Statutory Wills: What are they and when might you need to make one?

The main purpose of a Will is to carry out someone's testamentary wishes. A Will allows you to decide who is to receive your assets after you pass away. Significant events in life can change your intentions, and it is important to keep your Will up-to-date.

However, to make a valid Will, or to change an old one, you need to have the mental capacity to do so. This can lead to difficult situations where someone without mental capacity has testamentary arrangements that need to be changed, but they are unable to validly make or change their Will. This is where a Statutory Will can help.

If you have a loved one who is in this situation, you might be able to apply for a Statutory Will to change their testamentary arrangements.

What is a Statutory Will?

A Statutory Will is a Will made by the Court of Protection on behalf of someone who is unable to make one themselves because they lack the required mental capacity.

Statutory Wills are so named because the Court of Protection's authority to make them is derived from statute, specifically the Mental Capacity Act 2005.

A Statutory Will has the same effect as if the person lacking mental capacity made and executed the Will themselves. There are rare exceptions, however, which involve property in jurisdictions other than England and Wales.

When can an application for a Statutory Will be made?

If you wish to arrange a Statutory Will for a loved one, there are several basic requirements to be met before you can make your application.

Your loved one must:

- be over 18;
- lack the mental capacity to make a Will; and

- be domiciled in England or Wales (unless the proposed Statutory Will relates to immoveable property in England or Wales).

The concept of being 'domiciled' is complicated. In general, however, someone is considered to be domiciled in a jurisdiction if they have their permanent home there.

What qualifies as lacking mental capacity?

A Statutory Will cannot be made for someone who has the mental capacity to make a Will for themselves.

To determine whether someone has mental capacity or not, the following test is applied:

- Can they understand information that is relevant to the decision?
- Can they retain that information, even if only for a short period?
- Can they use or weigh up that information as part of the decision-making process?
- Can they communicate their decision, by whatever means?

If any of the above requirements are not met, then that person is considered to lack mental capacity.

However, mental capacity is not a 'blanket' state. A person may lack the mental capacity to make certain decisions but be able to make others. Each decision, and their capacity to make it, should be assessed on its own.

Similarly, the loss of mental capacity could be permanent or temporary depending on the reasons behind it. Certain medical conditions, for example, can cause varying degrees of mental impairment from day to day.

It is a legal principle that everyone is assumed to have mental capacity unless it can be established otherwise.

How do I arrange a Statutory Will for a loved one?

The process begins with an application to the Court of Protection. You may require the Court's permission before you can make the application. However, you will not need permission if you are:

- A Court appointed Deputy of your loved one (or if you have applied to become their Deputy).

- An Attorney under a Lasting Power of Attorney (LPA) or Enduring Power of Attorney (EPA) which your loved one has made.
- Someone who may become entitled to your loved one's property or you have an interest in it, under an existing Will or through the intestacy rules.
- Someone for whom your loved one might be expected to provide if they had capacity.

The application process for a Statutory Will can be expensive. In general, the costs of any application would be paid from your loved one's estate. This means the effort to alter their testamentary arrangements could easily reduce the value of the money or property they leave.

The application itself must be submitted with various details and supporting documents. These include:

- A copy of the proposed new Will
- Details of why your loved one could be expected to provide for the proposed beneficiaries of the new Will
- Consent from the proposed executors named in the new Will
- Copies of any existing Wills and codicils that your loved one has made
- Copies of any LPAs or EPAs your loved one has made
- Details of your loved one's family
- Details of your loved one's current assets
- Estimates of your loved one's current income and outgoings
- Details of any inheritance tax that is anticipated to be payable
- Medical evidence to show that your loved one does not have the required mental capacity.
- Confirmation that your loved one is resident and domiciled in England or Wales

In situations where you are worried that your loved one may not have long to live, an urgent application can be made. These kinds of application also require details and evidence of your loved one's condition to be given, as well as reasons for why an application was not made sooner.

It is possible for an application to be opposed. The Court will inform any beneficiaries who stand to gain from your loved one's current testamentary arrangements if their situation will be 'materially or adversely affected' by the

proposed new Statutory Will. This can include beneficiaries under any existing Will that your loved one made, or anyone who stands to gain through the intestacy rules if no valid Will exists. Such beneficiaries could argue against a Statutory Will being made.

Irrespective of whether your application is being opposed, the Court will set a date for a hearing. The hearing is when the Court will decide whether to make a Statutory Will.

How does the Court of Protection make decisions on Statutory Wills?

The Court will decide a course of action based entirely upon their assessment of what is in your loved one's best interests.

However, before deciding what would be in your loved one's best interests, a crucial step is to consider whether such an assessment is required. If there is a chance that your loved one might regain the necessary mental capacity to make a Will, there could be no need to make a Statutory Will on their behalf. This involves looking at:

- Whether your loved one is likely to have capacity to make a Will at some point in the future; and
- If so, when that is likely to be.

The law expects all reasonable efforts to be taken to try and allow your loved one to make the decision for themselves. In the event that your loved one does become able to make a Will, extra care should be taken to prove they have the necessary mental capacity. Given the previous uncertainty around your loved one's mental capacity, taking extra precautions helps to ensure the Will is valid and resistant to any challenges on the grounds of mental incapacity.

If it is unlikely your loved one will be able to make a valid Will, or there are time pressures on making a Statutory Will, the Court will proceed to assessing what would be in their best interests.

Determining this requires the Court to consider a wide range of circumstances and to weigh each one in the context of the case before them. The law requires that no assumptions are made on what your loved one's best interests would be based on superficial details (such as their age, appearance, or condition etc). A much more detailed approach is necessary instead.

The main factors the Court will consider are:

- Your loved one's past and present wishes and feelings. Any written statements of these, made when your loved one had capacity, will be particularly influential.
- The beliefs and values that would likely influence your loved one's decision.
- Any other factors your loved one would be likely to consider if they were able to do so.

The views of certain other people as to what would be in your loved one's best interests can also be taken into account. You may fall in to one of these categories. Where possible and appropriate, the Court will consider the opinions of:

- Anyone who has been previously named by your loved one as a person to be consulted in such situations.
- Anyone who is caring for your loved one or who is interested in their welfare.
- Attorneys under any EPA or LPA your loved one may have made.
- Any Deputies appointed by the Court.

The significance of your loved one's wishes

For many people, the reason to apply for a Statutory Will is to put into effect what you believe your loved one would have wanted. However, your loved one's wishes are not decisive – even if they can be ascertained. The Court will certainly include them in their assessment of your loved one's best interests but the weight given to them depends upon the circumstances of the case as a whole. Some of these circumstances will include:

- The degree of your loved one's incapacity – a lesser degree could mean more weight being placed on your loved one's wishes.
- How strongly-held or constant your loved one's wishes are or have been.
- The possible impact on your loved one of not giving effect to their wishes.
- How practical, sensible, or rational your loved one's wishes are.
- How your loved one's wishes fit into the Court's wider assessment of his or her best interests

The Court has made clear in past decisions that their goal is not to determine what your loved one would have done if they had capacity to make a Will. Recent judgments state that, 'stepping into their shoes' in this way, risks overlooking the reality that your loved one does not have mental capacity; a fact which may have a bearing on the assessment of their best interests.

How is a Statutory Will executed?

Without going into too much technical detail, a Statutory Will is executed differently from a normal Will. If the Court allows the application for a Statutory Will, it is signed by an authorised person in your loved one's name, in the presence of two or more witnesses. The Statutory Will must then be sealed with the official Court seal.

Further information

A Statutory Will could make a huge difference to a loved one who has lost mental capacity. It could prevent their estate from being distributed against their interest, ensuring instead that their property goes to the people they would want it to.

However, applying for a Statutory Will is not a decision to be taken lightly, and certainly not one to be taken selfishly. For the Court of Protection, the only objective is to ensure that any decision is made in the best interests of your loved one.

If you would like any further information or advice about Statutory Wills, please do not hesitate to contact us.

If you'd like more information call 01904 866139
or email hello@rochelegal.co.uk