

HONG KONG / JUDGMENT

RE CVB

[2025] HKCFI 4647

COURT

Court of First Instance

DECIDED

30 September 2025

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HCMH 11/2022

[2025] HKCFI 4647

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MENTAL HEALTH CASE NO 11 OF 2022

IN THE MATTER OF PART II of the Mental Health Ordinance, Chapter 136 (the “Ordinance”)

and

IN THE MATTER OF an alleged mentally incapacitated person CVB

Before: Hon Winnie Tsui J in Chambers (not open to the public)

Dates of Hearing: 16 and 17 July 2024

Date of Reasons for Decision: 30 September 2025

REASONS FOR DECISION

INTRODUCTION

By order dated 21 June 2022, CVB, a widow then of 83 years of age, was declared to be incapable of managing and administering her property and affairs by reason of her mental incapacity. Two nieces and one nephew of her late husband, Mr M, were appointed as committee of her estate under Part II of the Mental Health Ordinance, Cap 136. They are Ms A, Ms B and Mr C. I shall call them by their first names.

By ex parte summons dated 1 November 2022, the committee applied for an order that they be authorised to execute a statutory will for CVB.

The brief background to the application is as follows.

CVB and Mr M married in 1967. Mr M, who was about one year older than CVB, passed away in 2014. The couple had no children. CVB's parents have passed away. She is an only child. Mr M came from a family of 14 children. He ranked the twelfth. He has been referred to in these proceedings as "the 12th uncle" and I shall call him by that name accordingly. For reasons which I will explain below, in the absence of a statutory will, CVB will die intestate. By virtue of section 4(9) of the Intestates' Estates Ordinance, Cap 73, upon her passing away, her residuary estate will pass on to the government as bona vacantia.

CVB's estate is substantial. On a rough estimate, the total value of her assets is in the range of HK\$150,000,000 to HK\$200,000,000.

THE ORDERS

A two-day hearing was fixed to hear the summons. The committee was represented by Mr Anthony Ismail. Earlier, the court had invited the Official Solicitor to render his assistance and give his views on the application. At the hearing, the Official Solicitor was represented by Mr Nelson Miu.

By an earlier order, the court directed the committee to notify the Secretary for Justice of the application and to ascertain his stance. As stated in a letter from the Department of Justice dated 12 December 2023, the Secretary for Justice does not intend to participate in this application. I quote the reply here:

"Please be informed that the Secretary for Justice ("SJ") does not intend to participate or provide observations in the Application (i.e. the application for statutory will), but this is not to be constructed as the SJ's endorsement to the Application in general. In the event that the Application is dismissed, the SJ expressly reserves his right should there be issue of residuary estate in the CVB's estate in the future."

At the hearing, A, B and C testified. A and C were cross-examined by Mr Miu on their affirmations. By an earlier order of the court, affirmations from a number of individuals, including some of the siblings, nephews and nieces of the 12th uncle, were admitted into the evidence without cross-examination.

At the conclusion of the hearing, I granted the application. I authorised the committee to execute for CVB a statutory will comprising the following key terms:

The committee be appointed as the executors of the will.

A lump sum of HK\$2,000,000 shall be paid to Madam P. Madam P is the wife of the 11th brother of the 12th uncle. I shall call her "the 11th aunt".

The residuary estate shall be distributed equally among the 12th uncle's five siblings who survived him at the time of his death. They are his 8th brother, 10th brother, 13th sister, 14th sister and the three surviving issues of the 4th sister. (The 4th sister has passed away since.)

I should record here that A and B are daughters of the 13th sister and C the son of the 8th brother.

I also made an order that the costs of the application, including all reserved costs, be paid out of the estate of CVB, with the committee's costs to be assessed on a solicitor and own client basis and the Official Solicitor's costs to be assessed on an indemnity basis.

These are my reasons for making the above orders.

THE COMMITTEE'S CASE

The committee's evidence comprised the affirmations and the oral testimony of A, B and C, and the affirmations which were admitted as evidence without cross-examination of the deponents. The latter were made by 13 individuals. They are:

the eight beneficiaries in the proposed statutory will;

the two issues of the 6th sister of the 12th uncle, who are not named as beneficiaries in the proposed will;

Mr Y, who has worked as CVB's driver since 2015.

Mr L, a solicitor who met CVB in May 2018 with regard to the making of a will; and

Dr C, a specialist in cardiothoracic surgery. Dr C was consulted from time to time on CVB's health.

The evidence covered the following areas:

the background of CVB;

the characters of CVB and the 12th uncle and their relationship;

the relationship between the 12th uncle and his siblings;

the relationship between A, B and C on the one hand, and CVB and the 12th uncle on the other;

CVB's meeting with L, the solicitor, in May 2018 with regard to the making of a will;

the committee's discovery in July 2023 of the mutual wills executed by CVB and the 12th uncle dated 21 April 2005; and

the committee's beliefs as to the wishes of the 12th uncle and CVB with regard to their assets.

I heard live evidence from A, B and C. A and C testified in a straightforward manner in cross-examination, without showing any sign of being evasive or unnecessarily argumentative. (B was not cross-examined.) Their written and oral evidence is inherently plausible and credible. It is true that there are some discrepancies between some of their earlier affirmations and their later

ones. Most notably, in the supporting affirmation filed first in time in November 2022 and made by C, he deposed that to the best of his knowledge, CVB had never made a will. That has since been proved wrong as A discovered in July 2023 that CVB and the 12th uncle had executed mutual wills in favour of each other.

Notwithstanding that, I find that A, B and C are truthful witnesses. The three of them are engaged in respectable professions. A is a photographer, running her own studio. B is a nurse working at a government hospital. C is a practising solicitor. On the whole, they showed a genuine desire to tell the court what they knew about CVB and the 12th uncle. I accept that the earlier confirmation that CVB had never made a will was an honest mistake.

As regards the affirmation evidence of the others, there is no strong reason for not accepting the factual allegations as stated. The Official Solicitor agreed at an earlier directions hearing that their affirmations should be admitted without cross-examination.

For the above reasons, I find the committee's evidence as facts, subject to one exception. And that is the allegations made by A, B and C as to what they believed to be the wishes of CVB and the 12th uncle with regard to the distribution of their assets. It is not their evidence that CVB and the 12th uncle had told them expressly what their wishes were. Their beliefs in this regard are simply their beliefs. As we will see below, such wishes of CVB and the 12th uncle, if any, are material matters which the court will take into account when considering whether to order a statutory will. I shall in due course make factual findings on whether CVB and the 12th uncle in fact had those wishes as alleged by the committee. These factual findings are going to be inferences that can properly be drawn from the primary facts as found.

The evidence discloses the following.

The background of CVB

CVB was born in November 1938.

Before she married the 12th uncle in 1967, CVB was a nurse working at a government hospital. She then gave up her job and became a housewife. The 12th uncle was a surgeon. By the time he passed away in 2014, the couple had been married for about 47 years.

CVB has substantial assets. They are mainly derived from the 12th uncle, who had accumulated his fortune from his lifelong practice as a medical practitioner.

Previously, the couple had lived in a flat in Tai Tam. In late 2009, they purchased a flat in R Court without mortgage and sold their flat in Tai Tam in 2010. They then moved to the R Court flat. CVB still resides there. She is its sole legal owner.

At the hearing, the latest bank statement of CVB was produced. It showed a credit balance of about HK\$100 million in cash. In addition, CVB holds two life insurance policies, with face values of about US\$4 million and US\$1.3 million. There was no valuation of the R Court flat. The online search of an estate agent showed that a similar flat in the same building, measuring just over 2000 sq ft, put up an asking price of just over HK\$55 million.

As to the mental condition of CVB, she was examined in July 2024. According to the medical certificate, CVB was at the advanced stage of dementia. She could not speak coherently. She uttered incomprehensible sounds only. She could not meaningfully communicate. She primarily relied on a feeding tube for nutrition. She was mainly bedbound or chair-bound.

The characters of CVB and the 12th uncle and their relationship

According to A, CVB is a sensitive person and is kind to people. She is shy, but at the same time she wishes to have communication with others. She would want to protect herself. She has a deep sense of dignity.

CVB has been described as a loving wife to the 12th uncle. She looked up to him. They exchanged love letters and cards before their marriage, which are still kept in CVB's residence.

The 12th uncle had deep affection for CVB. Before he passed away, the 12th uncle took care of the couple's affairs and all the important documents, such as birth and marriage certificates. He was seriously ill for some time and suffered a great deal before he passed away. During that time, he expressed to A and C his utmost concern for CVB. He knew that she had been under his care the whole of her life. He was very worried that after he died, CVB would not be able to look after herself. In fact, A later found out that CVB did not even know how to issue a cheque by herself. The 12th uncle asked A, B and C to look after CVB after his passing.

The couple had a happy marriage and a close relationship. That is what C grew up observing. He therefore believed that the 12th uncle's wishes would be CVB's wishes. This is what he said in his affirmation:

"I grew up observing that 12th Aunt [ie CVB] looked up to the 12th Uncle very much, and that they had a very happy marriage. Their relationship was close, and 12th Uncle's wishes would be 12th Aunt's wishes. As such, I genuinely believe that 12th Aunt would (if she were competent to manage her affairs) wish to honour and carry out 12th Uncle's wishes ... in her Will."

The relationship between the 12th uncle and his siblings

The 12th uncle's family is a very traditional Chinese family. They have family gatherings and keep in contact frequently. The 12th uncle was kind, loving and generous to his family. He upheld traditional family values and maintained close relationships with his siblings and their families. He cared deeply about them.

He and CVB had a history of helping the siblings financially and they were generous.

They had been giving financial help to the 11th aunt.

When the 11th brother passed away suddenly in 2011, the 12th uncle promised to help her financially if needed.

After the 12th uncle died, CVB prepared meals for the 11th aunt or took her for meals at the Hong Kong Country Club or the Club House in Tai Tam. Y recalled that for the first two years or so after he was employed as CVB's driver, he used to take CVB and the 11th aunt to lunch nearly every day. And that only became less frequent since about 2018 when CVB's health apparently started to deteriorate.

Since 2016, CVB gave the 11th aunt a sum of HK\$1,000 a month. Since about 2018, when the two had lunches less often, CVB increased the monthly sum to HK\$1,200 and additionally gave the 11th aunt a monthly sum of HK\$5,000 as meal allowance.

In 1999, the 10th brother was diagnosed with cancer. The 12th uncle sent him money to pay for his treatment at a private hospital.

The 10th brother also received financial help from the 12th uncle and CVB for the education of his two daughters. When the daughters turned 16, the 10th brother wished to enrol them in a private school. However, his income was too little for the school fees. The 12th uncle and CVB sent money over to help.

The 12th uncle and CVB also provided financial help for the grandson of the 4th sister. The grandson studied law in the UK. From 2008 to 2011, the 12th uncle and CVB gave a sum of HK\$300,000 each year to support his studies. After that, the grandson moved back to study the PCLL course at the Hong Kong University. The 12th uncle and CVB initially insisted on giving the same sum of HK\$300,000 to him but as the tuition fee in Hong Kong was much lower, they eventually gave him a sum of HK\$50,000 to support his studies.

Based on the above, it is the committee's belief that if the 12th uncle had had an opportunity to make a will, after providing for CVB, he would have provided for his siblings too. C said this in his first affirmation:

"In light of 12th Uncle's close relationship with and affections towards his siblings and their families, I have no doubt that had he had the opportunity to make a Will, he would have provided for his wife and, upon her passing, made sure to bequeath his assets to his siblings, especially those of the whole blood and, in view of their advancing years, to their respective children. I have been informed by both [A] and [B] that they share my belief."

As will be seen below, the belief is later proved wrong by the discovery of the mutual wills of the couple in July 2023.

At this juncture, I should record that based on the enquiries made by the committee and their understanding, the following siblings and their families were not in contact with the committee or their families and there is no evidence suggesting that they were previously in contact with the 12th uncle: the 1st brother, the 2nd sister, the 3rd sister, the 5th brother, the 7th sister (who was given away at a very young age), and the 9th sister. Their contact information is unavailable.

The relationship between the committee and the 12th uncle and CVB

A and B have for many years been helping the 12th uncle and CVB with most of their needs and attending to their affairs as they grew old. The couple trusted the two nieces as they knew A and B from a young age and both were good natured and had been good nieces.

A was responsible for the 12th uncle and CVB's move from the Tai Tam flat to the R Court flat in 2010 and fitting out the new flat so that it would be suitable for them in their advancing years. The move was made so that the 12th uncle could have easy access to the nearby Hong Kong Sanatorium & Hospital for his illness.

The 12th uncle asked A and B to look after CVB after his passing as he trusted that they would carry out his wishes.

C also had spent time with the couple. When the couple were still residing at the Tai Tam flat, the 12th uncle would swing by at C's place (on Stubbs Road) for chats. They would discuss legal concepts concerning medical cases. The 12th uncle also trusted C enough to ask him to help look after CVB after his death.

After the 12th uncle passed away, A helped with the hiring of two domestic helpers and the driver for CVB. She would have lunch with CVB once every two to three weeks. She would monitor CVB's health and provide advice and assistance as and when needed. She would respond to calls from the domestic helpers and the driver when they encountered difficulties. She would visit CVB at home when health concerns arose and would consult Dr C for advice if needed. She represented CVB in the owners' meetings of R Court and voted on her behalf. That was when the building was undergoing renovation.

In 2018, CVB had a fall at home but was unwilling to go to see a doctor. Upon learning this from the helpers, A immediately contacted Dr C for help. Dr C checked on CVB and believed that she was fine but recommended a thorough check up at the hospital, which CVB declined. After that, A bought a wheelchair and walking aids for CVB. In 2019, CVB had another fall. According to the helpers, CVB did not allow them to call A as she did not want Dr C to know about her fall. The helpers called the 11th aunt instead. After the incident, A encouraged CVB to see a doctor. Again, she declined.

Upon learning of some suspicious conduct of the helpers, as related to A by CVB's bank manager in 2020 and 2021 and by a nurse at Gleneagles Hospital in 2021, in early 2022, A arranged for the termination of the helpers and hired private caregivers to look after CVB instead.

After their appointment as committee of the estate of CVB in June 2022, A has continued to take care of all daily matters as she has been helping CVB over the years. Given her nursing knowledge and experience, B has taken up the responsibility of overseeing CVB's nursing arrangements. C would help with legal matters concerning the committee.

CVB met with a solicitor with regard to the making of a will in May 2018

In early May 2018, CVB asked A to make an appointment with L, who was the solicitor previously handling the purchase of the R Court flat and the sale of the Tai Tam flat for the 12th uncle and CVB. She did that because after seeing an ambulance appear in her car park one day, she became worried about her affairs. She wanted her things to be in order when she passed away. She would like to have a will.

A accompanied CVB to the meeting with L on 25 May 2018. According to L's recollection, CVB was physically weak but had a clear mind. She expressed her wish to make a will and would like to know how to do it. L explained to CVB the process of making a will and advised that given her age and poor health, she should consult a medical practitioner to obtain a certificate confirming her mental capacity. The meeting only touched on general issues. L's impression was that CVB was keen to make her will but she needed time to digest what he explained and decide on who should be executor and who should be entitled to share her legacy. The meeting lasted for less than an hour. L has not heard from CVB since the meeting.

After the meeting, A reminded CVB several times. It appeared to A that CVB wanted to make a will but she was procrastinating as she did not want to see a doctor.

The committee discovered the mutual wills of CVB and the 12th uncle

In her second affirmation filed in August 2023 (ie after the present application was taken out), A deposed to her discovery of the mutual wills of CVB and the 12th uncle in July 2023 when she was clearing out the utility room in the R Court flat, in preparation for the arrival of a new helper. She found a brown envelope containing the originals of the mutual wills.

Both wills were dated 21 April 2005 and prepared by a law firm. Under CVB's will, she appointed the 12th uncle, C and a son of the 4th sister as executors and bequeathed the whole of her estate to the 12th uncle absolutely. Similarly, in the 12th uncle's will, he appointed CVB, C and the same nephew as executors and bequeathed the whole of his estate to CVB absolutely. There was no gift as to the remainder of the balance of the estate on the death of the last surviving spouse.

Prior to the discovery, CVB had never mentioned to A, B or C the existence of the mutual wills. She did not mention them to L during their meeting. After the discovery, the committee's solicitors wrote to (1) the law firm who prepared the wills, and (2) the solicitor who was recorded to have attested and interpreted the wills to the couple. The firm replied that they no longer kept the files and the solicitor replied that she had no recollection of the instructions given to her about the wills and the wishes expressed at the time.

The committee's beliefs as to the wishes of CVB and the 12th uncle

Based on the above, the committee hold the following beliefs.

First, CVB wanted to make a will. That is why she took the initiative to ask A to make an appointment with L in May 2018. By that time, CVB had likely forgotten about her earlier mutual will as she did not mention it at all to L or anyone. After the meeting, CVB still wanted to make a will. However, she was reluctant to see a doctor and undergo a medical examination for the purpose of the will. Her unwillingness to see a doctor is understandable. She declined to see a doctor after her fall in 2018 and another fall in 2019. She simply procrastinated.

Second, CVB's wishes would be the 12th uncle's wishes. CVB would want to honour and carry out the 12th uncle's wishes in her will.

Third, it would be the 12th uncle's wish to provide for his siblings, whom he cared for deeply, in his will after making provision for his wife or upon his wife's passing.

In these factual premises, the committee asked the court to authorise a statutory will for CVB to make provisions for some of the siblings of the 12th uncle, as that would be to give effect to her wishes.

THE OFFICIAL SOLICITOR'S VIEWS

The Official Solicitor is in support of the statutory will as proposed (and amended) by the committee. It is his submission that it is in the best interests of CVB that a statutory will should be made for her so that she can dispose of her very substantial estate among the family members of her late husband instead of letting it go to the government as bona vacantia. Mr Miu remarked, as an aside, at the hearing that the Secretary for Justice did not even wish to take part in this application upon being notified.

The Official Solicitor's main points are as follows.

First, there is no evidence that CVB would prefer her estate to go bona vacantia. That is evident from the fact that she executed a mutual will in 2005 and the further fact that she consulted the solicitor with regard to the making of a will in 2018. There is no plausible reason why she would want her estate to go to the government at the expense of her relatives.

Second, on the evidence, Mr Miu submitted that there is no evidence that the 12th uncle had wished to leave the surplus of his estate to his siblings. More likely than not, he had not thought about what should happen to the surplus of the substantial asset that CVB would inherit from him under the mutual will. Furthermore, if the 12th uncle had had this wish, he would have communicated it to CVB. And, after he died, CVB would have felt necessary to make a fresh will to implement his wishes. But that had not happened. Hence, even if one accepts that CVB's wishes would be the same as her late husband's wishes, on the evidence, as the 12th uncle did not hold the wish as alleged by the committee, CVB could not be having the same alleged wish.

Third, however, notwithstanding that no such wish on the part of CVB can be established as a matter of fact, applying the well-established legal principles, the court should order a statutory will.

I should now turn to address the legal principles.

LEGAL PRINCIPLES

In Hong Kong, the legal principles governing statutory wills are well-established. The statutory provisions empowering the court to make an order for a will of a mentally incapacitated person (“an MIP”) are to be found in sections 10A and 10B of the Mental Health Ordinance.

On case law, the leading authorities are:

Re CYL [2007] 4 HKLRD 218;

Re LLC (Statutory Will) [2010] 3 HKLRD 16; and

LCK v DLKY (Committee of the Estate of WSY) [2022] 4 HKC 1, [2022] HKCFI 496.

The statutory basis for statutory wills: sections 10A and 10B

Section 10A sets out the general functions of the mental health court with respect to the property and affairs of an MIP. Subsection (1)(c) is the relevant subsection for statutory wills. It provides that the court may do or secure the doing of all such things as appear necessary or expedient

“for making provision for any other person or purposes for whom or for which the mentally incapacitated person might be expected to provide if he were not mentally incapacitated”

Section 10B(1)(e) expressly empowers the court to make an order for the execution for the MIP of a will making any provision which could be made by a will executed by that person if he were not mentally incapacitated.

Section 10B(4) imposes a threshold requirement, which is that the court should not exercise its power unless it has reason to believe that the MIP is incapable of making a valid will for himself. It is well-established that only after this threshold is met will the discretion under the Ordinance be properly engaged, and only at that stage should the court consider if it should order a will to be made: Re LLC at paras 4 to 5.

When considering whether to exercise the power, the court must bear in mind the paramount consideration set out in section 10A(2)(a), which mandates that:

“the court shall have regard ... as a paramount consideration, to the requirements of the mentally incapacitated person”

While the words “best interests” do not appear in the subsection and the actual word used is “requirements”, the Hong Kong courts have long equated the word “requirements” with the words “best interests”. See:

In Re CYL, Lam J (as his Lordship then was) said, at para 32:

“In other words, the court should give priority to the interest of the patient.”

In LLC, Poon J (as his Lordship then was) said:

“The court shall have regard, as a paramount consideration, to the requirements of the mentally incapacitated person: s.10A(2)(a). In other words, the court will give priority to the interest of the patient: Re CYL, per Lam J, paras.31 and 32.” (para 5)

“... Ordering a statutory will to be made on her behalf in all the circumstances plainly serves her interests best.” (para 14)

In Re LLC (No 2), Poon J made the point most explicitly, at para 13:

“... in exercising its protective jurisdiction under Pt.II, the court carries investigations and determines the matters before it fairly and expeditiously, always having regard to the patient’s best interest as the paramount consideration: s.10A(2)(a) of the Mental Health Ordinance. ... ” (underline added)

In LCK v DLKY, Lok J held, at para 112:

“... Under such circumstances, the making of the statutory will and lifetime settlement as mentioned above would only be in the best interest of WSY ...”

It can therefore be seen that the Hong Kong approach, when having regard to the paramount consideration in section 10A(2)(a), is to treat the word “requirements” and the words “best interests” interchangeably in mental health cases.

Contrast the English position after the Mental Capacity Act 2005

It is necessary to highlight the use of the term “best interests” here because as we will see below, the Mental Capacity Act 2005, which is the latest English statute, expressly adopts the principle of “best interests”. Notwithstanding the identical terminology, subsequent English case law shows that this requires the court to adopt a different approach from how we have applied the concept of “best interests” in Hong Kong in the context of statutory wills. In gist, in Hong Kong, the courts apply what is sometimes called the “substituted judgment” approach but in doing so, the courts will always have regard to the MIP’s best interests. In England, under the 2005 Act, the courts now apply what is sometimes called the “balance sheet” approach, subject to the express statutory direction that any decision made by the courts must be in the best interests of the MIP.

Since the passing of the 2005 Act, there is thus a divergence in the Hong Kong and English judicial approaches in statutory will cases even though both approaches are couched in terms of the “best interests” of the MIP. The post-2005 Act English authorities therefore cannot be directly applied in Hong Kong. However, Mr Miu submits, and I agree, that any wisdom in such judgments as to what counts as “best interests” can still be distilled and applied where appropriate in the Hong Kong context.

The English authorities pre- and post-the 2005 Act

Against this background, I will highlight below the leading pre-2005 Act authorities in England, which were applied and followed by the Hong Kong courts. At the end of the subsection, I will also introduce the two post-2005 Act authorities referred to by Mr Ismail and Mr Miu.

Sections 10A and 10B of the Ordinance were introduced by the Mental Health (Amendment) Ordinance of 1997, and became effective in February 1999. The two sections are substantially based on sections 102 and 103 of the Mental Health Act 1959, and, subsequently, sections 95 and 96 of the Mental Health Act 1983.

The leading authorities on statutory wills under the two Acts are:

Re L (WJG) [1966] 1 Ch 135;

Re D (J) [1982] 1 Ch 237;

Re C (a patient) [1991] 3 All ER 866; and

G v Official Solicitor [2006] EWCA Civ 816.

The two authorities decided under the 2005 Act and cited by counsel are Re P (Statutory Will) [2010] Ch 33 and Re M (Statutory Will) [2011] 1 WLR 344. They are helpful not only for the reason stated above but also because they contain a thorough discussion of the legal position of the English law, which was followed in Hong Kong, before the 2005 Act came into effect.

The Hong Kong position

Once the threshold requirement concerning the lack of testamentary capacity is met, the court considers whether it should order a statutory will to be made. Here, section 10A(2) applies. The court shall have regard as a paramount consideration to the requirements of the MIP and will give priority to his interest. After the court has decided to exercise its discretion to make a statutory will, it proceeds to determine what the proper contents of the will should be. The court must seek to make the will which the actual MIP, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight and with sound legal advice available: Re CYL at paras 34 to 36; Re LLC at paras 5 and 6; and, LCK at paras 29 and 30.

The court applies the five guiding principles enunciated by Megarry V-C in Re D at 243C-244G:

The MIP should be assumed to have a brief lucid interval at the time when the will is made.

During the lucid interval, the MIP has full knowledge of the past, and a full realisation that as soon as the will is executed he will relapse into the actual mental state that previously existed, with the prognosis as it actually is.

It is the actual MIP who has to be considered and not a hypothetical one.

The MIP is to be envisaged as being advised by competent solicitors.

The MIP is to be envisaged as taking a broad brush to the claims on his bounty, rather than an accountant's pen.

It was also said in *Re D*, at 249C, that the court will look at the matters broadly as they stand at the time of the hearing with emphasis more on recent events than what happened in the distant past.

These principles were confirmed and applied by the English Court of Appeal in *G v Official Solicitor* at para 21.

There are two points which should be emphasised.

First, the statute mandates that the court looks at the actual MIP and asks the question of what the MIP, if not mentally incapacitated, would himself have done: see section 10A(1)(c). This requires the court to make the counterfactual assumption that the MIP was not mentally incapacitated, and then to ask what, on that hypothesis, the MIP might be expected to do. The MIP has to be taken as he was before. This is therefore a subjective question to be answered by the court. And that is why this approach is sometimes called the “substituted judgment” approach: see *Re P* at paras 13 to 15.

That said, however, there is at the same time an element of objectivity in the exercise. In *Re D*, Megarry V-C explained, at 244B-C:

“I think that the court must take the patient as he or she was before losing testamentary capacity. ... Furthermore, I do not think that the court should give effect to antipathies or affections of the patient which are beyond reason. But subject to all due allowances, I think that the court must seek to make the will which the actual patient, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight. ... the court is to do for the patient what the patient would fairly do for himself, if he could.” (underline added)

Second, section 10A(1)(c) refers to whom the MIP “might” be expected to provide for, not whom he “would” be expected to provide for. Because of the use of the word “might”, in cases where it is difficult for the court to come to a subjective assessment of what the MIP would have wanted to do, the court's task is not to be satisfied that the MIP would definitely have chosen one particular way of making a will rather than another. A distribution which can be rationally justified would be a provision which the MIP “might” be expected to make: *Re C* at 870a-g.

This point is particularly material in those cases in which nothing much is known about the MIP or his wishes, preferences and personality. In this situation, practically speaking, there will not be any material on which to construct a subjective assessment of what he would have wanted to do. This is best illustrated by the case of *Re C*. The MIP there lacked capacity since birth.

Hoffmann J (as his Lordship then was) approached the matter this way, at 870c-d:

“I recognise the difficulty in forming a view of what might have been expected from a person who has never enjoyed a rational mind. But I think that in those circumstances the court must assume that she would have been a normal decent person, acting in accordance with contemporary standards of morality. In the absence of actual evidence to the contrary, no less should be assumed of any person and in this case there is nothing to displace such an assumption. A person in the position of Miss C, looking

back over life, would in my view have been influenced by two principal considerations. First, that she had spent the whole of her life in the care of the community, as embodied in the national health service, the hospital and voluntary mental health charities ... Secondly, that she had derived her fortune from being a child of a family. She would therefore in my view have felt moral obligations to show recognition to the community and to her family.” (underline added)

The English position after the 2005 Act

I shall not go into detail what changes have been brought about by the 2005 Act in England. It will be sufficient for present purposes to point out that in the context of statutory wills, the Act no longer requires the English court to do what the MIP himself might be expected to do if he had not been mentally incapacitated. The “substituted judgment” approach is no longer relevant. Instead, the statute requires the English court to engage in a structured decision-making process and make an enquiry as to what is in the MIP’s best interests: see section 1 (The principles) and section 4 (Best interests). Section 4 contains an elaborate list of matters which should be taken into account when the court determines what is in a person’s best interests.

In this exercise, the English court draws up a balance sheet enumerating the benefits and disbenefits of taking a certain course of action. It ultimately strikes a balance and comes to a view as to which course of action is more likely to advance the best interests of the MIP. This exercise is not about what the MIP himself would have done if he had had the mental capacity, although his wishes and feelings would be a factor in the balance, with varying weight to be given to them depending on the factual circumstances of each case. This exercise involves the court arriving at a value judgment about what is in a person’s best interests after weighing all relevant factors in the balance. And that judgment may not necessarily coincide with the wishes of the person in question: see sections 16 and 18 of the 2005 Act; *Re P* at paras 37 to 40; *Re M* at paras 28 to 29.

It is therefore worth repeating that while the same terminology “best interests” is used in both Hong Kong and England, the two regimes governing statutory wills now have different statutory underpinnings and therefore require different approaches to be adopted by the courts.

Notwithstanding that, both Mr Ismail and Mr Miu referred the court to what Lewison J said in the following passage in *Re P*, a decision made under the 2005 Act, at para 44:

“There is one other aspect of the “best interests” test that I must consider. In deciding what provision should be made in a will to be executed on P’s behalf and which, ex hypothesi, will only have effect after he is dead, what are P’s best interests? ... But what will live on after P’s death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done “the right thing” by their will. In my judgment the decision-maker is entitled to take into account, in assessing what is in P’s best interests, how he will be remembered after his death.”

Mr Miu further referred the court to *Re M*, in which Munby J expressed his agreement with the above passage: para 38.

It is true that both Lewison J and Munby J were discussing what would be in a person's best interests after death under the framework of the 2005 Act. As such, their views cannot directly apply to an application under the Hong Kong regime. However, I agree with both Mr Ismail and Mr Miu that in appropriate cases, similar to the assumption made in *Re C*, we can safely assume that the MIP in question would, like many other people, want to be remembered fondly by his family and as having done the right thing by providing for them in a will.

DISCUSSION

On the basis of the medical evidence before me, I am satisfied that CVB does not have the capability to make a valid will for herself. Hence, the threshold laid down in section 10B(4) is met.

The committee and the Official Solicitor have agreed that three issues arise in this application:

Should the court order the execution for CVB of a will under section 10B(1)(e)?

If the answer to the first issue is yes, should the will contain the provisions now proposed by the committee?

If the answer to the second issue is no, what provisions should the will contain?

Applying *Re LLC*, in answering the first issue, section 10A(2) applies and the court shall have regard to CVB's best interests as a paramount consideration.

If the court does not authorise a statutory will, the whole of CVB's estate will go to the government with the 12th uncle's family getting nothing at all upon her passing. If the court does so authorise, those siblings of the 12th uncle with whom he still had contact before he died would share in CVB's estate.

The difference is stark. I consider that it is appropriate to deal with the first issue by applying the approach which should apply to the second stage, ie what the proper contents of the will should be, if one is to be made.

The first issue

If notionally restored to full mental capacity, memory and foresight and with proper legal advice of a solicitor, would CVB, acting reasonably, decide that her estate should all go to the government when she dies? Or would she decide that she should provide for some of the siblings of her late husband in a will?

The answer turns on what CVB would herself do. If, as a matter of fact, before her mental incapacity, she had expressed or otherwise shown particular wishes or preferences in how to distribute her assets, that would likely be a material factor in coming to the answer.

I have to say that on the evidence received by the court, I am not quite able to make out what CVB was like as a person before she became mentally incapacitated. The most direct evidence about her is that she took the 11th aunt to meals frequently and paid her monthly sums to support her. This shows a generous and caring side of her. Apart from that, however, very little has been said about her personality or what she had done which would reveal her general character.

Instead, much of the evidence about her revolves around her relationship with the 12th uncle. They had a happy marriage and a close and loving relationship. They made mutual wills in favour of each other. The 12th uncle looked after her and even when he was seriously ill, he made the point of asking A, B and C on different occasions to look after her after he died. CVB looked up to the 12th uncle very much. Based on such evidence, I find that it is more likely than not that CVB would wish to honour and carry out the 12th uncle's wish, if any. In other words, it can be said that CVB's wishes are her late husband's wishes.

As regards the committee's belief that it was the 12th uncle's wish to provide for his siblings after providing for CVB if he had an opportunity to make a will, I am unable to share that belief. It is true that the 12th uncle helped some of his siblings financially and generously during his lifetime. But the committee's belief is directly contradicted by the contents of the mutual will. I accept the submission made by Mr Miu as set out in para 61 above. I find that when he made the mutual will and until his death, the 12th uncle did not think about what should happen to the surplus of his substantial estate which CVB would inherit from him. In fact, in his closing submissions, Mr Ismail made the point, and I agree, that it is reasonable to assume that when making the mutual wills, the couple wanted to take matters one step at a time and leave it to the surviving spouse to deal with his or her estate when the time came. (Unfortunately, the time has now come but CVB is incapable of doing so.)

Lastly, as regards the committee's belief that CVB intended to make a will even though she took no step to do so after her meeting with L in May 2018, my observations are as follows.

On the one hand, one may interpret her failure to follow up with L as suggesting that she decided not to make a will. On the other hand, it was she who took the initiative of asking to see a solicitor about the making of a will. And this would suggest that she wanted to make one. It might have been the fear of having to see more doctors in order to make a will which prevented her from going ahead. There was a pattern of her not wanting to see doctors even when it seemed warranted. Another reason may simply be procrastination. As submitted by Mr Miu, the making of a will is not usually perceived as a time-critical matter. For many people, it is often procrastinated until death or dementia takes over.

Another possibility is of course that she was simply undecided and just left the matter there after seeing L.

Given all these possibilities and given the lack of any concrete evidence shedding light on her intention, I am not in a position to make any factual finding on whether CVB still wanted to make a will after seeing L. To attribute a factual intention to her would seem to me artificial and evidentially unsustainable. At the same time, however, the evidence should not be taken to

suggest that CVB preferred her estate to go to the government after her death. There is simply no evidence of that. There is in fact no evidence to suggest that CVB even knew that to be the legal position.

It follows that no wish of CVB making a will, whether to provide for the 12th uncle's siblings or otherwise, can be ascertained as a matter of fact. In this situation, it still falls on the court to apply the "substituted judgment" approach and ask the counterfactual question of what she might be expected to do if she were not mentally incapacitated.

These objective facts are material. First, the bulk of CVB's wealth was derived from her late husband. Second, the latter cared deeply for those siblings with whom he had maintained contact during his lifetime. Third, he supported some of these siblings financially and generously when the need arose.

If CVB now had a brief lucid interval, she would know that she is now near the end of her life. She would remember that her substantial wealth was inherited from her late husband. She would also remember that he cared deeply for his family. Her solicitor would tell her that if she does not make a will, all her assets would go to the government when she dies, and that in that situation, nothing will pass to the 12th uncle's family. That would include the 11th aunt whom CVB herself had been supporting financially for a long time.

I have said that we do not know much about CVB's own personality. However, when presented with a choice between having her estate go to either the government or the 12th uncle's family after her death, like in *Re C*, the court may safely assume that CVB is a normal decent person, who would act in accordance with contemporary standards of morality. She would feel a moral obligation to show recognition to the 12th uncle's family, including the 11th aunt in particular, and to give them back what she had inherited from the 12th uncle. Furthermore, as in *Re P* and *Re M*, the court may assume that CVB would want to be remembered fondly by the 12th uncle's family, which is really also her family, and as having done the right thing by providing for them in a will.

By contrast, there is no reason why she would feel morally obliged to let her estate go to the government. The 12th uncle was a successful surgeon. He accumulated his wealth from his practice. I am prepared to assume that he paid all his taxes and that the couple were not recipients of any social benefit. Hence, unlike the MIP in *Re L* and *Re C* who had been maintained by state hospitals, CVB would not feel obliged to pay back the government anything.

For these reasons, CVB would not want her estate to go to the government as *bona vacantia*. To make a will to provide for the 12th uncle's family would be the right, moral and decent thing to do. It would therefore be in her best interests. I would therefore authorise the committee to make a statutory will on her behalf.

The second issue

According to the latest proposed statutory will, the 11th aunt would be given a lump sum of HK\$2,000,000. This reflects the financial assistance which CVB has been giving her all along. As for the residuary beneficiaries, they are chosen because they were the siblings who survived at the time of the 12th uncle's death and with whom he had maintained contact. The siblings which have not been included are those with whom the committee has no contact, or who were not supported by the 12th uncle in any meaningful way.

I am satisfied that the proposed distribution and the reasons put forward are reasonable and that is something which CVB "might" be expected to do. As remarked in *Re C*, the court does not need to be satisfied that the MIP would definitely choose one particular way of distributing his assets. So long as the proposal can be rationally justified, the court would be satisfied that that is something which the MIP "might" be expected to provide.

As to the proposal of nominating the three committee members as executors, I am satisfied that that is also something which CVB "might" be expected to stipulate. She would trust A, B and C, who were each asked by the 12th uncle to look after her. C himself was named as one of the co-executors in the mutual wills.

For the above reasons, I am satisfied that the statutory will should contain the provisions proposed by the committee.

The third issue

In light of my answer to the second issue, the third issue is no longer relevant.

CONCLUSION

These are the reasons for which I made the orders set out in para 9 above at the conclusion of the two-day hearing.

As the application for statutory will was made bona fide and in the interests of CVB and was granted, applying *Re LLC* (No 2), I ordered that both the committee's costs and the Official Solicitor's costs be paid out of her estate.

(Winnie Tsui)

Judge of the Court of First Instance

High Court

Mr Anthony Ismail, instructed by Hart Giles, for the committee

Mr Nelson Miu, instructed by the Official Solicitor

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