

### What is a Statutory Will?

A Will made on behalf of someone who lacks the necessary capacity to do so themselves. This is known as testamentary capacity. A statutory Will can only be made by making an application to the Court of Protection.

When considering this note, you may also find it helpful to consider at the same time our related Guidance Note on the Court of Protection.

### Testamentary Capacity

In simple terms, to be capable of making a Will, a person must be able to:-

- understand what they are doing and what their will is saying;
- understand in general terms what property they are leaving (even if they do not know the full value); and
- at least consider who they ought to be thinking of providing for.

This test is not the same as that for deciding whether you are able to manage your own affairs. It is therefore possible that someone may be unable to manage their own affairs and yet still have the capacity to make a Will.

### Medical Evidence

Before any application will be considered by the Court, it will be necessary to obtain a medical opinion confirming that the person concerned lacks testamentary capacity. This can be obtained from either the person's GP or perhaps a specialist if necessary. Assessing mental capacity is a specialist skill and some GP's may not feel comfortable providing their opinion if it is not something they have great experience of. It is likely that whoever prepares the report will charge a fee for doing so.

### Why make a Statutory Will?

If a person has lost capacity, an application to make a statutory will can be very useful. They can be used to help save inheritance tax, take account of unforeseen family circumstances or even resolve doubt over the validity of an existing will. If the person who has lost capacity has never made a will, their estate will be subject to the statutory intestacy provisions. It is our experience that these provisions rarely reflect how a person would wish their estate to be distributed and making a statutory will can avoid this problem.

A statutory Will can bring both clarity and certainty in a wide number of circumstances and for a wide variety of reasons.

### Who can apply?

The application can be made by any one of a surprisingly wide group of people, including:-

- a Deputy appointed by the Court of Protection or a person who has made an application for the appointment of a Deputy;



- a beneficiary under an existing will or intestacy;
- an attorney under a registered Enduring Power of Attorney or Lasting Power of Attorney; or
- a person for whom the person lacking capacity might be expected to provide if he had the capacity to do so.

Anyone else not included above can apply, but they would need the specific consent of the Court of Protection before they can do so.

### The Application Process

It will be necessary to prepare a detailed application for the Court's consideration, including a draft of any proposed will, setting out why the Will should be made on the terms suggested.

The Court has published detailed guidelines on what evidence needs to be submitted, and in what form, before it can make a decision. It is therefore vital that the correct procedures are followed and appropriate evidence submitted. Unfortunately, it is not possible to set out in full these complicated procedural matters in this note but we would be happy to discuss these in greater detail with you at any time.

Once the application has been made, the Official Solicitor will be asked to represent the interests of the person alleged to lack capacity as an independent third party. It is also necessary to notify anybody affected by the proposed Will of the application to enable them to object or raise any queries. If the application cannot be agreed by all the parties involved then it may be necessary for a Court hearing to take place. Once the terms of the will have been agreed, the Will is then signed on behalf of the person lacking capacity by the person who made the application.

You should be aware that even if matters run smoothly, and the terms of the Will can be agreed without a hearing, the whole process is still likely to take several months to complete. There are provisions in place for urgent applications if the person's life expectancy is a concern.

### How can Hewitsons help?

The process of making a statutory Will and the law surrounding it is complex. We can provide expert guidance on all stages of the application, from obtaining the medical evidence to drafting the Will and application papers, negotiating with the Official Solicitor or organising representation at Court if necessary. The cost of our advice would normally be met from the funds of the person making the Will (subject to the approval of the Court).

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This document is written as an outline guide only and any action should not be based solely on the information given here. Appropriate professional advice should always be taken in specific instances.

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