

LegalWeek

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Event: Legal Week Trust and Estates Litigation Forum

The trouble with people

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Trust & Estates Litigation Forum

With jealousy, greed, suspicion and a desire for control all having the potential to affect decision making, a panel of experts at the recent Legal Week Trust and Estates Litigation forum discussed the importance of capacity when handling clients' affairs

Joshua Rubenstein, Katten Muchin Rosenman: There are many examples of family succession planning gone disastrously wrong that have played out before the public eye time and time again, yet people seem not to learn from their mistakes. Common recipes for disaster are: marrying the trophy wife; marrying the caretaker; deathbed marriages; balancing multiple families; successioning the family business; and living too long.

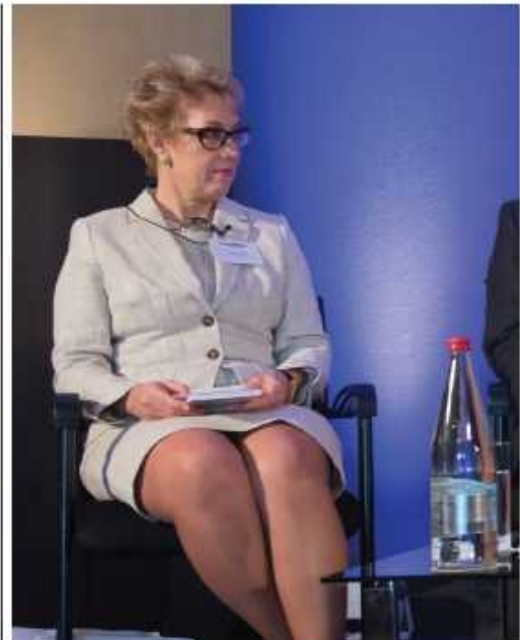
Almost all of these scenarios have, as a common denominator, the patriarch or matriarch's ageing and then either doing something controversial or having someone else take advantage of their weakened condition.

Dr Nori Graham, vice president of the National Alzheimer's Society of England: Everybody is living longer and inevitably this means that lawyers dealing with big estates and large sums of money are having to make decisions about older people whose capacity to manage their own affairs is in question.

I want to stress the importance of the Mental Capacity Act 2005. The principle underlying its provisions is that a person has capacity until

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Robert Brodrick



proved otherwise, and in cases of uncertainty you should try and maximise the extent of such capacity. So when you're helping somebody who is having problems understanding how to make a decision you need to that ensure they are as comfortable as possible, they are in familiar surroundings and that enough time is available for them to grasp the issues involved.

If someone does not have capacity, then the person acting on their behalf should act in their best interest.

Why does somebody not have capacity? What are the major disorders that one has to think about? Because of the aging of the population, dementia is now the most important group of disorders. There are more than 100 different types of dementia, the commonest types being Alzheimer's disease and vascular dementia. We have to remember the other two groups of mental disorder: affective disorders (depression, hypomania, bipolar disorder) and schizophrenia.

All three groups of disorders can happen at any age. Dementia can start in people in their fifties or even earlier. When you are dealing with an older person you should have a pretty low threshold to the possibility of the person having a dementia.

The English system now includes the possibility of making a lasting power of attorney (LPA). There are two sorts: one for personal and welfare issues, and the other for legal and financial affairs. I urge everyone at any age to make out their LPAs because in that way, while you are competent, you can

L-R: Dawn Goodman, Robert Brodrick, Dr Nori Graham and Joshua Rubenstein



appoint someone to act on your behalf should you become lacking in capacity at a future date.

Robert Brodrick, Payne Hicks Beach: Very often, when you come across a client, you have a good instinct as to whether the thing that they're wanting to do makes sense. You may well have acted for them for a long time and what they're planning to do is something that stacks up. But even then clients can be motivated by things that in hindsight could open the door to a challenge. That is where things get interesting.

Under English law an individual is free to change their mind; you have freedom of testamentary disposition so you can change your will, but obviously you have to have testamentary capacity. When someone is suffering from a form of dementia, for instance, there can be difficulty when deciding whether that prevents them from being able to execute a will or make a decision.

It's very difficult for us as lawyers to know when one needs to get an independent person in to make a determination or when you can trust your gut instinct that this is a rational and sensible thing for the person to be doing.

NG: First, if you have a diagnosis of Alzheimer's disease, this does not mean that you lack capacity. You have to go through the capacity questions: does the person understand what it is that they're making a decision about? Have they got the information to make that decision? Can they use

that, and then can they tell you about it – can they instruct you? It really is important to go through those questions carefully. If there's any uncertainty, the 'golden rule' states that you should get a medical witness.

RB: Then there's distinguishing between capacity and making unwise decisions. And obviously we're not always dealing with people who are just governed by the English test for capacity, we're often dealing with cross-border situations. Where people are making unwise or capricious decisions it does open the door for challenges.

JR: Under an English power of attorney, if you're not sure that the person has capacity, can you use a power of attorney to make a will or a trust?

RB: You can't make a will under a power of attorney but you can apply to the court if someone is lacking capacity for a statutory will to be made on their behalf. We frequently get involved when it's almost too late. Signing and sending the LPA off to be registered is often the kiss of death – you can guarantee that the person will be dead before it's actually registered. We need to encourage people to make LPAs much earlier.

JR: So under English law powers of attorney aren't effective until they're registered?

RB: They only are valid for very basic functions.

'How many of us have dealt with clients who think that what they should tell you is what you want to hear rather than what actually happened? Or that the right thing to do is to just give you a piece of the jigsaw and not the whole jigsaw?'

Dawn Goodman

JR: In the US we have two broad forms: those that are currently effective, and those that become effective later. Originally you only had the kind that were currently effective, and, as soon as you signed it, if you gave it to your kids, your kids could use it.

Then people became afraid that if they took a trip on the QE2 for six months they would come back to find that their estates had been probated. They didn't want to give their kids powers of attorney that were currently effective; they wanted to give them powers of attorney that didn't spring into effect until they were too incompetent to realise their kids were going to wipe them out.

So part of the problem is really finding the people to trust to give the powers of attorney to. People in the US have got into all sorts of trouble with these springing powers of attorney because it depends on your definition of when it springs into effect.

Dawn Goodman, Withers: Do you think that people are taking the same precautions over making lifetime transfer into trust when they've got an elderly client as they do when they're taking instructions for a will? This is an area that I think is going to cause a lot of difficulties, and work for us, for the next decade or so.

RB: The best possible safeguard is if you do have a longstanding relationship with the client, you are generally able to detect whether that is something that they would have done, and you're better able to detect whether they might be suffering from some sort of incapacity.

If it's a new instruction and you're meeting someone for the first time, you can generally detect if it's got the hallmarks of something that is going to be a problem, and then you've got to do the right thing and get the right medical advice because, if you don't, there will be problems. I think we've all seen those problems manifest themselves at a time when it's much more difficult to prove that the person was capable of making that decision in the first place because, by the time it becomes a problem, they're dead and you're just dealing with medical records and evidence from people who are often going to be wanting a particular result.

JR: In most states – I can't speak for all of them – the standard of capacity to make a gift is much higher than the standard of capacity to do a will. So you tend to worry more about a much easier standard of capacity to meet when you do a will, whereas you really should be worrying about the higher need business or contract standard of capacity required to make a trust or to do a gift.

DG: There should be, I think, a higher standard of capacity because, if you're making a lifetime disposition with the bulk of your wealth, there's another factor there that's not present when you're making a will: have you got enough to live on for





the rest of your life and deal with any contingencies, for example, if you needed to pay medical expenses or nursing home fees at the rate of £80,000 a year or whatever it happens to be.

NG: The central principle of the Mental Capacity Act is to ensure that the person making the decision is centre stage. It is really incumbent upon whoever is acting on behalf of that person to ensure that he or she is protected with enough money to live on for the rest of their life.

DG: Let's suppose that you have a client who's behaving a bit oddly, to put it mildly, and you feel that there's something playing here that is not quite within the normal ranges of behaviour. The first point is have they got capacity of course, but, supposing that you've come to the conclusion that they've got capacity, one of the common problems is can you rely on the truth that they are encouraging you to take down in the witness statement as being any resemblance to what happened?

We all know that truth is an extremely difficult thing because people's memories fade, they get affected by other issues, they get affected by cultural issues. How many of us have dealt with clients who think that what they should tell you for a witness statement is what you want to hear rather than what actually happened? Or that the right thing to do is to just give you a piece of the jigsaw and not the whole jigsaw?

That may be a cultural issue rather than being down to some sort of disorder, but you do have to be very careful that you test and look at the documents to check that what you're going to be putting forward is verifiable.

RB: I think we all have come across examples of people who, in a particular situation, typically in litigation, become completely obsessed and fixated. In other situations, they will be totally rational and totally normal and will present themselves normally.

DG: You do end up with considerable problems about them genuinely feeling they can assess the risks, a heightened sense of the justice of their case and therefore difficulty accepting that there might be any problems, a belief that all they've got to do is to get into the witness box and tell their story and everything will be fine when you know full well they're going to be an absolute disaster in the box.

Some of these problems could be exacerbated if there's a degree of mental disorder there. Then of course you've got the problem of your client being vulnerable, either just because of their personality traits or because of some form of disorder. What do you do if that's in a family context where, unless there's been a total breakdown of a relationship, they actually want to keep up some semblance of family relationship? Do you go and get injunctions against other members of the family? Probably not, but it's very difficult. How

do you try to protect your vulnerable client?

RB: It's incumbent on us as lawyers to try and make sure that, if there isn't someone there to speak for the vulnerable person, you encourage them to be either legally represented or at the very least to have another family member or preferably someone independent to help them through it and who is able to explain it in terms that the person is going to be able to understand.

NG: The trouble is that sometimes the independent person brought in may take advantage of the vulnerability of the person they are supposed to be helping.

RB: You have to find a way of easing that person out of the picture, whether it's by conflicting them in some way or persuading everyone that getting a second opinion is a good idea. There are usually ways of doing that. It's not easy but that will often help you towards the resolution.

DG: What happens when it's not your client that you're worried about, it's the other side? Is there any point in expending a lot of time and energy on settlement discussions hoping that you're going to find some common ground if you think their perceptions are completely off what you would describe as a normal scale?

If you think that this person is just spinning a whole load of fabrication to their lawyer, do you want to try and get to disclosure as soon as possible?

If you think that this person is potentially going to do something that's damaging to your client, what do you do then? Do you have to try and bring this to a conclusion as soon as possible, or do you take the view and say to your client: 'I don't think there's any point in us engaging with a view to trying to resolve this. You've either got to take a decision that you drop it or you've got to take a decision that you're going to press on to trial and get the court's assistance as soon as possible?'

JR: The example I want to close with is even though you need to be sensitive to people doing aberrational things, you can't use substituted judgement for them. People are allowed to be foolish, they're allowed to be mean. Leona Helmsley's estate was a very interesting example of that. She was dubbed the 'Queen of Mean' and left her \$7bn (£4.8bn) estate to her dogs. There was a long, contentious probate contest over that. She cut out her entire family. Her husband predeceased her, and she ended up doing time in jail for tax fraud. At the end of the probate contest, the court concluded that she was perfectly competent, she was just the meanest person who ever lived.

For more information about the Trust and Estates Litigation Forum visit trustsandestateslitigationforum.com.



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