

PRACTICE DIRECTION 9E – APPLICATIONS RELATING TO STATUTORY WILLS, CODICILS, SETTLEMENTS AND OTHER DEALINGS WITH P's PROPERTY

This practice direction supplements Part 9 of the Court of Protection Rules 2017

General

1. Rule 9.11 enables a practice direction to make additional or different provision in relation to specified applications.

Applications to which this practice direction applies

2. This practice direction makes provision for applications that relate to—
 - (a) the execution of a will or codicil of P;
 - (b) the settlement of any of P's property; and
 - (c) the sale, exchange, charging, gift or other disposition of P's property.
3. A deputy may not be given powers with respect to—
 - (a) the settlement of any of P's property;
 - (b) the execution of a will of P; or
 - (c) the exercise of any power (including a power to consent) vested in P whether beneficially or as a trustee or otherwise.¹
4. Hence, an application must be made to the court for a decision in relation to such matters. This practice direction is concerned with matters mentioned at paragraphs 3(a) and (b) above. Practice direction G accompanying Part 9 contains provisions as to applications falling within paragraph 3(c).

Permission to make applications to the court

5. Section 50(1) of, and paragraph 20(2) of Schedule 3 to, the Act and rule 8.2 set out the circumstances in which permission is or is not required to make an application to the court for the exercise of any of its powers under the Act.

Information to be provided with application form

6. In addition to the application Form COP1 (and its annexes) and any information or documents required to be provided by the Rules or another practice direction, the following information must be provided (in the form of a witness statement, attaching documents as exhibits where necessary) for any application to which this practice direction applies—

¹ Section 20(3) of the Act.

- (a) where the application is for the execution of a statutory will or codicil, a copy of the draft will or codicil,² plus one copy;
- (b) a copy of any existing will or codicil;
- (c) any consents to act by proposed executors;
- (d) details of P's family, preferably in the form of a family tree, including details of the full name and date of birth of each person included in the family tree;
- (e) a schedule showing details of P's current assets, with up to date valuations;
- (f) a schedule showing the estimated net yearly income and spending of P;
- (g) a statement showing P's needs, both current and future estimates, and P's general circumstances;
- (h) if P is living in National Health Service accommodation, information on whether P may be discharged to local authority accommodation, to other fee-paying accommodation or to P's own home;
- (i) if the applicant considers it relevant, full details of the resources of any proposed beneficiary, and details of any likely changes if the application is successful;
- (j) details of any capital gains tax, inheritance tax or income tax which may be chargeable in respect of the subject matter of the application;
- (k) an explanation of the effect, if any, that the proposed changes will have on P's circumstances, preferably in the form of a 'before and after' schedule of assets and income;
- (l) if appropriate, a statement of whether any land would be affected by the proposed will or settlement and if so, details of its location and title number, if applicable;
- (m) where the application is for a settlement of property or for the variation of an existing settlement or trust, a draft of the proposed deed, plus one copy;
- (n) a copy of any registered enduring power of attorney or lasting power of attorney;
- (o) confirmation that P is a resident of England or Wales; and
- (p) an up to date report of P's present medical condition, life expectancy, likelihood of requiring increased expenditure in the foreseeable future, and testamentary capacity.

7. The court may direct that other material is to be filed by the applicant, and if it does, the information will be set out in the form of a witness statement.

8. If any of the information mentioned above has been provided already (e.g. by way of inclusion in an annex to the application form) it need not be provided again.

Respondents and persons who must be notified of an application

9. The applicant must name as a respondent—

² The Annex to this practice direction contains an example of a will.

- (a) any beneficiary under an existing will or codicil who is likely to be materially or adversely affected by the application;
- (b) any beneficiary under a proposed will or codicil who is likely to be materially or adversely affected by the application; and
- (c) any prospective beneficiary under P's intestacy where P has no existing will.

(Practice direction B accompanying Part 9 sets out the procedure for notifying others of an application.)

10. The court will consider at the earliest opportunity whether P should be joined as a party to the proceedings and, if P is so joined, the court will consider whether the Official Solicitor should be invited to act as a litigation friend, or whether some other person should be appointed as a litigation friend.

Procedure on execution of a will

11. Once a will of P has been executed, the applicant must send the original and two copies of the will to the court for sealing.

12. The court shall seal the original and the copy and return both documents to the applicant.

(Paragraph 3(2) of Schedule 2 to the Mental Capacity Act 2005 sets out the requirements for execution of a will on behalf of P, where the will is executed pursuant to an order or direction of the court.)

ANNEX

Example form of statutory will

(This only shows the manner in which the authorised person makes the will and executes the same.)

This is the last will of me AB [the person who lacks capacity] of _____ acting by CD the person authorised in that behalf by an order dated the _____ day of _____ 20____ made under the Mental Capacity Act 2005.

I revoke all my former wills and codicils and declare this to be my last will.

1. I appoint EF and GH to be executors and trustees of this my will.
2. I give _____

In witness of which this will is signed by me AB acting by CD under the order mentioned above on (date).

SIGNED by the said AB [the person who lacks capacity]

by the said CD [authorised person]

and by the said CD with his (or her) own name pursuant to the said order in our presence and

AB [person who lacks capacity]

attested by us in the presence of the said CD

CD [authorised person]

[Name and addresses of witness]

Sealed with the official seal of the Court of Protection the _____ day of _____
20____