

Status: Point in time view as at 01/04/2009.

Changes to legislation: Mental Capacity Act 2005, SCHEDULE 2 is up to date with all changes known to be in force on or before 17 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

SCHEDULES

SCHEDULE 2

Section 18(4)

PROPERTY AND AFFAIRS: SUPPLEMENTARY PROVISIONS

Wills: general

- 1 Paragraphs 2 to 4 apply in relation to the execution of a will, by virtue of section 18, on behalf of P.

Provision that may be made in will

- 2 The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it.

Wills: requirements relating to execution

- 3 (1) Sub-paragraph (2) applies if under section 16 the court makes an order or gives directions requiring or authorising a person (“the authorised person”) to execute a will on behalf of P.
- (2) Any will executed in pursuance of the order or direction—
- (a) must state that it is signed by P acting by the authorised person,
 - (b) must be signed by the authorised person with the name of P and his own name, in the presence of two or more witnesses present at the same time,
 - (c) must be attested and subscribed by those witnesses in the presence of the authorised person, and
 - (d) must be sealed with the official seal of the court.

Wills: effect of execution

- 4 (1) This paragraph applies where a will is executed in accordance with paragraph 3.
- (2) The Wills Act 1837 (c. 26) has effect in relation to the will as if it were signed by P by his own hand, except that—
- (a) section 9 of the 1837 Act (requirements as to signing and attestation) does not apply, and
 - (b) in the subsequent provisions of the 1837 Act any reference to execution in the manner required by the previous provisions is to be read as a reference to execution in accordance with paragraph 3.
- (3) The will has the same effect for all purposes as if—
- (a) P had had the capacity to make a valid will, and
 - (b) the will had been executed by him in the manner required by the 1837 Act.
- (4) But sub-paragraph (3) does not have effect in relation to the will—

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- (a) in so far as it disposes of immovable property outside England and Wales, or
 - (b) in so far as it relates to any other property or matter if, when the will is executed—
 - (i) P is domiciled outside England and Wales, and
 - (ii) the condition in sub-paragraph (5) is met.
- (5) The condition is that, under the law of P's domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales.

Vesting orders ancillary to settlement etc.

- 5 (1) If provision is made by virtue of section 18 for—
- (a) the settlement of any property of P, or
 - (b) the exercise of a power vested in him of appointing trustees or retiring from a trust,
- the court may also make as respects the property settled or the trust property such consequential vesting or other orders as the case may require.
- (2) The power under sub-paragraph (1) includes, in the case of the exercise of such a power, any order which could have been made in such a case under Part 4 of the Trustee Act 1925 (c. 19).

Variation of settlements

- 6 (1) If a settlement has been made by virtue of section 18, the court may by order vary or revoke the settlement if—
- (a) the settlement makes provision for its variation or revocation,
 - (b) the court is satisfied that a material fact was not disclosed when the settlement was made, or
 - (c) the court is satisfied that there has been a substantial change of circumstances.
- (2) Any such order may give such consequential directions as the court thinks fit.

Vesting of stock in curator appointed outside England and Wales

- 7 (1) Sub-paragraph (2) applies if the court is satisfied—
- (a) that under the law prevailing in a place outside England and Wales a person (“M”) has been appointed to exercise powers in respect of the property or affairs of P on the ground (however formulated) that P lacks capacity to make decisions with respect to the management and administration of his property and affairs, and
 - (b) that, having regard to the nature of the appointment and to the circumstances of the case, it is expedient that the court should exercise its powers under this paragraph.
- (2) The court may direct—
- (a) any stocks standing in the name of P, or
 - (b) the right to receive dividends from the stocks,

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to be transferred into M's name or otherwise dealt with as required by M, and may give such directions as the court thinks fit for dealing with accrued dividends from the stocks.

- (3) “Stocks” includes—
- (a) shares, and
 - (b) any funds, annuity or security transferable in the books kept by any body corporate or unincorporated company or society or by an instrument of transfer either alone or accompanied by other formalities,
- and “dividends” is to be construed accordingly.

Preservation of interests in property disposed of on behalf of person lacking capacity

- 8 (1) Sub-paragraphs (2) and (3) apply if—
- (a) P's property has been disposed of by virtue of section 18,
 - (b) under P's will or intestacy, or by a gift perfected or nomination taking effect on his death, any other person would have taken an interest in the property but for the disposal, and
 - (c) on P's death, any property belonging to P's estate represents the property disposed of.
- (2) The person takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of.
- (3) If the property disposed of was real property, any property representing it is to be treated, so long as it remains part of P's estate, as if it were real property.
- (4) The court may direct that, on a disposal of P's property—
- (a) which is made by virtue of section 18, and
 - (b) which would apart from this paragraph result in the conversion of personal property into real property,
- property representing the property disposed of is to be treated, so long as it remains P's property or forms part of P's estate, as if it were personal property.
- (5) References in sub-paragraphs (1) to (4) to the disposal of property are to—
- (a) the sale, exchange, charging of or other dealing (otherwise than by will) with property other than money;
 - (b) the removal of property from one place to another;
 - (c) the application of money in acquiring property;
 - (d) the transfer of money from one account to another;
- and references to property representing property disposed of are to be construed accordingly and as including the result of successive disposals.
- (6) The court may give such directions as appear to it necessary or expedient for the purpose of facilitating the operation of sub-paragraphs (1) to (3), including the carrying of money to a separate account and the transfer of property other than money.
- 9 (1) Sub-paragraph (2) applies if the court has ordered or directed the expenditure of money—
- (a) for carrying out permanent improvements on any of P's property, or
 - (b) otherwise for the permanent benefit of any of P's property.

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- (2) The court may order that—
 - (a) the whole of the money expended or to be expended, or
 - (b) any part of it,is to be a charge on the property either without interest or with interest at a specified rate.
- (3) An order under sub-paragraph (2) may provide for excluding or restricting the operation of paragraph 8(1) to (3).
- (4) A charge under sub-paragraph (2) may be made in favour of such person as may be just and, in particular, where the money charged is paid out of P's general estate, may be made in favour of a person as trustee for P.
- (5) No charge under sub-paragraph (2) may confer any right of sale or foreclosure during P's lifetime.

Powers as patron of benefice

- 10 (1) Any functions which P has as patron of a benefice may be discharged only by a person (“R”) appointed by the court.
- (2) R must be an individual capable of appointment under section 8(1)(b) of the 1986 Measure (which provides for an individual able to make a declaration of communicant status, a clerk in Holy Orders, etc. to be appointed to discharge a registered patron's functions).
- (3) The 1986 Measure applies to R as it applies to an individual appointed by the registered patron of the benefice under section 8(1)(b) or (3) of that Measure to discharge his functions as patron.
- (4) “The 1986 Measure” means the Patronage (Benefices) Measure 1986 (No. 3).

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