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STATUTORY WILL DISPUTES

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This note provides an overview of statutory will disputes. It explains what a statutory will is, how the courts make a statutory will and the factors which are considered.

STATUTORY WILLS

Section 18(1)(i) of Mental Capacity Act 2005 ("**MCA 2005**") gives the Court power to order the execution of a statutory will on behalf of persons who lack the capacity.

For the purposes of the MCA 2005:

- An Person ("**P**") lacks capacity in relation to a matter if at the material time he/she is unable to make a decision for himself/herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain (section 2(1), MCA 2005).
- Section 3 of MCA 2005 provides that a person is unable to make a decision for himself/herself if he/she is unable to:
 - understand the information relevant to the decision (including information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision);
 - retain such information for long enough to enable him to make the decision;
 - use or weigh that information as part of the process of making the decision; or
 - communicate his/her decision.

WHEN DOES THE COURT USE ITS POWER TO MAKE WILLS?

The Court must always be persuaded that there are grounds for departing from P's existing testamentary arrangements. The Court is most likely to execute a statutory will:

- If P has never executed a will; or
- If there has been a significant change in P's circumstances, when P might be expected to review his/her own arrangements.

The Court does not necessarily execute a statutory will simply because there is an issue as to validity or construction of an existing will. However, the Court might execute a new will if it was satisfied that a previous will was executed under some form of undue influence, or that the testator had lacked capacity when he made the previous will.

The Court's discretion

A will whose execution is ordered by the Court may make any provision that could be made by a will executed by P if he had capacity to make it.

BEST INTERESTS

Any act done, or decision made, under MCA 2005 must be done, or made, in P's best interests. Section 4 of MCA 2005 sets out the steps to follow to determine what is in P's best interests.

Under section 4, the Court, when considering the execution of a will for P, must consider, so far as is reasonably ascertainable:

- P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when he/she had capacity).
- The beliefs and values that would be likely to influence P's decision if he/she had capacity.

- The other factors that P would be likely to consider if he were able to do so.

THE SIGNIFICANCE OF P'S WISHES

P's wishes and feelings are not determinative. There is no hierarchy as between the various factors specified in MCA 2005 and that the weight to be attached to each would vary between cases. Thus the weight to be attached to P's wishes and feelings varies between cases.

HOW THE DECISION MAKING-PROCESS IS APPROACHED

The following points are important to consider:

- The overarching principle is that any decision made on behalf of P must be in P's best interests. This is not the same as inquiring what P would have decided if he/she or she had had capacity. It is not a test of substituted judgment, but requires the court to apply an objective test of what would be in P's best interests.
- The court must follow the structured decision-making process laid down by MCA 2005. Thus, the court must consider all relevant circumstances, and, in particular, must consider, and take into account, the matters set out in sections 4.
- The court must then make a value judgement, giving effect to the paramount statutory instruction that the decision must be made in P's best interests.
- MCA 2005 contains no hierarchy between the various factors which have to be borne in mind. The weight to be attached to different factors will inevitably differ depending on the individual circumstances of the particular case. There may, however, in a particular case be one or more features which, in a particular case, are of "magnetic importance" in influencing, or even determining, the outcome.
- The decision-maker must consider the beliefs and values that would be likely to have influenced P's decision if he/she had capacity, and also the other factors that P would be likely to have considered if he/she were able to do so. That did not, however, necessarily require those to be given effect. P's wishes and feelings will always be a significant factor to which the Court must pay close regard, but the weight to be attached to those wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular weight or importance to P's wishes and feelings. It all depends, and it must depend, upon the individual circumstance of the particular case.