



## THE LAW AND THE ELDERLY

Those of you who have received our Newsletters will be aware of the great concern we share for the shabby way in which the elderly have been treated by successive governments. Most, but not all, the areas where we can assist arise from the provision, or lack of it, for the care of elderly people in old age. The National Insurance contributions paid by all of us throughout our working lives have been treated by all the parties of government since 1945, as general taxation. No fund was created into which the contributions taken from our pay were invested. There are, therefore, inadequate funds to pay the benefits to which we should be entitled without placing an intolerable tax burden on those still in work.

The political answer is, of course, one of expediency; having made us pay once for our care in retirement the politicians see nothing wrong in making us pay a second time for the same service. This strikes at the very root of what we look for in retirement - security. This is normally the security of knowing that we have our own homes and adequate savings - it is this that the government now attacks by providing a morass of regulations which even health and social services professionals find impenetrable.

Whilst Section 1 of The National Health Service Act 1947 - enshrines the principle that we are entitled to free medical care from cradle to grave - we now have bureaucratic categories of how ill you need to be before you are considered ill enough to be entitled to free treatment by the National Health Service. There is a complicated system of scoring to establish how ill you are - but every score sheet we have seen has been completed incorrectly and the standards laid down by many Health Service trusts do not comply with the, government set, national guidelines. In other words, some Health Authorities are making up excuses to not pay for your care.

We feel so strongly about these matters that two of us, John Hawkridge and Mark Hawkridge are members of Solicitors for the Elderly, a specialist grouping of solicitors providing courses and advice to enable us to keep up to date with this rapidly changing area of the Law.

There are many areas where we can assist, most of these are mentioned briefly below, but this is not an exhaustive list. If you have a problem, which is not referred to, please contact us and we will be pleased to discuss it with you.

## LASTING POWERS OF ATTORNEY

It is always a good idea,(whatever your age) to make an Lasting Power of Attorney which enables a trusted relative or friend to take over your financial affairs or make decisions relating to your welfare or where you should live, should you be incapacitated through accident, illness or old age. There are two separate Powers of Attorney:-

1. One gives authority to another or others to deal with your **financial affairs** and is the most used of the Lasting Power; and
2. The second gives authority to deal with decisions **relating to your well being**. A Welfare Power gives your Attorney(s) power to make decisions about your welfare. Without that Power, in the event that you lose your mental capacity, in certain circumstances Social Services can place you into a Care Home who can then make a claim to the Courts to keep you as a resident even if your loved ones wish you to return to live with them or to your original home.

There are also still some Enduring Powers of Attorney in existence which if made before October 2007 are still valid.

A Lasting Power of Attorney continues, unless you revoke it, for the whole of your life, whether or not you lose your mental capacity at some point in the future. However, it must be registered at the Office of the Public Guardian and until that registration has been effected it is not valid.

It is possible and involves a saving in legal costs to make both a financial and a welfare power at the same time.

All Lasting Powers are in three parts:-

- The first part enables the person making the Power (Donor) to appoint the Attorneys of their choosing and to decide the extent of the Attorneys' powers and if there should be any restrictions on those powers. They can also give their Attorneys guidance within the document
- The second part is to be completed by a "Certificate Provider" this is either a professional person e.g. doctor, solicitor, accountant or dentist or someone who has known you for at least two years who must say that in their opinion you have the mental capacity to complete the Power and understand it's meaning.
- The third part is for the Attorneys to sign if they agree to accept their appointment

Once the Lasting Power document has been completed two other forms require completion:-

- Firstly, a third party notice needs then to be given to those chosen for this purpose by the Donor.
- Secondly, an Application for Registration must be completed and in some cases (If you are in receipt of certain benefits) together with an application for reduced Court Fees or a total exemption.

### **MENTAL CAPACITY ACT**

The Mental Capacity Act 2005 has to be implemented whenever there is a question as to the mental capacity of an individual. There are five key principles in the Act:

1. Every adult has the right to make his or her own decisions and must be assumed to have capacity to make them unless it is proved otherwise.
2. A person must be given all practicable help before anyone treats them as not being able to make their own decisions.
3. Just because an individual makes what might be seen as an unwise decision, they should not be treated as lacking capacity to make that decision.
4. Anything done or any decision made on behalf of a person who lacks capacity must be done in their best interests.
5. Anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms.

These principles are now at the core of how social services, hospitals, nursing homes and all professionals conduct themselves when dealing with any individual. It also dictates how an Attorney should behave in acting in their capacity as an Attorney.

### **COURT OF PROTECTION/DEPUTYSHIP ORDERS**

Many people leave this too late, when, after they have lost their mental faculties, the only other alternative for dealing with their property and finances is a **Court of Protection Application**, which is both expensive and longwinded. Mark has experience in both these areas and are happy to advise you or your elderly relative.

## **CARE HOMES - NURSING AND RESIDENTIAL**

If you are very ill, particularly if you are to be discharged from hospital, many people are unaware that it is possible to receive free care in a Nursing Home. An assessment must be carried out by the Health Service Trust and if the degree of incapacity meets certain criteria they will fund your care and you are then not subject to any means test or financial assessment.

If they will not fund then it may be possible, by means of an "impaired life annuity" to fund quite high nursing home fees through an insurance company without the risk of using up all your assets thus leaving your beneficiaries with a reduced, but still substantial benefit.

Before accepting any advice that you or your elderly relative should go into a "care" home it is essential that a proper assessment of your/their needs is carried out. The assessment should be with a medical professional, preferably a doctor or consultant, a social worker, the patient, and their next of kin. A proper legal assessment requires that all these are present. After that assessment is agreed a "care plan" also needs to be agreed. If this assessment and care plan are not implemented there is a strong possibility that if, when funds run out, you ask Social Services to assist and they will move the patient to a cheaper home. It is now well established that such a move, for a patient who is elderly and frail, is fatal in the majority of cases. It is our experience that many health and social workers are unaware of these dire consequences of the failure to follow the correct procedures.

There are a number of cases where the patient's family may not agree with the health or social workers on the future care. In such circumstances you should be specific on why you feel that your relative needs a particular type of care, for instance to provide for them to be cared for and to remain in their own home, it is our experience that logic and common sense may prevail, but this is an area where you may need our assistance and social workers are working under severe cost restraints which tends to presume that you will fund your own care.

## **THE FAMILY HOME**

Many people ask whether it is possible to gift the family home to children now and whether that gift can be set aside at a later date should you need to go into a care home, the cost of which you are required to personally fund. Many social workers have told our clients that they can override such a gift.

You can make a gift of your home provided that the purpose of such gift was not to avoid the payment of care home fees and the responsibility for proving this, unless the gift was made within 6 months of your entering "care", is on the Local Authority. If the reason for your gift was to remove your responsibility for maintenance and or insurance then it has been decided that your gift cannot be set aside unless made within that six month period. This is, however, a particularly delicate area and each case will depend very much on the precise facts. You must get proper advice if you are considering the gift of your home and please bear in mind that it may not reduce your Estate which is liable to Inheritance Tax and that your children may be liable for Capital Gains Tax. Even so, it may still be worth consideration.

## **PENSION AND BENEFITS**

Many elderly people, predominantly women, do not have an adequate pension and are having a real struggle, just to get by. There is a range of means and non-means tested benefits which are intended to improve this situation, but the problems in claiming these may seem to be too daunting. We will be pleased to help with information on what benefits should be available and how to claim them or to inform you where you can get more information or assistance with such claims.

## **HOME VISITS AVAILABLE**

If you can't come to us, we can come to you! We will be happy to visit you at home, in hospital or in your care home.

If you would like further help and advice please contact:-

**Mark Hawkrige on 01634 854381 or [mark@hawklaw.co.uk](mailto:mark@hawklaw.co.uk)**

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