ThirtyNine
ESSEX STREET

Statutory Wills Update

Alex Ruck Keene
Thirty Nine Essex Street

May 2013

INTRODUCTION

1. This paper addresses the exercise by the Court of Protection of its power under s.18(1)(i) Mental Capacity Act 2005 ('MCA 2005') to execute a will for P where P is incapable of making a valid will for him or herself.[1] Such so-called statutory wills (although the phrase does not in fact appear in the MCA 2005) are a very powerful tool that the Court can deploy to protect P and, in particular, P's estate. Having set the statutory scene, this paper address two key aspects of the Court's jurisdiction in this regard: (1) the assessment of P's best interests; and (2) the assessment of P's testamentary capacity (and, linked, how this assessment relates to the assessment that is undertaken outside the Court's jurisdiction)

THE STATUTORY PROVISIONS

2. As is well known, the MCA 2005 introduced a new legislative framework dealing with loss of mental capacity, following a number of consultation documents and reports of the Law Commission. Section 1 (the principles) provides:

> "*(1) The following principles apply for the purposes of this Act.*
> *(2) A person must be assumed to have capacity unless it is established that he lacks capacity.*
> *(3) 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.*
> *(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
> *(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.*
> *(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.*"

3. Section 2 (1) provides that:

> "*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.*"

4. Section 3 elaborates the meaning of inability to make a decision. It provides, so far as relevant:

> "*(1) For the purposes of section 2, 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).*

[1] It is sometimes thought that P must also to be incapable of managing their property and affairs as well, but this would appear not to be correct in light of the decision of Hedley J in *A, B and C v X and Z,* [2012] EWHC 2400 (COP) [2013] COPLR 1, discussed further below.

> *(4) 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.*"

5. In *PC and NC v City of York Council*,[2] McFarlane LJ has very recently observed that the "*core determinative provision*" as regards the assessment of capacity is s.2(1), and that the "*remaining provisions of s 2 and s 3, including the specific elements within the decision making process set out in s 3(1), are statutory descriptions and explanations which support the core provision in s 2(1). The detail within ss 2 and 3, outside that within s 2(1), does not establish a series of additional, free-standing tests of capacity. Section 2(1) is the single test, albeit that it falls to be interpreted by applying the more detailed description given around it in ss 2 and 3*" (paragraph 56). In that case, McFarlane LJ was considering a decision by Hedley J in which – it appeared – that the learned judge had applied s.2(1) and 3(1) as separate, albeit related tests. He noted (at paragraph 58) that:

> "*It would be going too far to hold that in approaching matters in this way Hedley J plainly erred in applying the law. His judgment refers to the key provisions and twice refers to the nexus between the elements of an inability to make decisions set out in s 3(1) and mental impairment or disturbance required by s 2(1). There is, however, a danger in structuring the decision by looking to s 2(1) primarily as requiring a finding of mental impairment and nothing more and in considering s 2(1) first before then going on to look at s 3(1) as requiring a finding of inability to make a decision. The danger is that the strength of the causative nexus between mental impairment and inability to decide is watered down. That sequence - 'mental impairment' and then 'inability to make a decision' - is the reverse of that in s 2(1) – 'unable to make a decision … <u>because of</u> an impairment of, or a disturbance in the functioning of, the mind or brain' [emphasis added]. The danger in using s 2(1) simply to collect the mental health element is that the key words 'because of' in s 2(1) may lose their prominence and be replaced by words such as those deployed by Hedley J: 'referable to' or 'significantly relates to.'*"

6. Also relevant in this regard is the decision of Baker J in *CC v KK and STCC*,[3] in which he set out (at paragraphs 18-25) a series of principles that the Court must apply when addressing questions of capacity. Whilst determined in the context of a decision relating to residence, they are, I suggest, of wider relevance.[4] I will return below to his fifth principle (at paragraph 22), thus:

> "*Fifthly, I bear in mind and adopt the important observations of Macur J in LBL v RYJ and VJ [2010] EWHC 2665 (COP), [2010] COPLR Con Vol 795, [2011] 1 FLR 1279, at para [24], that:*
>
> > *'it is not always necessary for a person to comprehend all peripheral details …'*
>
> *At para [58] of the judgment, Macur J identified the question as being whether the person under review can 'comprehend and weigh the salient details relevant to the*

[2] [2013] EWCA Civ 478.
[3] [2012] EWHC 2136 (COP) [2012] COPLR 627.
[4] Indeed, I make no apologies, especially before COPPA, for citing cases drawn from the welfare sphere. As Senior Judge Lush has repeatedly noted, there is a danger in the COP that the historically distinct disciplines of property and affairs on the one hand and health and welfare on the other remain distinct, when there is, in truth, one Court of Protection applying one statute, albeit across almost the whole gamut of human decisions.

decision to be made'. A further point – to my mind of particular importance in the present case – was also made by Macur J at para [24] in that judgment: '… it is recognised that different individuals may give different weight to different factors'."

7. Section 4 expands on the concept of "best interests" referred to in s.1(5). It provides (so far as relevant):

> "*(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—*
> *(a) the person's age or appearance, or*
> *(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*
> *(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*
> *(3) He must consider –*
> *(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
> *(b) if it appears likely that he will, when that is likely to be.*
> *(4) 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.*
> *(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.*
> *(6) He must consider, so far as is reasonably ascertainable—*
> *(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*
> *(b) the beliefs and values that would be likely to influence his decision if he had capacity, and*
> *(c) he other factors that he would be likely to consider if he were able to do so.*
> *(7) He must take into account, if it is practicable and appropriate to consult them, the views of –*
> *(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*
> *(b) anyone engaged in caring for the person or interested in his welfare,*
> *(c) any donee of a lasting power of attorney granted by the person, and*
> *(d) any deputy appointed for the person by the court,*
> *as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).*"

8. Section 16 gives the court the power to appoint a deputy or to make decisions on behalf a person who lacks mental capacity. It provides so far as relevant:

> "*(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning –*
> *(a) P's personal welfare, or*
> *(b) P's property and affairs.*
> *(2) The court may –*
> *(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or*
> *(b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.*

> *(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).*
> *(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that –*
> *(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and*
> *(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances."*

9. The powers conferred by s.16 MCA 2005 in respect of P's property and affairs include the execution for P of a will: s.18 (1) (i). The execution of a will for P is a decision which must be made by the court itself, and cannot be entrusted to a deputy: s.20(3)(b).

10. A will executed for P by the Court may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it: paragraph 2 of Schedule 2 to the MCA. Paragraph 4 of Schedule 2, in turn, deals with the effect of executing a will on behalf of P. It provides, so far as relevant:

> *"(3) The will has the same effect for all purposes as if—*
> *(a) P had had the capacity to make a valid will, and*
> *(b) the will had been executed by him in the manner required by the 1837 Act.*
> *(4) But sub-paragraph (3) does not have effect in relation to the will –*
> *(a) in so far as it disposes of immovable property outside England and Wales, or*
> *(b) in so far as it relates to any other property or matter if, when the will is executed –*
> *(i) P is domiciled outside England and Wales, and*
> *(ii) the condition in sub-paragraph (5) is met.*
> *(5) The condition is that, under the law of P's domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales."*[5]

THE BEST INTERESTS EXERCISE

11. I return in the next section to the question of the establishment of a lack of testamentary capacity, but want to address first the nature of the best interests exercise that the Court will undertake upon an application for a statutory will.

12. In *NT v FS and others*,[6] HHJ Behrens has recently provided so neat a summary of the law in this regard that it makes sense simply to reproduce the relevant passages of his judgment in full by way of an introduction to the points I want to discuss:

---

[5] Paragraph 4 of Schedule 2 was the subject of detailed consideration by Lewison J (as he then was) in *Re P* [2010] Ch 33. Upon his construction of paragraph 4:
(1) a statutory will is ineffective in respect of all immovable property outside England and Wales (regardless of where the testator is domiciled).
(2) it is effective (regardless of domicile) insofar as it relates to immovable property in England and Wales;
(3) if the testator is domiciled outside England and Wales at the time of execution of the statutory will, and the law of the testator's domicile does not direct that English law applies to the question of testamentary capacity, a statutory will is only effective in relation to movable property in England and Wales.

[6] [2013] EWHC 684 (COP).

"8. *I was referred to 4 authorities in the course of submissions – the decision of Lewison J (as he then was) in Re P ,the decision of Munby J (as he then was) in Re M [2011] 1 WLR 344, the decision of Morgan J in Re G(TJ) [2011] WTLR 231 and the decision of Senior Judge Lush in Re J(C) [2012] WTLR 121. I do not intend to lengthen this judgment with lengthy quotations from those authorities. The guidance from them may be summarised:*

1. *The 2005 Act marks a radical change in the treatment of persons lacking capacity. The overarching principle is that any decision made on behalf of P must be in P's best interests. This is not the same as inquiring what P would have decided if he or she had had capacity. It is not a test of substituted judgment but requires the Court to apply an objective test of what would be in P's best interests. [Re P paragraphs 36 – 38]*

2. *The Court must follow the structured decision making process laid down by the 2005 Act. Thus the Court must consider all relevant circumstances and in particular must consider and take into account the matters set out in sections 4(6) and 4(7) which I have set out above.*

3. *The Court must then make a value judgment giving effect to the paramount statutory instruction that the decision must be made in P's best interests. [See Re P paragraph 39].*

4. *As Munby J pointed out [Re M paragraph 32] the 2005 Act contains no hierarchy between the various factors which have to be borne in mind. The weight to be attached to different factors will inevitably differ depending on the individual circumstances of the particular case. There may however in a particular case be one or more features which, in a particular case, are of 'magnetic importance' in influencing or even determining the outcome.*

5. *The authorities contain a discussion of the weight to be attached to P's wishes and feelings. In paragraph 40 of Re P Lewison J cited at length from the decision of Judge Marshall QC in Re S [2009] WTLR 315. In paragraph 55 of her judgment she had said that the views and wishes of P in regard to decisions made on his behalf are to carry great weight. Her reasons, expressed in paragraph 56 were:*

   56. The Act does not of course say that P's wishes are to be paramount, nor does it lay down any express presumption in favour of implementing them if they can be ascertained. Indeed the paramount objective is that of P's best interests. However, by giving such prominence to the above matters, the Act does in my judgment recognise that having his views and wishes taken into account and respected is a very significant aspect of P's best interests. Due regard should therefore be paid when doing the weighing exercise of determining what is in P's best interests in all the circumstances of the case.

   She went on in paragraph 57 to suggest that there was a presumption in favour of implementing those wishes. Lewison J did not wholly agree with this reasoning. In paragraph 41 of Re P he said:

41. I agree with the broad thrust of this, although I think that HH Judge Marshall QC may have slightly overstated the importance to be given to P's wishes. First, section 1 (6) is not a statutory direction that one "must achieve" any desired objective by the least restrictive route. Section 1 (6) only requires that before a decision is made "regard must be had" to that question. It is an important question, to be sure, but it is not determinative. The only imperative is that the decision must be made in P's best interests. Second, although P's wishes must be given weight, if, as I think, Parliament has endorsed the "balance sheet" approach, they are only one part of the balance. I agree that those wishes are to be given great weight, but I would prefer not to speak in terms of presumptions. Third, any attempt to test a decision by reference to what P would hypothetically have done or wanted runs the risk of amounting to a "substituted judgment" rather than a decision of what would be in P's best interests. But despite this risk, the Act itself requires some hypothesising. The decision maker must consider the beliefs and values that would be likely to influence P's decision if he had capacity and also the other factors that P would be likely to consider if he were able to do so. This does not, I think, necessarily require those to be given effect.

In paragraph 34 of Re M Munby J agreed with the broad thrust of Lewison J and Judge Marshall's views. He amplified his views in paragraph 35:

35 I venture, however, to add the following observations:

i) First, P's wishes and feelings will always be a significant factor to which the court must pay close regard: see Re MM; Local Authority X v MM (by the Official Solicitor) and KM[2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at paras [121]-[124].

ii) Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular a priori weight or importance to P's wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case …

6. Differing views are expressed in the authorities as to relevance to the decision maker of P 'having done the right thing' by his will and being remembered for that after his death. Both Lewison J and Munby J took the view that this was a relevant matter to be placed in the balance sheet. However Morgan J and Senior Judge Lush have expressed doubts. [See paragraphs 52 – 53, 64 of Re G(TJ) and paragraph 54 of Re JC.] As Morgan J pointed out the making of the gift and/or the terms of the will are not being made by P but by the Court. Furthermore insofar as there is a dispute between family members the unsuccessful members are not likely to think that he had done the right thing. For my part I think there is force in Morgan J's

> *views on the facts of this case with the result that I do not intend to place any weight on this factor.*"

13. In *NT*, whilst HHJ Behrens made glancing reference (in paragraph 6) to the 'balance sheet,' and prefaced his conclusions with a direction to himself (at paragraph 80) that "[a]s set out above the court has to make a value judgment giving effect to the paramount instruction that the decision must be made in F's best interests. It must consider all relevant matters including the matters in sections 4(6) and (7)," he did not attempt to undertake any form of balance sheet exercise of the nature regularly undertaken in health and welfare cases.[7] There is, indeed, a real question as to whether such a balance sheet exercise is a useful analytical tool in such cases, and in only one of the reported cases has the Court sought to adopt it:[8] *Re J(C)*,[9] in which Senior Judge Lush noted that he had:

> "*doubts about the effectiveness of the balance sheet approach in statutory will applications. I applied that approach recently in Re JDS; KGS v JDS [2012] EWHC 302 (COP), [2012] COPLR 383, which involved an application for a gift to save inheritance tax on the eventual death of a 20-year-old man who had been awarded damages for clinical negligence. The balance sheet approach worked satisfactorily in that case, essentially because the exercise was a risk analysis. However, in the context of making a will on behalf of JC, apart from threats from A that he would no longer consider himself bound by the undertaking he gave in the consent order of 4 January 2011, if he received less than his existing one third share of JC's estate, I have struggled to identify any 'factors of actual benefit' or 'counterbalancing dis-benefits' or 'risks of possibility of loss' or 'possibilities of gain'. These were all expressions used by Thorpe LJ when he originally advocated the use of the balance sheet approach in Re A (Medical Treatment: Male Sterilisation) [2000] 1 FLR 549. Notwithstanding my comments about the efficacy of the balance sheet approach, there will usually be at least one factor of magnetic importance – as there is in this case – that will assist the judge in reaching a decision.*"

14. Whilst Morgan J adopted the approach in *Re G(TJ)* and (not without reservations) Senior Judge Lush did so in *Re JDS*[10] in the context of applications to approve lifetime gifts (which have some similarities to applications for the execution of statutory wills), for my part, it seems to me that it is quite proper to proceed on the basis that the 'balance sheet' approach (1) is not part of the MCA 2005;[11] and (2) whatever its (very considerable) utility in health and welfare applications, does not form a necessary part of the structured approach that a Court must take under s.4 MCA 2005 when deciding: (1) whether to execute a statutory will for P; and (2) (if so) what the contents of such a will should be. That means, in turn, that when preparing a statutory will application[12] it does not seem to me that it will be necessary to

---

[7] Following the pre-MCA 2005 judgment given by Thorpe LJ in *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FLR 549,

[8] The reported judgment in *Re P* does not make clear whether or not the balance sheet was adopted, but I understand that it was not; rather (and unsurprisingly) Lewison J went through each of the subsections of s.4, identified the factors relevant to the case, weighed them up and made his decision based upon those factors.

[9] [2012] COPLR 540.

[10] [2012] EWHC 302 (COP) [2012] COPLR 383.

[11] As Senior Judge Lush noted in *Re JDS* (at paragraph 25): "*Lord Justice Thorpe originally intended the balance sheet approach to be only an interim measure "pending the enactment of a checklist or other statutory direction". This checklist has now been enacted as section 4 of the Mental Capacity Act 2005, but the balance sheet approach has survived the implementation of the Act and is widely used today.*'" The importance of not adding additional glosses to the MCA 2005 has recently been emphasised in *PC and NC v City of York Council*.

[12] Which must include the information mandated by Practice Direction 9F, namely:

> "*In addition to the application form COP1 (and its annexes) and any information or documents required to be provided by the Rules or another practice direction, the following information must be provided (in the form of a*

seek to pre-empt judicial consideration of that balance sheet by including such a balance sheet in the application, although it will, of course, be necessary to include evidence to satisfy first the Official Solicitor and then the Court that it is in P's best interests for a statutory will to be executed for him in the form advanced before the Court.

15. As a final, but very important, point as regards best interests, it should be noted that following the decision of HHJ Hodge QC in *Re D (Statutory Will)*,[13] it is clear that there is no presumption, nor any principle of general application, that the Court should not direct the execution of a statutory will in any case where the validity of an earlier will is in dispute, and that in an appropriate case the Court may decide that it is in a protected person's best interests to order a statutory will rather than to leave the protected person to be remembered for having bequeathed a contentious probate dispute to his heirs. However, the existence and nature of the dispute, and the ability of the Court of Protection to investigate the issues which underlie it, will be relevant factors in deciding whether to order a statutory will in such a case. I shall return below to one interesting point of principle that arises in consequence of this decision in respect of the assessment of testamentary capacity.

TESTAMENTARY CAPACITY

Parallel jurisdictions and parallel tests?

16. Before I address the question of the proper test to apply when considering whether an adult has testamentary capacity for purposes of applying for a statutory will, it is important to be clear as to the limits of the jurisdiction of the Court of Protection. Whilst the Court of Protection is a superior court of record (s.45(1)), the repertoire of declarations available to it are set out (and defined exclusively) by s.15 MCA 2005,[14] and s.15 includes no power to make declarations as to the validity of any will. The Court

---

witness statement, attaching documents as exhibits where necessary) for any application to which this practice direction applies:

(a) […] a copy of the draft will or codicil, plus one copy;
(b) a copy of any existing will or codicil;
(c) any consents to act by proposed executors;
(d) details of P's family, preferably in the form of a family tree, including details of the full name and date of birth of each person included in the family tree;
(e) a schedule showing details of P's current assets, with up to date valuations;
(f) a schedule showing the estimated net yearly income and spending of P;
(g) a statement showing P's needs, both current and future estimates, and his general circumstances;
(h) if P is living in National Health Service accommodation, information on whether he may be discharged to local authority accommodation, to other fee-paying accommodation or to his own home;
(i) if the applicant considers it relevant, full details of the resources of any proposed beneficiary, and details of any likely changes if the application is successful;
(j) details of any capital gains tax, inheritance tax or income tax which may be chargeable in respect of the subject matter of the application;
(k) an explanation of the effect, if any, that the proposed changes will have on P's circumstances, preferably in the form of a 'before and after' schedule of assets and income;
(l) if appropriate, a statement of whether any land would be affected by the proposed will or settlement and if so, details of its location and title number, if applicable;
(m) […]
(n) a copy of any registered enduring power of attorney or lasting power of attorney;
(o) confirmation that P is a resident of England or Wales; and
(p) an up to date report of P's present medical condition, life expectancy, likelihood of requiring increased expenditure in the foreseeable future, and testamentary capacity."

[13] [2010] EWHC 2159 (Ch) [2010] COPLR Con Vol 302.
[14] *XCC v AA & Ors* [2012] EWHC 2183 (COP) [2012] COPLR 730, at paragraph 48 per Parker J.

therefore has no jurisdiction to make a formal ruling upon the validity of any will.[15] Such a ruling will conventionally therefore be sought by way of proceedings in the Chancery Division.[16] Moreover, and unlike the Chancery Division, the Court has no jurisdiction over the deceased or their affairs (save for a residual jurisdiction in respect of those whose affairs it has had been involved in, essentially for purposes of resolving the incidence of expenditures incurred during P's life[17]).

17. Importantly, whilst the Court of Protection has to apply the statutory test set down in ss.2-3 MCA 2005 when determining whether P has testamentary capacity, a judge sitting in any other Court is not, formally, bound to apply this test. This point frequently causes (understandable) confusion, and needs unpacking:

    a. the MCA Code of Practice provides at paragraphs 4.31-3 thus:

> "*What other legal tests of capacity are there?*
>
> *4.31 The Act makes clear that the definition of 'lack of capacity' and the two-stage test for capacity set out in the Act are 'for the purposes of this Act'. This means that the definition and test are to be used in situations covered by this Act. Schedule 6 of the Act also amends existing laws to ensure that the definition and test are used in other areas of law not covered directly by this Act. For example, Schedule 6, paragraph 20 allows a person to be disqualified from jury service if they lack the capacity (using this Act's definition) to carry out a juror's tasks.*
>
> *4.32 There are several tests of capacity that have been produced following judgments in court cases (known as common law tests).*
>
> - *capacity to make a will*
> - *capacity to make a gift*
> - *capacity to enter into a contract*

[15] See *Re M* at paragraph 50(ii). But see below for the implications of the decision in *Re D* in this regard.

[16] Although query, but only query, whether a High Court judge of the Family Division exercising the inherent jurisdiction of the High Court could not grant such a declaration in analogous fashion to the manner in which Parker J made a declaration under the inherent jurisdiction that a marriage contracted in Bangladesh with a woman without capacity to enter it would not be recognised as a valid marriage in England and Wales in circumstances where she considered that she was unable to grant such a declaration under s.15 MCA 2005.

[17] *Re RC (Deceased)* [2010] COPLR Con Vol 1022, per SJ Lush

"*51. ..even after P's death, the court continues to have a residual jurisdiction over matters such as:*
• costs (Practice Direction 23B, para 10, and COP Rules 2007, r 165);
• the remuneration of a deputy, donee, or attorney (r 167);
• fees;
• the discharge of security (the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, reg 37);
• the deputy's final report on the termination of his appointment (LPA, EPA & PG Regulations 2007, reg 40); and
• the transfer and delivery of funds (Practice Direction 23B, para 11).
52. Although the Mental Capacity Act 2005 does not expressly say anything about the court's jurisdiction after P's death, s 56(1)(c) by implication acknowledges that a residual jurisdiction exists when it states that:
'Court of Protection Rules may make provision … for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings."

- *capacity to litigate (take part in legal cases), and*
- *capacity to enter into marriage.*

4.33 The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think it is appropriate. The Act will apply to all other cases relating to financial, healthcare or welfare decisions." (footnotes omitted, the footnote after 'capacity to make a will' referring to *Banks v Goodfellow* (1870) 5 QB 549)[18]

b. whilst it is fair to say that paragraph 4.33 is not a model of clear drafting, in *Re MM (an adult),*[19] Munby J (as he then was) addressed himself to the question of what it meant, thus:

> *"80. A question was raised as to what was meant by the words 'When cases come before the court on the above issues, judges can adopt the new definition <u>if they</u> think it is appropriate' (emphasis added). I do not for my part see any difficulty. The meaning of the observation is clear and the sentiment unexceptional. It is not being said – it could not properly be said—that a judge sitting in the (new) Court of Protection and exercising the statutory jurisdiction under the Mental Capacity Act 2005 is in some mysterious and undefined way entitled to disregard the statutory test in s 3. Certainly not. What is being said is that judges sitting elsewhere than in the Court of Protection and deciding cases where what is in issue is, for example, capacity to make a will, capacity to make a gift, capacity to enter into a contract, capacity to litigate or capacity to enter into marriage, can adopt the new definition if it is appropriate – appropriate, that is, having regard to the existing principles of the common law. And since, as I have said, there is no relevant distinction between the test as formulated in Re MB*[20] *and the test set out in s 3(1) of the Mental Capacity Act 2005, and since, as it were, the one merely encapsulates in the language of the parliamentary draftsmen the principles hitherto expounded by the judges in the other, the invitation extended to the judges by the Code of Practice is entirely understandable and, indeed, appropriate*;"

c. in *Saulle v Nouvet*,[21] Andrew Edis QC, sitting as a deputy High Court judge, considered *Re MM* and held that the High Court was required for purposes of civil proceedings to consider the question of whether P is either a protected party or a protected beneficiary by applying the test set down in the MCA 2005, but only because of the way in which the relevant provisions of the CPR were worded: see paragraph 21. Whilst not concerned with questions of testamentary capacity, this case provides further authority for the proposition that the MCA 2005 does not bind judges sitting other than in the Court of Protection;

---

[18] I return below to whether the test in s.3 MCA 2005 is really 'in line with' the test in *Banks v Goodfellow*.
[19] [2007] EWHC 2003 (Fam) [2009] 1 FLR 443.
[20] *Re MB* (*an adult: medical treatment*) [1997] 2 FLR 426 where, at 437, Butler-Sloss LJ held that "[a] *person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to or to refuse treatment. That inability to make a decision will occur when: (a) the patient is unable to comprehend and retain the information which is material to the decision, especially as to the likely consequences of having or not having the treatment in question. (b) the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision*."
[21] [2007] EWHC 2902 (QB).

d. in *Scammell v Farmer*,[22] Stephen Smith QC, sitting as a Deputy Judge of the High Court, considering a posthumous challenge to a will on the basis of (inter alia) lack of testamentary capacity, commented thus in response to a submission that he should apply the tests set down in ss. 3 MCA 2005:

> *"24. There was a large measure of agreement between counsel that the test of mental capacity under Section 3 of the 2005 Act is a modern restatement of the test propounded in Banks v. Goodfellow (1870) 5 QB 549, to which I shall turn below.*[23] *There is, however, an obvious difference between the position at common law and the position under the 2005 Act, in that the onus of proof of incapacity under the 2005 Act (Section 1(2)) is from the outset, and remains, on the complainant. At common law, the position is different.*
>
> *25. I do not consider that the 2005 Act applies in this case, for either (or both) of two reasons. First, this is not a case within the purposes of the 2005 Act, as required by section 1(1) . I was referred by Mr. Pugh to Sections 16-18 of the 2005 Act, but those provisions concern the power of the Court to make or authorise the making of Wills on behalf of persons who lack capacity, not the ascertainment of whether a particular testatator had capacity when a Will was made.*
>
> *26. I was also referred to the Code of Practice under the Mental Capacity Act issued by the Lord Chancellor on 23rd April 2007, and it was suggested that parts of that Code of Practice suggest that the Act was intended to apply in a case such as this. Even if that was a correct reading of the Code of Practice, it would not change my interpretation of the 2005 Act. But I do not think that it is a correct reading of the Code of Practice at all, see especially paragraphs 4.31 to 4.33. The latter paragraph actually states that when cases concerning, eg, a testator's capacity to make a will come before the court, 'judges can adopt the new definition if they think it is appropriate'."*[24]

18. *Scammell v Farmer* is now regularly cited as authority for the proposition that there is (and should remain) a distinction between the approach adopted at common law in, for instance, the Chancery Division and the approach adopted by the Court of Protection to determining questions of testamentary capacity.[25]

19. In light of the authorities cited above, it might be thought to be clear that (1) there is a bright line distinction between the jurisdiction of the Court of Protection and the jurisdiction of the Chancery Division; and (2) the common law continues to march in parallel with the statutory regime enshrined in the MCA 2005. It seems to me, though, that the lines have been blurred substantially by the decision of

[22] [2008] EWHC 1100 (Ch) [2008] W.T.L.R. 1261. Stephen Smith QC does not appear to have had *Re MM* cited to him (or indeed *Saulle v Nouvet*).

[23] Again, I address below whether this proposition is entirely correct.

[24] Stephen Smith QC found, as a further reason why it would be inappropriate to apply the Act that the relevant will had been executed substantially prior to the enactment of the Act, and that to apply it to the disposition of the estate in this case would be to give it retrospective effect contrary to the presumptions against the retrospective operation of statutes and against the interference by statutes with vested interests. To the extent that any relevant changes brought about by the 2005 Act improve the position of one of the parties, the judge found, they would do so contrary to the presumption against retrospectivity, the presumption against the interference with vested interests, and the presumption against application to actions which are pending. This ground will, with the passage of time, hold ever less sway.

[25] See, for instance, *Gorjat v Gorjat* [2010] EWHC 1537 (Ch), although in that case Sarah Asplin QC endorsed the course adopted in that case on the basis that it would offend against the presumption against retrospectivity, and did not comment specifically upon the first ground upon which Stephen Smith QC found that the MCA 2005 did not apply.

in *Re D*. In that case, as will be recalled, HHJ Hodge QC considered that the Court of Protection had jurisdiction to execute a statutory will for an incapacitated adult in the face of an existing will where there was sufficient doubt as to the validity of that earlier will. In *Re D*, the doubts that arose do not appear to have arisen as a result of doubts as to Mrs D's testamentary capacity at the time of making the wills in question.[26]

20. However: (1) the ratio of HHJ Hodge QC's decision is not limited to situations in which (for instance) questions of undue influence arise, but is equally capable of encompassing situations in which retrospective doubt is cast upon the testamentary capacity of P at the time of making the earlier will; and (2) whilst HHJ Hodge QC declined to rule upon the validity of the earlier wills purportedly made by Mrs D,[27] he appeared not to have done so on the basis of want of jurisdiction.[28]

21. The decision in *Re D* has undoubtedly opened the door, therefore, both for applications to be brought for statutory wills to be made on the basis that there is doubt as to whether the adult had testamentary capacity at the time of making an earlier will and also for the Court of Protection in effect to rule upon the validity of that earlier will (potentially after a fact-finding hearing which would be to all intents and purposes identical to a hearing conducted in the Chancery Division).[29]

22. *Re D* therefore poses a very stark question (which did not need to be and was not answered by HHJ Hodge QC): in a case where an application is made for a statutory will on the basis that there is doubt as to the testamentary capacity of P at the time of an earlier will, what test does the Court of Protection apply?

23. I will return to this question after I have examined the differences between the test at common law and that set down under the MCA 2005.

The common law and the MCA 2005 contrasted

24. It is important to note that there are two aspects to the approach to the determination of testamentary capacity under both the common law and the MCA 2005: (1) the substantive content of the test that must be satisfied; and (2) the forensic question of where the legal and evidential burden of proof lies in establishing the necessary components of the test. I will deal with both in turn.

<u>The substantive content of the test of capacity to make a will</u>

25. It makes sense to start with the MCA 2005. As set out at the outset of this paper, the statutory test to apply to determine whether a person has or lacks capacity to make a decision is set out in ss.2-3 MCA 2005. As emphasised in *PC v City of York Council*, the test is decision-specific. Further, as emphasised in *CC v KK*, in order to be able to assess an adult's capacity to make a decision, it is important to specify "*the salient details relevant to the decision to be made*."

---

[26] See paragraphs 18-21.

[27] And had expressly directed himself as to the injunction in *Re M* given by Munby J that the Court of Protection has no jurisdiction to rule upon the validity of the will.

[28] See paragraph 21: "[i]*t is not appropriate for me to rule upon the validity of either of the wills purportedly made in 2004 and 2006 since I have not been presented with all the evidence which it would be necessary for me to hear if findings of fact were to be made on these issues; nor is it necessary for me to do so*."

[29] Indeed, the recitals to the order made by District Judge Ashton permitting the application before him to proceed as an application for a statutory will (rather than a direction that Mrs D's deputy should apply for one, as it had initially be constituted) and transferring it to a Circuit Judge, noted that "[t]*he court was concerned that to exercise the jurisdiction in these circumstances: 'would encourage many applications where the substantive issue is the validity of a new will made when there was doubt as to testamentary capacity or concern as to undue influence and this Court would be ill-equipped to resolve these disputes*.'"

26. As with s.4 MCA 2005, ss.2-3 MCA 2005 does not provide the answer to the questions that arise, but rather provides a clearly structured way in which that answer is to be sought. It is silent as to precisely what information will be relevant to the decision in question, hence the Court of Protection has had to grapple on occasion with such questions.[30] As we see below, the Court of Protection has not, in terms, addressed this question with reference to the test of capacity to make a will.

27. At common law, the canonical case on testamentary capacity is *Banks v Goodfellow*,[31] in which the Lord Chief Justice, Lord Cockburn set out the following criteria for testamentary capacity:

> "*It is essential … that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made*."[32]

28. The first three elements (understanding the nature of the act, its effects, and the extent of the property being disposed of) involve the will-maker's understanding: in other words, the ability to receive and evaluate information which may possibly be communicated by others. The final test (being able to comprehend the claims to which he or she ought to give effect) goes beyond understanding and requires the person making the will to be able to distinguish and compare potential beneficiaries and arrive at some form of judgment. It was well established at common law that a person making a will could, if mentally capable, ignore the claims of relatives and other potential beneficiaries, as well act in a "*such a manner as to deserve approbation from the prudent, the wise, or the good*."[33]

29. Whilst the *Banks v Goodfellow* is used as the shorthand for the test for testamentary capacity at common law, and the passage cited above quoted almost as a mantra, it is vitally important to recognise that, as it is a common law test, it is a test which is, by definition, capable of development at the hands of the judges applying it:

    a. as Lewison J pointed out in *Perrins v Holland*[34] the common law test of capacity to make a will in *Banks v Goodfellow* has been refined and explained over the years:

> *"First since the test is a common law test it is capable of being influenced by contemporary attitudes. Second, our general understanding of impaired mental capacity of adults has increased enormously since 1870. Third, we now recognise that an adult with impaired mental capacity is capable of making some decisions for himself, given help. Thus fourth, we recognise that the test of mental capacity is not monolithic, but is tailored to the task of in*

30 For instance, *A Local Authority v Mrs A (Test for Capacity as to Contraception)* [2010] EWHC 1549 (COP) [2011] Fam 61, in which Bodey J had to determine what information a person had to be able to understand/use/weigh/retain/communicate for purposes of making a capacitous decision to consent to receiving contraception; and *A Primary Care Trust v LDV* [2013] EWHC 272 (Fam), where Baker J conducted the same exercise in respect of the decision whether to be admitted to a psychiatric hospital on an informal basis.

31 *Banks* v *Goodfellow* (1870) LR 5 QB 549.

32 Ibid: 565.

33 *Bird* v *Luckie* (1850) 8 Hare 301.

34 [2009] EWHC 1945 (Ch), at paragraph 40. The Court of Appeal in affirming his decision [2011] Ch 270 did not have cause to consider these dicta. It is perhaps worth also noting that Lewison J – almost in passing – began his comments in this paragraph: "[t]*his common law test has been applied on countless occasions, and although it is now superseded by the Mental Capacity Act 2005 it applies in the present case, since the relevant events took place before that Act came into force*."

hand: Hoff v Atherton [2005] WTLR 99, 109. Fifth, contemporary attitudes toward adults with impaired capacity are more respectful of adult autonomy. Sixth, even the traditional test must be applied in the context of the particular testator and the particular estate. A testator with a complex estate and many potential beneficiaries may need a greater degree of cognitive capability than one with a simple estate and few claimants. In addition as the Court of Appeal of New South Wales pointed out in Zorbas v Sidiropoulous (No 2) [2009] NSWCA 197:

> *The criteria in Banks v Goodfellow are not matters that are directly medical question, in the way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgment on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the Banks v Goodfellow criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording), of a detailed conversation with the deceased at this time of the will displaying understanding of the deceased' assets, the deceased's family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did no understand these things would overcome the effect of evidence of such a conversation."*

b. in *Re Key*[35] Briggs J noted that:

> *"95. Without in any way detracting from the continuing authority of Banks v Goodfellow , it must be recognised that psychiatric medicine has come a long way since 1870 in recognising an ever widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision-making, quite distinctly from old age and infirmity. The mental shock of witnessing an injury to a loved one is an example recognised by the law, and the affective disorder which may be caused by bereavement is an example recognised by psychiatrists, as both Dr Hughes and Professor Jacoby acknowledged. The latter described the symptomatic effect of bereavement as capable of being almost identical to that associated with severe depression. Accordingly, although neither I nor counsel has found any reported case dealing with the effect of bereavement on testamentary capacity, the Banks v Goodfellow test must be applied so as to accommodate this, among other factors capable of impairing testamentary capacity, in a way in which, perhaps, the court would have found difficult to recognise in the 19th century.*
>
> *96 Banks v Goodfellow was itself mainly a case about alleged insane delusions. Many of the cases which have followed it are about cognitive impairment brought on by old age and dementia. The test which has emerged is primarily about the mental capacity to understand or comprehend. The evidence of the experts in the present case shows, as I shall later describe, that affective disorder such as depression, including that caused by bereavement, is more likely to affect powers of decision-making than comprehension. A person in that condition may have the*

[35] [2010] 1 WLR 2020.

> *capacity to understand what his property is, and even who his relatives and dependants are, without having the mental energy to make any decisions of his own about whom to benefit.*"

In the case before him, Briggs J found that:

> "*115 This is not one of those cases in which it is possible to point simply to a conspicuous inability of the deceased to satisfy one of the distinct limbs of the Banks v Goodfellow test. Rather it is a case in which I have been persuaded, taking the evidence as a whole, that Mr Key was simply unable during the week following his wife's death to exercise the decision-making powers required of a testator. In any event, the defendants have not discharged the burden of proving that he was. To the extent that such a conclusion involves a slight development of the Banks v Goodfellow test, taking into account decision-making powers rather than just comprehension, I consider that it is necessitated by the greater understanding of the mind now available from modern psychiatric medicine, in particular in relation to affective disorder.*"

30. In the circumstances, therefore, there is no reason in principle why the common law test of capacity to make a will could not evolve so as to incorporate the functional and diagnostic tests set down in ss.2-3 MCA 2005.

31. But has it already done so – i.e. is (as Stephen Smith QC asserted in *Scammell v Farmer*) –"*the test of mental capacity under Section 3 of the 2005 Act* […] *a modern restatement of the test propounded in Banks v. Goodfellow*"?

32. The general tenor of authorities decided in the Chancery Division subsequent to *Scammell v Farmer* is to the effect that the statutory test does not add anything to the common law test.[36] Further, in *A, B and C v X and Z,*[37] Hedley J considered (for the first time that I am aware[38]) the question for purposes of exercising the Court of Protection's jurisdiction, thus:

> "*33. Let me turn then to the second issue, which is the question of capacity to make a will. The law is long established in this case, deriving as it does from a decision of the full court of the Queen's Bench on 6 July 1870 in Banks v Goodfellow (1870) LR 5 QB 549. There is a helpful observation at 565 in the judgment of the Lord Chief Justice which deals with the question of testamentary capacity, thus:*

---

[36] See, for recent examples: "*I did not hear any submissions as to whether* [the statutory s.2 MCA 2005] *test differed from the common law test, though the latter is more expressly tailored to the issue in this case*": *Turner v Phythian* [2013] EWHC 499 (Ch) at paragraph 39 per Vivian Rose QC sitting as a Deputy High Court Judge; "[i]*t was not, however, suggested by any counsel that this provision* [s.2 MCA 2005] *adds anything of importance to the common law authorities for the purposes of the present case*." *Greaves v Stolkin* [2013] EWHC 1140 (Ch) at paragraph 50 per Newey J. It is a curious feature of both of these decisions (and others in the Chancery Division) that s.2 MCA 2005 alone is cited, rather than both ss.2 and 3, which <u>together</u> make up the test.

[37] [2012] EWHC 2400 (COP) [2013] COPLR 1.

[38] In *Re Clarke* [2012] EWHC 2256 (COP), Peter Jackson J made a declaration that the adult in question lacked testamentary capacity in the context of an application to discharge a deputyship. His conclusion upon the point was very shortly reasoned: "*36 As to making a will, based on the views of the doctors I find that Mrs Clarke is able to reach a capacitious decision. The concept of leaving her estate to* [her eldest son] *Michael Clarke, or anyone else, on her death is not a complex one. Like Dr Waite, I cannot exclude the possibility that Michael Clarke exerts influence on Mrs Clarke, but I do not find that this currently invalidates her general testamentary capacity. Whether any particular will that she may make could subsequently be challenged is not a matter for this court at this time.*"

> *'It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.'*
>
> *34. It is also important, although it does not actually apply in this case, to bear in mind that an eccentric disposition of property is not of itself evidence of incapacity by reason of s 1(4), but it is the whole picture that needs to be looked at, as described by the Lord Chief Justice.*"

33. Whilst the respondents in *A, B and C* sought (and obtained) permission to appeal the decision of Hedley J (primarily, as I understand it, on the basis of a challenge to his conclusions as to Mr X's capacity to marry), Mr X's death brought the appeal to an end. This decision therefore stands as the sole decision in the Court of Protection upon this important point, and it is perhaps therefore to be regretted that it is so shortly reasoned.[39]

34. Notwithstanding the approach adopted by the authorities noted above, I would venture to suggest that there is, still, a gap between the common law test as it now stands and that set down in the MCA 2005. In saying this, I would like to think that I am in good company: as Barbara Rich QC identified in a 2011 article: "[i]*t is debatable whether s 3 of the Act is simply a 'modern restatement' of Banks v Goodfellow. In particular, s 3(4), which includes in 'information relevant to a decision', 'information about the reasonably foreseeable consequences of – (a) deciding one way or another, or (b) failing to make the decision, arguably goes further than anything in Banks v Goodfellow.*" [40]

35. I would also add that there no reference in *Banks v Goodfellow* to retention of information[41] (or communication of information). Further, *Banks v Goodfellow* runs together the diagnostic and functional

---

[39] Although it is undoubtedly a decision which is to be welcomed for a different reason, namely the 'qualified' declarations that Hedley J made in respect both of X's testamentary capacity and his capacity to make an LPA – offering a pragmatic solution to the problem of fluctuating capacity which besets practitioners. Hedley J also distinguished between the capacity to make a will and the capacity to manage one's property and affairs – finding on the evidence before him that X had the former but lacked the latter, noting (at paragraph 41) that "*the general concept of managing affairs is an ongoing act and, therefore, quite unlike the specific act of making a will or making an enduring power of attorney. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent.*"

[40] Barbara Rich QC: "*The Assessment of Mental Capacity for Legal Purposes*" [2011] Eld LJ 39 at 41.

[41] The importance of retention of information in the (admittedly slightly different) context of marriage by Bodey J was emphasised in *A Local Authority v AK and Others* Bailii Citation [2012] EWHC B29 (COP) [2013] COPLR forthcoming at para 51.

> "*On the totality of the medical evidence and considering it alongside the factual evidence, as already discussed, I am completely satisfied that on 17 November 2010 AK did not have capacity freely to decide to enter into a marriage. Even if, and accepting, that he understood on an intellectual level the concept of a marriage and the status of being husband and wife (which is in any event doubtful) he was, in my judgment, disabled from adequately using or weighing that information (a) by the fact that the choice would not have been put to him neutrally and (b) by his inability, as shown by subsequent interviews (his condition having remained much the same throughout) to know or remember, except for extremely short periods of time, his own marital status and/or the identity of his spouse. The reference to the retention of information for 'a short period' in s 3(3) of the MCA 2005 cannot seriously be interpreted to mean, in the context of the lifetime commitment of marriage, for so short a period as AK is able to recall whether he is married at all,*

limbs of the statutory test in ss.2-3 MCA 2005: as emphasised in *PC v City of York Council*, both aspects of the test are equally important to a clear identification of (1) whether P suffers from a material disturbance of the mind or brain and (2) whether as a result of that impairment or disturbance he or she is unable to understand, use/weigh, etc. the information relevant to the decision whether to make a will and what to include in that will.

36. In the circumstances, I would suggest both that the common law test still has some way to go before it meets the statutory test, and (with sufficiently due respect) that there is no reason in principle why it should not reflect the terms of the statutory test, in which the factors set down in *Banks v Goodfellow* serve to indicate the categories of relevant information: i.e. (1) the nature of the act of making a will; (2) the effects of making a will (and I would, the effects of not making a will); (3) the extent of the property; and (4) the claims of others.[42]

The forensic process

37. The second aspect of the assessment of testamentary capacity is the forensic process by which the substantive test is applied. At first blush, the position appears simple:

    a. at common law, and whilst there is a presumption of capacity, that presumption can shift. The burden of proof in relation to testamentary capacity is subject to the following rules: (1) while the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity; (2) in such a case the evidential burden then shifts to the objector to raise a real doubt about capacity; (3) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless;[43]

    b. by contrast, under the MCA 2005, there is a statutory presumption of capacity (s.1(2)), and the evidential burden lies throughout upon the person asserting incapacity;

    c. at both common law and under the MCA 2005, the standard of proof is the civil standard, i.e. the balance of probabilities.

38. As identified in *Scammell v Farmer*, there is, therefore, a clear distinction between the position at common law and under the MCA 2005. Whilst little may appear to turn upon this distinction, it seems to me that the distinction will assume the greatest importance in the most difficult cases: i.e. those cases where the assessment of capacity is taking place retrospectively and where there is most doubt as to whether the adult had testamentary capacity at the material time.

---

or reliably (when he does remember) to whom. That evidence from interviews with AK to which I have just referred, admittedly relates to after the marriage; but it is clearly also a reliable indicator of AK's ability to retain information before it. Further, as Miss Butler-Cole submits, AK's thinking was distorted by false beliefs about marriage (for example about his getting 'holiday pay' and being 'able to control' his money) such that any weighing up by him of his wishes about marriage is likely to have been on false premises."

[42] For a further breakdown of information within each of these categories, see the guidance given in the Law Society/BMA's *Assessment of Mental Capacity: A Guide for Doctors and Lawyers* (3rd Edition, Law Society, 2009) at pp. 72-3 (endorsed in the most recent edition of *Heywood & Massey* at 4-045).

[43] See *Key & Ors v Key & Ors* [2010] 1 WLR 2020 at paragraph 97 per Briggs J, citing *Ledger v Wootton* [2007] EWHC 2599 (Ch) per HHJ Norris QC at paragraph 5. The position is similar in relation to lifetime gifts: see *Gorjat v Gorjat* [2010] EWHC 1537(Ch), at paragraph 139 per Sarah Asplin QC (sitting as a Deputy High Court Judge), citing *Williams v Williams* [2003] WTLR 1371 at 1383.

39. Furthermore, the public policy basis for the common law approach is clear: it acts as a safeguard for the vulnerable, in essence because it ensures that the well-known forensic difficulty of retrospective assessment of capacity[44] cannot too readily serve to support of wills of doubtful validity.

40. In the circumstances, therefore, and whilst it seems to me for the reasons set out above that the common law can – and arguably – should align itself with the statutory test in ss.2-3 MCA 2005 as regards the substantive test to apply for want of capacity, it seems to me that there is a very sound basis upon which the long-standing forensic approach at common law should remain unchallenged.

41. As flagged earlier in relation to *Re D*, this raises, in turn, the interesting and (as far as I know, so far unrecognised) question of what the Court of Protection should do when undertaking retrospective assessments of capacity.[45] As noted in relation to *Re D*, it seems to me that there will now be occasions upon which the Court will have to decide whether an individual had testamentary capacity at a previous point in time, rather than deciding whether they currently have such capacity.

42. If the Court is doing so, where does the burden of proof lie? At first blush, the answer might appear to be simple, namely that the presumption of capacity enshrined in s.1(2) MCA 2005 applies both to present and past assessments, and that the burden lies at all stages upon the person who seeks to displace the presumption. Support for this proposition can be found by analogy in:

    a. the approach adopted (for instance) by HHJ Marshall QC in *Chafer v Jesshope*[46] to the question of whether a property and affairs LPA should be revoked under s.22(2)(a) MCA 2005 on the basis that the donor did not have capacity to execute it, in which she to proceeded on the basis that the burden at all stages lay with the applicant to establish that the donor lacked capacity;[47]

    b. the approach adopted in *A Local Authority v AK and Others*[48] to the retrospective assessment of AK's capacity to marry.

43. I note that in both of these cases, but in particular in relation to the execution of an LPA, it might be said that the decision in question was sufficiently momentous in its effects both upon P's legal status and for their affairs that there is a powerful analogy to be drawn with the position in relation to wills. It would appear, though, that in both cases the approach was adopted without any argument.[49]

---

[44] As to which, see the recent decision in *Hawes v Burgess* [2013] EWCA Civ 94, in which (albeit obiter) serious doubts were expressed by Mummery LJ about the value of retrospective medical evidence from an expert who had neither met nor medically examined the testatrix (albeit in the context of a case where the will in question had been drafted by an experienced independent lawyer who had formed the opinion from a meeting or meetings that the testatrix understands what she was doing (see paragraphs 59-61).

[45] Not just, I note, in the context of testamentary capacity.

[46] [2012] WTLR 771.

[47] See paragraphs 31-2, where HHJ Marshall QC addressed the question of whether Mrs Jesshope had capacity to execute the Lasting Power of Attorney of 7 January 2009 when she purported to do so:

> *"31. The test here is whether I am satisfied, on the balance of probability, that she did. I am in fact perfectly satisfied that she did.*
>
> *32. The LPA is regular and regularly obtained on the face of it. Since this is the mechanism laid down by the Mental Capacity Act 2005 in order to guard against exactly the possibility of later question about the capacity of the donor of an LPA, this factor throws the burden onto the challenger, Mr Crafer, to prove on balance* of *probability that Mrs Jesshope did lack capacity*."

[48] Bailii Citation [2012] EWHC B29 (COP) [2013] COPLR forthcoming.

[49] There was in *AK* an argument advanced in relation to the standard of proof that, given the seriousness of the underlying issue (i.e. whether an apparently validly contracted marriage should be annulled), the evidence required to establish lack of capacity should be compelling. This was rejected, Bodey J holding that the standard of proof was the balance of probabilities set down in s.2(4) MCA 2005, although given the seriousness of the underlying issue, the court would not decide lightly that the prescribed standard had been met (see paragraphs 14-16).

44. I would, perhaps a little controversially, like to suggest that when it comes to the retrospective assessment of testamentary capacity in the Court of Protection (most obviously in the *Re D* scenario), the Court should adopt the common law approach and allow for a shifting of the evidential burden where a real doubt has been raised. If (as I suggest is the case) the public policy rationale in favour of this shifting remains good at common law despite the enactment of the MCA 2005, then by the same token it should be good wherever the exercise is being conducted.

45. The immediate objection that would be raised is that it would conflict with the statutory presumption in s.1(2) MCA 2005, a statutory presumption which applies as much to the Court of Protection as it does to those concerned with an adult who potentially lacks capacity. It seems to me, though, that on a proper first principles analysis of the position, this objection is not made out. The argument (and I entirely concede this is very much an argument) would go as follows:

    a. in order to make a decision "for or on behalf of" P in respect of a relevant matter – here, whether to make a statutory will – the Court must be satisfied that P currently lacks capacity to make that decision (and must then proceed to make the decision following the structured decision-making process set out in s.4);

    b. when deciding whether it has jurisdiction to make a decision, the Court is bound by the presumption in s. 1(2);

    c. however, strictly, the presumption in s.1(2) applies only to the current assessment of capacity: "[a] *person must be assumed to have capacity unless it is established that he lacks capacity*;"

    d. the Act is silent as to the approach that the Court is required to take in respect of the past assessment of capacity, even in those sections where it specifically empowers the Court to consider questions of P's past capacity – most obviously ss.22(2)(a) (enabling the Court to decide whether one or more of the requirements for the creation of a lasting power of attorney have been met); and s.26(4)(a) (empowering the Court to declare whether an advance decision regarding medical treatment exists);

    e. whilst there are sound reasons, not least so as to secure proper respect for P's rights under Article 8 ECHR, for the Court to proceed in the retrospective assessment of P's capacity as if it were bound by the presumption in s.2(1), that still leaves room in an appropriate case for the Court to modify the presumption so as to secure P's interests;

    f. the retrospective assessment of testamentary capacity is, I would suggest, such a case. Whilst outside the scope of this paper, other decisions that might fall to be approached in the same way might include:

        i. the making of a life-time gift;[50] and

        ii. the making of advance decisions to refuse life-sustaining medical treatment. This appears to have been the position at common law,[51] and in the post-MCA case of *A Local Authority v*

[50] In line with the common law approach: see *Gorjat v Gorjat* [2010] EWHC 1537(Ch), at paragraph 139 per Sarah Asplin QC (sitting as a Deputy High Court Judge), citing *Williams v Williams* [2003] WTLR 1371 at 1383.

[51] *HE v A Hospital NHS Trust* [2003] 2 FLR 408 per Munby J (as he then was). Whilst he noted (at paragraph 19) that it was a well-established proposition that "[a]*n adult is presumed to have capacity, so the burden of proof is on those who seek to rebut the presumption and who assert a lack of capacity. It is therefore for those who assert that an adult was not competent at the time he made his advance directive to prove that fact,*" he went on at paragraph 46 to summarise the legal position as including the propositions that: "(4) *The existence and continuing validity and applicability of an advance directive is a question of fact. Whether an advance directive has been revoked or has for some other reason*

> *E*,[52] Peter Jackson J appeared to adopt a similar approach to the question of whether the young lady in question had had capacity to make an advance decision to refuse life-sustaining treatment, holding that "*for an advance decision relating to life-sustaining treatment to be valid and applicable, there should be clear evidence establishing on the balance of probability that the maker had capacity at the relevant time. Where the evidence of capacity is doubtful or equivocal it is not appropriate to uphold the decision;*"[53]

g. query whether the same approach should not also be adopted to the historical assessment of the capacity of adults to take other 'momentous' decisions with lasting effect, two obvious examples being marriage and the making of an LPA. As set out above, in both cases, upon the reported cases to date, the courts have proceeded on the 'conventional' MCA 2005 approach, but this question may well fall for determination in a suitable case in future.

46. I should note that the logical implication of the approach set out in the paragraphs above is that in the *Re D* scenario the Court could apply not just the forensic approach indicated at common law but also, potentially, the common law test for testamentary capacity. Whilst it seems to me that this would be merited in respect of the assessment of a will made prior to the coming into the force of the MCA 2005, it seems to me that the Court would, rightly, require some very considerable persuasion that it would be appropriate not to apply the provisions of the MCA 2005 in respect of any will concluded after October 2007. Of course, as noted above, if the substantive tests at common law and under the MCA 2005 can be aligned, this question would become otiose and the risk of differing approaches being adopted dependent on the forum in which the question is asked eliminated.

47. I cannot emphasise enough, however, that, for purposes of the assessment of an adult's <u>current</u> testamentary capacity (whether by an expert or by the Court of Protection):

    a. none of the points set out immediately above are remotely relevant and

    b. the Court is – properly – bound by the provisions of the MCA 2005 both as to the substantive law to apply and the forensic process to apply.

---

ceased to be operative is a question of fact;" and that "*(5) The burden of proof is on those who seek to establish the existence and continuing validity and applicability of an advance directive*."

[52] [2012] EWHC 1639 (COP).

[53] Paragraph 55; see also paragraph 67, where he concluded that: "*on the balance of probabilities that E did not have capacity at the time she signed the advance decision in October 2011. Against* [the alerting background he set out] *a full, reasoned and contemporaneous assessment evidencing mental capacity to make such a momentous decision would in my view be necessary. No such assessment occurred in E's case and I think it at best doubtful that a thorough investigation at the time would have reached the conclusion that she had capacity.*" The position is slightly complicated by the fact that Peter Jackson J did not invite submissions on the approach to be adopted. E was represented at the hearing by the Official Solicitor, who did not (it appears) advance a case that she had had the capacity at the material time, although I note that Peter Jackson J recorded – in the context of a consideration of her current capacity to consent to or refuse medical treatment – the observation of Counsel instructed by the Official Solicitor that in the absence of contrary medical opinion he would have felt able to take instructions from E (paragraph 51). It is not altogether clear whether E's parents – who appeared for themselves – advanced a positive case that their daughter had had capacity at the material time, their primary position being to "*fight for her best interests which, at this time, we strongly feel should be the right to choose her own pathway, free from restraint and fear of enforced re-feed… We want her to be able to die with dignity in safe, warm surroundings with those that love her*" (paragraph 80). I should note that have criticised the approach adopted by Peter Jackson J as being inconsistent with the statutory presumption in s.2(1). It may be that this criticism was misplaced.

CONCLUSION

48. It is perhaps, not surprising, that even into the sixth year of the 'radical change' in the treatment of those without capacity wrought by the MCA 2005 the Courts are still grappling with the consequence of those changes. It seems to me that those who advise and appear in cases relating to those without testamentary capacity have some of the most important roles to play in ensuring that the common law and the MCA 2005 march in step to the maximum extent possible with the (hopefully) uncontentious aim of the securing the interests of adults at their most vulnerable.

ALEXANDER RUCK KEENE
39 Essex Street
London
WC2R 3AT

May 2013

alex.ruckkeene@39essex.com
www.39essex.com
www.copcasesonline.com