

FAMILY DISPUTES AFTER DEATH: WHERE THERE'S A WILL...

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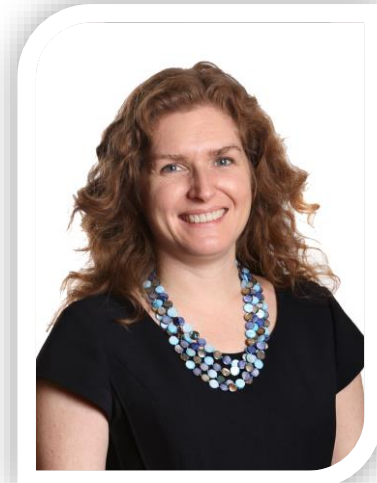


PHILIP LUMB

Consultant Solicitor

INTRODUCTION

- Our speakers:



MMMMM.....



WHY HAVE PROBATE CLAIMS INCREASED?



ILOTT V MITSON (MELITA JACKSON)




OTHER RECENT CASES

- R v Hampshire
- Adepoju v Akinola
- Re JS (Disposal of Body)



LAUREN ABBS

Wills, Trusts and Probate Solicitor

- 
- Individual signing a Will – how can I ensure my wishes are respected when I die?
 - Disappointed potential beneficiary – how can I bring a claim against the estate?

INVALID WILL

- Homemade Will
 - Witnessing issues, not valid at all
 - Valid but unintended outcome
- Professionally drafted Will
 - Far more unlikely to fail due to issue with formal validity
 - Marley v Rawlings
 - Solicitors Regulation Authority, Indemnity Insurance

INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

- Categories of individual eligible to bring a claim against estate on the basis that the deceased did not make adequate provision for them:
 - Spouse or civil partner;
 - Ex spouse or civil partner;
 - Child;
 - Individual treated as a child of the family;
 - Individual financially maintained by deceased at date of death;
 - Individual living with deceased as husband and wife for at least two years immediately preceding death

INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

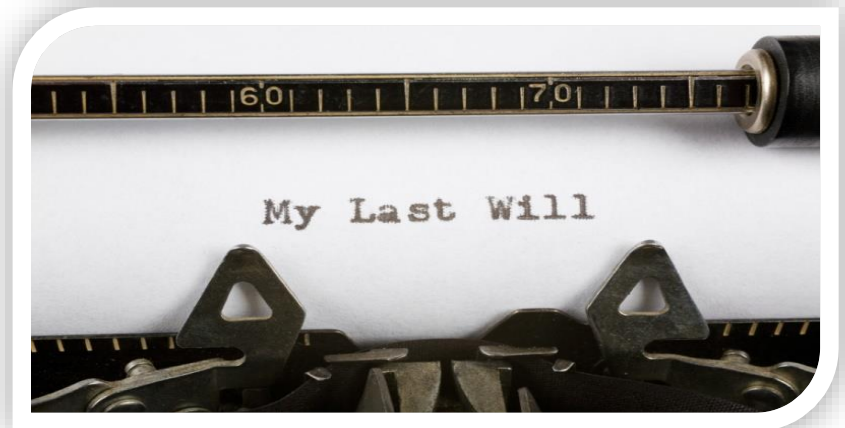
- Although an individual is eligible to bring a claim, this does not mean that their claim will be successful
- In determining whether or not an order should be made, the court will consider:
 - Size and nature of estate;
 - Moral obligations to claimant;
 - Mental or physical disability;
 - Conduct and letter of explanation;
 - Claimant category specific matters, for example,
 - spouse: length of marriage;
 - Financially maintained: extent to which deceased assumed responsibility/basis upon which responsibility assumed/length of time



- Disappointed potential beneficiary
 - If the court decides the deceased did not make reasonable provision for the claimant, it has the power to divide the estate differently to the terms of the Will and/or provide rights over certain assets



- Individual signing Will
 - Letter of explanation
 - Gift with no contest clause
 - Instruct solicitor to draft Will to advise on risk of claim and ways to protect wishes



INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975



DEREK AND PAULA'S STORY



- Derek, a senior bachelor, signed his Will in 1989
- His Will gifted his whole estate to his mother and step-father
- He owned his home in his sole name and had some savings
- In the early 90s he started dating Paula
- In 1996 Paula moved in with Derek. Derek's mother died in 2000 and his step father was diagnosed with dementia and moved into long-term care. Derek did not update his Will
- Derek died in December 2016, leaving his house in his sole name and some savings
- Paula, on the face of the legal documentation (Derek's Will and the Deeds to his house), had no right to continue living in Derek's house
- Derek's step-father died in January 2017, after inheriting from Derek and that inheritance will pass in accordance with his Will to RSPCA



- Paula has been left in a position, due to her personal financial circumstances, where she has little choice but to bring a claim under the Inheritance Act.
- Lessons we can learn from Derek and Paula:
 - The importance of keeping your Will under review;
 - There is no such thing as a “common law” marriage

TESTAMENTARY CAPACITY

- An individual must have sufficient capacity to execute Will in order for it to be valid
- Banks v Goodfellow



- Disappointed potential beneficiary
 - Claimant could be anyone who stood to benefit from previous Will (or, if no previous Will, the intestacy rules) may bring this claim
 - Unlike with an Inheritance Act claim, the court will not decide how the estate should be divided. The Will is valid, or it is not.



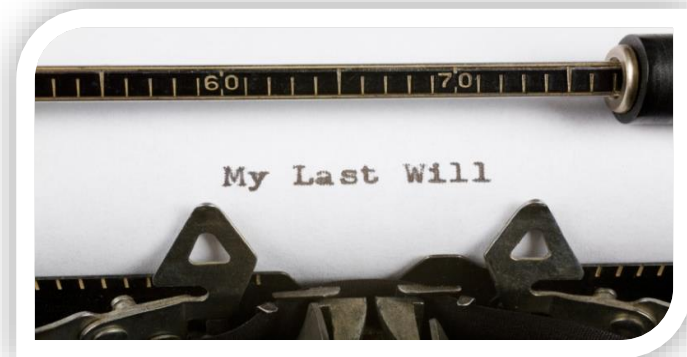
- Individual signing Will:

- Instruct a solicitor to draft Will

- Attendance note should recite Banks v Goodfellow test and confirm opinion with regard to capacity;

- The Golden Rule

- “the making of a Will by an aged or seriously ill testator ought to be witnessed or approved by a medical practitioner who has satisfied himself of the capacity and understanding of the testator, and records and preserves his examination or findings”



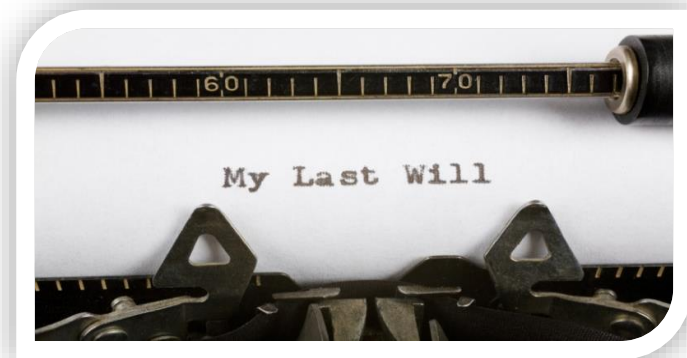
KNOWLEDGE AND APPROVAL

- In order for a Will to be valid, the testator must know and approve its contents
- Link with testamentary capacity:
 - To know and approve the contents of the document, the testator must have the necessary mental capacity; however
 - Having the necessary capacity does not necessarily mean that the testator knows and approves the contents of the particular Will



- Disappointed potential beneficiary
 - Claimant could be anyone who would benefit if Will is not valid or if part of Will is not valid
 - Claim could result in whole of Will being treated as invalid, or just a certain part(s).





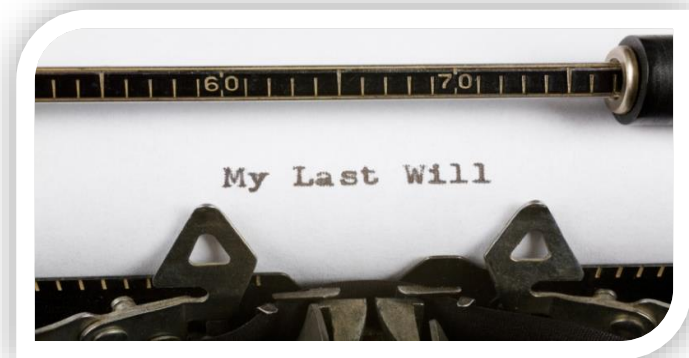
- Individual signing Will
 - Instruct solicitor to draft Will
 - Will should be explained in writing and face to face at signing meeting, with attendance note covering knowledge and approval

UNDUE INFLUENCE

- Spoken about more frequently than knowledge and approval, but arguably a more difficult claim to make
- Persuasion is not necessarily enough to amount to undue influence
- Coercion to the extent that it causes an individual to do something they did not intend to do



- Disappointed potential beneficiary
 - Claimant could be anyone who would benefit if Will is not valid
 - Very subjective claim and can be evidentially difficult to prove



- Individual signing Will
 - Instruct a solicitor
 - Solicitor will usually insist on meeting one on one to receive instructions

ERIC SMART



- I met Eric on Thursday 2 July 2015 at 4pm to obtain instructions for a new Will. He explained that he had two children, Lynda and Michael. He was in his late 80s and, due to his physical health, looking to move into long-term care local to his daughter in Kent. He owned his home, had cash savings, premium bonds and held some shares.
- He instructed me to draft his Will dividing his estate 20% for his son and 80% for his daughter.

ERIC SMART




- I was satisfied that he had the requisite mental capacity to sign his Will, so arranged for a draft to be hand delivered on Thursday afternoon and met with Eric to sign the final version on Friday 3 July 2015 at 11am. Due to the terms of Eric's Will and his physical frailty, I arranged for his doctor to confirm that he had the necessary capacity to sign the new Will. The soonest the doctors appointment could be arranged was the following Friday, 10 July 2015.
- Eric died before his doctors appointment on Wednesday 8 July 2015.
- Eric's son instructed a solicitor to challenge the Will...

ERIC SMART



- ... but dropped his claim following the first round of correspondence.

A graphic illustrating the iceberg metaphor. A small, snow-capped peak of an iceberg is visible above a calm blue sea. Below the waterline, a much larger, jagged, and complex structure of ice is submerged. The sky is a clear, bright blue with a few wispy white clouds. The text 'THE TIP OF THE ICEBERG' is overlaid on the image. 'THE' is in a small, white, sans-serif font. 'TIP' is in a very large, white, sans-serif font, with its base extending into the water. 'OF THE' is in a small, light blue, sans-serif font. 'ICEBERG' is in a large, light blue, sans-serif font.

THE TIP OF THE ICEBERG



TAMMY PARNELL

Partner and Contentious Probate and Trusts
Solicitor



ABUSE OF THE ELDERLY



A BIT ABOUT ME

- Solicitor, Partner at Clapham & Collinge LLP
- Qualified 14 years, Litigation and Family law background
- In 2014 I began studying to achieve the Qualification for the Association of Contentious Trusts and Probate Specialists.
- In 2016 became an Associate Member of the Association of Contentious Trust and Probate Specialists.
- The common thread of my legal practice has been resolving disputes within families.

THE STORY OF ANNE

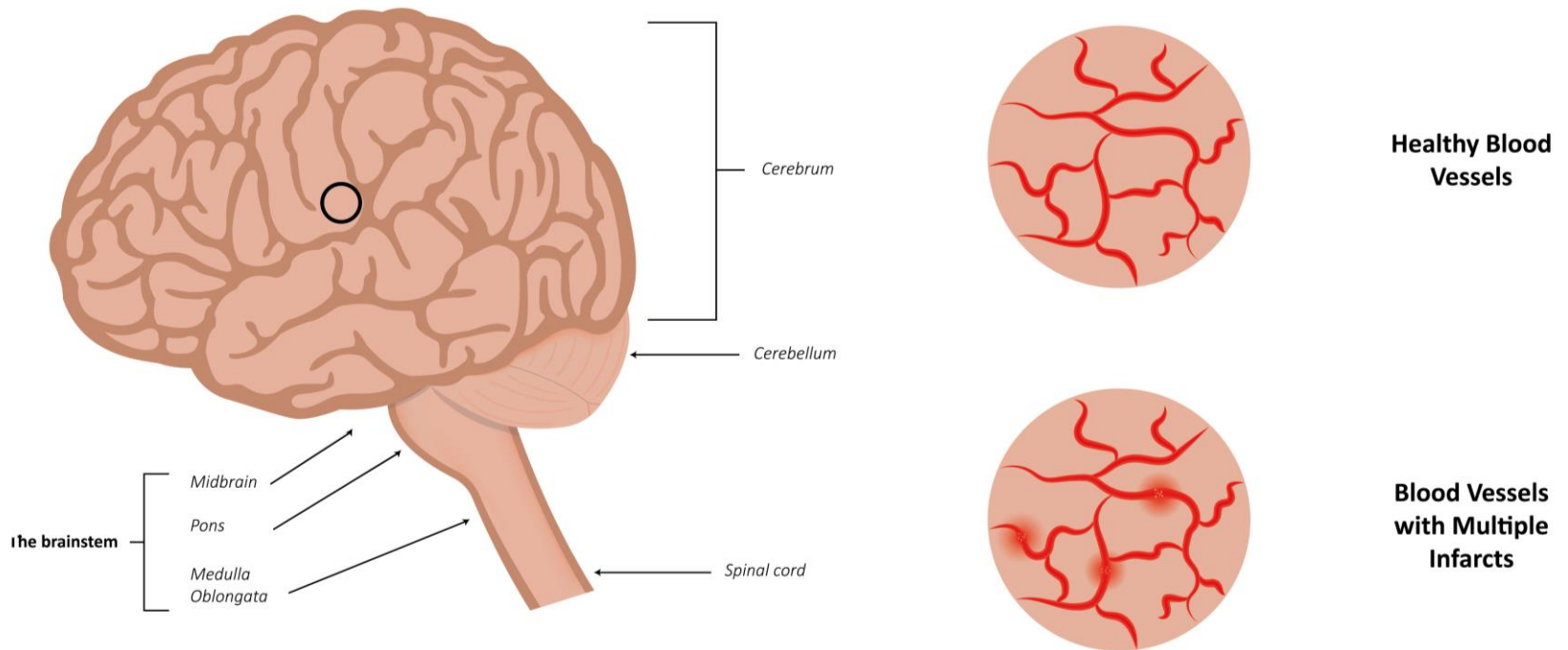


- Anne lives alone
- Her husband died a few years before her
- She had no children
- Her brother had three children, and they have all moved away to the other side of the country
- Her brother has also died now
- She has found herself in a vulnerable, isolated position
- She does have some people that she can rely on, a friend of the family, lets call her Pauline, and her husband Jim
- Pauline and Jim have known Anne for years, the families were close and so she trusts them
- Anne becomes immobile. She can no longer drive
- As she slides into old age she develops vascular dementia, she grows increasingly confused

A NOTE ABOUT VASCULAR DEMENTIA

"The word 'dementia' describes a set of symptoms that may include memory loss and difficulties with thinking, problem-solving or language. These changes are often small to start with, but for someone with dementia they have become severe enough to affect daily life. A person with dementia may also experience changes in their mood or behaviour." Alzheimers Society

VASCULAR DEMENTIA



VASCULAR DEMENTIA IS THE SECOND MOST COMMON TYPE OF DEMENTIA (AFTER ALZHEIMER'S DISEASE)

- It affects around 150,000 people in the UK
- The most common cognitive symptoms in the early stages of vascular dementia are:
 - problems with planning or organising, making decisions or solving problems
 - difficulties following a series of steps (e.g. cooking a meal)
 - slower speed of thought
 - problems concentrating, including short periods of sudden confusion

VASCULAR DEMENTIA

- A person in the early stages of vascular dementia may also have difficulties with:
 - memory - problems recalling recent events (often mild)
 - language – e.g. speech may become less fluent
 - visuospatial skills - problems perceiving objects in three dimensions
- It is common for someone with early vascular dementia to experience mood changes, such as apathy, depression or anxiety. They may be prone to rapid mood swings and being unusually tearful or happy
- Good days and bad days
- Importantly – Fluctuating mental capacity to make decisions

BACK TO THE STORY OF ANNE



- Anne begins to feel very depressed and lonely
- Pauline and Jim step up to help her with the shopping, around the house and with the garden
- It seems convenient for her to give them her cash card, to withdraw money from the bank. She can't get there herself and wants to have cash
- She feels that she has to pay them for the work they do in the house, cleaning, shopping and mowing the lawn, taking care of things
- All okay so far...

BUT, ALL WAS NOT AS IT SEEMED...

- It emerged that Jim was in a lot of debt and had been made bankrupt
- Jim and Pauline had 'borrowed' money from Anne
- Large payments had been made to them for their housekeeping/gardening/caring services
- Large withdrawals had been made from Anne's accounts, which were unaccounted for

WHAT HAPPENED NEXT?

- The bank called one of the nieces – they were concerned about unusual cash withdrawals
- The nieces went to visit their elderly aunt
- She told them that she was happy with the care and affection she was receiving from Pauline and Jim
- Anne was emotional, confused, highly susceptible to influence
- She was suspicious of her nieces motives and that they might try to move her from her house
- She refused to co-operate and wouldn't believe that her trusted Pauline and Jim would be capable of manipulating her
- The nieces involved both the police and social services, neither of which were particularly helpful, as Anne wouldn't say anything negative about her friends Pauline and Jim

THE QUESTIONS THAT NEED TO BE ASKED

- Often in cases like these, the indications are there, but it is difficult to prove abuse/undue influence at the time
- Question: Did Anne know about the money taken?
 - Did she have mental capacity to understand what was happening and to authorise the withdrawals of cash

WERE PAULINE AND JIM ACTING UNDER THE POWER OF ATTORNEY OR ON THEIR OWN ACCOUNT?

- The effect of a Power of Attorney is to give them authority to 'step into Anne's shoes' and act in her best interests
- It does not give them authority to use Mrs A's money as their own.
- Is there evidence of abuse? Can we find that evidence?

WHAT IS ABUSE?

- According to Age UK...

“Abuse is when someone we expect to trust causes us harm or distress. ”

ABUSE CAN TAKE MANY FORMS, INCLUDING FINANCIAL, EMOTIONAL, PHYSICAL AND SEXUAL.

- Examples are:
 - stealing or pressurising someone to hand over money
 - making decisions without consulting the person involved
 - treating someone in a way that makes them feel threatened, belittled or embarrassed
 - touching someone in a way they don't want to be touched
 - physically hurting someone
 - neglecting someone's needs
 - If an elderly person is being cared for, abuse can include not giving them enough food, not keeping them warm, refusing to take them to the doctor when they're ill, or stopping them from seeing friends and family

WHAT IS FINANCIAL ABUSE?

- **Some examples of financial abuse are when a relative or carer:**
- spends the older person's money on themselves when they're shopping for them
- refuses to let an older person decide what to spend their money on
- tells an older person they should give them money, perhaps by telling a hard luck story or by making the older person feel they're a burden
- moves into the older person's home uninvited, or pressurises the person to sign their property over to them or to change their will.

WHY IS IT HAPPENING MORE NOW?

- According to Action on Elder Abuse over 500,000 older people are victims of abuse each year
- The number of people with dementia is steadily increasing

CURRENT NUMBER OF PEOPLE WITH DEMENTIA IN THE UK

- Research conducted for Dementia UK: second edition shows that, in 2013, there were 815,827 people with dementia in the UK (Alzheimer's Society, 2014). 773,502 of these people with dementia were aged 65 years or over.
- In 2015, there will be 856,700 people with dementia in the UK in 2015 at the current rate of prevalence.

PROJECTED GROWTH

- If current trends continue and no action is taken, the number of people with dementia in the UK is forecast to increase to 1,142,677 by 2025 and 2,092,945 by 2051, an increase of 40% over the next 12 years and of 156% over the next 38 years.
- Internet making it easier to do DIY wills and LPAs easier to create online.

WHAT TO LOOK FOR

- Signs of abuse
 - Character changes
 - Isolation
 - Giving money to non-family members
 - Not being left alone with that person
 - Someone speaking for them
 - Hurry/pressure

WHO CAN HELP?

- Police - vulnerable persons unit
- Elder Abuse UK
- Age UK
- Alzheimer's society
- Solicitor



HOW DO SOLICITORS HELP?

- Often the abuse isn't discovered until after the person dies
- Prior to a death:
 - Solicitors can spot issues – expert private client solicitors are trained to be vigilant
 - Can liaise with the authorities where there appears to be an abuse situation occurring
 - Can apply for an injunction to keep a suspected person away

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- 
- If a family member is alleging abuse/undue influence:


Can also defend against accusations of undue influence by taking good notes, seeing the client on their own

- After a death:
 - Having an expert medical opinion into likely capacity
 - Take statements from relevant witnesses
 - Solicitors can gather evidence, find out what money has been taken
 - The estate needs to be complete – so if money has been taken out – it has to be returned and accounted for before it can be completed

AND ANNE?



- Anne gradually became more frail and ill, she required 24 hour care and moved into a care home. She passed away a few months later
- Her nieces discovered after her death that Pauline and Jim had been:
 - systematically withdrawing sums of money from her accounts
 - selling her jewellery and personal items, and keeping the money
 - paying themselves large sums of money for the 'services' that they had been providing to her
- Anne had changed her Will in their favour, making them executors in the Will and beneficiaries of her estate. Pauline and Jim had effectively got total control of her estate.
 - **They then came to us for advice...**

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- Urgent steps needed to be taken
 - We blocked the probate, by entering a CAVEAT at the probate registry
 - We gathered evidence including interviewing witnesses
 - We reviewed medical notes, to show that Mrs A didn't have mental capacity
 - Liaised with Pauline and Jim's lawyers
 - Mediation/Court options

LATEST NEWS

- On Tuesday 28 February 2017 data from Freedom of Information requests submitted by the BBC Radio 4 programme File on 4 revealed more than 23,000 allegations of abuse have been made against carers working in people's homes across the UK.
- Approximately 60% of all homecare is received by people with dementia.
- **George McNamara, Head of Policy and Public Affairs at Alzheimer's Society said:** "It is scandalous to hear of such disturbing abuse and neglect of some of the most vulnerable people in society in their own homes, hidden from public scrutiny."

LATEST NEWS

- The United Kingdom Homecare Association, which represents 2,000 care companies, described the findings as "horrifying" and blamed cuts to local government budgets.
- Between 2013-14 and 2015-16 there had been at least 23,428 safeguarding alerts across the UK, but only half the councils provided data when they were asked so the total will be far more.



PHILIP LUMB

Consultant Solicitor



QUESTIONS....



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UPCOMING EVENTS

- Legal Information Morning (North Walsham) – Saturday 8th April
- Dementia Training Workshop – Wednesday 26th April
- (Charity) Trustee Training Session – 14th June

To book your place or for more information, contact Louis Hilldrup-Boorman
on 01603 693579 or email lhb@clapham-collinge.co.uk

THANK YOU

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