

Avoiding estate disputes

Rigorous documentation around assessments of capacity should become the norm, especially considering the concerning rise in dementia figures, says Sir Robert Francis QC

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It has recently been reported that an estimated 850,000 people in the UK are living with dementia. With an ever-increasing life expectancy, this figure is expected to rise to over one million in the UK by 2025 and keep going. On a global scale, by 2050 it is predicted that over 150 million people will have dementia. It can affect the middle-aged as well as the more elderly. There were over 24,000 people aged between 60 and 69 reported as having the condition in England this year.



So what does dementia mean for the legal community, and in particular those advising on wills, probate, and trust affairs?

One of the more promising routes for family members who have been disinherited and wish to challenge a will is to argue that their relative was not in their right mind at the time of writing the will.

It is rare to go more than a few weeks without hearing in the news that a family member has been disinherited for one reason or another – the case of *lott v The Blue Cross* and others is a recent notable example. Increasingly, these disinherited family members have been citing mental incapacity as the reason behind the testator leaving them out of their will, but in reality it can be very difficult to actually prove that the deceased was not in their sound mind at the time of writing the will.

At the time of writing (or revisiting an existing) will, it is very important that adequate precautions are taken to ensure a testator has capacity, and that written evidence is kept, showing that all adequate precautions were taken.

External opinion

In some instances, it is worth obtaining an external opinion to prove testamentary capacity. It can be particularly difficult to acquire evidence of capacity retrospectively, especially after death. Taking preventative measures can greatly reduce the risk of a will being disputed later on.

A medical opinion by an experienced expert in mental capacity issues, properly instructed by the legal adviser with the questions to consider, is much more authoritative if offered by a doctor who has seen and assessed the testator directly and at around the time the will is to be made. It is also important that the assessor has access to the testator's medical history and records if required.

Those preparing wills on another's behalf, or revisiting an existing will, should carefully document the questions asked, showing that they have properly assessed capacity and came to a logical conclusion. Just because a practitioner may be challenged only rarely as to the capacity of their client does not mean that they should not be very careful in this regard, if they are to avoid potential disputes down the line.

Asking a potentially vulnerable person to prove capacity can be challenging and requires sensitive handling. Few of us will appreciate being told that others might think we lack the capacity to do what we want. This issue can, however, be circumvented by clearly explaining to the testator the perils of failing to document the important point of capacity for the preparation of a will.

Increase in challenges

So why is it that more and more wills are being disputed? More complex family structures is one big reason. It is increasingly common for people to marry more than once, to adopt children, or to have stepchildren as well as biological ones. This inevitably means that the number of potential beneficiaries can rise greatly, and by default then so too can the potential for discord and litigation when it comes to the will being read.

The other main reason for the increase in contentious probate is the growing value of property and a person's estate. Not only is the price of property enjoying

unprecedented growth, but on top of that the size of estates in the UK has increased owing to changes to inheritance tax and pensions. There is thus much more at stake, and claimants are very aware that, should they be successful in court, the potential reward can far outweigh the cost of litigation.

When writing a will, it is of paramount importance to ensure that all measures are taken to avoid a lengthy and costly dispute, especially where a vulnerable person is involved. Rigorous documentation around assessments of capacity should become the norm, especially considering the concerning rise in dementia figures.

Sir Robert Francis QC is head of the healthcare regulatory team at Serjeants' Inn Chambers