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Farley Dwek Solicitors are one of the country’s leading providers of specialist legal services in relation to Care Funding issues. We were one of the first firms to tackle the growing issue of unfair care home funding.

Farley Dwek are helping hundreds of families throughout the country, with Care Funding assessments, appeals, or seeking a retrospective refund of care home fees that were improperly charged.

The issues surrounding Care Funding are wide ranging, and Farley Dwek are able to provide expert legal advice in a number of vital areas to assist you.

Whether you need legal advice in relation to your (or your relative’s) Care Funding will depend on your individual circumstances.

It is possible for you to address issues around Care Funding without the need for legal advice, and this Guide is designed to highlight some of the main issues you’ll face, plus provide you with some useful tips and free information, so you can decide whether you need legal advice.

Care Funding is an exhaustive subject. However, we’ve tried to make this Guide as helpful as possible for anyone looking for general guidance about Care Funding issues - whether for your own care requirements, or for a relative or friend, who may already be in care now or who may need Care (Funding) in the future.

So, in the Guide when we talk about “your relative’s care”, this can equally apply to your own care needs.

*(1.1) Legal Disclaimer*

As a firm of Solicitors, we have a duty of care to provide our clients with the best advice in relation to their individual circumstances. This Guide is intended to provide some general information and guidance around the broad subject of Care Funding.

Any information provided within the Guide should be treated as general information and cannot be taken as legal advice. For specific legal advice on your relative’s individual circumstances, please contact us directly.

Whilst we have made every reasonable effort to ensure the accuracy of the information contained within the Guide, we cannot be held responsible for any consequences arising from actions taken in relation to the general advice and guidance set out in it.

As part of our duty of care to provide our clients with the best advice, we believe that you should seek Independent Financial Advice to assess your financial circumstances in relation to the funding of long term care.

We can help with Independent Financial Advice through Farley Dwek Financial Planning.

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*Please note that this Guide ONLY and our legal services relate to NHS Continuing Healthcare Funding in England and Wales. The funding system and rules in Scotland and Northern Ireland are different and are not covered in this Guide.*
Care Funding Background

The requirement for long term care can arise at any time and for any variety of reasons. In most cases care is required as a result of the ageing process, often combined with one or more medical conditions. However, the requirement for care is not just associated with the ageing process; anyone may require care as a result of a disability, serious illness, progressive medical condition, or even an accident.

Regardless of your relative’s age, there are two distinct types of care they may require - either Healthcare or Social Care.

Often, an individual may require a combination of each type of care, and that’s what leads to uncertainty about who should pay for it.

This distinction between Healthcare needs and Social Care needs is absolutely critical to the Care Funding your relative may be entitled to.

This is why there are often issues surrounding payment for care – because it's all about money.

Farley Dwek is constantly campaigning to raise the profile of Care Funding issues to the general public. We have recently been featured in articles and news stories in:

- Daily Express
- The Guardian
- Daily Mail
- The Daily Telegraph
- BBC Radio
- Mirror
(3.1) What are Social Care needs?

There is no formal definition of Social Care, but it’s often described as dealing with the “activities of daily living” i.e. needing help with day-to-day activities such as feeding, washing and dressing, mobility, toileting, etc. But it also includes requiring help in terms of maintaining independence, social interaction, protection from vulnerable situations and help in managing complex relationships.

(3.2) What are Healthcare needs?

Whilst not defined in law, the definition of Healthcare needs is set out in the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care (Revised October 2018), where it is stated that:

A Healthcare need is one related to the “treatment, control, management or prevention of a disease, illness, injury or disability, and the care or aftercare of a person with these needs (whether or not the tasks involved have to be carried out by a health professional).”

The National Framework sets out a “Primary Health Needs Approach” which is binding on the NHS, and effectively imposes an obligation on the NHS to provide care FREE of charge – known as NHS Continuing Healthcare (Funding).

The National Framework establishes that where the primary need for care is a health need, then the responsibility for providing for that health need lies with the NHS, even if the individual is in a Local Authority care home, or in a private nursing home, or indeed receiving care at home. It is the health need which is the important factor, not the place where the care is provided.

There have been various Court rulings, including the landmark ‘Coughlan’ case in the Court of Appeal. Coughlan established that the Local Authority can provide some nursing care, but only if “…the nursing services are merely (i) incidental or ancillary to the provision of the accommodation which a local authority is under a duty to provide, and (ii) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide.” So, in short, if your relative’s healthcare needs fall outside the remit of what the Local Authority are legally expected to provide, then responsibility for care should pass to the NHS (even when the individual has been placed in a home by a local authority).

You can download the National Framework Document (Revised October 2018) from the internet at:

Why is Funding of Care such an issue?

The simple answer is... because it costs money.

If the NHS can show that your relative doesn't have primary health needs, they can pass the responsibility for the payment of their care over to the Local Authority instead - unless your relative becomes self-funding. This is where the fight lies, in terms of who pays for your relative's care.

Unfortunately, despite having paid Income Tax and National Insurance contributions all their life to fund the NHS, at the point your relative needs long term care, the NHS will, by and large, do everything in its power to deny them the right to that free care. This is not a political point. It's a fact borne out by the hundreds of individuals we have helped over many years - who have either been wrongly assessed in terms of their healthcare needs, or else had their care funding wrongly withdrawn. Instead, they have been left to fund their own healthcare, often being forced to sell their home, needlessly, to do so.

It is estimated that, at any one time, over 100,000 people in the UK are incorrectly paying for their care.

It's a national scandal and yet it doesn't seem to make the news. At Farley Dwek, we campaign tirelessly to bring this issue into the mainstream news agenda. We've had some success with our campaign in the media, and have been quoted in the national tabloid press, featured on BBC TV's Victoria Derbyshire's Show, and have been interviewed on national radio. But there's no doubt much more needs to be done to bring this shameful issue to light.

It is a ticking time bomb for the nation's finances, and it's no wonder that no Government, of whatever persuasion, wants to tackle this scandal head on.

The issue of unfair assessments has been going on for years. As far back as February 2003, the Parliamentary and Health Services Ombudsman produced a report on "NHS Funding for Long Term Care", in response to the conduct of the NHS, stretching back to 1996. When this wasn't acted on, the Ombudsman produced another report in March 2007 on "Retrospective Continuing Care Funding and Redress" which again criticised the NHS's approach to the funding assessment issues.

Whilst the NHS responded with the National Framework to guide Clinical Commissioning Groups (CCGs) on the provision of a consistent service, with the needs of the individual at its core, we continue to see everyday examples where the correct assessment procedures haven't been properly followed or implemented.

Of course, it's important to note that not everyone requiring care has primary healthcare needs. It may be that your relative's healthcare needs are incidental to their social care needs. If so, then their care needs will be assessed and means-tested by the Local Authority, and they may well have to pay for some or all of their care.

Do NOT allow anyone (either in the NHS or in the Local Authority/Social Services) to tell your relative that they do not have primary healthcare needs without the NHS having first conducted a Continuing Healthcare Assessment.

- The average fee for a single room in a private residential care home is £27,872 per annum – in a private nursing home it is £38,376 per annum.
- To date, it is estimated that more than 1 million homes have been sold by pensioners to pay for the soaring costs of care and that another 2 million pensioners have had to use their savings to pay for care.
- In the last quarter of 2013 the NHS confirmed that only 58,000 people in the UK received NHS Continuing Healthcare Funding.
- The Government knows it's got this wrong – CCGs' estimated liabilities for NHS Continuing Healthcare Funding rose from £134 million in 2011/12 to £764m in 2012/13 – that's just based on the increased number of claims in one year.
- There are over 400,000 elderly and disabled people living in residential care – 95% of whom are over 65.
Your entitlement to NHS Continuing Healthcare Funding

Your relative has every entitlement to an assessment for Continuing Healthcare, if they reasonably believe that they have a Primary Healthcare need.

Note: Any such Assessment should **always be done before** passing them to the Local Authority to deal with their care needs. Don't be fobbed off and pushed down the Local Authority assessment route (which is means-tested), or even discuss how your relative's care will be funded, until they've had a proper assessment of their healthcare needs.

The NHS is under an obligation to undertake an assessment in all cases where it “appears that there may be a need for such care” – this is critical.

This is the starting point for all cases we deal with, because either:

(a) the NHS failed to undertake a Continuing Healthcare Assessment, either before your relative was placed into care, or at a stage in their care when it was clear that their medical condition had deteriorated to a point where their primary healthcare needs have overtaken their social care needs; or

(b) the NHS assessment was flawed and incorrect.

However, very often, staff within the NHS will not advise you or your relative of their right to an NHS Continuing Healthcare Assessment. It is open to debate whether this is due to a lack of understanding and training on their part, or part of a deliberate wider strategy to avoid the costs of Continuing Healthcare Funding. The important point is that you must know and understand your rights – otherwise, your relative may end up paying many thousands of pounds a month for their care, quite unnecessarily.

In many circumstances, we hear from clients that staff within the NHS often give misleading or false statements when asked about Continuing Healthcare Funding. For example:

“People with Dementia don't qualify for funding”
“Your relative won't qualify”
“Your relative has to pay for care”
“Your relative doesn't appear to have any health needs, etc.”

In other circumstances, we hear that people are told that an assessment has already been done, or, for example:

“Your relative has been continually assessed whilst they've been in hospital, so we don't need to do any more checks”
“Your relative has already been assessed and they don't qualify”
“Your relative will have to pay for an assessment”
“An assessment will take too long. Your relative will have to pay for care until we can arrange one”

Again, statements along these lines are simply incorrect. Remember:

- Your relative should be told in good time if an assessment is taking place, and if they haven't, you can ask for another one to be done.
- If an Assessment has already taken place, your relative should have received a written copy of the Assessment outcome. If they haven't been given one, request a copy immediately.

Under no circumstances should you or your relative sign anything before an Assessment has taken place – that includes any form of agreement with Social Services in relation to a Care Agreement or Financial Terms.

**Statements along these lines are not correct. If you and your relative consider that they may have Primary Healthcare Needs, then your relative is entitled to have an Assessment.**
Continuing Healthcare Funding – How does the assessment process work?

The NHS is under an obligation to undertake a Continuing Healthcare Assessment which will determine whether your relative is eligible for NHS Continuing Healthcare Funding. 

This Assessment is carried out in two stages:

(6.1) Stage 1 – The Checklist Assessment

This is the start of the Assessment process. If your relative is already in a care home, or else is about to go into a care setting for the first time (perhaps following discharge from hospital), or being cared for in their own home, they are entitled to request that the NHS undertake an initial Checklist Assessment. The Checklist Assessment is a useful preliminary ‘screening’ tool to see whether an individual would, in fact, trigger for a Full Assessment for NHS Continuing Healthcare (CHC) at a Multi-Disciplinary Team meeting (see Stage 2 below).

The initial Checklist Assessment can take place in whatever setting your relative is currently living – whether in a care or nursing home, or even in their own home.

Anyone can ask for a Checklist Assessment to be carried out. Speak to a health professional, your GP, hospital doctor, social worker, care provider or care home to request a Checklist Assessment.

The Checklist can be completed by a variety of health and social care practitioners, who have been trained in its use, including, for example: a registered nurse employed by the NHS, GPs, other clinicians or local authority staff (such as social workers, care managers or social care assistants).

If your relative is being discharged from hospital into a care environment, the NHS are now obliged to put an interim package of care in place until the Checklist Assessment is undertaken to ensure that there is no gap in their healthcare requirements.

Your relative is entitled to have their advocate in attendance when the Assessment is done. We strongly recommend that you do not allow this to go ahead unless they are present.

However, if you are told in advance of the Checklist Assessment that ‘there’s no point because your relative won’t qualify for funding’ – then you must object. Comments like this are misleading, and suggest that the outcome has already been predetermined even before the assessment process has even begun! The whole essence of the Checklist Assessment is to see if there is a possibility that your relative may qualify for CHC Funding.

The initial Checklist has 11 Care Domains, which are set out below:

- Breathing*
- Nutrition – food and drink
- Continence
- Skin integrity (including tissue viability)
- Mobility
- Communication
- Psychological/emotional needs
- Cognition
- Behaviour*
- Drugs/medication/symptom control*
- Altered states of consciousness *

The Care Domains are broken down into 3 levels, A, B or C – where A represents the highest level of care needed, and C is the lowest.

Preparation is key - it is important that your relative and their advocate prepare as fully as possible ahead of the Checklist Assessment. Remember, the person doing the Assessment might never have met your relative. Your relative and their advocate are the ones who know the most about their healthcare needs. Your relative should think about all their healthcare needs in each Care Domain and be ready to put their views across during the Assessment.
The outcome of the Checklist depends on the aggregate number of As, Bs, and Cs scored. In order for the CCG to consider doing a comprehensive Full Assessment, you have to have a minimum ‘score’ in the Checklist:

- 2 or more ‘A’s
- 5 or more ‘B’s (or 1 A and 4 Bs)
- or at least 1 A in a domain with an asterisk

The Checklist threshold to proceed to a Full Assessment has been set at a deliberately low level in order to enable all those who require a Full Assessment for eligibility to have that opportunity.

Therefore, whilst your relative might proceed to a Full Assessment that does not automatically mean that they will actually qualify for fully funded CHC at the next stage. There are still many hurdles to overcome, and getting past the initial Checklist stage is only the first rung on the ladder to seeking NHS Continuing Healthcare Funding.

Once completed, your relative must be given a written copy of the Checklist outcome.

A positive score may mean that your relative automatically progresses through to the Full Assessment stage at a Multi-Disciplinary Team Assessment (see below).

A negative score is a usually good indication that your relative’s healthcare needs are not (yet) at a sufficiently high level of need to justify a Full Assessment, but they should also be given a copy of the NHS Complaints Procedure. Whilst disappointing, a negative outcome at this stage can still provide a very useful baseline to refer back to at any subsequent assessment(s), should your relative’s healthcare needs deteriorate in the future. Use the Checklist to compare any changes in needs against the previous Care Domains, as a basis for justifying that an updated Checklist be carried out.

If your relative agrees that their needs do not meet the necessary criteria for CHC, they will move from the care of the NHS into the care of the Local Authority/Social Services [see Section 8 later].


Here’s a link to the CHECKLIST 2018: https://www.continuing-healthcare.co.uk/files/NHS_continuing_healthcare_checklist_-_October_2018_revised.pdf

We recommend that you take someone with you to the initial Checklist Assessment and keep a detailed note of what was discussed. This may be useful evidence if you feel that the Assessment was not carried out properly.

If you feel that your relative has been wrongly screened out of the Assessment process, or the Assessment process was flawed in any way, then you must complain swiftly – otherwise it could count against your relative later on. You only have 12 months to raise a complaint. So, if you suspect abuse of process, you should request that the Checklist be repeated. Do not delay!

Note: There are some circumstances when the NHS are not obliged to do a Checklist Assessment. For example:

- It is clear to the professionals involved that one isn’t needed at this point in time; (ie because the individual’s needs are obviously not healthcare related);
- The CCG agrees that the individual's needs are so obvious that they should be referred directly to a Full Assessment for eligibility for NHS Continuing Healthcare funding (at a Multi-Disciplinary Meeting);
- The Individual has a rapidly deteriorating condition and may be entering a terminal phase that should be referred to a Fast Track Pathway assessment instead;
- The individual is receiving services under Section 117 of the Mental Health Act which are meeting all of their assessed needs;
- The individual has short-term healthcare needs which are expected to improve significantly with short-term rehabilitation, and it is reasonable to allow time to see how they recover.
(6.2) Stage 2 – The Full Assessment at a Multi-Disciplinary Team Meeting (MDT)

If your relative’s Checklist Assessment is successful, they will progress to a Full Assessment - which the CCG should arrange within 28 calendar days of the Checklist Assessment taking place. However, these timescales are rarely met.

The MDT meeting should take place in a setting as near to the individual’s location as possible so that they can be actively involved in the process. This will usually be in the care/nursing home, or even in the individual’s own home, depending on the particular circumstances.

The Full Assessment is carried out by a Multi-Disciplinary Team (MDT).

The MDT must consist of at least two people from different (healthcare) professions - one Healthcare Professional and one Social Services Professional.

The Assessors must be properly trained in the NHS National Framework and the Assessment process. They should also be knowledgeable about your relative’s health and social needs, and where possible, have recently been involved in their treatment or care.

Ask the assessors how they have been involved in your relative’s care, what direct knowledge they have of their daily needs, what training they’ve had on the National Framework, and their experiences of other MDT Assessments. However, don’t be surprised if this is their first MDT Assessment!

Ideally, there should be more than just two Assessors because the MDT needs to draw on all the available evidence from all those other healthcare professionals involved in your relative’s daily care, such as: Nurse Assessors, Social Care Practitioners, Physiotherapists, Occupational Therapists, Dieticians/ Nutritionists, GPs/Consultants/Other Medical Practitioners, Community Psychiatric Nurses, Ward Nurses, Care Home/ Support Provider Staff, Community Nurses, Specialist Nurses, Community Matrons, Discharge Nurses, etc.

An MDT Co-ordinator will be appointed by the CCG to lead the Assessment process.

Your relative will be advised when the Full Assessment is taking place. Make sure you are given plenty of notice so that you can properly prepare for the meeting in advance. You know your relative, and are best placed to provide the Assessors with information as to their day-to-day care needs.

Again, we recommend that you take someone else along with you who can take a note of what is being discussed, and be another pair of eyes and ears.

You are entitled to have an advocate to represent you, and we strongly recommend that you do so, to give yourself the best chance of success.

Prior to the Full Assessment, the MDT are required to review all the relevant care notes and medical records (eg GP, hospital, treatment records etc.) in relation to your relative’s needs. Make sure that you get hold of these records, too, and review them carefully in advance. The key to success is in the detail!

The Full Assessment follows a similar process to the Checklist Assessment, but uses a Decision Support Tool (DST) instead. The DST has all the same Care Domains as the Checklist, plus one further Domain for “Other” requirements.

Here’s a link to the DST (Revised 2018): https://www.continuing-healthcare.co.uk/files/NHS_continuing_healthcare_decision_support_tool_-_October_2018_revised.pdf

As with the Checklist Assessment, it’s vital that you prepare your thoughts and views in advance.

The MDT Meeting is your chance to hear what the CCG’s Assessors have to say in their assessment of your relative’s needs, and of course, your opportunity to put your own points of view across to the panel of representatives. It is likely to be an emotional and daunting experience, being surrounded by the various health and social care professionals, but this is your relative’s health that’s being assessed, and if you or their advocate don’t agree with what is being discussed, then you must say so!
Nevertheless, if turned down for CHC Funding after the MDT’s Full Assessment, the Decision Support Tool will form the comparative baseline of your relative’s needs at any future reassessment.

Our nationwide team of specialist nurses have years of experience in dealing with MDT Assessments. Read more about our services later and get in touch if you need help or advocacy support.

We recommend that you read the NHS Guidelines on the Full Assessment which you can download at: https://www.gov.uk/government/publications/national-framework-for-nhs-continuing-healthcare-and-nhs-funded-nursing-care

(6.3) NHS-funded Nursing Care

If your relative has been turned down for CHC following a Full Assessment, but has other needs which include nursing needs, don't give up! They may still be eligible for NHS-funded Nursing Care (FNC) instead.

FNC applies to individuals living in a nursing home who need some element of nursing care from a registered nurse.

FNC is not assessed, or means-tested, and is tax free. FNC is a weekly sum paid by the Clinical Commissioning Group directly to the care home, as a contribution towards the cost of your relative’s nursing care needs that are provided by a registered nurse, employed by the nursing home. The current national FNC rate for England 2018/19 is £158.16 a week (correct as at June 2019).

FNC can be withdrawn if it is no longer appropriate. For example: (a) if your relative no longer lives in a nursing home; or (b) lives in a care home but does not now need any level of nursing care from a registered nurse; or (c) your relative’s healthcare needs have changed, and they have become entitled to fully-funded free NHS Continuing Healthcare instead.
(6.4) Joint Packages of Care

Remember: Primary healthcare needs are met by the NHS – free of charge and are not means-tested. Social needs are provided by the Local Authority and are means-tested.

But what happens if your relative falls between ‘two stools’ and is ineligible for full CHC Funding, but has some degree of needs that are beyond the legal powers of a Local Authority to meet? In that situation, funding may potentially come from more than one source – a combination of both NHS and Local Authority funding. The National Framework provides that both organisations should work in partnership together and provide a joint package of health and social care. Read the National Framework for more information on joint packages of care.

(6.5) The Fast Track Tool

This shortcut process is used to assess eligibility for CHC funding where your relative has a rapidly deteriorating condition (or inevitably expected to deteriorate rapidly in the future), which may mean that they are entering a terminal phase, or else who need access to NHS Continuing Healthcare quickly, with minimum delay. If successful, CHC Funding for your relative’s care needs should be put in place within 48 hours of assessment.

Get the care/nursing home or GP to approach your Clinical Commissioning Group to arrange an immediate Fast Track Pathway assessment of your relative’s eligibility for NHS Continuing Healthcare Funding.

The Fast Track Pathway Tool will be completed by an ‘appropriate clinician’ ie someone responsible or knowledgeable about your relative’s health needs, diagnosis, treatment or care (eg a registered nurse or registered medical practitioner, and is usually a Consultant, Registrar) to determine whether your relative has a ‘primary health need’.

Here’s a link to the Fast Track Pathway Tool: https://www.gov.uk/government/publications/nhs-continuing-healthcare-fast-track-pathway-tool

(6.6) What happens next?

If your relative is successful, then a discussion should follow, allowing them a choice of care homes, but usually they will require an element of nursing due to their healthcare needs. Choosing the right care home, or even choosing care at home, is a whole subject in itself and not one that we cover in this Guide.

How that care is provided and in what environment – whether in a care home or in your relative’s own home, should always take account of their personal preferences.

It is worth noting that, from April 2014, the Government introduced Personal Health Budgets (PHBs) – an amount of money designed to give individuals more choice and control about how their health and care needs are met.

If your relative’s Full Assessment is unsuccessful, they will be passed over to Social Services who will then assess their financial circumstances and whether they have to pay for some, or all, of their social care costs themselves (ie self-fund).

We often find that individuals end up paying for their care due to incorrect or flawed assessments. Unfortunately, in our experience, many families only realise this once their relative has passed away, and after they have parted with their life savings.

The process for recovering a refund of care costs improperly charged in these circumstances is similar to the process of Full Assessment already described - save that the assessment is done on a retrospective basis, and is based primarily on a review of the care and medical notes available for the historic period of care under review. Families can also add great value to this retrospective review process, by pointing out any obvious gaps or errors in the care home records, which are often incomplete, inaccurate, or contain insufficient detail as to their relative’s daily needs.

Retrospective claims are registered with the CCG, who should undertake a retrospective assessment as to the merits of your relative’s claim at a Local Resolution Panel Meeting. The National Framework sets out the process for seeking a retrospective review and the process of appeals (and strict timescales) if you remain dissatisfied with the outcome. The CCG will prepare a Needs Portrayal Document (NPD) which is summarised in a DST.

Responding to the CCG’s NPD/DST and preparing your own written submissions in reply, to be lodged in support of your retrospective review (and any appeal), is a very time consuming exercise, requiring a careful in-depth analysis of your relative’s care home and medical records. This can take days, even if you are a skilled professional, know what to look for in the records, and how to present your written response. Most families are out of their depth here and the process can be mentally exhausting and emotional draining, not to mention overwhelming. Farley Dwek Solicitors have expertise in handling Retrospective reviews and appeals, and calculating interest due on care fees wrongly paid. Read about our Reclams Service below to see how we can help you.

All is not lost in these circumstances. You can bring a retrospective claim for a refund of the Care Costs your relative has previously paid. Indeed, we represent hundreds of clients who are recovering Care Costs in exactly these circumstances.
This Guide provides you with the information you need about your relative’s rights regarding Care Funding. It gives you an outline of the process, along with some practical tips to help you to ensure that your relative’s Care Funding entitlement is properly assessed. You now have two options:

To undertake the whole process and battle against the NHS on your own (though not straightforward, quite complex and inevitably stressful); or to use our expert legal services to help you through the process.

There are obvious advantages to having expert legal representation throughout this process, and there is a charge for our legal services which we are happy to discuss with you.

You are entitled to nominate a person to represent you or speak on your behalf. Whilst the NHS National Framework suggests that individuals do not (in their opinion) need legal representation during the NHS Continuing Healthcare eligibility process, the Framework specifically states, “individuals are free to choose whether they wish to have an advocate present, and to choose who that advocate is”. Where the individual chooses a legally qualified person to act as their advocate, that person would be acting with the same status as any another advocate nominated by the individual i.e. a relative or friend. So, don’t be fobbed off if the CCG’s Assessors say you can’t have a legal representative in attendance!

Whether you need help with a current Assessment, an Appeal, or retrospectively to recover previously paid care home fees, Farley Dwek can help. Read more about our services below:

(7.1) Free Initial Assessment

The first step in our process is always for us to undertake a FREE initial assessment of your relative’s circumstances, which we do over the telephone.

If, after speaking to you, we believe that your relative may be eligible for Funding, then we will discuss with you what other services we can offer.

We are happy to answer any questions you may have about the process at any time.

(7.2) Clinical Review Service – help with MDT Assessments

If we believe that your relative may be eligible for CHC Funding, we may be able to offer our Clinical Review Service, which will assist you ahead of your Full Assessment at the MDT.

If you proceed with our Clinical Review Service, we will send one of our experienced specialist nurses to meet you and your relative, and carry out an independent assessment of their care needs, face to face.

Following the assessment meeting, our nurse will produce a detailed report which we will send you, setting out their assessment of your relative’s care needs.

The report will help you to understand whether, in our view, there is any realistic prospect of arguing that your relative should potentially qualify for NHS Continuing Healthcare Funding.

If our nurse’s report concludes that your relative may not qualify for CHC Funding at the moment, you will be able to use the report as a baseline and for comparison purposes, when monitoring important changes in your relative’s condition, in case they meet the funding criteria at any future reassessment. Furthermore, the report will also give you the reassurance of knowing that the matter has been assessed objectively by a skilled nurse who has a wealth of experience in this specialised field.

If, following the Clinical Review Service, we believe that your relative could potentially qualify for NHS Continuing Healthcare Funding, we can offer you our Advisory Service to assist and guide you through the NHS Assessment process, or you can use the report to help you through that Assessment process yourself.

The Clinical Review Service is done on a fixed cost basis.
(7.3) Advisory Service – for help with Advocacy at any stage

If you need help with advocacy at any stage in the process, we can help by offering to support you through our Advisory Service, where we will act as your relative’s advocate throughout the process. This means that you and your relative will have access to our specialist legal knowledge of the Assessment process at all times. You will also have access to our specialist clinical advice as we work collaboratively with a team of experienced nurses to support our clients.

Whilst we understand the legal requirements, our experienced team of nurses understand the clinical basis of the assessment process.

Under our legal guidance, our experienced nurses will act as your relative’s advocate throughout the process, and will be there with you and your relative at the Full Assessment to fight your corner, and ensure that the Assessment process is carried out fairly and robustly.

Our nurses have all worked for years in the NHS in the field of Continuing Healthcare, and know how to communicate effectively on your behalf with members of the Multi-Disciplinary Team. They know your relative’s rights! Having our nurses on your side, working in collaboration with our legal team, means that you will have the best chance of achieving a successful outcome.

However, we cannot guarantee success. If, at any stage, we believe that your relative’s prospects of a successful assessment are limited, we will explain that to you and the reasons for our advice.

We may be able to offer our Advisory Service on a Contingency Fee Agreement basis, sometimes known as “No Win, No Fee”. That means, if we are unable to secure funding for your relative, then you will pay us nothing. We can only consider offering our Advocacy services on a Contingency Fee basis, if we have first undertaken the Clinical Review Service.
Barry Pritchard is an ex-police officer from Salisbury. Without getting lawyers involved he says his father probably wouldn’t have received the NHS Continuing Healthcare Funding he was entitled to all along...

My father became ill with dementia and was gradually getting worse. At first, we arranged for some help from social services in his own home but it soon became clear that his needs were greater than the daily 15 minute visits allocated to him. One day my sister went round to his house only to find him injured on the floor. He had slipped and hurt himself quite badly.

We took him to hospital at the Queen Alexander Hospital in Cosham, Portsmouth where he stayed for two months.

During this time I requested that he was assessed for full NHS Continuing Healthcare Funding but was flatly denied the funding following a brief, cursory assessment by a consultant.

I wasn’t satisfied with this and my financial adviser forwarded me a press article about NHS Continuing Healthcare Funding featuring Farley Dwek, and the more I read, the more I felt my father met the criteria laid down in the ‘checklist’ set out by the NHS.

This time I took no chances and hired Farley Dwek who ensured we passed the ‘checklist’ with flying colours and then sent an experienced nurse along to the full assessment alongside our family.

At first the NHS wanted to do the assessment with just three days’ notice and made it, quite frankly, difficult to get transparency on my father’s paperwork and assessment process. However, my legal team and I pushed hard and we secured the funding with the assessors confirming my father was well above and beyond the minimum criteria needed to get the funding.

With care costs averaging more than £1,000 a week in the South of England this funding is essential to ensuring my father gets the best care that he is entitled to without financially crippling the family.

It’s unfair that such a ‘postcode lottery’ exists and families have to fight so hard to get the funding. The process should be more transparent and simpler. Until then, I’d recommend anyone who feels they should be getting the funding to use a specialist law firm like Farley Dwek. That way you stand the strongest chance of getting the funding and are less likely to have the wool pulled over your eyes or suffer from mistakes made by well-meaning but misinformed NHS staff.

Andrew Farley of Farley Dwek said:

“It is unfortunate that so many families get wrongly rejected for NHS Continuing Care Funding when they clearly meet the criteria laid down in the NHS’s own guidelines. Too many people take ‘no’ for an answer and Mr Pritchard’s case proves that if you’ve got the tenacity and meet the criteria, you can overturn the decision and avoid paying thousands of pounds a year on care home fees for your parents.

“It is important to remember that it doesn’t matter where you live or what assets you have, this funding is not means-tested and people should not be misled about the qualifying criteria. Our evidence is that there is a ‘postcode lottery’ for this funding and depending on where you live there is a massive difference on who avoids care home fees and who doesn’t.”

(7.4) Appeals Service

Many families have already worked through the funding process themselves, without the need for any assistance. Some are successful, but others are not so fortunate and find themselves frustrated by the NHS appeals process.

If you need help with an Appeal, we can help! The first stage is for us to assess your relative’s eligibility through our Clinical Review Service – see above.

If, after the Clinical Review Service, our nurse believes that you have a strong case, we can help you with your Appeal and we may be able to offer our Appeals Service on a Contingency Fee Agreement basis*, sometimes known as “No Win, No Fee”. That means, if we are unable to secure funding for your relative, then you will pay us nothing. For successful retrospective reclaims, we also charge on a Contingency Fee Agreement basis*. If we are successful with regard to both appeals, we will agree an overall percentage reduction to account for this, and are happy to discuss this on a case-by-case basis.

If you would prefer to work on a Fixed Fee basis, regardless of whether your Appeal is successful or not, we would be happy to discuss our fees with you.

* – Subject to terms and conditions
(7.5) Supported Assessment Service – emergency support at an Assessment or Appeal at short notice

If you have become stuck in the process and need urgent advocacy support at a forthcoming Full Assessment or Appeal, we may be able to provide assistance even at short notice by sending one of our specialist nurses to accompany you and be your advocate (subject to availability). You will need to provide our nurse with all the relevant documentation ahead of the meeting, and our nurse will arrange to meet you in advance to explain the process. However, unless we have had the prior opportunity to carry out our Clinical Review Service, our nurses will not have had the benefit of previously assessing your relative's condition and care needs – so there can be no guarantees of success; but you will still benefit from their support and experience, at what can often be challenging and adversarial meetings.

We offer our Supported Assessment Service on a fixed fee basis.

(7.6) Reclaims Service – for help with Reclaiming Fees already paid

Our Reclaims Service helps families to reclaim care home and nursing home fees which have been paid incorrectly – perhaps because an individual in care was wrongly assessed for their eligibility for NHS Continuing Healthcare Funding – or worse still, never assessed at all!

Farley Dwek have acted for hundreds of families whose relatives have passed away in care and often had to use their life savings, or sell their homes to pay for care, unnecessarily and unfairly.

The process for claiming back care home fees incorrectly paid, follows a similar process to the Full Assessment process. However, the assessment is done on a retrospective basis, using evidence from GP, hospital and care records and any previous full Assessments that may have been carried out. Our specialist team of nurses will undertake our Records Review Service – a clinical retrospective analysis of the individual's care needs, in order to advise you whether there are reasonable prospects of successfully reclaiming care home fees. The Records Review Service is done on a fixed fee basis.
When Alice Newton (88) entered a care home five years ago she was told that she would not be eligible for any kind of funding. Five years and £158,000 spent in care home fees, her family have finally secured NHS Continuing Healthcare Funding after getting Farley Dwek involved.

David Newton, 65, a site supervisor at a local school, lives in Bamber Bridge, Lancashire – less than two miles from where his mother now resides in a nursing home.

He takes up the story:

“After my father died, my mother’s health slowly began to decline until she was diagnosed with dementia and over time developed various other conditions including incontinence and mobility issues.

The family will now save around £2,700 per month in nursing home fees, thanks to Farley Dwek.

As a family, we decided that the best thing to do would be to bring her to live near me and my wife in Lancashire, so we could support her better. After a period in a rest home she then entered a nursing home. We noticed that other people in the home were getting financial support but they appeared to be in much better state of health than my mother. We were told that they may have different circumstances and that we shouldn’t get concerned about that.

It seemed a little unfair to us at the time, but because we were in a position to pay the fees after we sold my mother’s home in Hertfordshire, we felt we had to do so.

Whenever we approached the subject of NHS Continuing Healthcare Funding we felt like we were getting fobbed off by the system. We kept being told that my mother didn’t fall into a certain category of health requirements and had assets in the form of the funding from the house sale, so we would have to pay. We were simply told, ‘that’s the law’.

We now know that this is not the case and that NHS Continuing Healthcare Funding is based on health needs and not how much money you’ve got in the bank.

After reading an article in the Daily Mirror we got in touch with Farley Dwek and they agreed to look at our case. After they reviewed our position they said we have a strong case for NHS Continuing Healthcare Funding. Then they supported us in the crucial assessment meeting with the NHS by sending one of their experienced nurses who was able to make sure the assessment criteria was applied fairly and properly. Without Farley Dwek’s support we wouldn’t have secured the funding.

Soon after we presented our case with Farley Dwek, we were informed by the NHS that my mother was entitled to the funding after all. It was a huge relief because the size of the care home fees can be a huge worry.

There must be many other families out there in the same position as us. I’d urge people to seek legal advice from a specialist law firm to see if they too can secure the funding they are entitled to. We’re happy with the outcome knowing that the right decision was made but we’re unhappy about the long drawn out process to get proper information on how and when we would be entitled to it.”

Andrew Farley, of Farley Dwek, who acted for the Newton family, said:

“We’re pleased that we made sure the NHS came to the right decision to grant Mrs. Newton the funding she is fully entitled to.

The fact that she was rejected so many times is a worrying indictment of the current system and we will be looking into this aspect a little further.

In this particular case a very hard-working family that has paid taxes all their lives in Britain has had to sell off an inheritance asset in the form of a family home and pay more than £158,000 for care home fees. People should not feel coy about challenging the NHS over fees they have already paid, or fees they are already paying.

This isn’t money being claimed from the NHS – this is money that has already been mistakenly paid over by families, ending up in the hands of private care operators. It is essential that families are assertive in claiming and reclaiming what is rightfully theirs in the first place.”

The family will now save around £2,700 per month in nursing home fees, thanks to Farley Dwek.
Once we have completed the Records Review Service, if we think that there are reasonable prospects of success, we may act for you on a Contingency Fee Agreement basis*, sometimes known as “No Win, No Fee”. That means that if we are unable to secure a refund, then you will pay us nothing. Our specialist legal team will then present the arguments for retrospective entitlement for NHS Continuing Healthcare Funding to the relevant Clinical Commissioning Group.

In some circumstances, CCGs agree refunds for part periods of care only, and our legal team then decide whether to appeal for refunds against those periods in dispute. There are also issues of interest payments due on the care costs paid. At Farley Dwek, our legal team are highly skilled at working out the often complex interest calculations, to make sure that the maximum entitlement is refunded.

Note: Some time ago, the Government imposed a **deadline**, so now any retrospective claims can now only be made for care costs paid after **31st March 2012**. Care costs paid before that date cannot be reclaimed.

However, if you have already lodged a claim before 31st March 2012 which is ongoing, or has been rejected, we can help you reclaim payments made for care dating back to 2004.

In **Wales**, a similar deadline was imposed, limiting claims to any period after 31st July 2013. However, their rules also state that the claim period under consideration will be no longer than 12 months from the date of the first application.

* – Subject to terms and condition.

(7.7) **Case Review Service**

No matter where your case is up to, we are able to consider all steps already taken in the process, undertake a detailed review of all documentation and records available, and advise you on the next steps, including the likelihood of success.

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Edward Battersby’s 93-year old mother, Marion Wilson, was already receiving NHS Continuing Healthcare Funding but the family was called to a re-assessment of her situation and they wanted to make sure funding wasn’t removed, so they contacted Farley Dwek...

Mr. Battersby, a retired businessman, explains:

“My mother who has dementia has been in a nursing home setting for the past seven years and has received NHS Continuing Healthcare Funding for the past three. This funding is invaluable and it is an enormous financial support for our entire family.

When we were asked to attend an assessment to see if my mother was still eligible, we were worried that a mistake might be made and that funding might be pulled. We’d read horror stories about families having to sell their homes and make massive financial sacrifices, and wanted to avoid that happening to us.

The assessment process for NHS Continuing Healthcare funding is complicated and we were told that the NHS didn’t always get it right. We felt more confident going into the review process with Farley Dwek on our side. After they attended the assessment meeting with us we secured the funding, and we continue to save on the astronomical care home fees that we might otherwise have had to pay.

I firmly believe there are many families out there who don’t know about this NHS Continuing Healthcare Funding, and that they should see if their loved one or loved ones are eligible. We didn’t realise we could get it ourselves until we’d spent £42,000 on care home fees. It has saved us a fortune, and it is comforting knowing that my mother is getting all the assistance she requires from the NHS after a lifetime of paying into the system.”

Andrew Farley of Farley Dwek said:

“It is true that the process for applying for NHS Continuing Healthcare Funding is too complex for most families to get right. The NHS will always be looking to save money, and all too often, it is families who are entitled to funding who pay the price. If you’ve got an assessment coming up or you know someone who has, it’s sensible to get legal advice from an experienced solicitor.”
Peter Shaw is a retired teacher from Pickering in North Yorkshire. He had to sell his mother’s home in order to pay for her care home fees. Then, not long after her funeral, he discovered that she should have received free funding from the NHS, and was entitled to NHS Continuing Healthcare Funding all along.

Farley Dwek was able to recover around £44,000 of fees from Powys Local Health Board which were wrongly paid when his mother, Edna, lived in her local nursing home.

Mr Shaw explains:

“In 2006, my mother fell off a stool which resulted in her breaking her hip. At the time she was nearly 87 years old and she stayed in hospital for about two and a half months before we took the decision to transfer her to a nursing home, where she lived until she passed away at the age of 88.

When you’re researching nursing homes for your mother there isn’t enough time to consider whether she may be eligible for funding. You simply want the best care and focus on making sure she’ll be happy and comfortable.

From day one, we were asked to pay the fees and we paid each bill for the 18 months that she stayed in the home. It was a huge amount of money and obviously we were forced to sell her home in order to fund the costs of her care.

After my mother’s funeral, I read something about NHS Continuing Healthcare Funding and felt I should investigate further. After doing my own research, gathering medical records and looking at my mother’s care plan, I appointed Farley Dwek to handle my case.

“Farley Dwek were exceptional and explained the process of recovering these care home fees every step of the way. Farley Dwek were able to reassure me that I had a strong case and always kept me in the picture with progress. It was a stress-free experience, and the fact the service was provided on a no-win-no-fee basis meant I could proceed with peace of mind and avoid running up expensive legal bills.

Farley Dwek are doing something unique, and have been reassuring and informative throughout the process to gain a result. They are recovering what is rightfully yours in a clear, concise and professional way. It is as far removed from other ‘no win/no fee’ legal services as you can get. It’s a specialist area of law and they know their stuff inside out.

More people should claim NHS Continuing Healthcare Funding. Getting it right in the first place will save other families the heartache of having to sell property to pay for care home fees. The system is wrong and needs looking at. It relies on naivety and ignorance from families at a time when they are vulnerable and simply want to focus on the best nursing home for their mother or father.

Too many people also want to close the book on a traumatic experience and don’t want to see if they are eligible for reclaiming care home fees. I would urge families who feel they have a case to take legal advice to see how they can recover these fees. My mother died when she was 88 and I’m sure that she’d be pleased to know that her family was eventually able to reclaim what was rightfully theirs in the first place.

If a relative of yours is going into a care home or nursing home, I’d 100% recommend you to call Farley Dwek to see if you are eligible for NHS Continuing Healthcare Funding.”

Andrew Farley, of Farley Dwek, who acted for the Newton family, said:

“We’re pleased we got a good result for Mr Shaw and his family and recovered the fees that were wrongly paid all those years ago. It is important that families who currently have relatives in care take action, if they feel they too may be entitled to NHS Continuing Healthcare funding. We’re proud that we are able to help families like Mr Shaw’s to recover this money which is rightfully theirs. We know that there are thousands of other families who are unaware that their mother, father or elderly relative should be receiving this funding. Hopefully, we are doing our bit to shine a light on this little-known area of NHS funding.

Mr Shaw is quite correct. The system is wrong and relies on ignorance and an unwillingness from families to look more closely into the detail of their relative’s care plan and medical history.

Applying for NHS Continuing Healthcare Funding is no walk in the park. It’s confusing, emotional and complex. We’re happy that we’re providing a much-needed service for families all over the UK.”
Following the Clinical Review Assessment or Full Assessment, you may agree that your relative's care needs are not primarily healthcare needs, which will be the case for many people.

In this situation your relative's care needs may fall under the auspices of the Local Authority/Social Services, subject to means-testing.

The Local Authority has its own statutory duties to ensure that a Care Plan is put in place to meet your relative's Social Care needs, but they may have to pay for these services, subject to means-testing.

Regardless of the outcome of the means test, a number of NHS services should always remain FREE as part of your relative's Care Plan. These include:

- Primary healthcare
- Any assessment of healthcare (your relative should never be charged for an assessment)
- Rehabilitation which forms part of your relative's overall care package
- Respite healthcare
- Community health services
- Palliative and End of Life healthcare

(8.1) Current Rules

The current rules in respect of means-testing are as follows:

If your relative has over £23,250 (correct as at June 2019) in capital, they will have to pay for the cost of their care in full until it falls below the threshold of £23,250.

If your relative has between £14,250 and £23,250 in capital, they will have to contribute towards the cost of their care under the Tariff Rules (which currently means that they will contribute £1 per week to the cost of their care for every £250 in capital they have and part thereof, between £14,250 and £23,250).

If your relative has over £23,250 in capital, they do not have to complete any means-tested assessment for Social Services. In other words, they can declare that they are self-funding and they don't have to disclose anything else about their financial circumstances – however, they will pay for the FULL cost of their care.

If the Local Authority is meeting the full cost of your relative's care (because they have less than £14,250 in capital), they will pay your relative's care home costs up to their approved rate - as long as they are able to accommodate you in a care setting which is adequate to meet your needs and is within their budget.

However, if having been offered a care home which is within the Local Authority's rate, you choose one above the approved rate, then you will have to pay the care home a top-up fee to meet any shortfall. If you can't afford those top-up fees, then you will probably have to move into a cheaper care home that is within the Local Authority's approved rate. However, it is up to the Local Authority to find suitable accommodation for your relative and ensure that the services provided are in accordance with their Care Plan.

Your relative may also qualify for NHS-funded Nursing Care, depending on their health needs. This is a flat rate payment paid to their nursing home, only for the provision of certain designated nursing requirements – see above.

In calculating your relative's capital, the Local Authority cannot take into account the value of their property and other assets during the first 12 weeks of care, thus giving your relative the opportunity to deal with their finances, including their property (if that's what they decide to do).

In any event, it is important to know that the Local Authority cannot force your relative to sell their home, or take the value of their home into consideration as capital, if:

- Your relative's partner still lives there
- A dependent under 16 lives there
- A relative over 60 lives there
- A relative who is incapacitated lives there
- Or if someone else owns a proportion of the property eg their spouse. Read more on this later, in Section 9 below.

Even if none of the above circumstances apply, your relative can ask the Local Authority to set up a Deferred Payment Agreement in respect of their care home fees. Under this type of arrangement, the Local Authority will pay for your relative's care, but will defer payment until their property is sold at some point in time, or after they have passed away – at which point the deferred costs of their care will be recovered from the sale proceeds or their estate.

The rule is – don’t worry about being forced to sell your relative’s home – this won’t happen. However, they may have to pay from the sale proceeds at a later stage.
“Every man is entitled, if he can, to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be.”

(Baron Tomlinson, IRC v Duke of Westminster (1936))

Many people want to ensure that the wealth that they have amassed over their lifetime passes to their chosen beneficiaries and that they are not taxed either on their death or during their lifetime by being forced to pay for their care.

It is therefore important when looking at your Will and Lasting Powers of Attorney to also consider your wider estate and asset protection planning strategy.

One of the difficulties with asset protection is that the Local Authority can view these arrangements as deliberate deprivation of capital.

This anti-avoidance measure in the law enables some gifts or arrangements to be simply ignored by the Local Authority and even set aside by the court. Not only are these measures subject to change from time to time, but it is also unclear how far the authorities will go to pursue contributions that they believe are owing to them in individual cases. It is very much dependent upon the particular Local Authority, and in all likelihood, their financial position at the time.

(9.1) What can Local Authorities do?

Firstly, it is important to remember that if you enter residential care within 6 months of making the gift, the Local Authority can send the bill for care fees to the recipient of the gift or the trustees if you have created a Trust.

After this time, the Local Authority can treat you as still owning the asset even if it has already been given away. This can affect your entitlement to Local Authority financial assistance. If the recipient of your gift is not in a position to assist, or will not assist in the payment of fees, this creates an untenable position for you.

There is no time limit in which a Local Authority can treat you as owning that asset which you have given away, the gift may have occurred many years before you enter care and there may still be a reasonable link between the transaction and your subsequent claim for care. Of course, if you are in reasonable health now, then over the course of time the risk will fade. Each case must be assessed on its own merits.

In addition to the deliberate deprivation rules, a Local Authority can sue for debts and they could also invoke the Bankruptcy and Insolvency Rules to set aside transactions. It is generally thought that very few Local Authorities would be willing to attempt a bankruptcy because of the political/social implications and pure bad feeling generated, but it is important to address this possibility.

There can be no guarantees that there is a fool-proof way of avoiding the value of the home being taken into account in means-testing.

(9.2) What can you do?

Notwithstanding this threat from the Local Authority, protecting your assets and the inheritance for your loved ones is perfectly legitimate, and there are a number of options available.

Seek professional advice that is tailored to your individual circumstances rather than a generic ‘off the shelf’ product.

These options can include:

- Gifting (either in whole or in part)
- Repaying debts or compensating those who provide you with care
- Setting up a Trust
- Purchasing an Investment Bond with Live Cover

(9.3) Outright gifts (either whole or in part)

There are a number of reasons why you may wish to make an outright gift.

1. A desire to see the gift being enjoyed by the recipient during your lifetime, rather than under the terms of your Will post-death. Although, where this is the family home this can be somewhat tricky.

2. You may feel it appropriate that certain family members receive a gift of value from you.

3. You may wish to recognise the contribution which a family member has made to your property, your lifestyle and your personal choices.

4. Avoiding family issues or disputes.

5. Avoidance of delays following your death. A Grant of Probate would be required if you retained the property in your sole name at death. You may not need a Grant of Probate if you gift the property and which would also reduce the fees payable upon your death.

6. You may want to pass the burden of owning a property to the next generation. For example, they may agree to then keep the property maintained, repaired and insured at their own expense.
As your home is likely to be your only, or most valuable asset, it is important to be cautious about making this decision. Transferring the property outright can leave you financially insecure even if the recipient of the gift does not intend it. For example:

1. If the recipient has financial problems or becomes bankrupt, then your property may be lost to creditors.
2. If the recipient gets divorced, then your home will become part of their assets in determining the divorce settlement.
3. With gifts requiring the recipient to take control of the property in respect of repair, maintenance, insurance etc., then it is important that the recipient is aware of and accepts that responsibility.
4. If the family falls out.
5. If the recipient dies, then the asset will pass under the terms of their Will, or if they have no Will, under the Rules of Intestacy. This could mean that a daughter-in-law or son-in-law and the grandchildren could benefit. This, of course, could be addressed by ensuring that they had a suitable clause in their Will, but there is no way of compelling them to do so.

(9.4) Mitigating these risks – Declaration of Trust

It is possible to mitigate some of these risks by giving away a share in your property, rather than the whole.

Your property would normally be transferred into the joint names of you and your chosen family members, and a separate document called a Declaration of Trust is prepared. This divides the beneficial interests in your property and assigns to each person an interest in your property.

This option can be used as a method of formally recognising the contribution which a family member or other person has made to the property and to your lifestyle or personal choices. This work can be, for example, helping you with your shopping, finances, paperwork, paying your bills and generally enabling you to remain living independent for as long as possible.

It is important that this is tailored to your family circumstances to mitigate any challenge.

(9.5) Gifts to Trusts

Instead of transferring your assets outright you can consider making a gift to a family trust (either discretionary or life interest trust).

(9.6) What is a Trust?

A Trust is a relationship which is recognised and enforceable in court. Its details are contained in a Trust Deed, which is rather like a rule book.

A Trust has its own bank account, assets and tax reference. When a Trust is established, it is usually registered with the HM Revenue & Customs. It pays income tax, inheritance tax and capital gains tax.

A Trust is governed by trustees. They look after the property, deciding what will happen to it on behalf of named beneficiaries. There must be a minimum of two trustees and a maximum of four trustees. It is not advisable for the settlor (the person making the gift into the Trust) to be a trustee.

(9.7) Responsibilities of Trustees

The trustees must always act in the best interest of the beneficiaries. They have very wide powers to act in this way and can take advice in this respect. They have wide powers to invest money, insure property, lease and mortgage it.

The trustees are required to keep Trust records and hold trustee meetings on an annual basis. They must also make sure that they carry out the terms of the Trust and not go beyond their powers. A trustee must never profit from their role as a trustee, and must act impartially and fairly between the beneficiaries entitled to benefit from the Trust, now and in the future.

(9.8) The terms of the Trust

Depending on the terms of the Trust, you may be one of the beneficiaries and you would continue to benefit from the asset during your lifetime. On your death, the Trust will end and the property will then pass to the recipient that you specify. The terms of the Trust can be tailored to your own individual circumstances and could be made flexible for future generations.
(9.9) Continuing to live in your own home

If the asset is your home, then during your lifetime you could live in the property; or if your home is sold, the proceeds can be used to purchase another property for you. Alternatively, the proceeds can be invested to generate an income for you. You need to be aware that having a property in a Trust is not the same as having it in your own name. The trustees must be free to make decisions about the property, and if you are seen as interfering, the Trust may be declared a sham.

(9.10) Advantages of a family Trust

1. Matters of affection and moral obligations can be fulfilled by creating a family Trust.
2. A family Trust can formally recognise the contribution which a family member or other person has made to the property and to your lifestyle or personal choices.
3. Forming the Trust can be used to promote family harmony and avoid problems on death. You can make the Trust flexible so that your property remains within the Trust and can be used to provide for the family after your death.
4. The property in a family Trust can be sold without a Grant of Probate and this avoids delays on death and avoids paying the court fee.
5. Peace of mind – being free of property ownership, by passing on the responsibilities and financial burdens to the trustees.
6. You can retain a place to live for as long as you wish, and you could also retain an income should the property be sold or rented out.
7. The trustees do not own the property in the Trust fund outright. This is an important distinction between using a Trust and an outright gift. The property does not belong to family members until your own death, and is therefore not available to the recipient's creditors or other third party claimants.

(9.11) Disadvantages of setting up a family Trust

1. Where a property has been transferred to a family Trust, the trustees decide what will happen with that property. Although they must operate within the terms of the Trust, once a property has been placed in a Trust, there is an element of loss of control.
2. If you wish to raise a loan on your property, then you will not be able to achieve this.
3. You may lose valuable tax reliefs upon your death.
4. It is important that the trustees have cash with which to maintain your property to avoid the Trust being treated as a sham.
5. Depending upon the value of your home, there may be inheritance tax to pay.

How Farley Dwek can help you

As a firm of Solicitors, we have the legal resources to set up a Trust for your relative.

Given our specialist expertise in the area of Care Funding, we can provide them with the right legal advice in terms of what type of Trust to set up, based on their individual circumstances. As Solicitors, we can also act as Professional Trustees within the Trust.

Please remember, Trusts are not just for the rich. A Trust will help to protect their assets no matter what their value. If their assets are worth more than the current threshold of £23,250 then you should protect them.

If you would like to know more about how our Trust Service works please do not hesitate to call us today on 0800 011 4136 or 0161 272 5222, or visit our website www.farleydwek.com for more information.
There will be times when your relative will need to provide their consent both to the NHS and to the Local Authority to share personal information about their healthcare needs, and also share that information with their advocate.

As long as your relative has the capacity under the Mental Capacity Act 2005, they can provide that consent either verbally, or (preferably) in writing.

However, life is precarious. Your relative’s mental or physical health could change very quickly - whether due to declining health, or as a result of an unpredictable life – changing event, such as a catastrophic stroke, accident or stressful event. Once it is determined that they don’t have mental capacity to make decisions for themselves, their advocate will have to apply to the Court of Protection for a Deputyship Order in order to gain ‘control’ over their affairs. This can be expensive, and most importantly time consuming, causing delays whilst critical (perhaps even life-saving) decisions may be put on hold.

If your relative sets up a Lasting Power of Attorney (LPA) whilst they still have mental capacity, then this issue won’t arise. A Lasting Power of Attorney is a binding document made whilst you are alive, and before you lose mental capacity, that transfers power to another person you have specifically chosen, known as your ‘attorney’, to make your decisions about your own health and welfare, and/or property and financial matters on your behalf – as if you were making those decisions yourself. The LPA protects your health and financial interests at a time when you can’t, and ensures that your appointed representative (attorney) will act in your best interests at all times.

There are two types of LPA:

- Property and Financial Affairs.
- Health and welfare.

You can have either or both types of LPA. We strongly recommend getting both for maximum protection.

(10.1) Who can make an LPA?

Anybody who is over 18 and understands what they are signing, when making an LPA.

(10.2) What are the differences between the two types of LPA?

An LPA for property and financial affairs

This type of LPA allows your attorney to deal with your financial affairs. For example: to pay your bills, sell your property or investments and operate your bank accounts. Unless you specify otherwise in your LPA, you can allow your attorney to use your LPA even though you still have mental capacity to make financial decisions yourself. This can be helpful if you are unwell or on holiday for an extended period of time.

An LPA for Health and Welfare

This type of LPA allows your attorney to make decisions about matters such as your medical treatment, your diet, where you
live and how you spend your time. Unlike the LPA for Property and Financial Affairs, your attorney can only use it when you have lost the mental capacity to make decisions yourself.

Your attorney cannot make decisions about life-sustaining treatment unless you specifically allow this in the LPA. Life-sustaining treatment includes ventilation to help with breathing, feeding through a tube and resuscitation.

(10.3) How do I make an LPA?

An LPA must be made using a specific form. There is a different form for each of the two types of LPA. The form is simple to complete but you should make sure that you have thought carefully about the three categories of people who will perform different roles in relation to your LPA:

- Attorney(s).
- People that will be notified before your LPA is registered.

You will also need to consider the decisions that you would like the attorney to make on your behalf, including how they will make those decisions, and whether there should be any limits on what they can do. More information on each of these is provided below.

If you have not completed the form yourself, you must read everything very carefully before signing the document. It is a legal requirement that everyone signing your LPA must read “Your legal rights and responsibilities” section. This provides you with information about how your attorney can use the LPA.

Once the form has been completed, it must be signed in the right order. You must sign first, then the Certificate Provider, and then your attorney.

The LPA must be registered before your attorney can use it.

(10.4) Who can act as my attorney?

Ideally, you should only appoint people that you can trust to act as your attorney. We refer to ‘attorney’ in the singular, but as you will see below you can have up to 4 attorneys. Typically, most people look to the following categories when choosing their attorney:

- Family members
- Friends
- Professional advisors such as your solicitor or accountant

You should also consider practical issues such as whether it would be better to have an attorney who is geographically close to you. You should also consider the time, skills and expertise that each attorney has in relation to what they may need to do. If you choose to appoint a professional attorney you will need to pay them for their services but you can also pay other attorneys if you wish.

(10.5) Can I have more than one attorney?

It is possible to appoint more than one person to act as your attorney (usually up to 4). You can also appoint replacement attorneys. This is useful as an insurance policy in case one of your attorneys cannot act. You can appoint more than one attorney in the following ways:

- Jointly. If you appoint attorneys to make decisions jointly, then they can only act together and must agree unanimously on every decision, however minor or important. This may prove inconvenient, particularly for day-to-day decisions. Your LPA will be terminated if one of the attorneys can no longer act unless you have appointed a replacement attorney(s).
- Jointly and severally. If you appoint attorneys to make decisions jointly and severally, they may act either together or independently. This provides more flexibility than appointing attorneys to act jointly, and means that the remaining attorney(s) can continue to act even if one of them becomes incapable of doing so. The downside of this flexibility is that one attorney may act in a way that the other attorney(s) would not endorse. Arguably, however, you should not appoint an attorney to act at all if you don’t trust that person to act alone.
- Jointly when making some decisions and jointly and severally when making other decisions. This option may provide a compromise between allowing sufficient flexibility for attorneys to act independently in relation to day-to-day matters, and jointly in relation to more important decisions. You will need to decide which decisions the attorneys have to take jointly.

(10.6) How can I control what my attorneys can and cannot do?

Restrictions imposed by law

The law limits what your attorneys can do and how they must act. The most important rule is that an attorney is only allowed to act in your best interests. Another important rule for an attorney for financial decisions is that they must keep accounts and submit them to the Office of the Public Guardian (OPG) on request.

Other rules include:

- Strict limits on the kinds of gifts that an attorney for financial decisions can make on your behalf. For example, they can give birthday, Christmas and wedding presents, but they can’t make gifts for inheritance tax planning, or pay school fees for grandchildren without making an application to court.
- The law against euthanasia and assisted suicide. Your attorney cannot break the law even if you try to allow them to do so in your LPA for health and care decisions.
Instructions from you

You can also place additional restrictions on the authority of your attorney in the LPA, by specifying instructions that they must follow in section 7 of the LPA form. Common instructions in an LPA for Property and Financial Affairs include:

- Requiring your attorney to submit annual accounts to a person of your choice.
- Allowing your attorney to appoint an investment manager to make decisions about your investments.

Common instructions in an LPA for Health and Welfare include:

- Specifying that you would like your attorney to ensure that you have a particular diet, for example, a vegetarian diet.
- Allowing your attorney to agree to residential care only if your doctor confirms that you are unable to live independently.

Preferences

You can provide your attorney with advice in your LPA about how you would like them to manage your affairs. This indicates your preferences, rather than something which your attorney must do. For example, you might say that you would like (ie prefer) to be cared for in your own home and must not be put into a care home.

(10.7) Who checks that my attorney(s) are acting properly?

You shouldn’t appoint anyone that you don’t trust to act as your attorney! The OPG oversees attorneys and deals with any complaints that arise about the way that attorneys are exercising their powers.

(10.8) People to notify

When making your LPA, you have the option to nominate up to 5 people to be notified when you (or your attorney) apply to register the LPA at the OPG. Any people that you specify should be people who are involved in your life and who know you well. The notification acts as a safeguard by allowing them to raise any concerns that they may have at the point of registration.
(10.9) Certificate Providers

You need just one Certificate Provider - an impartial person who is qualified to act in one of two ways:

- They are a professional (for example, a GP or your Solicitor).
- They have known you for at least two years.

A Certificate Provider must be independent. For example, it is not possible for any of your attorneys, a member of your family or a member of an attorney's family to act in this capacity. The LPA form contains a full list of those who cannot act as a Certificate Provider.

When completing and signing the form, the Certificate Provider will be certifying that:

- You understand the meaning of the LPA
- You have not been put under pressure to make the LPA
- There has been no fraud involved in making the LPA (ie no dishonesty or scam involved)
- There is no other reason for concern

Again, the certificate is a safeguard for you because it is confirmation from a qualified third party that you understand what you are signing and that you have decided to make it yourself, without pressure from others.

(10.10) Registration

You or your attorneys can register your LPA with the OPG at any time. However, your attorney can only use your LPA to make decisions on your behalf after it has been registered. You will need to decide whether you want your LPA to be registered immediately.

If you wish to register your LPA immediately, you or your attorney will need to complete sections 12 to 15 of the LPA and give notice to any 'people to be notified' using form LP3. You will also need to pay the OPG registration fee (currently £82 as at June 2019). If the LPA will not be registered immediately, these sections of the LPA form should be left blank until you are ready to register.

Advantages of immediate registration

The advantages are that:

- The OPG checks the LPA so any problems will be found immediately. If the LPA is not registered until you have lost capacity, you won’t be able to rectify any errors and the LPA may be invalid - so your attorney(s) will not be able to use it.
- The LPA is ready to use if it is needed in the future. As the registration process can take eight to ten weeks, delaying registration until you lose mental capacity can cause an inconvenient delay when the LPA is required.

Disadvantages of immediate registration

The disadvantages are that:

- The registration fee (£110 per LPA) has to be paid straight away.
- Over time, you may decide that you want to revoke your LPA and make a new one. If you have already registered your LPA, you will need to pay a second registration fee to register the new LPA.

How the LPA is used after registration

Your attorney(s) can use a registered LPA for property and financial decisions either before you lose mental capacity (with your agreement), or afterwards. Your attorney(s) can only use a registered LPA for health and welfare decisions after you have lost mental capacity.

When your attorney starts using the LPA, they may need to provide evidence of their authority to act for you to banks, utility companies, the Local Authority, your doctor, care homes and other third parties, etc. The requirements of each individual or organisation will vary. For example, some may need to see the original registered LPA, while others may only want a photocopy. Your attorney should avoid sending the original registered LPA by post to a third party and offer to supply an office or certified copy instead. Your attorneys can get office copies from the OPG at a cost of £35 per document. Alternatively, a solicitor or accountant can certify a copy of the LPA, confirming that it is a true copy of the original registered LPA.

How Farley Dwek can help you

As a firm of solicitors, we have the legal resources to set up Lasting Powers of Attorney for your relative.

Given our specialist expertise in the area of Care Funding, we can provide them with the right legal advice in terms of what type of LPA to set up, based on their individual circumstances. As solicitors, we can also act as Professional Trustees within the LPA. It’s often a good idea to use the same firm of solicitors for their LPAs as those acting for them in other matters, as they should already be familiar with their personal circumstances.

If you would like to know more about how our Trust Service works please do not hesitate to call us today on 0800 011 4136 or 0161 272 5222, or visit our website www.farleydwek.com for more information.
Almost 70% of people in the UK have not written a Will – which is a startling figure when you consider how important it is to have a Will in place. Read on...

If you die without having made a Will then your assets will be considered to be ‘Intestate’. That means that your family will have to apply to the Court for a Grant of Probate, which sets out how your assets are divided up.

If you are married then normally your assets would pass automatically to your spouse.

If you are not married or your spouse has passed away, then normally your assets would be divided equally between your children or other relatives. But, unfortunately, there can often be disputes about who is inheriting what.

There are also legal costs associated with applying for a Grant of Probate, and even more legal costs involved if there is a dispute. These costs (and potential disputes) can be easily avoided by making a Will.

There are also lots of other personal matters that you can deal with in a Will. Some examples include:

- Provisions for the care of children
- Gifting jewellery or other possessions to specific individuals
- Arranging donations to charities
- Making provision for the care of pets
- Setting out funeral arrangements

All of which are good reasons to make a Will.

There are also many misconceptions about who can inherit your estate. If you haven’t made a Will, the following people can’t inherit your estate:

- Unmarried partners – no matter how long you may have been together – there is no such thing as a ‘common law spouse’ in law.
- Relations by marriage – i.e. your brother-in-law
- Close friends
- Carers
- Same sex partners who are not in a Civil Partnership or Married

Again, the list goes on, and so it makes even more sense to make a Will.

(11.1) Why should I make a Will?

Making a Will is the only guaranteed way that you can ensure that your estate passes to who you want.

It is vital to have a Will if you are unmarried, have children, have a business, are concerned about inheritance tax, care home fees, have been married before, or cohabit.

Myth buster – *if you are not married you will not automatically receive anything from your partner’s estate.*

(11.2) What is my Estate?

Your estate is everything that you own whether jointly with another person or in your sole name. This can include a house, cash, investments, shares, your car, and your personal items like jewellery, watches, antiques. Your estate can also include your digital estate such as your i-tunes purchases or PayPal account.

(11.3) What should I include in my Will?

There are certain important aspects to your Will which include:

- Your Executors and Trustees
- Who you want to receive your estate; and, more importantly
- How they should receive your estate

There are also other provisions you can include, such as your funeral wishes, any specific or cash legacies, nomination of guardians for your children, and provisions for your business.

(11.4) What are Executors and Trustees?

In most cases these will be the same people. Your Executors are responsible during the administration of your estate, dealing with the assets of your estate, and then distributing them in accordance with the terms of your Will. This role can involve: closing your bank accounts, selling shares/investments and selling your house. Your Executors are also responsible for paying any debts.

At the end of the administration (when all the assets have been realised and debts paid) your Executors may need to take on the role of Trustees to look after the assets if there are any trusts created by your Will; for example, if there are any children under 18.

Myth buster – *You can appoint a Beneficiary as an Executor*
(11.5) Appointment of Guardians

In your Will you can nominate one or more people whom you would like to look after your children if they are under 18. This provision cannot supersede a parent’s right if they have parental responsibility, but it is an important consideration should both parents pass away.

You can appoint the same person to be both an Executor and Guardian, but it is a big responsibility, and many clients feel more comfortable having different people in this role.

(11.6) Cash/Specific Legacies

These are used where you want to give a specific amount of money or a specific item to someone or a group of people.

For example, “I give £1,000 to each of my grandchildren” - this would allow £1,000 each to be given to however many grandchildren you had at the date of your death.

Generally speaking, where you wish to leave items, we usually refer to a side Letter of Wishes.

(11.7) Your Residuary Estate

This is usually the largest part of your estate for distribution, and is calculated as the balance remaining after deduction of your debts, funeral expenses, any cash or specific legacies and the costs of administering your estate.

You can leave your Residuary Estate:

• To one or more than one person
• To charity
• In trust (see below)

You should also think about where your estate would go should your first beneficiary die before you, and what would happen if none of your beneficiaries survive (we call this the ultimate default clause).

How Farley Dwek can help you

As a firm of Solicitors, we have the legal resources to set up a Will for your relative.

Given our specialist expertise in the area of Care Funding, we can provide them with the right legal advice in terms of what type of Will to set up, based on their individual circumstances. As solicitors we can also act as Professional Trustees within the Will. It’s often a good idea to use the same firm of solicitors for their LPAs as those acting for them in other matters, as they should already be familiar with their personal circumstances.

Independent Financial Advice

Regardless of whether your relative is eligible for NHS Continuing Healthcare Funding, we strongly recommend that they seek Independent Financial Advice in relation to the funding of their care. An Independent Financial Adviser will review their personal circumstances and provide them with recommendations about how to make the best use of capital.

We can help with Independent Financial Advice through Farley Dwek Financial Services.

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