

Statutory Wills: Best interests after death

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The conundrum:

Best interests 6 feet under

The journey:

From substituted judgement to multifactorial
and back again



Start with the statute:
s.4 Mental Capacity Act 2005:

Multifactorial considerations:
Actual wishes and feelings,
Values and beliefs that would influence if had
capacity
Other factors would be likely to consider if able
Other relevant circumstances

Re M [2011] 1 WLR 344 at [32]: no statutory
hierarchy

Re P [2010] Ch 33 at [18-19]

Counsel:

the Court is making a person's "Will" that takes effect only after he is dead

therefore "adult autonomy" and "P's best interests would be served simply by giving effect to his wishes".

But Lewison J: this is "part of the overall picture, and an important one at that"

But P also has an interest in how he is remembered,

And the pre-Act "substituted judgement" guidance is **not**, for this reason, to be "directly applied" ... **although** it contains a good deal of wisdom, and wisdom can always be applied".

Takeaway from Re P :

(1) In determining P's best interests as to the making of his will, the Court is directed by the Act to consider P's actual wishes and feelings, the values and beliefs that would influence him if he had capacity, other factors he would be likely to consider if able, and other relevant circumstances, without a set formula as to their consequence.

(2) The Court is determining upon those considerations what P's "Will" should be. An "important" part of the "overall picture" of P's best interests, because P has no material interests after his death, is the Court's inference from those considerations as to what P's "will" would be.

(3) But that is not the whole picture of P's best interests, as P also has an interest in how he will be remembered after his death.

Present practical concerns eg dispute resolution

In their absence, two factors:

Doing what the Court infers from consideration of statutory factors P would want to do (subjective)

P's interest in being remembered for doing "the right thing" (objective)

Subjective balanced with Objective as a value judgement, not derivation of an outcome from application of a formula

(1) Inference as to what P would want

Aintree University Hospitals NHS Trust v James
[2014] AC 591; [2013] UKSC 67 at [39]

In determining best interests the Court must try to put itself in the place of the individual patient and ask what their attitude to the decision is or would be likely to be, and that, insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values, or the things which were important to them, it is those which should be taken into account in making the choice right for them as an individual human being.

In the statutory will context:

Re JC [2012] COPLR 540 at [52] “the best interests criterion certainly does contain a strong element of substituted judgement”,

NT v FS [2013] EWHC 684 (COP); [2013] WTLR 867 at [8(5)] noted:

Re S [2010] 1 WLR 1082 at [55-58]: weight should be given to the wishes of P, and respecting P’s wishes is a very significant part of P’s best interests; **Re P** At [40]-[41] and **Re M** [2011] 1 WLR 344 both agree with the broad thrust.

ADS v DSM [2017] EWCOP 8 at [21]: noted broad agreement and confirmation by **Re M** of importance of adult autonomy.

But **ADS v DSM** at [37-8]:

The weight to be attached to P's expressions of wishes may be affected by his ability to take into account relevant past and present circumstances, the factual accuracy of his reasons, the influences to which he was subject and the way in which the expression was obtained,

Echoing **Re M** [2011] 1 WLR 344 at [35]: the weight to be attached to P's wishes and feelings will vary according to circumstances, such as the degree of his incapacity when they were expressed, the strength and consistency of the views expressed, and the extent to which they were rational, sensible, and responsible.

Re G (TJ) [2011] WTLR 231 at [32,35,42,55,56]

Best interests are not confined to self-interest, and, guided by Hoffmann LJ in **Airedale NHS Trust v Bland** [1993] AC 789 at 829:

“if the individual concerned is not able to form and express his wishes, the court should try its best to do what the court thinks the individual would have wanted”

“the substituted judgement approach could be subsumed within the concept of best interests”.

“Respect for P’s wishes, actual or putative, can be a relevant factor even where P has no awareness of, and no reaction to, the fact that such wishes are being respected.”

(2) P's interest in how he will be remembered

Re P [2010] Ch 33 at [18-19] **ADS v DSM** [2017] EWCOP 8 at [18-19]; **Re M** [2011] 1 WLR 344 at [37]-[38].

Re Meek [2014] COPLR 535 at [33(vi)]-[34] addressed doubts in **Re G(T)** [2008] WTLR 599 and **NT v FS** [2013] WTLR 867.

“‘the right thing’ is to be judged from the perspective, not of any relatives or friends [or charities] who may be competing for a share of the incapacity of persons testamentary bounty, but rather from the perspective of the well informed, and disinterested, objective bystander”, and by reference to P’s own standards.

An interest in doing the "right thing" is the right thing by those people and causes with whom or which P is connected.

Subject to findings of fact as to P's actual wishes and influences, the Court therefore looks objectively at the call on the patient's bounty of those people and causes, as reflecting the interest of P in doing the right thing by providing for them.

P will have "done" the right thing in the sense that it is his Will, made for him under an enabling jurisdiction, by reference to his wishes, feelings, beliefs and values, and the considerations he would be likely to take into account.

Considerations to which P would be likely to have regard

Re C [1991] 3 AER 866 at 870c; **Re G(TJ)** [2011] WTLR 231; **Re A** [2015] EWCOP 46 at [47]; **Re LM** [2015] EWCOP 91

If no factual findings as to the wishes or disposition of P, or insofar as the weight to be attached to a statement of wishes is reduced, say, by their being significantly affected by a change in circumstances, or by ignorance of relevant circumstances, or by incapacity, the Court approaches the consideration, under s.4(6)(c), of factors which P would be likely to consider if they were able to do so, on the basis that:

P is “a normal decent person who would act in accordance with contemporary standards of morality.”

The force of P's expressions of wishes may be diluted by **ADS v DSM** factors, but if not, then:

In general, subjective autonomy will trump objective fairness: **Re JC** [2012] COPLR 540 at [54]-[55]; **Re Jones** [2014] EWCOP 59 at[69]:

"I am not sure that the idea of being remembered with affection for having done the right thing is of any assistance in this case. JC has an appalling track record. He has spent his entire lifetime doing precisely "the wrong thing" in his relationships with others, and his malevolence is such that he would probably relish the chance of thwarting his children's designs on his estate and would rejoice at being remembered by them with disaffection.."

But **Re Meek** at [33(v)]: to be addressed in the circumstances of the particular case: no a priori prioritisation.

Summary

In the absence of material interests, the two principal relevant interests to be weighed (without determining a priori the weight to be attached) are :

- (1) The (objective) interest in being well remembered for doing the right thing by making provision for those people and causes with whom they were connected; and,
- (2) The (subjective) interest in respect for their autonomy by inference as to what P would want from consideration of their past and present wishes and feelings, the beliefs and values that would be likely to influence them, any other factors that they would be likely to consider, and any other relevant circumstances.

An enabling jurisdiction

Therefore: how P will be remembered and what P would want are of central importance

In the absence of material self interest or other present practical concerns, the reason why it is in P's best interests to make a testamentary gift can only be that P is being enabled to do:

(1) the right thing (in the interest of being remembered for that) ;

and/or (2) the thing which the Court infers from the statutory considerations that P would want to do. In such a case, P has no other interests.

Nonetheless a balancing value judgement on the facts of each particular case, having regard to the statutory considerations.

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