

Statutory wills – why are they useful?

A statutory will can be made for an individual who has lost the mental capacity to make a will for themselves. This is made as an application to the Court of Protection.

A will is a document which has to be made when you have sufficient capacity to understand the information relevant to the disposals you seek to make. This means you need to have a good idea of the extent of your estate and the inheritance you might leave, what a will does, and the people and relationships you ought to consider when making a will. This is known as testamentary capacity.

What happens when an individual lacks testamentary capacity?

When a person is unable to make a will due to mental incapacity, there is a process available to apply to the Court of Protection to authorise a new statutory will to be made for them. If successful, the Court of Protection will provide an order approving the proposed will and authorising an individual to sign it on behalf of the vulnerable person.

Why make a statutory will?

A statutory will can be a useful tool for providing certainty and clarity to a vulnerable person's post-death estate. It can allow for an existing will to be updated to take into account changing circumstances, to provide for inheritance tax planning or to restore balance to a complex family scenario. For example, a statutory will may be appropriate to recognise the support provided by a family member or friend or to address inequity caused by financial abuse by someone who would otherwise benefit under the individual's will or intestacy.

Process

As a starting point, the applicant should supply appropriate evidence to the court to justify the proposed terms of the will in the best interests of the vulnerable person.

It is a requirement that all potential beneficiaries (whether under a will or intestacy rules) be notified of the application and be given the opportunity to object and to participate in the proceedings.

The Court of Protection will consider all relevant information, including:

- The terms of the proposed new will
- The extent of the vulnerable person's estate
- The best interests of the vulnerable person
- The vulnerable person's previous wills or codicils
- The vulnerable person's past (and current) wishes, thoughts and feelings.

The 'official solicitor' will be appointed by the Court of Protection to act as an independent third-party solicitor on behalf of the vulnerable person. The role of the official solicitor is to objectively consider the terms of the proposed will and to negotiate with the applicant and other interested parties to reach agreement on the terms of the will.

An application for a statutory will should not be taken lightly and it can be a costly and complex process. The fees of the application, together with the official solicitor's fees, will be payable by the vulnerable person. In many cases, the legal fees of other interested parties may also be assessed as payable from the estate of the vulnerable person once the application has concluded. It is therefore important to consider at an early stage, whether the benefits of a statutory will outweigh the likely costs consequences.

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