Statutory Wills—frequently asked questions

What is a statutory Will?

If a person is over 18 and lacks the mental capacity to make a Will, an application can be made to the Court of Protection for a statutory Will to be made on their behalf. The application is usually made by the person's Deputy or Attorney. Other people can make an application for a statutory Will but may need the permission of the Court to do so.

The Mental Capacity Act 2005 allows the Court to authorise a Will to be made for a person who lacks capacity and there is a general principal under the Act that any decision must be made in the best interests of that person.

What is 'capacity to make a Will'?

There is specific legal test to make a Will. A person may not be able to manage a large amount of money on a day to day basis, but that does not mean he or she cannot make a Will.

A person has capacity to make a Will if they understand:

- the nature of the act of making a Will – ie. that a Will comes into effect on death
- the effects of making a Will – who will be responsible for dealing with the estate and how the estate will be distributed
- the extent of the estate - the amount of property or money or investments in the estate, any debts and any money or property held in joint names
- the possible claims of others - the ability to distinguish between individuals who may have some claim on the estate and make a decision about who should receive anything from the estate

The person's GP or another appropriate medical professional will need to carry out an assessment of their capacity and if the person cannot make a Will then the application for a statutory Will must include a medical report confirming this.

When should a statutory will be made?

The preparation for an application can start when a person turns 17, but it can only be finalised once the person is over the age of 18.

How do you make an application?

The Court of Protection has issued guidance (called a Practice Direction) setting out what information and documents it requires in order to consider an application for a statutory Will; information such as a family tree, financial information (how much money do they have, do they own a property) and a detailed statement setting out the background about the incapacitated person, their medical conditions, their regular income and expenditure and how their estate would be distributed under the proposed Will and also if they die without a Will. An application for a statutory Will usually takes 6 – 12 months.

Once the Court makes the Order authorising the statutory Will for someone, the person who has made the application can sign the statutory Will on that person's behalf. The original signed Will should to be kept somewhere safe, such as a Solicitor's office.

Who is the Official Solicitor?

The Official Solicitor is part of the courts system in England and Wales and acts on behalf of those who lack capacity to represent themselves in court proceedings. In statutory Will applications, the Court usually appoints the Official Solicitor to act for the incapacitated person. The Official Solicitor will consider what the person would have wanted and who they would include in their Will if they were able to voice their wishes.

The Official Solicitor may ask for more information about the person, their family and whether their circumstances might change in the future. The person making the application works with the Official Solicitor to reach an agreed draft of the Will, which is then approved by the Court. If there is no dispute about the statutory Will, then there will usually be no need for anyone to go to Court.

Why should a statutory Will be made?

Without a statutory Will a person's estate will be dealt with in accordance with their last Will (which may be out of date), or if there is no Will then the estate would be distributed in strict order under the law (known as the Intestacy Rules) which may not be what the deceased would have wanted. It may also put the person's family in a difficult position, for example if the person owns the house where their parents live. Often, there will be a significant amount of inheritance tax to pay and this will also have to be considered when preparing the draft statutory Will.

What does it cost to apply for a statutory Will?

An application for a statutory will costs £400.

Other fees may also apply, including:

- £500 if the court decides to hold a hearing
- solicitor's fees if a solicitor is appointed by the Official Solicitor to act as the person's litigation friend
- Counsel's (barrister's) fees (if there are any)

Whether or not the application and hearing fees are charged depends on the circumstances of the person who is the subject of the application; for example, they will not be charged if the person has have little or no income, or if they receive certain types of benefit.

Our thanks to Ruth Meyer of Boyes Turner, a Brain Injury Group member firm, for her help with this factsheet.
www.boyesturner.com