

# **STEP JOURNAL**

Downloaded on 7th October 2024 - 06:38

## **Statutory wills and litigation friends**

Steven Appleton comments on a case that demonstrates the unique challenges involved in acting as litigation friend for a person lacking mental capacity in England and Wales.

Creating a will is typically a straightforward process. Usually, when someone wants to express a desire for how their estate will pass when they die, they simply visit their solicitor and give instructions. Where an individual lacks capacity, however, it is necessary to apply to the Court for permission to make a statutory will. The recent Court of Protection case of *NT v FS and others* [2013] EWHC 684 involved a statutory will, although it was the particular circumstances that made it especially interesting.

## Facts

The case involved a 74-year-old gentleman, F, who was suffering from moderate to severe Alzheimer's disease. F had been a professional rugby player who enjoyed a relatively successful career and invested his earnings in property. Having then worked as an electrician, he focused his efforts on the purchase and renovation of dilapidated properties. He had amassed a fortune of some GBP3 million.

F had spun a complex family and relationship web – something that played a defining role in this case. Following contested deputyship proceedings in 2011, a panel deputy, NT, was appointed to manage his property and financial affairs.

NT established that F did not appear to have a valid will, and his long-term partner, N, did not stand to inherit his assets on the basis that they were not married. F also had a son from a different relationship, K, whose paternity had previously been questioned. Unless this issue was resolved, significant difficulties may have occurred on the death of F, had K sought his entitlement to his father's estate. It was also acknowledged that F had close relationships with his siblings and his uncle, and a particularly close relationship with his elderly mother, T.

Having discovered an invalid will made by F among his mother's papers, the deputy made an application for a statutory will on the basis that it would be in the best interests of F for a will to be made on his behalf. Those interested in the affairs of F (all of the above individuals and even the mother of K) objected to the terms of the proposed statutory will, although they all agreed that a statutory will should be made for F.

## The litigation friend

Where an individual is a party to court proceedings and either lacks capacity or is a minor, a litigation friend must be appointed to represent their position to the Court. The Official Solicitor was appointed to represent the interests of F, but, as T also lacked capacity, another solicitor was asked to act as her litigation friend.

The hearing consisted of mixed recollections about what F had done or said during his life. His relationships were examined, and individuals recalled very specific events. In many cases, more than

one individual had been party to the same conversation or argument, with strikingly different pictures of the same event being painted – time and personal differences can account for much of this.

### *Where an individual is a party to court proceedings and lacks capacity, a litigation friend must be appointed to represent their position to the Court*

What became clear, however, was that F seemed to compartmentalise his life between his partner; his mother, uncle and siblings; and his son and his son's family. He would consistently tell different things to different people, which left everyone believing others had behaved badly towards him in some way.

The concern of the litigation friend acting on behalf of T was to ensure the best outcome for T, given that F had seemingly not only provided significant support to his mother over the years, but also had given financial assistance by providing the majority of the GBP80,000 of funds that were being used to fund her care.

The litigation friend's job, and that of counsel acting for T, was to ensure that, in light of what the litigation friend believed would have been F's wishes in respect of his mother (bearing in mind that she was unable to engage in any meaningful conversation on any subject), T would remain in a position whereby she would be able to support herself in the chosen nursing accommodation for the remainder of her life, regardless of her personal financial position. Unlike in most cases, there was no client to seek instructions from.

The litigation friend and counsel acting for T went through a careful process of determining her potential financial needs (on the basis that, given her age, any provision from F's estate was likely to be, primarily, on the basis of need), and presented this to the Court.

## **Determining provision**

The two biggest challenges for the judge in determining the appropriate provision (once it was agreed what T's needs were likely to be) were:

- how to acknowledge that T's need for funds was likely to arise before F died (the statutory will would only apply if F died); and
- how to cater for T's needs should she survive F (bearing in mind she was 95 at the time of the hearing).

With regard to the first issue, the Court directed that a statutory gift of GBP50,000 should immediately be made from F's assets. It was felt this should fund any shortfall in the cost of T's care for perhaps four more years. Should T survive beyond four years, the Court pointed out that it would still be possible for her to apply for further provision from F if he was still alive at the time.

As regards the latter issue, the arguments rotated around outright provision in the form of a lump sum on F's death, or a life interest in all or part of his estate (whereby T would be entitled to the income produced by F's estate for the rest of her life).

It was thought a lump sum was too arbitrary; it would provide no certainty for T if she lived longer than the period for which the lump sum was intended to provide funding. Further, the best interests of F would not be served by paying a large lump sum to T on his death if T survived him by only a short period, in which case the remaining funds would pass under her own will. The life interest, although generally preferred, was highly unlikely to provide sufficient income to meet the current or future anticipated shortfall.

In these circumstances, the Court took the novel approach of granting a fixed annuity to T of GBP20,000 per annum (net of income tax) to be paid out of a proportion of F's estate – novel, as annuities are a rare feature of provision in wills in modern times. The effect of granting the annuity was that the part of F's estate that had been awarded to F's siblings and uncle would first bear the cost of the annuity for the remainder of T's life, and they would only inherit following T's death. As the value of the fund from which the annuity should be paid would be aggregated with T's estate for inheritance tax (IHT) purposes on her death, an analysis of the IHT effect on her estate was also undertaken.

The next challenge for the Court was that, as a statutory gift of GBP50,000 was being made to T, in the event F died in the near future, the Court did not want the annuity to commence until that GBP50,000 had been exhausted. In the end, the Court directed that the annuity would, in any event, following F's death, not become payable until 2017 (i.e. the four years it was anticipated the GBP50,000 gift would last for).

The provision for T posed some unique challenges for the will draftsman; it was one of those rare occasions when the plethora of available precedents just did not suffice. The approach taken by T's litigation friend and counsel acting for T appears to have served T's best interests, and the ultimate decision left her in the best possible position.

© 2024 STEP (Society of Trust and Estate Practitioners). All rights in and relating to the STEP Journal and Trust Quarterly Review and to content online at [journal.step.org](https://journal.step.org) are expressly reserved.

<https://journal.step.org/step-journal-march-2014/statutory-wills-and-litigation-friends>