Challenging lifetime dispositions

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The nature of disputes as to lifetime dispositions

Particularly where an estate appears to be smaller than anticipated, personal representatives (PRs) and beneficiaries often have queries and concerns about dispositions made by the deceased during their lifetime. These dispositions may include gifts, asset sales which appear to have been made at an undervalue, loans on favourable terms, solely owned assets which were transferred into joint names and deathbed gifts.

Where the deceased's affairs were being dealt with by an attorney or deputy the focus of investigations may need to include them.

Challenging lifetime dispositions

There are a number of bases upon which a lifetime disposition may be challenged. Such claims may involve allegations that:

- the deceased lacked capacity (including concerns relating to potential abuse by an attorney or deputy)
- the deceased was subjected to undue influence, and
- the requirements for a valid deathbed gift (donatio mortis causa) were not met

The test for capacity to make lifetime gifts and the burden of proof

The common law test for establishing mental capacity to make a lifetime gift is set out in the case of *Re Beaney* and is described as an ability to understand, rather than actual understanding:

References:
Re Beaney [1978] 1 WLR 770 at para [773A]

> '...the question in each case is whether the person concerned is capable of understanding what he does by executing the deed in question when its general purport has been fully explained to him.'

Since 2014, it has been clear that this common law test applies, rather than the test set out in the Mental Capacity Act 2005 (MCA 2005), which applies only in relation to matters arising under MCA 2005 (and does not include retrospective consideration of capacity to make a lifetime gift).

References:
Re Smith (Deceased); also known as Kicks v Leigh [2014] EWHC 3926 (Ch)

MCA 2005 is arguably still useful as it has not been found to be inconsistent with the common law test, although it expands on it and the approach to the burden of proof differs slightly. (Under MCA 2005, such burden remains on the party claiming incapacity—this is discussed further below.) In particular, MCA 2005 provides:

References:
Re Smith (Deceased) [2014] EWHC 3926 (Ch) at paras [43] and [65]

- 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', and

  References:
  Mental Capacity Act 2005, s 2
- guidance that a person is considered unable to make a decision if they are unable to:

  References:
  MCA 2005, s 3

  - understand the information relevant to the decision
  - retain that information
  - weigh that information as part of the decision-making process
  - communicate the decision (whether by talking or other-wise)

The degree of understanding required in order to make a lifetime gift varies according to the importance of the transaction. In *Re Beaney*, the court was asked to consider a widow's gift of her house to the eldest of her three daughters. The gift was made shortly after the widow was admitted to hospital with dementia and she died intestate a year later. The court set aside the gift having taken into account the medical evidence, and the facts that the effect of the gift was to disentitle the other daughters to any share in the estate (on the basis that the house was the only valuable asset) and that this was not explained to the widow. This was notwithstanding that the deceased had told an old friend of her husband and a solicitor, who were present when the transfer was executed, that she understood the effect of her actions. The court found:

References:
Re Beaney [1978] 1 WLR 770

> '...at one extreme, if the subject matter and value of a gift are trivial in relation the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus... to pre-empt the devolution of his estate...then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.'

References:
Re Beaney [1978] 1 WLR 770 at para [774E-F]

It has subsequently been held that the requisite capacity for the transfer of a family home is as high as that required for a Will, ie the well-known four-limb test in *Banks v Goodfellow*. Further, if the home is the donor's principal asset, an understanding is also required of both the effect of the gift on their estate and also, if relevant, that it

would deprive a spouse of any entitlement or legal right to stay there.

References:
Re Morris (Deceased) [2000] All ER (D) 598
Banks v Goodfellow (1870) L.R. 5 Q.B. 549 at p [565]
Re Sutton (Deceased) [2009] EWHC 2576 (Ch)

In terms of assessing capacity, it is advisable to ask the donor open questions, rather than questions requiring yes or no responses. Failure to do so may lead the court to a conclusion that the donor did not understand the nature of the gift. This approach may also be useful in establishing that the donor could hear and understand what is being read to them, or that they could read.

References:
Re Beaney [1978] 1 WLR 770
Williams v Williams [2003] EWHC 742 (Ch)

The burden of proof to establish, on the balance of probabilities, that the deceased did not have capacity to make the gift lies with the party asserting incapacity. If, however, that party adduces evidence to raise sufficient doubt from which incapacity can be inferred, the evidential burden shifts at that point to the opposing party.

References:
Re Smith (Deceased) [2014] EWHC 3926 (Ch) at para [67]
Gorjat v Gorjat [2010] EWHC 1537 (Ch)

The point at which capacity is required

Capacity is required when the donor of a gift provides instructions but is not essential at the time of execution of the relevant documentation effecting the gift, provided the donor understands they are signing documents for which they gave instructions.

References:
Re Singellos (Deceased) [2010] EWHC 2353 (Ch)

Gifts made by an attorney or deputy and the risk of abuse

The donee of a lasting power of attorney for property and financial affairs is, unless otherwise stated in the instrument, authorised to make gifts to any charity to whom the donor made or might have been expected to make gifts and on customary occasions topersons (including themselves) who are related to or connected with the donor. A 'customary occasion' includes birthdays, marriages or civil partnerships, or any occasion on which presents are customarily given within families or among friends or associates. Similar powers are given to attorneys acting under enduring powers of attorney.

References:
MCA 2005, s 12(2)–(3)
MCA 2005, Sch 4, para 3(3)

A deputy appointed by the Court of Protection may also make gifts, subject to the confines of the court's order and the restrictions outlined in MCA 2005.

References:
MCA 2005, ss 16(2), 18(1)(b) and 20

Regardless of whether a gift is made by a deputy or an attorney, the value of the gift must be reasonable having regard to all the circumstances, including the size of the donor's estate.

References:
MJ v The Public Guardian [2013] EWHC 2966 (COP) at para [53]

Guidance has been given in the case of Re GM that a threshold of £5,500 annually (representing the then annual inheritance tax exemption of £3,000, and the annual small gifts exception of £250 up to a maximum of 10 people) per donor is reasonable where:

References:
MJ v The Public Guardian [2013] EWHC 2966 (COP)

- the donor has a life expectancy of less than five years
- the donor's estate exceeds the inheritance tax nil rate band
- the gifts are affordable, taking into account the donor's care costs, and would not adversely affect the donor's quality of life, and
- there is no evidence that the donor would object to the size of such gifts

The Court of Protection will need to consider any proposed gift in excess of this, which will involve consideration as to whether it would be in the donor's best interests. For further detail, see Practice Note: Making lifetime gifts and settling property on behalf of P (ie the donor).

It is worth noting that whenever a deputy is appointed by the Court of Protection, the deputy will be ordered to take out a bond in order to protect the donor's estate against unauthorised use or abuse before the order is issued.

References:
Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007/1253, regs 33 and 36

Concerns about abuse, such as misuse of monies, can be reported to the Office of the Public Guardian (OPG).

Lifetime dispositions other than gifts—knowledge of the other party as to capacity

Aside from gifts, it is clear that where one party has insufficient mental capacity to enter into a contract and the other party knew or ought reasonably to have known of this, the contract will be voidable.

References:
Hart v O'Connor [1985] A.C. 1000

If, however, a party was ostensibly sane, the contract will be considered as a contract by a person of sound mind and cannot be rescinded merely because the bargain was unfair (unconscionable conduct or equitable fraud would be required).

For further detail, see Practice Note: Capacity to make gifts, settle property and contract.

Undue influence and unconscionable bargains

Generally, undue influence (formerly known as duress) in respect of lifetime transactions has been categorised as either actual or presumed. This is in contrast to the law in respect of Wills, which allows only actual undue influence.

References:
Parfitt v Lawless (1872) L.R. 2 P. & D. 462 at p [468]

Actual undue influence has been described as 'overt acts of improper pressure or coercion, such as unlawful threats', while presumed undue influence arises where there is a 'relationship... where one has acquired over another a measure of influence or ascendancy of which the ascendant person then takes unfair advantage...without any specific acts of coercion'. On occasion, both will be pleaded.

References:
Royal Bank of Scotland v Etridge (No 2) [2002] 2 AC 773 at paras [8]–[9]
Re Craig (Deceased) [1971] Ch. 95

Actual undue influence

For actual undue influence, coercion has been described as 'the moment that the person who influences the other does so by the threat of taking away from that other something they then possess, or of preventing them from obtaining an advantage they would otherwise have obtained'. More recently, it has been described as an overpowering of a person's volition without convincing their judgment.

References:
Ellis v Barker (1871) L.R. 7 Ch.App. 104
Bateman v Overy [2014] EWHC 432 (Ch)

Generally, the burden of proving an allegation of undue influence rests upon the person who claims to have been wronged.

References:
Etridge (No 2) [2002] 2 AC 773 at para [13]

Presumed undue influence

A presumption of undue influence will arise:

- in the case of certain relationships, namely parent and child, guardian and ward, trustee and beneficiary, solicitor and client, and medical adviser and patient—in *Etridge (No 2)*, Lord Nicholls said 'in these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existence of the type of relationship', and

  References:
  Etridge (No 2) [2002] 2 AC 773 at para [18]
- if there is proven to be a relationship of trust and confidence in relation to the management of a subservient party's affairs and a transaction which calls for an explanation (or where no reasonable explanation is available).

  References:
  Hart v Burbidge [2014] EWCA Civ 992
  Hammond v Osborn [2002] EWCA Civ 885
  Tociapski v Tociapski [2013] EWHC 1770 (Ch)

As to the latter, relevant features include, for example, gifts which are substantial in the context of the donor's other liquid assets, out of proportion to the kindness shown by the donee to the donor and which give rise to significant adverse tax implications. Any explanation provided will be considered carefully. For example, in *Tociapski v Tociapski*, the only available explanation for the transfer—that it was an estate planning measure —was rejected on the basis it was improbable. In this context, the presumption of undue influence is rebuttable

Where there is a presumption of undue influence, the evidential burden switches to the defendant and the court may infer that, in the absence of a satisfactory explanation by them, the transaction can only have been procured by undue influence.

References:
Etridge (No 2) [2002] 2 AC 773 at para [14]
Birmingham City Council v Beech [2014] EWCA Civ 830

The judgment in *Etridge (No 2)* clarifies that whether a transaction was brought about by undue influence is a question of fact. Disadvantage to the donor is not a requirement, and proof that the donor received advice before entering into the transaction is one of the matters a court takes into account.

References:
Etridge (No 2) [2002] 2 AC 773 at paras [12]–[13] and [20]

If undue influence is proven, generally speaking, the transaction will be voidable.

For further detail, see News Analysis: Holistic analysis at the heart of undue influence and Practice Note: Undue influence.

Unconscionable bargains

The court may also consider whether transactions ought to be set aside on the basis that they are in the nature of unconscionable bargains. For a transaction to be unconscionable, it must satisfy the three components of the test:

References:
Re Morris (Deceased) [2000] All ER (D) 598
Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd [1983] 1 WLR 87

- one party is at a serious disadvantage to the other through poverty, ignorance, lack of independent advice or otherwise so that circumstances existed of which unfair advantage can be taken
- this weakness is exploited by the other party in a morally culpable manner, and
- the resulting transaction is not merely hard or improvident but overreaching and oppressive, such that it shocks the conscience of the court

Deathbed gifts (donatio mortis causa)

Where a person makes a gift which is not included within their Will but is intended to take effect upon death, this is referred to as a deathbed gift.

The donor must have the requisite mental capacity to make a valid lifetime gift. The further requirements for which there must be proof of compliance are that the donor:

References:
King v Dubrey [2015] EWCA Civ 581, [2016] Ch. 221

- contemplated impending death
- made a gift which is conditional and effective on death (and until death the donor had the right to revoke the gift)
- parted with dominion over the subject matter of the gift to the recipient

Depending on whether the asset gifted is capable of delivery, parting with dominion will involve actual delivery, constructive delivery (for example, providing a key or passcode to a safety deposit box), or delivery of the title documents, for example, title deeds.

References:
Sen v Headley [1991] Ch. 425

Given the many opportunities and strong temptations which present themselves to unscrupulous persons to say there has been a deathbed gift, such cases require strict scrutiny and should

be supported by 'evidence of the clearest and most unequivocal character' (*Cosnahan v Grice* (1862) 15 Moo PCC 215, 15 ER 476 (not reported by LexisNexis®)).

If the deathbed gift is effective then, failing revocation before death, when the donor dies their PR holds the property on trust for the donee.

Jointly held property and resulting trusts (including the presumption of advancement)

Joint tenants v tenants in common

Where property is owned jointly, the legal title will always be held on a joint tenancy. The beneficial interest may be held either on a joint tenancy or on a tenancy in common according to designated specific shares.

On the death of the first owner, under a joint tenancy in equity the right of survivorship applies and the deceased's interest passes to the survivor(s). Under a tenancy in common, the deceased's interest passes to their estate and devolves in accordance with their Will or intestacy.

Resulting trusts

Concerns may arise where the deceased made a gratuitous transfer of property to a third party or where property has been purchased in another's name but using the deceased's funds.

If there are express or inferred provisions determining the transferor's intentions as to beneficial ownership of the property transferred, effect will be given to those. Where land is concerned, generally speaking (unless there are allegations of fraud), the requirements of the Law of Property Act 1925 must be satisfied.

References:
Law of Property Act 1925, s 53(1)(b)

In the absence of such provisions as to beneficial ownership, there is a rebuttable presumption of resulting trust, whereby beneficial ownership is returned to the transferor or their estate. The presumption may be rebutted where:

> there is evidence that the transferor intended to make a gift (the burden of proof lies with the person alleging such an intention), or

> as a result of a pre-existing relationship between the parties, the presumption of advancement applies that the transferor intended to make a gift

The presumption of advancement applies if the transferor is the spouse or parent of the transferee, or in a similar relationship. It is rebuttable by evidence to the contrary.

The presumption of advancement is due to be abolished, however it is unclear when the relevant statutory provision will come into force. When it does, in circumstances where the presumption of advancement had previously applied, the presumption of resulting trust will not be rebutted and will still apply. In any event, the abolition will not apply to anything done prior to it coming into force.

References:
Equality Act 2010, Pt 15 s 199

Joint bank accounts

In the case of joint bank accounts, special considerations apply regarding beneficial ownership. Where all funds are provided by one party, there is a rebuttable presumption of resulting trust that all funds are held on trust for that party.

This presumption can be rebutted where the presumption of advancement applies or there is evidence that the transferor intended to make a gift.

Even where a presumption of advancement applies, it may be rebutted on the basis that the co-signatory was added to the bank account simply for the convenience of the original account holder. In such a case, the co-signatory holds the asset in question on trust for the benefit of the original owner or, if deceased, their estate.

The terms of any bank mandate will be considered alongside the parties' intentions for opening the account and any agreement between the parties.

In 2017, the Privy Council considered the situation where one of two account holders of a joint bank account dies. It found that where the documents relating to the opening of the account contain terms to suggest that the survivor should be the sole owner, those terms apply to both the legal and beneficial interest, unless the document is challenged, for example on the basis of fraud, duress, undue influence, misrepresentation or mistake. Such decision will be of persuasive authority in English courts.

References:
Whitlock v Moree (Bahamas) [2017] UKPC 44

Real property in joint names

As regards real property, following the House of Lords decision in *Stack v Dowden*, where property has been registered in the joint names of a married or cohabiting couple and there is no express declaration as to the respective shares held for each party, the starting point is equal beneficial ownership.

References:
Stack v Dowden [2007] 2 AC 432

Any party asserting a claim to a non-equal share has the burden of showing that the parties intended their beneficial interests to be different from their legal interests and in what way. It has been acknowledged that such intention could change over the course of the parties' relationship.

References:
Jones v Kernott [2011] UKSC 53

Each case turns on its own facts—context will be the main factor. Factors other than financial contributions could be relevant to intention, including the nature of the relationship and how the parties arrange their finances. However, cases in which the joint legal owners are found to have intended their beneficial interests to be different from their legal interests would be very unusual.

References:
Marr v Collie [2017] UKPC 17

Previously, where property has been registered in the joint names of members of the same family, primarily as an investment, the Court of Appeal determined that the presumption of equal beneficial ownership, as in *Stack v Dowden*, does not apply.

References:
Laskar v Laskar [2008] EWCA Civ 347
Stack v Dowden [2007] 2 AC 432

In 2017 however, the Privy Council found that the starting point of equal beneficial ownership applied not only to family homes but also to investment assets and that there should be no distinction

between a domestic and non-domestic situation. The Privy Council also stated that the issue needed to be considered in relation to various other assets and not solely in relation to properties. This decision, which is also likely to be of persuasive authority in English courts, reduces the role of the presumption of resulting trust in relation to a couple's assets.

References:
Marr v Collie [2017] UKPC 17

In *Marr v Collie*, the Privy Council remitted the case and, specifically, the issue of the intention of the parties, back to the Supreme Court of the Bahamas for determination of the ownership of the investment properties and other assets.

References:
Marr v Collie [2017] UKPC 17

Other potential challenges

Other principles which should be borne in mind when considering the formal validity of lifetime gifts include:

- the presumption against double portions, where the making of a significant lifetime gift to a child follows the making of the parent's Will on the basis the parent only intended to make such provision once. For further detail, see News Analysis: Lifetime gifts and the presumption against double portions

  References:
  Re Cameron (Deceased) [1999] Ch. 386
- the rule in *Strong v Bird*, which states that where during their life, a testator expresses an intention to give assets at the time of their death to someone who later becomes the executor of their estate, the done executor is entitled to hold the property for their own benefit

  References:
  Strong v Bird (1874) L.R. 18 Eq. 315
  Re Stewart [1908] 2 Ch. 251

Bringing a claim challenging a lifetime disposition and duties of the personal representatives

Parties may not become aware of lifetime dispositions until they have seen estate accounts. In any event, they may need to understand the extent of the estate in order to ascertain whether an asset has, for example, been gifted or sold at an undervalue.

Anyone with an interest or a potential or contingent interest in the estate can make an application to the court that the PRs provide a full inventory and an account of the administration of the estate.

References:
Administration of Estates Act 1925, s 25

PRs should make appropriate enquiries as to any lifetime gifts made by the deceased, particularly in the seven years preceding their death.

References:
Hutchings v HMRC [2015] UKFTT 9 (TC)

Where there is a suggestion that a lifetime transaction may be voidable, PRs may make initial enquiries by, for example, obtaining medical records and contacting witnesses.

PRs who fail to take active steps when there is a suggestion that a lifetime transaction should be challenged, and allow a limitation period to expire may face a claim of devastavit (wasting of assets) for failing in their duties to collect in assets. The PR may then be personally liable to the beneficiaries for the loss to the estate.

For further detail, see News Analysis: Executors' duties and the question of lifetime gifts.

Generally speaking, given the likelihood that a challenge of a lifetime disposition will involve a substantial dispute of fact, a claim will need to be issued under CPR 7.

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