

Statutory Wills

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Legal Framework

The CoP has power by virtue of Mental Capacity Act 2005 (“MCA”):

- to make decisions for P, if P lacks capacity to make decisions for himself: MCA s.16 (1) and (2)
- to authorise: MCA s.18(1)
 - (b) The sale, exchange, charging, gift or other disposition of P’s property
 - (h) The settlement of any of P’s property, whether for P’s benefit or for the benefit of others
 - (i) The execution of a Will for P

Who has the power to make a Statutory Will?

- MUST be made and authorised by the CoP
- Requires a formal application
- If parties agree by consent, must still secure CoP authorisation
- Deputy does not have power and the power cannot be granted:
s.20(3)(b)
- Attorney does not have the power and the power cannot be granted

When does the need for a Statutory Will arise (not exclusive)?

- Where no previous Will or need to change an existing will/codicil
- Examples include:
 - Intestacy rules would leave estate to a parent who has not been involved in P's life
 - Change of previously expressed testamentary wishes
 - Inheritance or Tax planning purposes

Further examples:

- Fundamental change of circumstances: i.e.
 - Compensation received for a personal injury or clinical negligence claim
 - Need to sell property left as a legacy or other assets to pay for care needs
- Change in relationship with beneficiary or new relationship commenced since Will executed
- No provision in Will for a person who has become P's carer in later life
- Intended beneficiary pre-deceases P and no provision for a substitute
- Financial or other abuse by beneficiary
- Response to a predatory marriage
- Potential dispute as to validity of previous Will(s)

What is a Statutory Will?

- Has same effect as Will made by a person with capacity
- Can include any provision that could be made in a Will executed by P if had capacity: MCA, paragraph 2, schedule 2:
 - Make a Statutory Will for a P if domiciled outside E&W to deal with immoveable property within E&W – Re P [2009] EWHC 163 (Ch)
 - Only be executed once P is 18: MCA s.18(2)
- Cannot:
 - Make if P is domiciled outside E&W and any question of testamentary capacity falls to be determined in accordance with the law of a place outside of E&W: MCA, paragraph 4, schedule 2
 - Dispose of any immoveable property outside E & W

Requirements when executing a Statutory Will?

- Specific clause must be included:
 - Must state that signed by P acting by the authorised person
- Must be executed in a specific way:
 - Two copies signed by the authorised person with the name of P and their own name
 - Witnessed by two people over 18 in presence and at time of execution
 - Be attested to by the witnesses in the presence of the authorised person
 - Be stamped with the Official Seal of the CoP
- If P dies after signing but before sealed will be valid
- The Statutory Will needs to be retained for the rest of P's life – can be retained by the applicant's solicitor or executor (if a solicitor)
- Beware s.15 Wills Act 1837

Who can make an application?

- Usually made by the deputy or attorney if one has been appointed but it does not have to be
- Anyone who is a beneficiary or potential beneficiary of P's estate can make the application
- Permission is not required: CoPR 2017, Rule 8.2(b)(i)

Procedure

- Forms COP1, COP1A, COP1C, COP3 and COP24
- Application fee
- Part 9 of CoPR Rules 2017
- Practice Direction 9E (sets out the information required with the application)
- Not allocated to a case management pathway: CoPR 2017, Rule 3.9
- Usually a paper-based procedure – can take 6 months to a year to process
- May take longer if need a hearing if contested

Urgent applications

- Can make urgent application, if needed
- Need to provide evidence of P's health condition and why the application was not made sooner
- Court will need unequivocal evidence that P is likely to die before the Court can deal with the application in the usual way
- Court can:
 - dispense with need for notification or
 - abridge time for service or
 - make a holding will

Urgent applications – practical tip

- File a CoP 9 Form explaining why application is urgent
- If making an urgent application, contact relevant department in Office of Official Solicitor as soon as possible to put them on notice of the application
 - Tel: 020 3681 2758
 - Email: OSPTSecretarialSupport@ospt.gov.uk

Practice Direction 9E

- Statement explaining why Statutory Will needed, and why it would be in P's best interests
- Supporting evidence:
 - Confirmation P lives in E&W
 - Family tree (including dates of birth)
 - Copy of current Will, including any amendments or codicils
 - Copy of any deputyship, LPA or EPA
 - Confirmation any deputy or attorney has been notified of the application
 - Evidence of lack of mental capacity (preferably from a medical practitioner)
 - Full financial disclosure – schedule of assets, net yearly income and expenditure
 - Current and future financial needs

Practice Direction 9E (continued)

- Current accommodation costs and an estimate of future costs, if likely to change
- Resources of potential beneficiaries and impact on beneficiaries of successful application
- Any inheritance tax that may be incurred (or confirmation that no impact) (including any formal financial advice provided)
- Details of any CGT or income tax that may be chargeable
- Whether ownership of any land would be affected
- Details of present medical conditions and life expectancy of P (including impact on expenditure, if relevant)
- A draft of the proposed Statutory Will
- Written confirmation of executors and trustees agreement to act

Who will represent P?

- Official Solicitor will usually be appointed to represent P (even if have an attorney or deputy)
- Applicant must be ready, willing and able to meet the costs of the Official Solicitor so her criteria for accepting invitation to act can be met
- Usual rule - costs of P and other parties payable from P's estate: COPR 2017, Rule 19.2 (for ability to depart from usual rule see CoPR 2017, Rule 19.5)
- Applicant will not be able to recover these costs until after the application has been determined and SCCO has undertaken detailed assessment
- If P dies before assessment of costs – P's estate will become liable and may agree costs without a detailed assessment

Who must be notified?

Practice Direction 9E, paragraph 9

- Who must be named as respondents:
 - All persons who could be materially or adversely affected by the proposed Statutory Will, including any potential beneficiary under:
 - an existing Will or codicil,
 - by rules of intestacy,
 - the proposed Statutory Will
- Who must be notified:
 - Three other people who are not a respondent

Recent cases

- Reported cases are rare
- Most applications are agreed
- Most reported cases are where issue of law has arisen
- Rare for a reported case where issue of fact or wishes and feelings in dispute

Case law is focused on three issues

1. Testamentary capacity
2. Best interests
3. Notification/service on beneficiaries

1. Test for testamentary capacity

- Presumption that P has capacity: MCA, s.1(2)
- Test in MCA, s.2(1)
 - Is there an impairment of or disturbance in the functioning of the mind or brain?
 - If so, is the impairment of disturbance such that the person lacks capacity to make a decision?
- Unable to make a decision: MCA, s.3(1):
 - Unable to understand information about the decision to be made
 - Unable to retain that information
 - Unable to use or weigh the information as part of the decision-making process
 - Unable to communicate the decision by any means

Does test in MCA or Banks v Goodfellow (1870) LR 5 QB 549 apply?

Banks v Goodfellow sets out a 4 limb test:

- T must be able to understand, retain information about and consider:
 - The nature and effect of making a Will
 - The extent of their assets
 - Who their beneficiaries are, and what obligations they have towards those beneficiaries.
- T must not be suffering from any disorder of the mind or delusions that affect their views in relation to those obligations

Main differences?

- Burden of proof
- Degree of T's understanding of relevant information
- Whether T is required to understand the reasonably foreseeable consequences of the different choices of how to distribute their estate
- P is not to be treated as lacking capacity to make a decision unless all practicable steps have been taken to assist P: MCA, s.1(3) (cf: Golden Rule)

Clitheroe v Bond [2021] EWHC 1102 (Ch.) per Falk J

- Many commentators suggest now have clarity - the test in Banks v Goodfellow applies when assessing testamentary capacity
- Agree have more certainty when considering issue of capacity retrospectively the test in Banks v Goodfellow will apply— i.e. in post-death proceedings brought in the BPC challenging a Will
- But views expressed by Mrs J Falk were *obita dicta* (son not allowed to appeal as did not dispute at first instance that Banks v Goodfellow was the correct test)

Post – Clitheroe landscape for Statutory Will applications?

- Views of Mrs J Falk do not provide binding guidance as to applicable test for testamentary capacity if making an application for a Statutory Will in CoP
- Mrs J Falk did not decide which test applies when CoP is considering an application for a Statutory Will
- A decision where CoP applied test in Banks when assessing testamentary capacity: ABC v X Y [2012] EWHC 2400 (CoP)
- Falk J's at §61 – CoP can only authorise Statutory Will if conditions in MCA s.1 are met

Post – Clitheroe landscape for Statutory Will applications (2)

- CoP only has jurisdiction to make a decision for P (i.e. to authorise a Statutory Will) if test in MCA is met
- The two tests remain
- Arguable:
 - The more difficult MCA test should apply when CoP is deciding whether to impose a Statutory Will on P
 - Easier test should apply in a post-death challenge to validity of Will as BPC is dealing with a retrospective challenge to a written expression of the Deceased's testamentary wishes

2. What does best interests mean?

- Any act done or decision made under the MCA must be done in P's best interests: MCA, s.1(5)
- Steps to consider when assessing best interests are in set out in, MCA s.4:
 - (3) ... must consider—
 - (a) *whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
 - (b) *if it appears likely that he will, when that is likely to be.*

Best interests (2)

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

Weighing the various factors

- No hierarchy between the factors in s.4
- Weight to be attached to each factor will depend on the individual circumstances of the case
- There may be one or more factors of 'magnetic importance'
- P's wishes and feelings are not determinative
- If P had previously made an unwise decision, the Court will not approve that decision simply because it reflects P's wishes and feelings

In practice, CoP will consider:

- P's own wishes – past and present
 - any written documents or witness evidence of what P told others when had capacity
- How strongly held P's views were
- What and how strong P's current wishes and feelings are
- How these wishes and feelings might affect others
- How P's wishes and feelings fit into the court's own assessment of P's best interests
- Degree of incapacity
- Any beliefs and values that might have influenced P's decision
- The views of others

Significance of P's wishes and feelings

- Important that P's wishes and feelings are accorded due significance: Re M (Statutory Will) [2009] EWHC 2525 (Fam)
- When looking at wishes and feelings – not looking at what P would have done if had capacity – not going back to substituted judgment: Re P [2009] EWHC 163 (Ch)
- Applying an objective test, but Court will still consider what P would have done if had capacity and aware of his/her current circumstances

Evidence of P's wishes and feelings

Re NT v FS and Others [2013] EWHC 684 (COP)

- F lacked capacity
- Estate of £3m
- Rules of intestacy – whole estate would go to only son
- Had a partner who had cared for him in later life, 3 siblings and uncle involved in his life, also an elderly mother
- Siblings and uncle applied for a Statutory Will

Form of P's wishes and feelings

- Evidence of wishes and feelings:
 - Handwritten document from 1986
 - Left legacies to other family members, residuary to mother, none to son
 - Not a valid will as not witnessed
- Arguments:
 - Applicants argued document was of magnetic importance as proof of P's testamentary wishes
 - Son argued given passage of time, 1986 document of no relevance
- Court directed that family members receive 22% of the estate

Dispute as to validity of current Will

- No presumption that CoP will or will not make Statutory Will if a dispute as to validity of P's current will
- CoP does not have jurisdiction to determine whether previous Will/codicil is valid or not: ITW v Z and Others [2009] EWHC 2525 (Fam) §50, per Munby J
- Court may make a Statutory Will if evidence that could be uncertainty upon P's death: Re D [2010] EWHC 2159 (Ch)

Validity of current Will (2)

- Re D [2010] EWHC 2159 (Ch) per HHJ Hodge QC (also known as VAC v JAD and others) – ‘doing the right thing’
 - ‘Doing the right thing’ is a relevant factor when court is assessing best interests (following Re P [2009] EWHC 163 (Ch))
 - Doing the right thing may mean it is in P’s best interest to authorise a Statutory Will rather than bequeath a contentious probate dispute to relatives

Tax mitigation

No presumption that in P's best interests to carry out tax mitigation planning: PBC v JMA and others [2018] EWCOP 19

What happens if application not agreed?

- Any beneficiary or potential beneficiary must serve an Acknowledgement of Service if wish to object to the application
- Court will make directions to secure views of others – in form of CoP 24 witness statement
- List for final contested hearing to determine any dispute

Contested hearing

In *Re Meek* [2014] EWCOP 1, HHJ Hodge QC gave detailed guidance as to how CoP will assess best interests of P:

- What is in P's best interests – not same as what P would have done if had capacity
- Objective test
- Structured decision-making following principles in s.4(6) and (7) MCA
- No hierarchy between factors in s.4 – will vary on the facts of each case
- May be one or more factor(s) of magnetic importance
- A value judgment

Contested hearing (2)

- In some cases, P's wishes and feelings will be given considerable weight and in others may carry little weight
 - 'Doing the right thing' is to be viewed from the eyes of a well-informed disinterested bystander
 - 'Doing the right thing' is to be judged by the standards of P when he had capacity
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- Preparation:
 - Prepare a balance sheet for / against making the Statutory Will
 - Prepare a table of beneficiaries and the share of P's estate that will pass to each with/without a Statutory Will

Securing views of P

- Must take all reasonably practical steps to permit and encourage P to participate in decision affecting them: MCA s.4(4)
- Must ensure this principal is applied when securing P's wishes and feelings and when expert is undertaking capacity assessment
- Must take all reasonable steps when considering where to meet P, to ensure cannot be subject to external/undue influence

ADS v DSM [2017] EWCOP 8, Charles J.

- Appeal against decision by CoP to make a Statutory Will 25:75
- Charles J. upheld appeal, finding:
 - A failure by parties to properly prepare for the hearing before the CoP
 - Official Solicitor failed to properly ascertain the wishes and feelings of P
 - Official Solicitor proposed terms for a Statutory Will that did not accord with any expression of P's wishes and feelings
 - DSM wrongly told he did not need to participate in proceedings before the CoP despite ADS having made allegations of undue influence against him
 - When assessing best interests, Court must investigate whether P's ascertainable wishes and feelings have been affected by undue influence
 - In practice: those seeking to assess capacity and/or ascertain P's wishes and feelings must take all necessary steps to ensure P is not unduly affected by the influence of another

3. Dispensing with service on beneficiaries

Re D [2016] EWCOP 35, per SJ Lush

- Official Solicitor appealed decision to authorise Statutory Will without serving papers on a beneficiary who was entitled to a 50% share of P's estate under rules of intestacy
- CoPR 2010, rule 38 gave CoP power to dispense with service
- Upheld appeal:
 - Power to dispense with service must only be used where case is exceptional, a compelling reason or genuine urgency
 - SJ Lush observed that often made as more convenient to avoid potential confrontation with difficult family members
 - Dispensing with service would affect fairness and deny right to a fair hearing under ECHR

Service on beneficiaries (2)

LCB v CJP [2019] EWCOP 1, per DJ Beckley

- Dispensed with service on P's biological father who would be entitled to 50% of estate under rules of intestacy:
- Held:
 - Exceptional circumstances:
 - At time of issue full name and address not known
 - Lack of involvement in P's life
 - Denial of paternity
 - Genuine urgency
 - Wrong to delay making an order given impact of rules of intestacy if P died
 - Directed that must attempt to find and serve order on father, so father may have opportunity to set aside or vary

Thank you!

Any questions?

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