

Is that wise? Mental capacity and marriage

14 MARCH 2018

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Seeing a parent embarking on a second marriage can sometimes be difficult for children of the first.

The recent case of *Re DMM* shows just how much harder it can be when questions of capacity are involved.

The legal question was how to determine if someone has capacity to marry. In particular does the test require one to be able to understand the financial consequences of a proposed marriage.

The legal background

The 2004 case *Sheffield CC v E* set out the legal test for capacity to marry. There are essentially two questions.

- Does the person understand the nature of the marriage contract (which is, in essence, a simple question which does not require a high degree of intelligence)?
- Does the person understand the duties and responsibilities that normally attach to marriage? For example, living together to the exclusion of others and the 'right to enjoy each other's society, comfort and assistance'.

The *Sheffield* case predates the introduction of the Mental Capacity Act 2005 ('MCA'). Under the MCA, a person is unable to make a decision for himself if he is unable: (a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision. The information relevant to the decision 'includes information about the reasonably foreseeable consequences of: (a) deciding one way or another, or (b) failing to make a decision'.

The facts

DMM, a retired insurance broker in his mid-80s, wants to marry SD. He and SD, who is in her 70s, have been living together for the past 20 years. DMM has three children from a previous marriage.

DMM had executed powers of attorney for his property and affairs in 2007 and for health and welfare in 2013. Both powers appointed EJ, one of his daughters.

In 2013, DMM executed a will giving SD 2/3rds of his pension, a legacy of £300,000 and the right to reside at the property for two years after his death. He left everything else to his daughters.

DMM now suffers from Alzheimer's disease. In November 2016, SD took DMM to assess his capacity to revoke the two powers of attorney, to make new powers and to marry. Dr Bailey, a consultant psychiatrist, concluded that DMM did not have capacity on the power of attorney issues but he did have capacity to marry.

DMM's children were concerned that if DMM married SD it would revoke his 2013 will. The effect of the intestacy rules is that SD will receive more and his children less.

EJ entered a caveat at the registry office preventing any marriage between DMM and SD. She instructed Mr Farmer to carry out an assessment of DMM's capacity to make a will and to marry. That assessment concluded that DMM lacked capacity on both counts.

The question before the Court

The Court of Protection had to decide whether the legal test for capacity to marry *'includes a requirement that the person should be able to understand, retain, use and weigh information as to the reasonably foreseeable consequences of a marriage, including that the marriage would automatically revoke the person's will'*.

The decision

The Court held that, applying the test under the MCA, information relevant to a decision (to marry) includes information about the reasonably foreseeable consequences of deciding one way or another. The test for capacity to marry should not be set too high because to do so would be *'an unfair, unnecessary and discriminatory bar against those with capacity issues potentially denying them that which all the rest of us enjoy...'* Importing into the test an appreciation of the financial effect of a marriage *'is setting too high a standard, too refined an analysis, asking to take too many hypothetical situations into consideration'*. On the other hand, understanding that a marriage revokes a will *'is information that a person should be able to understand, retain, use and weigh to have capacity to marry'*.

Dr Series was instructed to assess DMM in light of the Court's approach. He concluded that DMM had capacity to understand that the will would be revoked, he might not be able to make a new one, and that as a result his children would receive less and SD more.

The Court held that DMM did have capacity to marry.

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