



# Do not go gentle....

Many solicitors deal with elderly clients on a regular basis. They must be alert to the possibility of pressure on the client and the existence of financial abuse, says James Cahill, especially if that client is dependent in any way

## MAIN POINTS

- Mistreatment of the elderly
- Psychological and financial abuse
- Solicitors' role and Law Society guidelines

**O**ver the past number of years, the mistreatment of the elderly has been highlighted. Stories of physical abuse of patients in nursing homes were shocking. More recently, the debate surrounding the proposed withdrawal of medical cards for the over 70s gave insights into the hardships suffered by many elderly.

Solicitors deal with elderly clients on a regular basis. The reality is that many older people are at a stage where they wish to dispose of assets or organise their affairs. They often find themselves making bigger decisions than have previously been necessary

in their lives. They then seek the advice of a solicitor to assist them.

Most older people are extremely independent and capable of arranging their affairs, provided they have access to the right information. However, many are dependent on others and this may make them vulnerable to abuse. Anyone can become dependent because of failing health, whether physical or mental. Isolation, perhaps following the death of significant family members or friends, can also be a factor. Solicitors are well placed to ensure that, when they deal with an elderly client, that client is protected – especially if they are dependent in any way.

## HSE ADVERTISING CAMPAIGN

The HSE advertising campaign encouraged older people to protect themselves with the following advice:

- Seek independent financial and legal advice,
- Know your rights,
- Conduct your own financial affairs as much as possible, ensuring your legal and financial matters are in order,
- Plan ahead and make your wishes known in relation to assets,
- Make sure you understand any documents you are asked to sign, and any transactions, such as creating a power of attorney,
- Ask for more time if needed,
- Think about options.
- Where possible, stay active within your community and keep in regular contact with friends and family,
- Maintain independence,
- Ask questions: do not be fobbed off,
- Speak out – let somebody know if you are being abused,
- Be suspicious and vigilant,
- Be awkward if necessary.

*“Elder abuse has been defined as ‘a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person, or violates their human and civil rights’”*

Sometimes abuse is obvious. Sometimes it is subtle. Elder abuse has been defined as “a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person, or violates their human and civil rights”.

We understand physical abuse. However, there are many other forms of abuse. For instance, psychological abuse includes threats of harm or abandonment, refusal to facilitate contact with others, humiliation, intimidation or coercion. It also includes depriving a person of their right to make decisions about themselves and their affairs.

Abuse is not always motivated by malice. It may be motivated by concern. For instance, family members may decide that ‘they know best’ when decisions are being made about where an older family member should live. A typical example would be where pressure is put on an older person to move from a family home to an apartment or granny flat, when this is not necessarily the only option.

The older person’s circumstances may be such that they believe that they have no choice in the matter because of their dependency for their needs. Solicitors will be familiar with the client who is reluctant to oppose their family’s wishes, although the solicitor explains that decisions being made may be against their best interests. Certain phrases are often heard, such as “I don’t have a choice – they are very good to me,” or a fearful “Where would I be without them?”

### Financial abuse

In a recent HSE survey of over 1,500 cases reported within a 15-month period, psychological abuse was the most common type of abuse reported. However, a fifth of the reported cases related to financial abuse. The survey showed that the average person had a very limited understanding of what might be involved in financial abuse. They presumed that it referred mainly to actual theft of cash from a person’s home. Some people were aware that it might also include the control of a person’s pension book and the theft of the pension.

The prevalence of financial abuse surprised many. Solicitors, however, would be unlikely to be surprised

by the statistics. They know that financial abuse of the elderly also includes fraud, exploitation or pressure in connection with disposals of real property and are aware of difficulties occurring in relation to cash, bank accounts, grants and benefits. Solicitors may sometimes see pressure being exerted when a will is being made.

Sometimes, exasperated family members try to take the decision away from the older person because they simply do not agree with the wishes of the elderly person, or believe that their affairs are not being organised to the best advantage of the next generation.

Sometimes elderly clients are brought to the solicitor at a time of crisis – for instance, when a parent is moving from a family home to a nursing home. They are brought to a solicitor if there is fear that the older person is losing mental capacity, even though that person might still be capable of making many important decisions and will continue to retain some capacity. If the elderly person is the client, the solicitor must ensure that, regardless of family wishes, no decision is acted upon unless it is the free decision of the client.

As with any form of abuse, a wide range of people may be involved in carrying out financial abuse. Perpetrators may be relatives, paid care workers, volunteers, neighbours, friends and associates. Solicitors have encountered the neighbour who is intent on getting the client’s land. The elderly can also be victims of financial abuse at the hands of tradesmen, professionals, financial institutions or other organisations.

### HSE advertising campaign

The HSE has organised an advertising campaign to raise awareness of elder abuse. It employs senior caseworkers dedicated to coordinate services for the elderly, and to coordinate the response to allegations and concerns about all forms of elder abuse.

The campaign focuses on financial abuse. The HSE is aware that, unlike in the case of physical abuse, it can only play a limited role in protecting the elderly from financial abuse. The HSE believe that protections must be put in place in a much wider context than the

health services it provides to the elderly.

With this in mind, the HSE sought advice and support from agencies that they believed might be best placed to respond to the problem on a continuing basis. These included the:

- Department of Social and Family Affairs,
- National Consumer Agency,
- Financial Services Ombudsman,
- Law Reform Commission,
- Law Society of Ireland,
- Irish Bankers' Federation,
- Financial Regulator,
- Money Advice and Budgeting Service,
- An Garda Síochána,
- Irish League of Credit Unions.

All were requested to take initiatives to ensure that staff are trained to deal with services to the older client. It was recommended that there should be a code of practice within organisations for dealing with all vulnerable people.

The problem of isolation leading to vulnerability was highlighted. It was noted that there are many organisations in the wider community that can help to keep older people in contact with others: Citizens' Information Board, Meals on Wheels and Seniors' Helpline.

#### Law Society response

The Law Society, when approached by the HSE, saw an opportunity to undertake a project to give guidance to solicitors to assist them in dealing with elderly and vulnerable clients. Relevant practice notes, some already published by the Society, are now being reviewed for republication, with a changed emphasis, where necessary.

It is intended to publish a number of practice notes to include:

- Joint bank accounts (see practice note, p63 of this *Gazette*),
- Wills,
- Enduring powers of attorney,
- Equity release schemes.

The traditional role of the valued 'family solicitor', taking instructions from more than one member of the family may not be tenable – in many cases, the solicitor is liaising with both the elderly person who is disposing of assets and family members or unrelated persons who may be the recipient of the assets or who may have some interest in the situation. The solicitor must be alert to the fact that there may be a conflict of interest between the parties, no matter how well-intentioned all may be.

The practice notes will highlight the essential question that every solicitor must ask: 'Who is the client?' If the solicitor is clear about who his or her client is, and acts in the best interests of that client, there can be no conflict of interest for the solicitor. If there is a conflict, then – as with all situations where



Be awkward if necessary, says the HSE

two clients of a firm are in conflict – the solicitor must refuse to act for one, or possibly both.

The solicitor must be alert to the possibility of pressure on the client and the existence of financial abuse. They must know:

- How to recognise it,
- How to probe for it,
- How to address it.

The solicitor must fully advise the client of the consequences of any particular decision. They should also explain that the decision must be made in the context of the legal rights and needs of immediate and extended family members who may be affected, but who may have been overlooked, to provide for the client's own needs.

If, following independent advice to all parties, the disposition of assets by the elderly person that was originally proposed does not happen as planned, or as quickly as planned, it is likely that, if and when a different arrangement is eventually put in place, it may well be the more satisfactory outcome, particularly for the elderly person.

Each practice note will address the issue of mental capacity. It is now well established that there are different tests for different situations, and solicitors must inform themselves on this issue. (The heads of a *Mental Capacity Bill* have been published, and the Law Society will issue guidelines on this legislation when enacted.)

#### Solicitors' role

Solicitors can have a general role in encouraging clients to organise their affairs, and to review them regularly, so that the result will be that satisfactory arrangements are in place to ensure provision is made for their future needs.

In their early or middle years, everyone hopes, or even presumes, that when they get older they will be among those elderly who maintain good health and all their faculties, work as long as they please and stay fully in control of their own affairs. The reality will be different for many. Solicitors can play their part in protecting this important group of clients. **G**

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*James Cabill is chairman of the Guidance and Ethics Committee.*