

## *Human Rights & Older Age – Where Rhetoric meets Reality*

### *A Solicitor's Perspective*

#### *Protection to Promotion*

## Introduction

This paper is to supplement the presentation delivered to the Erasmus+ project participants in November 2022.

This presentation outlines a solicitor's perspective in human rights and older age, where rhetoric meets reality. During the presentation, a case scenario/story was told.

The story will not be repeated here however this paper seeks to reinforce the importance of storytelling as a way of learning. Storytelling moves away from rhetoric to reality and allows for relatability and practicality. This enhances an audience's ability to feel a sense of solidarity. It is noted that the theme of 'intergenerational solidarity' is important for the project.

## Main Points from the Story

The story told during the presentation outlined quite a common situation where a person seeks to change their will later in life.

The story outlines what a solicitor must keep in mind when taking instructions from an older client and speaks to some of the guidance from the Law Society of Ireland's guidance and practice notes.

In summary the guidance from the Law Society of Ireland outlines that a solicitor has additional duties when working with older clients to ensure that they are not under undue influence or being coerced in any way.

Whilst guidance says a number of things, the bottom line is that a solicitor must safeguard the rights of older people.

The story did not challenge the duty to safeguard however it did outline how a solicitor can overstep the mark by infringing on the rights of the older person in the name of protecting their older client's best interests. It also points to the common overreliance both solicitors and wider agencies (such as the Probate Office) place upon medical evidence.

This case scenario shows that often solicitors in practice can be influenced by age rather than how their client is presenting. In this regard, an unfair approach is applied that aligns with ageism. It discriminates against the person based solely on their age.

## Capacity

The story outlined the clarity in Law Society guidance that any assessment of capacity when a person makes a will is a legal assessment. Discussion after the presentation

referenced the *Banks v Goodfellow (1870)* decision. This case set out clearly the test for testamentary capacity as having 4 core elements:

1. That the client must appreciate the nature and consequences of making (or in this story- changing) their will;
2. They must understand the extent of their assets;
3. They must be able to consider potential claims to their estate (eg family or other);
4. They must be compos mentis.

Whilst the story alluded to the above, it also however pointed out the value given to corroborating medical evidence by the solicitor's profession. This preference given to medical evidence often means that, in practice, a solicitor will unnecessarily obtain medical evidence and do so in conflict with the rights of the older client.

Certainly, the story showed that current common practice in this regard is inconsistent with the guiding principles of the Assisted Decision Making (Capacity) Act 2015. Discussion after the presentation highlighted the potential use of this legislation (once commenced) to hold solicitors to account to act in line with their lawful obligations.

## The Impact of Societal Norms

Whilst the role of a solicitor is naturally more rights based, a solicitor does not work in a vacuum and is absolutely impacted by societal norms. In fact, a solicitor must look forward to see what challenges might present and seek to avoid them. This involves a certain level of prediction based on what they know and expect of society.

This really is where a solicitor must move from rhetoric to reality. In this regard, a solicitor can often feel the conflict of wanting to work a particular way that is rights based but also they can be influenced by societal norms around them.

In practice, the importance of preparing extensive contemporaneous notes is vital and this is particularly the case when it comes to clients that wish to make decisions that would appear to be against advice or that might be outside what would be considered the 'societal norm'.

## Rhetoric to Reality – The Issue of Ableism and Ageism

Ableism is the conscious or sub conscious belief that socio typical abilities are superior. Ageism is closely connected with this whereby a person is discriminated against based on their age.

Socio typical abilities or attributes often focus on age, physical ability, medical condition or other characteristics.

Ableism and ageism can negatively impact upon people who experience disability, ageing or deterioration in health as it leads to discrimination. The reason for this is that rather than respecting diversity and life experience, society moves to 'help', 'cure' and 'protect'

disabled or elderly people. This is often done through segregation or expert intervention. It relies heavily on a medical model rather than a rights based approach.

Medical interventions or expertise that highlight conditions, illness or weakness often start to take over a person's identity. In practice the medicalisation of a person promotes the perceived distance from what is seen as the societal norm.

Ableism and ageism erodes intergenerational solidarity. In fact, by 'othering' older people it is the antithesis of solidarity.

## Steps Forward

To recognise ableism and ageism is a first step. Once it's recognised it can be challenged. From a solicitor's perspective the best way to challenge this is to work from a rights based approach. It is to support clients and the wider society recognise each person as people that have the enforceable and recognised rights on the same basis of others around them.

Furthermore, for the solicitor's profession, and society in general, it is to recognise the overreliance on the medical model. Medical professionals play a very important role in society and deserve huge respect for their work. However, medical professionals are experts in their own field only. They do not have the authority to supersede the rights of people (other than in exceptional circumstances through lawful means- for example in the case of involuntary admissions under Mental Health legislation).

Solicitors must continuously challenge their own paradigms- what they accept as reality; and re-evaluate it. Solicitors have an invaluable role in challenging the status quo and in grounding their challenges in the enforceable rights of their clients.

Solicitors have a duty to serve the interests of justice not only for their client but for the benefit of others including society more generally. They are a potentially potent source of positive change that can ripple through society. It is however through the work of organisations, like those that are part of this Erasmus+ event, that it will shine a light on areas of injustice and empower solicitors to be agents of change and inclusion.

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