

Age old problem

Lucy Trevelyan examines the role of private client practitioners in cases of elder abuse, and looks at whether changing the safeguarding procedures will help or hinder vulnerable people – and their solicitors



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In 2007, a nationwide study commissioned by the Department of Health found that 4% of those aged over 66 years living in private households – around 342,400 people – reported experiencing mistreatment by a family member, close friend, care worker, neighbour or acquaintance in the previous year. Since then, elder abuse has been heightened in the public consciousness after the exposé of mistreatment in numerous care homes and Winterbourne View hospital, yet the problem has far from abated: in 2014/15, reports Lia Musto-Shinton, solicitor and community care and information governance legal manager at Wakefield MDC, 58% of all safeguarding alerts (the reporting of allegations of abuse to social services) involved people aged 65 or over.

Sophie Andrews, chief executive officer of The Silver Line, a free and confidential 24/7 helpline for older people (0800 470 8090), says around 5% of callers talk about abuse. “Abuse takes many forms – emotional, sexual, financial, plus, of course, neglect, which is something we see more of,” she says.

Elder abuse is an emotive concern for any family to deal with, and allegations can cause conflicts from which families may never recover. Jess Flanagan, an associate at Clarke Willmott LLP, explains: “It is important for any evidence to be handled carefully and sensitively, as in many cases, the elderly person is not being abused at all; their family member is just trying to do the best they can, in the manner they have always lived, and possibly just need some additional support, rather than their loved one being removed.”

Private client practitioners are sometimes among the first to hear about suspicions of abuse, whether from an elderly client or their family members, and in such cases, they have obligations both to their client and in the wider public interest. However, this is not a simple process: conflicts of interest may

be encountered, and the processes and procedures, especially around safeguarding, can be challenging.

FINANCIAL ABUSE

Flanagan says financial abuse is possibly the most frequently identified form of abuse of the elderly, as it becomes more prevalent where there is a lack of mental capacity of the individual concerned to manage their own finances. It is also easier to evidence the misuse of money than other kinds of abuse.

This form of abuse is also frequently one that private client practitioners get to hear about before healthcare providers or other professionals – often via a phone call from someone worried about an elderly friend or relative. A key question in that case is: who is the client?

“If there is no lasting (or enduring) power of attorney in place and the elderly person still has capacity to appoint an attorney, we can advise them about making a lasting power of attorney (LPA). The elderly person in this situation would be our client,” explains Flanagan.

“If the elderly person no longer has capacity to appoint an attorney, the initial discussion with the person contacting us will focus on who might be the best person to be appointed as a financial deputy. It might be the person contacting us. If so, the person who is applying to be deputy to manage the elderly person’s finances would be the client.

“This option may be contentious, as the individual managing (or mis-managing) the elderly person’s finances may object to the other family member being appointed as deputy. The court would then decide who is the most appropriate individual to be appointed deputy. In contentious situations, we frequently advise that either the local authority or a professional deputy (dependent on the value of the estate) be appointed, rather than go through a challenging court application at great cost to the elderly person.”

While having an LPA for property and financial affairs can help safeguard the elderly person (P), attorneys under the LPA may also abuse their position.

Breaches of duties by attorneys may include: making gifts to themselves from P’s estate; transferring policies into their own names; placing sale proceeds of P’s properties into their own bank accounts; using P’s money for their own gain; not keeping accurate records; not keeping P’s affairs separate from their own; and making investments in schemes that would not be in the best interests of P.

However, says Flanagan, the Office of the Public Guardian (OPG) and Court of Protection (CoP) are becoming wiser to this, and there has been a series of cases where the CoP has removed attorneys for not complying with their duties.

REMOVAL TO A CARE HOME

As a welfare lawyer, Flanagan often becomes involved in applications to the CoP by local authorities to remove an elderly person from their home to a nursing, or care home. There are cases, she says, where a family member is accused of abusing an elderly person, and they maintain their innocence, but the local authority is not satisfied that the care the elderly



person is receiving at home is sufficient.

“If the local authority can prove this, the court will usually agree that the elderly person’s needs are too great to be met at home,” explains Flanagan. “This generally alleviates the need for the court to consider the truth and extent of the allegations made – these types of hearings are not good for anyone, because, once the lawyers have gone, the family still wants to see their loved ones and will still have to work with the social care team and the care staff, and these hearings damage relations further.”

If an elderly person needs to move to a care home, says Slee Blackwell associate Nicki Cozens, it is imperative to check the complaints procedure for the care home, the procedure for terminating a contract, and how medicines will be administered. “Also check if there is an exclusion on liability in the event of death or injury, if the care home can make significant changes to the service provision without consultation and if, or how long, fees may remain payable after death. Often, contracts are signed in a hurry to secure a care home bed, but legal advice should be taken.”

THE PRACTITIONER’S ROLE AND DUTIES

The private client practitioner’s role in elder abuse cases, says Jane Bennett of JE Bennett Law, is to keep a watchful eye and investigate where there are concerns; to follow up concerns of family members; and to try to resolve issues.

“Where there are concerns, for example, about the care home or staff, this could involve meeting with the care home manager. Where the person is cared for at home, this would involve meeting with the company employing the carers. Often, where there are concerns about family members’ actions, this necessitates a meeting with family members. There is often a need to report safeguarding concerns to the local authority so that, where necessary, an advocate, such as a social worker, can be appointed, so that situations causing concern can be more readily monitored and appropriate support given to the individual concerned and to family members.”

Lawyers are sometimes placed in a difficult situation in elder abuse cases, says Cozens. “Lawyers have the basic duties of adhering to their

professional code of conduct, but where abuse is suspected, the lawyer has an overriding duty to the client, and the wider public interest, to report it. A lawyer has a duty of confidentiality, but this can come into conflict with the duty to report an immediate risk to a vulnerable person. Usually, the elderly person, once properly advised, will agree that the abuse can be reported. It is a difficult area for a practitioner, and the Solicitors Regulation Authority provides a professional ethics service to assist professionals.”

Lawyers are also required to contact the local authority whenever they suspect elder abuse. After that point, Musto-Shinton explains: “Their role would be to advise their client and to safeguard their client’s interests (who may or may not be the alleged victim of abuse – for example, it may be the alleged perpetrator), but to also take appropriate action if they were aware of a matter which ought to be referred to the local authority and/or another agency, for example, the police.”

THE SAFEGUARDING PROCESS

Once the local authority has received a safeguarding alert, they will make initial enquiries to verify facts, the capacity of the adult at risk, and their wishes, if they are able to express them, explains Musto-Shinton. In most cases, the safeguarding alert can be appropriately managed without recourse to the safeguarding

procedures, but in a small number of cases, the alert will be followed up with the formal process: a strategy meeting, followed by an investigation, and a case conference to hear the evidence. Throughout the process, there is an ongoing risk assessment and requirement to ensure the adult at risk is protected. Case conference outcomes where abuse is substantiated can lead to referrals to the Disclosure and Barring Service or to professional organisations such as the Nursing and Midwifery Council, which may result in suspension from working with adults at risk in future, and/or professional suspension.

As for the impact on the abused individual, explains Musto-Shinton: “The safeguarding process seeks to be person-centred, but there are occasions when action must be taken, irrespective of the adult at risk’s wishes, if other people are at risk or the risk to the person is so serious to consider utilising the powers under the inherent jurisdiction of the High Court.”

Many practitioners believe the current safeguarding system is not effective. “Action on Elder Abuse estimates that no more than one in 10 victims reach the attention of adult safeguarding,” explains Andrews. “Often, the options for protection that are offered are not acceptable to victims, with the result that a high proportion of outcomes are ‘inconclusive’ or ‘no further action’. Consequently, we need to increase the status and relevance of the systems, with adequate staffing and funding, and a legislative framework that at least matches the legal protection that we afford to children or animals.”

One issue to address is consistency. “There are a wide range of adult protection arrangements in different areas, so there is no guarantee of a comprehensive and consistent approach,” explains Jane Chesterman, associate solicitor at Wendy Hopkins Family Law Practice. “The funding received by different adult protection teams also varies, as do the staffing levels and training. These problems increase the risk of abuse going unreported or unchallenged.

“It also needs to be made easier for different organisations to co-ordinate and work together to combat abuse. Ultimately, there need to be procedures in place to enable earlier identification of abuse and swifter action to investigate and deal with abuse.”


UPCOMING CHANGES

Changes to the system are in the pipeline. The Care Act 2014, which applies in England and comes into force in April 2015, will represent a significant reform of the adult social care system, with the introduction of a statutory safeguarding framework, she says.

“It introduces a new low threshold above which local authorities will be forced to make enquiries or ask others to make enquiries. Where there is a ‘reasonable cause to suspect’ that an adult in their locality is experiencing or is at risk of abuse or neglect, enquiries must be instigated. A Safeguarding Adults Board (SAB) must be established, with the objective of helping and protecting adults at risk in the area. The SAB must include membership of certain local organisations, including the police.”

Sections 17-21 of the Criminal Justice and Courts Bill, meanwhile, include a new offence “involving ill treatment or wilful neglect” by a care worker and/or care provider. It was drafted in response to the Winterbourne View and Mid Staffordshire hospital scandals, and is due to become law sometime this year.

Musto-Shinton explains that prosecutions brought under section 44 of the Mental Capacity Act 2005 (MCA 2005) are difficult in terms of evidence required, relevant to the alleged victim’s capacity at the time of the alleged offence. “If sections 17-21 of the Criminal Justice and Courts Bill come into force as currently drafted, this evidence will no longer be required, and I anticipate more cases will be brought under sections 17-21. This strengthens the current position, as it seeks to protect those who require services from a care worker from



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ill treatment or wilful neglect – this is a much broader spectrum of persons than that currently catered for by virtue of section 44 of the MCA 2005.”

Some of the problematic issues around the safeguarding system (such as disclosure) will, she says, be combated to a degree by the Care Act and its accompanying statutory guidance – which, she points out, mainly set out what is already good practice in many local authorities. She adds, however, that with decreased budgets and increased obligations (including by legislation such as the Care Act and MCA 2005), this dilemma could result in “some failures” by local authorities, “and with that comes the risk of legal challenge and reputational damage”.

Ensuring all relevant individuals receive appropriate training so they are aware of the relevant frameworks will be crucial, she says. “This area of work has become complex, and is increasing the need for specialist safeguarding teams to fully understand the enquiry process, to ensure a robust and fair investigation process, and to know when to consult the local authority lawyer; this should lead to better outcomes for the alleged victim of abuse.”

In addition, as Chesterman points out, the new system remains dependent upon the willingness of elderly people to report abuse, which can be especially difficult in cases of large scale financial abuse, where “many perpetrators ... do not deny accessing the money but claim that the older person gave them permission to spend the money. Due to the vulnerability of the older person, they are unable to categorically deny that they did not give permission, so very few cases result in full recovery of the assets or criminal prosecution of the perpetrator.”

Some, she says, have criticised the role and functions of the SAB as being too vague. “The outcome of the SAB may also be dependent upon who is chairing the meeting and the independence of that chair from the type of abuse being considered. Perhaps a similar level of protection as the laws governing child protection should be considered, as we are talking about a vulnerable generation. Perhaps there is also a need for clear legal penalties specifically for individuals who abuse the elderly.”

So will the new laws make the work of the private client practitioner easier or more difficult where elder abuse is happening or suspected? “We will have more tools at our fingertips to get an initial enquiry into any suspected elder abuse, and may be able to ensure that the individual who is allegedly being abused has more support,” says Flanagan. “I am not sure that it will make our role any easier; when dealing with issues of abuse, limited capacity and decisions such as care, how people manage their money and other deeply personal issues, nothing is ever easy, and I don’t think it should be.”