

# michelmores

## mental capacity seminar

### 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 month 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.

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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***