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Statutory Wills - Myths

Statutory Wills Myths

Your will is one of the most important documents you will ever make and ensures your estate is distributed in accordance with your wishes. If your family member or close friend lacks capacity to make a will, it can be difficult to know what you can do to ensure their wishes are met. This is where statutory wills come in andhere we dispel some of the common myths about them.

"You cannot make a will if you lack the capacity to make or amend a valid will"

This is not true. It is possible for a person to have a will even when they lack testamentary capacity to make one themselves. This is known as a statutory will. If a statutory will becomes necessary, an application must be made to the Court of Protection in order to proceed.

"If you have a court-appointed deputy it means you lack capacity to make a will"

This is incorrect. The fact someone has a deputy does not mean they are unable to make a will for themselves. Although they have a deputy to manage their property and finances, they can still make a will for themselves. Capacity is issue specific which means they might not be able to manage their finances, yet still be able to make decisions about how to deal with their estate.

"Having a court-appointed deputy means that the deputy will be able to sign a will on your behalf"

Not true. Even if a deputy is acting for someone, an application to the Court of Protection is needed in every case.

"You have capacity to make a will if you have capacity to manage your own finances"

This is not always the case. You may be able to manage your own finances but unable to make a will. In these circumstances, an application will need to be made to the Court of Protection for someone to sign a statutory will on your behalf.

"If your husband or wife does not have a will it doesn't matter because as the next of kin, you receive everything anyway"

This is a common misconception. However, there are specific rules known as the intestacy provisions which deal with the division of somebody's estate if they do not have a will. Even if you are married or in a civil partnership, you will not necessarily receive all of your partner's estate. This should be considered carefully and if the intestacy provisions are inappropriate (as they often are), an application should be made for a statutory will.

"If you don't have a will, all of your assets will pass to the Government"

Incorrect. Your estate will be dealt with in accordance with the intestacy provisions. The Government will only receive your estate if there are no blood relatives entitled to it under these provisions.

"If someone lacks capacity they must have a statutory will"

This is false. A statutory will is only needed if it is in the person's best interests to have one. It may be that the intestacy provisions are adequate in which case no application is needed. Each case must be considered on its own facts.

"You must appoint a solicitor to make a statutory will"

This is not strictly true. However, a solicitor will be able to provide expert help and advice when it comes to drafting and modifying a statutory will and can represent you or your loved one in court if a lawsuit arises in connection with the will.

"Statutory wills are not suitable for terminally ill people with only a short time to live"

This is false. You can apply to the Court of Protection for an emergency decision on a statutory will if the person concerned has a short time to live.

"There are no costs associated with applying for a statutory will"

This is incorrect. An application for a statutory will costs £400.You may also have to pay:

- £500 if the court decides to hold a hearing (including telephone hearings)
- Fees to the Official Solicitor where he acts as the person's litigation friend
- Counsel's fees (if there are any)