Tax, Trust and Probate ~ July 2023

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**A Diagnosis of Dementia Does Not Necessarily Equate to a Loss of Capacity**

Occasional episodes of forgetfulness, or even a formal diagnosis of dementia, do not necessarily mean that a person lacks the mental capacity required to make important decisions. The High Court made that point in finding that a pensioner acted as a free agent when he made a six-figure gift to one of his children.

By his will, the man bequeathed his estate, which had a net value of about £230,000, equally to his three children. He had, about two years before he died, gifted £200,000 from his bank account to one of his daughters. After he died, her sister challenged the validity of the gift and sought an order requiring her to pay the money back into their father's estate so that it could be divided in accordance with his will.

In asserting that her father lacked the mental capacity to make the gift, the sister pointed out that he had by then been diagnosed with dementia and was becoming increasingly frail and confused. She further contended that the daughter, with whom he had only recently been reconciled, had exerted undue influence over him.

Rejecting the sister's case, however, the Court noted that a diagnosis of dementia does not equate to a blanket assessment of incapacity and occasional bouts of forgetfulness do not do so either. The evidence suggested that medication had improved his condition and the sister had failed to establish on the balance of probabilities that he lacked the capacity to make the gift.

The Court noted that he made the gift to assist the daughter in exercising her right to buy her council home. That was, on the face of it, a sound proposition. Although the gift represented about 45 per cent of his total assets, he was a careful and frugal man and there was no evidence that his generosity compromised his ability to fund his own day-to-day expenses.

The gift to the daughter clearly resulted in inequality and impacted on the inheritance prospects of the other two children. There was, however, nothing to prevent him from reallocating his resources as he chose, thereby favouring one child over the others. Substantial assets remained in the estate, in which all three siblings would share.

The gift was not so unusual or suspicious as to be only explicable on the basis that it had been procured by undue influence. The dementia diagnosis did not, by itself, support a conclusion that he was so vulnerable that the daughter had attained a dominating or ascendant influence over him when he made the gift.

Contact us for expert advice on any matters relating to inheritance disputes.

**Partner Note**

*Blythe v Blythe [2023] EWHC 1085 (Ch)*

**Court of Appeal Analyses Will Revocation Clause in Guideline Decision**

Included in most people's wills is a clause that has the effect of revoking all their previous wills. Such straightforward provisions are usually uncontentious but, as a guideline Court of Appeal ruling showed, they can give rise to difficulties where a testator has assets both in England and abroad.

A businessman had substantial assets in England and India when he died at the age of 72. He made a will in 2007 dealing with all of those assets. However, he made another will in 2016 which disposed only of his Indian assets. The 2016 will was declared to be his last and included a clause that revoked all such previous documents.

After an inheritance dispute broke out between members of his family, a judge found that the meaning of the revocation clause could not have been clearer and that it revoked the 2007 will in its entirety. That meant that the businessman died intestate – without having a valid will in place – save in respect of his Indian estate.

A more senior judge, however, subsequently took a different view on appeal: he found that the revocation clause was only effective to revoke the 2007 will to the extent that it dealt with the businessman's Indian assets. That meant that his English assets would be distributed in accordance with the 2007 will.

Upholding a challenge to the latter ruling, the Court noted that, given the clear and unambiguous terms of the revocation clause, the businessman was, on the face of it, to be taken as having intended the 2016 will to be not only his primary will but his only will. Circumstantial and other evidence before the Court fell short of displacing such a conclusion.

The businessman may well have assumed that all but a relatively modest lump of his English assets had already been dealt with by way of lifetime gifts. He may have regarded his English estate as less pressing and something that could be dealt with at a later date. The legal presumption that he did not intend to die intestate was quite weak in the circumstances and insufficient to overcome the natural meaning of the revocation clause. The Court's ruling meant that the 2007 will had been wholly revoked.

We can ensure that your wishes are made clear in an expertly drafted and valid will. Contact us for advice.

**Partner Note**

*Sangha v Sangha [2023] EWCA Civ 660*

**Declaration of Death Opens Way for Administration of Missing Teacher's Estate**

When a person goes missing without trace, the fact that their assets are left in limbo often adds to the agony suffered by their loved ones. However, as a High Court ruling in a very sad case showed, such impasses can if necessary be broken by a judicial declaration of death.

The case concerned a teacher and keen outdoorsman in his 50s who never returned home from a walking holiday to Turkey. He told fellow guests at the hotel where he was staying that he was going for a hike to a tourist spot and was never seen again. Despite a missing person publicity campaign and five search parties, using army personnel, drones, helicopters and dogs, no trace of him had been found.

About four years after his disappearance, his sister and closest living relative applied to the Court under the Presumption of Death Act 2013. In the absence of official confirmation of his death, there could neither be closure for her and her family nor could his estate, which included a £350,000 property, be administered.

Ruling on the matter, the Court noted that there was no indication whatsoever that he was depressed or that there was anything wrong in his life. His sister had done all in her power to find him, travelling to Turkey twice, without any success. His passport and personal items were found in his hotel room, strongly indicating that he had not deliberately disappeared with a view to starting a new life. Calls to his mobile phone went to voicemail until the battery ran out.

It was surprising that no body had been found, but he was a responsible man and there was absolutely no evidence that he intended to disappear without telling his loving sister, her husband and their children. Everything suggested that he went out for a walk, intending to return to the hotel that evening.

The Court was satisfied that something happened on the day of his disappearance that caused his death. It was impossible to know whether he tripped and fell into a crevice on rough terrain or suffered a heart attack or stroke. The Court made a declaration that he died seven days after the date on which he went missing.

For advice regarding missing persons and declarations of death, contact **<<CONTACT DETAILS>>**.

**Partner Note**

*Re: David Horton Cann [2023] EWHC 1006 (Fam)*

**Stamp Duty Avoidance Scheme Goes Pear Shaped – A Cautionary Tale**

Tax avoidance schemes are not always effective and can have serious unforeseen consequences. In a telling case on point, a man was required to pay the entirety of the Stamp Duty Land Tax (SDLT) due on a seven-figure property transaction, a bill that he would otherwise have shared equally with his then wife.

The then couple initially contemplated a straightforward purchase of the property for £1.075 million. Had that happened, the property would have been conveyed into their joint names, rendering them equally liable to SDLT. In the event, however, they elected to take a different course with a view to saving SDLT.

The scheme envisaged that the wife alone would agree to purchase the property for £1.075 million. She would then agree to sell it on to the husband for £10,000. The property's freehold would then be transferred by the vendors directly to the husband alone. The husband subsequently declared to HM Revenue and Customs (HMRC) that the chargeable consideration for the purchase was £10,000 and that no SDLT was due.

HMRC disputed that proposition and the husband conceded that the scheme had not worked as planned and was ineffective. He was required to pay SDLT on a purchase price of £1,085,000. That was £10,000 more than if the scheme had not been carried out. Following the couple's divorce, the First-tier Tribunal (FTT) agreed with HMRC that the whole SDLT liability fell on the husband alone.

Challenging that outcome, he argued that, following the property's transfer, he held it on implied trust for himself and his wife. As they were joint beneficial owners of the property, he said that he should only be liable for one half of the SDLT bill. The Upper Tribunal (UT), however, found no fault in the FTT's conclusions on the evidence and dismissed his appeal.

The UT noted that, in essence, the failed scheme required the husband to become the property's sole beneficial owner on completion of the purchase. That was what the couple intended and some care was taken to achieve that result. He was to be regarded as the transferee under the conveyance, which vested the property, both legally and beneficially, in him alone.

It is important to source specialist legal advice if a dispute with HMRC arises. Our expert team can assist.

**Partner Note**

*Fox v The Commissioners for His Majesty's Revenue and Customs [2022] UKUT 310 (TCC)*

**Undue Influence – Vulnerable Mother 'Coerced' into Making Will**

Making a valid will requires an exercise of independent decision-making, free from the undue influence of others. The High Court powerfully made that point in finding that a daughter coerced her ailing mother into bequeathing everything to her.

The mother was aged 82 when she made her one and only will, leaving her home and everything else she owned to one of her four daughters. She had by then been diagnosed with dementia and had suffered a suspected stroke. She died three months after signing the document. A legal challenge to the will's validity was later brought by two of her disinherited daughters and four of her grandchildren.

Ruling on the matter, the Court noted that the circumstances were suspicious. No solicitor was involved in the preparation and execution of the will and the mother was not medically examined at the time. The Court was not, however, satisfied on the evidence either that she lacked the mental capacity required to make a valid will or that she did not know and approve of the document's contents.

In nevertheless ruling the will invalid, the Court found that the facts pointed inevitably to a conclusion that the daughter who became her sole beneficiary had coerced her into making it. She may have believed that she was simply persuading her mother to do the right thing, but the undue influence that she brought to bear went far beyond persuasion.

The mother was very vulnerable, both physically and mentally, when she signed the will. She had been devastated by the recent death of one of her daughters and was probably still grieving deeply. After moving in with her, the daughter who benefited under the will had taken steps to isolate her from other members of the family. The daughter's assertion that she had nothing to do with making the will was inherently unlikely.

The Court found that the mother signed the will not as a free agent but because her volition had been overcome by her daughter's undue influence. The decision meant that she died without making a valid will and that her estate would be distributed amongst her next of kin in accordance with intestacy rules.

For advice on making sure your estate will be dealt with fairly and efficiently, to avoid contentious situations such as this arising, contact us.

**Partner Note**

*Jones and Others v Jones [2023] EWHC 1457 (Ch)*

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