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NATURAL JUSTICE AND STATUTORY WILL APPLICATIONS: *FAIRWEATHER v AG* [2026] EWCOP

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Justin Holmes discusses the recent case of Fairweather v AG [2026] EWCOP 24, which concerned the circumstances in which the Court of Protection may direct that a person who would otherwise be a necessary party to a statutory will application should not be served with or notified of that application.

1. Under the Mental Capacity Act 2005, the Court of Protection can make a statutory will on behalf of somebody who does not have the capacity to make one for themselves. Sometimes, such an application is made in order to disinherit a relative who has become estranged from P. In those cases there is often a genuine fear that the estranged person will harass or even injure P or some other member of his or her family. Family members often ask whether a statutory will application can be made without notifying or serving an estranged person.

2. In the case Re D [2016] EWCOP 35 Senior Judge Lush held that the decision whether or not to exclude an estranged parent or other interested person from participation in the proceedings is not a decision to be taken under section 4 of the Act in the best interests of P, but rather a procedural decision to be taken in accordance with the principles of natural justice, the overriding objective as set out in paragraph 1 of the Court of Protection Rules, and the requirements of the European Convention on Human Rights as applied by the Human Rights Act 1998. He went on to say that the circumstances in which the court would permit an applicant not to notify or serve an interested party would be likely to be exceptional, and emphasised that at the point at which the court was being asked to dispense with the need for service on the estranged person, the court would only have heard one side of the story and should not assume that the estranged person's case would necessarily fail.

3. The principles set out in Re D have been approved and applied in a number of subsequent cases in relation to applications for statutory wills and settlements, including M v P [2019] EWCOP 42, a decision of HHJ Hilder.

4. In recent years, however, the Court of Protection has had to consider in a series of welfare applications the extent to which the principles of natural justice may or should be balanced against the interests of P. These cases include C v C [2014] EWHC 131, KK v Leeds City Council [2020] EWCOP 64 and Southwark LBC v P and AA [2021] EWCA Civ 512. The Court's desire to protect P in those cases has resulted in there being an apparent gap between the law there stated and the approach set out by Senior Judge Lush in Re D. In all three of these welfare cases, the court took the view that, where there was a conflict between P's rights and the rights of some other person, P's rights should prevail. In KK, at para. 41, Cobb J said:

   "The best interests of P, alternatively the 'interests and position' of P, should occupy a central place in any decision to provide or withhold sensitive information/evidence to an applicant (section 4 MCA 2005 when read with rule 1.1(3)(b) COPR 2017); the greater the risk of harm or adverse consequences to P (and/or the legal process, and specifically P's participation in that process) by disclosure of the sensitive information, the stronger the imperative for withholding the same; […] any decision to withhold information from an aspirant for party status can only be justified on the grounds of necessity (see [36] and [37] above); in such a situation the Article 6 and Article 8 rights of P and the aspirant for party status are engaged; where they conflict, the rights of P must prevail (see [37] above) […]".

   In Southwark v P and AA the Court of Appeal expressly approved Senior Judge Lush's decision in Re D, but also agreed with the statement of the law made by Cobb J in KK. Baker LJ said at para. 53:

   "On the other hand, Cobb J was plainly right when he observed in KK v Leeds City Council that 'the best interests of P… should occupy a central place in any decision to provide or withhold sensitive information or evidence to an applicant' and that 'the greater the risk of harm or adverse consequences to P (and/or the legal process, and specifically P's participation in that process) by disclosure of the sensitive information, the stronger the imperative for withholding the same'.

5. In Fairweather v AG [2026] EWCOP 241, in which I represented the Official Solicitor, the Court of Protection recently reviewed the guidance provided by Re D in the light of these welfare cases. District Judge Ellington held that Re D remains the leading authority in respect of applications concerning statutory wills and settlements.

6. The facts of the case were as follows. AG was the daughter of AB and CG. AB and CG had become estranged within a few years of AG's birth and AB claimed that CG had been violent towards her. There was evidence that CG had accepted a caution in respect of threatening behaviour against AB some years before. In 2025 AG's deputy made an application to the Court of Protection for a statutory will to be made for AG which would disinherit CG. He also applied to the court for an order dispensing with the need to serve or notify CG, on the grounds that he and AB anticipated that CG might, if informed of AG's current circumstances, harass the family, and potentially use violence against them.

7. The applicant and the Official Solicitor were agreed that Re D remains the leading authority in respect of statutory will applications. The Official Solicitor pointed out that in a statutory will application the rules and practice directions of the court, and specifically Practice Direction 9E, explicitly provide that a person interested on intestacy or under a previous or proposed will must be served as a respondent. This is because those people have an identifiable expectation of receiving an interest either under the will or under an intestacy. Contrast this with a welfare application, where it is left up to the applicant to identify those persons "who ought to be served" and "who ought to be notified" on the basis of their perceived interest in and closeness to P. The Official Solicitor argued that the welfare cases can therefore be distinguished from the statutory will cases. District Judge Ellington agreed. She said at paragraph 33:

   "The Official Solicitor's analysis on the difference between the welfare line of authorities and the statutory will line of authorities is accepted. There is a difference between including persons in each because the specific Practice Direction which applies for statutory wills – 9E – identifies those persons with a proprietary interest which would be affected by the outcome of the application as persons to be served."

8. In relation to the potential conflict of human rights, she said (at para. 34):

   "The Official Solicitor submits that: 'The court should be cautious about preferring AG's Article 8 right over CG's Article 6 right, and should only do so if satisfied that the harm or potential harm to AG justifies the denial to CG of his rights under Article 6.' I accept that is the proper approach and does not depart from the Re D principles."

9. The judge then applied the guidance given by Senior Judge Lush in Re D. She was not convinced that the evidence put forward by the deputy showed that there was, or might be, a continuing risk of serious harm to AB and AG which would justify keeping CG in ignorance of the proceedings even though the relief sought by the applicant would prejudicially affect him. Although both the Applicant and the Official Solicitor were concerned that even mere notification would easily enable CG to locate AG and her family, she directed that CG should be notified of the proceedings, although full service of the application and all the supporting papers on him was not yet required.

10. She concluded:

   "In my decision, I have to ensure that AG's interests and position are properly considered under the Overriding Objective. I have not been satisfied of the risk of harm to AB or to AB/AG/GB on the evidence before me. It is important for AG that there is certainty in the outcome of the application. Making an order on the basis of excluding a potentially interested party and not giving them the opportunity to participate in the proceedings is an important failure and one which could lead to challenge if CG becomes aware of the order. The Official Solicitor submits for AG that this is a difficult case which sits on the borderline, such that either an order dispensing with service or an order dismissing the application could be justified. For the reasons I have given, I dismiss the application. Service is not needed, notification will suffice in principle."

11. District Judge Ellington's decision in Fairweather thus makes it clear that in statutory will applications, at least, Re D remains the leading authority and orders dispensing with the need to serve or notify an estranged person will be exceptional. Very clear evidence of an imminent and serious threat to P or her family will be required before such an order will be made. As the judgment in M v P illustrates, even a well attested history of violence and threats including criminal convictions may still not be enough to persuade the court to dispense with service or notification on a person directly and prejudicially affected by an application. The Court may be willing to direct notification, rather than service, but in many circumstances the parties will feel no safer because notification has been used rather than full service; what matters to them is that the estranged person is being made aware of the existence of the proceedings, not that he will have to make an application to the court in order to be made a full party to those proceedings.

12. It should be noted that in Fairweather the applicant deputy changed his position immediately before the hearing. He informed the court that if his application were not granted, he would withdraw his statutory will application. This raised the possibility, as canvassed in Re D, that the application might not proceed at all if the estranged person had to be served, to the prejudice of P. District Judge Ellington noted, however, that permission would be required for the deputy to withdraw his application. In her judgment she stated that she took account of the deputy's position, but it was clearly not sufficient to change her view of the merits of the application.

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