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LawTalk Blog



What is a Statutory Will and who should have one?

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Recently we acted on a matter involving a young man with a permanent mental incapacity whose financial and family circumstances warranted the making of a Will.

It was thought that making a Will would provide some degree of certainty as to who would benefit from the young man's estate when he passed away.

It was necessary to make an application to the Court which ultimately resulted in an Order for a Statutory Will being made which was an excellent result for our instructing client as well as the young man.

What is a Statutory Will?

In circumstances where a person lacks testamentary capacity, that is, the capacity to make a Will for themselves, it is possible for any person to apply to the Supreme Court (with the permission of the Court) for an Order authorising the making of a Will in a specific form. This type of Will is often called a 'Statutory Will' because the power of a Court to make it is derived from statute; the *Wills Act 1936*.

The Court is empowered to make a Statutory Will on such conditions as it sees fit, however it must first be satisfied of the following:

1. The person lacks testamentary capacity; and
2. The proposed Will (or alteration or revocation of an existing Will) would accurately reflect the likely intentions of the person if he or she did not lack testamentary capacity; and

3. It is reasonable in all the circumstances that the Order should be made.

It is necessary to satisfy all 3 elements, such that even if one element is not satisfied the application will fail.

What is considered in establishing testamentary incapacity?

The first element, establishing testamentary incapacity, is a process which in itself requires a great deal of consideration.

It is perhaps a common misconception that persons with a mental incapacity are incapable of making a Will. Ultimately, it is the severity of the mental incapacity which will determine whether someone has the capacity to make a Will, but it will also depend on whether the legal test criteria has been met.

This criteria can be found in an old English case named *Banks v Goodfellow* in which it was established that a person making a Will must:

- understand the nature of the Will and its effect;
- comprehend the extent of the property disposed of under the Will; and
- understand and appreciate the claims to which he or she ought to give effect.

Without a medico-legal report from a suitably qualified medical practitioner, such as a neuro-psychologist or geriatrician, the task of satisfying a Court that a given person lacks testamentary capacity will be very difficult.

The second element essentially requires findings of fact and the third element requires the Court to exercise its discretion having regard to all the circumstances of the matter at hand.

In exercising its discretion, the Court is required to take into account the following:

- a. any evidence relating to the wishes of the person;
- b. the likelihood of the person acquiring or regaining testamentary capacity;
- c. the terms of any will previously made by the person;
- d. the interests of-
 - (i) the beneficiaries under any Will previously made by the person;
 - (ii) any person who would be entitled to receive any part of the estate of the person if the person were to die intestate;
 - (iii) any person who would be entitled to claim the benefit of the Inheritance (Family Provision) Act 1972 in relation to the estate of the person if the person were to die;
 - (iv) any other person who has cared for or provided emotional support to the person;
- e. any gift for a charitable or other purpose the person might reasonably be expected to give by a Will;

- f. the likely size of the estate;
- g. any other matter that the Court considers to be relevant.

Who can be named as beneficiaries in a Statutory Will?

The beneficiaries who may be named under a Statutory Will are not confined to family members and may extend to long-standing carers or others who play a significant role in the person's life.

Who needs a Statutory Will?

The need for a Statutory Will is perhaps even more evident in cases where the estate of the person concerned would pass to family members who the person clearly would not want to benefit if he or she did not lack testamentary capacity. For example, where a child and his or her biological parent are estranged from each other or there is evidence of serious abuse in the relationship.

There is no 'one size fits all' principle that applies however and each case will be looked at and determined on its own facts. Therefore, even where there is evidence of a strained relationship it is possible for a small amount to be left to the other person in such a relationship even if its main purpose is to deter any claims being by that person against the estate at a future date.

A lot of 'legwork' is required in the initial stages of a Statutory Will matter to ascertain whether the application will satisfy the legal criteria outlined above.

Legal advice will almost certainly be required to increase the chances of achieving a successful outcome in such matters.

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