KINGS CHAMBERS

STATUTORY WILLS

Francesca P. Gardner

Substituted Judgment

- The COP & its predecessors have for a long time had jurisdiction to authorise gifts and settlements out of the property of persons who lack capacity

- Under the Mental Health Act 1959 the COP had authority to make provision from the patients estate for other persons or purposes for whom he might have been expected to provide if he was not mentally disordered.

- In 1970 the court's jurisdiction was extended to enable it to authorise the execution of a will for the patient

- The powers were re-enacted by the Mental Health Act 1983 – sections 95 & 96

- The COP exercised ‘substituted judgment’, the court would attempt to make the will which it considered that the patient would have done if he had capacity.

- The court had to make an elaborate set of counter-factual assumptions…

Re D(J) [1982] Ch 237

1) It is assumed that the patient is having a brief lucid interval at the time that the will is made;
2) It is assumed that he has full knowledge of the past and a full realisation that once the will is executed he will relapse into his actual mental state;
3) Is the actual patient who is considered- not a hypothetical reasonable person. The court should seek to make the will which the patient himself, acting reasonably, would have made if notionally restored to full capacity, memory and foresight…
4) The patient should be assumed to be advised by competent solicitors; and
5) The patient should be envisaged as taking a broad brush to his bounty rather than an accountant's pen.

Sir Robert Megarry

Vice Chancellor of the Chancery Division

The Mental Capacity Act 2005

- The COP has general powers to authorise the execution of a will for P, or to authorise gifts being made from P's estate.
- Section 18(1) of the MCA 2005 confirms the court's powers extend to:

(b) The sale, exchange, charging, gift or other disposition of P's property;

(h) The settlement of any of P's property, whether for P's benefit or for the benefits of others;

(i) The execution of a will for P

BEST INTERESTS

- The main issue in statutory will applications is whether the proposals are in P's best interests
- The non defined test of best interests has been the subject of much debate in cases of this nature
- 'All relevant circumstances' must be considered, and in particular the court must consider…
  - The person's past and present wishes and feelings (and in particular, any relevant written statement made by him when he had capacity),
  - The beliefs and values that would be likely to influence his decision if he had capacity, and
  - The other factors that he would be likely to consider if he were able to do so.
  - If it is practicable and appropriate to consult them, the views of various interested persons are also relevant to the determination of best interests.

Wishes & Feelings

Re S and S [2008] EWHC B16

'In my judgment it is the inescapable conclusion from the stress laid on these matters in the Act that the views and wishes of P in regard to decisions made on his behalf are to carry great weight. What, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved in the decision making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself?' [55]

'As to how this will work in practice, in my judgment, where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person with full capacity might reasonably have), is not impracticable as far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources (ie whether a responsible person of full capacity who had such resources might reasonably consider it worth using the necessary resources to implement his wish) then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this..' [57]

HHJ Marshall QC

Re P [2009] EWHC 163

- P resident in and domiciled in California, also tenant in tail in possession of an entailed estate in England & Wales

- In February 2008 P's niece applied in California for the appointment of a Conservator

- The Bank of America was appointed as the Conservator by the Californian court

- The bank issued an application in the COP for the execution of a statutory will & the appointment of an English property & affairs deputy

‘…As the explanatory notes to the Mental Capacity Bill explained:

“Best interest is not a test of “substituted judgment” (what the person would have wanted), but rather it require a determination to be made by applying an objective test as to what would be in the person’s best interests.”

I agree. It follows from this, in my judgment, that the guidance given under the Mental Health Act 1959 and 1983 about the making of settlements or wills can no longer be directly applied to a decision being made under the 2005 Act.” [37-38]

Lewison J

- S.4 does not require consideration of what P ‘might be expected’ to have done, but what is is P’s best interests taking into account the factors in s.4

- The balance sheet approach is different from the substituted judgment approach;

- P’s wishes and feelings should not be lightly overridden and form an important part of the overall picture

Re M ITW v Z & Others

- M an elderly widow, M had been befriended by her neighbour Z
- Proceedings in the COP established that it was in the best interests of M to live in a care home rather than with Z
- An application was made for the approval of a statutory will on behalf of M
- Number of testamentary documents previously made by M, including one appointing Z as M's executor and gave him the entirety of he restate.
- The Judge ordered the making of a will which broadly reinstated earlier wills made by M under which a former neighbour and charities benefitted instead.

Munby J (as he then was) applied s.4 of the MCA and considered the judgment in Re P to have 'compelling force':

"*…there is, in my judgment, no place in that process for any reference to- any harking back to- judicial decisions under the earlier and very different statutory scheme.*"

Munby J made the following points:

- The MCA does not provide a hierarchy as between the various factors to be considered in s.4
- The weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case
- In any given case there may be one or more features or factors which are of "magnetic importance" in influencing or even determining the outcome.

Re G (TJ) [2010] EWHC 3005

Reconsideration of the approach?

-Despite the guidance given in Re P and Re M, the determination of best interests has continued to pose difficulties for the court.

- Mr. and Mrs. G were a married couple, they both had dementia and lacked capacity to manage and administer their property and affairs;
- In 2007 various applications under ss 95 and 96 of the Mental Health Act 1983 came before Morgan J
- He applied the substituted judgment test and authorised payment to the couple's adult daughter
- Mr. G died in 2010, which meant that the daughter was then only entitled to half of the monthly payments

- The matter was restored before Morgan J and he was asked to consider whether he should vary his earlier order to provide that the full monthly maintenance should be borne by Mrs. G's estate;
- As a result of the legislative change the Judge was required to consider whether it was in Mrs. G's best interests to vary the order;
- The judge held that in an appropriate case, a court could conclude that it is in the best interests of P for the court to give effect to the wishes which P would have formed on the relevant point, if he had capacity.
- Morgan J recognised that this approach involved an element of substituted judgment being taken into account together with anything else which is relevant….

- However, Morgan J was clear that the ultimate test for the court is best interests and not the test of substituted judgment, although he emphasised that substituted judgment can be relevant and is not excluded from consideration;

- Morgan J concluded that continuing the maintenance to the daughter was something that Mrs. G would have wished to have done, had she regained capacity, and therefore held that in the absence of any countervailing factors, it was in P's best interests to make the payments.

VAC v JAD & Ors [2010] EWHC 2159

Doing the right thing/Disputed wills

- The court highlighted the importance of "doing the right thing" as a relevant factor in determining the best interests of P
- The case concerned an application for a statutory will by P's deputy on the ground that it was in P's best interests where there is a dispute or uncertainty as to the validity of a recent will which departs from the terms of an earlier will;
- DJ Ashton refused permission for the application but upon reconsideration transferred the matter to one of the chancery circuit judges on account of the fact that he considered that a statutory will in these circumstances:
- "*would encourage many applications where the substantive issue is the validity of a new will made when there was doubt as to testamentary capacity or concern as to undue influence and the COP would be ill-equipped to resolve these disputes.*"

After careful examination of Re P HHJ Hodge determined that:

…in my judgment, there can be no presumption, still less any principle of general application, that the Court should not direct the execution of a statutory will in any case where there is a dispute or uncertainty about the validity of a recent will, the terms of which depart from those of an earlier, apparently valid, will."

Parliament has rejected the "substituted judgment" test in favour of the objective test as to what would be in the protected person's best interests. Given the importance attached by the Court to the protected person being remembered for having done the "right thing" by his will, it is open to the Court, in an appropriate case, to decide that the "right thing" to do, in the protected person's best interests, is to order the execution of a statutory will, rather than to leave him to be remembered for having bequeathed a contentious probate dispute to his relatives and the beneficiaries named in a disputed will.

ADS v DSM [2017] EWCOP 8

Doing the right thing/honesty

- Appeal against the making of a statutory will which divided P's estate between two sons in the ratio of 25:75. The appeal was allowed.
- P 86 and lacks capacity. P has two sons, A and D
- P's husband died in 2009
- Following proceedings in the Chancery division, the court ruled that the patient's matrimonial home and a piece of land had been procured by A and his wife from the father by undue influence and the conveyance of both were set aside and vested in P.
- The order provided that a deputy should be appointed in the COP and that an application should be made for a statutory will for the division of P's estate to be split equally between the sons
- The COP Judge made a statutory will dividing the estate in the ratio of 25:75 to D- A appealed

The grounds:

(1) The COP judge erred in principle and further or alternatively failed to take relevant features of the case into account in her approach to the Chancery Settlement Agreement, and its impact on the decision- making process under the MCA, and further or alternatively;

(2) The COP judge erred in principle and further or alternatively failed to take relevant features of the case into account, in a number of other ways.

'I have concluded that this appeal should be allowed for a number of free standing and complementary reasons. In my view a significant factor leading to what I have concluded are valid grounds of appeal is the failure by the parties to properly prepare the case for hearing by identifying the issues of law and fact that needed to be considered and determined in applying the approach set by the MCA. Naturally, I acknowledge that hindsight is a wonderful thing but in my view some of the failures in preparation relate to very basic steps in the preparation of a case which there is or may be a factual dispute.'

Lessons to be learnt…

1) The need to identify the issues of fact and law;
2) The need to carefully consider how professionals who are asked to ascertain the wishes and feelings of P should be instructed and approach their task
3) When a settlement of civil proceedings is approved on behalf of a protected party who will or may become the subject of proceedings before the COP, the need to consider carefully what should be explained to a civil court asked to approve the settlement on behalf of P, what that court should be invited to consider and explain about its approach to the approval of the settlement, how that is to be recorded, whether the settlement is dependant on a particular outcome in the COP and more generally how the COP will be invited to approach the settlement that P has entered into with court approval, how P's wishes and feelings about the settlement should be sought and recorded, and who the likely parties to the COP proceedings will be, and …

4) Although I understand that the approach taken in this case of joining P as a respondent and inviting the Official Solicitor to act as P's litigation friend works well in a great number of applications for a statutory will, there may be a need in some cases for the COP when making that invitation to the Official Solicitor and for the Official Solicitor when deciding whether or not to accept it to consider whether a professional deputy should make the application for P or act for P at least until it is made clear whether there is or is not a dispute.

- This case demonstrates an extremely important lesson and that is where it is said that P's wishes and feelings are the result of a want of capacity or possibly influence, the court should not blindly act on those stated wishes and feeling but may need to investigate the extent to which those wishes and feelings are soundly based or the product of influence;
- Important to ensure that steps must be taken to ensure that P's wishes and feelings are based in fact and not, as they were considered to be here, a result of undue influence by one of P's sons.

Re D [2016] EWCOP 35

Service

- Senior Judge Lush (as he then was) heard the appeal against an order authorising the applicant to execute a statutory will without the obligation to serve papers on someone who is entitled to a half share of the estate;
- D was aged 30, he had cerebral palsy as a result of complications at birth, he was reliant on others for all aspects of his care;
- He received a damages award as a result of the negligence of the relevant health authority and received 1.3 million in damages;
- He lived with his mother who was appointed as his deputy in 2008;
- D lacked capacity to execute a will, on his death his estate would have been divided equally between his mother and his father (with whom he had had no contact for 22 years)
- D's mother applied for an order authorising her to execute a statutory will which would appoint her and D's brothers as executors and trustees…

- …it would give her a life interest in his house which would pass to the brothers upon her death, donate 2% of his residuary estate to charity, and split the remaining 98% between the executors and trustees in equal shares;

- DJ Payne ordered that service upon D's father could be dispensed with under Rule 38 as D had no contact with his father, the Official Solicitor was granted leave to appeal;

- Having considered the relevant case law Senior Judge Lush was clear in his view that:

(a) The case was not exceptional;

(b) There was no compelling reason why service should be dispensed with; and

(c) It was not urgent.

- Senior Judge Lush commented that applications of this nature are often made simply because “it would be more convenient for the applicant to avoid any potential confrontation and less painful than the re-opening of old wounds.”

- He said that nevertheless this should not be a bar to fairness in proceedings and deny someone their Article rights under the ECHR because of the discomfort to the parties cannot be right.

Important Practice Points

- A statutory will can only be executed by a person specifically authorised to do so;
- An LPA, EPA or deputyship order does not confer power on the attorney or deputy to make a will a for P
- An EPA, or LPS can only confer on the attorney authority to carry out such acts as P can lawfully carry out by an attorney (which does not include the execution of a will)
- S.20(3)(b) – a deputy may not be given powers with respect to the execution of a will for P.
- Applications for statutory wills- Practice Direction 9E will apply
- P will usually be a party/ the case management pilot does not apply.