clarke willmott

Capacity to make a will

One of the essential requirements for a Will to be valid is that the person making it (the testator) must have the necessary mental capacity to make a Will. If a Will is rational on its face, and correctly executed, it will be presumed that the testator had capacity and thus anyone challenging the Will on these grounds will need to show that the testator did not have the necessary capacity.

The test for whether an individual has the necessary mental capacity to carry out a particular action is task specific. This means that the requirements can differ depending on the action being contemplated.

At common law, it is established that in order to have capacity to make a will a testator must understand:

- the nature of a Will and its effects
- the extent of his or her property and
- the moral obligations that he or she ought to consider. This includes distinguishing between
- individuals and reaching a moral judgment, such as whether one child should be preferred
- over other children because they are less well provided for, more deserving or in need of
- greater financial assistance because of family responsibilities or state of health.

In a recent case the judge reiterated that capacity depends on the potential to understand these matters. It is not necessary that the testator remembers details without prompting. In the case of the testator in the case in question it was irrelevant that she had forgotten she owned a particular asset until reminded, just that when reminded she understood that she owned it.

Similarly, capacity does not require understanding of the collateral consequences of making a Will. So in the above case, the fact that the testator did not appreciate that leaving her holding of shares in the family company to her children equally could potentially lead to deadlock over decisions, did not affect the fact that she understood that she owned the shares, appreciated the claims of her children and formulated the desire to leave the shares to the children equally which she understood the Will achieved. Thus she had capacity to make the Will, albeit that she did not appreciate the ramifications of leaving the shares equally.

When it comes to making a Will the test for capacity should be based 'on the balance of probabilities'.

In other words, is it more likely that individual is capable or that the individual is incapable? The person undertaking the test, which would generally be the individual's GP or consultant, does not need to be satisfied 'beyond reasonable doubt'.

Medical evidence can be crucial in establishing capacity. The so-called "golden rule" for practitioners is that, in preparing a Will for a very elderly or seriously ill testator, contemporaneous, written medical evidence as to capacity should be obtained so this can be produced if any later claim as to lack of capacity is made. In a 2013 case it was, however, stated that strong evidence of incapacity would be required when an experienced solicitor had formed the opinion that the testator had capacity and had recorded this contemporaneously in writing.

Further information

For further information on this or on any other Private Capital matter you may have, please **contact us**.