Title Research

Entitlement

Spring 2019

Mental capacity and probate: Removing the obstacle

Plus:

- Pressure, poison and probate: **Challenging Wills in "suspicious" circumstances**
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Welcome to Title Research's quarterly news digest – **Entitlement.**

As the days begin to see more sunlight and we move towards the start of spring, we're bringing you the next edition of Entitlement.

In this issue, we're very excited to have a contribution from Tim Farmer, one of the UK's leading experts in the assessment of mental capacity. Tim shares how we can remove the obstacle between mental capacity and probate.

We welcome an article from Ewan Paton of Guildhall Chambers who practises extensively in contentious probate and estate matters. Ewan writes about challenging Wills in "suspicious" circumstances and has fittingly named the article "Pressure, poison and probate".

We also explore how historical events can impact genealogical research and share some interesting examples of how we've uncovered the most fascinating family histories when locating missing or unknown people.

As always, Title Research continues to support all our solicitor clients in overcoming the complexities that arise from estate administration. One interesting case involved dealing with Canadian shares that our solicitor client had been administering for eight years. You can read the full story on page 10.

Title Research offers fast, fixed fee access to specialist genealogical research and asset repatriation services. The services available to you include dealing with North American and UK shareholdings, locating missing beneficiaries, reconstructing family trees and much more.

Our Client Services Team are the first point of contact to discuss how we can help accelerate the estate administration process. Call 0345 87 27 600 or email info@titleresearch.com for more information.

We hope you enjoy this edition of Entitlement!

Anthony Allsopp
Head of Business Development

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Mental Capacity and Probate: Removing the Obstacle

By **Tim Farmer**, TSF Consultants

Tim Farmer is the Founder and Managing Director of multi award-winning mental capacity assessors, TSF Consultants.

Probate and mental capacity are not two concepts that are automatically linked in most people's minds. However, with an increasing emphasis on supporting vulnerable clients and a growing awareness of the concept of mental capacity a link is forming.

The importance of this area is leading to a call to determine an individual's capacity to issue a receipt of probate or to act as executors of an estate.

Mental capacity

Mental capacity is simply another way of saying a person's ability to make a decision. Contrary to common misconceptions there is no such thing as 'blanket capacity' i.e. that you either have it or you don't. This is because what a person needs to understand to make a decision varies according to the decision. For example, what Mrs Smith needs to understand when making a Will is very different to what she will need to understand when acting as an executor.

Why is mental capacity an issue in probate?

It is necessary to ensure the individuals involved are able to perform the duties assigned to them before you can complete probate on an estate, be they executor, trustee or beneficiary. In many cases, this will not be an issue. However, with an ageing population and increasing incidences of dementia it can be difficult to feel confident that every person you deal with is able to fulfil the role assigned to them.

Identifying capacity

Although there are a number of legal tests for capacity, the most well known is The Mental Capacity Act (2005). This is certainly the relevant test when attempting to determine if a person has the capacity to act as an executor or to provide a receipt of probate.

The Mental Capacity Act (2005) provides us with the 2-stage test. It dictates a way of testing for capacity and essentially asks whether a person has an impairment to the mind or the brain that is directly affecting their ability to make the specific decision in question. If there is evidence of such an impairment, then we need to check that they can understand relevant information, retain that information, weigh up and use that information and communicate it back to us.

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Threshold of understanding

In order to determine whether a person has the mental capacity to make a specific decision it is vital that you, as the person assessing their capacity, are fully aware of the relevant threshold of understanding. In other words, what does a person need to understand to make the specific decision in question.

When assessing a person's ability to provide a gift of receipt the necessary threshold is the same as that for capacity to manage property and financial affairs. The threshold of understanding for capacity to be an executor is unique to that role as it involves an understanding of the role itself as well as an element of property and financial affairs.

Removing the obstacle

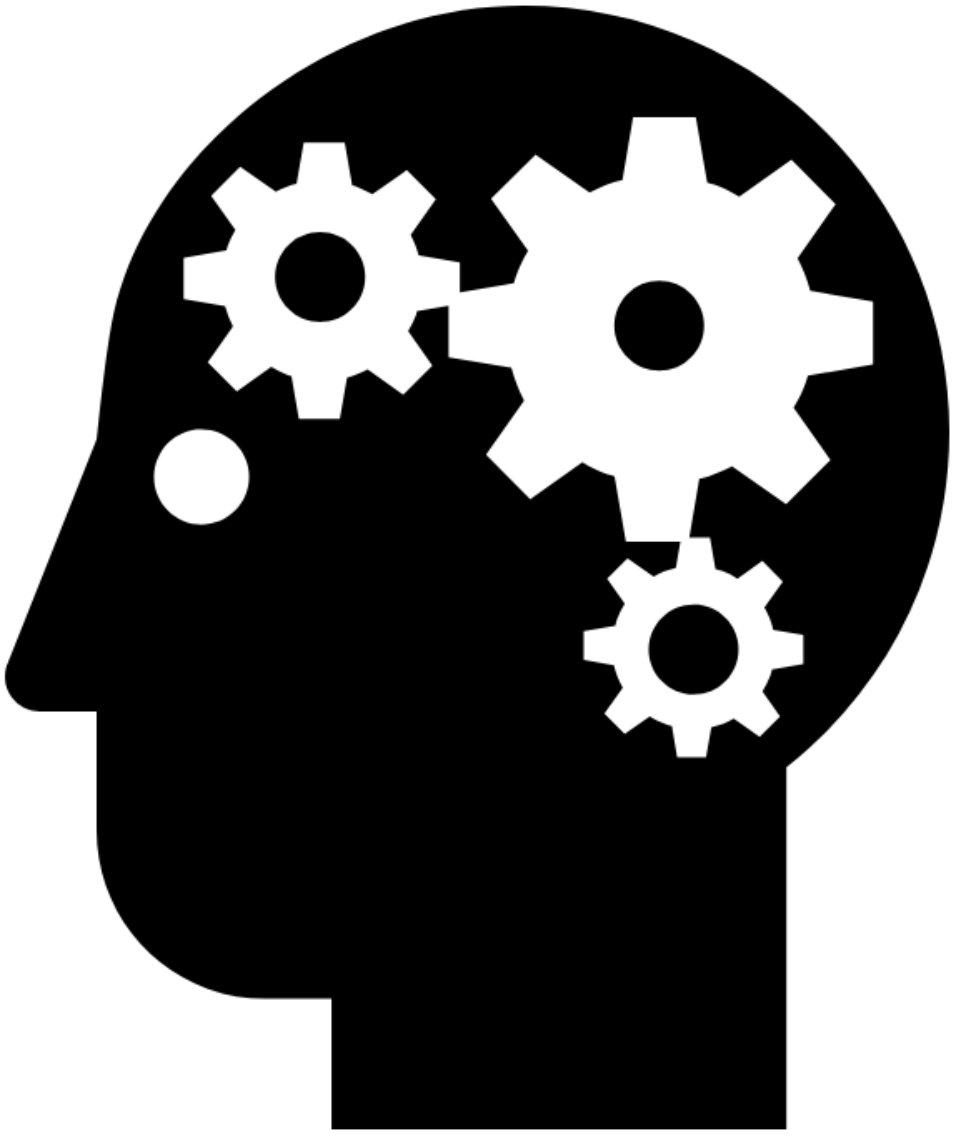
The failure to get a timely and accurate assessment of a person's mental capacity to either be an executor or beneficiary results in a delay in being able to issue probate.

Whilst the GP is often seen as the first port-of-call for such assessments, increasingly they are refusing to do them. Often when they are completed by the GP, they are done reluctantly and incorrectly.

At TSF Consultants our experts understand the need to determine an individual's capacity as quickly and smoothly as possible. Our unique, court validated processes remove the obstacles caused by questions over capacity.

Our robust assessments and reports allow you to focus on your client, quickly and easily fulfilling your duties and protecting those that may be vulnerable.

If you have any issues relating to mental capacity and probate that you would like to discuss then please contact us on either info@tsfconsultants.co.uk or telephone us on 0333 577 7020.



Pressure, poison and probate: Challenging Wills in "suspicious" circumstances

Guest contributor: Ewan Paton, Guildhall Chambers

Ewan Paton is a Barrister at Guildhall Chambers, Bristol, who practises extensively in contentious probate and estate matters.

Death can generate much rancour and suspicion amongst the living. The Deceased may have had multiple claims on her affections and bounty. Disputes between such claimants may be sparked by something as minor as a snub at the funeral, or unnecessary secrecy over testamentary papers. More cynically, there may be some who had regarded the Deceased's demise as their long-awaited payday, only to be disappointed by a small gift of jewellery.

Whatever the reasons, many Wills and estates lawyers will be all too familiar with the aggrieved client who is adamant that "something is not right" about the last Will, that there has been some "funny business", and that it must be "challenged" at the earliest opportunity.

The best advice in such situations will often be not to bother. Successful challenges to duly executed and rational Wills, on vitiating grounds such as undue influence and fraudulent calumny, are far rarer than the mere existence of suspicions of the kind described above.

Undue influence in this sphere is of the "actual" variety only. It was summed up in 1885 by Sir James Hannen (P) in Wingrove v. Wingrove (1885) 11 PD 81 as requiring "..in a word – coercion". His contrast of this with the exercise of mere "natural" influence, such as might be applied to "a young man caught in the toils of a harlot", has not aged so well. Lewison J.'s modern restatement of the required standard in Edwards v Edwards [2007] WTLR 1387 emphasised the element of "coercion [as] pressure that overpowers the volition without convincing the testator's judgment" which was "to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate". Edwards was itself one of the rare cases in which such actual undue influence was inferred on the facts, against a "frequently drunk, abusive and aggressive" live-in son who actively procured his mother's change of Will, for which change he had given a "palpably inadequate and false" explanation to the solicitor who was instructed. The totality of circumstances were "inconsistent with any other hypothesis".

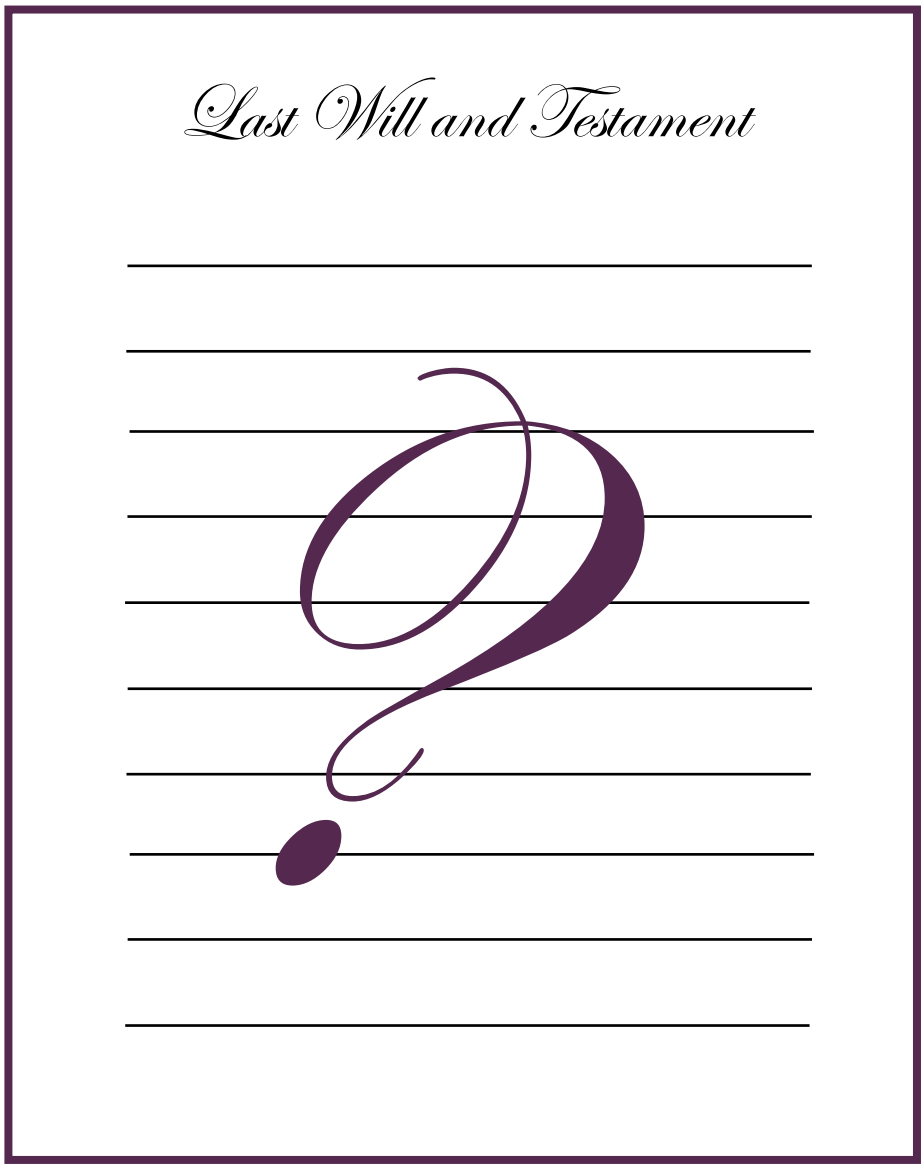
A similar result, on not dissimilar facts, was arrived at by Mann J. in Schrader v Schrader [2013] EWHC 466 Ch., involving another live-in son, who was not abusive but whose 'physical presence and personality were likely to produce a degree of subservience' in his frail, anxious mother when she made a new Will leaving him the house. Again, this case displayed the tell-tale signs of the beneficiary being the active promoter and procurer of the Will, even making some handwritten suggested amendments to her instructions.

These cases are the exception rather than the rule. A more common example from last year is Nutt v Nutt [2018] EWHC 851 (Ch) (Master Clark), in which a handful of odd circumstances, such as the last Will being a stationer's form of unknown origin, replacing a previous solicitor-drafted Will, with operative parts written in an "unknown hand", favouring one of the Deceased's three sons (a nightclub "security guard" who lived nearby) were not enough to generate an inference of undue influence by this "affectionate and attentive" gentleman.

The 2017 case of Christodoulides v Marcou [2017] EWHC 2632 (Morgan J) 26/10/2017, despite only being a report of an unsuccessful application for permission to appeal from decision of a Recorder, generated some interest (and a flurry of articles) in the antique doctrine of "fraudulent calumny". The central idea of this can perhaps be expressed as "s/he told her lies about me". In that case, the Recorder, not mincing his words, had found the Defendant a "thoroughly dishonest and manipulative individual, to whom integrity and truth are less important than achieving what she wants", who had "poisoned the mind" of her mother against her sister by insinuating a theft of money from bank accounts, causing the sister to be excluded from the Will.

Although Morgan J. (perhaps not surprisingly on the facts) rejected the application for permission to appeal, this was an extreme case, and the limits of this doctrine as a vitiating factor should be noted. The "calumny" or lies must be "dishonest aspersions on the character" of the victim. There is as yet no reported case where the perhaps more common tactic of false aspersions as to means ("she doesn't need any money") has had this effect. The lies must also be conveyed for the specific purpose of altering testamentary intention, and be proven to have worked, or at least to have been a significant causal factor. Proof of malice, or at least the knowledge of falsity, is also required; so merely pig-headed, unreasonable or unfair aspersions which have an effect are acceptable, if they are genuinely believed.

In summary, the disgruntled would-be challenger of a Will on any of these grounds needs somewhat more than suspicion, opportunity and a sense of unfairness. Direct evidence and 'smoking guns' will be extremely rare: undue influence in particular usually "goes on when no-one is looking", as Mann J. said in Schomberg v. Taylor [2013] EWHC 2269 (Ch). Much persuasion, influence and 'bad mouthing' may be morally dubious but legally unimpeachable. A claimant in such a case therefore needs to be very sure of their ground - and be made fully aware of the risks and costs exposure – before going any further.



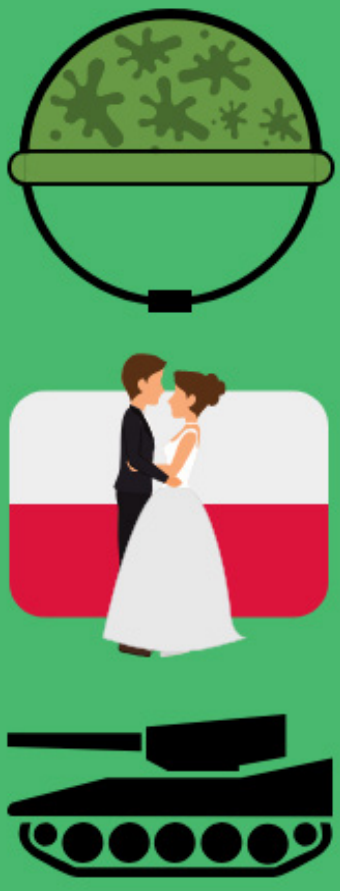
When the bloodline stops: **How historical events can affect genealogical research**

By Title Research

The nature of family relationships are often complex as people become estranged, divisions occur and unknown family members appear. These complications increase the need for genealogical research - more missing beneficiaries need to be identified and more family trees must be reconstructed in order to identify rightful heirs.

As a provider of genealogical research services, we often find that historical events can play a significant part in the make-up of a family. This article takes a look at a few of the fascinating family histories we've uncovered whilst conducting recent genealogical research.

The unintentional bigamist



Our solicitor client instructed us to locate the next of kin on intestacy for a Polish gentleman named Mr S. Mr S served in the Polish Home Army during World War II and subsequently settled in Huddersfield, UK. He married an English woman but she had predeceased him and they did not have any children together. Our client expected us to be searching for Mr S's siblings, starting off in Poland.

After the facts were reviewed and it was confirmed that Mr S was born in the town of Plock in Poland, the researcher on the ground commenced work at the Polish local records office. The initial findings revealed that Mr S was married in Plock before the war and his wife was still alive in Poland. Although, she had subsequently married again, twice.

As there was no legal divorce on record, this individual was Mr S's surviving spouse and his next of kin. His later marriage in England was therefore technically invalid. We located the individual concerned and interviewed her about her life history. It turned out that because Mr S never returned to Poland following the war, he was presumed dead and she therefore remarried. Now very elderly, she took the news that her first husband had survived well, and became the sole beneficiary to his £250,000 estate.

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Tracing a Holocaust survivor through overseas records

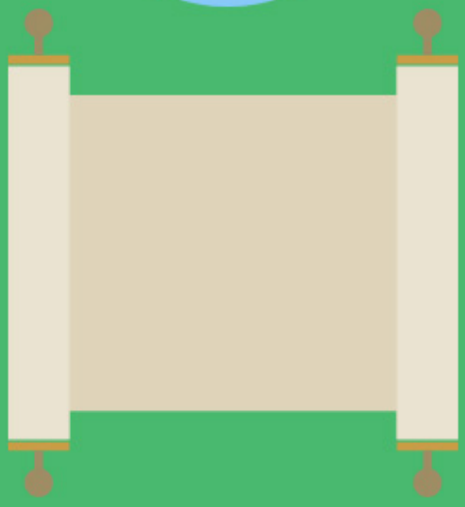
Our client asked us to reconstruct the family tree for a woman who died intestate in England. She was a widow, without issue, parent, grandparent or surviving siblings (or their issue) so we were able to proceed straight to investigating the class of whole blood uncles and aunts (and their issue).

The Deceased was born in eastern Poland and her family were of the Jewish faith. Religion is not usually something we need to take into account when we are researching a UK based family. This is due to the fact that UK records are no longer organised in accordance with religious beliefs and that has been the case since the civil registration started in 1837. When we are carrying out this type of research in Europe however, the civil registration system is not as advanced so we more frequently need to consult religious records. Therefore, knowing the family's religious beliefs can be very useful.

When we began investigating the family, we found that some lines of the family had completely disappeared without a trace. We could not find any records relating to some of the first cousins once they had been identified – for example, we could not find any marriage or emigration records. Whilst investigating, we found records that some members of the family had perished at Auschwitz.

The atrocities that were committed against the Jews across Europe during World War Two often present themselves when we're carrying out research, as it did in this case. Over the last fifty years, the worldwide Jewish community has preserved testimony from the now dwindling number of Holocaust survivors - much of which is readily available online and can assist with genealogical research.

Some of the lines of this family did escape and research was ultimately required around the world to track them down. We located only seven potential heirs to this estate, much less than we would expect from a family of this size. For the lines where documentary evidence was not available, we arranged for insurance to be put in place. An interesting final point comes from two of the heirs we found in the United States. They, along with approximately 850 others, avoided transport to Auschwitz Concentration Camp with the help of Oskar Schindler. We are sure that many of you will have seen the film Schindler's List which tells this story.



Title Research provide fast, fixed fee access to genealogical research and asset repatriation services, making us the safe choice for the resolution of complex estate administration cases. If you want to find out more, get in touch with our Client Services Team by calling 0345 87 27 600 or emailing info@titleresearch.com.

Dealing with overseas assets: Interesting case studies

Complicated Canadian shareholdings

Title Research were instructed to sell two Canadian shareholdings, on behalf of our solicitor client who was on the verge of retiring. The solictor had been trying to sell the Canadian shares for eight years and hoped to do so before she retired.

The Canadian shareholdings were held in the joint names of three individuals, and two of these individuals had died. Each deceased individual had appointed four executors, additionally all of the share certificates were also missing.

Title Research worked closely with the client to explain the whole process and ensure instructions were included with all of the paperwork.

We provided updates every two weeks whilst the client worked with the nine individuals who needed to sign the paperwork. Once the paperwork had been signed, the missing share certificates were reissued and the shares were sold.

Our solicitor client had been trying to sell the Canadian shareholdings for eight years and Title Research managed to complete the work in just nine months. The client was incredibly complimentary and grateful. She could also now retire with peace of mind that the estate was now closed.

Administering US assets

We were approached to help deal with shares held by the late Mrs Valerie Davies, in the US company Marsh & McLennan Plc. As part of the requirements, the client was asked to provide proof of the asset.

Many months later after the initial enquiry, the client advised Title Research that they had been in touch with the Share Registrar in the USA on multiple occasions, and found it impossible to obtain a recent statement as proof of the asset.

The client was unimpressed with the service they had received in the USA, commenting that they had easily been able to obtain statements from UK Share Registrars regarding the UK assets.

Title Research agreed to obtain a statement on behalf of the estate, and upon investigations discovered that the asset was actually registered to the Deceased's former work address – from 24 years previously.

Using this information, Title Research were able to liaise with the Share Registrar and obtain proof of the asset.

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Specialist support for estate administration

At Title Research, we provide trusted genealogical research and asset repatriation services to legal professionals.

The experience we've gained over five decades means that we know where to find the people you need to trace and how to navigate even the most complex international processes. We believe it's our task to remove uncertainty so that you can complete your job with confidence.

A commitment to clarity runs through everything we do at Title Research and helps us provide legal professionals with the best possible service. Our fees are transparent, our processes straightforward and our reporting unambiguous.

Everything we do is designed to streamline estate administration, to take the effort out of locating the correct people or assets, and to mitigate against the risk of future dispute or complications.

- Locating missing beneficiaries
- Reconstructing family trees
- FamilyChecker™
- Probate valuation and verification
- Missing beneficiary insurance
- Worldwide bankruptcy searches
- Locating Wills, adresses and missing documents
- UK share sales with a nine-day turnaround
- Obtaining overseas grants and resealing UK grants overseas
- Dealing with North American assets
- Administering foreign shares and funds

Our proven expertise can help you with any estate administration challenge – at home or overseas. Call one of our team today on **+44 (0) 345 87 27 600** to find out more.

Ensuring accuracy, eliminating risk

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