Dealing with capacity

An application to the Court of Protection can give new opportunities for incapacitated people whose wills have left their affairs in a perilous situation, says Lynne Bradey of Wrigleys Solicitors LLP

THE GOOD NEWS is that we are all living longer. However, the downside of our increasing longevity is the greater likelihood of losing our physical or mental abilities. The number of people lacking capacity because of dementia and Alzheimer's disease-type conditions is increasing, and shows no sign of abating. Add to this the many people who have a lifelong learning disability – either congenitally or because of an accident or birth incident – and the number of people lacking capacity becomes increasingly significant, affecting more and more of us and our clients.

Incapacitated people may have estates that need to be dealt with for tax, family or other reasons. Yet if someone lacks capacity, they cannot make the will we would recommend, or consent to the gift or deed of variation that would make excellent sense from a tax or other perspective. This prevents us from providing the best possible service, and the client from resolving their affairs in the most efficient manner.

Court of Protection orders

Happily there is a solution. It comes in the form of an application to the Court of Protection for an order allowing our proposals to be carried out on behalf of the incapacitated person. It is a specialist area and one which is, even now, not widely known across the profession. The changes brought about by the Mental Capacity Act 2005 add a new dimension for practitioners.

An awareness of these applications and how to make them can only enhance client service and firms' reputations. Depending on the scope of retainers with clients, it could also keep indemnity insurers happy in the future.

The Supreme Court Costs Office assess fees for reasonableness at the end of the application and give authority for costs to be paid. Recovery is very reasonable. Although the Court of Protection billing procedure needs to be followed, please do not let that put you off. Even if you do not want or feel able to tackle these applications yourself, you will still be doing your clients a great service by raising the issue and pointing them in the direction of someone who does.

When would it be appropriate to approach the Court of Protection? The following examples will give a flavour of some typical scenarios.

Statutory will for Michael

Michael made a will 25 years ago leaving his estate to his mother Edna, and failing that, to his long-term friend Mary. The problem is that Michael's mother passed away 20 years ago, and Mary is the same age as Michael.

Michael has lost mental capacity. The concern is that if Mary dies before Michael, there will be an intestacy situation as there are no further provisions in the will. Michael's family situation is such that the issue of his uncles and aunts would be entitled. Some of the family live in Australia.

We know from Mary and from looking through Michael's address book that he was in contact with the daughter of his deceased uncle John, who now lives in Australia. He was also in contact with his uncle Albert, who has just died but has a son. Both of these relatives are on his father's side. He does not appear to have had any contact with relatives from his mother's side.

To save Michael's estate a messy and expensive intestacy, the court orders that we can make a will leaving the entire estate to Mary as before, but with substitute gifts to John's daughter and Albert's son or their issue if they predecease. The executors are also changed as the firm has ceased to exist.

Statutory will for Robert

Robert lost his mental capacity as a result of an accident two years ago, for which he received compensation. He was married 30 years ago and there were two children of the marriage before a divorce. He then cohabited with a partner Emma, and has three further children from that relationship. Although he was no longer in a relationship with Emma, she has cared for him, along with two of his children with her. He has little to do with his first family.

Feelings between the two families are not warm to say the least, and Robert has no will. Although two of Robert's children are his main carers, they do not want to ask for more than they would be entitled to under the intestacy rules. They do however feel that their mother should have something as she has cared for Robert. They also feel that the hospital which cared for Robert should receive something. As we anticipate that an unseemly and costly 'grant race' could result on Robert's death, we propose a will that appoints professional executors and divides the estate in accordance with the intestacy rules with legacies of 2 per cent of the estate to Emma and the hospital. Emma could have received more but did not want this.

Statutory will for Peter

Peter is now 20 and was injured in a car accident when he was four. His parents are his main carers and his compensation funded part of the purchase and adaptation of a new property, with his parents paying the rest.

Peter's estate is worth approximately £1.5m. There is a potential inheritance tax liability. Gifting would not be appropriate as the compensation is to look after Peter. We do however need to provide flexibly for Peter's parents, who will need to stay in the house in the short term and avoid too much of Peter's money being passed outright to his parents, who also have estates over the nil rate band. The court authorises a discretionary trust will, with Peter's parents, brother and wider family as potential beneficiaries.

Statutory will for Vera

Vera is a widow who suffers from dementia. She lives with Simon, who met her after her husband died and moved in with her 20 years ago. He used to do various jobs around the house but as Vera's arthritis and dementia have progressed, he has cared for her increasingly and now looks after her full time, day and night.

Simon had intended to move in to a flat connected to his son's house, and had given his son the proceeds of his house sale 20 years ago to allow the flat to be built. The son has remarried and Simon found out two years ago that the son's new wife's mother now lives in the flat, leaving him with no money and nowhere to go. No formal agreement was ever drawn up.

Simon is concerned that the residuary beneficiaries under Vera's will, made when she was in good health and Simon had a flat to live in after her death, will not allow him to stay in Vera's property after her death. He is in his eighties and feels vulnerable. The nieces who are the residuary beneficiaries have told him he will have to 'get out'.

We ask the court to approve a statutory will giving Simon a life interest in the property and a small fund of £5,000 for essential repairs. The nieces object. The Official Solicitor supports our application. In this case, an attended hearing is likely to be required. However, it is avoided at the last minute by a negotiated settlement.

Statutory will for Alan

Alan is a single man with one daughter. He gave instructions for a will to a firm of solicitors but never quite got round to signing it. He had an accident that left him without capacity. The will made provision for his daughter at age 25 and also for his former partner as well as two charities. His daughter is 19.

The court, after satisfying itself that circumstances have not changed, orders that a statutory will based on the will that was never signed, be executed.

Deed variation for Ellen

Ellen's husband died a year ago. She suffers from advanced Alzheimer's disease and is cared for in a home. She has an estate that is close to the nil-rate band and has inherited a further £300,000 from her husband. Despite the new inheritance tax rules, there can still be good reasons for executing the deed.

Ellen's income from pensions, attendance allowance and investment income covers most of her care fees. Her life expectancy is three to four years and the annual shortfall in fees is £4,500.

The court authorises a deed of variation diverting the nil-rate band to Ellen's children with the remainder to her. For reference, the court will not normally exercise its jurisdiction to make gifts for tax planning purposes that take the incapacitated person's estate under the nil-rate band.

Gifts from Nigel's estate

Nigel, a widower for some years, is cared for in a home and has Alzheimer's disease. He has a substantial estate of £760,000, mainly consisting of a house in London worth £700,000 which is about to be sold. His attorneys, his son and daughter, are concerned that there is potentially a very large inheritance tax liability on his death. They have taken advice about care fees and have already purchased a policy to cover the shortfall between Nigel's income and the fees for the home.

We ask the court to authorise gifts to reduce Nigel's estate to the nil-rate band. Although he is not expected to live for a full seven years, taper relief is available on the amount over the nil-rate band which has been gifted.

The children are the beneficiaries under Nigel's will. They elect to pass some of their gift direct to their own children. If Nigel does not live for seven years, the children and grandchildren will be responsible for the tax. To complicate matters, Nigel's daughter's husband's business is not doing well. The beneficiaries elect not only to place the daughter's gift into discretionary trust but also to set up a trust to hold the potential tax liability separately.

How to apply

Normally the deputy or attorney under either a Lasting Power of Attorney (LPA) or an Enduring Power of Attorney (EPA) will apply to the court for permission to execute the will or deed. Without an order for gifting, attorneys cannot make more than the normal seasonal gifts out of the donor's estate. Unfortunately, not all attorneys know that they need this permission.

The court fee will be £400. The court will also need medical evidence dealing specifically with the person's inability to make a will as well as life expectancy and likelihood of future care costs.

The court will also want a draft of the proposed will, a copy of the EPA or LPA and information about the incapacitated person, in the form of an affidavit about:

- family, including an up-to-date family tree;
- assets (to the extent that these are not clear from COP1A, the financial form which must also be submitted);
- income and outgoings schedule;
- current and future needs;
- full information on health, now and prognosis for the future;
- if the person is cared for by the NHS, whether they are likely to be discharged and to where;
- details of the financial circumstances of beneficiaries – such as employment, marriage, home ownership;
- the tax implications of the proposed action (income tax, inheritance tax and capital gains tax);
- details of how the proposed action will affect the person's resources;
- details of the patient's domicile and any effects of that on the application;
- details of any land which will be affected by the application;
- confirmation that the proposed executors are happy to act; and
- a copy of the patient's current will, if any. This is obviously important in statutory will applications, but in other applications, the court will want to check that a lifetime gift or variation is not adversely affecting people who will benefit under the patient's will.

The costs of the application are subject to assessment, and are usually met from the person's estate. The court does not have to order that costs are met from the estate and where a party has objected unreasonably or brought an application that was not appropriate, they may have to bear their own costs.

Mental capacity is an area with which clients need assistance, and are unlikely to be able or willing to tackle by themselves. An awareness of these issues can only enhance our client service and reputation, not to mention provide a real service to clients at often a distressing time.

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