



Feidhmeannacht na Seirbhíse Sláinte
Health Service Executive

**Will Making by Older People in Residential and Day Services
HSE Guidelines**

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Signed:  Asst. National Director, Older Persons Services.

Date: 17th January 2012

Signed:  Chairperson, National Elder Abuse Steering Committee

Date: 17th January 2012

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1.0 Policy Statement:

The HSE its employees and its agents are the key statutory agency providing health and social services to older people.

2.0 Purpose:

The purpose of these guidelines is to facilitate older people in the care of the HSE and/or their agents, who wish to make a will and to obtain legal advice to do so.

2.1 Staff have a duty of care to older people availing of its services and must therefore be alert to the possibility that in certain circumstances some older people may be vulnerable to financial abuse. There is also an obligation on services to have in place a policy on the prevention, detection and response to abuse within residential care settings.

(National Quality Standards for Older People in Residential Care HIQA 2008)

2.3 These guidelines aim is to support staff and to promote best practice in this area so as to protect older people and prevent possible abuse.

3.0 Scope:

These guidelines apply to all HSE staff, and its agents in residential and day care services.

4.0 Underlying Principles:

These guidelines promote the following principles in supporting older people in making a will, and protecting them from abuse. They acknowledge that due regard must be given to the older person's right to privacy and autonomy in relation to managing their affairs, while at the same time being alert to the possibilities of potential abuse. Unit staff will;

- Act in the best interests of the older person at all times.
- Presume that a person has capacity to make any decision unless there is a basis of concern that this may not be the case.
- Recognise that while older people have a right to confidentiality in the conduct their affairs, the right to confidentiality may be overridden particularly where a concern has been established regarding possible abuse.
- Act in the way that supports the rights of the individual to lead the most independent life based on self determination.
- Recognise people who are unable to make their own decisions and/or to protect themselves, their assets and their bodily integrity, and ensure adequate protection for them.
- Ensure that the law and statutory requirements are known and used appropriately so that older people receive the protection of the law and access to judicial process".

(‘Protecting Our Future’, Report of the Working Group on Elder Abuse 2002)
(‘Responding to allegations of Elder Abuse’, HSE 2008)

5.0 Roles and Responsibilities:

5.1 The Specialist for Older Persons Services and Dedicated Officers in each HSE Area are responsible for the implementation of these guidelines within their area of responsibility.

5.2 The role of the person in charge (PIC) is to ensure that:

- All staff are aware of this policy. It is the responsibility of each member of staff to familiarise themselves with the policy and must act at all times in accordance with the policy.
- There are adequate systems in place to provide for the communication, education and ongoing audit of the policy to ensure compliance.

5.3 Role of the Senior Case Worker for the Protection of Older People:

The senior case worker is available to consult with any member of staff who has concerns that an older person may be a victim of financial abuse. However it should be noted that the extent of the senior case worker's investigations into alleged financial abuse can be limited due to the financial and legal complexities involved.

5.4 The National Steering Committee on Elder Abuse is responsible for the ongoing review of the guidelines.

6.0 LEGISLATION AND OTHER RELATED POLICIES

6.1 Legislation and Related Policies:

The guidelines are underpinned by the following policies and legislation:

- The Succession Act 1965
- Freedom of Information Act, 1997.
- The Data Protection Act 1988, 2003.
- Standard & Behaviour Code HSE 2006
- Protected Disclosures of Information, Section 103 Health Act 2007.
- Responding to Allegations of Elder Abuse, HSE 2008.
- The Scheme of the Mental Capacity Bill 2008
- National Quality Standards 'for Older People in Residential Care'(2008) HIQA
- HSE National Financial Regulation Voluntary Donations, Gifts and Bequests NFR-17

7.0 Glossary of Terms and Definitions:

7.1 Terms

The Unit

" Refers to all HSE staff and their agents in residential and day units"

7.2 Definitions:

Elder Abuse

"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 (aged 65 years or over) or violates their human and civil rights."

*(Protecting Our Future, The report of the Working Group Report on Elder Abuse, 2002),
(WHO, 2002)*

Financial Abuse

"Financial abuse includes theft, fraud, exploitation, or pressure being exerted in connection with disposals of real property, cash, bank accounts, grants and benefits."

*(‘Protecting Our Future, The report of the Working Group on Elder Abuse’, 2002)
(‘Responding to allegations of Elder Abuse’, HSE 2008)*

"Financial Abuse can also be defined in relation to behaviour such as; forced to give money or property, denied access to money or property, stolen money or possessions, forced/misled to sign over ownership of home or property, not contributing to household expenses, forged signature, forced to change a Will or misuse of Power of Attorney."

(‘Abuse and Neglect of Older People in Ireland’, Report on the National Study of Elder Abuse and Neglect, NCPOP 2010.)

HIQA

The Health Information and Quality Authority, Ireland’s independent Authority has been established to drive high quality and safe care in Ireland’s health and social care services. It has 32 quality standards, setting out the rights of residents in nursing homes and other residential care settings. It affirms the entitlement of residents to protection, high quality, safe and respectful care. It sets out the criteria for the Person in Charge to inform them of all concerns regarding elder abuse within 3 working days.

Standard 8

"8.2 The person-in-charge takes steps to ensure that the resident is safe from physical or sexual abuse, psychological abuse, financial or material abuse, neglect or acts of omission, or discriminatory abuse, through deliberate intent, negligence or ignorance by others within the residential care setting. All allegations of any such incidents are fully and promptly investigated in accordance with the policies and procedures."

(‘National Quality Standards for Older People in Residential Care’ HIQA 2008)

Will

A will is a written document which sets out legally binding wishes in relation to the distribution of property/assets after death. A person who makes a will is called a testator/testatrix. A person who dies without having made a will is deemed to have died intestate and the distribution of an intestate’s assets is among next of kin as set out in the Succession Act 1965.

8.0 Capacity

There is a legal presumption that an individual of 18 years and over has the mental capacity to make their own decisions. This is a legal presumption which can be rebutted by evidence to the contrary. Assessment of capacity to make a decision is time and issue specific.

8.1 The degree of capacity required depends on the significance of the decision to be made. The individual must fully comprehend the information about the decision to be made and the implications of the decision to be made.

8.2 Assessment of Capacity when making decisions:

The assessment of a person's ability to make a decision relating to a matter shall be based on the person's ability to:

- (i) Understand the information relevant to the decision,
- (ii) Retain that information,
- (iii) Use or weigh that information as part of the process of making the decision, or
- (iv) Communicate their decision by any means (including by means of a third party)

(Scheme of the Mental Capacity Bill, 2008)

8.2.1 A person's capacity should be judged on these criteria and not simply on the basis of appearance, age, condition or an aspect of a person's behaviour.

8.2.2 Some people may require help to assist them in making a decision or to communicate a decision but this does not mean that they lack capacity to make a decision.

8.2.3 Also if the person is able to retain the information relevant to a particular decision for a short period of time only, it does not prevent that person from being regarded as having capacity to make a decision.

8.3 Assessment of Capacity when making a Will:

In the context of a will this means that a person has:

- (i) Ability to decide to make a will,
- (ii) Ability to decide to seek legal advice in relation to making a will,
- (iii) Ability to give instructions personally to enable a will to be drafted taking account of their wishes and,
- (iv) Ability to understand they are executing a will for which they have already given instructions.

8.3.1 Senior unit staff can assess for points (i) and (ii) however a solicitor is required to make the assessment with regard to points (iii) and (iv), as this involves testamentary capacity. A person has a right to make a will themselves and not seek the assistance of a solicitor. However, for a will to be valid it must comply with requirements set out in the Succession Act 1965.

8.4 Testamentary Capacity

In addition to capacity to make a decision, when making a will a person is required to satisfy the test for testamentary capacity. One therefore must show that they can understand;

- (i) the nature of the act (the person understands that they are making a will)

- (ii) the effects (they are setting out their wishes with regard to the distribution of their property when they die)
- (iii) the extent of the property of which the person is disposing of, and
- (v) that the claims to which the person making the will ought to give effect(for example, are there individuals for whom provision should be made)

8.5 Assessment of Mental Capacity

A solicitor in carrying out an assessment of capacity may request a medical report of the older person's medical condition at the time the will is being made which may assist in determining whether or not the person has capacity. This can be carried out by the older person's GP or Consultant where appropriate.¹

8.6 Medical Evidence:

Testamentary capacity is a legal test and not a medical test. However in assessing the testamentary capacity, a solicitor may, due to the older person's particular illness /disability, require medical evidence as to the medical condition of the patient. Some illnesses may affect one's ability to make decisions but is not necessarily indicative of lack of capacity. Any request for a medical report should be facilitated as soon as possible.

8.6.1 An older person who may be very ill may be anxious to make a will and time may be of the essence. A solicitor must facilitate a person making a will "*where there is a plain and substantial risk of the client's imminent death*". In such cases a verbal medical statement may be sought and the written report to follow as soon as possible.

8.6.2 When requesting a medical report the solicitor should inform the medical expert as to the reason for the report. The medical report must be contemporaneous and the patient must be examined. One should note that should legal questions arise in the future, the circumstances of the request for the medical report, examination and any surrounding circumstances of the making of the will may be required as evidence.

9.0 Access to a Solicitor

An older person has a fundamental constitutional and human right to privacy and to consult their solicitor without the requirement to inform the unit of their doing so. However given the need for privacy and the obligation to protect older people from possible abuse, older people should be encouraged to inform the unit of impending visit from advisors.

9.1 An Older person requests to speak with their Solicitor:

Where an older person, (about whom there are no concerns regarding capacity or ability to handle their own affairs competently) contacts their solicitor directly or requests the unit to contact their solicitor on their behalf it should be facilitated by the unit as soon as possible.

9.1.2 The older person who wishes to deal with the management of their affairs without disclosing their intention is entitled to have their privacy and autonomy respected by the unit. The unit should not disclose this information to any third parties unless the older person has given expressed consent for same.

¹ A Mini Mental test can be carried out to test for memory and are a useful guide of cognitive ability but they are not tests of capacity. An in-depth assessment is required in assessing memory impairment and its effects on decision making but again the fact that a person has a memory impairment does not mean that they lack capacity to make a decision at the time the decision has to be made

9.2 An Older Person requests Assistance with contacting a Solicitor:

Where an older person requests assistance in making a will or conducting a legal transaction but does not have their own solicitor the unit should suggest that the person discusses this with their family/friend/Next of Kin for a recommendation.

9.2.1 If the older person does not wish to inform such third parties as to their intention the unit should refer the older person to the Law Society of Ireland which has a list of all practising solicitors in Ireland. (www.lawsociety.ie or on telephone number; (01) 672 400.

9.2.2 Or the local Citizens Information Office (www.citizensinformation.ie).

9.2.3 Or to Solicitors for the Elderly which is an independent, national organisation of solicitors and barristers, who provide legal advice to older and vulnerable people, their families and carers. (www.solicitorsfortheelderly.ie) or on telephone number; (01) 6761185

9.3 The unit should supply the older person with a comprehensive list for them to choose from. In no circumstances should the unit recommend any particular solicitor.

9.4 An Older Person where there are concerns as to their capacity requests contact with a Solicitor:

Where an older person requests to contact their solicitor and there are concerns about the person's capacity ones' line manager should be informed and an assessment made by speaking directly with the older person to clarify their request.²

9.4.1 The solicitor should be informed of the concerns If the solicitor wishes to proceed inform him that a record of the capacity/vulnerability concerns will be made on the older persons file.

9.4.2 If there are concerns that an older person is being unduly influenced by a third party to meet with their solicitor a report should be made to the line manager and the solicitor informed of the concerns. A request should be made to the solicitor that the meeting is postponed whilst further clarification is sought. Postponing of making decisions where there are grounds of being unduly influenced should be dealt with as a priority. The line manager may consult on issues of possible financial abuse concerns with the Senior Case Worker for the Protection of Older People and the Person in Charge should report any instances of possible financial abuse to HIQA within 3 working days.

9.5 Solicitor Visits to an Older Person:

A solicitor visiting an older person in a professional capacity does *not necessarily* have to inform the unit of their visit as circumstances may arise where the older person does not wish the unit to know that they have a solicitor visiting. However in the balance of protecting vulnerable older people, older people should be encouraged to inform the unit manager of the visit in advance.

9.5.1 Where staff are aware that a solicitor is visiting an older person, staff must clarify (if possible with the older person) if this visit was a direct request from the older person. If it

² Note: The fact that a person has limited capacity should not preclude a staff member from making every effort to assist the older person in carrying out their wishes and assisting them in making contact with their solicitor if that is necessary.

was and there are no concerns in relation to capacity or vulnerability the visit should be facilitated as soon as possible.

9.5.2 If the unit has concerns that the visit from the solicitor is not at the request of the older person senior unit staff should clarify this with the solicitor and if possible with the older person. If the older person has capacity they will be in a position to confirm that this is their wish then the meeting should be immediately facilitated and a record noted on the person's file.

Or

9.5.3 If the older person states that they did not request a visit or if the unit have grounds to believe that the older person did not request a meeting with the solicitor then a request should be made to the solicitor that the meeting should be postponed. A note should be made on the older person's file and a report should be made to the line manager who may consult with the Senior Case Worker regarding concerns of financial abuse. The Person in Charge should report any concerns of financial abuse to HIQA within 3 working days.

9.5.4 Concerns that arise if a solicitor persists with the visit to an older person and there are concerns about the older person's capacity. In these instances the unit should inform the solicitor of the concerns and the fact that the unit will be recording those concerns on the older person's file. Any concerns as to capacity and vulnerability should be recorded on the older persons file and line manager should be informed.³ Record keeping surrounding a solicitor's visit should be clear and comprehensive documenting any concerns raised with the solicitor as these files may be requested as evidence at a later stage. Older people should be told not to sign any document without fully understanding its contents and effect. In this regard older people should be supported and encouraged to obtain independent legal advice. The line manager may consult with the Senior Case Worker for the Protection of Older People regarding the concerns. Any concerns of financial abuse should be reported to HIQA within 3 working days.

9.5.5 Family members who raise queries with regard to an older relative's affairs should be directed to their own solicitor.

9.6 Fluctuating Capacity

In making a will the older person must have capacity at the time of the giving of instructions to his/her solicitor. If the older person's capacity fluctuates at times due to diminished capacity/medication/agitation the solicitor should be informed of this fluctuation. The unit should facilitate a further meeting as soon as the older person is fit and ones' line manager informed.

9.6.1 If a meeting has taken place, when in the opinion of the unit staff member that the older person clearly did not have capacity, a note should be made on the file, a report should be made to the line manager and the solicitor informed of these concerns and that these concerns are recorded on the older person's file. The service manager may consult with the Senior Case Worker for the Protection of Older People regarding these concerns and report concerns to HIQA within 3 working days.

³ It is a matter for solicitor to determine testamentary capacity, regardless of any medical or other evidence. Medical or other evidence can be useful in assisting the solicitor in making a decision about the person's capacity. It is a matter for the HSE to identify and respond to concerns of financial abuse appropriately.

10.0 Request to Act as a Witness to a Will:

A valid will requires two witnesses for a person signing the will. If contacting a named solicitor on behalf of an older person who intends to make a will one should inform the solicitor of the reason for the request and that remind him/her to bring two witnesses as the unit staff as do not normally act as witness. Only in exceptional circumstances where time is of the essence and subject to ones' line manager's approval may a unit employee act as a witness, for example near or imminent death.

10.1 The role of the witness is to witness that the person signing the will is the person making the will and that he/she is signing it freely and not under pressure. In some circumstances a mark may act as the older person's signature in executing the will but this is a matter for the solicitor to decide. The witness may be called to give evidence as to the older person's capacity at the time of signing the will if a legal dispute arises. A beneficiary who witnesses a will invalidates their bequest. The witness should know the nature of the document but does not need to know the content or beneficiaries of the document.

11.0 HSE Staff Code of Behaviour

11.1 Discussing a Will with an Older Person

In general unit staff should not discuss the contents, possible beneficiaries or assets being passed under a will with an older person.

11.1.1 In the event that an older person indicates that they wish to benefit a staff member in their will, one must decline the bequest as it contravenes the terms of employment of staff as set out in the HSE Codes & Standards of Behaviour Section 3 (i). One must record and inform their line manager of same.

11.2 Discussing an Older Person's Will with a Third Party

Under no circumstances should the unit staff disclose any information to third parties of the fact that an older person indicated that they wished to make a will or that they made a will. The third party should be advised that this information is private and confidential to the older person and that the unit cannot release same to them without the expressed permission of the older person.

11.2.1 If such a query persists perhaps even on the grounds that the older person lacks capacity and certain action must be taken on their behalf, the third party should be directed to the appropriate support services, i.e. service manager, social work department, fair deal or independent legal advice. The line manager may consult with the Senior Case Worker for the Protection of Older People for advice.

11.3 Handling of Wills or other documents

In the event that a unit staff member is handed any personal legal documents (including a will) by an older person or comes across such documents which require safekeeping they should be passed to the line manager immediately and stored securely.

11.3.1 Under no circumstances should any legal documents be handed to family members, friends, legal advisors without consulting the unit's own legal advisors, who will ensure that any documents are properly given to the person/s who may have legal authority to receive them.

11.3.2A note should be made on the person's file of the fact that such documents were handed over or the circumstances in which they were found and subsequently handed over.

12.0 Review:

These guidelines will be reviewed in April 2013 by the Elder Abuse Policies Procedures Protocols Guidelines Working Group and any changes deemed necessary will be recommended to the National Steering Committee on Elder Abuse for approval.

13. 0 Implementation Plan:

These guidelines will be implemented through the National Steering Committee on Elder Abuse / HSE PCCC structure.

See Appendix C for detailed implementation plan.

14.0 References:

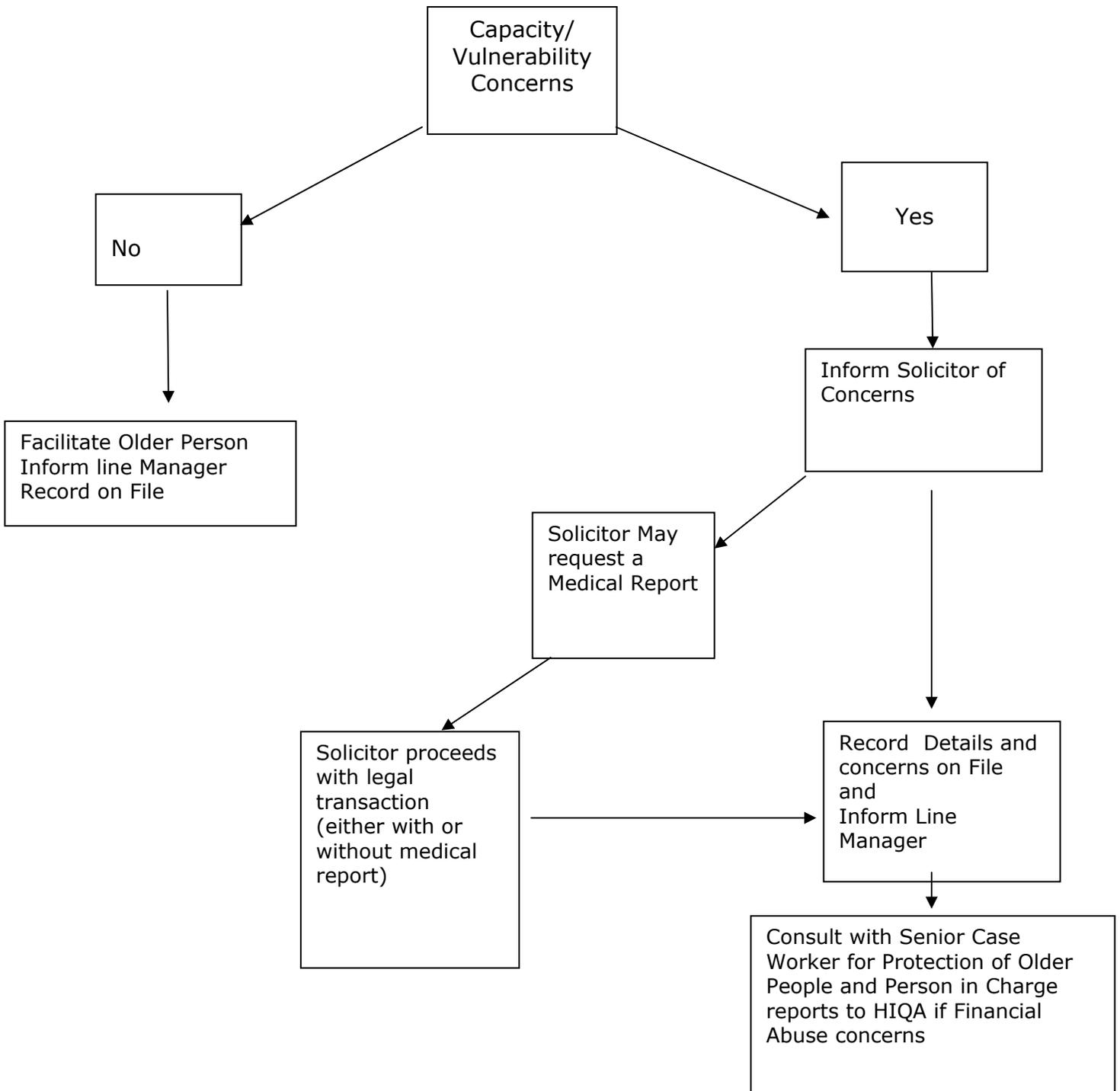
- The Succession Act 1965
- Freedom of Information Act, 1997
- *Protecting Our Future*, (2002) Report of the Working Group on Elder Abuse
- The Data Protection Act 1988, 2003.
- *Responding to Allegations of Elder Abuse*,(2007) Health Service Executive
- Protected Disclosures of Information Explanatory Leaflet, Health Act 2007.
- Protected Disclosures of Information, Section 103 Health Act 2007.
- The Scheme of the Mental Capacity Bill 2008
- National Quality Standards 'for Older People in Residential Care', (2008) HIQA
- "*Codes of Standards and Behavior*" (2009) Document 2.1 Framework for the Corporate and Financial Governance of the Health Service Executive
- HSE National Financial Regulation Voluntary Donations, Gifts and Bequests NFR-17
- *Abuse and Neglect of Older People in Ireland*,(2010) NCPOP

15.0 Appendices:

Appendix A	Flow Chart
Appendix B	Summary Sheet
Appendix C	Implementation Plan

Appendix A

Flow Chart:



Appendix B

Summary Sheet:

Capacity/Vulnerability Concerns?

No

1. Facilitate the older person and the solicitor and record that a meeting has taken place in the older person's file.
2. Inform line manager that a meeting has taken place.

Vulnerability Concerns?

Yes

1. If you have concerns as to the older person's vulnerability in making legal decisions inform the solicitor and record same on the older person's file.
2. Make a report to the line manager.
3. If the solicitor proceeds with the legal transaction advise that concerns are noted on the older person's file.
4. Consult with the Senior Case Worker for the Protection of Older People concerns of Financial Abuse. Person in Charge makes a report to HIQA of financial abuse concerns.

Capacity Concerns?

Yes

1. If you have concerns regarding the older person's capacity inform the person's solicitor and record same on the older person's file
2. Make a report to the line manager.
3. The solicitor may request a medical assessment to inform his assessment of the older person's capacity.
4. If solicitor proceeds advise that concerns will be noted on the older person's file.
5. Consult with the Senior Case Worker for the Protection of Older People regarding concerns of Financial Abuse. The Person in Charge makes a report to HIQA of financial abuse concerns.

Appendix C

Implementation Plan

Will making by Older People in Residential and Day services HSE Guidelines

Implementation Plan:-

Will making by Older People in Residential and Day services **HSE Guidelines**

Background

In common with most developed countries, people in Ireland are living longer, healthier, more active and independent lives than ever before. Most older people continue to live in their own homes and communities. Many people are supported in this through attendance at day care centres. In addition, a relatively small number of older people who, because of their dependencies and need for care, live in HSE residential facilities.

Regardless of where people live, it is important that they are afforded the same rights and choices as everyone else. In relation to people availing of HSE services, and in particular those in residential care, those right must be nurtured and protected. The making of a will is one such right.

There are a number of reasons why people should be helped to make a will, if they so wish. These include:-

- To have control over how one's estate is distributed upon his/her death.
- To minimise the tax liability of one's estate.
- To appoint guardian's to look after dependents.
- To ensure that executors are aware of ones' wishes in relation to funeral arrangements, etc.

While people have a right to make a will, it should also be recognised that there are opportunities for abuse which must be minimised. These guidelines outline the roles and responsibilities of HSE staff which offer protection to them while at the same time supporting older people in their care to make their own choices.

The National Steering Committee on Elder Abuse established a Working Group to develop Policies/Procedures/Protocols/Guidelines in order to assist staff in relation to protecting

older people. The "*HSE Staff Guidelines for Assisting Older People in Residential and Day Care Services with Making a Will*" has been developed following significant consultation, with input from HSE staff and the Law Reform Commission.

The purpose of this implementation plan is to set out key actions and time frames for the dissemination of the guidelines.

Dissemination of the Guidelines

These guidelines will be made available on the HSE intranet and the PPPG register of national policies.

The Offices of the Area Specialists, Services for Older Persons, and Dedicated Officers for Elder Abuse, will develop a national set of training materials to support the roll out of these guidelines. These will include PowerPoint presentation, summary leaflets and FAQ's.

It is proposed that, in each HSE Area, the Specialist and Dedicated Officer will oversee the implementation of the policy.

The Specialists and Dedicated Officers will arrange for briefing sessions for senior management, Directors of Nursing and Senior Case Workers. The Directors of Nursing will further disseminate the guidelines to staff in their own areas.

Monitoring and Evaluation

A feedback process will be put in place to ensure adequacy of the policy.

A formal review of the policy may be instigated by the Assistant National Director of Services for Older people in light of the regional monitoring processes.

Implementation Costs

Costs will be kept to a minimum and will be met from existing budgets.

No:	Action:	Measure:	Responsibility:	Challenges:	Risks:	Start date	Finish	Start date:	Finish date:
1.	Disseminate Guidelines	Guidelines uploaded onto intranet	Specialists and Dedicated Officers	N/A		Q3, 2011	Q3, 2011		
		Letter outlining responsibilities and implementation plan sent to senior managers via RDO.	AND Service for Older Persons			Q3, 2011	Q3, 2011		
2	Establish core team to oversee the development of training materials to support implementation	Development of training support materials, i.e. PowerPoint presentation summary, leaflets and FAQ's	Specialists and Dedicated Officers			Q3, 2011	Q3, 2011		
3	Specialists/Dedicated Officers develop regional implementation plan in conjunction with local managers	Regional plan with time scales for briefings, familiarisation sessions and evaluation.	Specialists and Dedicated Officers			Q3, 2011	Q3, 2011		
4	Communication process commences	Regional briefing for Area Management Teams, Directors of Nursing and Senior Case Workers .	Specialists/Dedicated Officers	Difficulties in releasing managers due to staff shortages. Travel costs		Q4, 2011	Q4, 2011		
5		All appropriate staff of residential and day care units to receive training from DoN's or their representatives. All staff sign stakeholder sheet to acknowledge that they are aware of the policy	Directors of Nursing			Q4, 2011	Q4, 2011		
6		Policy added to induction pack	Directors of Nursing/HR depts.			Q4, 2011	Q4, 2011		
7		Feed back coordinated	Dedicated Officers/Specialists			Q4 2011	Q4, 2011		

		and communicated to Specialists							
8	Review policy	Feedback on adequacy of guidelines and issues raised in briefing sessions communicated fed back to Specialists and SOP	Specialists/Dedicated Officers			Q4, 2011	Q4, 2011		
9	Review Policy	As a result of feedback and monitoring process AND may instigate a review of policy.	Assistant National Director of Services for Older People						