Statutory Wills and Dispensing With Service

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The Court of Protection has the power under Section 16 and 18(1) of the Mental Capacity Act 2005 to execute a will on behalf of a protected party. Such statutory wills can have profound effects on beneficiaries under existing wills or intestacy. A protected party may still be married, even though she has had no contact with her husband for 50 years. Beneficiaries under an intestacy may be numerous and distant or their whereabouts unknown. Practice Direction 9F to the Court of Protection Rules 2007 requires that an applicant must name as a respondent any beneficiary under an existing will or an intestacy who may be materially and adversely affected by the proposed statutory will.

However, under Rule 38(1) of the Court of Protection Rules the Court has the power to dispense with service. It may seem a foregone conclusion that it is right that the relevant beneficiaries should not inherit under the proposed statutory will. To try and track them down and serve them could seem like a waste of money, given the limited prospects of a successful objection to the proposed will. *In the matter of D sub nom I v D (By his litigation friend the Official Solicitor*[1]*)* is a recent appeal in the Court of Protection heard by the Senior Judge, Judge Lush. It considered these issues and resulted in the approval of new guidance proposed by the Official Solicitor on the approach to be taken in such situations.

The Facts:

The Protected Party (P) was 30 years old. As a result of complications at the time of his birth he had athetoid cerebral palsy and lacked capacity to make a will. He had been awarded damages of £3.1 million on his claim for clinical negligence. His mother (M), with whom he lived, was his deputy. P was intestate and on his death his estate would be divided equally between M and his father (K). K was 53. He was believed to be in Jamaica and had not had contact with P for over twenty years.

[1] [2016] EWCOP 35

Solicitors instructed by M applied to the court for an order authorising the execution of a statutory will by which it was proposed that K would receive nothing. P's estate would pass to M and his brothers. An application was made to dispense with service on K. The Official Solicitor was appointed to represent P.

Permission to dispense with service was granted. District Judge Payne referred to the following matters in his judgment:

1) The only link between K and P was biological. There was nothing to suggest K had ever shown the slightest interest in P and there had been no contact since he was 8 years old.
2) No one knew where K was and it was indicated it would cost a minimum of £5,000 to find him.
3) The potential anxiety that could be caused to M if the statutory will came to K's attention.

The District Judge balanced the costs of locating K against the likelihood of his benefitting under the statutory will. That likelihood was described as "vanishingly small". The expenditure of a four figure sum to find K was not proportionate. The case was considered exceptional.

The Appeal

The appeal came before Judge Lush. The judgment contains a useful review of the case law on dispensation with service in relation to statutory wills. The court was also invited by the Official Solicitor to approve guidance on the granting of such applications. That guidance was in the following terms:

"(1) A decision by the court to dispense with the service of an application on a person who would otherwise be entitled to it is not "an act done, or decision made, under [the Mental Capacity Act 2005] for or on behalf of P" within the meaning of section 1(5). It is therefore not a decision which is to be determined only by reference to an assessment of P's best interests."

This reflects the decision in *Re AB*[2] that dispensation with service is a decision taken under case management powers rather than for the purposes of Section 1(5) of the Mental Capacity Act 2005. It is not a decision being taken by or on behalf of P. P's best interest is not the determining factor (although it remains a relevant factor for case management).

[2] [2014] COPLR 381

"(2) The court's decisions on procedural matters should be considered with regard to the obligation to give effect to the overriding objective set out at rule 3 of the Court of Protection Rules 2007."

The overriding objective as set out in the Court of Protection Rules largely follows that as set out in the CPR. There is a significant difference in that the Court of Protection is required to ensure that P's interests and position are properly considered, but they are not determinative to a decision to dispense with service.

"(3) The court should recognise that a decision to dispense with service on an individual otherwise entitled to it may engage that individual's rights under the European Convention on Human Rights, especially articles 6 and 8. In any event, P's own Convention rights are certainly engaged. More broadly, even if Convention rights are not engaged, issues of procedural fairness arise."

As recognised in *Re AB* Article 6, the right to a fair trial, is an absolute and not a qualified right. Article 8 is the right to respect for privacy and family life (which is a qualified right). To dispense with service would mean a beneficiary was unaware that their rights had been interfered with and would deny them the opportunity to advance their case. In any event it is a principle of natural justice that a party who may be adversely impacted by a judicial decision should be given an opportunity to be heard.

"(4) A decision to dispense with service on an affected party will mean that the court may have to decide the substantive application without all the relevant material before it."

Without the involvement of those to be adversely affected, the applicant's evidence will go unchallenged and the court could not be satisfied that it had all of the relevant material (*Re B*[3]). Relevant material in *Re HMF*[4] was expressed in terms of argument from those interested under the current will to enable the court to be satisfied as to the balance between the parties and what P would have done if they had capacity.

"(5) Any decision to dispense with service on an individual will be taken by the court on the basis of untested evidence. The apparent merits of the substantive application should not be used to justify dispensing with service."

This principle flows from the earlier provisions in the guidance. If a party has not been made aware of the application or given a chance to respond to it, then it would be wrong to rely on its apparent, but untested, strength.

[3] [1987] 1 WLR 552
[4] [1976] Ch 33

"(6) Fears about the consequences to P or the applicant of service on the individual in question can in many ways be ameliorated by the use of the court's powers under rule 19 to redact relevant details, such as addresses."

Rule 19(1) allows a party to apply to the court for documents to be edited before service. The efficacy of these measures will depend on the circumstances of the case. If P's whereabouts are already known to those to be served, redaction will provide no assistance. Where the beneficiary has been out of contact or estranged from P for some time it may provide sufficient protection for P.

"(7) The consequences of the application succeeding to the individual who is not to be served should also be considered."

As in *I v D* the individual who is not to be served may be about to lose out on a potentially very substantial legacy. If only a specific modest legacy has been provided for under the existing will then the court may consider this a relevant factor.

"(8) Before a decision is taken to dispense with service because of practical difficulties, consideration should be given to the possibility of effecting service by means of an alternative route under rule 34."

The court would be in a position to direct service via a relative of the person who should be served whose location was known or could be established more readily. In proceedings under the CPR or Insolvency Rules service can be affected by advertisement. Advertisement could be used to try and trace an individual who should be served. The internet and social media were referred to in *I v D* as routes by which an individual could be traced. It may be appropriate to include evidence from a tracing agent explaining any difficulties encountered in attempting to trace the individual.

"(9) Matters of procedural fairness should be given a high regard, and it is submitted that cases where it is appropriate to dispense with service on an individual who is directly and adversely affected by an application are likely to be exceptional."

Matters such as difficulty locating an individual or fears of harassment are often themes in such applications. A successful application for dispensation with service will need to demonstrate clearly factors which make the case exceptional. For example evidence of thorough but ultimately unsuccessful attempts to trace the individual required to be served along with the absence of an alternative means of service. Judge Lush referred in *I v D* to being unimpressed with the efforts to try and trace K.

"(10) Different factors may apply in cases where the application is to dispense with service on P or where there is genuine urgency and there is a need to balance the prejudice of proceeding in the absence of an affected party against the prejudice to P or another party of not proceeding at all."

In *Re Davey*[5] a care assistant had befriended a 92 year old resident in a nursing home who lacked capacity. They married in "suspicious circumstances" shortly before she became terminally ill. The Official Solicitor was appointed and applied for an order to execute a statutory will without giving notice to Mr Davey. The order was made and the will executed, with the patient dying six days later. Mr Davey's appeal was dismissed. The urgency of the position displaced the position in a normal case that a person adversely affected should be served. Mr Davey would have taken the benefit of P's estate under the rules of intestacy.

Genuine urgency is likely to be seen as a persuasive factor in seeking to obtain dispensation from service. The Court of Protection will not simply infer urgency from advanced age or general ill health. An application seeking to put forward urgency as a relevant factor should be supported by evidence of a specific urgent need. It may also be appropriate to explain why the need for a statutory will has not been addressed at an earlier stage if urgency is relied upon. In *I v D* reference was made to the fact that it had been ten years since M had been alerted to the possibility of a statutory will and yet had not taken any steps until recently. Unjustified inactivity could weigh against the making of an order dispensing with service.

The Decision

Having considered the case law and the Official Solicitor's guidance the appeal was allowed. It was not an exceptional case and there was no compelling reason why service on K should be dispensed with:

1) There was no urgency in the case. P had a normal life expectancy and it had been ten years since M had been advised by the Court that she could make such an application;
2) The Judge was "unimpressed" with the efforts to locate and K and doubted whether any attempt had been made to find him. There were no enquiries or consideration of whether any of K's relatives could be identified to permit substituted service;
3) Undue prominence was given to the cost of searching for K given: the principle at stake (K's entitlement to participate in proceedings) and the extent of K's proposed disinheritance;

[5] [1981] WLR 164

4) The suggestion of a risk of harassment was seen as vague and the fact K could be aware of the award and have an expectation to benefit from it was all the more reason to serve him;
5) Such applications to dispense with service were often made because it is more convenient to avoid any potential confrontation. However, Article 6 of the ECHR, and the principles of natural justice, deter a judge from making a decision against an individual's interests without that individual being heard;
6) Generally to agree not to hear the other party because it would be more convenient, less discomforting for the applicant or cheaper would be for the court to fail in its duty to manage conflicts of interest.

Conclusion

Applications for dispensation from the service requirements arise comparatively frequently. The clear message from *I v D* and the earlier cases it discusses is that an individual's right to be served will not be dispensed with lightly. Exceptional means exceptional, and the burden of proof is on the applicant to show that their case falls into that narrow category.

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