RadcliffesLeBrasseur

Care Homes Briefing

Solicitors

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Statutory Wills: ensuring residents have Wills

Everybody will be aware of the advisability of making a Will to avoid the increased administrative difficulty, heartache and possible deviation of funds if an individual dies intestate.

What is less well known is that the Court of Protection may authorise the execution of a Will on behalf of a "patient" [1].

It is an essential facet of the process of making a Will that the Testator has sufficient testamentary capacity. Many care home residents may lack such capacity because of either congenital disorders or the onset of dementia.

However, in such situations, all is not lost and a Will may still be obtained by utilising the procedure of the Court of Protection to authorise a Statutory Will. If a patient lacks testamentary capacity the Court of Protection can make the Will on the patient's behalf, commonly known as a "Statutory Will"[2].

The Court of Protection may authorise a Statutory Will if a patient is:

a) Aged 18 or over
b) Domiciled in England and Wales, and
c) Incapable of making a Will for himself.

The Court of Protection is likely to authorise a Statutory Will in particular in the following situations:

- **In cases of abuse**

  Abuse can come in many forms, physical, mental or financial. There have been many cases of attempts being made to take advantage of the elderly to benefit from their Estate and the Court is alert to the need to protect the vulnerable from such abuse.

  By way of an illustration of a case where the Court may make a Statutory Will, in 1981[3] the Court authorised a Statutory Will for a Care Home resident who had recently married the man who acted as her main carer at the Care Home in which she resided. The marriage had the effect of revoking her existing Will, however the Court felt that there was a significant risk of financial abuse having occurred and authorised a Statutory Will in effect re-instating her earlier, pre-marriage, testamentary dispositions.

[1] A patient is someone who is incapable by reason of mental disorder of managing and administering his or her property and affairs.

[2] Made pursuant to Section 96 (1) (e) Mental Health Act 1983.

[3] Re Davey (Deceased)[1981]1WLR164

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- **To avoid an intestacy**

  One of the most common situations is where there is a need to dispose of the resident's Estate and no Will has been made before their capacity declined.

- **Because of a change in circumstances so as to make the patient's existing Will out of date**

  This may arise if there has been a significant change in the available beneficiaries or assets since the previous Will was made (at a time when the patient had capacity to make such a Will, but now lacks capacity).

Applications for a Statutory Will can be made by any person authorised by the Court but particularly any Attorney under an Enduring Power of Attorney, a receiver, or a person entitled under either any Will or Intestacy.

The patient will usually be represented by the Official Solicitor and in many cases the Statutory Will will be granted without any difficulty and without a Court Hearing. Statistics from the Court of Protection suggest that around 250 Statutory Wills are made each year. The cost of the process is usually ordered to be paid out of the patient's Estate.

Whilst it is clearly a matter for individual residents to make provision for their own finances, Care Home operators may have situations where the existence of Statutory Wills is of interest to residents' families. If assistance with this is required this is available from RadcliffesLeBrasseur.

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