Post-mortem capacity assessments

Giles Eyre & Dr Linda Monaci provide practical insight into assessing a testator's capacity after their death

IN BRIEF

- Assessing mental capacity retrospectively is a difficult task: it is essential to instruct an expert, such as a neuropsychologist, to provide a mental capacity assessment on the basis of the evidence then available.

Case study

Marie was born in France but had lived in the UK for the last 35 years. She died of dementia aged 88 in a nursing home, leaving under her will a considerable wealth to her four children, but divided unequally, and a legacy to an unrelated younger man.

Two of her children who lived abroad instructed a solicitor to contest the will as they claimed she lacked capacity at the time that the will was made and that the assets should be divided equally among all four children, in accordance with her previous will, and that the gift of £20,000 she had made to a man in his fifties should not be allowed as they claimed he had been a younger lover of hers who sought fortune and had taken advantage of their mother.

Background history: Marie, from a child, had been a performing circus artist, travelling the world with the circus. She had had little formal education. She then married and lived with her husband who travelled between the US, the UK and the United Arab Emirates for 20 years. Her husband involved her in the management of his companies that owned several commercial properties in various countries. After he passed away, when she was aged 60, she decided to spend most of her time in the UK, where two of her children, together with their children, lived. Her other two children lived in France and Switzerland and had no children.

Marie continued, until shortly before her death, to enjoy going out for meals in high-end restaurants and taking her children and grandchildren on weekend breaks, which had been a regular feature of her adult married life. From time to time, she also enjoyed giving gifts. For instance, she was paying the private school fees for her grandchildren in the UK. Her previous will, made when she was in her sixties, had divided all of her assets equally between her four children, but unbeknown to her children she had made a new will in her late seventies, which assigned roughly 30% each to her two children living in the UK and 20% each to her two children living in Europe. This new will also included a gift of £20,000 to a man in his fifties, and provision that the university fees and loans of her three grandchildren in the UK would be paid from her estate before the assets were to be divided. At the time of her death, her estate was estimated to be worth £5m.

Marie started experiencing cognitive decline consistent with dementia in her sixties, but due to the slow progression of the condition, it was only formally diagnosed in her seventies and she continued to live in her own home (with some private support), which was the arrangement when the disputed will was made. During the diagnostic process, a private neuropsychological assessment had been carried out, and a brain scan showing significant areas of infarction within the white matter. This was two years before the last will was made, but no assessment of her capacity was made when making the will. Aged 84 she agreed to move into a specialist nursing home where she could be provided with adequate care and support.

Given the will was contested on the basis that Marie was thought to have lacked capacity when it was made, a clinical neuropsychologist was instructed to comment on this issue, but because the person to be assessed had already passed away, a 'post-mortem' capacity assessment was required. This task obviously presented some difficulties. The neuropsychologist had available the documentation in relation to the diagnosis of dementia made prior to the will, which was primarily concerned with Marie's ability to live safely, the level of support that she then required and what, if anything, could be done to ameliorate her condition. Additionally, the medical records (including GP records and the nursing home records) and the minutes of the meetings with the solicitor who drafted the will were available. The neuropsychologist was provided with witness statements from the four children and the younger man, and from the solicitor who made the will, together with his notes, which had included no direct consideration as to capacity or mental state. He had not been informed of the diagnosis.

The notes of Marie's solicitor had documented the conversations he had had about amending the will and the gifts; the solicitor was also interviewed as he had known Marie (and her husband) for many years. He was able to recall numerous details about Marie's presentation and behaviour over the years he had known her, which was helpful to put things into context. For instance, he told of many lavish meals and a generous lifestyle, so that it appeared less likely that treating her family members to relatively expensive outings meant that they were taking advantage of her (as claimed by Marie's two children living in Europe), but had been a normal part of her lifestyle before her health deteriorated.

Finally, there were statements from two carers, both now living in Poland, who had been involved in assisting Marie while she was still living at home. The neuropsychologist was able to speak with the two children living in the UK, who had had most involvement with their mother, as well as the solicitor to further clarify matters.

Legal principles

Capacity is to be judged in relation to the decision or activity in question and not globally. 'A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain' (s 2 Mental Capacity Act 2005 (MCA 2005)).

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But 'a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success' (s 1(3) MCA 2005).

Under s 3(1) MCA 2005, it is provided that 'a person is unable to make a decision for himself if he is unable—

a) to understand the information relevant to the decision,
b) to retain that information,
c) to use or weigh that information as part of the process of making the decision, or
d) to communicate his decision (whether by talking, using sign language or any other means).'

'The information relevant to a decision includes information about the reasonably foreseeable consequences of—

a) deciding one way or another, or
b) failing to make the decision' (s 3(4) MCA 2005).

To make that assessment more difficult 'a person is not to be treated as unable to make a decision merely because he makes an unwise decision' (s 1(4) MCA 2005).

The expert must address:

- Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works, whether the impairment or disturbance is temporary or permanent (the 'diagnostic threshold')?
- If so, does that impairment/disturbance mean that the person is unable to make the decision in question at the time it needs to be made (the 'functional' test)?

The expert must then go on to assess the ability to make a decision by answering the following questions:

- Does the person have a general understanding of what decision they need to make and why they need to make it?
- Does the person have a general understanding of the likely consequences of making, or not making, this decision?
- Is the person able to understand, retain, use and weigh up the information relevant to this decision?
- Can the person communicate his or her decision?

Specifically, in relation to the making of a will, the person making the will must be capable of understanding:

- the nature and effect of making a will—what it is they are doing;
- the extent of his or her estate—what it is they have to dispose of on their death; and
- the claims of those who might expect to benefit from the will—what expectations there might be among others as to what they might get under the will.

Further, in the rather arcane language of the time, 'that no insane delusion shall influence his will in disposing of his property' (*Banks v Goodfellow* (1870) LR 5 QB 549).

The expert's task

Carrying out mental capacity assessments is a complex task and must take into account the character of the person to be assessed, their beliefs, behaviour and values, both before and after their capacity was questioned.

For instance, in this case, the medical records indicated that Marie suffered from significant cognitive problems in her seventies, at the time the new will was made, to the extent that she needed support in order to continue to live in the community. However, experiencing cognitive problems does not preclude retaining capacity on a particular issue at the time the decision is taken. Marie had to move into a nursing home in her eighties due to the severity of her cognitive problems and the nursing home records show numerous incidents of behavioural problems and that Marie's cognition was so badly affected that she needed 24-hour care in order to maintain her safety.

Applying the legal principles set out above, the neuropsychologist had to decide whether (on the balance of probabilities) at the time the will was made Marie had an impairment of the mind or brain, or some sort of disturbance affecting the way her mind or brain worked, whether temporary or permanent (the 'diagnostic threshold'). The nature of her condition and the date of diagnosis satisfied the diagnostic threshold.

The neuropsychologist then had to decide whether at the time the will was made Marie was unable to make the decision in question at the time it needed to be made (the 'functional' test). To do that the neuropsychologist had to determine whether Marie had at that time a general understanding of what decision she needed to make and why she needed to make it; a general understanding of the likely consequences of making, or not making, this decision; was able to understand, retain, use and weigh up the information relevant to this decision; and could communicate her decision.

Although Marie was clearly affected by cognitive problems, the solicitor's meeting notes documented Marie's thinking and reasoning in relation to her will and the

Reflections, considerations & learning points

- Whenever any doubts arise as to capacity, it is essential to instruct an expert to carry out a mental capacity assessment to avoid possible issues later on. If any doubt arises when a solicitor is instructed to draft or execute a will for a client, at the least the client's GP—and in a more difficult case a neuropsychologist—should be instructed to advise, with specific questions asked of them in line with the tests referred to above. Advanced years or a degree of physical or mental frailty may well be indicators that care should be taken, but in the absence of either there may be cause to be careful.
- Solicitors should follow a golden rule—that the making of a will by an elderly person, or one who has suffered a serious illness, ought to be witnessed or approved by a medical practitioner who 'satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding' (**Kenward v Adams** [1975] CLY 3591).
- A professional person who witnesses a will will be inferred to have made an assessment of the testamentary capacity of the testator and could be challenged in writing or in the witness box, and asked to explain their experience and expertise in assessing testamentary capacity, as well as explaining how they came to their opinion. Therefore, a doctor witnessing a will must be able to justify the opinion reached on capacity from the evidence available and applying the test set out above. Notes of the interview should include a record of what the person making the will said and, in particular, anything said to explain the exclusion of potential beneficiaries or reasons for treating them unequally.
- The solicitor taking instructions for a will from a person of mature years, particularly one living on their own, should themselves consider the question of capacity and record themselves matters relevant to such an assessment, such as those mentioned in the previous paragraph, and as set out in the legal principles above.
- Assessing mental capacity retrospectively is a far more difficult task, and if any doubts arise, it is essential to instruct an expert such as a neuropsychologist, to provide a mental capacity assessment on the basis of the evidence then available.

- The expert must reach a conclusion on capacity, on the balance of probabilities, applying the statutory tests in MCA 2005. The statutory presumption is of capacity.
- The expert must justify their conclusion logically from the findings of fact, and the factual information provided, from the client, if still alive, from witnesses, from any lawyer involved and, where appropriate, from formal assessment. This will require consideration of all those matters set out above under legal principles
- It is important not to penalise a person for having limited life experience and lower educational attainment. An important consideration will be the person's ability to give instructions and seek, understand and follow the advice of their solicitor.
- Contemporaneous records, such as the solicitor's attendance notes, and contemporaneous medical or care notes are a vital source of evidence and are likely to carry much greater weight than the recollections of others and particularly family members.
- The evidence of independent witnesses with no financial interest in the outcome of the investigation is likely to carry greater weight than that of family members.

gifts and the reasons for a change of will. The noted discussion with the solicitor, and questions raised by the solicitor and by Marie, indicated that she appeared to have the ability to weigh up pros and cons in relation to making the will and its effects. The notes indicated that the man in his fifties to whom she wanted to give £20,000 did not appear to have been her lover, but was the husband of her cleaning lady who had worked for her since her husband had died and who had died a few years earlier, leaving two children. The meeting notes also indicated that Marie considered herself as having become less close with her two children in Europe and that they contacted their mother less frequently after she had refused to lend them money for two separate business ventures.

In summary, it appeared that Marie had often enjoyed a relatively extravagant lifestyle and that she had continued to enjoy what can be considered to be expensive meals and holidays with her family. Although a gift of £20,000 can be deemed a considerable amount of money, this was not a significant amount in the context of her wealth. In relation to the disparity in the treatment of the children, and the generosity towards the grandchildren, reasons were recorded in the solicitor's notes and it was apparent a discussion had taken place about the potential implications of the will showing inequality between her children. The meeting notes with her solicitor suggested that she had capacity at the time of making the disputed will.

Summary

There can be very real difficulty in carrying out a post-mortem assessment many years after the events to which they relate. Often there will be an absence of specific evidence other than a subsequent diagnosis. Here, there was sufficient evidence available in Marie's case from the solicitor's contemporaneous notes—even though he did not specifically address the question of capacity—to indicate her mental state at the time the will was made, and to provide explanations about the decisions made, and general evidence relevant to rebut suggestions of extravagance and partiality as a result of absence of capacity. **NLJ**

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