PUBLIC TRUSTEE AND GUARDIAN

FACTSHEET

STATUTORY WILLS

What is a statutory will?

A statutory will is just like a normal will however the ACT Supreme Court (the Court) proves the will on application by an interested party on behalf of an adult or child who does not have testamentary capacity.

In the ACT, an application for a statutory will can also be made to resolve problems that have been identified with the existing will of a proposed testator who may have later lost testamentary capacity i.e. the process could also be used to alter, or revoke, an existing will.

What does testamentary capacity mean?

Ordinarily, to make a valid will, a person must have testamentary capacity. The test for establishing whether a person has testamentary capacity was set down in the case of *Banks v Goodfellow (1870)*.

For statutory wills however, the Court often identifies and divides testamentary capacity into 3 categories:

- Lost capacity - where a person has made a will but then loses testamentary capacity, or loses testamentary capacity before making a will.
- Nil capacity - where a person has never had testamentary capacity.
- Pre-empted capacity - where a person, though a minor and therefore lacking testamentary capacity, is old enough to form relationships and to express reasonable wishes about property before losing testamentary capacity.

Factors the Court must consider

Part 3A of the *Wills Act 1968* (the Act) provides that the Court must be satisfied as to the following matters before granting leave for a statutory will -

1. There is reason to believe that the person for whom the order is sought is, or is reasonably likely to be, incapable of making a will.
2. The proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity.
3. It is, or may be, appropriate for the order to be made.
4. The applicant for leave is an 'appropriate person' to make the application.
5. Adequate steps have been taken to allow representation of all people with a legitimate interest in the application, including any person who has reason to expect a gift or benefit from the estate of the person for whom the order is sought.

Why would you make an application for a statutory will?

If a person dies without a valid will, they are said to die 'intestate'. This means that the laws of intestacy decide who inherits the person's estate.

This may create the situation where someone who deserves to inherit from an estate misses out because of the operation of the law. In this situation, you may wish to make application for a statutory will.

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If the person does not have people in their life who are eligible on intestacy, their estate will pass to the Territory. A statutory will can prevent this from happening.

A statutory will can provide some certainty to family members or others in the life of a person, that their testamentary intentions can still be fulfilled even if they lack the capacity to make a will.

Who can make an application for a statutory will?

The law requires that an application for a statutory will must be made by an 'appropriate person'. This requirement prevents an order being made in circumstances where the applicant has no real interest in the outcome of the application.

If you are considering making application, you are advised to seek independent legal advice.

When does the Court prove a statutory will?

Before proving a statutory will, the Court must be satisfied that -

- the person has not made a valid will; and
- he or she is incapable of making a valid will; and
- in all the circumstances a will should be made.

At the hearing, the Court may take into account a number of matters such as –

- the wishes of the person, whether first or second hand, past or present;
- the likelihood of that person acquiring or regaining capacity to make a will at any future time;
- the interests of any person entitled to receive any part of the person's estate on intestacy;
- the likelihood of an application under the *Family Provision Act 1969*;
- the circumstances of any person who might benefit under a statutory will, for example a long term carer;
- any gifts for charitable or other purposes the person might be expected to make;
- the assets of the person; and
- any other relevant matter.

The overriding duty of the Court is to make a will that is as close as possible to a will that the person would have made if he or she had the capacity to make their own will.

An applicant for a statutory will must provide evidence that satisfies the Court that, without a statutory will, the person's estate would be unfairly distributed. To assist the Court, the applicant prepares a report and talks with all family members and interested parties.

The Public Trustee and Guardian is centrally located at 221 London Crct, Canberra City and may be contacted during business hours by calling (02) 62079800 or by email to ptg@act.gov.au

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