placed in the trust are the "trust fund." Common uses of Trusts include:

- tax planning
- to provide for a partner after your death while protecting the interests of any children.
- to protect the inheritance of young children until they are old enough to take responsibility themselves.
- to provide for vulnerable people who are unlikely to be able to look after their own affairs.

For more information see **Trusts and settlements** in our list of **Services**.

Wills

A will is a document containing your instructions and wishes as to how your property and assets are to be distributed after your death. Unless your will is going to be very simple it is advisable to consult a solicitor who specialises in will writing.

For more information see **Will drafting** in our list of **Services**.

How can Powells with Chawner Grey help?

For advice on Elderly Client issues, please contact:

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