

# Probate: The next generation

In the first of a three-part series, **Araba Taylor** explores the growth area of probate litigation and the nature of the claims frequently made. She outlines steps which can be taken in advance to discourage speculative claims and help in the early resolution of those with limited merit

Ever since *White v Jones*, solicitors who make mistakes with a client's will have – for policy reasons, if nothing else – been held liable to disappointed beneficiaries. Foreshadowed by the key negligence decision of *Ross v Caunters*, the rationale is that the person to whom the duties are principally owed – the testator – has suffered the breach of duty but no loss, while the beneficiaries have suffered the loss but, arguably, not been on the receiving end of any breach of duty.

The claims considered here are, firstly, validity claims arising out of:

- want of due execution;
- want of capacity;
- want of knowledge and approval; and
- undue influence.

## ACCEPTING THE RETAINER

When considering the general retainer and client care issue, there is an inevitable tension in this area between the desirability of a testator, even one on his deathbed, being able to make a will and the possibility of fault on the part of a solicitor even in accepting such a retainer. Is the solicitor's duty to accept the retainer or to reject it? When making their probate claims, the next generation frequently complain that having regard to the testator's age, health and so on, no responsible professional should even have contemplated making a will for such a client. And yet it seems a fundamental freedom that someone, however old, however sick, who nevertheless retains the ability to direct the destination of their property should be able to do so, even with their dying breath.

The terms of section 9 of the Wills Act seem to support this, allowing as they do for the acknowledgment of a signature, for signature by another person at the testator's direction and for any form of attestation clause to be used. In addition, recent cases such as *Hoff v Atherton* and *Re McClintock* (Deceased), suggest a trend whereby the courts will examine allegations of want of capacity very carefully before denying the testator the freedom to make a will. As a result, the mere allegation of some degree of cognitive impairment is not sufficient, by itself, to invalidate a will.

In addition, the courts lean very heavily against intestacy

and wherever it is possible to uphold a document as a true last will, they will seek to do so.

When receiving instructions to make a will for a client who is old, infirm, suffering from mental impairment or close to death, there are some pointers which might assist in avoiding claims later on:

- Instructions should be taken from the client and not from a relative or carer, particularly one who is going to benefit: *Richards v Allan*;
- Some assessment of capacity must be made;
- As capacity is transaction-specific, it will assist if the will is simple and straightforward, such that even with some cognitive impairment, the client is likely to be considered able to understand it;
- The *Banks v Goodfellow* tests should be actively considered and the solicitor should satisfy himself that the testator possesses soundness of mind, memory and understanding. An attendance note should be made which can assist in showing that he was of sound mind;
- Where possible, medical evidence should be obtained of soundness of mind, although the counsel of perfection in *Kenward v Adams*, that a medical practitioner should actually be present when a will is executed and be a witness, is in practice almost impossible to achieve; and
- Particular care needs to be taken where the client has fluctuating capacity. Although the law recognises the possibility of a lucid interval (s 96(1)(e) Mental Health Act 1983 and ss 16 and 18(1)(i) of the not yet enforced Mental Capacity Act 2005), evidence to support this needs to be clear.

Lastly, practitioners need to be aware that it is not only conditions resulting in mental impairment which might be of relevance to testamentary capacity. The recent decision in *Re Adam* (Deceased) shows that multiple sclerosis can be relied on as indicating want of capacity and there are of course other diseases, both mental and physical which might be relevant. Thus it is not surprising that depression or bipolar disease or, of course, testamentary delusion might alert the practitioner to the possibility that a client lacks capacity, but so, too, should severe pain resulting in heavy medication or, indeed, any condition which makes the client vulnerable or suggestible or generally less capable than formerly. Claims can arise even where the condition from which the

testator was suffering was, for example, stroke, Parkinson's disease, Huntington's disease, or even a fall or a bad dose of influenza, where this has resulted in reduced confidence, confusion, however temporary, or anxiety.

Chronic conditions, not strictly amounting to ill-health, may also be material to capacity. This would include, for example, poor eyesight, loss of hearing and any condition which might make it difficult for the client to communicate or understand. The test for capacity is not just whether a client understands what he is doing, but whether he understands with the assistance of such explanation as he may have been given. The nature, scope and intelligibility of that explanation may therefore assume crucial importance and the practitioner should ensure that if the client's health has any implications for understanding and communication, the explanation was demonstrably adequate to deal with these. This, at the very least, is likely to entail taking extra time and care with the client.

The state of the testator's health is relevant not just to issues of his capacity to retain solicitors and give instructions for a will, but also to claims based on want of knowledge and approval and undue influence. As stated above, the starting point for the claimant is frequently that no responsible practitioner would have contemplated making a will for a person in the testator's condition and this will often be sufficient to warrant an inquiry. Given the inquisitorial nature of the court's role in this area, it may often be sufficient to justify commencing a probate claim even if, in the event, the will is upheld.

Accordingly, the will draftsman can ill-afford to ignore the state of the client's health, whether or not the condition from which he or she suffers is directly relevant to testamentary capacity. If the retainer is accepted, a clear note should be made showing that the condition and its possible implications for the retainer were expressly identified and acknowledged. Where necessary or possible, this should be supported by medical evidence.

#### **AVOIDING DELAY**

Once the retainer has been accepted, the solicitor should be scrupulous to observe the term implied into every retainer that it will be performed with reasonable expedition. This is obviously of particular importance where the client is elderly and/or infirm. It does, however, have implications for staffing and availability. The following practice points are worth noting:

- appointments should be made promptly and kept;
  - accurate notes of the testator's wishes should be made, which should assist in preventing:
    - rectification claims;
    - validity problems where capacity is lost between the date of the instructions and the date of execution;
  - and
  - claims based on want of knowledge and approval.
- Drafts should be produced with appropriate haste and should accord with the instructions given and noted.

Provided a solicitor has acted with reasonable expedition in the performance of a will retainer, he will not be held liable in the event that the client dies before execution of the will due to having taken an unexpected turn for the worse: *X v Woollcombe Yonge*. However, as in *White v Jones* and *Hooper v Fynmores*, where the delay is held to be attributable to the solicitor, there will now be liability.

*In the next issue Araba Taylor looks at specific ways of avoiding claims under the Inheritance (Provision for Family and Dependents) Act 1975*

**Araba Taylor is a general Chancery barrister in private practice. Comments on this article can be sent to her at [ataylor@9stonebuildings.com](mailto:ataylor@9stonebuildings.com) or [ataylor\\_stalbanschambers@yahoo.co.uk](mailto:ataylor_stalbanschambers@yahoo.co.uk).**

