CAPACITY ISSUES IN LIFE AND AFTER DEATH, A FAMILY PERSPECTIVE

CASE STUDY

Polly is a 65-year-old woman who has been admitted to hospital following a surfing accident. She has suffered a severe injury to her brain. Polly is able to communicate with doctors and her family, however her recollection of events is confused and she struggles to follow conversations about her treatment or diagnosis. Polly is often forgetful, and has failed to recognise her partner and her children when they have visited. She is very unsteady on her feet, although she can mobilise with a frame. She needs help with the activities of daily living, and prompting to remember to eat, drink and take her medication. Her consultant has confirmed that she will require help from carers when she leaves hospital. She has expressed that she wants to return home, as she wants to sleep in her own bed, and take long dog walks on the beach. She doesn't think she needs care, and that she and Max will be fine.

Polly usually resides in Dorset with her partner Max, and owns a second home in Florida, where she spends around 2 months per year. Polly inherited the Dorset property from her family, and received the Florida property following her separation from her former husband.

Polly has two children from a former relationship, as does Max. All 4 children are now adults. During her life Polly has made regular weekly payments to her son, Sam, to support her grandchild who has autism and significant care needs. Max and Polly have been together for around 5 years, and are unmarried. They keep their finances separate. They each pay 50% of the day to day running costs of their home in Dorset, although the payments go from Polly's account by Direct Debit.

Polly prepared a Will (the 2002 Will) during her marriage to her first husband, and has not updated it since. They are financially separated, but not divorced, and remain on good terms. It leaves her estate to her first husband and then to her children. She was in the process of taking legal advice about her estate, and before her accident Polly also prepared a Will in Florida (the Florida Will), which gifts the Florida property only to Max. Max's Will leaves his entire estate to his two children. Max has tried to speak to Polly about her Wills, and how she wants to manage her money when she leaves hospital, but Polly doesn't seem to understand the difference between her Wills and her day-to-day money.

Polly has an LPA for Property and Finances but does not have one for Health and Welfare. The Property and Finances LPA appoints Max as her attorney.

Polly has stated she is looking forward to moving home again once she is discharged from hospital. Max has told the hospital he is concerned that their home in Dorset is not suitable for her anymore, as the floors are uneven and the stairs are narrow. He also has a busy social life, and particularly enjoys long golfing trips to the Florida property with his friends, and doesn't feel able to give Polly the care she needs. He would like to move Polly to a specialist care home. Max and his children live nearby the hospital and visit frequently, the hospital was not aware that Max's children are not Polly's biological children, and had been consulting with them about Polly's medical care.

Polly's two children have accused Max of not supporting Polly, and believe she should be moved back into her own home with care at home arranged.

Polly's children are concerned that Max is taking advantage of the situation to gain control of Polly's property and finances. They have arranged for Polly to prepare a new Will, and have instructed a solicitor to visit her in hospital to speak to her about making a new Will and also explore making an LPA for Health and Welfare. The solicitor has drafted the Will (the New Will), which gifts Polly's entire estate to her children. The New Will does not state whether it operates only in respect of Polly's English property or whether it operates for her worldwide assets. The solicitor has now raised concerns about Polly's capacity and has refused to arrange for it to be signed until a mental capacity assessment has taken place. He has also expressed concerns about her capacity to make an LPA for Health and Welfare.

Max is proposing to raise a mortgage against the Dorset property which he assures the family will be in Polly's best interests, as it will give him sufficient funds to pay for her care and renovations at the Dorset property, including a hot tub in the garden. He has also recently had a debt called in on him, which he was hoping would go away, and is going to struggle with his finances for a few months whilst he gets things straightened out. He is going to stop paying his 50% of the Dorset utility bills for a few months, and he is sure that Polly wouldn't mind. He has also been paying himself a small stipend from Polly's funds over the past few months whilst she has been in hospital, to cover the additional costs of parking, food and petrol whilst she has been in hospital, and to compensate him for the time he has spent managing her finances for her and making arrangements for her.

Whilst Polly has been in hospital, Polly's payments to Sam have stopped, and he can no longer afford specialist therapy sessions for his daughter. Sam has complained about this to Max, who has confirmed that he has stopped the payments on Polly's behalf.

Max has also announced to the family that following the accident, he and Polly have realised they want to make the most of the time they have left to them, and have decided to get married. Unsurprisingly Polly's children are not happy about this, and they have come to you to seek advice.

NB: Florida is not a community property or forced heirship state

Questions and answers

Pre-Death

1. **Who should be leading the discussions around Polly's discharge planning, and where she should live following her discharge from hospital? What should be taken into account in making the decisions about Polly's care?**

   The first thing to establish is whether Polly has capacity to make decisions about her care and accommodation. Ideally this assessment will be led by the social worker that is liaising with Polly about her discharge planning. On occasion a social worker will try and argue that due to the presumption of capacity, no assessment is needed. However, the Mental Capacity Act 2005 Code of Practice clearly states that where a person's capacity to make a specific decision has been questioned, then an assessment should take place. At paragraph 4.35 it gives the following non-exhaustive list of reasons why a person's capacity may be questioned:

- the person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision
- somebody else says they are concerned about the person's capacity, or
- the person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works and it has already been shown they lack capacity to make other decisions in their life.

Polly is making statements that call into question her capacity to make decisions around her care planning, and others also have concerns about her mental capacity in regarding this issue. Therefore, an assessment needs to be done.

The hospital can only comply with their duty of care if they consider that they are discharging Polly to a place where her care needs will be met, unless Polly is able to consent to this being overridden. Therefore, as Polly is an adult in their jurisdiction that may have needs for care and support, the Local Authority need to carry out a Care and Support Needs Assessment (s.9 Care Act 2014), so that it is clear what Polly's needs are.

If she has capacity to make decisions about care and accommodation for herself, then she should be supported to put in place whatever plans she wishes in respect of her ongoing care and accommodation. It may be that her decisions are unwise, but if she has capacity to make a decision about this, then she is able to do so. She should be supported by a social worker who can help her put in place the arrangements that she would like to see in place for her return home, should this be what she wants.

However, the fact that she asserts that she has no care needs, and she envisages that returning home will be just like it was before her accident would suggest that she isn't able to have the required insight into her injuries to enable her to understand the information that she needs to weigh up as part of the decision making process, including the reasonably foreseeable consequences of deciding, or failing to decide one way or another. Therefore, on balance, in Polly's case it is very possible that she lacks capacity to make this decision.

It is important to note that capacity to make a decision about accommodation does not necessitate capacity to make decisions about care (*London Borough of Tower Hamlets v A & KF [2020] EWCOP 21).* For a full list of considerations about what a person should be able to weigh up when deciding about accommodation, this note by 39 Essex Chambers has very helpful guidance: Mental Capacity Guidance Note: Assessment and Recording of Capacity | 39 Essex Chambers.

If Polly lacks capacity to make a decision, then a best interests decision needs to be made in respect of her ongoing care needs. It would appear on the facts that there is disagreement between what Polly and her children would like to happen, ie to go home, and what Max would like to happen. Therefore, the Local Authority will need to step in and take the role of the best interests 'decision maker' in the first instance. They should speak to all parties, and convene a Best Interests meeting where a decision can be made in respect of how Polly's ongoing care needs will be met. As the decision is in respect of where Polly should be living the long term, the Local Authority will need to consider whether to appoint an Independent Mental Capacity Advocate for Polly

(Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006) and What do IMCAs do and who should get an IMCA? - SCIE). However, as she has a good network of family and friends, it is unlikely that an IMCA will be appointed in the first instance. However, the Social Worker should still ensure that they have spoken with Polly about the options, with information about what each option will look like in practice, using tools such as photos and appropriate language as appropriate.

It is important that ahead of any Best Interests meeting, the options available to Polly are fleshed out, so that a discussion of the realistic options available to her can be had. For example, it is not sufficient to say 'a care home'. The specific care home in question should have been identified by the family or local authority, they should have carried out a suitability assessment in respect of Polly, information about costings and availability should be at hand. The same should apply in respect of any provision of care at home, and the Local Authority will have needed to assess the suitability of the Dorset house, with an Occupational Therapist report, and confirm what adaptations will be needed to make it suitable for Polly, and what care will look like on the ground to meet her needs.

At the Best Interests meeting, a formal record will be made of the views of all parties, including Polly, Max, Polly's children and anyone that is interested in her care such as a close friend. All parties should be encouraged to attend in person where possible. The decision maker will ensure that each person has had an opportunity to have their say, and then apply the s.4 Mental Capacity Act 2005 best interests criteria, and reach a decision.

If Polly had made an LPA for Health and Welfare, this would not be the case and if she lacked capacity to make decisions regarding care and accommodation, her attorney would be the decision maker, and would need to apply to criteria in s.4 MCA 2005.

Should a decision not be unanimous, then it is open to any party to make an Application, either on their own behalf, or on behalf of Polly to challenge the decision in the Court of Protection.

2. **What steps should the solicitor that is visiting Polly in hospital be taking from the following perspectives:**
    a. **Client care**
    b. **Money laundering**
    c. **Capacity assessments**
    d. **Will drafting**

Client care

The fact that Polly's children have made initial contact with a solicitor for Polly should mean that the solicitor dealing with the matter is on alert when dealing with Polly in respect of issues around capacity, undue influence and vulnerabilities. This is particularly the case as Polly's children are not her attorneys, and have no legal authority to instruct anybody on her behalf. They also have a vested interest in the outcome of any changes to her Will and LPA. The SRA have published a very helpful guide to solicitors in respect of what their duties are when dealing with vulnerable clients (SRA | Accepting instructions from vulnerable clients or third parties acting on their behalf | Solicitors Regulation Authority), and accepting instructions on behalf of a vulnerable client. Specific attention should be paid to Rule 3 of the SRA's Code of Conduct for Solicitors, which states:

3.1 You only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your client's wishes, you do not act unless you have satisfied yourself that they do. However, in circumstances where you have legal authority to act notwithstanding that it is not possible to obtain or ascertain the instructions of your client, then you are subject to the overriding obligation to protect your client's best interests.

3.2 You ensure that the service you provide to clients is competent and delivered in a timely manner.

3.3 You maintain your competence to carry out your role and keep your professional knowledge and skills up to date.

3.4 You consider and take account of your client's attributes, needs and circumstances.

The first step for any solicitor will be to assess Polly's capacity to instruct them. This is different to the capacity to make a Will or LPA. The SRA refer solicitors to a guidance note from the Law Society entitled Meeting the needs of vulnerable clients | The Law Society. However, when considering capacity issues, the note Working with clients who may lack mental capacity | The Law Society is also very helpful. It states:

You must be satisfied that your client has capacity to give you instructions on the matter you are dealing with. It may be appropriate for you to form an opinion about the client's capacity but there may be situations where you need to instruct a suitably qualified professional to undertake a formal assessment. If you do not, you may be at risk of sanctions. See our guidance on meeting the needs of vulnerable clients. See below for the practicalities of obtaining a capacity opinion for more information.

Different levels of capacity are needed for different transactions, such as making a gift or conducting litigation. You must assess your client's understanding in the context of the transaction, applying the relevant legal test of capacity (see below), and then consider whether the client can provide you with instructions on what they wish to do.

Even if you're satisfied that your client has the necessary mental capacity to make a specific decision, you still need to watch out for any signs that the client is subject to undue influence or undue pressure (see the section on influence and undue influence in our guidance on meeting the needs of vulnerable clients).

The solicitor acting may need to take steps in line with the Principles of the Mental Capacity Act 2005 to support and enable your client to have capacity to instruct a solicitor. A visit to Polly in hospital is likely to be needed, and privacy away from her family arranged. Whilst technically it is possible for Polly to give you written authority to take instructions from other people, such as her children, in light of the risks of undue influence and lack of knowledge and approval in respect of documents as important as a Will and LPA, great care would need to be taken to ensure that any instructions are given independently by Polly. The involvement of any third parties should be purely administrative (ie helping Polly access the internet).

If Polly lacks capacity to instruct a solicitor, then Max, as her attorney for Property and Financial Affairs can enter into contracts on her behalf, such as instructing a solicitor. However, Max cannot give instructions on a Will or LPA for Polly, as these are inherently personal instructions and such authority cannot be delegated.

Money laundering

The key thing to bear in mind is that Polly is the client where she is giving instructions, and therefore any money laundering ID must be in respect of her, not her children. If her children are paying in the first instance, as third parties, the solicitor will need to ensure that the client care letter reflects this, and that their source of funds are also clear. It would be best practice to also obtain their ID for money laundering purposes.

Polly may not be able to use online money laundering verification, and the firm will need to be sure that they do not preclude Polly from becoming a client as a result of these procedures, otherwise they may fall foul of Equalities legislation.

If Max were to give instructions on Polly's behalf, for example in the sale of the Dorset property, money laundering ID would need to be obtained for both of Max and Polly.

Capacity assessments

The solicitor visiting Polly will need to satisfy themselves that Polly has capacity with respect to the following in the first instance:

i. Instructing a solicitor
ii. Making a will
iii. Making an LPA for Health and Welfare

All of these have different tests, which are set out below.

Capacity to instruct a solicitor

In terms of when a solicitor is under a duty to investigate capacity, the leading case is *Hill v Fellowes [2011] All ER (D) 157*, which confirms:

'A solicitor is generally only required to make inquiries as to a person's capacity to contract if there are circumstances such as to raise doubt as to this in the mind of a reasonably competent practitioner'

'The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession'

This is in line with MCA 2005, i.e. sufficient doubt has been raised so as to require an investigation into capacity and rebut the presumption of capacity.

Capacity to make a will

Banks v Goodfellow (1870) still stands the test of time, as has been reiterated in numerous cases over the past few years. See answer '6' below for full details.

Capacity to make an LPA

The test for this is set out in The Public Guardian v RI & Ors [2022] EWCOP 22 (07 June 2022) (bailii.org). This case confirms that in order to make an LPA,

a person must be able to understand, retain, use and weigh up the relevant information regarding the below, and make a decision on the same:

- the effect of the LPA;
- who the attorneys are;
- the scope of the attorneys' powers and that the MCA 2005 restricted the exercise of their powers;
- when the attorneys could exercise those powers, including the need for the LPA to be executed before it was effective;
- the scope of the assets the attorneys could deal with under the LPA; the power of the donor to revoke the LPA when they had capacity to do so;
- the pros and cons of executing the particular LPA and of not doing so.

Will drafting

When drafting a Will for a client the solicitor should follow the golden rule. This is set out in *Re Key Deceased [2010] 1 WLR 2020 (Ch)* and was recently covered in some detail in *Leonard v Leonard [2024] EWHC 321 (Ch).*

The golden rule is that "*when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings*".

Although this is no guarantee against the Will being challenged, it is the prudent approach to ensure that a) the Will reflects Polly's genuine wishes, and b) there is proper contemporaneous evidence in the event of a challenge.

The solicitor drafting Polly's Will should take a cautious approach to Polly's capacity and, as they have done, request that a mental capacity assessment takes place.

Once requested, the solicitor should ensure that the report is completed in a timely manner.

The solicitor's next steps will depend on whether Polly is found to have capacity.

If the mental capacity assessment confirms that Polly does have mental capacity, it may be that certain steps need to be taken to ensure that she does in fact understand the terms of her Will. For example, Polly may be able to give instructions better in the morning, rather than later in the afternoon if she is tired.

The solicitor should also ensure that the instructions she has received are Polly's instructions, and not those of her children. He should ensure that he meets with Polly without her children and confirms that the draft Will reflects Polly's testamentary wishes.

Again, it is important that the solicitor takes instructions and, provided Polly does wish to execute a new Will, that the Will is executed within a reasonable timeframe of the capacity assessment taking place. What is reasonable will depend on the assessor's view of Polly's capacity.

If Polly does not have testamentary capacity, further advice will be needed in terms of whether it would be appropriate for a Statutory Will to be prepared. This will depend on factors including:

1. Whether she has permanently lost capacity, or whether she may recover in the near future.

2. Which assets fall into her estate and the costs involved, particularly bearing in mind that Statutory Wills do not cover immovable assets outside of England and Wales. It is likely that her family will wish for a statutory Will to be prepared to ensure that her Estate passes to Max and/or her children.

It would be helpful in these circumstances to understand the advice Polly had previously received in relation to her estate, and whether she had already expressed any wishes as to how her Estate should be divided.

3. **Max has made a number of financial decisions as attorney for Polly, and on his own behalf. What are your views about the following decisions, and do they pose any challenges from a legal perspective?**
    a. **Ceasing payments made on behalf of Polly's autistic grandchild**
    b. **Mortgaging the property to raise funds for:**
        i. **Polly's care**
        ii. **Renovations**
    c. **Stopping his utility payments at the Dorset property**
    d. **Paying himself a small stipend**
    e. **Spending extended time at the Florida property**

We assume the LPA has been registered. Max is only able to make the decisions on Polly's behalf if she lacks capacity to make them herself, or she has authorised him to do so:

"The attorney should allow and encourage the donor to do as much as possible, and should only act when the donor asks them to or to make those decisions the donor lacks capacity to make." Code of Practice 7.34

In accordance with the five principles in Section 1 MCA 2005:

a. S.1(2) - Polly is assumed to have capacity to make a relevant decision until it is determined she does not.

b. S.1(3) - Polly should be assisted to make the decision for herself, as far as is possible:

> "*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."*

Even if she lacks capacity, Max can only make decisions in Polly's best interests (s.1(5)). He must also consider any comments/restrictions within the LPA itself. Moreover, he must:

> so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him. (s.4(4)).

And consider/take into account:

i. Polly's past wishes and feelings
ii. Views of people engaged in Polly's welfare (most likely her children)
iii. Polly's beliefs and values
iv. Other factors she would likely take into account were she able to do so.

(*s.4(6) and 4(7) MCA 2005)*

In relation to the specific items:

a. Polly's grandchild

In *Re Various Lasting Powers of Attorney* the court referred to the Code of Practice at 5.48 and reiterated that the concept of a best interests decision is not limited to self-interest. It also distinguished between a gift and a benefit. It confirmed that where there is an established pattern of benefiting (as opposed to gifting to) another prior to the loss of capacity, such as to suggest that there is a moral obligation on the donor of the LPA to continue making the payment, where the payment is affordable to the donor, and it is in their best interests, that it can continue, and no specific Court of Protection authority is required.

Assuming Polly is unable to make this decision for herself, and the LPA contains no specific directions, Max should take into account her past wishes and feelings and her beliefs and values, both of which point to continued payment. Polly may well be able to give an indication of her current wishes and feelings as well. That being the case, it is likely there would have to have been a significant change in her financial circumstances for the (immediate) cessation to be in her best interests.

b. Mortgaging the Property – unless restricted P&A attorneys generally have the authority to buy and sell property. However:

i. Max should seek specialist independent financial advice before making major changes to Polly's financial set up, and ensure that any financial advice is directly solely at Polly's interests, not serving his own.

ii. The likelihood of funds becoming available for repayment is slim, meaning mortgaging may seem like a last resort. For an equity release you will need COP approval (Practice Direction

9D), and so by analogy it would be sensible to seek Court approval prior to entering into a mortgage arrangement.

iii. Given the potential for a dispute with Polly's children, it may be sensible to make an application to the Court in any event. Max's fiduciary duty means he cannot use his power to confer a benefit on himself, and there is a query as to how the remortgage funds are to be used.

iv. One might question whether it is more likely in Polly's interests to sell the Florida property to pay for any care costs.

v. Whilst it might be more justifiable in the sense of Polly's best interests to enter into a mortgage to provide care, the justifications for renovations - when Max is proposing Polly is going into care – are less obvious, unless:

1. the renovations are to allow Polly to reside at the property; or

2. there is persuasive evidence that short-term expenditure would disproportionately increase the value of the property.

c. Stopping his utility payments at the Property – this is not a decision he is making as attorney and it is difficult to see what enforcement options would be available to Polly. It is, however indicative of not acting in her best interests and gives rise to a potential conflict with the LPA. When considered alongside other patterns of behaviour as attorney it may lend weight to an application to revoke the LPA.

d. Stipend/Expenses – an attorney is entitled to recover reasonable costs incurred as a result of an LPA, but it does not seem he is visiting her in hospital in his capacity as attorney. He is not entitled to be paid for his time. Insofar as they are claimed to be gifts, this would exceed Max's powers under section 12 MCA 2005.

e. Florida Property – managing who is entitled to visit the Florida property is a decision about how to manage Polly's property and affairs. If she cannot make this decision, it is one the attorney is entitled to make. Given her Florida will gifts the property to Max, it is reasonable to assume she may be content for him to visit. However, there is a potential conflict of interest in that it may be in Polly's interest for it to be sold to fund her care, given she appears unable to make use of it herself. Max is also under an obligation to consider whether to rent the property out to create income for Polly if she can no longer use it.

4. If you were advising Max, what would your advice be in respect of the proposal that he and Polly are to marry, and the implications of the same? Would he be able to represent her in any divorce proceedings?

There can be no question of any marriage taking place unless and until Polly has divorced her first husband. It will be necessary to obtain a capacity assessment to determine her capacity to divorce and to litigate.

If Polly lacks capacity to litigate, then she would have to be represented in any divorce by a litigation friend. The Family Practice Rules Practice Direction 15A states at paragraph 2.1: *"It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of a protected party. The litigation friend must have no interest in the proceedings adverse to that of the protected party and all steps and decisions the litigation friend takes in the proceedings must be taken for the benefit of the protected party".*

The fact that Max is named as Polly's attorney does not automatically entitle him to act as her litigation friend in any divorce proceedings. It is doubtful that he could so act because he has a financial interest in the outcome which is arguably adverse to Polly's interests: *Hinduja v. Hinduja [2020] EWHC 1533.*

Any litigation friend would have to take a view as to whether it is in Polly's best interests (and benefit) to pursue divorce proceedings, particularly given that she has not taken steps to pursue a divorce until now.

If Polly were to divorce her first husband, then it would be necessary to obtain an assessment of her capacity to marry Max. The test for capacity to marry is that Polly must understand the nature of the marriage contract, which means that she must mentally be capable of understanding the duties and responsibilities that normally attached to marriage, although the contract is a simple one which does not require a high degree of intelligence to understand: *A, B & C v. X & Z [2012] EWHC 2400 (COP).* It is uncertain whether the test includes a requirement that Polly should understand that the marriage would revoke her will: *Re DMM [2017] EWCOP 32* but c.f. *Latimer v. Karamamoli [2023] EWHC 1524 (Ch).*

It is possible that Polly's children (if they knew of his plans) could take steps to prevent the marriage, e.g. by entering a caveat at the Registry Office or by applying for a declaration and injunction.

If the marriage took place, then its effect would be to revoke her English will automatically: s.18 of the Wills Act 1837. Max would need to take advice from a Florida lawyer on what effect, if any, the marriage would have on the Florida Will. As the law currently stands, even if Polly's children were to establish, after the marriage had taken place, that Polly lacked capacity to enter into it, the marriage could only be declared void as from the date of the court order nullifying the marriage. The marriage would remain valid until the date of the order, and so Polly's English will would remain revoked. See *ss.12(1)(c) and 16 of the Matrimonial Causes Act 1973*. The Law Commission is currently looking into this and it is possible that the law may change in future: see the Law Commission's Supplementary Consultation Paper on Wills issued in October 2023.

If the English will was revoked as a result of the marriage, then it is possible that Polly might make a new will (if she has testamentary capacity) or a statutory will may be made on her behalf if authorised by the Court of Protection. Otherwise the devolution of her estate will be governed by the intestacy rules, under which Max, as her surviving spouse, would be entitled to her chattels, a fixed legacy of £322,000 (increased from £250,000 as from 26 July 2023), and one-half of the remainder of the estate, with the other one half passing to Polly's children.

5. **What steps would you advise Polly's children to take in light of their concerns as to:-**

    a. **Max's management of Polly's finances.**
    b. **The proposed marriage.**

    As regards their concerns about Max's management of Polly's finances, a capacity report should be obtained as to Polly's capacity to manage her own property and affairs, to revoke the LPA in favour Max and to make a new LPA in favour of someone else (the children?). If she does have such capacity then it will be up to her to decide what to do. Pending the capacity assessment it would be prudent to raise the concerns with the OPG and write to Max to ask him to take no further financial decisions without the children's consent.

    If Polly lacks capacity to revoke the LPA etc then the children could apply under s.22 of the Mental Capacity Act 2005 to remove Max as Polly's attorney on the basis that he has acted, is acting or proposes to act in a manner contrary to Polly's best interests. At the same time they could apply to appoint a suitable person to act as Polly's deputy.

    As regards the proposed marriage, this cannot take place unless and until Polly divorces her first husband (the children's father). The children should ask their father to notify them if Polly (or anyone acting on her behalf) initiates divorce proceedings.

    If a divorce were to take place then the children should take steps to prevent the marriage taking place, by entering a caveat and/or applying for a declaration and injunction. Otherwise the marriage would revoke Polly's English will, even if the marriage were subsequently annulled. If her English will is revoked, then they should consider a statutory will application, failing which they may be left with a 1975 Act claim on her death (which would not be worth pursuing unless they have maintenance needs).

Post-Death

6. **What is Polly's current status in respect of her testamentary set up? Do you have any concerns about this?**

    Polly has her 2002 Will in respect of her UK assets which she made during her marriage to her husband (from whom she is now separated but not divorced). The 2002 Will leaves Polly's estate to her husband and then her children. Polly also has a Florida Will which gifts the Florida property to Max. Polly's children have asked a solicitor to help Polly make a New Will. This New Will would leave her entire estate to her children (and nothing to Max). Polly's capacity is in question and therefore the New Will has not yet been executed. As far as we are aware, the 2002 Will and the Florida Will are both valid. We would have to check that the Florida Will does not cancel out the 2002 Will and deal with UK property as well as the Florida property. On the facts however it seems that the Florida Will only deals with the Florida property.

    Max says he and Polly would now like to get married. This means she would also need to divorce first and have the necessary capacity to both divorce and litigate as explored earlier.

    Should Max and Polly marry, the 2002 Will would be revoked. Florida rules would also need to be checked to see if marriage affects the Florida Will also.

There are concerns that the 2002 Will provides for Polly's husband from whom she is financially separated in the first instance and if he has died before her, her estate would go to her children.

Whilst Polly and her husband have financially separated, they have not divorced. Therefore the 2002 Will still stands in its entirety. If she has appointed her husband as her executor that appointment stands as does his entitlement under the terms of her Will. The position would be different had they divorced. Whilst the 2002 Will would not be void upon divorce, *S18A of the Wills Act 1837* confirms that had he been appointed as executor and/ or beneficiary under the 2002 Will, the 2002 Will is read as if her husband had pre-deceased her. The rest of the provisions would remain meaning her children would benefit.

There are significant concerns that a claim may be brought against Polly's estate if the testamentary position remains as it currently stands. Max would likely say that he is being financially maintained by Polly as well as having lived with her for at least 2 years pre her death in a cohabiting relationship. He would therefore be an eligible claimant under *Sections (1)(e) and (1)(1A)* of the *Inheritance (Provision for Family and Dependants) Act 1975*.

The New Will is not going to be executed with the assistance of her solicitor without a capacity assessment to assess Polly's testamentary capacity. Recent case law maintains that the *Banks v Goodfellow test* is still the appropriate test rather than the test set out in the *Mental Capacity Act 2005*. The test provides that Polly must:-

- Understand the nature and extent of the act of making a will and its effect.
- Have some understanding of the extent of her estate which she is disposing of under her will.
- Be aware of the people she would usually be expected to provide for (therefore understand and appreciate any possible claims against the estate).
- Not suffer from any delusion or disorder of the mind that would impair or influence her dispositions.

If Polly had a mental capacity test which focused on her testamentary capacity and it found that she had capacity, she could make her New Will in any terms she saw fit.

If, however, Polly was found to lack testamentary capacity to make her New Will, it would be sensible to consider whether an application for a Statutory Will would be in her best interests. Such an application is governed by the *Mental Capacity 2005, Part 9 of the Court of Protections Rules 2017* and *Supplemental Practice Direction 9E of the Court of Protection Rules 2017*.

As any beneficiary under an existing Will and under a proposed Will must be named as respondents to a Statutory Will application, the parties to the application would need to be Polly's husband, her children and Max. Consideration would also need to be given as to whether her grandchild with autism should be made a party too (via a litigation friend as they are a minor). The Official Solicitor would need to be asked to act as litigation friend for Polly.

7. **What steps would you be advising Polly's family to take upon Polly's death if her testamentary position remained unchanged?**

   If Polly's testamentary position remains unchanged, Max would be benefiting from the Florida house and Polly's husband would receive Polly's UK estate. This would mean Polly's children receive nothing and Max receives none of Polly's UK estate.

   Whilst Polly's children would be eligible claimants under Section (1)(c) of the *Inheritance (Provision for Family and Dependants) Act 1975* their claims would be limited to maintenance only. They would need to take legal advice as to the possible merits of their claim.

   On the face of it, the adult child with most merit may be Polly's son, Sam, whom she was helping financially with his autistic child's needs. However, this would likely be faced with a claim from Max.

   There would unlikely be any cause for concern regarding the validity of the 2002 Will or Florida Will based on the facts.

8. **What steps would you be advising Max to take if Polly's Will was updated?**

   Max would understandably have concerns as to the New Will if that had been executed in favour of solely Polly's adult children. Thought will need to be given as to whether it would be better for him to pursue a claim based on the validity of the New Will or based on his own financial need.

   When considering whether to make a claim based on the validity of the New Will, Max will need to be advised that if successful, the effect would be for the position to revert to that under the 2002 Will, which would mean Polly's husband inherits which would also not assist him.

   Accordingly, whilst the usual steps to begin investigating the 2002 Will could be helpful to gather information, it may be more cost effective for him to pursue a claim under *Sections (1)(e) and (1)(1A)* of the *Inheritance (Provision for Family and Dependants) Act 1975* based on his own financial need. His claim would be limited to maintenance also.

9. **As it currently stands, what claims could be made against Polly's estate, and by whom? What do you think the relative merits or otherwise of these claims would be?**

Inheritance Act Claims (if the will is not changed)

Max may qualify as a cohabitee (s.1(1)(ba) and s.1(1A) of the 1975 Act. If Polly does not return to the Dorset property this may prove more difficult, though not impossible (see Re Watson [1999] 1 FLR 878 and what is meant by 'household'). Assuming he qualifies:

a. The claim would have an immediate attraction, in circumstances where Polly's former husband benefits but Max receives nothing (though he does receive the Florida property under the Florida will). If Polly divorces, the will survives but

the ex-husband is treated as predeceasing Polly, meaning Max still gets nothing.

b. There is little evidence on what Max requires for his maintenance, though his finances appear tight. However he appears to be able to travel to Florida on a regular basis. Further investigation needed.

c. However, any claim would be counterbalanced against the needs and resources of Polly's two children. Not much is known about those children, but it is relevant that Polly is currently supporting Sam and his daughter.

d. The claim likely has a greater chance of success if the Florida property is sold during Polly's lifetime.

Polly's children (or even her granddaughter as someone being maintained) may have a viable claim under the 1975 Act if Polly and her husband do not divorce prior to her death.

Other Claims

There is no evidence the current will is invalid so any probate claim appears unlikely.

If Max abuses his position as LPA for his own benefit, there is the possibility of a claim lying with Polly's executors against him. This might apply to payments he makes to himself where he was not permitted to do so, though the likely sums involved may be considered too trivial to pursue.

10. If you were advising Polly in respect of her Will, what provisions would you put within it in respect of the Florida property?

When advising Polly we need to consider whether her English will should deal with the Florida property/foreign assets. If it does, it should say so expressly.

If the English will is intended to deal with the Florida property, Polly should make sure (again by taking advice) that the proposed English will meets the requirements of Florida law. Florida is not a community property/forced heirship state, but the English court will require evidence that the will is Florida-compliant.

We need to consider that even if Florida accepts the English will has valid, local law may govern how the will is implemented and what inheritance tax should be paid. Advice should be taken from a Florida lawyer.

Having an English 'worldwide' will may delay administration of the estate as probate would have to be obtained in England before then applying again in Florida to have the will notarised/legalised in Florida.

If the Will is not intended to deal with the Florida property then, again, it should say so expressly. Polly should take advice on the impact of any divorce/marriage on the validity of the Florida Will to ensure that it remains valid regardless of what happens in the future. She should continue to take legal advice in Florida at key events in her lifetime as she would for her English assets.

Polly may also want to consider whether she wants to attempt to impose some kind of life interest in Max's favour, with her children as remaindermen, rather than an absolute gift of the property.

20.3.24