

# PEAK DEMENTIA, PEAK LITIGATION?

**Michael Mylonas QC looks at how practitioners can reduce the risk of a challenge to testamentary capacity**

The worldwide number of people living with dementia in 2015 was estimated at 47 million. By 2030, that figure will reach more than 75 million, and by 2050, more than 135 million.<sup>1</sup> The latter is equivalent to the combined populations of the UK and France with one new case being diagnosed every 3.2 seconds.<sup>2</sup>

This demographic timebomb has well- documented socio-economic consequences. It is also of critical importance for the international legal community and in particular those advising on wills, probate and trust affairs.

Between 2013 and 2014, the number of claims reaching the High Court in England and Wales involving a contested will rose by more than 80 per cent – and those claims represent only the tip of the iceberg, which looks set to increase in size as a result of several factors:

- **Increase in property values:** The enthusiasm for a challenge to testamentary disposition is directly affected by the amount in issue. A claim is not worth bringing unless the potential rewards justify the expense of litigation. Property prices have enjoyed unprecedented growth in recent years, and the values need not be very high in order to justify mounting a challenge.
- **Interest rates:** Historically low rates of interest since 2008 have also allowed older and more cautious homeowners to pay off substantial amounts of mortgage debt rather than borrow big and upscale. This means that parties have a share of the unencumbered property in their sights when assessing the merits of a claim.
- **Taxation:** Changes in domestic taxation laws – for example, inheritance tax and the laws governing pensions – will also have an impact on the size of the estate.
- **Blended families:** As we live longer, there is an increased potential for people to tire of one life partner and form a new relationship, complete with stepchildren or adopted children, as well as those born to the relationship. As the number of potential beneficiaries increases, so too the potential for discord and litigation.

The above, however, do not wholly explain the increase in the number of challenges. In part, the increase is likely to be a result of the publicity of some high-profile cases and public awareness that such a challenge can be brought. Another reason is that the ageing population presents a significantly greater risk that a testator's mind will be affected, whether by vascular disease or some other impairment.

Given that risk, it is more critical than ever that STEP members take adequate precautions to ensure not only that a testator has capacity, but also that they carefully evidence such precautions and where necessary, seek an external opinion confirming testamentary capacity.

Although it is possible to obtain expert and lay evidence retrospectively to address capacity issues, it becomes much harder after death, particularly in the absence of careful and focused questioning during life.

As part of our regular practice in the UK, members of chambers frequently advise in relation to the provision or withdrawal of life-saving treatment. Assessments of capacity are integral to those decisions, but even experienced and senior clinicians often fail to identify and address the correct issues. Those who regularly prepare wills must confirm that they are asking the correct questions to assess capacity and carefully documenting their conclusions. Challenges to capacity are unlikely to be a frequent occurrence in the working week of individual practitioners and the absence of challenges may well lead to complacency, with the result that advisors become overconfident in the robustness of their assessments.

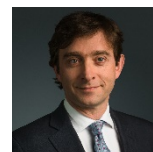
One factor that cannot be ignored is the embarrassment that a minority may feel when explaining to a client that capacity is in issue and will need to be assessed. Usually, it is possible to hold back the tide of righteous indignation by explaining the ramifications of a successful post-death challenge.

The advice and warnings noted above are important in the preparation of all wills. However, where the estates are larger, the range of beneficiaries more disparate and the planning more complex, the need to confirm capacity and reduce the prospect of challenge is paramount.

Rigorous, documented assessments of capacity should be the norm, accompanied by accessible training in firms. Templates of questions can assist those who are less experienced, and provide the evidential basis of assessment should a challenge ever materialise. As ever, ongoing review of those who perform assessments should serve to confirm that standards are maintained and have not slipped over time.

1 **World Health Organization, The Epidemiology and Impact of Dementia (2015), [bit.ly/2v0vwWt](https://bit.ly/2v0vwWt)**

2 **Alzheimer's Disease International statistics, [bit.ly/2h5wavK](https://bit.ly/2h5wavK)**



**MICHAEL MYLONAS QC**  
is head of the Court of  
Protection team at  
Serjeants' Inn Chambers,  
London