

RadcliffesLeBrasseur



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A new approach to making Wills

We previously commented on the statutory framework which allows the Court of Protection to authorise the Will of a "patient" [1] using the procedure to authorise a Statutory Will [2]. This is particularly important if a resident lacks capacity to make a Will (perhaps because of the onset of dementia) but has a significant Estate to have administered.

When authorising a Statutory Will, the Court had to consider what the patient himself would have executed had he had the requisite capacity. This required the Court in effect to put itself in the shoes of the patient and anticipate what Will he would have made if he had done so.

However, the Court has recently had to reconsider this jurisdiction and has held that since the Mental Capacity Act 2005 ("MCA") came into force, a new approach to Statutory Wills is required. The Court will now need to consider the best interests of the patient, given that decision making for patients who lack capacity is, in line with the aims of the MCA, to be based on their best interests.

This is not straightforward as it is difficult to ascertain the best interests of the patient when the impact of the decision being made (the administration of an Estate covered by a Statutory Will) is likely to have no bearing on the patient's wellbeing during his own lifetime. Nevertheless, the Court has held in a recent case [3] that the Court must adopt an approach consistent with the MCA. Taking account of what the patient's wishes would have been is still an important part of the process under the MCA, however, ultimately the test is to decide in accordance with the patient's best wishes.

The Judge concluded that this would include taking account of the fact that when making decisions about a Statutory Will what remains after death is the memory of the patient. In particular, the patient may be remembered as having done the right thing and that may be sufficient to justify a decision as being in his best interests.

The benefit in having a Will to assist in the administration of an Estate may thus be obtained via the Statutory Will process even if an individual fails to do this himself before he loses the capacity to make a will.

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Footnotes

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

[2] See RadcliffesLeBrasseur Care Homes Briefing No. 45

[3] Re: P [2009] EWHC 163 (CH)

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