Limiting the opportunities for financial abuse through assisted dying

If the Terminally Ill Adults (End of Life) Bill is passed, then this will lead to some of the most vulnerable people dying for others' financial gain. That is certain. During a career spent specialising in mental capacity law and inheritance I have seen an array of financial abuse. Such abuse can be highly sophisticated. Here are some examples: the defrauding of an incapable person following a dodgy doctor's misleading mental capacity report; "predatory" marriage by a paid or voluntary carer; families taking advantage of an elderly relative through wills or lifetime transactions they don't want or don't understand; and even the removal of that relative from one continent to another.

Some people at the end of their life are highly vulnerable to pressure. Many, perhaps particularly women, may consider themselves to be a burden and the high cost of social care can see them running through a lifetime of savings they expected to be able to pass on to their children at an extremely high rate. That money might well be needed for adult children to get on the property ladder particularly in the South of England where prices are so high. There is a risk of guilt that can be leveraged and much reason for a beneficiary to do so.

It is surprisingly easy for a relative, whilst completing a variation on "the classic asset strip", to persuade themselves that they are actually acting in their aunt Dorothy's best interests or in accordance with her wishes or what would be her wishes if only she properly understood. It is attractive, sometimes unconsciously, to elide self-interest with self-righteousness.

The fact that the ability for some people legally to end their life with the assistance of others will cause exploitation does not inexorably lead to the conclusion that the Terminally Ill Adults (End of Life) Bill should not become law. An adult, with full capacity, properly informed and not being pressurised, is in the best place to decide whether their life is worth living and should be able to end it if they wish. However, it is an extremely powerful reason to insist on the strongest safeguards within the Terminally Ill Adults (End of Life) Bill. A person with diminished capacity, weak and vulnerable to exploitation, ought to be properly protected from being killed with the assistance of the state for financial gain.

In my view:

(a) the safeguards set out in the Terminally Ill Adults (End of Life) Bill as introduced are insufficient and require strengthening; and

(b) it is imperative to keep the judicial safeguard and failing to do so would cause substantial difficulty in the administration of the estates of those people who are assisted to die under the legislation, if enacted.

Providing Sufficient Safeguards

The Terminally Ill Adults (End of Life) Bill attempts to put in place safeguards against abuse to protect the incapacitous and vulnerable who might be pressured into ending their own life.

These include (a) a requirement for proof of identity, (2) two doctors' assessments, including an independent doctor, which involve the doctor giving an opinion that the person wishing to die has a settled intention to end their own life, has capacity and is not being coerced or pressurised by any other person: see sections 7(2) and 8(2) of the Bill. Under section 12 the

Bill also requires an application to the High Court for a judicial declaration that the requirements of the legislation (including those in relation to a settled intention, capacity and lack of pressure or coercion) are satisfied.

The Court has power to set its own rules under section 12(4) subject to mandatory requirements in section 12(5) that the Court may (but not must) hear from the person wishing to die, the Court must hear from in person (and may question) at least one of the doctors and may require to hear and question from both. The Court has power to hear from others under section 12(6) and also obtain reports.

The Bill establishes offences under section 26 for a person who "by dishonesty, coercion or pressure" induces a person to: make the declaration required under the Bill, or not to cancel them, or to self-administer the drugs required to die.

Whilst these safeguards might seem robust, in my opinion there are holes in the scheme of protection which is being established by the draft legislation. Indeed, under the current proposals there is likely to be significantly less scrutiny of a decision by the Court in relation to assisted dying than there is for example currently in relation to a decision of the Court of Protection to withdraw life-sustaining treatment from a person, or even a decision as to where a person lacking capacity should live or with whom they should have contact.

First, section 3 imports the test for capacity under the Mental Capacity Act 2005 ("the 2005 Act"). The 2005 Act includes a presumption of capacity under section 1(2) such that a person is presumed to have capacity unless it is established that they lack capacity. Under section 1(3) of the 2005 Act a person is not to be treated as unable to make a decision (i.e. to lack capacity) unless all practical steps have been taken to help them to do so without success.

In my experience it is relatively common for there to be difficulties in assessing capacity such that assessors including doctors will say that, in their view, a person has capacity simply because of the presumption of capacity. A doctor assessing capacity and indeed the Court cannot ignore the presumption of capacity. Therefore in the absence of any evidence that a person wishing to die *lacks* capacity they will be presumed to have capacity to make the decision. It is all the more likely that there will be problems in assessing capacity where a person is being isolated and controlled. Although in general I would, of course, accept the importance of the presumption of capacity, in relation to assisted dying, I consider that, the burden of proof for capacity should be reversed so that it is necessary to establish capacity to decide to die positively.

Secondly, there is no mandatory notification requirement. This means that if a rogue has obtained control of a person who says they wish to die and is exploiting that person then there is no mandatory requirement for notification of nearest relatives including a spouse or child. Therefore, your mother could be "assisted to die" without you knowing about it. You might believe that your mother is being coerced for example by a new partner or "carer". You might well never have the opportunity to put those concerns before a Court before it is too late.

I suggest that better protection would be provided by the notification of spouses, cohabitees, parents, children and grandchildren over the age of 18.

Thirdly, there is no requirement to hear from the person wishing to die themselves. In my opinion a Court would be in a much better position to decide on capacity, coercion and pressure if it were required to hear from the person wishing to die, and both doctors.

Fourthly, and importantly, there is no person appointed to assist the Court to consider and test the evidence before it. Our Court system is inherently adversarial. Generally, two or more parties to a dispute will present evidence and argument to the Court and the Court will make findings of fact on the evidence and come to decisions on the law in accordance with those arguments. The Court is not hidebound, but equally it is not set up to obtain evidence itself. A scheme which does not provide for an independent party to consider the evidence and present arguments against an application will be unlikely to be robust and will not be well designed to identify, for example, a lack of capacity or the existence of coercion or pressure. Doctors, for example, may not be well placed to identify coercion, pressure or control. In my experience they are are often missed by solicitors taking instructions for the making of gifts or wills.

The best solution, perhaps the only good solution, to this problem would be to require the Official Solicitor to act as advocate to the Court in cases brought under the proposed legislation. That might require additional funding for the Official Solicitor, but if the Terminally Ill Adults (End of Life) Bill is a priority for Parliament it is necessary to find appropriate funding, not just through the Department of Health, but also through the Ministry of Justice to minimise the risk of death as a result of financial abuse. It will not be possible to eliminate such deaths, but it will be possible to reduce them. Furthermore, it will limit the risk of a later finding, when matters have gone wrong, that there has been a breach of a person's Article 2 (right to life) rights. If that occurs there is a real risk of a claim for damages against, for example, the National Health Service for damages under the Human Rights Act 1998.

Lastly, the person wishing to die should be required to provide evidence of any change to their will or other testamentary disposition within the six months prior to the application to Court. This requirement will help shine a light on cases where there is a risk of financial abuse and to detect and discourage wrongdoing.

The Judicial Safeguard is essential

It is clear from the analysis above that the judicial safeguard is imperative to help to minimise the risk of financial abuse leading to deaths of the vulnerable. I would be extremely concerned without it that issues, particularly of coercion and pressure, will be missed and there is a strong likelihood in such cases that there will be declarations after death that a deceased person's Article 2 (right to life) rights have been infringed.

If the Terminally Ill Adults (End of Life) Bill is passed without judicial safeguard there is perhaps an additional arguably more prosaic problem: the estates of those who have been assisted to die under the proposed legislation may be difficult to administer. That is because claims that beneficiaries have put pressure on a deceased person to end their own life will be straightforward to make. That would lead to arguments that such beneficiaries' interests in the estate have been forfeited. This would cause personal representatives administering those estates to apply to Court for directions on how to distribute the assets. There may even be applications for relief from forfeiture by beneficiaries. I go on to explain the reasons for this in detail below.

As *Williams, Mortimer & Sunnucks Executors Administrators & Probate 22nd ed* at 64-02 says "It is a fundamental principle of public policy that a person is not to be allowed to have recourse to a Court of Justice to claim a benefit from a crime whether under a contract or a gift. This principle is felt particularly strongly in cases of unlawful killing. Thus, as a matter of public policy a person guilty of unlawfully killing another, whether by murder, manslaughter, aiding and abetting, counselling or procuring another's suicide, or causing death by dangerous driving, cannot take a benefit under that person's will or intestacy or in any other way arising from the crime. Evidence of conviction in a criminal court is admissible in civil proceedings, but a conviction is not necessary to ground the operation of the principle."

No doubt a person guilty of an offence under section 26 of the Bill in relation to dishonesty coercion or pressure would (rightly) fall within that rule of public policy such that he or she could not benefit under the will or intestacy of a person assisted to die. It might be possible for the impact of this rule to be moderated by an order of the Court under the Forfeiture Act 1982 to allow such a person nevertheless to benefit from the estate of a deceased person. Plainly in cases of dishonesty or coercion it will be difficult to persuade the Court to apply the Forfeiture Act because the moral culpability of an offender will likely be high: see further *Dunbar v Plant* [1998] Ch 412 (CA) at 437.

As *Williams, Mortimer & Sunnucks* points out it is not necessary for there to be a conviction for the forfeiture principle to operate. A recent example of such a case is *Leeson v Macpherson* [2024] EHWC 2277 (Ch) where the deceased died from drowning in a Danish swimming pool. Her husband was acquitted of her murder. That a murder had taken place was a serious allegation and the more serious an allegation the more cogent the evidence required to prove it: see [176]. Joanna Smith J held that the deceased had been killed by her husband and his interest in her estate was forfeit.

If there were a judicial declaration as envisaged under the current scheme of the Terminally Ill Adults (End of Life) Bill, then it would be straightforward for the personal representatives of the person assisted to die to administer the estate on the basis that no offence had been committed.

However if there were not a judicial declaration those persons who would otherwise benefit from the estate would have an obvious interest in arguing that dishonesty, coercion or pressure had been used by a beneficiary of the deceased's will or intestacy. The burden of proof on the civil standard would be on the person asserting an offence: see *Re Dellow's Will Trust* [1964] 1 WLR 451 at 455. However, in order to qualify for assisted dying under the Bill a person must be terminally ill such that they have a progressive illness, disease or condition which cannot be treated and the person's death in consequence can reasonably be expected within six months. We can assume most such people will be extremely unwell, in pain and vulnerable to influence. In those circumstances it might not be particularly hard to establish that "pressure" had been brought to bear on the deceased person.

Those drafting the Bill have plainly deliberately used "pressure" rather than for example "undue pressure" (which phrase is used in relation to the validity of a lasting power of attorney in section 22(3)(a) of the Mental Capacity Act 2005, or "undue influence" which is a doctrine which can be used to establish the invalidity of a transaction including a will). In the context of a will "undue influence" means

> *"pressure of whatever character…if so exercised to overpower the volition without convincing the judgment".*

per Sir JP Wilde in *Hall v Hall* (1868) LR 1 P & D 481.

In *Wingrove v Wingrove* (1885) 11 PD 81 undue influence was described as *"in a word – coercion*". "Pressure" must require something significantly less than that.

In *Re Edwards* [2007] EWHC 1119 (Ch) Lewison J, as he then was, noted at [47] that

> *"The physical and mental strength of a testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will*".

Therefore, in the context of a terminally ill person it may be relatively straightforward to make the case that "pressure" has been exerted on them through e.g. repeated discussion. It will not require the will to be overborne because pressure must mean something less than coercion.

The lack of a judicial safeguard could place the devolution of the estates of very many people who are assisted to die into question with allegations made after death of "pressure" having been exerted by a beneficiary.

Conclusion

Assisted dying may well help many people face the end of their lives with dignity. If legalised assisted dying will offer new opportunities for financial abuse of the vulnerable which will have fatal consequences. In those circumstances it is right that Parliament ensures that robust safeguards are put in place to protect the vulnerable from such abuse. In my view the safeguards in the Terminally Ill Adults (End of Life) Bill as currently drafted are insufficient and require strengthening.

In particular I suggest:

(a) a reversal of the burden of proof in respect of mental capacity;

(b) notification of close family members;

(c) a requirement to hear from the person who wishes to die;

(d) disclosure of recent changes to testamentary dispositions; and

(e) an advocate to the Court to ensure that the evidence in support of a claim is appropriately tested.

The first four listed suggestions will not constitute any substantial additional cost. That is not so in relation to the advocate to the Court: it will have a cost. However if assisted dying is a priority for Parliament, it must be willing to foot the bill for the costs of protecting the vulnerable from abuse of the new liberties.

Plainly, I consider it necessary to retain a judicial declaration to protect people who might lack capacity or be subject to coercion or pressure prematurely to end their own lives. However, a judicial declaration is also necessary to safeguard estates of those who are assisted to die from confusion and claims that beneficiaries have committed offences such that their interests in the estates become forfeit.

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These are my personal views and not the views of chambers or any of my clients.