

## **Topics**

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- I. INTRODUCTION
- II. GENERAL POINTS ON APPLICATIONS FOR WILLS & LIFETIME GIFTS
- III. APPLICATIONS FOR STATUTORY WILLS
  - CASE STUDY
- IV. APPLICATIONS FOR LIFETIME GIFTS
  - CASE STUDY

## **I. INTRODUCTION**

## Applications relatively rare

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- T must be shown to lack testamentary capacity
- If T has an existing will the Court of Protection is reluctant to interfere with T's choice unless there has been a significant change of circumstance.
  - EG, births, deaths or marriages, T becoming significantly richer or poorer or ademption of a specific legacy.
- Lifetime gifts may be more attractive as they can reduce IHT.
- In the case of predatory marriages, it is more satisfactory to prevent the marriage rather than trying to deal with the fallout afterwards (though often there is so much secrecy that prevention is not possible).

## Ademption

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- Specific gifts adeem if the subject matter of the gift is no longer owned at the date of death or has changed substantially in nature.
- It is sometimes possible to argue that the change is merely one of form not of substance.
  - In *Re Dorman* there was no ademption where an attorney closed one bank account and reinvested the proceeds in another account carrying a higher rate of interest.

## Statutory prevention of ademption

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- If property of P which would otherwise have passed by will or intestacy has been disposed of by
  - an order made by the Court of Protection or
  - a court appointed deputy,

and on P's death, any property belonging to P's estate represents the property disposed of,

the disappointed beneficiary takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of.

- Sales by an attorney are not protected.

## Statutory prevention of ademption

- Best for T to make attorney aware of contents of will.
- Where this has not happened, can a solicitor disclose will to attorney or is this prevented by duty of confidentiality?
- SRA Ethics Guidance says a will forms part of the financial affairs belonging to the donor and so, unless the donor provides contrary instructions, the attorney is entitled to a copy of the donor's will.

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## **Predatory marriages: the problem**

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- The marriage revokes any existing will.
- Lack of capacity makes a marriage voidable but until avoided, it is valid.
  - Too late to avoid once a party is dead
  - Avoiding does not revive the revoked will.
- If known about before, it is possible to enter a caveat at the registry office or apply for a forced marriage protection order (FMPO) on the basis of lack of capacity to consent.
- The test of capacity to marry is not high. But there are examples of successful applications for a FMPO on this basis.

## **Once the marriage has happened options are limited**

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- Application to dissolve the marriage on the basis of lack of capacity.
- A statutory will?
- An application under Inheritance (Provision for Family and Dependents) Act 1975

## General points on applications for Wills and Lifetime Gifts

### **Limited powers of attorneys and deputies**

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- Wills
  - Neither attorneys nor deputies can make a will for P.
  - Court of Protection can do so on P's behalf.
- Lifetime gifts
  - Attorneys have the limited powers conferred by MCA 2005, s12
  - Deputies have the powers conferred by the order (normally the same as attorneys).
  - Gifts beyond these powers require authorization from Court of Protection.

Applications cost £408 + £494 if a hearing is required.

## **Court of Protection's Powers under MCA 2005**

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- Where P lacks capacity to make a decision Court of Protection can make it for P (s16).
- Section 18 lists the Court's powers in relation to property and financial affairs. They include:
  - the sale, exchange, charging, gift or other disposition of P's property; and
  - the execution for P of a will.
- Note that a statutory will cannot deal with land outside the UK.
- Decisions are made in P's best interests (s4).

## **Best interests?**

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All relevant circumstances must be considered, and in particular, so far as reasonably ascertainable:

- s4(6)(a) P's past and present wishes and feelings (in particular, any written statement made when P had capacity),
- (b) the beliefs and values that would be likely to influence the decision if P had capacity, and
  - (c) any other factors that P would be likely to consider if able to do so.
- s4(7) The views of anyone named by P, anyone caring for P or interested in P's welfare, their attorneys and deputies.

## The role of the Official Solicitor

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- The Court of Protection will normally want to join P as a party.
- P will need a litigation friend.
- Family members are usually precluded from acting because, as potential beneficiaries, there is a conflict of interests.
- Hence the Official Solicitor (OS) will be appointed.
- In statutory will proceedings, even when there is a professional deputy, the OS is normally appointed because he has expertise and has no interest adverse to P.

## Minors

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- A statutory will cannot be made for a minor: MCA, s18(2), so they will die intestate
  - *See Bouette v Rose* P died intestate with a large estate left from a damages award. Absent father entitled to half at the expense of the carer mother who had to make an application under I(PFD)A as a person maintained by deceased.
- However, under s18(3) Court can exercise its other s16 powers, if P is likely to lack capacity to make the relevant decisions at 18. So it can order gifts and settlements on P's behalf.
  - *See LCN v CJF* application made for settlement of P's property to prevent property passing on intestacy.

## **P may be able to make some decisions**

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- P lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain (s2).
- While P may be incapable of managing his own property and affairs, he may have sufficient capacity to be able to make a will, particularly if it is relatively simple.
- Court of Protection can only act where P lacks capacity to do so.
- See *A, B, C v X, Y, Z* and *James v James*.

## **Procedure: PD9E of CoP Rules 2017**

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- Para 6 of PD 9E sets out the documentation required for an application for a statutory will, lifetime gift, or settlement.
- In addition to the Application Form COP1 (and its annexes, eg COP3 Capacity Report), an enormous amount of information is required.
- For example, consents to act by proposed executors, an up to date report of P's present medical condition, life expectancy, likelihood of requiring increased expenditure in the foreseeable future, and testamentary capacity



## In addition

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- Submit Forms COP1 in duplicate, COP1C (supporting info: will/gift applications), COP3 (assessment of capacity), COP24 (witness statement).
- Paragraph 9 of PD9E requires the following to be respondents in statutory will and gift applications:
  - beneficiaries of an existing will or codicil likely to be materially or adversely affected by the application;
  - beneficiaries of proposed will or codicil likely to be materially or adversely affected by the application; and
  - where P has no existing will, those prospectively entitled on P's intestacy.

## Dispensing with need to serve notice on Respondents

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- Possible, but such power will only be exercised in “exceptional cases”. See *Re AB*.
- *In I v D* Senior Judge Lush said:
  - The decision is not a ‘best interests’ decision.
  - Court is required to deal *‘justly’* with parties affected.
  - Issues of Human Rights and procedural fairness arise.
  - Usually possible to protect parties in other ways.
  - Decision taken on untested evidence.
  - Different factors may apply in urgent cases.

## Implications for costs

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- Costs of applications normally come out of P's estate.
- But not where the application is completely misconceived.
- In *I v D* the OS asked for an order that P's mother pay the costs.
- Senior Judge Lush did not make that order because mother had not been warned of the risks.
- However, he suggested that, in future, costs orders will be made against applicants who, in unexceptional circumstances and for no compelling reason, apply to dispense with service on someone who is materially and adversely affected by a statutory will application.

## Common errors according to OS

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- Omitting basic information required by Rules and Practice Direction.
- Failing to serve the necessary respondents.
- Failing to ensure that evidence addresses P's best interests as set out in MCA 2005, s4.
- Failing to ensure that capacity report addresses correct issue. A general capacity report is not sufficient.

## **Checklist for applicants**

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- Draft the proposed will or settlement deed.
- Obtain consents from proposed executors and trustees.
- Draft the witness statements in support.
- Draft the application itself (COP1) and its annexes.
- Send the documentation to the applicant for approval and amendment.
- Lodge the application and cheque with the Court of Protection keeping full photocopies. (Important for serving notice.)

## **Statutory Wills**

## MCA 2005 changed the approach of CoP

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- Pre-MCA the Court operated the fiction that P had temporarily recovered capacity and made the will P would have made in that '*lucid interval*'.
- Under MCA the court makes a '*best interests*' decision using the factors set out in s4(6) and (7). These include:
  - Getting P to participate in the decision.
  - Considering P's past and present wishes, beliefs and values.
- Although these wishes must be given weight, they are only one part of the balancing process. "*Considering*" them does not, necessarily, require that they be given effect.
  - But "*P's expressed wishes should not be lightly overridden*". **Re P.**

## Points arising from cases (1)

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- **Re P:** What will live on after death is the memory of the person; it is in a person's best interests that they be remembered with affection by their family and as having done "*the right thing*" by their will.
- **Re M:** No hierarchy of factors. The weight to be attached to any factor will differ depending upon the circumstances of the case. But P's wishes and feelings will always be significant.

*"We have an interest in being remembered as having done the 'right thing', either in life or, post mortem, by will."*

## Points arising from cases (2)

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- **Re G(TJ)**: Critical of the '*being remembered for having done the right thing*' factor.
  - It is the court not P who takes action.
  - Some family members may think the action is the right thing but some will not.
- **D v JC**: Senior Judge Lush found '*being remembered for having done the right thing*' of no relevance at all on the particular facts. P had:

*“an appalling track record of spending a lifetime doing entirely the wrong thing in his relationships with others, his malevolence is such that he would rejoice at being remembered by them with disaffection*

## Points arising from cases (3)

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- **NT v FS**: acknowledged that the authorities differed as to the relevance to the decision maker of P "*having done the right thing*" by his will and being remembered for that after his death. In this case the factor carried no weight.
- **Re Peter Jones**: each case turns on its own facts and a factor which is of magnetic importance in one case may be relatively insignificant in another superficially similar case. For many, but not all, people it is in their best interests that they be remembered with affection by their family as having done the right thing by their Will. A judge is entitled to take it into account.

## **Court will not necessarily order a statutory will**

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- The Court must always be persuaded that there are grounds for departing from P's existing testamentary arrangements. It is most likely to execute a statutory will if:
  - P has never executed a will; or
  - there has been a significant change in P's circumstances, such that P might be expected to review his arrangements.
- **Re Peter Jones**: No '*moral correction*'. The court can authorise a statutory will that makes good P's omissions but must not seek to correct his considered acts and decisions.

## **Doubts about validity of existing will may not be enough**

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- **Re D, VAC v JAD**: The Court will not normally order a statutory will because of doubts about the validity of an existing will. It takes the view that P's assets should be preserved to meet P's needs.
- But, exceptional circumstances may justify a statutory will.

*"...on the specific facts of the case, the best interests of Mrs D dictated that all concerns about her true testamentary wishes should be set aside by ordering statutory will, rather than leaving her memory to be tainted by the bitterness of a contested probate dispute between her children."*

## After the Order

- The will is expressed to be signed by P acting by X. It takes effect as a normal will except:
  - it cannot deal with land outside England & Wales,
  - if P is domiciled outside England & Wales, capacity is tested under law of domicile. [MCA 2005, sch 2, para 4](#)
- The will is witnessed, as normal, by 2 independent witnesses.
- Will + 2 copies is sent to court for sealing.
- Court returns the sealed will + 1 copy to the applicant.

Case Study

## **P is 86, predeceased by H and sister. No children**

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- P and H were keen amateur musicians with a passion for music and the arts. They made regular donations to various charities.
- P's current will (professionally drawn) is dated 1 January 1982. It gives a pecuniary legacy to P's sister, residue to H absolutely with substitutional gift to sister. H had a mirror will.
- The will file for P is no longer in existence.
- P was diagnosed with dementia in 2010. She now lacks testamentary capacity and is unable to communicate any wishes and feelings.
- P's professional deputies propose a statutory will leaving P's estate to an arts charity.

## **Questions**

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- (1) Who are the necessary respondents to application and how should they be identified?

**The proposed charity and the next of kin entitled on intestacy.**

**Genealogists to trace the next of kin.**

- (2) The deputies want to dispense with service on the respondents. Arguments for and against this?

**Expense v Fairness**

- (3) What are the relevant factors CoP will consider when assessing P's best interests?

**P's past wishes and feeling. The views of those caring for P and the deputies.**



## **LIFETIME GIFTS ON BEHALF OF P**

### **Attorneys have limited powers to make gifts**

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MCA 2005, s12 (2) provides that attorneys may make gifts:

- (a) on customary occasions to persons (including himself) who are related to or connected with the donor, or
- (b) to any charity to whom the donor made or might have been expected to make gifts,

if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.

Deputies have the powers conferred on them by the order.

## MCA 2005 requires OPG to refuse registration

If an LPA contains a provision which would:

- (1) be ineffective as part of an LPA;
  - (2) prevent the instrument from operating as a valid LPA.
- Unlike the EPA legislation, nothing in MCA authorises attorneys to meet the needs of family members or dependants. Hence, OPG's view used to be that attorneys can only meet the needs of persons P is legally obliged to maintain. (Spouse, civil partner or child under 18.)
  - OPG would refuse to register LPAs containing requests that attorneys use funds for benefit of others.

## Change in approach following *Re JG* (2017)

Eldergill J disagreed with OPG's approach

- Whereas an EPA attorney had only the specific powers conferred by the Act, an LPA attorney is able to deal with the property and financial affairs of P in his or her best interests subject only to specific limitations on the power to make gifts.
- Acting in an incapacitated person's best interests does not preclude giving weight "*to the interests of other persons dear to them.*"
- It is permissible to express the wish that attorneys consider the needs of others but it must not be an instruction.

## **Approach subsequently confirmed by Hilder J**

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- Provisions in an LPA requesting the use of P's funds for others may be valid as a written statement of P's wishes:
  - if expressed in precatory terms, but
  - will be ineffective if expressed in mandatory terms.
- Provisions allowing attorneys to use P's funds to benefit themselves are not invalid as a breach of fiduciary obligations, any conflict has been authorised by P and the attorney must in any event act in accordance with the donor's best interests.

## **Court's power to authorize gifts: important factors**

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- Gifts should not interfere with the succession to P's estate, as envisaged by P's current testamentary position. *Re Treadwell*
- Evidence of P having previously made gifts when capacitous is an indication of past wishes and feeling which will be taken into account, as will written expressions of wishes.
- Gifts must be affordable (although affordability is not, in itself, sufficient).
- Tax planning: There is no default position or presumption for or against. P's previous attitudes are important.

## Affordability

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### *Re PP*

*“There should be a cushion over and above the likely cost of meeting PP's care costs to meet unforeseen needs.”*

### *Re JMA*

*“I am satisfied that, even though the gifts proposed in this case are very large, they are amply affordable for JMA. ... She will still have at her disposal funds which are more than sufficient to meet her conceivable needs. That in itself is not however sufficient basis to conclude that making the proposed gifts would be in her best interests. **There is no expectation on people who retain capacity to make gifts of their surplus wealth during their lifetime, and nor should there be any expectation that it is in the best interests of persons who lack capacity so to do.**”*

## Evidence of affordability

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Ensure the following evidence is provided:

- Schedules of P's assets, annual income and annual expenditure – showing current position, and position if proposed gifts made.
- Cautious projection covering period of P's life expectancy, plus a reasonable cushion. Ensure inflation accounted for – particularly in relation to expenditure.
- Calculations of any CGT that would be payable as a result of proposed gift being made.

## Tax Planning

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### *Re JMA*

***“Mitigation of tax, particularly taxes of inter-generational effect and even by completely lawful ‘vanilla’ means, is a matter on which there may be a range of views. The Mental Capacity Act does not permit the Court to rely on default positions, assumptions or generalisations in making a decision about whether gifts to effect tax mitigation are in the best interests of a particular protected person. The Court must decide the application on nothing more and nothing less than a case-specific application of section 4.”***

## Post-death variations read back only for IHT and CGT

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- For other purposes a variation is a lifetime gift
- So a variation on behalf of P giving up an entitlement is a lifetime gift and will require the consent of the Court of Protection.
- Similarly a post-death variation may be regarded as deliberate deprivation for the purposes of assessment of capital in relation to care home fees and eligibility for means-tested benefits.
- Take care when will drafting. Find out if beneficiaries are on means tested benefits. Too late to remedy after death. See ***F v R***.

## Case Study

### **P is 85, a widow with 3 children & 5 grandchildren**

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- P was diagnosed with dementia in 2013 and lacks capacity to make gifts. Her children are her attorneys.
- P has £1.4m in bank accounts and investments. Her home was sold when she went into care. Net income is. £74K (pensions/investments). Expenditure is approx. £75K (care fees).
- P and H made mirror wills in 2006, creating a NRB discretionary trust for survivor, children and grandchildren, residue for survivor absolutely. Trustees appointed Nil Rate sum to P to benefit from H's transferred NRB.
- P settled £200K on a Discounted Gift Trust in 2009. She receives 5% capital payments. On her death the funds go to her children.

## Further facts

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- P and H provided financial support to their children 20 years ago to assist with property purchases.
- P's health is stable but no evidence of her life expectancy.
- P's children want to give themselves f £750K to reduce IHT.

## Questions

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- What are likely to be relevant factors the Court will consider when assessing affordability and P's best interests?

**Expenditure already exceeds income. Cushion required.**

**P has demonstrated an interest in tax saving and has assisted children financially.**

- What size of gift would you propose as being in P's best interests?

**Considerably less than the proposed amount!**

**IHT threshold likely to be £1m (NRB and downsizing allowance) so perhaps £400K.**