

The Court of Protection and Statutory Wills

Introduction

Where a person lacks capacity to make a decision or series of decisions, the Court of Protection has jurisdiction under the Mental Capacity Act 2005 to make decisions on behalf of that person or appoint another person – a deputy – to make the decisions in question. However, certain important decisions such as the making of a will can only be taken by the Court. A will made under the Mental Capacity Act is referred to as a ‘Statutory Will.’

What is the Court of Protection?

The Court of Protection is a Superior Court of Record, which has the authority to make decisions, such as the making of a will, on behalf of a person who lacks capacity. Decisions are made by nominated judges at the appropriate level, usually a district or circuit judge. Cases may also be heard by the High Court and at some regional courts in different parts of England and Wales.

The powers of the Court and the authority and role of a Deputy are governed by the Mental Capacity Act 2005, the Code of Practice and the Court of Protection Rules 2017.

The contact details for the Court of Protection are:

Court of Protection, PO Box 70185, First Avenue House, 42-49 High Holborn, London WC1A 9JA

Phone number 0300 456 4600

Proceedings in the Court of Protection

A will is rightly regarded as a very important and personal document. It represents a person’s fundamental right to dispose of his assets where he or she chooses. A person

is also free not to make a will and leave his or her estate to pass under the Intestacy Rules. The making of a will for someone does therefore represent an intrusion into another person’s life and needs to be dealt with sensitively as well as in accordance with a formal judicial process. That must be underpinned by evidence as to the lack of testamentary capacity and as to how an appropriate decision should be made.

Evidence must be tested and can be challenged by other parties who may have an interest in the Statutory Will, as well as the Official Solicitor who is generally appointed to represent the interests of the person lacking capacity.

Our expertise

We have a great deal of experience in this area of practice. We have a dedicated team of lawyers specialising in Court of Protection practice. Our partners act in over 225 cases where they have been appointed to act as Deputy. Cases we deal with range from complex personal injury awards for young adults and children, to elderly clients with dementia in care. Coupled with this experience in dealing with an extensive range of clients who lack capacity, we are frequently involved in the formal process of making applications to the Court of Protection including cases which are contested.

We also have a dedicated Wills and Tax Planning team, with experience in all areas of will drafting and tax planning. In appropriate cases, we can therefore provide a holistic service. We are proud of having a range of skills that can be combined to deal with this most difficult and unusual of procedures.

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The Court of Protection and Statutory Wills

Continued

Testamentary capacity

Before the Court of Protection can make a decision for a person, it must be established that the person cannot make the decision in question. In the case of a will, it must be shown that at the material time (i.e. when the will is made) they are unable to make the decision for themselves in relation to the matter because of 'an impairment of, or a disturbance in the functioning of, the mind or brain'. A person is regarded as unable to make a decision if they are unable:

- to understand the information relevant to the decision (e.g. the nature of a will, the value of the estate, the beneficiaries and potential beneficiaries of the Will)
- to retain that information
- to use or weigh that information as part of the process of making the decision (which includes understanding the consequences of deciding one way or the other or of not making a decision)
- to communicate his decision (whether by talking, using sign language or any other means).

Before an application can be made to the Court of Protection, the applicant will therefore need to obtain medical evidence as to lack of capacity. Some General Practitioners are reluctant to complete the relevant forms, particularly in cases where the person's capacity may be considered 'borderline'. In such cases, we can assist in helping clients access assistance and input from specialists in this field of work.

Acting in a person's best interests

Any decision, including a Statutory Will, which is made on behalf of a person who lacks capacity, must be in the person's best interests. The Court of Protection and therefore anyone engaged in making a case before the Court is required to act in that

person's best interests, following the statutory principles set out in the Act.

Thus the decision must not be made on the basis of (a) the person's age or appearance, or (b) a condition of their, or an aspect of their behaviour, which might lead others to make unjustified assumptions about what might be in their best interests. The Court must consider all of the relevant circumstances and, in particular, take the following steps:

- 1 consider; (i) whether it is likely that the person will at some time have capacity in relation to the matter in question, and (ii) if it appears likely that they will, when that is likely to be
- 2 so far as reasonably practicable, permit and encourage the person to participate, or to improve their ability to participate, as fully as possible in any act done for them and any decision affecting them (even if the person lacks capacity, they may be able to give some assistance to the decision being made on their behalf)
- 3 consider, so far as is reasonably ascertainable; (i) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by them when they had capacity), (ii) the beliefs and values that would be likely to influence their decision if they had capacity, and (iii) the other factors that they would be likely to consider if they were able to do so
- 4 take into account, if it is practicable and appropriate to consult them, the views of; (i) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind, (ii) anyone engaged in caring for the person or interested in their welfare, (iii) any donee of a Lasting Power of Attorney (LPA) granted by the person, and (iv)

The Court of Protection and Statutory Wills

Continued

any deputy appointed for the person by the Court, as to what would be in the person's best interests.

'Substituted judgment'

Historically, the approach taken by the Court when authorising a Statutory Will would have been to consider what the person concerned would have included known as 'substituted judgment'. The Court must now consider a person's 'best interests' in the widest sense, taking account of matters that the person may not have considered such as taxation, changes in personal relationships or family disputes. But in the majority of cases the Court will start with the aim of making a will which the person would have wished to make if they had capacity and a complete understanding of their personal circumstances. The Court will therefore need to address the following questions:

- what reliable evidence is there of the person's last known wishes?
- what has happened to justify a departure from those wishes?

The Court is for obvious reasons reluctant to impose a decision on a person who lacks capacity without clear and compelling evidence. It is not sufficient to suggest that a particular will is 'reasonable' or 'fair.'

When should a Statutory Will be made?

Although there is a heavy burden on anyone proposing a Statutory Will, there are many situations where such a will should be made. For example:

- a property left in the will has been sold so that the gift would otherwise fail
- the beneficiaries named in the current will have died and there is no provision

for their replacement or the results are at odds with what the person had intended

- an intestacy would lead to a parent who has no involvement in the person's life being the sole beneficiary
- a current will makes inadequate provision for friends and relatives who have been caring for a person for many years
- the provisions of a current will are likely to cause conflict. Although a will should not be used to conduct a family dispute, a satisfactory Statutory Will may avoid far greater argument.

Who can apply for a Statutory Will?

An application can only be made without the prior permission of the Court if it is made by one of the following persons:

- the person who lacks or is alleged to lack capacity
- the donor or donee of an LPA to which the application relates
- a deputy appointed by the Court for the person to whom the application relates or a person who has made an application for the appointment of a deputy but which has not yet been determined
- a person who, under any known will of the person or under their intestacy, may become entitled to any property of the person or any interest in it
- a person who is an attorney appointed under an Enduring Power of Attorney (EPA) or LPA which has been registered
- a person for whom the person might be expected to provide if he had capacity to do so.

The Court of Protection and Statutory Wills

Continued

Procedure for a Statutory Will

Application

An application is made using the standard application form (COP1) together with medical evidence of the lack of capacity, a cheque for £365 in respect of the fee and the evidence in support of the application.

Evidence in support of the application

The applicant must provide the following information in support of the application:

- where the application is for the execution of a Statutory Will or codicil, a copy of the draft will or codicil
- a copy of any existing Will or codicil
- any consents to act by proposed executors
- details of the person's family, preferably in the form of a family tree, including details of the name and date of birth of each person included in the family tree
- a schedule showing details of current assets, with up to date valuations
- a schedule showing estimated net yearly income and spending
- a statement showing the person's needs, current and future estimates, and general circumstances
- if the person is living in National Health Service accommodation, information on whether they may be discharged to local authority accommodation, to other fee-paying accommodation or to their own home
- if relevant, full details of the resources of any proposed beneficiary, and details of any likely changes if the application is successful
- details of any Capital Gains Tax, Inheritance Tax or income tax which may

be chargeable in respect of the subject matter of the application

- if appropriate, a statement of whether any land would be affected by the proposed will
- confirmation that the person is a resident of England or Wales
- an up to date report of the person's present medical condition, life expectancy, likelihood of requiring increased expenditure in the foreseeable future, and testamentary capacity
- an explanation as to why the applicant considers the proposed will to be in the person's best interests.

Following the application

Once the application has been filed with the Court, the Court will generally issue the application and direct service of the application and supporting evidence on the Official Solicitor (who is appointed to act as litigation friend for the person who lacks capacity) and any other person who is adversely or potentially affected by the application. Thus a beneficiary under an existing will or intestacy must be served. All such persons (known as 'respondents') must also be provided with a form for acknowledging service. A respondent who wishes to object to the application, support the application or generally assist with the proceedings must file an acknowledgement of service if he is to be a party.

Once acknowledgements have been filed, the Court will have a clearer picture of the issues and whether the case is complicated or contested. Directions will then be given for the serving of further evidence, setting down the case for a hearing or if there is a consensus and the case is straightforward, directing one party (usually the Official Solicitor) to submit an agreed draft to the Court for approval of the draft will 'on the

The Court of Protection and Statutory Wills

Continued

papers.’ In a complex case requiring the further disclosure and exchange of evidence a directions hearing may be held either before the Court or by telephone.

Hearings before the Court of Protection

If there is no agreement between the parties the application will be listed for hearing before a judge. Once evidence has been filed and served, the parties may also need to exchange position statements summarising their legal arguments. No new evidence can be introduced at a hearing but a party or witness may be cross-examined. It is therefore usual for counsel to be instructed to represent parties at a hearing. Parties are encouraged at all times to establish common ground where possible and limit the scope for contention. Hearings are generally short and listed for half a day or exceptionally for a whole day, so that the judge can concentrate on the key issues that remain in dispute and allow any important evidence to be tested.

Execution of the will

Once the judge has agreed the terms of the proposed Statutory Will the Court will make an order authorising the applicant or some other person to execute the will. The Court will also seal the will and direct where the original should be stored.

Costs

Costs in proceedings before the Court of Protection are at the discretion of the Court and no costs can be taken from a person’s estate without an order of the Court. Generally the Court will apply the rule which provides that costs in proceedings concerning a person’s property and affairs will be paid from that person’s estate subject to detailed assessment. It is important that this is not taken for granted and the Court has the right to consider the

conduct of the parties, refuse a party costs or direct one party to pay the costs of another. The Court may also limit the extent to which costs can be claimed, for instance where costs are allowed up to a particular stage in the proceedings.

The conduct of the parties includes:

- conduct before, as well as during, the proceedings
- whether it was reasonable for a party to raise, pursue or contest a particular issue
- the manner in which a party has made or responded to an application or a particular issue
- whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in their application or response.

Assessment of costs

Costs ordered in an application are subject to detailed assessment by the Senior Courts Costs Office (SCCO), which is responsible for checking and certifying a lawyer’s costs.

The costs that can be claimed on assessment are by reference to the hourly rates of the persons dealing with the case, and our work in this matter will be charged on this basis. The hourly rates are set by the Court. The current Published Guideline Hourly Rates, which came into force on 1 April 2010, are as follows:

- 1 Partner (over eight years post qualification experience) - £217 per hour
- 2 Senior solicitor (over four years post qualification experience) - £192 per hour

The Court of Protection and Statutory Wills

Continued

- 3 Other experienced Solicitor/Legal Executive and assistants of equivalent experience - £161 per hour
- 4 Trainee solicitors, paralegals and assistants of equivalent experience- £118 per hour.

These rates are reviewed periodically by the Court.

Disbursements and other expenses

The main disbursements and further expenses which are payable on an application for a Statutory Will are as follows:

- 5 medical certificate – the fee payable to a doctor is as charged by the doctor
- 6 application fee - where an application is made to the Court then a fee of £365 is payable (if an attended hearing is ordered then a further fee of £485 is payable)
- 7 assessment fee – where costs are assessed by the Court an assessment fee of £85 is payable by each party having their costs assessed
- 8 costs draftsman's fee for preparing a detailed bill of costs
- 9 counsel's fees (if instructed)
- 10 miscellaneous disbursements such as travel costs, courier fees, commissioner's or notary's fees etc.

Disclaimer

This information sheet has been prepared to highlight some key issues relating to the Court of Protection and the procedure for making a Statutory Will. It is intended to be for general guidance only and is not a

substitute for specific advice. It is based upon our legal understanding of the legal position as at October 2019 and may be affected by subsequent changes in the law.

If you require further information, please contact Brian Bacon, Rosalind Hamlyn or Catherine Fuller on 01892 510000 or by email at:



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