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Harding, Rosalind

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## The Rise of Statutory Wills and the Limits of Best Interests Decision-Making in Inheritance

Professor Rosie Harding\*

**Abstract:** This article addresses the under-researched phenomenon of ‘statutory wills’ executed under the Mental Capacity Act 2005 (MCA) for persons with impaired mental capacity. It argues that the legal justification for statutory wills requires reconsideration, given the limitations of ‘best interests’ decision making in this area. Part 1 provides an overview of the historical development of statutory wills, and their relationship to testamentary freedom and intestacy to argue that statutory wills reflect changing social understandings of ‘deserving’ inheritance alongside a desire for tax efficient succession planning. Part 2 moves on to explore the rising contemporary significance of this form of testamentary document. It considers the shift from the previous ‘hypothetical substituted judgment’ test to the contemporary ‘best interests’ orientation of the MCA. Part 3 then turns to assess the problems that this new best interests approach raises, and its (in)compatibility with the right to equal recognition before the law under Article 12 of the UN Convention on the Rights of Persons with Disabilities, arguing that the pervasive reach of best interests in contemporary mental capacity law requires reconsideration. The paper concludes by suggesting potential solutions to these intersecting problems and argues that a more limited framing of the power to execute statutory wills is required in order to appropriately balance the rights of individuals with disabilities with practical considerations around the distribution of assets on death.

**Keywords:** Best Interests, Statutory Wills, Inheritance, Mental Capacity, UN CRPD.

Inheritance is a social and legal practice of profound significance. For many people, having control over what happens to property after death is both socially important and legally valuable.<sup>1</sup> In jurisdictions such as England and Wales, where there is no ‘forced heirship’,<sup>2</sup> the ‘myth’ of testamentary freedom<sup>3</sup> persists in spite of statutory provision for family dependants.<sup>4</sup> Within the bounds of this legislative framework, the general principle is that adults in England and Wales can choose who they wish to inherit their property when they die. Despite the relative ease of making a valid will,<sup>5</sup> estimates from recent research by the Law Commission suggest that half of deaths may be intestate.<sup>6</sup> Whilst the vast majority of intestate estates fall to a surviving spouse, the intestacy rules also provide a set of general principles for intestate succession, based on genetic kinship. If there are no surviving blood relatives, and no will, the estate passes in its entirety as *bona vacantia* (unowned goods), most often to the Crown.<sup>7</sup> All of this remains relatively uncontroversial, though the extent

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\* Professor of Law and Society, Birmingham Law School, University of Birmingham. Email: [r.j.harding@bham.ac.uk](mailto:r.j.harding@bham.ac.uk). I am very grateful for the extremely helpful comments of David Kershaw, Mary Donnelly, Marie Fox, Daniel Monk, Elizabeth Peel, Antu Sorainen, participants in the Mental Capacity Law stream at the SLSA Annual Conference (2014) and the two anonymous reviewers for the MLR.

<sup>1</sup> Daniel Monk & Daphna Hacker ‘Wealth, Families and Death: Socio-Legal Perspectives on Wills and Inheritance: Introduction’ (2014) 4(2) *Onati Socio-Legal Series* 170.

<sup>2</sup> In contrast to Scotland and much of continental Europe, where family members have an entitlement to inherit specified proportions of the estate.

<sup>3</sup> Melanie B. Leslie ‘The Myth of Testamentary Freedom’ (1996) 38 *Ariz L Rev* 235.

<sup>4</sup> Inheritance (Provision for Family and Dependents) Act 1975; Gillian Douglas ‘Family Provision and Family Practices – The Discretionary Regime of the Inheritance Act of England and Wales’ (2014) 4(2) *Onati Socio-Legal Series* 222.

<sup>5</sup> Wills Act 1837, s. 9 (as amended).

<sup>6</sup> Law Commission *Inheritance and Trustees Powers Bill Impact Assessment* (Law Com IA 0012, 2011); Law Commission *Intestacy and Family Provision Claims on Death* (Law Com No 331, 2011)

<sup>7</sup> For the list of unclaimed estates, which is updated daily see <https://www.gov.uk/government/statistical-data-sets/unclaimed-estates-list> last accessed 6 March 2015.

to which the intestacy rules appropriately and adequately reflect the contemporary diversity of familial forms and practices is open to debate.<sup>8</sup>

Where a will has been made, it can be challenged after death where there are suspicions of fraud, undue influence, or lack of knowledge and approval.<sup>9</sup> Case law to date, however, suggests that making such a challenge exposes the person claiming against the will to significant difficulties and potentially high costs orders.<sup>10</sup> As Kerridge has argued,<sup>11</sup> English succession law does not currently provide satisfactory responses to the problems that may be caused by excessive persuasion, coercion or pressure on vulnerable testators. The so-called “golden rule” that a when a solicitor draws up a will for a person whose testamentary capacity<sup>12</sup> may be in question, “it should be witnessed or approved by a medical practitioner, who ought to record his examination of the testator and his findings”<sup>13</sup> does not offer much assistance as whilst it is “prudent guidance for solicitors” it “does not purport to lay down the law.”<sup>14</sup> Indeed, the most reasonable use for this rule appears to be “to assist in the avoidance of disputes, or at least in the minimisation of their scope.”<sup>15</sup> Those who seek to challenge a will on grounds of undue influence or fraud will find the balance of proof falls on them to prove the alleged misdeeds,<sup>16</sup> which, combined with the likelihood of a costs order if unsuccessful, generates a significant disincentive to litigation in this area.<sup>17</sup> Further, a successful challenge on the basis of fraud or undue influence may result in the estate being held on a constructive trust for those who the testator wanted to benefit.<sup>18</sup> In contrast, where a will is set aside (in whole or part) on grounds of lack of knowledge and approval (the most common ground for successful challenges to a will) the result is as if there were no will, and the estate devolves according to the principles of intestate succession.<sup>19</sup> This vexed area of law is ripe for reform, and the issue of testamentary capacity and rectification of wills is to be addressed by the Law Commission in their current programme.<sup>20</sup>

There is, however, one group of people who already have an alternative legislative framework to draw on in place of difficult and costly challenges to wills: those with intellectual disabilities.<sup>21</sup> It is estimated that in

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<sup>8</sup> Daniel Monk ‘Sexuality and Succession Law: Beyond Formal Equality’ (2011) 19 *Feminist Legal Studies* 231; Gillian Douglas, Hilary Woodward, Alun Humphrey, Lisa Mills and Gareth Morell ‘Enduring Love? Attitudes to Family and Inheritance Law in England and Wales’ (2011) 38(2) *JLS* 245.

<sup>9</sup> Roger Kerridge ‘Wills Made in Suspicious Circumstances: the Problem of the Vulnerable Testator’ (2000) 59 *Cambridge L. J.* 310. It appears that ‘unconventional’ wills may be more likely to be challenged than those which conform to normative patterns of bequeathing to biological kin: Monk, 2011 (n 8); Alice Diver ‘Clean hands’ or ‘kinship trusts’? *Detrimental reliance and familial promises in Northern Ireland’s Chancery Division.* (2011) *Trust and Trustees* 17 (8) 752.

<sup>10</sup> A plea of undue influence or fraud that is not proven usually results in a costs order against the party claiming the undue influence (see *Cutcliffe’s Estate, Re* [1958] 3 *W.L.R.* 707 CA; Lee Mason ‘Undue influence and testamentary dispositions: an equitable jurisdiction in probate law’ (2011) *Conv.* 115, Kerridge,(n 9).

<sup>11</sup> Kerridge, n 9; Roger Kerridge *Parry and Kerridge: the Law of Succession* 12<sup>th</sup> edition (2009, Sweet & Maxwell).

<sup>12</sup> *Banks v Goodfellow* (1870) LR 5 QB 549. The *Banks v Goodfellow* test for testamentary capacity survived the Mental Capacity Act 2005, though the two tests are closely linked, and a person who lacks testamentary capacity may well lack capacity to make other financial and personal welfare decisions.

<sup>13</sup> *Kenward v Adams* (1975) *The Times*, 29 November.

<sup>14</sup> *Hoff v Atherton* [2004] EWCA Civ 1554 at [48].

<sup>15</sup> *Key v Key* [2010] EWHC 408 (Ch) at [8].

<sup>16</sup> *Craig v Lumoureux* [1920] AC 349.

<sup>17</sup> Kerridge (2000) (n9).

<sup>18</sup> Kerridge (2009) (n11) at 86.

<sup>19</sup> *Ibid.*

<sup>20</sup> Law Commission *Twelfth Programme of Law Reform* (Law Com No 354, 2014) Law commission (2015) *Wills* available at: <http://lawcommission.justice.gov.uk/areas/wills.htm> accessed on 18 June 2015.

<sup>21</sup> Terminology in this area can be challenging. The term ‘intellectual disabilities’ is used here, and is intended to be non-derogatory and inclusive of all people with cognitive impairments or mental health problems that affect their cognition. This would include persons with learning disabilities, acquired brain injuries, dementia or significant mental health problems.

2011 there were 1,191,000 people in England with learning disabilities<sup>22</sup> and a further 850,000 people live with dementia in the UK in 2015.<sup>23</sup> It is predicted that as the population ages, the numbers of people living with dementia will increase to over 1 million by 2025.<sup>24</sup> A further 1 million people are estimated to be living with the long term effects of acquired brain injury,<sup>25</sup> and there were over 50,000 detentions under the Mental Health Act in 2012/13.<sup>26</sup> Many of those with learning disabilities, dementia, acquired brain injuries or significant mental health problems may lack testamentary capacity either on a temporary or permanent basis, and be subject to the provisions of the Mental Capacity Act 2005. Those persons who have never had testamentary capacity, those who lose the capacity to make a will during their lifetime and have not done so, or those for whom the validity or continuing relevance of their most recent will is in question, but who do not have capacity to write a new will,<sup>27</sup> can apply to the Court of Protection for the execution of a ‘statutory will’.<sup>28</sup> Whilst accurate statistics as to the number of statutory wills authorised by the Court are not kept by the Ministry of Justice,<sup>29</sup> published court and judicial statistics show a gradual annual increase in the numbers of applications to the Court of Protection ‘to execute wills, apply for gifts and orders for settlements’ since 2010.<sup>30</sup> The number of applications under this heading is the second highest overall of applications to the Court of Protection not involving powers of attorney or deputies, after applications for one-off property and affairs orders.<sup>31</sup> The number of such applications that have been granted by the Court of Protection have, however, fluctuated over the same period, with a peak in 2011 (see Figure 1).<sup>32</sup> Given that the numbers of Enduring and Lasting Powers of Attorney documents received by the Office of the Public Guardian in each of these years has increased dramatically, from 182,734 in 2010 to 289,950 in 2013,<sup>33</sup> mental capacity law has the potential to impact on very many people’s lives.

[INSERT FIGURE 1 ABOUT HERE]

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<sup>22</sup> Learning Disabilities Observatory People with Learning Disabilities in England 2011, available at: <[http://www.improvinghealthandlives.org.uk/securefiles/150223\\_1838//IHAL2012-04PWLD2011.pdf](http://www.improvinghealthandlives.org.uk/securefiles/150223_1838//IHAL2012-04PWLD2011.pdf)> accessed 23 February 2015.

<sup>23</sup> Alzheimer’s Society (2015) Statistics available at <<http://www.alzheimers.org.uk/statistics>> accessed 23 February 2015.

<sup>24</sup> Ibid.

<sup>25</sup> Headway (2015) Key facts and statistics available at <<https://www.headway.org.uk/key-facts-and-statistics.aspx>> accessed 23 February 2015.

<sup>26</sup> Mind (2014) Key facts and statistics available at <<http://www.nhsconfed.org/~media/Confederation/Files/Publications/Documents/facts-trends-mental-health-2014.pdf>> accessed 23 February 2015.

<sup>27</sup> *Re D (Statutory Will)* [2010] EWHC 2159 (Ch); [2012] Ch 57.

<sup>28</sup> The term ‘statutory will’ here is used to describe a will executed under the authority of the Court of Protection. England and Wales is one of a very few jurisdictions that allow a court (or anyone other than the testator) to execute a will. Other jurisdictions that presently allow statutory wills include New Zealand, most of Australia, and the Canadian Province of New Brunswick. There is no statutory jurisdiction to do so in Scotland, though a recent case has opened up the possibility (See Adrian Ward and Jill Stavert ‘Can an intervention order be granted for purposes of executing a will?’ (2014) January 39 *Essex Street Mental Capacity Law Newsletter* p31-32 <[http://www.39essex.com/docs/newsletters/mc\\_law\\_newsletter\\_january\\_2014.pdf](http://www.39essex.com/docs/newsletters/mc_law_newsletter_january_2014.pdf)> accessed on 17 July 2014). The term ‘statutory will’ has occasionally been used to refer to the rules of intestate succession and/or the family provision legislation (e.g., Judith Masson ‘Making Wills, Making Clients, Part 1’ (1994) Jul/Aug Conv 267). The type of statutory will discussed here should also be contrasted, for the avoidance of doubt, with the ‘statutory will forms’ that are available in some US states, as standardised, low cost, approaches to making a valid will.

<sup>29</sup> FOIA Request, 2014. Published statistics do not disaggregate applications and orders for the execution of wills and those for gifts and settlements.

<sup>30</sup> Ministry of Justice (2014) ‘Court Statistics Quarterly: January to March 2014’ available at: <<https://www.gov.uk/government/statistics/court-statistics-quarterly-january-to-march-2014>> accessed on 23 February 2015.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid, at additional tables, 6.1 – 6.2.

<sup>33</sup> Ibid, at additional tables, 6.3.

This article examines the law relating to statutory wills to highlight the tensions created by this two-tier legal provision, which treats persons with intellectual disabilities differently from the rest of the population. The rationale for the existence of a framework enabling statutory wills is explored, alongside a critique of the potentially discriminatory nature and effects of statutory wills as they are currently configured. The aim is to put forward an argument for significant revision of statutory wills to remove differences of treatment for people with intellectual disabilities and those without, as mandated by Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD).<sup>34</sup> In making this argument, the article also contributes to the ongoing debates as to the extent to which the best interests focus of the Mental Capacity Act 2005 (MCA) is compatible with the CRPD, and how to implement the CRPD's approach to supported decision-making.<sup>35</sup> By exploring critiques of best interests in this realm of succession law, rather than the more usual focus of health<sup>36</sup> and personal welfare decision-making,<sup>37</sup> some of the more ethically troubling aspects of best interests<sup>38</sup> can be circumvented, as can many of the paternalistic justifications for best interests decision making for persons with intellectual disabilities that often complicate discussion of that principle in mental health and learning disability cases.<sup>39</sup>

Part 1 provides an overview of the development of statutory wills from their introduction in 1969 to the current regulatory framework under the MCA. Part 2 explores the operation of the new approach to the execution of statutory wills under the MCA, and the implications of the shift to a 'best interests' approach to decision-making enacted therein. Part 3 builds on these discussions to set out a critique of best interests reasoning as it has been advanced under the MCA, and interrogates the (in)compatibility of this approach with Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD),<sup>40</sup> particularly the guarantee, under Article 12(2), that persons with disabilities (including intellectual disabilities) "enjoy legal capacity on an equal basis with others in all aspects of life", the right of persons with disabilities to "the support they may require in exercising their legal capacity",<sup>41</sup> and the guarantee that safeguards to protect disabled people from abuse prioritise the "will and preferences" of the person.<sup>42</sup> The critiques set out in the first three parts are drawn together in the conclusion to argue that legislation enabling statutory wills should be

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<sup>34</sup> Article 12 CRPD provides for the right of "Equal recognition before the law" for people with disabilities (including people with intellectual disabilities), and was a particularly contentious provision during discussions that led to the convention. Disagreements arose because of the challenges the right to equal enjoyment of legal capacity for disabled people posed to settled understandings about the distinction between legal capacity and mental capacity. See further: Amita Dhanda 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar of the Future?' (2006-7) *Syracuse J Int'l Law & Com* 429. The proper interpretation of Article 12 was also the subject of the first 'General Comment' on the convention by the Committee on the Rights of Persons with Disabilities: Committee on the Rights of People with Disabilities (2014) General Comment No. 1 on Article 12: Equal recognition before the law CRPD/C/GC/1. For an overview of the potentially wide ranging impact of the UN CRPD on English law, see: Peter Bartlett 'The United Nations Convention on the Rights of People with Disabilities and Mental Health Law' (2012) 75(5) *MLR* 752. These issues are addressed in more detail in part 3, below.

<sup>35</sup> See e.g., Eilionoir Flynn & Anna Arstein-Kerslake 'Legislating personhood: realising the right to support in exercising legal capacity' (2014) 10 *Int JLC* 81; Genevra Richardson 'Mental Disabilities and the Law: From substituted to supported decision-making?' (2012) 65 *Current Legal Problems* 333; Wayne Martin, Sabine Michalowski, Timo Jütten & Matthew Burch (2014) *Achieving CRPD Compliance: Report submitted to the Ministry of Justice* Essex Autonomy Project, available at: <<http://autonomy.essex.ac.uk/mca-compliance-with-the-uncrpd>> accessed on 6 March 2015.

<sup>36</sup> E.g., Mary Donnelly 'Best Interests, Patient Participation and the Mental Capacity Act 2005' (2009) 17 *Med L Rev* 1; John Harrington 'Deciding best interests: Medical progress, clinical judgment and the 'good family'' (2003). *Web Journal of Current Legal Issues*, 3.

<sup>37</sup> See, e.g., Hilary Brown and Liz Marchant 'Using the Mental Capacity Act in Complex Cases' (2013) 18(2) *Tizard Learning Disability Review* 60; Shazia Choudhury 'Best Interest in the MCA 2005 – What can Healthcare Law Learn from Family Law?' (2008) 16 *Health Care Analysis* 240-251; Michael Dunn 'Commentary on "Using the Mental Capacity Act in complex cases"' (2013) 18(2) *Tizard Learning Disability Review* 70.

<sup>38</sup> Soren Holm and Andrew Edgar 'Best Interest: A Philosophical Critique' (2008) 16 *Health care Analysis* 197.

<sup>39</sup> Phil Fennell 'Best Interests and Treatment for Mental Disorder' (2008) 16 *Health Care Analysis* 255.

<sup>40</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

<sup>41</sup> Art 12(3) CRPD.

<sup>42</sup> Art 12(4) CRPD.

re-focused in ways that avoid discrimination against persons with intellectual disabilities, and that support everyone with intellectual disabilities to make their own testamentary decisions whenever possible.

## The Historical Development of Statutory Wills

The power to make wills and codicils for a ‘mentally disordered patient’ was first enacted in 1969.<sup>43</sup> This power was retained in the Mental Health Act 1983 and is now contained in the MCA,<sup>44</sup> where the only change to the statutory framework was to place it inside the ‘best interests’ decision-making framework that lies at the heart of the MCA.<sup>45</sup> There has been surprisingly little academic commentary on statutory wills, though a small practitioner-focused literature has developed in recent years.<sup>46</sup> Hansard debates on the Administration of Justice Act 1969 contain little by way of elucidation as to why this new power to make wills was needed. The then Attorney General, Sir Elwyn Jones, introduced the relevant provisions to the House of Commons as follows:

The Court of Protection has power at present under the Mental Health Act, 1959 to direct a settlement of all the property of a mental patient whose affairs it is managing. A patient cannot, however, make a valid will except during a lucid interval, because he is incapable of understanding the nature of the business on which he is engaged. The court has, in the past, avoided the injustice that might arise from this inability to make a valid will by authorising a settlement under the power to which I have just referred. Although the existing law is intended to safeguard the position of the mental patient and those for whom he might have been expected to provide, its practical effect is to place him at a disadvantage.<sup>47</sup>

Three examples of the ‘disadvantage’ were referred to: 1) a person who has a valid will, subsequently loses testamentary capacity, and her personal relationships change (personal factors); 2) that ‘to make provision for the patient’s family or for a servant by a legacy or an annuity in a will would be far less complicated and less expensive than by using the process of a settlement’<sup>48</sup> (technical factors) and 3) that disposing of property by settlement results in Capital Gains Tax liability and stamp duty, which can be avoided if a will is used instead (tax planning). In the reported case law, these three issues are often inter-woven in the rationale for the creation of a statutory will.

The examples given in Hansard on the introduction of statutory wills reflect 1960s social ideals and understandings of ‘deserving’ inheritance, as well as the complexities of family law at that time. Through the Attorney General’s comments during the Commons second reading debate we can see that a cautionary tale of the undeserving legatee, and examples of those who would be more deserving, are used to introduce the provisions:

For instance, a patient might, on marriage, have made a will in favour of her husband; subsequently, he may leave her, obtain a divorce abroad which is not recognised by the English courts, and re-marry. Meanwhile, the wife becomes mentally ill and is no longer of testamentary capacity. The only way to prevent the will from taking effect is by means of a settlement, but it would be much simpler and cheaper if a new will could be made for the patient; and, furthermore, to make provision for the

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<sup>43</sup> Administration of Justice Act 1969, s 17, amending the Mental Health Act 1959.

<sup>44</sup> Mental Capacity Act 2005, s 18 and sch 2, paras 1-4.

<sup>45</sup> Mental Capacity Act 2005, s. 1(5): “An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.”

<sup>46</sup> See, for example: Stuart Barber ‘Re C (A Patient) revisited: how strong is the family’s claim?’ (1996) 1 PCB 34; Barbara Rich ‘Re P: statutory wills: an epitaph for the “lucid interval” (2009) 3 PCB 210; Angharad Palin ‘Advising the disabled: Part 3: lasting powers of attorney, deputyship appointments, statutory wills and benefits’ (2010) 3 PCB 197; Samantha Hamilton ‘Best Interests in Statutory Will and Gift Applications: Practical Implications of *Re G (TJ)*’ (2011) 1(3) *Elder Law Journal* 331; Paul Hewitt, Stephen Richards and Natasha Stourton ‘The Court of Protection, charities and the evolution of best interests’ (2012) 2(2) *Elder Law Journal* 264; Denzil Lush ‘The evolution of the statutory will jurisdiction’ (2014) 4 (2) *Elder Law Journal* 173.

<sup>47</sup> HC Deb 5 February 1969, Vol 777, Col 416.

<sup>48</sup> *Ibid*, Col 417.

patient's family or for a servant by a legacy or an annuity in a will would be far less complicated and less expensive than by using the process of a settlement.<sup>49</sup>

One startling aspect of this parliamentary discourse is the extent to which the imaginary 'mental patient' is both classed and gendered: she is a wife who succumbs to mental illness (while her husband illicitly divorces her in order to remarry); she would want to change her will to ensure that her biological family and servants benefit on her death, rather than her deserting husband. Whilst the issues of desertion and unrecognised divorce were largely resolved during family law reforms in the 1970s and 1980s,<sup>50</sup> divorce does still have an impact on wills, and thus retains some relevance for the issue of statutory wills. Until 1982, divorce had no effect on the validity of a will, in contrast to marriage which revokes a pre-existing will.<sup>51</sup> Contemporary rules hold that on divorce the former spouse is deemed for most purposes to have pre-deceased the testator.<sup>52</sup> These reforms suggest that there is now less of a pressing need to be able to execute a statutory will on behalf of a divorced person who loses testamentary capacity. Indeed, this particular example is not one that is evident in either the contemporary or historical reported case law on statutory wills. Rather, the reported cases (at least prior to the MCA), were chiefly concerned with ensuring that the estate passed to the most appropriate persons, whether by way of will or by *inter vivos* settlement.

A clear example of the benefits the power to execute a statutory will can provide is the case of Miss Olive St. Barbe,<sup>53</sup> an elderly woman who moved into a nursing home in June 1979, aged 92. She had never married, and her nearest relatives were two nephews. Miss St. Barbe made a will in September 1979, which divided her estate between a range of relatives "by blood or marriage" as well as the manager of the nursing home in which she resided. Shortly after executing this will, she married Mr Davey, a 48 year old employee of the nursing home. Her will was therefore automatically revoked.<sup>54</sup> Her family were unaware of the marriage. As part of a subsequent application to the Court of Protection for the appointment of a receiver, the marriage certificate was amongst the papers. Evidence was presented that by this time Miss St Barbe lacked testamentary capacity. The Court appointed the Official Solicitor as receiver, who subsequently applied for authorisation for the execution of a statutory will, in the same terms as the September will. This was authorised and the statutory will was executed less than a week before Miss St. Barbe's death. In this case, the existence of a power to execute a statutory will may well have prevented an injustice arising from the (presumed) 'gold-digging' behaviour of Mr Davey.

The contents of the statutory will in *Re Davey* were straightforward: there was a previously valid recent will, made when the testatrix had capacity, which was effectively re-instated by the court. A somewhat less straightforward set of circumstances arose in the case of *In Re D (J)*.<sup>55</sup> Here, D was a woman with five children, one of whom (A) had been living with her at the time she executed a valid will. This will bequeathed D's house, furniture and personal effects to A, and shared the residue between A and her four siblings. As such, this case departed from the more normative approach of sharing inheritance equally between all relatives with the same genealogical status, into a more complex formula, varying the inheritance to each child on the basis of relationship.<sup>56</sup> The complexity in this case arose when D subsequently sold her house, resulting in ademption of the bequest to A, thus leaving A in the same position as her siblings under their mother's will. A statutory will was executed which effectively reinstated D's previously settled testamentary wishes, despite

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<sup>49</sup> *Ibid*, Col 416-417.

<sup>50</sup> Matrimonial Causes Act 1973; Family Law Act 1986; Matrimonial and Family Proceedings Act 1984.

<sup>51</sup> Wills Act 1837, s. 18. This now also applies to civil partnership, though many who enter into civil partnerships appear unaware of the provision: Monk, (n 8).

<sup>52</sup> Law Reform (Succession) Act 1995, s 3 and s 4. There was a period between 1982 and 1996 where 'any devise or bequest to the former spouse shall lapse' but this led to the potential for injustice in some cases. An example is *Re Sinclair* [1985] Ch 446, where the failure of a will following divorce meant that the estate passed to family on intestacy, rather than to a charity that could have benefited if the rules were differently formulated.

<sup>53</sup> *In Re Davey* [1981] 1 WLR 164.

<sup>54</sup> Wills Act 1837, s 18.

<sup>55</sup> *In Re D (J)* [1982] Ch 237.

<sup>56</sup> These different approaches have been respectively been described as 'ascriptive' and 'relational' positioning of kin: Janet Finch, Lynn Hayes, Jennifer Mason, Judith Masson & Lorraine Wallis *Wills, Inheritance, and Families* (Oxford, Clarendon Press, 1996), 164.

her change in circumstances. As with the outcome in *Re Davey*, the use of the statutory will in *In Re D (J)* appeared to provide an effective, fair and just resolution to ensure that the testators' wishes were carried out despite a change in circumstances.

The approach to statutory wills developed in *Re D (J)* subsequently became the general criteria for the execution of such wills until the changes brought about by the MCA, which came into force in 2007.<sup>57</sup> In that case, Sir Robert Megarry V-C set out five factors which should guide the execution of a statutory will.<sup>58</sup> First, the execution of the will was assumed to take place at a point where the patient was having a 'brief lucid interval'; second, that during this 'brief lucid interval' the patient had a full awareness not only of her past, but also full knowledge and understanding that as soon as the will is executed, she would return to her actual mental state, with the actual prognosis for her future health. Third, it is the actual patient in question, not a hypothetical patient, nor 'the patient on the Clapham omnibus,' who is to be considered in this hypothetical substitute decision making process.<sup>59</sup> Fourth, it was to be assumed that during the hypothetical lucid interval, that the patient was 'being advised by competent solicitors,'<sup>60</sup> (though it did not necessarily follow that she would keep to the advice given). Finally, the approach to be taken was 'in all normal cases the patient is to be envisaged as taking a broad brush to the claims on his bounty,'<sup>61</sup> rather than a detailed attempt to repay the various kindnesses that the patient received from others over her life. In many respects these factors were simply an extension of the approach previously taken to orders relating to gifts and settlements, and the 'curious assumptions'<sup>62</sup> used to guide those decisions prior to the creation of the power to execute a statutory will.

Whereas both *Re Davey* and *Re D (J)* were relatively uncontroversial re-instatements of previously settled testamentary wishes, statutory wills present more of a challenge to social ideals of inheritance where the person lacking mental capacity has either never made a will, or has never had testamentary capacity. Two cases under the pre-2005 legislation provide a starting point for discussion.<sup>63</sup> *Re C (a patient)*<sup>64</sup> was the first reported case where a statutory will was executed on behalf of a person lacking capacity where she had not previously made a will. The problem that the court was faced with was how to proceed where it was not possible to take the approach set out in *Re D (J)* of following the actual patient's views before she became incapacitated, because the patient in question had been intellectually disabled since birth and had never had testamentary capacity. Miss C was, however, wealthy with assets valued at some £1.6 million. Had a statutory will not been available to the court as a means of distributing her estate, Miss C's next of kin (descendants of her maternal and paternal aunts) would have inherited in equal shares under the intestacy rules. *Inter vivos* settlements would have to have been used in order to make any appropriate donations to charity, or to recognise specific individuals beyond the strict intestacy rules.

The key difference here, which required a departure from the approach set out in *Re D (J)*<sup>65</sup> was that rather than being able to rely on evidence about Miss C's previous desires in order to make a subjective judgment, Hoffman J made the assumption that Miss C "would have been a normal decent person, acting in accordance with contemporary standards of morality,"<sup>66</sup> clearly drawing on the social ideals of inheritance at that time. He then went on to suppose that a person in Miss C's circumstance would be influenced by the care she had received from the community, including the National Health Service, and various charitable organisations, alongside an appreciation of the fact that her fortune had come to her through family inheritance. These dual influences guided Hoffman J's construction of Miss C's statutory will:

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<sup>57</sup> *In Re P (Statutory Will)* [2009] EWHC 163 (Ch).

<sup>58</sup> *Re D (J)* [1982] Ch 237, 243-244.

<sup>59</sup> *Ibid* 243.

<sup>60</sup> *Ibid* 244.

<sup>61</sup> *Ibid*.

<sup>62</sup> *In Re L (WJG)* [1966] Ch 135, 142 (Cross J).

<sup>63</sup> *Re C (a patient)* [1991] 3 All ER 866; *Re S (Gifts by Mental Patient)* [1997] 2 F.C.R. 320.

<sup>64</sup> [1991] 3 All ER 866.

<sup>65</sup> [1982] Ch 237.

<sup>66</sup> *Re C(a patient)* [1991] 3 All ER 866, 870.

Miss C's estate is relatively large, and this enables her to satisfy in full the claims of both community and family. I think that she would have recognised that although none of her family have ever been to see her, this was not on account of any lack of feeling on their part. None of them appear to have known of her existence. Taking her family as a whole, therefore, I think that she would have wished to distribute her estate equally between them and the community.<sup>67</sup>

If we compare the approach here to the findings from contemporaneous empirical research into probated wills,<sup>68</sup> the contents of the statutory will appear unusual, despite Hoffman J's adherence to 'contemporary standards of morality'. In Finch et al's detailed exploration of 800 wills (200 each from the years 1959, 1969, 1979 and 1989), just 9 per cent of all wills named a charity or other organisation as a beneficiary. Some 92 per cent named at least one relative in their will, but only 15 per cent named a relative as distant as those who would benefit from this estate.<sup>69</sup> In their random sample of wills, cousins (as all the beneficiaries in this will would be) were most likely to receive cash bequests, and only very few wills included bequests of a share of the total estate or residue to cousins.<sup>70</sup> Additionally, more distant relatives, including cousins, are much more likely to receive 'relational' bequests.<sup>71</sup> There was one notable example of 'relational' positioning that is worthy of comment in this case: a legacy of £15,000 was written into the will for the grandchild of a cousin who had Down's Syndrome. In the words of Hoffman J: 'I think that Miss C would wish to recognise her community of misfortune with this child by special provision.'<sup>72</sup> Whilst clearly a noble sentiment, the reference to their 'community of misfortune' here highlights not only the inherent subjectivity of writing statutory wills, but also sheds light on the cultural valuation of intellectual disabilities at that time. Overall, however, the approach in *Re C* can be understood as an attempt to place a veil of objectivity over the construction of statutory wills for those who had never had capacity, rather than a subjective, person centred, approach.

The relatively arbitrary nature of the outcome in *Re C* is underscored when we consider *Re S (Gifts by Mental Patient)*.<sup>73</sup> In this case of very similar fact to *Re C*, Mr Justice Ferris noted that:

This is not an area in which judicial precedent really has any weight and it seems to me that there is as much scope for somewhat differing results to be arrived at in different cases as there is for different individuals who are of full capacity but in similar personal and economic circumstances to make substantially different dispositions of their estates.<sup>74</sup>

Rather than follow Hoffman J's approach, Mr Justice Ferris sought to disrupt as little as possible the distribution of the estate that would happen under the intestacy rules, given that without the exercise of the Court's discretion under the statutory framework<sup>75</sup> the entire estate would be distributed through the intestacy rules. Indeed, Mr Justice Ferris went so far as to say:

It seems to me that I ought not to authorize the making of dispositions to charity except to the extent that I have a reasonable degree of confidence that not only is it objectively reasonable but that it is something which the patient herself would have wished to be done if she were of full capacity and aware of the circumstances.<sup>76</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> Finch et al (n 56)

<sup>69</sup> Ibid 70-71.

<sup>70</sup> In total, Finch et al's analysis of 800 wills included 9 cousins who received a bequest of this nature, which was less than the number of friends (17) who received such a bequest. Interestingly, friends were also more likely than cousins to receive a cash bequest, the testators home, or a bequest of personal property: Finch et al (n 56) 101.

<sup>71</sup> Ibid 165.

<sup>72</sup> *Re C (a patient)* [1991] 3 All ER 866, 872.

<sup>73</sup> *Re S (Gifts by Mental Patient)* [1997] 2 FCR 320.

<sup>74</sup> Ibid 322.

<sup>75</sup> Mental Health Act 1983, s. 95.

<sup>76</sup> *Re S (Gifts by Mental Patient)* [1997] 2 FCR 320, 323.

Here, the court described Hoffman J's approach from *Re C* as requiring an 'objectively reasonable' standard, and added a substituted judgement element seeking to focus on what 'the patient herself would have wished' where a charitable donation is proposed. In many respects, this approach, and the approach set out in *Re D (J)* can be read as compatible with Article 12 UN CRPD, as they place the will and preferences of the individual at the heart of the decision-making process.

As will be clear from the above discussion, prior to 2005, there were three complementary aims evident in judicial reasoning about statutory wills. Firstly, statutory wills could reinstate the settled testamentary wishes of a person who had previously made a will but had lost the capacity to do so, in the face of changed circumstances that would frustrate the testator's intentions. Secondly, where there was no previous will, or where a person had never had testamentary capacity, any statutory will should depart as little as possible from the intestacy rules. Finally, donations to charity would be possible in a statutory will, in circumstances where a) there was the means in the estate; b) it was objectively reasonable to donate; and c) it was thought that the person themselves would have wished to so donate. A final purpose of statutory wills is more or less explicit in the case law: that of tax and estate planning.<sup>77</sup> People with intellectual disabilities should not, of course, be disadvantaged in their tax planning (as to do so would be discriminatory), indeed making the most of possible tax reliefs is an important aspect of making wills, statutory or not. Such approaches do, however, raise important policy questions as to the extent to which saving beneficiaries from inheritance tax is a legitimate aim of the legislation permitting statutory wills, given that this framework only applies to those with intellectual disabilities.

## Contemporary Approaches to Statutory Wills

The MCA brought with it a significant change in how English law deals with persons who lack the mental capacity to make some or all legally-relevant decisions about their lives, including those relating to inheritance.<sup>78</sup> This part turns to an exploration of the development of Court of Protection jurisprudence on statutory wills under the MCA. It will be argued that whilst the MCA demands a 'best interests' decision-making framework in all cases, statutory wills stretch this reasoning to breaking point. The aim of this section is to explore the impact of the imposition of a best interests decision making framework onto statutory wills, and therefore expose the limitations of the expanded use of best interests decision-making in mental capacity law since the MCA.

## Statutory Wills as Best Interests Decisions

The first consideration of statutory wills under the MCA framework came in 2009.<sup>79</sup> As is common in reporting cases concerning the affairs of vulnerable people, little information was provided in the case report about the facts giving rise to the matter, except that P was domiciled in California, owned immovable property in England and Wales, and "there is no doubt that he now lacks mental capacity".<sup>80</sup> Not only was this the first statutory wills case under the new legislation, it was also one of the first to deal in significant detail with the new statutory checklist for determining best interests set out in s. 4 MCA. In the judgement, Lewison J quotes from the Explanatory Notes to the Mental Capacity Bill to note that: 'best interests is not a test of 'substituted judgment' (what the person would have wanted), but rather it requires a determination to be made by applying an objective test as to what would be in the person's best interests.'<sup>81</sup> He then used this as the rationale for going on to say: 'It follows from this, in my judgement, that the guidance given under the Mental Health Acts 1959 and 1983 about the making of settlements or wills can no longer be directly applied to a decision being made under the 2005 Act.'

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<sup>77</sup> See, for example, Hoffman J's comments in *Re C* that "there is still ample scope for a substantial distribution which would give the family a chance of saving inheritance tax" at 871, or the comments from Ferris J that "the will ought, I think, to provide expressly for the position as to inheritance tax on the inter vivos gifts in the event of the patient dying within seven years of the gifts" in *Re S* at 324.

<sup>78</sup> Mental Capacity Act 2005, s. 18(1)(i). For detailed consideration of the provisions and implications of the MCA, see Peter Bartlett *Blackstone's Guide to the Mental Capacity Act* (2<sup>nd</sup> edn, OUP 2008).

<sup>79</sup> *Re P (Statutory Will)* [2009] EWHC 163 (Ch), [2010] Ch 33.

<sup>80</sup> *Ibid* [8].

<sup>81</sup> *Ibid* [37].

Lewison J provided six reasons for his decision that the MCA had changed the approach to statutory wills: 1) there is no longer a need for the ‘mental gymnastics’ of the ‘brief lucid interval’; 2) ‘best interests’ rather than ‘substituted judgement’<sup>82</sup> is the way to approach the decision; 3) the decision must be made with regard to P’s ‘present wishes and feelings, which ex hypothesi are wishes and feelings entertained by a person who lacks mental capacity in relation to the decision being made on his behalf.’; 4) the same approach to best interests should be taken for all decisions made on behalf of P; 5) ‘all relevant circumstances’ must be considered; and 6) P should be encouraged to participate in the decision, his past and present wishes should be considered, and the views of third parties should be ‘taken into account.’<sup>83</sup> This, in turn, is used as justification for a rejection of the previous ‘substituted’ decision making approach to statutory wills.<sup>84</sup> Importantly, there had been no express intention by Parliament in the passage of the MCA 2005 to change the law relating to statutory wills. Nor, indeed, was there any suggestion from the Law Commission in their 1995 report on Mental Incapacity<sup>85</sup> that the approach under the previous legislation to statutory wills was incorrect. Rather, statutory wills were hailed as an exemplar of the courts already engaging in decision-making with reference to the factors that P “would have considered” if able to do so.<sup>86</sup>

Subsequently, in the practice note in *Re M (Statutory Will)*,<sup>87</sup> Munby J largely echoed Lewison J’s approach in *Re P (Statutory Will)*. Leaving aside the subjective outcome in the case,<sup>88</sup> it is vital to note the influence that *Re M (Statutory Will)* and *Re P (Statutory Will)* in combination have had on the interpretation of best interests generally under the MCA. There are two key elements of the reasoning in *Re M (Statutory Will)* that have had a significant impact on future MCA cases: first, the idea that the weight to be attached to P’s wishes and feelings will always be ‘case-specific and fact-specific’; and second, the drawing into mental capacity law of the principle that in many cases ‘there may ... be one or more feature or factors which ... are of “magnetic importance” in influencing or even determining the outcome.’<sup>89</sup> Whilst the latter of these is somewhat less controversial, the case by case weighting of P’s wishes and feelings places the contemporary interpretation of the MCA at odds with the UN CRPD Article 12, and the approach recommended by the Committee on the Rights of Persons with Disabilities, who have recently recommended replacing all ‘best interests’ decisions with decision-making that reflects the ‘best interpretation of the will and preferences of the individual’.<sup>90</sup>

The application of the MCA approach to decision-making to statutory wills raises important questions relating to ‘best interests’, and specifically to their relevance after death. In *Re M (Statutory Will)*, Munby J set out the following justification for the use of best interests as a guiding framework for decisions about wills:

Best interests do not cease at the moment of death. We have an interest in how our bodies are disposed of after death, whether by burial, cremation or donation for medical research. We have ... an interest in how we will be remembered, whether on a tombstone or through the medium of a will or in any other way. In particular ... we have an interest in being remembered as having done the “right thing”, either in life or, post mortem, by will.<sup>91</sup>

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<sup>82</sup> There is some confusion in contemporary mental capacity law about terminology, and the differences between ‘best interests’ and ‘substituted judgment’, as the UN Committee on the Rights of Persons with Disabilities uses the term ‘substituted judgement’ to mean ‘best interests’, in contrast to supported decision-making whereas here Lewison J distinguished between the two, suggesting that ‘best interests’ is not a ‘substituted’ decision making framework. Rather, the previous approach (following the rules set out in *Re D (J)*) was a ‘substituted judgement’ approach as it sought to make the decision that the person themselves would have made.

<sup>83</sup> *Re P (Statutory Will)* [2009] EWHC 163 (Ch) [38].

<sup>84</sup> *In Re D (J)*[1982] Ch 237.

<sup>85</sup> Law Commission *Mental Incapacity* (Law Com no 231, 1995).

<sup>86</sup> *Ibid* [3.30].

<sup>87</sup> *Re M (Statutory Will)* [2009] EWHC 2525 (Fam); [2011] 1 WLR 344.

<sup>88</sup> Though the facts were complex, the final conclusion was, in essence, to reinstate M’s previously settled testamentary intentions.

<sup>89</sup> *Ibid* [32].

<sup>90</sup> Committee on the Rights of People with Disabilities (2014) General Comment No. 1 on Article 12: Equal recognition before the law CRPD/C/GC/1 para 21.

<sup>91</sup> *Re M (Statutory Will)* [2009] EWHC 2525 (Fam) [38].

While this purports to be a justification for post-mortem to ‘best interests’, the majority of the reasoning actually appears to be referring to ‘interests’ rather than ‘best interests’. Whereas ‘interests’ suggests matters that we might all have a view on, ‘best interests’ implies a layer of objectivity that sits on top of ‘interests’, which makes clear that this is the preeminent approach. It seems difficult to think of the decision whether to be buried or cremated as a ‘best interests’ matter, rather it is a private matter that depends on a complex interplay of factors like, for example, religious belief, family practices and environmental concerns.<sup>92</sup> Similarly, whilst donation of bodies or body parts to medical research might be authorised by family members, the principles of ethical research practice and particularly the importance of personal autonomy and informed consent weigh against the possibility of others making the decision to donate on our behalf. In terms of ‘how we are remembered’, we may well have an interest, we may make plans, but we must always depend on others to carry these out. Our relatives may erect a tombstone, but the epitaph may not be as we would wish; a will may be challenged. We have little control over how we are remembered either by friends and family or by the wider world.

Consider *Re D (Statutory Will)*.<sup>93</sup> Here, there was a dispute about the validity of a home-made will that disinherited one of Mrs D’s three children. Also mentioned in the judgement is a forged Enduring Power of Attorney document, and some discussion of two of her children taking control of her finances without due authority. The court decided that the execution of a statutory will can be ordered where there is a dispute over the validity of a recent will, in order to avoid a probate dispute. The Court of Protection does not have jurisdiction to determine probate disputes, yet by authorising a statutory will in this case, they were able to circumvent the legal process that would usually apply where the validity of a will is questioned. In the words of the court:

Given the importance attached by the court to the protected person being remembered for having done the “right thing” by his will, it is open to the court, in an appropriate case, to decide that the “right thing” to do, in the protected person’s best interests, is to order the execution of a statutory will, rather than to leave him to be remembered for having bequeathed a contentious probate dispute to his relatives and the beneficiaries named in a disputed will.<sup>94</sup>

This is rather surprising reasoning: to be remembered for ‘doing the right thing’<sup>95</sup> in this context seems unlikely. Where a court is making a will behalf of someone (either because they have not done so themselves, or because questions have been raised about their testamentary capacity at the date of the execution of the most recent will), it is the Court acting, and not the individual. In *Re G (TJ)*<sup>96</sup> Morgan J noted that there were two complicating factors to this analysis. First, he noted that unless the person has been involved in making the relevant testamentary decisions, it is the Court, rather than the person who has made the gift or determined the terms of the will. Second, he pointed out that (particularly in contentious cases): ‘some families do not agree...Some family members will think that the court has done the right thing and some will think that the court has done the wrong thing.’<sup>97</sup> Similarly, in *Re JC*,<sup>98</sup> Senior Judge Lush cast doubt upon the assistance provided by the concept of the person being seen to have done ‘the right thing’, given the propensity of the person in that particular case to do the ‘wrong thing’. As such, the rationale in the earlier cases that best interests are engaged in statutory wills cases because of our interests in being remembered for having done the right thing appears erroneous.

Looking across the outcomes of *Re P (Statutory Will)*, *Re M (Statutory Will)* and *Re D (Statutory Will)*, there is little to distinguish them from the approach that may have been expected under the previous legislation, despite the new focus on ‘best interests’ as a guiding principle in the decision-making process. In both of these

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<sup>92</sup> Sheelagh McGuinness and Margaret Brazier ‘Respecting the Living Means Respecting the Dead too’ (2008) 28(2) OJLS 297.

<sup>93</sup> *Re D (Statutory Will)* [2010] EWHC 2159 (Ch); [2012] Ch 57.

<sup>94</sup> *Ibid* [16].

<sup>95</sup> *Re P (Statutory Will)* [2009] EWHC 163 (Ch); *Re M (Statutory Will)* [2009] EWHC 2525 (Fam).

<sup>96</sup> *Re G(TJ)* [2011] WTLR 231.

<sup>97</sup> *Ibid* [53].

<sup>98</sup> *Re JC* [2012] WTLR 1211.

cases where the details of the statutory will are provided,<sup>99</sup> the outcome was a reinstatement of the terms of a previously settled testamentary document. It is certainly possible to interpret the decision to roll back to a previously valid will as a ‘best interests’ decision, and much of the reasoning in these cases purports to do just that. It is, however, also clear that by reinstating a previously valid will, the testator’s known wishes and preferences are (appropriately) elevated above other ‘best interests’ considerations. As with the case law prior to the MCA, things become more troubling when there is no valid will to revert to.

### Writing Statutory Wills in P’s Best Interests?

The first reported statutory wills case under the new legislation where there was limited evidence as to the testator’s previously settled intentions was that of *NT v FS*.<sup>100</sup> Here, a man (F) with dementia had a significant estate, valued at somewhere in the region of £3 million. F was intestate, though there was evidence of an invalid will<sup>101</sup> dating from the mid-1980s. There were a complex range of familial relationships in this case, including F’s cohabiting partner (N), his son (K), his elderly mother (T), three siblings (I, B and Q) and a half-uncle (L), all of whom claimed an interest in his assets. The Court described F as ‘a secretive man’, who ‘kept his life compartmentalised.’<sup>102</sup> The rules of intestate succession would have meant that the vast majority of F’s estate would go to K, his son. Additionally, N would have had a claim under the Inheritance (Provision for Family and Dependents) Act 1975, but given that she was a cohabiting partner, rather than a spouse, this would have been limited to the ‘maintenance standard’, rather than the more generous ‘surviving spouse standard’.<sup>103</sup> None of the other family members listed would have had an entitlement to inherit on intestacy, nor would they have had a straightforward claim under the 1975 Act, though it is possible that T may have had a claim as a dependant under s. 1(1)(e).<sup>104</sup> The terms of the statutory will, and the relative proportions of the estate that should fall to each of the different family members formed the substance of the decision in the Court of Protection.

The ultimate decision in the case was a significant departure from the intestacy rules, dividing F’s assets in varying shares between his partner, son and family members. The justification given by Behrens J for the proportion of the estate that went to F’s mother, siblings and uncle was:

Members of the S family have made a very significant contribution to F’s wealth. I, L and Q all contributed to it without payment before F’s dementia. I and B have contributed since. If it were not for these contributions I suspect that the value of F’s estate would be significantly less than it is.<sup>105</sup>

On the one hand, there was ‘plenty to go round’ in this case, and the Court was able to conduct an exercise in redistributive justice by sharing F’s fortune between a wide range of family members. Alternatively, the division could be understood as a mechanism for rewarding past and present support with promised future payments.<sup>106</sup> Either way, the question of F’s best interests was given surprisingly little substantive consideration in the judgment.

Three main issues relating to F’s best interests were raised in this case: first, that ‘there is no dispute that F lacks the capacity to make a will. There is equally no dispute that it is in his best interests that such a will be made.’<sup>107</sup> Accordingly, no justification was provided as to why it was in F’s best interests for a will to be made, rather than allowing his estate to be distributed following the rules of intestacy and provision for family dependants. Intuitively, we can see that it would be in the interests of F’s wider family for a statutory will to

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<sup>99</sup> *Re M (Statutory Will)* [2009] EWHC 2525 (Fam); *Re D (Statutory Will)* [2010] EWHC 2159 (Ch).

<sup>100</sup> *NT v FS and others* [2013] EWHC 684 (COP); [2013] WTLR 867.

<sup>101</sup> The document in question had been signed, but not witnessed.

<sup>102</sup> *NT v FS and others* [2013] EWHC 684 (COP) at [17].

<sup>103</sup> For a discussion of the differences between the two standards, see R. Kerridge *Parry and Kerridge: The law of Succession* 12<sup>th</sup> Edition (2009, Sweet & Maxwell), chapter 8.

<sup>104</sup> Inheritance (Provision for Family and Dependents) Act 1975, s1 (2). See Douglas, 2014 (n4) for a detailed discussion of the operation of this discretionary regime.

<sup>105</sup> *NT v FS* [2013] EWHC 684 (COP) [90].

<sup>106</sup> For an interesting set of arguments concerning recognising carers’ claims under private law, see Brian Sloan *Informal Carers and Private Law* (2013, Oxford, Hart).

<sup>107</sup> *NT v FS* [2013] EWHC 684 (COP) [1].

be made (so that they could benefit financially on his death). The legal rationale for the application was set out early in the judgement, but this did not include any discussion of F's present wishes and feelings on the matter, nor any detailed discussion of F's best interests.<sup>108</sup> The second substantive issue for the court revolved around F's invalid will (dating from 1986), which it was determined should not be regarded as the starting point for the determination of F's best interests<sup>109</sup> because the weight to be placed on F's wishes was, following Munby J's judgement in *Re M (Statutory Will)* 'case-specific and fact specific'.<sup>110</sup> Behrens J did, however, place emphasis on the 1986 invalid will as probably representing F's wishes and feelings (at that time) that his mother and his siblings should 'be included as objects of his bounty'.<sup>111</sup> Finally, Behrens J made clear that he did not place any weight on the issue of being remembered as having 'done the right thing',<sup>112</sup> following Morgan J's reasoning in *Re G (TJ)*.<sup>113</sup> Vitally, none of these aspects of the discussion of best interests shed any light onto the substantive content of considerations of F's best interests in relation to either the need for a statutory will or the distribution of his estate between the various beneficiaries.

The specific determination of who should receive which proportions of F's estate through the statutory will was arrived at through a process of discussion and compromise between the submissions of the various parties involved in the case.<sup>114</sup> Whilst this is not an unusual approach,<sup>115</sup> it is difficult to see how this approach can be reconciled with the MCA focus on all decisions being in the 'best interests' of F. It could, at a stretch, be argued that the various submissions from different parties represent an attempt to comply with the direction under s. 4(7) MCA that in coming to a best interests decision, the decision maker should take into account the views of carers and family members. Section 4 MCA also requires consideration of F's past and present wishes and feelings, his beliefs and values, and the other factors he would have taken into account if he were making this decision.<sup>116</sup> As is always the case when only the judgment is available for academic scrutiny, we cannot be clear as to the ways that the various submissions were framed. It is entirely possible that each of the submissions was focused on a discussion of F's wishes, beliefs and values and that the rationale for the various proportional splits suggested were arrived at as a consequence of considering how F would have liked to remember his family members in his will. Yet it is also entirely possible that the claims were concerned more with the extent of desert that each of the parties who stood to benefit could demonstrate.

The latter approach is more clearly hinted at in the one excerpt from those submissions (a letter from F's Deputy) that was reproduced in the judgment.<sup>117</sup> In this excerpt, the relative proportions are expressed as representing (for example) the length of F's relationship with N, or the "important contribution" I, B, Q and L have made throughout F's life. This certainly corresponds with socio-legal literature on wills, intestacy and inheritance, and these are themes and approaches to inheritance that are common in discussions of wills and expectations of inheritance.<sup>118</sup> Consider, for example, the 'relational' positioning of kin found in some of the wills analysed by Finch et al, where more distant family relations were more likely to be treated differently, reflecting differences in interpersonal relationships.<sup>119</sup> It also echoes the differences in public opinion about

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<sup>108</sup> *Ibid* [8].

<sup>109</sup> *Ibid* [77].

<sup>110</sup> *Ibid*.

<sup>111</sup> *NT v FS* [2013] EWHC 684 (COP) [77].

<sup>112</sup> *Ibid* [6].

<sup>113</sup> *Re G (TJ)* [2011] WTLR 231.

<sup>114</sup> See, for example, the table presented in the judgement *NT v FS* [2013] EWHC 684 (COP) [78].

<sup>115</sup> See, e.g., *Treadwell (Deceased)* 2013 WL 4788832, where Senior Judge Lush stated "As often happens in statutory will proceedings, a compromise was reached among the parties" [38].

<sup>116</sup> MCA s. 4(6)(a)-(c).

<sup>117</sup> *NT v FS* [2013] EWHC 684 (COP) [79].

<sup>118</sup> Finch et al (n56); Janet Finch & Jennifer Mason *Passing on: Kinship and inheritance in England* (London, Routledge, 2000); Karen Rowlingson & Stephen McKay *Attitudes to inheritance in Britain* (Bristol: Policy Press, 2005); Alun Humphrey, Lisa Mills, Gareth Morrell, Gillian Douglas and Hilary Woodward *Inheritance and the Family: Attitudes to Will-Making and Intestacy* (NatCen, 2010) < <http://www.natcen.ac.uk/media/23979/inheritance-family-attitudes-will-making.pdf> > accessed on 16 June 2014.

<sup>119</sup> Finch et al (n 56).

rights to inheritance for cohabitants depending on the length of the relationship.<sup>120</sup> They are not, however, themes that reflect legal understandings of best interests, either in medical law or family law, which are focused on the individual for whom the decision is being made. Consequently the justification for the use of best interests decision-making in statutory wills cases remains opaque.

The problem of best interests decision making in respect of statutory wills is compounded in cases where there is little agreement between the parties about who deserves to inherit, or where those who would have been the ‘natural objects of P’s bounty’ are considered undeserving by the courts. Two further recent cases are notable in this regard. In *Treadwell (Deceased)*,<sup>121</sup> Mrs Treadwell’s son by her first marriage, who had served as her deputy, was required to pay back some £44,375 from his security bond. This followed a finding that he had made unauthorised gifts to his relatives from his mother’s assets whilst she was alive in an attempt to circumvent the provisions of a statutory will that left a significant proportion of his mother’s estate to his step-sisters. Similarly, in *Re Meek*<sup>122</sup> two former deputies were excluded as possible beneficiaries of a statutory will written on behalf of Mrs Meek (who was intestate) after they had been refused ratification of extravagant gifts to themselves, their relatives and to various charities. Whilst this can be construed as a necessary protection of Mrs Meek’s best interests to be protected from financial abuse, it can also be understood as ‘punishment’ of the former deputies for their financial wrongdoing.

Even more interesting in *Re Meek* was the (limited) reasoning given by the court for excluding as possible beneficiaries the two surviving blood relatives who would have stood to inherit under the intestacy provisions. In respect of one relative, the rationale was that the parties had fallen out some years previously, and in respect of the other, that they had not been in contact for many years. Neither of these are inherently persuasive reasons for refusing them any benefit under the statutory will, given that without intervention by the court, they would each have had an entitlement under the intestacy rules. In *Re Meek*, the statutory will authorised by the court included provision for a family friend and her daughter, and for four charities whose respective missions reflected some of the interests Mrs Meek had during her lifetime. Surprisingly, there was no suggestion that the statutory will actually reflected the approach that Mrs Meek would have taken to the distribution of her assets, nor were persuasive reasons provided as to why the statutory will suggested was in her best interests, as compared to leaving her estate to be divided according to the rules of intestate succession.

In summary, whilst settled patterns could be ascertained from the jurisprudence relating to statutory wills prior to 2005, the situation under the MCA framework is much less clear. No satisfactory justification has yet been provided for how statutory wills can be written in ways that are compatible with the MCA best interests principle. Indeed, attempts to use best interests in these cases have stretched best interests reasoning beyond that which is set out in the MCA, whilst continuing to make (more or less) pragmatic decisions about the appropriate division of assets. If the lack of clarity of approach under the MCA were not reason enough to look again at statutory wills, there is a further complication to add into this already confused legal picture: the view of the UN Committee on the Rights of Persons with Disabilities that a ‘best interests’ approach to decision-making is not compliant with the right to equal recognition before the law under Article 12 of the UN CRPD.<sup>123</sup>

## **The End of Best Interests Decision-Making for Adults with Disabilities?**

As the above discussion has demonstrated, the relationship between statutory wills and best interests decision-making is a vexed issue. Four key critiques of best interests in relation to statutory wills arise from the post-

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<sup>120</sup> Alun Humphrey et al (n 118), 45: whereas 40% of respondents considered that all or most of an intestate estate should go to a cohabiting partner when s/he had been living with the deceased for 2 years, the proportion rose to 74% for cohabitants who had been living together for 10 years.

<sup>121</sup> *Treadwell (Deceased)* 2013 WL 4788832.

<sup>122</sup> *Re Meek* [2014] EW COP 1.

<sup>123</sup> Committee on the Rights of People with Disabilities (2014) General Comment No. 1 on Article 12: Equal recognition before the law CRPD/C/GC/1 para 21. This general comment furthers the already controversial scope of the Article 12 of the convention: see further Dhanda (n 34).

MCA case law. Firstly, it is not clear to what extent things that happen after the death of an individual with mental capacity impairments are relevant to their ‘best interests,’ nor why the ‘post-mortem best interests’ of a person with an intellectual disability should be treated differently in law from those of a person without a disability. Secondly, the spirit of compromise that underpins the drafting of statutory wills under the MCA has the potential to, counter-intuitively, cause difficulties within the interpersonal relationships of the person with intellectual disabilities, an outcome which is unlikely to be in their best interests.<sup>124</sup> Thirdly, statutory wills appear to occasionally be used as a mechanism for either rewarding or punishing persons connected to the person with impaired mental capacity.<sup>125</sup> Finally, where there is no clear engagement with the will and preferences of the individual, decisions purportedly made in the person’s ‘best interests’ may unduly interfere with their rights to equal recognition under the law as protected by the UN CRPD, and consequently amount to an infringement of their human rights. It is submitted, therefore, that the rationale for a best interests approach, both to statutory wills specifically, and by extension to other decisions made under the MCA, requires further interrogation. Reform may be needed in this area to ensure compatibility of the MCA with international human rights standards.<sup>126</sup>

Best interests decision-making is a central concept in both medical law<sup>127</sup> and family law.<sup>128</sup> In child law, best interests remains an underpinning principle of the way that developing children’s rights are operationalised,<sup>129</sup> as well as a foundational concept within domestic law relating to children.<sup>130</sup> The text of the CRPD itself stresses the continuing importance of best interest decision making for children, as reflects their developing capacities.<sup>131</sup> Yet the Committee on the CRPD is highly critical of the use of best interests decision-making for adults with disabilities.<sup>132</sup> Critiques of best interests are not new, but the challenge to best interests in the CRPD requires substantive engagement, as it goes further than academic critiques of best interests decision-making in healthcare law.<sup>133</sup> Previously, scholars have pointed out that best interests approaches to decision making are vague, uncertain and unpredictable;<sup>134</sup> have the potential to be influenced by the views and ideals of the decision-maker;<sup>135</sup> rely on a peculiar judicial version of common sense (complete with values, principles, stock images and stereotypes);<sup>136</sup> and are potentially incompatible with the need for balance between the rights of different family members under Article 8 of European Convention on Human Rights.<sup>137</sup> Whilst these arguments are persuasive, they are not all entirely appropriate to the critique of best interests in the realm of adults with disabilities. Rather, the most thoroughgoing critique of best interests in the mental capacity sphere is the paternalistic nature of best interests decision-making.

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<sup>124</sup> *Treadwell (Deceased)* 2013 WL 4788832; *Re Meek* [2014] EWCOP 1.

<sup>125</sup> E.g., *NT v FS* [2013] EWHC 684 (COP); *Treadwell (Deceased)* 2013 WL 4788832; *Re Meek* [2014] EWCOP 1;

<sup>126</sup> See also, Martin et al, 2014 (n. 35).

<sup>127</sup> *Re F (An Adult: Sterilisation)* [1990] 2 AC 1; Donnelly (n 36).

<sup>128</sup> Helen Reece. ‘The paramountcy principle. Consensus or Construct?’ (1996) 49 CLP 267; Jonathan Herring ‘The Human Rights Act and the Welfare Principle in Family Law — Conflicting or Complementary?’ (1999) 11(3) CFLQ 223; John Eekelaar ‘Beyond the Welfare Principle’ (2002) 14(3) CFLQ 237; Sarah Elliston *The Best Interests of the Child in Healthcare* (2007) (Abingdon, Routledge-Cavendish).

<sup>129</sup> UN Convention on the Rights of the Child; Jane Fortin *Children’s rights and the developing law* (3<sup>rd</sup> edn, CUP 2009).

<sup>130</sup> Children Act 1989, s. 1.

<sup>131</sup> CRPD, Article 7(2); UN Convention on the Rights of the Child, Article 3(1): “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

<sup>132</sup> Committee on the Rights of People with Disabilities (2014) General Comment No. 1 on Article 12: Equal recognition before the law CRPD/C/GC/1 para 21.

<sup>133</sup> See, for example, the contributions to John Coggon & Soren Holm (eds) ‘Best Interests: A reappraisal’ Special Issue of (2008) 16 *Health Care Analysis* 193 – 301.

<sup>134</sup> Shazia Choudhury ‘Best Interest in the MCA 2005 – What can Healthcare Law Learn from Family Law?’ (2008) 16 *Health Care Analysis* 240-251.

<sup>135</sup> Reece (n 116).

<sup>136</sup> John Harrington ‘Deciding best interests: Medical progress, clinical judgment and the “good family”’ (2003) *Web Journal of Current Legal Issues*, 3, 6.

<sup>137</sup> Eekelaar (n 128).

There are three problematic elements of paternalism inherent in health and social care best interests decision-making. The first problem (which is most evident in some of the earlier medical law cases) is that the patient's views are often minimised in favour of a 'doctor-knows-best' approach. This can be explained, to an extent, by the insertion of the *Bolam* standard of medical negligence by the House of Lords<sup>138</sup> to justify use of the doctrine of necessity in order to declare certain medical interventions lawful in the absence of consent.<sup>139</sup> At its pinnacle, this approach even went so far as to authorise the use of force to compel treatment considered to be in the patient's best interests.<sup>140</sup> Whilst arguably remedying a legal lacuna at the time the early cases were decided,<sup>141</sup> this approach is woefully out of step with contemporary understandings of the importance of patient autonomy.<sup>142</sup>

The second problem is that 'best interests' decisions can operate as a smokescreen to hide other (less legally justifiable) reasons for a particular decision, including the 'social and cultural values of the decision-maker.'<sup>143</sup> One recent example of this can be found in the decision of the Court of Appeal in *RB v Brighton & Hove City Council*,<sup>144</sup> about a deprivation of liberty application in respect of RB, a recovering alcoholic who, following rehabilitation, no longer wished to live in a residential care setting. In this case, the court, upholding a Deprivation of Liberty order, held that "confinement in S House, at least for the time being, is in RB's best interests,"<sup>145</sup> despite RB's own firmly stated desires to move back into the community. A detailed analysis of the extent to which this decision accords with the approach to best interests determinations under s. 4 of the MCA is outside the scope of this article. Suffice to say, it does not clearly align with the emphasis in the statute on the wishes and preferences of the individual, nor of the interpretation by the Supreme Court in *Aintree*,<sup>146</sup> where Lady Hale made clear that 'the purpose of the best interests test is to consider matters from the patient's point of view.'<sup>147</sup>

A third problem with best interests decision-making is that it denies legal capacity to make decisions on the basis of impairments in mental capacity. Arguably, this contravenes Article 12 of the CPRD, because it interferes with the rights of individuals with intellectual disabilities to equal treatment before the law by conflating mental capacity with legal capacity. In their first general comment on the CRPD, the Committee on the CRPD distinguish three different approaches to the conflation of legal and mental capacity: *status* approaches, which depend on diagnosis of a particular impairment or condition; *outcome* approaches, where capacity is determined on the basis that the person's decision would have negative outcomes; and finally *functional* approaches, where a person is deemed incapable of making a decision and legal capacity is removed as a result. The MCA model fits most closely with the last of these, though arguably the Court of Protection have occasionally been in the business of interfering with decisions on outcome grounds.<sup>148</sup> The status approach is less of an issue in English law, though the MCA requirement that a person have 'an impairment of the mind or brain' that causes their incapacity before the Act is engaged, raises the possibility of accusations of discrimination against people with disabilities.<sup>149</sup>

Given the closeness of the operation of the MCA to the functional approach, it is important to be clear why the Committee are critical of it, and consider it to be an infringement of Article 12 rights under the CRPD. In their

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<sup>138</sup> E.g., *Re F (Sterilisation)* [1990] 2 AC 1; *Airedale NHS Trust v Bland* [1993] AC 789, [1993] 1 FLR 1026.

<sup>139</sup> Sir James Munby 'Protecting the rights of vulnerable and incapacitous adults – the role of the courts: an example of judicial law-making' [2014] CFLQ 63.

<sup>140</sup> *Re MB (An Adult: Medical Treatment)* [1997] 2 FCR 541; Donnelly (n 36).

<sup>141</sup> Munby (n 139).

<sup>142</sup> Raanan Gillon 'Ethics needs principles—four can encompass the rest—and respect for autonomy should be "first among equals"' (2003) 29 J Med Ethics 307; UN CRPD, Article 3(a).

<sup>143</sup> Phil Fennell 'Best Interests and Treatment for Mental Disorder' (2008) 16 *Health Care Analysis* 255.

<sup>144</sup> *RB v Brighton & Hove City Council* [2014] EWCA Civ 561.

<sup>145</sup> *Ibid* [87].

<sup>146</sup> *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67.

<sup>147</sup> *Ibid* [45]. See further, Vikram Sachdeva, Alex Ruck Keene and Victoria Butler-Cole 'The MCA in the Supreme Court—Reflections on *Aintree v James*' (2014) 4(1) *Elder Law Journal* 54.

<sup>148</sup> E.g. *RB v Brighton & Hove City Council* [2014] EWCA Civ 561; *Dorset County Council v EH* [2009] EWHC 784; Rosie Harding 'Legal constructions of dementia: discourses of autonomy at the margins of capacity' [2012] 34 (4) *JSWFL* 425.

<sup>149</sup> Bartlett (n 35); Martin et al (n 36).

view, the functional approach is flawed for two key reasons. The first is that it is discriminatorily applied to people with disabilities, and that too often disabled people are held to a higher decision-making standard than non-disabled people. The second is that ‘it presumes to be able to accurately assess the inner-workings of the human mind and to then deny a core human right – the right to equal recognition before the law – when an individual does not pass the assessment.’<sup>150</sup> The Committee would have all best interests decision-making replaced with an approach that supports everyone to make their own decisions, and only if all avenues for support have been exhausted would there be a possibility of substituted decisions that reflect the ‘best interpretation of the will and preferences of the individual’.<sup>151</sup>

These critiques of best interests decision-making for adults with disabilities are persuasive, and form the basis of a great deal of debate about contentious issues in contemporary mental capacity law. Yet the complex work of implementing this approach will not simply require a shift in emphasis towards supported decision-making in place of best interests. It will require significant changes not only to our understandings of effective legal decision-making, but also to the jurisprudential content of legal personhood, particularly to the extent this relies on rationality or cognitive processing as its foundation.<sup>152</sup> It is easier to envisage barriers to full implementation of a move from best interests decision-making to supported decision-making than it is to generate workable solutions to this problem.<sup>153</sup> It is clear that best interests decision-making has become embedded in medical law and in personal welfare decision-making for persons with impaired mental capacity over the last quarter of a century.<sup>154</sup> This does not mean, however, that it is either the best or most appropriate approach to take. Indeed it may be that the pervasive reach of best interests decision-making in medical law and in family law must now begin to wane. The problems experienced by the Court of Protection in reconciling a best interests approach with justifications for the execution of statutory wills, set out above, especially when considered alongside the CRPD’s renewed focus on the autonomy rights of persons with disabilities, certainly suggests that the best interests focus of the MCA requires some reconsideration.

## Conclusions: The Future of Statutory Wills

This paper has sought to demonstrate that there are three problems with contemporary approaches to statutory wills. In Part 1, it argued that statutory wills sit outside of contemporary and historical social and legal understandings of inheritance, succession and intestacy. In part 2, the argument was advanced that statutory wills, as they are currently configured, do not have a sound jurisprudential basis, either in respect of how ‘best interests’ applies to the post-mortem interests of a person with limited mental capacity, or for why a departure from the standard rules of intestacy and provision for family dependants is justified where the testator has an intellectual disability. In Part 3, it was argued that the MCA ‘best interests’ approach to statutory wills is incompatible with the right to equality of treatment for persons with disabilities under the UN CRPD. It appears, therefore, that the question of statutory wills requires reconsideration. Empirical research into attitudes to inheritance, wills and intestacy has not, to date, measured public understandings of statutory wills. There has been no legislative scrutiny of the social or legal justification for statutory wills under the MCA, and this issue was not considered by the Law Commission in either their report on provision for persons with impaired mental capacity,<sup>155</sup> or their more recent consideration of intestacy.<sup>156</sup>

There are certain instances where statutory wills are relatively uncontroversial. These are generally where the courts are re-establishing, in proper form, the settled testamentary preferences of a person who (by reason of

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<sup>150</sup> Committee on the Rights of People with Disabilities (2014) General Comment No. 1 on Article 12: Equal recognition before the law CRPD/C/GC/1 [15].

<sup>151</sup> *Ibid* [21].

<sup>152</sup> Flynn & Arstein-Kerslake (n 36).

<sup>153</sup> The Law Commission of Ontario have made a reasonable attempt at the latter: Michael Bach & Lana Kerzner (2010) ‘A New Paradigm for Protecting Autonomy and the Right to Legal Capacity’, prepared for the Law Commission of Ontario (October 2010). Available at: < <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>> accessed 18 June 2015.

<sup>154</sup> Munby (n 139).

<sup>155</sup> Law Commission *Mental Incapacity* (Law Com no 231, 1995).

<sup>156</sup> Law Commission *Intestacy and Family Provision Claims on Death* (Law Com No 331, 2011).

failing health, usually due to dementia) has lost their testamentary capacity, and their circumstances have changed.<sup>157</sup> This approach does not rely on convoluted best interests reasoning, nor does it substitute the decision of the court or the views of family members, over the will and preferences of the individual. It is suggested here that the power for the court to execute a will in these circumstances should remain. Such an approach would likely be compatible with Article 12 CRPD.

Somewhat more controversial are the situations where the Court of Protection are called upon to write a will in the ‘best interests’ a person who has never had testamentary capacity.<sup>158</sup> Here, the courts have generally been relatively creative in their reasoning, in order to justify legacies to charities and other departures from the rules of intestate succession. The UN CRPD is highly applicable to situations such as this, and it is clear that any decision to execute a statutory will in these cases must have proper regard to the individual’s rights to respect for her legal capacity, and to equal treatment under Article 12 CRPD. In these situations, the approach to supported decision-making for people with intellectual disabilities as envisaged by the drafters of the UN CRPD, and outlined in the Committee on the Rights of Persons with Disabilities in their General Comment on Article 12 should be followed. How to help such individuals to make their own testamentary decisions is an empirical question, which requires further research to explore the practical possibilities and limitations of doing so.

The third situation where statutory wills are used is also the most controversial: where a statutory will is executed for a person who has previously had testamentary capacity, but who is intestate, either through active choice, or by default.<sup>159</sup> Where a person in this situation can be supported to make a will that represents their own preferences, as for those who have never had testamentary capacity, this would be the best approach, and would be compatible with the national and international statutory frameworks. Where such supported decision making is not possible, the current statutory regime means that the Court of Protection can be called upon to execute a will that may bear no relation to the will and preferences of the individual, and that may also depart from the usual rules of intestacy and provision for family dependants. Often these wills are made in the spirit of compromise, which may cause resentment between family members.<sup>160</sup> Alternatively, a statutory will may be used to dis-inherit those who would have stood to benefit under the intestacy rules.<sup>161</sup>

This is not to say that the social consequences of statutory wills are always negative. It is sometimes the case that a statutory will executed in these circumstances may provide, for example, greater provision for cohabiting partners than would otherwise be the case,<sup>162</sup> and therefore provide greater recognition of the complexities of contemporary familial relationships.<sup>163</sup> Yet the issue of inheritance on intestacy for cohabiting partners was addressed in detail by the Law Commission in their most recent report on intestacy.<sup>164</sup> A recommendation for cohabiting partners to have (in certain circumstances) rights to inherit on intestacy that are equivalent to those of spouses was put forward in the report, alongside a draft Inheritance (Cohabitants) Bill.<sup>165</sup> These recommendations have not been taken up by the government. Consequently, injustice is created by the potential for some cohabitants<sup>166</sup> to apply for the execution of a statutory will, whereas others must rely on the statutory provision for dependants.<sup>167</sup>

Furthermore, it is hard to see a substantive justification for why the default rules of intestate succession should not apply to those who lose testamentary capacity in their lifetime, and who have not expressed their

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<sup>157</sup> E.g., *In Re Davey* [1981] 1 WLR 164; *Re M (Statutory Will)* [2009] EWHC 2525 (Fam); [2011] 1 WLR 344.

<sup>158</sup> E.g., *Re C (a patient)* [1991] 3 All ER 866; *Re S (Gifts by Mental Patient)* [1997] 2 F.C.R. 320. For an interesting recent discussion in such a case, see *Re AB, Notification of Statutory Will Application* [2013] EWCOP B39.

<sup>159</sup> E.g., *NT v FS* [2013] EWHC 684 (COP) [79]; *Re Meek* [2014] EWCOP 1.

<sup>160</sup> E.g., *Treadwell (Deceased)* 2013 WL 4788832.

<sup>161</sup> *Re Meek* [2014] EWCOP 1.

<sup>162</sup> E.g., *NT v FS* [2013] EWHC 684.

<sup>163</sup> See Douglas (n 4).

<sup>164</sup> Law Commission *Intestacy and Family Provision Claims on Death* (Law Com No 331, 2011).

<sup>165</sup> *Ibid*, Part 8 and Appendix B.

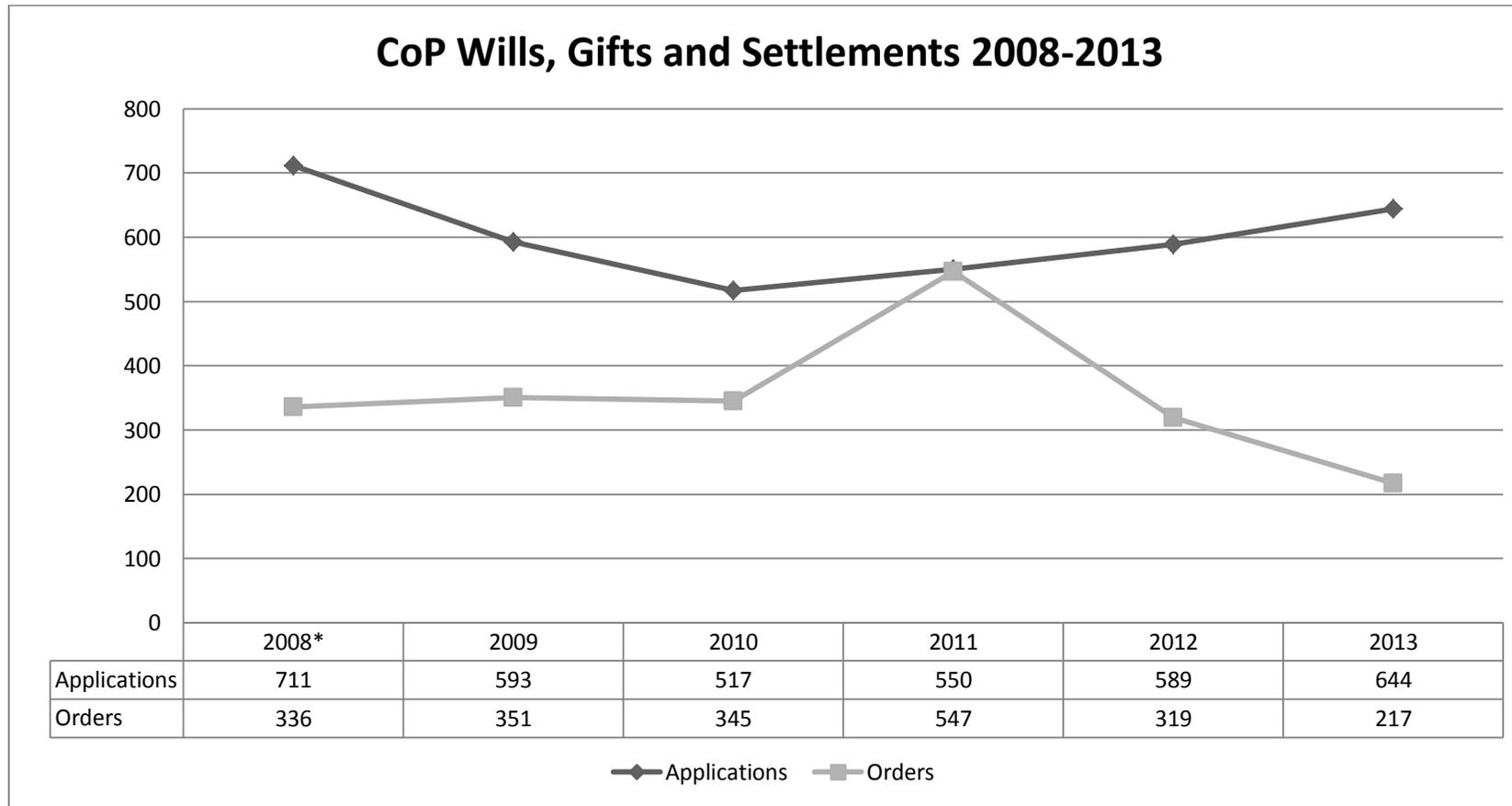
<sup>166</sup> For example, if they hold Power of Attorney for their partner, or if they have been appointed as Deputy.

<sup>167</sup> Inheritance (Family and Dependants) Act 1975. Similar iniquitous circumstances could arise for those who may be more likely to intend their ‘families of choice’ or friendship groups to inherit – see further, Monk (n 8).

testamentary wishes in a valid will when they had the opportunity to do so. The best interests reasoning that has been put forward in these sorts of cases to date does not provide us with a justification. To execute a statutory will in these circumstances appears to inappropriately interfere with the intellectually disabled person's rights under the UN CRPD, in favour of the financial interests of the potential beneficiaries under the statutory will. Moreover, it circumvents public policy decisions about intestacy, and interferes with the relative ante-mortem privacy of testamentary intentions for people with intellectual disabilities. The cynics among us may even see opportunities for the illicit destruction of valid wills, the contents of which are unsatisfactory to family members, cohabitants or others who provide care for a person who loses mental capacity later in life. Or, instead of encouraging people who are newly diagnosed with dementia to get their affairs in order and support them to write a valid will, the opportunity for family members to apply for a statutory will could potentially encourage delay, and therefore prevent such individuals from expressing their own testamentary wishes when they have the opportunity to do so.

In conclusion, it has been argued here that the legal context of statutory wills requires further attention. The Court of Protection's power to execute statutory wills under the MCA should be revisited in light of Article 12 UN CRPD. The arguments developed here would suggest that statutory wills are appropriate where they are utilised to (re)instate the previously settled testamentary will and preferences of the individual, particularly where their financial circumstances have changed and this would result in the frustration of the person's intentions under a valid will. In contrast, a statutory will may be inappropriate where the person is unable or unwilling to express their preferences about what should happen to their assets on their death. In these latter cases, rather than utilising the MCA power to execute a statutory will, the default rules of intestate succession should prevail. If the intestacy rules provide hardship or inequality (as arguably they can do for cohabitants and others with diverse familial relationships) it is those rules on intestacy that should be revisited, rather than increasing the use of (potentially discriminatory, often expensive) judicially-drafted wills.

Figure 1: Court of Protection Applications and Orders for Wills, Gifts and Settlements 2008 – 2013



\* Application numbers in 2008 included those for Q4 of 2007 (196)

Source: Ministry of Justice (2014) ‘Court Statistics Quarterly: January to March 2014’