

CHAPTER 2

PARTIES AND PROPERTY FOR EXPRESS TRUSTS

2. WHO MAY BE A SETTLOR

Minors

- 2–04** NOTE 13. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), §§ 4–023 to 4–028. FOR THE REFERENCE TO *Williams on Wills*, SEE NOW (9th edn), Vol.1, Chap.16.

Persons lacking mental capacity

- 2–09** IN THE TEXT TO N.29, AFTER THE WORD “VOID” INSERT: or voidable

NOTE 29. AT THE END ADD: On the question whether a gift, as distinct from a contract for consideration, made by a person of unsound mind is void or voidable, a number of modern English cases support the view that the gift is void, see *Re Beaney* [1978] 1 W.L.R. 700 (but see at 774); *Re Morris* [2000] All E.R. (D) 598; *Williams v Williams* [2003] EWHC 742 (Ch) 403; [2003] All E.R. (D) 403 (Feb); *Qutb v Hussain* [2005] EWHC 157 (Ch); [2005] All E.R. (D) 379 (Apr). But the point was left open in *Sutton v Sutton* [2009] EWHC 2576 (Ch); (2009–10) 12 I.T.E.L.R. 672 at [29]–[51], after a review of the above English authorities and after reference to *Gibbons v Wright* (1954) 91 C.L.R. 423, Aus. HC (joint tenancy severance deed voidable not void); *Craig v McIntyre* [1976] 1 N.S.W.L.R. 729 (voluntary settlement voidable not void).

- 2–10** NOTE 34. FOR THE REFERENCE TO Heywood and Massey, *Court of Protection Practice*, SEE NOW §§ 20–005A *et seq.* IN THE LAST SENTENCE AMEND THE OPENING WORDS TO READ: The principal reported cases on the jurisdiction before Mental Capacity Act 2005 came into force are: AFTER THE PENULTIMATE CASE CITED IN THAT SENTENCE INSERT: *G v Official Solicitor* [2006] EWCA Civ 816; [2007] W.T.L.R. 1201. AT THE END ADD: All these cases must be read subject to *Re P* [2009] EWHC 163 (Ch); [2010] Ch. 33; *Re M* [2009] EWHC 2525 (Fam) and *Re D* [2010] EWHC 2159 (Ch); [2010] W.T.L.R. 1511 concerned with the jurisdiction under Mental Capacity Act 2005. In *Re P* Lewison J said at [38] that the guidance given in the pre-Mental Capacity Act 2005 cases can no longer be directly applied to cases under

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Mental Capacity Act 2004, while in *Re M Munby J.* went further and said at [29] that those cases are best consigned to history.

NOTE 35. FOR THE REFERENCE TO Heywood and Massey, *Court of Protection Practice*, SEE NOW §§ 21–004 *et seq.* IN THE LAST SENTENCE AMEND THE OPENING WORDS TO READ: The principal reported cases on the jurisdiction before Mental Capacity Act 2005 came into force are: AT THE END ADD: All these cases must be read subject to the cases under the Mental Capacity Act 2005 cited in the previous footnote, all concerned with the jurisdiction under Mental Capacity Act 2005 in relation to statutory wills, but the principles of which are also applicable in relation to settlements.

NOTE 36. ADD: As to the mode of execution of a statutory will, see Mental Capacity Act 2005, s.18(4) and Sch.2, para.3. No specific rules are prescribed about the mode of execution of a settlement, but as to ancillary orders, see Mental Capacity Act 2005, s.18(4) and Sch.2, para.5.

AFTER § 2–10 INSERT THE FOLLOWING NEW PARAGRAPHS:

- 2–10A** What is in the best interests of the person concerned is a different test from the test which applied under the former legislation in relation to statutory wills and which was concerned with what the person concerned might be expected to provide for if he did lack capacity.^{37a} What is meant by the best interests of the person concerned is explained in section 4 of the Mental Capacity Act 2005, of which section 4(2), (6) and (7) are most relevant for present purposes. All relevant circumstances must be taken into consideration.^{37b} Those circumstances include the past and present wishes and feelings of the person concerned (including in particular any relevant written statement made by him when he had capacity), the beliefs and values that would be likely to influence his decision if he had capacity, and other factors which he would be likely to consider if he were able to do so.^{37c} The wishes of the person concerned carry great weight but are not determinative.^{37d} In considering the weight to be attached to the wishes and feelings of the person concerned, regard should be had to the degree of his incapacity, the strength and consistency of his views,

^{37a} *Re P* [2009] EWHC 163 (Ch); [2010] Ch. 33 at [238]–[239].

^{37b} Mental Capacity Act 2005, s.4(2).

^{37c} Mental Capacity Act 2005, s.4(6).

^{37d} *Re P*, above, at [40] and [44].

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the possible impact on him of knowledge that his wishes and feelings are not being given effect to, the extent to which his wishes and feelings are rational, sensible and responsible and, crucially, what can properly be accommodated in an overall assessment of what is in his best interests.^{37e} Further, so far as it is practical and appropriate to do so, account must be taken of the views of anyone named by the person concerned, a carer, a donee of a lasting power of attorney and a deputy appointed by the court as to what is in his best interests.^{37f} Material which falls outside the specific provisions contained in sections 4(2), (6) and (7) does not fall to be left out of account altogether since it may still form part of the relevant circumstances to be taken into account under the general wording of section 4(2), for instance an oral statement by the person concerned as to his wishes and feelings when he had capacity, and the views of a past carer as to what is in his best interests.^{37g} In a case where it is proposed to replace an existing will with one cutting out a particular beneficiary of the existing will, regard will be had to the misconduct of that beneficiary in relation to the person concerned.^{37h} Though the Court of Protection has no jurisdiction to rule on the validity of an existing will,³⁷ⁱ it should not refrain, as a matter of principle, from directing the execution of a statutory will where the validity of an earlier will is in dispute. In such a case, the existence and nature of the dispute, and the ability of the Court of Protection to investigate the issues which underlie it, are relevant factors to be taken into account when deciding whether, overall, it is the best interests of the person concerned to order the execution of a statutory will. But it may be in that person's best interests to set to rest concerns about his true testamentary wishes by an order for the execution of a statutory will, rather than to leave his estate to be eroded by the costs of litigation after his death, and his memory to be tainted by the bitterness of a contested probate dispute after his death.^{37j}

2–10B A statutory settlement may be varied or revoked by order of the Court of Protection if the settlement makes provision for its variation or revocation, or if the court is satisfied that a

^{37e} *Re M* [2009] EWHC 2525 (Fam) at [35].

^{37f} Mental Capacity Act 2005, s.4(7).

^{37g} *Re M*, above at [36].

^{37h} *Re M*, above, at [44]–[53].

³⁷ⁱ *Re M*, above at [50]; *Re D*, above, at [15].

^{37j} *Re D*, above, at [15]–[20].

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material fact was not disclosed when the settlement was made, or if there has been a material change of circumstances.^{37k}

5. WHAT PROPERTY MAY BE SUBJECT TO A TRUST**General**

2–35 AT THE END ADD: A share in a company limited by guarantee can be the subject of a trust and it makes no difference that the share carries no rights to dividends or distributions or that legal ownership of a share carries is limited to individuals with specified personal qualifications.^{90a}

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^{37k} Mental Capacity Act 2005, s.18(4) and Sch.2, para.6.

^{90a} *St Vincent de Paul Society (Queensland) v Ozcare Ltd* [2009] QCA 335; (2009–10) 12 I.T.E.L.R. 649.