STATUTORY WILLS

Denzil Lush
former Master and Senior Judge of the Court of Protection

A statutory will is a will approved by the Court of Protection on behalf of someone who is mentally incapable of making a will personally (someone who 'lacks testamentary capacity'), and has either:

- already made a will, which needs to be changed for some reason or other; or
- has never made a will before and would otherwise die intestate.

Judges in the Court of Protection have had the power to make orders approving statutory wills since 1 January 1970, when section 17 of the Administration of Justice Act 1969 came into force.

England and Wales was the first jurisdiction in the world to enact legislation of this kind and several Commonwealth countries have followed suit, including all of the states of Australia, New Zealand, and Singapore.

The present provisions can be found in the Mental Capacity Act 2005, section 18 (1)(i), section 18(2), and Schedule 2, paragraphs 3 and 4.

I am a great fan of statutory wills because they are an effective way of remedying unfairness or potential injustice and, to illustrate the point, I am going to describe four scenarios.

(1) Where a previous will is revoked by a subsequent marriage

The first scenario is where a previous will has been revoked by a subsequent marriage.

Section 18 of the Wills Act 1837 provides that a will is automatically revoked by the testator's marriage, though there is an exception to this rule where the will is expressed to have been made in contemplation of a particular marriage.

One of the problems with mental capacity law is that the threshold for making a will is fairly high, whereas the threshold for getting married is low, and often an older person with mild or even moderate dementia will have the capacity to marry, which will automatically revoke his existing will, but not have the capacity to make a new will.

(2) Where a property left in a will adeems

The second scenario in which a statutory will can be very useful is where the testator has already made a will containing a specific gift of property, but no longer owns that property at the time of his death. The gifts fails, or to use the technical term, it adeems.

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(3) Where there are doubts about the validity of a previous will

The third scenario in which a statutory will can be useful is where there are doubts about a previous will, particularly when the testator has been the victim of financial abuse.

https://www.telegraph.co.uk/news/uknews/1509289/Conman-tried-to-marry-rich-widow-101.html

(4) Where the intestacy rules will benefit someone who really doesn't deserve to benefit

The fourth and final scenario is where the intestacy rules benefit someone who really doesn't deserve to benefit

In the Court of Protection we have a number of patients with large damages awards as a result of a traumatic brain injury. Most of these injuries occur in road traffic accidents, and the victims are typically male and received their head injury two months before their twentieth birthday.

There are also the clinical negligence cases, and these are mainly people who have suffered hypoxic brain damage at birth leading to cerebral palsy and developmental delay. Sometimes, the father is incapable of coping with a severely disabled child, and in effect abandons the mother and child during infancy. A damages award is made and if, on reaching adulthood, the child were to die intestate, the father would stand to inherit half of the estate.

The very last case I wrote a judgment on before I retired in 2016 was called *Re D* [2016] EWCOP 35, and the judgment was published on the BAILII website on 1 July 2016.

https://www.bailii.org/ew/cases/EWCOP/2016/35.html

The Law Commission's consultation paper on *Making a will*

On 13 July 2017 the Law Commission published a consultation paper on *Making a will*, and it invited anyone who wished to respond to do so by 10 November 2017.

It proposed a number of important changes. For example:

(1) that the earliest age at which a testator can make a will should be reduced from 18 to 16. (Consultation Question 41, page 168).

(2) that the test for mental capacity set out in the Mental Capacity Act 2005 should be adopted for testamentary capacity, in place of the famous old common law authority *Banks v Goodfellow*, and that the specific elements of capacity necessary to make a will should be outlined in the Mental Capacity Act Code of Practice. (Consultation Question 3, page 35).

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The Law Commission said that there was no need to reform of the law relating to statutory wills (Consultation Question 12, page 58), but it invited consultees to consider whether there are reforms that could usefully be made to the procedure governing statutory wills with the aim of reducing the cost and length of proceedings (Consultation Question 13, page 59).

See *Re JMA* [2018] EWCOP 19 https://www.bailii.org/ew/cases/EWCOP/2018/19.html

Supported will-making

One of the issues raised in the Law Commission's report is supported will-making.

We already have a number of provisions in the Mental Capacity Act which provide for supported decision-making. For example:

- Section 1(2) – "A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success."
- Section 3(2) – "A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- Section (4) – The person making the best interests determination "must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him."

However, in 2014, the House of Lords Select Committee on the Act found that supported decision-making is "not well embedded" and "not working well in practice" in England and Wales. https://publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf

In fact, it is doubtful whether these provisions are compliant with the United Nations Convention on the Rights of Persons with Disabilities, which we ratified in 2009, four years after the Mental Capacity Act was enacted.

Article 12(3) of the United Nations Convention specifically requires member states (such as the United Kingdom) to take "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

The Law Commission envisages that:

> "Beyond the informal support given to testators, currently under the common law and potentially under the Mental Capacity Act, a formal scheme of supported decision-making might be warranted, [which] would involve the formal process of appointing someone to assist the testator with making a will", and that such a scheme "might be useful in contexts in which the person's lack of capacity is not clear or not yet established. Of course, if the person were found not to have capacity, even with support, the appropriate route for him or her to have a will made would be an application for a statutory will" (paragraph. 4.29).

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The Law Commission tentatively favours "any supporter role in a scheme for supported wills being filled by a professional, despite the disadvantage of the cost to the testator. We take this view because of the increased risk of undue influence and conflicts of interest if the role were to be undertaken by family and friends. … it may be [also] necessary for a supporter to carry indemnity insurance, which would suggest that the role is one better suited to professionals." (para. 4.45).

In the long run, the Law Commission envisages that "a scheme of supported will-making would fill the gap between wills made by testators who clearly have testamentary capacity and statutory wills made by the Court of Protection on behalf of testators who are determined not to have capacity." (para. 4.5).

However, it recognises that "in order to formulate a workable scheme, additional consultation by the Government might be required", and is considering including an enabling power in primary legislation, with further detail provided in regulations and guidance (para. 4.56).

Electronic Wills

Chapter 6 of the consultation paper discusses Electronic Wills and, although it doesn't think that suitable technology exists yet, looking ahead to the future, the Law Commission has provisionally proposed that:

(1) an enabling power should be introduced that will allow electronically executed wills or fully electronic wills to be recognised as valid, to be enacted through secondary legislation;

(2) the enabling power should be neutral as to the form that electronically executed or fully electronic wills should take, allowing this to be decided at the time of the enactment of the secondary legislation; and

(3) such an enabling power should be exercised when a form of electronically executed will or fully electronic will, as the case may be, is available which provides sufficient protection for testators against the risks of fraud and undue influence.

The four-month consultation period came to an end on 10 November 2017, and the Law Commission are currently analysing the responses they have received. I understand that it is unlikely that they will issue a final report and set out their legislative proposals until 2019 at the earliest.

Electronic signatures on Lasting Powers of Attorney

You may also care to note that on 21 August 2018 the Law Commission published a consultation paper on the *Electronic execution of documents*. The deadline for responses is 23 November 2018. Obviously, this includes the electronic execution of Lasting Powers of Attorney, but, as far as I can see, the Law Commission has left this matter to the Office of the Public Guardian to resolve.

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In its consultation paper the Law Commission says:

Our views on lasting powers of attorney

6.36 As discussed above, enabling the electronic execution of lasting powers of attorney gives rise to questions of fraud and financial abuse of individuals when they may be at their most vulnerable. We have considered these questions seriously and discussed them with the OPG and the Ministry of Justice.

6.37 The current system for the execution of lasting powers of attorney is partly digital. The donor of a lasting power of attorney may fill the details out online but is then required to print the document and sign it in wet ink, before it can be registered and take effect. Given our provisional conclusion in Chapter 3, a lasting power of attorney could in theory be executed with an electronic signature but we have been told by the OPG that this is not currently possible in practice. The document must be printed and executed in wet ink. The OPG has also confirmed that it has no plans to move quickly to a system of simple electronic signatures, without additional safeguards.

6.38 Notwithstanding our general provisional conclusion in Chapter 3, we are of the view that there are specific considerations in relation to lasting powers of attorney which should be taken into account. Nothing in this consultation paper should be taken to suggest that an individual authority, such as the OPG, cannot set its own specific additional requirements for documents to be registered with it.

6.39 In Chapter 2, we discussed some of the security and reliability concerns in relation to electronic signatures, saying that these are questions to be determined by the parties. We also noted that a simple typed electronic signature is extremely easy to forge. In the case of lasting powers of attorney, the OPG should consider what is sufficiently secure and reliable for donors before introducing any system using electronic signatures.

DENZIL LUSH
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