Law Commission
Reforming the law

Making a will

Consultation Paper 231

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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Bean, *Chairman,* Professor Nicholas Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: The law of wills. This consultation paper sets out options for reforming the law of wills and seeks consultees' views on those options. The paper also asks consultees a number of open questions related to the law of wills.

Geographical scope: This consultation paper applies to the law of England and Wales.

Availability of materials: The consultation paper is available on our website at http://www.lawcom.gov.uk/project/wills/.

Duration of the consultation: We invite responses from 13 July 2017 to 10 November 2017.

Comments may be sent:

By email to propertyandtrust@lawcommission.gsi.gov.uk

OR

By post to Damien Bruneau, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

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If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

Information provided to the Law Commission

We may publish or disclose information you provide us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

Contents

Glossary and abbreviations

"Ademption": where a gift in a will does not take effect at the testator's death because the subject matter no longer exists or has fundamentally changed; for example because it has been given away or sold. In such circumstances, the gift is said to "adeem" and the beneficiary will not receive anything from the estate in place of the gift.

"Administration of an estate": the process of the personal representatives dealing with the estate of a deceased person by collecting money, paying debts and distributing the estate to those entitled under a will or the intestacy rules.

"Administrator": a person who is authorised by letters of administration (granted by the court) to administer a deceased's estate where no executor has been appointment, either because there is no will, the will does not appoint an executor or the executors that are appointed are unwilling or unable to act.

"Attorney": a person appointed under a Power of Attorney, such as an Enduring Power of Attorney or Lasting Power of Attorney, to deal with that person's affairs.

"Beneficiary": a person who receives money or property under a will.

"Beneficial interest": where a person has a beneficial interest in, or is the beneficial owner of, property he or she has the right to enjoy that property by using it or receiving any proceeds of sale. Such a person is also said to have equitable title to property, in contrast to legal title. Often, but not always, a person will be both the legal and beneficial owner of property.

"Chattel": a physical object, other than real property; such as a piece of furniture or jewellery.

"Codicil": a subsequent addition or amendment to a will.

"Construction": the act of interpreting a will.

"Court of Protection": the court which makes decisions in relation to issues concerning the health, welfare and financial affairs of a person who lacks the capacity to make such decisions him or herself.

"Deputy": a person appointed by the Court of Protection to manage the welfare or property and affairs of a person who lacks the capacity to make such decisions on his or her own behalf.

"Donor" and "donee": a donor is a person who gives something while a donee is someone who receives something. In this paper the donor may be giving property during his or her lifetime or making a donatio mortis causa (a special kind of gift given by a person in his or her lifetime, but that takes effect on death, discussed in Chapter 13). Alternatively, the donor may be giving the donee a power of attorney (such as a lasting power of attorney, or, before the coming into force of the Mental Capacity Act 2005, an enduring power of attorney).

"Disposition": the making of a gift in a will.

"Enduring Powers of Attorney": prior to the coming into force of the Mental Capacity Act 2005, people could obtain an Enduring Power to Attorney to authorise a trusted person to act for them if they could no longer manage their finances. See the Enduring Powers of Attorney Act 1985 (now repealed).

"Estate": a person's property, money and possessions.

"Execution": the term used to refer to making a will that is in compliance with the formalities requirements in section 9 of the Wills Act 1837 so that the will is formally valid.

"Executor": a person appointed by a testator in their will to administer a person's estate following their death.

"Family provision": the statutory scheme under the Inheritance (Provision for Family and Dependents) Act 1975 which gives the courts the jurisdiction to make provision from the deceased's estate for certain categories of claimant, where the deceased ought to have made reasonable financial provision for that person.

"Formalities": the formal requirements for a valid will set out in section 9 of the Wills Act 1837, such as that the will must be in writing and signed by the testator.

"Gift": in this Consultation Paper, used to mean any benefit under a will.

"Grant of representation": a generic term for a grant of probate or grant of administration.

"Grant of letters of administration": the authority granted by a court to a person or number of people to allow him, her or them to deal with a deceased's estate where there is no will, where the will does not appoint an executor or where the executors that are appointed are unwilling or unable to act.

"Grant of probate": a legal document which authorises an executor (or executors) to manage the estate of a deceased in accordance with his or her will.

"Intestacy": where a person dies without having made a valid will. The deceased is said to have died "intestate".

"Lasting Powers of Attorney" (LPA): a legal document under which a person ("an attorney") can be appointed to make decisions on behalf of a person who is unable to make his or her own decisions regarding welfare, money or property. See section 9 of the Mental Capacity Act 2005.

"Legal interest": where a person has a legal interest in property, or is the legal owner, he or she has the right to deal with the property; for example to manage it, to sell it, or to make a gift of it. Such a person is also said to have legal title to property, in contrast to beneficial title. Often, but not always, a person will be both the legal and beneficial owner of property.

"Minor": a person who is under the age of 18.

"Official solicitor": the officer of the court who acts for a person who is unable to represent him or herself through a lack of capacity, where no other suitable person or agency is able and willing to act.

“Personal representative”: a generic term for either an executor or an administrator.

“Probate”: the legal process under which a will is proved as a valid will.

“Propound”: to advance a will as authentic. The propounder of a will claims that a particular document is the testators final will and that the provisions of that document should govern the distribution of the testator’s estate.

“Rectification”: the process of correcting a legal document, most commonly because of a typographical error.

“Residuary estate”: part of the deceased’s estate that has not been specifically disposed of in the will. The residuary estate includes any property which has been specifically disposed of where that disposition has failed; for example, where the intended beneficiary has predeceased the testator.

“Revocation”: the formal act of withdrawing a valid will. A will is, by its very nature, revocable by the testator until his or her death.

“Statutory will”: a will made by the Court of Protection on behalf of a person who lacks capacity.

“Testamentary capacity”: where a person has capacity to make a will.

“Testator”: a person who has made a will. Throughout this Consultation Paper, we use the term “testator” to refer to both male and female testators, though traditionally (and in legal documents) a female testator is referred to as a “testatrix”.

“Trust”: a trust is a means of separating legal from beneficial title; those who hold the legal interest in the property are called trustees and they hold the property for the benefit of those who have beneficial title, called beneficiaries. A trustee may also be a beneficiary in some cases.

“Will substitute”: an umbrella term sometimes used to describe legal means through which property is passed on death other than by a will, including by nomination in a private pension scheme and through payment of life assurance.

“Will writer”: professionals involved in the drafting of wills, acting otherwise than as solicitors or legal executives.

Chapter 1: Introduction

THE LAW COMMISSION'S REVIEW OF THE LAW OF WILLS

1.1 When we die our property passes to those we leave behind.[1] For some people a will determines who receives the property: many thousands of people each year make wills or receive inheritances under wills. However, many people die without having made a will, that is, they die "intestate". Estimates vary but it has been suggested that 40% of the adult population do not have a will.[2] This project is concerned with the law relating to wills.[3]

1.2 The law in England and Wales that governs wills is, in large part, a product of the 19th century: the main statute is the Wills Act 1837, and the law that specifies when a person has the capacity to make a will was set out in a case from 1870.[4] The law of wills needs to be modernised to take account of the changes in society, technology and medical understanding that have taken place since the Victorian era. The significant changes relevant to a review of wills law include:

(1) the ageing population;

(2) the greater incidence of dementia;

(3) the evolution of the medical understanding of disorders, diseases and conditions that could affect a person's capacity to make a will;

(4) the emergence of and increasing reliance upon digital technology;

(5) changing patterns of family life, for example, more cohabiting couples and more people having second families; and

(6) that more people now have sufficient property to make it important to control to whom it passes after their death.

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1 If there is no-one who can benefit, and we make no provision in a will for what should happen with our property, then our property goes to the Crown (or, alternatively, to the Duchy of Cornwall or Duchy of Lancaster).

2 This was the Law Society's view in its response to our 12th Programme public consultation, which suggested that we review the law of wills. Statistics support that estimate. There were 273,557 grants of representation for the 529,655 deaths registered in England and Wales in 2015. 40,409 were grants of letters of administration (that is, there was no will). For the 256,098 deaths where there was no grant it is not possible to know whether or not there was a will, but it is likely that most of these deaths were intestate. See Family Court Statistics Quarterly July to September 2016 and ONS webpage on Deaths at https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths (last visited 14 June 2017).

3 We considered the law that governs instances in which a person dies without having left a will in our 2011 project, Intestacy and Family Provision: Claims on Death (2011) Law Com No 331. The project recommended reforms to the law of intestacy that simplified how assets pass on death where a person dies without a will, and which clarified the law that applies where a person makes a claim under the Inheritance (Provision for Family and Dependants) Act 1975. The reforms were enacted by the Inheritance and Trustees' Powers Act 2014.

4 *Banks v Goodfellow* (1869-70) LR 5 QB 549 at 563.

1.3 Stakeholders agree that the law needs to be updated to improve clarity, bring it up to date and make it workable. In this consultation paper we set out the relevant law, explain what reforms we think could be made to the law and ask readers to answer questions that we ask about these potential reforms. Following the publication of this paper, there will be a formal consultation period for four months during which we will run consultation events aimed at eliciting views from the public and a broad range of stakeholders. Responses to the consultation paper should be sent to us by the end of those four months (10 November 2017) so that we can analyse them after the close of the consultation period. The final stage of the project will be the development of recommendations for reform of the law, which will be published in a report. Our report will be accompanied by an impact assessment, identifying the economic and non-economic effects of our recommendations for reform. The report may also be accompanied by a bill to change the law in line with those recommendations.

HISTORY OF THE PROJECT

1.4 In the latter part of 2013 the Commission undertook a public consultation on the contents of its 12th Programme of Law Reform, to run from summer 2014. In response to that consultation, suggestions for the reform of the law of wills were received from leading representative legal bodies (the Bar Council, the Law Society, the Chancery Bar Association and the Association of Contentious Trust and Probate Specialists) and by a wide range of practising lawyers specialising in wills work. Consultation responses focused in particular on two main areas of the law of wills: testamentary capacity and formalities. The importance of will-making had also been emphasised repeatedly by Ministers and by the Opposition in Parliament; for example, during the progress of the Inheritance and Trustees' Powers Bill, which implemented the recommendations of the Commission's project on intestacy.[5]

1.5 The project was originally scheduled to start at the beginning of 2015, and some preliminary work was undertaken during that time. However, at the start of 2015 the Government asked the Commission to review the law of marriage. On Commissioners' acceptance of this project, it was agreed that our work on wills should be put on hold. Following the publication in December 2015 of the scoping report "Getting Married", we commenced the review of the law of wills, alongside other ongoing law reform work.

1.6 Since early 2016 we have been researching the law, potential reforms and, importantly, meeting a broad range of stakeholders to inform the preparation of this paper. We have met those involved in the drafting of wills, such as solicitors and will writers, and relevant government departments and bodies. We have also met a range of charities and other organisations that work with those who may have particular needs, or be particularly vulnerable, in respect of the will-making process, such as elderly people or those whose capacity to make a will might be affected by conditions such as dementia.

[5] Intestacy and Family Provision: Claims on Death (2011) Law Com No 331.

WHAT IS A WILL?

1.7 In one respect this is an easy question to answer, as a will is one of the most familiar of legal concepts. Most people would recognise that "a will is an expression by a person of his or her wishes intended to take effect only at death".[6] In nearly all cases, wills made in England and Wales are written documents. However, in limited situations, where "privileged" wills are permitted, a will may be merely an oral declaration.[7]

1.8 More technically, the defining features of a will might be as follows:

(1) It is ambulatory, that is, subject to change or revocation. This means that the testator – the person making a will – has the opportunity to change his or her mind; the consequences of the document are not set in stone as soon as it is executed.

(2) The dispositions of property (and/or other instructions) in the will take effect upon the testator's death.

(3) The testator must have intended the dispositions to be revocable and to take effect on his or her death.[8]

1.9 With regard to terminology we have taken the decision in this paper to use the term testator, which is the legal term for a person who makes a will. We use "testator" to refer to both male and female testators, though traditionally (and in legal documents) a female testator is referred to as a "testatrix". We have considered whether it would be better to use a less technical term, such as "will-maker". We rejected doing so, in the paper, because we were concerned that the term might be ambiguous; it could conceivably refer to someone who drafts a will professionally for someone else. We also recognised that many of the sources that we cite, or quote from, use the term testator and that it is also the word which many who read this paper, such as those in the legal profession, would expect us to use. Nonetheless, it is a term which the public may find strange or off-putting and we therefore ask whether it would be preferable, in a new Wills Act, to use a less technical term.

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6 Lesley King, Keith Biggs and Peter Gausden, *A Practitioner's Guide to Wills* (2010) p 5.

7 See para 5.75 below.

8 *Re Berger* [1990] Ch 118 at 129 by Mustill LJ. This necessary intention is sometimes called the animus testandi.

Consultation Question 1.

In any new legislation on wills should the term "testator" be replaced by another term?

If so:

(1) should the term that replaces "testator" be "will-maker"? or

(2) should another term be used and, if so, what term?

TESTAMENTARY FREEDOM AND THE INTESTACY RULES

1.10 One might ask why it is important to have a will. A will is not strictly necessary; if a person dies intestate the law intervenes, by way of the intestacy rules.[9] These rules specify what should happen to a person's property either where there is no will or where a will does not completely dispose of a person's property. What the rules specify will depend on a person's circumstances at the time of death, for example whether he or she was married, what other relatives he or she had and the value of his or her estate.

1.11 The intestacy rules are, however, a blunt instrument that will not work for many people. Most notably, no provision is made for a person's cohabitant under the rules. This is obviously a serious issue for the many people in England and Wales who live together without being married or in a civil partnership. Likewise the intestacy rules may not give the result that would be wanted by some people who have remarried and have children from the first marriage. Many people also wish to leave a gift to charity in their will and the intestacy rules do not make provision for this.

1.12 In addition, the law of England and Wales places a great deal of emphasis on testamentary freedom – the freedom to make a will in whatever terms the testator wishes. This idea is the primary legal principle that underpins this area of the law and reflects a deeply rooted belief.[10] A will is the means by which a person can exercise his or her testamentary freedom, rather than relying on the default position provided by the intestacy rules, although some may choose to exercise that freedom by deliberately not making a will.

1.13 Historically, an integral aspect of testamentary freedom has been the testator's understanding of the moral obligations that he or she owes to others. In the case of *Banks v Goodfellow* it was said that the law provides testators absolute freedom to dispose of their property, but "a moral responsibility of no ordinary importance attaches to the exercise of the right thus given". Because of their "instincts and affections", testators will naturally make provision to those closest to them or for whom they have the most affection. Consequently, the testators' family members, and particularly their

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9 The intestacy rules appear at Administration of Estates Act 1925, s46.

10 See Intestacy and Family Provision Claims on Death: A Consultation Paper (2009) Law Com No 191, para 1.28.

children, will have "reasonable and well warranted expectation[s]" that the testator will gift his or her property to them.[11] Testators are also best able to determine who among their family members and friends are most deserving or most in need of assistance, or who have other claims arising from friendship or attachment. But testamentary freedom means that there is no obligation on us to do so, and our family and friends do not have a "right" to inherit our property.

1.14 There are, however, limits on testamentary freedom. If, for example, a testator does not have the capacity to make a will, he or she will not be able to exercise his or her right to make a will. In that situation, however, a will can be made for a person by the Court of Protection, which may allow an incapacitated person to express his or her wishes, at least to some extent, and therefore some degree of testamentary freedom.[12] We refer below to other limitations on testamentary freedom.

CONTEXT

1.15 We set out below a brief comment on areas which touch upon, and inform, our central focus on the law of wills.

Probate and estate administration

1.16 In this paper our focus is the law of England and Wales governing wills; we do not consider reform of the process of probate by which either the testator's wishes set out a will, or the rules of distribution contained in the intestacy rules, are then given effect.

1.17 Briefly, after a person's death, a grant of representation will usually be required to allow a person's personal representatives to administer or deal with his or her estate after death. This process of estate administration will involve collecting in money and property, paying debts and distributing the remainder of the estate to those who are entitled to receive it either because they are beneficiaries under a will or because they benefit under the intestacy rules.

1.18 A grant of representation will be either a grant of probate, obtained where the personal representatives are appointed in the will, or a grant of administration, granted where either the will does not appoint executors or the person died intestate. Where the personal representatives are appointed under a will they are called executors; those appointed by a grant of administration are called administrators.[13] A grant of representation to the executors or those entitled to a grant of administration is made by the court; in practice, this is obtained by an application to the Probate Registry. The administration of an estate will often involve the payment of inheritance tax and, therefore, the completion of a tax form by the personal representatives to be sent to Her Majesty's Revenue and Customs.

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11 *Banks v Goodfellow* (1869-70) LR 5 QB 549 at 563.

12 A person's "best interests" will govern the making of, and provisions within, a statutory will, under the Mental Capacity Act 2005 but best interests includes consideration of a person's wishes and feelings. See Chapter 3, below.

13 The law provides for whom is entitled to a grant of letters of administration; essentially this is a person's next of kin. See Non-Contentious Probate Rules 1987, r 22(1).

Other ways in which property may pass from the deceased to others on death

1.19 At least some of a person's property will often pass on death by a method other than a will. This might be because the person owns property jointly with another person in what is known as a "joint tenancy". When a joint tenant dies, the operation of a rule called "survivorship" means that the property simply remains with the surviving joint tenant or tenants; there is nothing for the person who has died to leave in his or her will.[14] Many people will own a family home or bank accounts in this way. People may also have nominated a person to receive a benefit after their death under a pension scheme or an insurance policy. These sums will pass to others under the terms of those nominations, rather than according to the provisions of a will. These ways of passing on wealth on death are sometimes referred to as "will-substitutes".[15]

Challenges to a will after the testator's death

1.20 We have already referred to the way in which a person's testamentary freedom may be limited by incapacity during his or her lifetime. Testamentary freedom may also be limited by what happens after a person's death. A will may be legally challenged on the basis that it is invalid: the person making such a claim may allege that the person did not, in fact, have testamentary capacity, or that he or she did not "know and approve" of the contents of the will, or that the will was the result of either another person's "undue influence" over the testator, or fraud.[16] The result of success in any of these arguments will be that the will is invalid and has no effect. The testator's estate will then pass according to any earlier valid will or, if there is none, under the intestacy rules.

1.21 The terms of a will, or the intestacy rules, may also be superseded by claims that certain categories of people have on an estate. The law provides that after a person's death certain categories of people related to the deceased, cohabiting with him or her, or financially dependent on him or her, are able to apply for financial provision from the estate under the Inheritance (Provision for Family and Dependants) Act 1975. If such claims are successful they will change the disposition of the estate.[17]

International law and the law of other jurisdictions

1.22 Later in this paper we discuss the relevance to wills of the United Nations Convention on the Rights of Persons with Disabilities. This Convention is an international instrument protecting and promoting the human rights of disabled people. Its relevance to the field of wills lies in Article 12 which deals with the right for disabled people to equality before

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14 The alternative would be for the person to own the property jointly as "tenants in common". In this situation each joint owner will have a defined share of the property and, on each owner's death, his or her share will pass to others either according to the provisions of his or her will, or under the intestacy rules.

15 Other methods include statutory nominations, where under statutory provisions a person may pass on certain funds or investments on death by way of a written nomination, and the donatio mortis causa, for which see Chapter 13 for our discussion. See also A Braun and A Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (2016).

16 These concepts are all discussed in later chapters of this paper.

17 We note the recent Supreme Court decision in *Ilott v Mitson* ([2017] UKSC 17; [2017] 2 WLR 979) regarding a claim under the 1975 Act by an adult child of a deceased woman. The Supreme Court reinstated the order of the District Judge, reversing the order of the Court of Appeal which had made more generous provision.

the law. We discuss the Convention further in our chapters on supported wills and statutory wills, where it is of most relevance.[18]

1.23 We have found it very helpful, when thinking about the problems in the law of wills in England and Wales, to consider the law of other jurisdictions. It is not always necessary to look far afield for such comparisons; the law in Scotland, is significantly different to that of England and Wales and provides a useful comparator.[19] We have also looked at the law in European jurisdictions, the United States, Canada, Australia and New Zealand. Law reform in other jurisdictions has informed our analysis and proposals. For example, the recent work of the Victorian Law Reform Commission on Succession Law has been very useful, as has consideration of recent reform in British Columbia and the work of the US Uniform Law Commission on a Uniform Probate Code.[20]

REFORM

Scope

1.24 This project is a general review of the law of wills. Whilst broad in its scope, this consultation paper is not, however, exhaustive in its coverage of this area. We have, instead, sought to be selective and to focus on those areas where we think, or stakeholders have told us, that reform is most needed. We had previously set out, on the web page for the project,[21] a list of examples of areas of the law of wills that we thought would be key in the project: will-making and testamentary capacity; what makes a will valid; the law on rectifying mistakes in wills; and mutual wills. Testamentary capacity, and the formalities needed to make a valid will remain of central importance to the project and we address these at length. In the course of preparing this paper the law on rectification, and mutual wills, has assumed less importance and we treat these topics relatively briefly, proposing either no, or minor, reform. Other topics, have, however, assumed greater importance, for example, the issue of whether a person knows and approves of the content of his or her will; whether he or she has been unduly influenced in making his or her will; the prospect of electronic will-making; and ademption - where a gift in a will does not take effect at the testator's death because the subject matter no longer exists or has fundamentally changed.

1.25 Notwithstanding our selective approach, we do, however, see one result of this project as being the creation of a more modern and improved Wills Act, to replace the Wills Act 1837.

1.26 There are certain areas of the law which intersect with the law of wills – as they may determine who is entitled to our property when we die – which we have excluded from

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18 Chapters 3 and 4.

19 One example: it is possible to make a will at the age of 12 in Scotland, whereas people under the age of 18 cannot make wills in England and Wales. We discuss children and succession in our paper at Chapter 8.

20 Succession Laws: Report (2013) Victorian Law Reform Commission; Wills, Estates and Succession: A Modern Legal Framework (2006) British Columbia Law Institute Report No 45; Report on common-law tests of capacity (2013) British Columbia Law Institute Report No 73; http://www.uniformlaws.org/shared/docs/probate%20code/UPC_Final_2016aug1.pdf (last visited 14 June 2017).

21 http://www.lawcom.gov.uk/project/wills/.

consideration in this project. We do not consider the law governing secret trusts[22] or proprietary estoppel.[23]. Intestacy, family provision and "forced heirship" (that certain categories of a deceased person's relatives – such as a spouse or a child – should have an entitlement to the deceased's property that cannot be overridden by a will) are also beyond the scope of this project.

1.27 In our chapter on "Other things a will could do"[24] we discuss the issue of digital "assets" such as social media and email accounts, digital music and photographs. These fall outside the sort of property that is normally dealt with by a will. We offer further observations in that chapter but, in brief, we take the view that a comprehensive consideration of this issue falls outside the scope of our project. This is because, in general, such "assets" are, in fact, a contractual agreement between the person and the relevant company (for example, an online music content provider). Any reform looking at, say, access by personal representatives to a deceased person's social media account, would therefore have to consider the contractual basis of what has been purchased, and the likely conflict between contract law and the law of estate administration. The issue of passing on digital assets is also relevant in circumstances other than the death of the person who had the right to use the asset. Consideration of this issue therefore goes beyond the law of wills.

1.28 The regulation of the professional drafting of wills, or "will-writing," also falls outside the scope of the project. Currently there is no regulation of who is permitted to write wills. The question of whether there should be any regulation was considered by the Legal Services Board in a 2013 report.[25] The report recommended that will-writing should be regulated by being made a reserved legal activity, which only certain professions would be permitted to practise. The Government, however, rejected this approach. We understand that Government's view has not changed and we do not consider that at this time the Commission could add value to the work already done by the Legal Services Board. Currently, therefore, wills continue to be prepared professionally by solicitors, legal executives, will writers and others.

1.29 In this paper we refer to "professionals" or "practitioners" preparing wills as including all those preparing wills for remuneration. We do not distinguish between different sorts of professionals unless we say so explicitly.

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22 A secret trust arises when a person inherits property, either under a will or on an intestacy, but the person who takes the property has promised to hold it on trust for another person (without there being any indication in the will that that is the case).

23 Proprietary estoppel will operate in the testamentary context where one person has made a promise to another that he or she will inherit an asset on the first person's death and that other person has acted to his or her detriment in relying on that promise: for example, a person might work for reduced wages on the family farm because she has been promised by his or her parents that he or she will inherit the farm on her mother's death.

24 Chapter 14.

25 Legal Services Board, "Sections 24 and 26 investigations: will-writing, estate administration and probate activities" (2013), available at http://www.legalservicesboard.org.uk/Projects/pdf/20130211_final_reports.pdf (last visited 14 June 2017).

Objectives of reform

1.30 In making provisional proposals for reform and discussing possible solutions to the problems in the law, we have borne in mind several aims:

(1) Supporting testamentary freedom, including reform aimed at encouraging and facilitating will-making and reform aimed at supporting testators' intentions.

(2) Protecting the testator from fraud and undue influence.

(3) Increasing the clarity and certainty of the law in this area, in so far as this is possible.

1.31 Consistent with the first objective, we do not suggest reforms that would prevent testators drafting their own wills and necessitate the additional involvement of a legal professional, for example, a new form of will that could only be made with the assistance of a practitioner. While it may often be advisable for a testator to obtain legal advice when making a will, the law should not directly or indirectly require it.

1.32 The latter two objectives are tempered by the need for flexibility in the law of wills. It is possible to take a "formalist" approach to wills, so that the emphasis is on compliance with, for example, strict rules as to formalities for a valid will. In general, however, there has been a move towards a more "functionalist" approach which places the emphasis on the purpose that formalities, and other rules in the law of wills, are seeking to perform, rather than being concerned with strict adherence to precise requirements.[26] The latter approach, which we support, necessarily means that the law is less certain than it might be, but for the good reasons of making it more just and responsive to the facts of a particular case.[27]

Beyond law reform

1.33 There are problems in the practice of will-making that cannot be solved by law reform. Stakeholders have told us about a wide range of reasons that people give for not making wills; for example, fear of death, or superstition. We have also been told that it can be difficult for practitioners to find witnesses for wills in hospital or care settings, possibly as a result of policies that seek to prevent staff engaging with the making of wills in these situations because of a fear of subsequent litigation. It may be helpful for those making such policies to review whether they are strictly necessary, given the barriers that they can place in the way of will making.

1.34 Many practitioners have also told us that they are concerned about market forces driving down the fees that they can charge for drafting a will to a point where it becomes uneconomic for professionals to continue to offer this service. This may in turn impact on the availability of professional advice about making a will. On the other hand, this

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[26] See for example, J Langbein "Excusing harmless errors in the execution of wills: a report on Australia's tranquil revolution in probate law" [1987] 1 *Columbia Law Review* 1; J Lindgren, "The fall of formalism" (1991-1992) 55 *Albany Law Review* 1009; "Should we admit Informal Wills to Probate" [2007] *Conveyancer and Property Lawyer* 289; D Horton, "Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism" (forthcoming) *Boston College Law Review*, Vol 58.

[27] A dispensing power, which we discuss in Chapter 5, is an example of taking a functionalist approach to this area of the law.

view is not shared by all who draft wills professionally and we consider that it is a matter for individual practitioners, or firms, to address in the way that they think best. What is adequately remunerative work for one practitioner will not be so for another. The Law Commission does not offer a view on this issue or suggest solutions, beyond expressing the hope that a clearer, and more modern, law of wills may make it easier to advise clients and therefore, potentially, reduce the time taken to deal with certain aspects of the process of making a will.[28]

IMPACT

1.35 We need to know as much as possible about the practical context in which wills are made, in order to inform our assessment of the impact, both economic and non-economic, of our recommendations for reform. The Association of Contentious Trust and Probate Specialists, a representative organisation of practitioners involved in this work, has kindly undertaken a survey of its members for us covering issues such as:

(1) how practitioners take instructions from clients;

(2) how much a professionally drafted will costs, including the cost of additional items such as a report from a suitably qualified professional on a person's capacity to make a will; and

(3) the issues that cause problems when a will is being drafted.

1.36 We would be grateful if those who respond to our consultation could consider whether they have any information on these issues which they could provide. We would also be interested to understand:

(1) The reasons why people do, or do not, make a will.

(2) What the impact is on those left behind by the testator when there is a dispute about the testator's will; for example, the cost of litigation. What is the impact if a will is declared to be invalid and the estate passes by the intestacy rules?

Consultation Question 2.

We ask consultees to tell us about their experiences of the impact, financial and otherwise of the:

(1) preparation, drafting and execution of wills; and

(2) disputes over wills following the testator's death.

[28] We do note that some practitioners choose to write wills on a distance basis so that instructions are taken remotely, without meeting the client, and sophisticated software may be used to assist in case management and drafting. This approach may offer economies of scale and allow the firm to offer lower priced wills which still make a profit. Typically, contracts for the provision of such services will exclude an assessment of a testator's capacity to make a will.

STRUCTURE OF THIS CONSULTATION PAPER

1.37 This paper begins by considering in Chapter 2 the testator's capacity to make a will. We consider the different ways in which the law approaches the question of a person's capacity to make a will and the problems with that approach, before going on to provisionally propose that a new approach is adopted—using the test in the Mental Capacity Act 2005. We consider how testamentary capacity should be assessed, provisionally proposing the introduction of a statutory code of practice.

1.38 In Chapter 3 we consider the special circumstance of wills made on behalf of an incapacitated person by the court. We take the provisional view that reform is not required to the rationale for why such wills are made or to how the court exercises its discretion, and ask whether any reform could usefully be made to the procedure.

1.39 In Chapter 4 we ask for consultees' views on a possible new scheme for supporting the making of wills in circumstances where testators who would otherwise not have capacity could be supported to do so.

1.40 In Chapter 5 we move on to consider the formalities that are necessary for a will to be valid, such as signature by the testator and two witnesses. We ask whether the current formalities are a barrier to making a will and discuss possible reforms aimed at improving the protection provided to testators where someone signs the will on their behalf, and in relation to who can witness a will. We explain the problems with the requirement that the witnesses "attest" a will and provisionally propose that this requirement be removed. We consider the law that allows people in the armed forces, as well as seamen, to make wills without complying with the usual formality requirements – "privileged wills". We propose that the scope of that doctrine be clarified so as to include only members of the UK armed forces and civilians serving alongside them. Finally we propose that a power should be introduced allowing the court to dispense with the required formalities on a case by case basis, and discuss how that should operate.

1.41 We then focus, in Chapter 6, on how the law should respond to the possibility of making a will electronically, rather than on paper. We open the way for the future adoption of electronic wills by proposing the introduction of a power in legislation enabling the Government to authorise this form of will, while leaving the detail of how this is done to be decided in the future. Accordingly, we also provisionally propose that the law should be clear that electronic signatures do not currently meet the requirement that a will be signed. We consider the possible methods that might be used to enable electronic wills, and their challenges.

1.42 In Chapter 7 we discuss how the law protects vulnerable testators by setting out when a testator will be found to know and approve the terms of his or her will, and when the will is the product of the testator's free will (that is, the testator has not been unduly influenced to make a will which he or she would not otherwise have made). We analyse how these two areas relate to each other and to the testator's capacity to make a will and propose that the law of undue influence in the testamentary context be reformed to provide greater protection to the testator. We also propose complementary reform to narrow the scope of the requirement of knowledge and approval. We explain the relevance in this area of the law governing whether one party should be ordered to pay

the other's legal costs and why we do not think that reform is required, before checking this conclusion with consultees.

1.43 In Chapter 8 we consider whether it should be possible for children to make a will and provisionally propose that the age at which a valid will can be made should be reduced from 18 to 16. We ask consultees whether the court should have the power to authorise children under that age to make a will, and who should assess whether they have the capacity to do so.

1.44 Chapter 9 looks at how the law allows mistakes in a will to be rectified in certain circumstances and how this relates to the way the court will interpret a will. We do not consider that any major reform is required in this area, beyond the reproduction in any new statute of the interpretive provisions contained in the Wills Act 1837, and, potentially, the repeal of certain obsolete provisions. However, we ask consultees questions designed to check our conclusions.

1.45 In Chapter 10 we explain the law of ademption: broadly, what happens when the subject of a specific gift in the testator's will is no longer in his or her estate at the time of death. We propose reforms to update the law of ademption with regard to several different circumstances: disposals of property by a person appointed under a power of attorney; where the testator dies before a transaction is completed; where there is a gift of shares; and where property is destroyed simultaneously with the death of the testator. We also ask whether wider reforms are required.

1.46 The ways in which a will can be revoked are explored in Chapter 11 where we conclude that no reform is required to most of the methods by which a will can be revoked. However, we ask consultees whether consideration should be given to changing the current rule that the testator's marriage automatically revokes his or her pre-existing will. We propose that, should that rule be retained, it should not apply where the testator lacks testamentary capacity at the time of the marriage.[29]

1.47 Chapter 12 considers a particular form of will - the mutual will – made by two or more people and which prevents the survivor(s) changing his or her will after the death of the first testator. We propose a reform to the law in this area to provide the court, where a family provision claim under the 1975 Act has been made, with the power to make orders against property which is the subject of a mutual wills arrangement.

1.48 In Chapter 13 we examine a way of making a gift that is a hybrid between a lifetime gift and a gift made in a will: the donatio mortis causa. We explain how this sort of gift is an anomaly but one where the limits of the doctrine have recently been considered by the Court of Appeal. We explain the problems in the law and ask consultees whether the donatio mortis causa should be abolished.

1.49 Finally, in Chapter 14, we reflect on what else testators consider when they write their wills other than disposing of their property. We discuss the issues of digital "assets" (such as social media accounts), burial and cremation and the appointment of guardians for children, asking consultees questions about the first and last of these topics.

[29] A person can simultaneously have capacity to enter a valid marriage, but lack testamentary capacity.

ACKNOWLEDGEMENTS AND THANKS

1.50 We have held a number of meetings with individuals and organisations while we have been preparing this paper, and we are extremely grateful to them all for giving us their time and expertise so generously.

1.51 We would like to extend our thanks to Action on Elder Abuse; Alzheimer's Society; Professor Peter Bartlett; Professor Alexandra Braun; Juliet Brook; Dementia UK; the Digital Legacy Association; Baroness Finlay of Llandaff; Foot Anstey; Gedye & Sons; Professor Birke Häcker; Professor Rosie Harding; Professor Jonathan Harris; Headway; Siôn Hudson; Hugh James; Professor Robin Jacoby; Professor Roger Kerridge; Dr Ying Liew; former Senior Judge Denzil Lush; Sue MacLeod; Mencap; MND Association; Daniel Monk; the Office of the Public Guardian; the staff of the Official Solicitor and Public Trustee; Dame Esther Rantzen DBE; Penelope Reed QC; the Probate Service; Sarah Rochira, the Older People's Commissioner for Wales and her staff; the Royal Hospital for Neuro-Disability; Gary Rycroft; Sense; Dr Brian Sloan; the Society of Will Writers; Solicitors for the Elderly; VoiceAbility; Withers; the attendees at the STEP workshop on Capacity on 11 September 2014, and the attendees at the Current Issues in Succession Law conference at All Souls College, Oxford on 10 and 11 July 2015.

1.52 In particular, STEP (Society of Trust and Estate Practitioners) and the Wills and Equity Committee of the Law Society have kindly invited us to meetings and provided very useful feedback on our provisional proposals, while ACTAPS (the Association of Contentious Trust and Probate Specialists) have been very helpful in conducting a survey of their members with regard to will-writing and will disputes.

THE TEAM WORKING ON THE PROJECT

1.53 The following members of the property, family and trust team have contributed to this report at various stages: Matthew Jolley (team manager); Spencer Clarke (team lawyer); Elizabeth Welch (legal assistant); Mairi Innes (research assistant); Damien Bruneau (research assistant); Maxwell Myers (research assistant).

Chapter 2: Capacity

INTRODUCTION

2.1 Capacity refers to a person's ability to do something. In law, capacity is a concept which refers to the person's ability or power to do something which may have legal consequences, whether for the person doing the action or making the decision or for others.[1]

2.2 Capacity can refer to a number of different characteristics a person must possess in order to act or make a decision. Age is one example.[2] To have capacity to make a will a person must be at least 18 years old.[3] Often, however, capacity refers to mental capacity. Mental capacity is the focus of this chapter, and throughout this chapter, when we use "capacity," we mean mental capacity.

2.3 Mental capacity refers to a person's cognitive ability to perform an act or make a decision. Whether a person has cognitive ability is inevitably a question of degree; the law does not hold a person to lack capacity simply because he or she has a disorder, illness or impairment. Rather, the law sets a threshold for when the degree of the disorder, illness or impairment renders a person incapable to do the act or make the decision.[4] Capacity therefore refers to the degree of understanding sufficient for the act or decision in question.

2.4 In 1857, Lord Cranworth famously described capacity in the following, old-fashioned but poetic, terms:

> … between such an extreme case [of obvious mental incapacity] and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.[5]

There is an important respect in which Lord Cranworth's metaphor requires qualification. A person's transmission from capacity to incapacity is not necessarily linear. Capacity may fluctuate according to the effect of a disorder, illness or impairment, so that a person who does not have capacity today, or this morning, may have regained

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1 The British Medical Association and the Law Society, *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (4th ed 2015) para 1.1.

2 See Wills Act 1837, s 7. British Columbia Law Institute, *Report on Common-Law Tests of Capacity* (BCLI Report no 73, 2013) pp 11 to 12.

3 Children under the age of 18, in accordance with Wills Act 1837, s7 as amended by Family Law Reform Act 1969, s3(1)(a) do not have capacity to make a will – see Chapter 8.

4 British Columbia Law Institute, *Report on Common-Law Tests of Capacity* (BCLI Report no 73, 2013) pp 1 and 12 to 13; *Boyse v Rossborough* (1857) 10 ER 1192, 1210.

5 *Boyse v Rossborough* (1857) 10 ER 1192, 1210.

capacity this afternoon, or tomorrow.[6] The crucial question is always whether the person had capacity at the time the decision was made or the act carried out.

2.5 The law in England and Wales does not have a single test for capacity that is used for all purposes. Instead, the law takes what is known as a "functional approach".[7] Under this approach, a person's capacity is assessed for a particular decision that has been made, or for a particular act that has been done. Different thresholds of capacity are required for different decisions and acts, based on their gravity and complexity. Consequently, the fact a person has capacity to make one decision (for example, to enter a simple contract to buy milk or a newspaper) does not necessarily mean that he or she will be found to have capacity to make a different decision (such as to enter a more complex contract like a credit agreement). How a person's capacity should be assessed, as acknowledged in the Law Commission's Consultation Paper on capacity, is a matter of debate.[8]

2.6 Many of the tests of capacity were developed over time within the common law. Each common law test attempts to assess the level of understanding sufficient for the decision at hand. Consequently, under the common law there is a test of capacity to marry,[9] to consent to medical treatment,[10] to enter into a contract,[11] to make a lifetime gift,[12] and so on.

2.7 The Mental Capacity Act 2005 ("MCA")[13] provides the legal framework in England and Wales for acting and making decisions for and on behalf of people aged 16 and over who lack the mental capacity to make particular decisions for themselves. It imposes a single test of capacity upon a broad range of decisions – specifically financial, healthcare and welfare decisions which may need to be made on behalf of a person who permanently or temporarily lacks capacity to make those decisions for him- or herself.[14] The MCA also outlines the principles and the framework that govern decisions relating to a person's capacity. The MCA affirms the functional approach taken by the common law in assessing capacity.[15]

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6 Fluctuating capacity is considered in detail in Mental Capacity and Deprivation of Liberty (2017) Law Com No 372 at para 9.38. Will making presents fewer difficulties in this regard than deprivation of liberty.

7 An explanation of different legal approaches to capacity, including the functional approach, is given in our 1991 consultation paper, Mentally Incapacitated Adults and Decision-Making: An Overview (1991) Law Com No 119.

8 Mentally Incapacitated Adults and Decision-Making: An Overview (1991) Law Comm No 119, para 1.2.

9 See, for example, *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326 at [68] to [69] and following.

10 Capacity to consent to medical treatment is governed by the MCA test; however, this enshrines the pre-existing common law test. See, for example, *In Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819.

11 See, for example, *Boughton v Knight* (1873) LR 3 P&D 64 at 72.

12 See, for example, *Re Beaney* (Deceased) [1978] 1 WLR 770.

13 The Mental Capacity Act 2005 enacted recommendations from the Law Commission's report Mental Incapacity (1995) Law Com No 231.

14 We address the difference between the common law test for testamentary capacity and the MCA test for capacity at 2.43 below.

15 The British Medical Association and the Law Society, *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (4th ed 2015) para 3.1.

2.8 The various common law tests of capacity nevertheless remain important. First, although it is far from clear, recent case law suggests that, unless the MCA explicitly applies to a decision, the common law test continues to apply.[16] Secondly, even where the MCA applies, the pre-existing common law test may still be relevant to an assessment of capacity. The common law tests provide useful guidance on the considerations relevant to assessing capacity to make the particular decision in issue.[17] Thirdly, the MCA is supplemented by the MCA Code of Practice, which includes a detailed illustration of the common law approach to lack of capacity. Under section 42(4) of the MCA, anyone who is acting in relation to a person who lacks capacity and is doing so in a professional capacity or for remuneration[18] is under a duty to have regard to the Code of Practice.

2.9 We note that the test of whether a person has capacity to make a will or, as it is usually described, testamentary capacity, appears to be a common law test. Following the enactment of the MCA there has been some uncertainty as to whether testamentary capacity should now be decided under that Act, rather than under the common law test. While the matter is not beyond doubt the prevailing view, as confirmed by *Re Walker*,[19] is that the common law test continues to apply. We discuss the common law test below.[20] We also discuss the disparity that exists within the context of making a will, created by the continued application of the common law test but the application of the MCA test to the making of a statutory will for a person who lacks capacity to make his or her own will.[21]

THE EFFECT OF INCAPACITY

2.10 If a person lacks capacity, the law will not afford any legal consequences to a decision that person purports to make. Consequently, an assessment of incapacity can result in a person being deprived of autonomy. Moreover, for many decisions, if a person is assessed as lacking the capacity to make a decision, a person or the court will be empowered to make a decision on that person's behalf, referred to as substituted decision-making.[22] In the context of the law of wills, if a person lacks testamentary

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16 *Re Walker* [2014] EWHC 71 (Ch), [2015] COPLR 348 (capacity to make a will; *Kicks v Leigh* [2014] EWHC 3926 (Ch), [2015] 4 All ER 329 (capacity to make a gift).

17 C Bielanska (ed), *Elderly Client Handbook* (5th ed 2016) para 1.5.

18 Mental Capacity Act 2005, s42(4)(e) and (f).

19 [2014] EWHC 71 (Ch), [2015] COPLR 348. The Court of Appeal suggested that the Mental Capacity Act 2005 would govern testamentary capacity for wills made after the Act was in force in *Simon v Byford* [2014] EWCA Civ 280, [2014] WTLR 1097 at [39]. However, the point did not need to be decided in that case as, the will was made before the coming into force of the Mental Capacity Act 2005.

20 See para 2.18 below.

21 See para 2.58 below.

22 The common law and MCA both exclude certain personal decisions from being able to be made on a person's behalf, for example, whether to marry or to consent to sexual relations: Mental Capacity Act 2005, s 27; Mentally Incapacitated Adults and Decision-Making: An Overview (1991) Law Commission Consultation Paper No 119, paras 2.26 and 2.27, citing *Hunter v Edney* (1885) 10 PD 93 and *R v Howard* [1965] 3 All ER 684, respectively.

capacity, the Court of Protection may, on an application made on behalf of the person, make a statutory will on his or her behalf.[23]

2.11 If a person is determined to have lacked testamentary capacity at the time when he or she made a will, then the will is invalid. The person's estate will pass under a previous valid will, if one exists, or under the rules of intestacy. Neither of these outcomes may reflect the person's wishes at the time of his or her death. As we have explained in the introduction to this consultation paper, the freedom to make a will in whatever terms a person wishes—testamentary freedom—is the foundation of succession law in England and Wales and is a deeply rooted principle. A finding of incapacity may deny a person his or her testamentary freedom.

2.12 The effect of incapacity is therefore significant. But while a finding of incapacity infringes on a person's autonomy and testamentary freedom, neither of those values—whilst important—is absolute. Both may be qualified where there is justification for doing so. The justification for qualifying these values through a test of capacity is to provide an important protective or safeguarding function. Tests of capacity protect a person from abuse or exploitation. Ultimately, rather than depriving a person of his or her autonomy and testamentary freedom, the test of capacity upholds those values. By ensuring that a will is valid only when the testator had the ability to make the will, capacity is one of the ways in which the law ensures that a will does in fact represent the autonomous decision of the testator and is a genuine exercise of his or her testamentary freedom.

2.13 The test of capacity must therefore strike a careful balance. If the test is too strict, it may become an unjustified infringement on individual autonomy and testamentary freedom. But if the bar for capacity is set too low, then the law may fail to provide an effective safeguard against abuse or exploitation.

2.14 The question whether a person has (or had) testamentary capacity may be raised prospectively or retrospectively. Where a will is being written professionally, such as by a solicitor, the solicitor will need to be satisfied that the testator has capacity. The solicitor will therefore consider the test of capacity prospectively before preparing the will to be executed by the testator. Alternatively, after the testator has died, someone may seek to challenge the validity of a will on the grounds that the testator did not have capacity. When such a challenge is made, the question of the testator's capacity must be determined retrospectively; the question asked is whether the testator had capacity at the time the will was executed.[24]

CAUSES OF INCAPACITY

2.15 A person's capacity can be impaired for many reasons. Stakeholders have highlighted to us that medication, pain levels, altered biochemistry, infection, stress, hypoglycaemia (low blood sugar) and other temporary conditions or states can impair capacity. A person with a terminal illness, receiving palliative care and being treated with medication for pain management, may also have impaired capacity. In addition to this variety of

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[23] Mental Capacity Act 2005, s 18(1)(i) and sch 2, in accordance with the Mental Capacity Act 2005 test rather than the common law test. See the discussion of statutory wills at Chapter 3 below.

[24] Under the rule in *Parker v Felgate*, which we discuss below (at para 2.89 and following) it may be sufficient for the testator to have had capacity at the time he or she gave instructions for a will.

causes, a person's capacity may be impaired, in particular, as a result of a learning disability, a personality disorder or through mental illness, including dementia.[25]

2.16 It is important to emphasise two points that we have made above.[26] First, that a person's incapacity may be temporary. Where a testator's capacity is fluctuating, it is important for a will to be made during a period in which the person has capacity. Similarly, a loss of capacity will be temporary where the cause of its loss is temporary; for example, during a period of treatment for an illness, or recovery from an operation. Secondly, the mere fact that a person has a learning disability, personality disorder or mental illness does not mean that he or she lacks capacity. Indeed, the fact of diagnosis (for example of dementia) may be the prompt for a person to make his or her will. The question always is whether the effect of the disability, disorder or illness is such as to mean that the individual does not have capacity to make a will. The complexity of the person's estate and of the proposed dispositions will be significant, as well as the extent of the mental impairment. For example, in the recent case of *Burns v Burns*[27] the simplicity of the will appears to have been a factor in the court finding that the testatrix, who had dementia, had capacity to make it.

2.17 A loss of capacity may, however, be permanent; for example, in the later stages of dementia. Further, a person may never have had capacity; such as a person born with a profound learning disability.

THE CURRENT TEST OF TESTAMENTARY CAPACITY

2.18 The common law test of testamentary capacity is contained in the judgment of Cockburn CJ in the case of *Banks v Goodfellow*:[28]

> It is essential … that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[29]

2.19 It can therefore be summarised that the testator must have the capacity to understand:

(1) that he or she is making a will, and the effect of his or her testamentary disposition;

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25 See M Frost, S Lawson and R Jacoby, *Testamentary capacity* (1st ed 2014) para 2.21. The MCA refers to a person lacking capacity "…because of an impairment of, or a disturbance in the functioning of, the mind or brain." (MCA, s2(1)).

26 See para 2.3 and 2.4 above.

27 [2016] EWCA Civ 37.

28 (1870) LR 5 QB 549. While the test is now widely referred to as the *Banks v Goodfellow* test, the essence of the test was reflected in earlier cases. See eg *Greenwood v Greenwood* (1790) 3 Curt App 30 and *Harwood v Baker* (1840) 3 Moo PC 282 at 290, cited in M Frost, S Lawson and R Jacoby, *Testamentary Capacity* (1st ed 2014) paras 2.01 to 2.05.

29 *Banks v Goodfellow* at 565.

(2) the extent of his or her estate and therefore the property that can be disposed of in his or her will;

(3) those who have claims on the estate; and

(4) this understanding must not be impaired by any disorder of the mind or delusions.

2.20 It is unclear whether (3) and (4) above are in fact two separate requirements. We discuss this issue below.[30]

2.21 The test in *Banks*, being of the 19th century, has had to be adapted for modern day use. For example, in *Key v Key,* which considered the effect of bereavement on testamentary capacity, Mr Justice Briggs said that:

> The *Banks v Goodfellow* test must be applied so as to accommodate this [the effect of bereavement], among other factors capable of impairing testamentary capacity, in a way which, perhaps, the court would have found difficult to recognise in the 19th century.[31]

Nevertheless, in the 2006 case of *Sharp v Adam*[32] Lord Justice May expressed the view that the test in *Banks* was still fitting and was not in need of substantial reformulation.

2.22 In *Hoff v Atherton*[33] it was recognised that focus on the actual understanding of the testator, in accordance with the wording of "shall understand" in *Banks*, was an "over-literal approach to a judicial statement".[34] So, the test is whether the testator is capable of understanding the testamentary disposition, not whether they actually understand it; nor is it a test of memory.

2.23 Each limb of the test will now be considered in more detail.

Limb (1): nature and effect

2.24 The requirements of the first limb are fairly straightforward: the testator must understand the nature and effect of the will, and that it reflects what he or she wishes to happen to his or her estate on death. With regard to the effects of the disposition, the testator does not have to understand the collateral consequences of the testamentary disposition, but

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30 See para 2.37 below.

31 [2010] EWHC 408 (Ch), [2010] 1 WLR 2020 at [95]; referred to with approval in *Re Wilson (deceased)* [2013] EWHC 499 (Ch), 2013 WL 617649.

32 [2006] EWCA Civ 449, [2006] WTLR 1059 at [82].

33 [2004] EWCA Civ 1554, [2005] WTLR 99.

34 Above, at [34]. However, concern has been expressed that those who do not understand, but have the capacity to understand, are a group of people whose capacity it is very difficult to assess: see M Frost, S Lawson and R Jacoby, *Testamentary capacity: law, practice and medicine* (1st ed 2015) paras 2.28 to 2.32. The authors of *Williams, Mortimer and Sunnucks* note that "unfortunately, the distinction does not seem to have been considered in any of the cases, because it did not need to be on the facts": *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th and 7th ed 2008) para 13-03.

the immediate consequences.[35] For example, in *Simon v Byford*,[36] the testator understood the dispositions she made of shares in a company amongst her children, but did not appreciate that the effect would be to create voting deadlock among shareholders. The will was found to be valid.

Limb (2): extent of the estate

2.25 The testator is also required to be able to understand the extent of his or her estate. Being capable of recalling the extent of one's estate does not mean having to be able to give a precise valuation.[37] An example of the application of this limb is the case of *Wood v Smith* in which it was noted that the testator "really was confused and did not have any sufficient capacity properly to comprehend … the real extent of his property".[38]

Limb (3): claims

2.26 The third limb requires the testator to understand and appreciate the claims "to which he [or she] ought to give effect". *Harwood v Baker*[39] provides an example of a will that failed to meet the third limb of *Banks v Goodfellow*. In that case, the testator left his whole estate to his wife, to the exclusion of the rest of his family. He was found to lack capacity because he was not sufficiently aware (so that he could decide whether to discount them) of the existence of other family members and of their potential claims on his estate.

Limb (4): disorder of the mind or delusions

2.27 Delusions generally are fixed beliefs that an individual cannot be talked out of.[40] The nature and effect of delusions under the test in *Banks v Goodfellow* is worth explaining in detail.

2.28 Delusions do not always cause a lack of testamentary capacity, but they can do so if they had (or were capable of having) an influence on the content of the will.[41] For example, in the case of delusional jealously (called Othello syndrome) an individual might become convinced that his or her spouse is cheating on him or her. The delusion only affects capacity to the extent of its subject matter:

> Their cognition and mental state remain otherwise intact and thus their capacity would not be affected, except in the very specific areas affected by their delusional belief.[42]

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35 *Simon v Byford* [2014] EWCA Civ 280, [2014] WTLR 1097 at [45]. Unlike the common law test, the MCA test does not distinguish between immediate and collateral consequences: *Walker v Badmin* [2014] EWHC 71 (Ch), [2015] COPLR 348 at [25].

36 *Simon v Byford* [2014] EWCA Civ 280, [2014] WTLR 1097.

37 *Scammell v Farmer* [2008] EWHC 1100 (Ch), [2008] WTLR 1261 at [97].

38 [1993] Ch 90 at 106.

39 (1840) 13 ER 117.

40 M Frost, S Lawson and R Jacoby, *Testamentary Capacity* (1st ed 2014) para 12.58.

41 *Smee v Smee* (1879) 5 PD 84.

42 Above at 228.

2.29 The impact of delusions on testamentary capacity can be demonstrated by the case of *Kostic v Chaplin*,[43] in which a testator was held to lack testamentary capacity as he was suffering under the delusion that there was an international conspiracy of dark forces colluding against him. Further, in *Walters v Smee*[44] a will was successfully challenged on the basis that the testatrix was deluded as a result of dementia by an incorrect belief that the beneficiary under her previous will had abused her.[45]

2.30 Nevertheless, testators have a right to act capriciously; a testator can be "eccentric" without being delusional.[46] This was recently reaffirmed in *The Vegetarian Society v Scott*,[47] in which it was held that the testator had capacity. The testator suffered from mental illness (he was a schizophrenic) and whilst leading an eccentric life, he was still capable of maintaining professional relationships, managing his affairs and giving clear instructions for a will. This was even so despite the fact he left his entire estate to the Vegetarian Society, when he was not a vegetarian; it was noted in the case that the testator did not feel the usual bond of natural love and affection towards his family.

2.31 However, the more capriciously a testator has acted, the more likely it is that the court will find that he or she was suffering from a delusion. For example, a testator can take a harsh view of his or her child, but at a certain point such a view will be so harsh and irrational so as to become a delusion.[48]

Burden of proof

2.32 Usually a will is admitted to probate without proof of capacity unless it is challenged.[49] When capacity is brought into question the burden of proof lies on the person propounding the will (the person who is offering the will for probate and therefore alleging that the testator had capacity).[50] However, if the person propounding the will can demonstrate that the will is formally valid and looks rational,[51] the burden of proof is re-shifted. Only if sufficient evidence is raised to bring doubt upon capacity, does the propounder have to prove capacity.[52] The burden of proof in cases of disputed testamentary capacity is therefore highly mobile, and stakeholders have argued that it is unclear where the burden of proof lies in many such cases. It was affirmed more generally in *Cowderoy v Cranfield*[53] that "if the provisions of a will are surprising, that

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43 [2007] EWHC 2298 (Ch), (2007-08) ITELR 364.

44 [2008] EWHC 2029 (Ch), [2009] WTLR 521.

45 See generally for further examples, H Smith, "A review of testamentary capacity" (2016) 160(15) *Solicitors Journal* 11.

46 *Pilkington v Gray* [1899] AC 401.

47 [2013] EWHC 4097 (Ch), [2014] WTLR 525.

48 *Boughton v Knight* (1872-75) LR 3 P & D 64.

49 *Sutton v Sadler* (1857) 3 CBNS 87.

50 *Smee v Smee* (1879) 5 PD 84.

51 *Symes v Green* (1859) 1 Sw & Tr 401.

52 See generally *Key v Key* [2010] EWHC 408 (Ch), [2010] WTLR 623 at [97].

53 [2011] EWHC 1616 (Ch), [2011] WTLR 1699.

may be material to the court's assessment of whether the testator did have capacity, or indeed, knew and approved of the terms of the will".[54]

PROBLEMS WITH THE BANKS V GOODFELLOW TEST

2.33 Many stakeholders have told us that the *Banks v Goodfellow* test works well, and is well understood by those who apply it. The test succinctly and effectively addresses the fundamental requirements for capacity in the context of making a will, covering what someone without expertise in the law would intuitively think necessary to make a will. It is a specific test to assess capacity for a specific issue – making a will.

2.34 Moreover, many commonwealth jurisdictions also continue to use the test developed from *Banks v Goodfellow*.[55] In its recent review of the common law tests of capacity, the British Columbia Law Institute decided against recommending change to the *Banks v Goodfellow* test (beyond introducing a legislative presumption of capacity). It noted that the common law test, with hundreds of years of precedent, is well-established in the case law.[56]

2.35 Other stakeholders have expressed concern with the test. The language of the case now appears archaic. It may be understood by lawyers who are well-versed in dealing with the test, but is unlikely to be readily appreciated by lay people or other professionals, such as social workers,[57] called upon to make assessments of capacity. At the very least, recasting the test in a modern form would make it more readily understandable and therefore more easily applied.

2.36 There are in particular three problems discussed in this section. Two of these problems relate to the test itself; the other relates to uncertainties surrounding the relationship between the test and other provisions.

Three or four limbs?

2.37 Specific ambiguities exist in respect of the relationship between the third and fourth limbs of the test. The ambiguity relates to the requirement "that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property".[58] As noted above, it is unclear whether these words form part of the third limb of the test or (as we have presented them) are a fourth limb. The point may have practical significance on the scope of the test. If the reference to disorders of the mind and delusions is part of the third limb of the test, then the question is whether the testator's understanding of the claims on him or her is affected by a disorder or

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54 [2011] EWHC 1616 (Ch), [2011] WTLR 1699 at [133].

55 For example, Scotland (*Sivewright v Sivewright's Trustees* 1920 SC (HL) 63 and *Smyth v Romanes's Executors* [2014] CSOH 150, 2014 GWD 33-642 (OH)); Canada's common law provinces (see eg *Schwartz v Schwartz* [1970] 2 OR 61, 10 DLR (3d) 15 at 32 by Laskin JA dissenting on other grounds (Ontario Court of Appeal); Australia (see eg *Tipper v Moore* (1911) 13 CLR 248 (High Court of Australia); New Zealand (see eg *Woodward v Smith* [2009] NZCA 215 (Court of Appeal of New Zealand).

56 British Columbia Law Institute, *Report on Common-Law Tests of Capacity* (BCLI Report no 73, 2013) pp 40 to 46.

57 See para 2.112 below.

58 *Banks v Goodfellow* (1870) LR 5 QB 549, at 565.

delusions. If the test consists of four limbs, however, then the question is whether the testator's decision generally was affected in this way.

2.38 There are inconsistent Court of Appeal judgments on the issue of whether a three or four limb test applies. The Court followed the three-limbed approach in *Hawes v Burgess*.[59] In this case a woman changed her will to exclude one of her three adult children. The Court of Appeal doubted the decision of the judge at first instance, who had found that the testator lacked testamentary capacity but did not express a concluded view on the subject as it agreed with the judge that there was also a lack of knowledge and approval.[60] In *Sharp v Adam*, a man who was in the final stages of progressive multiple sclerosis made a new will leaving his entire estate to employees who managed his stud farm, leaving nothing to his two daughters, who had been the principal beneficiaries under the previous will. The Court of Appeal in that case identified four limbs to the *Banks v Goodfellow* test and stated that this fourth element "…is concerned as much with mood as with cognition."[61] It was not possible to find a rational reason for the testator leaving his daughters nothing at all, the court having accepted the first instance judge's finding that the testator had a good relationship with his daughters. This finding provided the basis on which the Court of Appeal held that the judge's decision that the testator lacked testamentary capacity could not be overturned:

> the court must inquire why a testator has disinherited his children where there is a possibility that it is due to disease of the mind. In a latter passage, the deputy judge said, with reference to *Harwood v Baker*, that the justice or otherwise of Mr Adam excluding his daughters must as a matter of common sense have a bearing and cannot be excluded from consideration. We agree with this, provided that the inquiry is directed to the testator's soundness of mind, and not to general questions of perceived morality.[62]

2.39 The fourth limb of the test may therefore be needed to account for illnesses affecting a testator's personality rather than his or her cognitive ability.

2.40 The words "…with a view to the latter object…" in *Banks* may suggest that the following words in respect of delusions and disorders of the mind relate only to the previous (third) limb of the test. However, it seems illogical to limit the effect of "delusions" (or their modern equivalent, including disorders of mood) only to that limb. We are therefore inclined to agree with the Court of Appeal in *Sharp v Adam*[63] that the test should be understood as having four elements, noting that the four-limbed approach was adopted by the High Court in *Kostic v Chaplin*.[64] It is not clear, however, in practice, that the distinction has caused significant problems. We suggest that reform should clarify the position.

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59 [2013] EWCA Civ 9, [2013] WTLR 453.

60 Above at [61], [64], [66], [69] and [70].

61 [2006] EWCA Civ 449, [2006] WTLR 1059, at [93].

62 Above at [79].

63 [2006] EWCA Civ 449, [2006] WTLR 1059.

64 [2007] EWHC 2298 (Ch).

Does not reflect modern understandings of capacity

2.41 More generally, it has been questioned whether the test in *Banks v Goodfellow* is appropriate given that it was created before many developments in modern medicine. Its focus on disorders of the mind and delusions does not reflect the wide range of factors that are now understood to have the potential to affect a person's capacity.[65] In particular, the test does not reflect the significance of dementia in the context of assessments of capacity. The test dates back to a time when "rarely did [people] outlive their minds".[66] In the context of an ageing population[67] where dementia has become increasingly prevalent, it might be argued that "there is clearly scope here for a new test for testamentary capacity which would consign *Banks v Goodfellow* to history".[68]

2.42 Conversely, some developments in the common law test, designed to bring it up to date, such as the one in *Key v Key*[69] reflecting the impact of bereavement,[70] have led to criticism by stakeholders that the current test is unclear. Such criticism may suggest that the law has now reached the stage where piecemeal developments cannot produce a simple, clear and effective test that reflects modern understandings of capacity.

The relationship between *Banks v Goodfellow* and the Mental Capacity Act 2005

2.43 The problems with the test in *Banks v Goodfellow* that we have discussed so far relate to the nature of the test itself. A further problem that has arisen concerns the relationship between the common law test of testamentary capacity and the MCA. As we have explained above, that Act provides a single test of capacity to a broad range of financial, healthcare and welfare decisions.[71] Since the enactment of the MCA, it has been unclear whether the courts should use the test of capacity contained in the MCA to the question of testamentary capacity or continue to apply the test in *Banks v Goodfellow*.

2.44 As we noted above, following *Re Walker*[72] the prevailing view is that testamentary capacity continues to be determined by the common law test. This judgment was in line with the opinion of Mr Stephen Smith QC in *Scammell v Farmer*,[73] but contrary to the opinion of Judge Dight in *Fischer v Diffley*.[74] However, some stakeholders argue that, in the absence of the judgment of a higher court, the question is not entirely settled and

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65 See para 2.15 above.

66 H Marten, "Protecting the future" (1999) 96(11) *Law Society Gazette* 50.

67 In 2015, there were an estimated 556,270 people aged 90 and over, compared to 194,670 in 1985: Office of National Statistics, "Estimates of the very old (including centenarians), UK: 2002 to 2015, 29 September 2016. By 2035, it is estimated that 23% of the population will be aged 65 or older, while only 18% will be under 16: Office of National Statistics, "Older People's Day 2011", 1.

68 H Marten, "Protecting the future" (1999) 96(11) *Law Society Gazette* 50.

69 [2010] EWHC 408 (Ch), [2010] 1 WLR 2020 at [95]; referred to with approval in *Re Wilson (deceased)* [2013] EWHC 499 (Ch), 2013 WL 617649.

70 See para 2.21 above.

71 See para 2.7 above.

72 [2014] EWHC 71 (Ch), [2015] WTLR 493.

73 [2008] EWHC 1100 (Ch), [2008] WTLR 1261.

74 [2013] EWHC 4567 (Ch), [2014] WTLR 757.

could benefit from clarification. There is therefore one obvious criticism about the law here: it is uncertain.

2.45 The uncertainty matters because potential differences between the two tests have been identified.[75] It also matters because the fact of the existence of two tests, and any differences between them, may cause confusion to those responsible for undertaking capacity assessments and make it that much more difficult for them to develop knowledge and expertise in relation to assessing testamentary capacity.

2.46 To understand the differences between the two tests it is necessary to explain the test for capacity provided in the MCA.

The test of capacity in the Mental Capacity Act 2005

2.47 Sections 1 to 3 are the relevant sections of the MCA for assessments of capacity. Section 2(1) sets out the definition of a person who lacks capacity:

> For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

The determination of whether the lack of capacity is due to an "impairment" or "disturbance" is commonly known as the diagnostic test.

2.48 Section 3(1) outlines the circumstances in which a person is unable to make a decision for him- or herself, providing a "functional test":

> For the purposes of section 2, a person is unable to make a decision for himself if he is unable–
>
> (a) to understand the information relevant to the decision,
>
> (b) to retain that information,
>
> (c) to use or weigh that information as part of the process of making the decision, or
>
> (d) to communicate his decision (whether by talking, using sign language or any other means).

2.49 Section 3 further provides that relevant information includes the "reasonably foreseeable consequences" of making a decision or failing to make a decision. It outlines that a person is not to be regarded as unable to understand the information relevant to a decision if he or she can understand an explanation of the information "given … in a way that is appropriate to his [or her] circumstances", and moreover that because a person can only retain the relevant information for a short time does not prevent him or her from being regarded as unable to make the decision.

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[75] See para 2.54 below.

2.50 The test, and therefore the determination of capacity under the MCA, is specific to the decision that is being made. Case law has confirmed that the correct order for the application of the two stages, as required by the wording of the MCA, is for the functional test to be considered first.[76] The test for capacity under the MCA therefore asks:

(1) Is the person unable to make a decision for him- or herself in relation to the matter?

(2) Is the person unable to make the decision because of an impairment of, or a disturbance in the functioning of, his or her mind or brain?

2.51 The order of these enquiries is important: it emphasises the requirement that the impairment or disturbance must *cause* the person to be unable to make a specific decision. That an impairment or disturbance is significantly related to, or impairs, the person's ability to make a decision is insufficient to meet the test. Accordingly, an impairment or disturbance making a person vulnerable is not an issue of capacity, but of undue influence, which we discuss in Chapter 7 below.[77]

2.52 Sections 1 and 2 set out additional principles which must be considered in assessing capacity.

(1) A person must be assumed to have capacity unless it is established that he or she does not (section 1(2)).

(2) A person is not to be treated as unable to make a decision unless all practicable steps to help him or her do so have been taken without success (section 1(3)).

(3) A person is not to be treated as unable to make a decision merely because he or she makes an unwise decision (section 1(4)).

(4) It does not matter whether the impairment or disturbance is permanent or temporary (section 2(2)).

(5) A lack of capacity cannot be established merely by reference to a person's age or appearance, or a condition or aspect of behaviour that might lead others to make unjustified assumptions about his or her capacity (section 2(3)).

(6) A question of whether or not a person lacks capacity must be decided on a balance of probabilities (section 2(4)).

2.53 The MCA test of capacity is both decision- and time-specific. Rather than assessing whether the person is able to make decisions generally, it asks whether the person is able to make a particular decision that needs to be made at the time it needs to be

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[76] *PC v City of York Council* [2013] EWHC Civ 478, [2014] Fam 10 at [58] to [60] by McFarlane LJ; *Kings College Hospital NHS Foundation Trust v C* [2015] EWCOP 80, [2016] COPLR 50 at [33], [71] and [93]. The test is stated the wrong way round in the Code of Practice issued by the Lord Chancellor:, *Mental Capacity Act 2005 Code of Practice* (2007) paras 4.10 to 4.13.

[77] *PC v City of York Council* [2013] EWHC Civ 478, [2014] Fam 10 at [58] by McFarlane LJ; *Kings College Hospital NHS Foundation Trust v C* [2015] EWCOP 80, [2016] COPLR 50 at [31], [34] and [93].

made. Consequently, a person can have capacity under the MCA to take one decision but not another.[78]

The Mental Capacity Act 2005 and the *Banks v Goodfellow* test compared

2.54 Nicholas Strauss QC (sitting as a deputy judge of the High Court) in *Re Walker*[79] suggested three differences between the MCA test and the common law *Banks v Goodfellow* test.[80]

(1) Section 1(2) of the MCA provides for a presumption of capacity, whereas it is initially on the propounder of a will to prove capacity under the common law test.

(2) Section 3(1) of the MCA would require a testator to understand all the relevant information; this is not required by the common law test "which concentrates on whether the will correctly represents the testator's intentions and his appreciation of the claims to which he ought to give effect".

(3) Subsections 3(1) and 3(4) would require a testator to be capable of understanding the reasonably foreseeable consequences of the potential choices that can be made. Under the common law test, a testator only has to understand the immediate, not collateral, consequences of his or her will.**[81]**

2.55 However, the extent to which the above points constitute material differences can be questioned.[82] Although the common law does not import a presumption of capacity unlike section 1(2) of the MCA, the burden of capacity is easily shifted; this distinction may not, in practice, produce different results given that testamentary capacity is usually decided on the evidence. Moreover, like section 3(1) of the MCA, the *Banks v Goodfellow* test requires the testator to understand all the relevant information, with the relevant information being the information set out in the test (the nature and effects of a will, the extent of the property, and claims on the testator). Some stakeholders have suggested to us that they see little or no difference between the tests in practice and that *Banks v Goodfellow* test encapsulates all that is required in the MCA.

2.56 Another difference in the tests, highlighted by Penelope Reed QC, is that the common law test is modified by the case of *Parker v Felgate*[83] so that, if a testator gives instructions to a solicitor to make a will, the testator does not have to fully understand the will when it is later being executed. According to Penelope Reed, this aspect of the common law test "sits very unhappily with the concepts under the MCA which require

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78 See *Dunhill v Burgin* [2014] UKSC 18 at [13] by Lady Hale.

79 [2014] EWHC 71 (Ch), [2015] WTLR 493.

80 Above, [21] to [25].

81 *Simon v Byford* [2014] EWCA Civ 280, [2014] WTLR 1097 at [44] to [45]. In that case, it meant that the testator did not need to be able to understand how the disposition of shares in the company equally among her children meant that no one had a controlling interest in the company making deadlock possible. We do not know if Mrs Simon was incapable of understanding deadlock but we know that it did not, in fact, occur to her when she made the will. We cannot say definitively whether the case would have been decided differently had the MCA test for capacity been applied, but it is possible that would have been the case.

82 See J R Martyn, A Learmonth, J E Gordon, C Ford and T Fletcher, *Theobald on Wills* (18th ed 2016) para 3-007.

83 (1883) 8 PD 171.

the person to have capacity at the material time that the transaction is being carried through".[84] We discuss *Parker v Felgate* further below.[85]

2.57 Others have criticised the conclusion reached in *Re Walker*[86] because it leaves a disparity in the law.[87] As we have noted above if a person lacks testamentary capacity, then the Court of Protection may, on an application made on behalf of the person, make a statutory will on his or her behalf. In determining whether a person lacks capacity for the purpose of making a statutory will, the Court of Protection uses the test set out in the MCA. If, however, a person has made, or wishes to make a will, then the common law test is applied. It is anomalous that the same question – whether a person has testamentary capacity – should be determined according to a different test depending on the circumstances in which the question is raised.

2.58 The fundamental difficulty in the existence of two tests is that it leads to a risk of conflicting conclusions being drawn by the Court of Protection applying the MCA and other courts applying the common law. For example, although rarely used in isolation, section 15 of the MCA gives the Court of Protection power to make declarations as to a person's capacity to make a decision (including to make a will).[88] It is unclear whether the Court of Protection should apply the MCA test or the common law test. As a statutory court empowered by the MCA, it is not evident that the Court of Protection can apply the common law test. But a declaration by the Court that the testator had capacity under the MCA may not prevent a will from being challenged after death on the grounds that the testator lacked capacity under the common law test.

REFORM

2.59 The longevity of the *Banks v Goodfellow* test may suggest that it performs its task well and is understood by courts, solicitors and testators alike. We have concluded, however, that the problems with the current law mean that reform is required.

2.60 Moreover, although *Re Walker*[89] determined that the *Banks v Goodfellow* test continues to govern assessments of testamentary capacity rather than the MCA test, stakeholders have continued to express concern that this issue has not yet been conclusively settled. Whatever we ultimately propose for reform of the law of capacity, we think it is necessary to provide certainty on the issue of which test applies.

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84 P Reed, "Capacity and want of knowledge and approval" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) p 174.

85 See para 2.89 below.

86 [2014] EWHC 71 (Ch), [2015] WTLR 493.

87 A Ruck Keene and A Lee, "Testamentary capacity" [2013] *Elder Law Journal* 272, H Cumber, "Case note: Simon v Byford in the Court of Appeal: Banks v Goodfellow revisited" [2014] 3 *Private Client Business* 142, 147, P Reed, "Capacity and want of knowledge and approval", B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) p 175.

88 In order to make any decisions on a person's behalf, or empower a person to do so, pursuant to Mental Capacity Act 2005, s 16, the Court of Protection must make a declaration under s 15; however, it is rare for it to make a s 15 declaration in isolation.

89 [2014] EWHC 71 (Ch), [2015] COPLR 348.

2.61 We have considered, but rejected, two possible approaches to reform. The first would be to replace the *Banks v Goodfellow* test with one of the existing medical assessments doctors use to assess testamentary capacity. For example, the most commonly used test by doctors is the Mini Mental State Examination ("MMSE"), which consists of "a series of questions that test orientation, episodic memory, concentration, language comprehension, writing and copying a diagram".[90] Other examples include the Montreal Cognitive Assessment ("MOCA") and the Abbreviated Mental Test Score ("AMTS"). These tests would provide simplicity most result in a numeric score, which can be categorised along a spectrum of capacity or cognitive ability. Consequently, they are rather blunt instruments which: do not provide a detailed or contextual assessment of capacity and do not take into account the complexity of the will the person intends to make.[91] In short, these types of assessment are neither nuanced enough nor accurate enough to be used as a legal test for testamentary capacity.

2.62 Moreover, in our view, reforming the test of testamentary capacity to make it a test relying exclusively on medical evaluation is undesirable. Although doctors may be involved in assessing a person's capacity at the time of making a will, ultimately whether or not a person had testamentary capacity will be determined by a court; a court is better able to apply and assess a legal test than a medical test.[92] Medical tests are also arguably more suitable to contemporary assessments of capacity than retrospective assessments after the death of the testator.

2.63 Significantly, the use of a simple medical test to assess capacity would also appear to fall foul of the requirements in the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which we discuss further below.[93] By relying entirely on medical notions of disability, without any consideration of how they relate to the understanding involved in making a will, such a test would discriminate against persons with disabilities.

2.64 A second approach would be to propose an entirely new test to assessing testamentary capacity, not based on *Banks v Goodfellow*, the MCA, or even an existing medical test. We have rejected this approach as it does not seem necessary or desirable to create a legal test of capacity out of thin air. Ignoring hundreds of years of case law and the work on capacity that led to the MCA in order to strike out on an entirely new and untested path would appear foolhardy.

2.65 Having discounted these options, we provisionally propose that the MCA is adopted as the test for testamentary capacity, with the specific elements that a testator is required to understand outlined in the MCA Code of Practice. We explain the reasons for this proposal in the following section. We then suggest an alternative option for reform, which is to place *Banks v Goodfellow* on a statutory footing.

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90 M Frost, S Lawson and R Jacoby, *Testamentary capacity* (1st ed 2014) para 14.08.

91 See M Frost, S Lawson and R Jacoby, *Testamentary Capacity* (1st ed 2014) ch 14.

92 See M Frost, S Lawson and R Jacoby, *Testamentary Capacity* (1st ed 2014) para 2.11.

93 See para 3.16 below.

Adoption of the Mental Capacity Act 2005 test

2.66 There are a number of benefits of adopting the MCA test for testamentary capacity. Adopting the MCA would promote a consistent and cohesive approach to the law to assessing mental capacity and the MCA arguably provides a more modern approach to capacity. Furthermore, adopting the MCA would eliminate the issue of the Court of Protection applying the MCA test while other courts apply the *Banks v Goodfellow* test to determine testamentary capacity.

2.67 Our preference for adopting the MCA test is reinforced by the fact that doing so could maintain the virtues of the *Banks v Goodfellow* test while resolving or avoiding the technical issues that the common law test has produced.

2.68 As discussed above, the pre-existing common law tests remain relevant in situations other than will-making even where the MCA test currently applies. The common law informs the assessment of capacity by outlining the factors relevant to particular decisions or acts. In the law of wills, those factors are set out in *Banks v Goodfellow* and whatever the test, the underlying factors relevant to testamentary capacity will not be fundamentally different. Consequently, if the MCA test is adopted, the elements specific to testamentary capacity, identified by *Banks v Goodfellow* and developed in centuries of case law, should be set out in an MCA Code of Practice.

2.69 Adopting the MCA test alongside a Code of Practice therefore enables us to keep the benefit of the meaning of testamentary capacity provided by the *Banks v Goodfellow* test, whilst removing the conflicts with the MCA and the jurisdiction of the Court of Protection. It is the only option for reform that enables us to do so.

2.70 Furthermore, creating a Code of Practice that draws on the *Banks v Goodfellow* test would be an opportunity to resolve or avoid several of the technical issues that have beset the common law test. For example, the issue of whether the *Banks v Goodfellow* test comprises three or four limbs would become unnecessary to resolve if the MCA test were adopted. The MCA test clearly specifies a broad approach in which the effect of delusions would be considered with respect to all aspects of understanding (the claims of others), rather than just one.

2.71 Further, in the MCA, capacity is clearly framed as a person's being able to make a decision in relation to a matter. Any suggestion from the language of *Banks v Goodfellow* that, to have testamentary capacity, a person must have actually understood the will in question would fall away.

2.72 We consider the technical issues further in the context of our alternative proposal – placing an amended version of the test in *Banks v Goodfellow* on a statutory footing – but note that the virtues of that proposal mirror some of the virtues of adopting the MCA.

2.73 In our preliminary discussions, some stakeholders expressed support for the idea of adopting the MCA test and incorporating elements of *Banks v Goodfellow* into the MCA Code of Practice. Other stakeholders did not, preferring retention of the *Banks v Goodfellow* test. However, some stakeholders who favoured retaining the *Banks v Goodfellow* test were more comfortable with the adoption of the MCA test if the specific elements of capacity to make a will from *Banks v Goodfellow* were provided for in the MCA Code of Practice.

Consultation Question 3.

We provisionally propose

(1) that the test for mental capacity set out in the Mental Capacity Act 2005 should be adopted for testamentary capacity; and

(2) that the specific elements of capacity necessary to make a will should be outlined in the MCA Code of Practice.

Do consultees agree?

Placing *Banks v Goodfellow* on a statutory footing

2.74 While our preferred option for reform is to adopt the MCA as the test for testamentary capacity, we recognise that some stakeholders might still favour the retention of the *Banks v Goodfellow* test. Therefore, we would like to hear consultees' views on the alternative approach of placing *Banks v Goodfellow* on a statutory footing. We envisage that such an approach would go beyond a "codification", which would simply seek to crystallize the current test in statutory form. A statutory form of the test would incorporate reform.

2.75 Although we regard such a statutory test as an alternative to our preferred proposal, we recognise that, like the adoption of the MCA, this approach would have a number of advantages over the current common law test.

2.76 First, placing the Banks test on a statutory footing enables the test for capacity to be recast in simple, modern terms, and in terms more in line with current psychiatric thinking.

2.77 Secondly, this approach would also provide an opportunity to provide that disorders of the mind and delusions are only some of the possible causes of incapacity. Such a statutory test would meet the criticism that the test does not reflect the range of facts that are now understood as being capable of affecting a person's testamentary capacity.

2.78 Thirdly, statutory reform of the test could conclusively determine whether the test has three or four limbs. The answer to this question is not clear from the case law and it is unsurprising to find a diversity of views on the interpretation of an unclear turn of phrase in a case that is now 150 years old.[94] However, it is useful to distinguish between interpreting what was said in *Banks v Goodfellow*, from the question whether, as a matter of policy, it is preferable to treat the test as requiring three or four limbs. For the purpose of creating a statutory test, we do not consider it necessary to decide what was in fact intended in *Banks v Goodfellow*.

[94] See para 2.37 above.

2.79 The crucial policy question is whether a testator's delusions are relevant only to the testator's understanding of the claims on him or her (the three limb interpretation), or are relevant to his or her decision making more generally (the four limb interpretation).[95]

2.80 As a matter of policy, we can see no sound reason for confining the relevance of delusions to one aspect of the preparation of the will. Therefore, we provisionally consider that when placing *Banks v Goodfellow* on a statutory footing the four limb interpretation should be adopted.

2.81 Fourthly, a statutory test would provide an opportunity to clarify that the essential test is of the testator's ability to understand the will, not whether he or she actually understood the will. While the courts have interpreted *Banks v Goodfellow* to that effect, the language used in the judgment is arguably ambiguous on its face as regards that point.[96] Placing the test on a statutory footing would bring the explicit drafting of the rule into line with its interpretation.

2.82 Finally, this approach to the test would make the law more accessible. Accessibility is particularly important in the context of wills, given that many people write their own wills without the benefit of advice from a solicitor.

2.83 We note that despite concerns about the accessibility and clarity of the common law test, the British Columbia Law Institute did not recommended a statutory version of the *Banks v Goodfellow* test in its recent review. Rather, in its view, the test was better left to the common law in order to protect the test's flexibility, which allows it to respond to "emerging trends and new fact patterns".[97]

2.84 The flexibility supplied by the common law is an undeniable advantage. There is a risk that if the test were set out in statute in modern terms, those terms would over time become outdated, reflect a disproven approach to understanding mental capacity, or fail to address emerging medical issues affecting capacity. We have not, however, been persuaded that the test of testamentary capacity is better left to the common law. Although we regard the adoption of the MCA test as a preferable avenue of reform, we consider that placing the test on a statutory footing would provide a welcome opportunity to clarify and modernise key aspects of the common law test.

2.85 A number of stakeholders supported placing the *Banks v Goodfellow* test on a statutory footing using modern language and reflecting current medical knowledge. We note, however, that this view was not universally shared.

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95 See para 2.37 above.

96 *Hoff v Atherton* [2004] EWCA Civ 1554, [2005] WTLR 99 at [34] per Peter Gibson LJ.

97 British Columbia Law Institute, *Report on Common-Law Tests of Capacity* (BCLI Report no 73, 2013) p 43.

Consultation Question 4.

We invite consultees' views on whether, if the Mental Capacity Act 2005 is not adopted as the test for testamentary capacity, the *Banks v Goodfellow* test should be placed on a statutory footing.

Consultation Question 5.

We invite consultees' views on whether any statutory version of the test in *Banks v Goodfellow* should provide:

(1) a four limbed test of capacity, so that the relevance of the testator's delusions or disorder of the mind (or other cause of capacity) is not confined to understanding the claims on him or her;

(2) that a testator's capacity may be affected by factors other than delusions or a disorder of the mind; and

(3) clarification that the testator must have the capacity to understand, rather than actually understand, the relevant aspects of a will.

A statutory presumption of capacity

2.86 If the MCA test were to be applied to testamentary capacity, it would import a presumption of capacity under section 1(2) of the MCA. If reform were to take the form of placing *Banks v Goodfellow* on a statutory footing, a presumption would not automatically arise. Therefore, it is necessary to consider the value of a presumption of capacity and whether there is a case for introducing the presumption independently of applying the MCA to the law of wills.

2.87 Context is crucial. Much has been written about the "shifting burden of proof" in litigation over capacity in the law of wills.[98] However, at its core, the necessary analysis is simple. The question is whether the testator had capacity to execute the impugned will. The answer must be either "yes" or "no". The test to be applied is currently set out in *Banks v Goodfellow*. The standard of proof is the balance of probabilities.

2.88 The question is then: what does a presumption of capacity add to the analysis? In our view, the presumption of capacity draws attention to the functional nature of the capacity analysis. Since it would be presumed that every testator had capacity at the time the will was executed, the presumption would make clear that a person's medical status, diagnosis or condition is not determinative of capacity. No disability or impairment is, by itself, proof that the testator lacks capacity. Consequently, the presumption channels the analysis towards the effects of any impairment on the mental state of the testator at

[98] See R F D Barlow, R A Wallington, S L Meadway, J A D MacDougald, *Williams on Wills* (10th ed 2014) para 4.13 and eg *Schrader v Schrader* [2013] EWHC 455 (Ch), [2013] WTLR 701 at [79].

the time the will was executed. We note that the British Columbia Law Institute recently recommended a statutory presumption of capacity on the basis that the presumption might combat stereotypes about the capacity of persons with disabilities.[99]

Consultation Question 6.

We provisionally propose that if a reformed version of the *Banks v Goodfellow* test is set out in statute it should be accompanied by a statutory presumption of capacity.

Do consultees agree?

THE RULE IN PARKER V FELGATE

2.89 As explained above,[100] capacity is decision-specific and assessed at the time that a decision is made. In the context of a will, the time that the decision is made is when the will is executed. Accordingly, the general rule is that a testator must have testamentary capacity when the will is executed.[101] Incapacity after the will is executed does not make the will invalid; similarly, later capacity does not make an earlier will valid if the testator did not have capacity at that time.[102] As a result, it is possible for an individual with fluctuating capacity to make a will so long as that person has capacity at the time when the will is made.

2.90 In some circumstances, however, testamentary capacity is not required when the will is executed. This exception to the general rule is known as the rule in *Parker v Felgate*.[103] This rule was recently reaffirmed in *Perrins v Holland*, and set out as follows by Lord Justice Moore-Bick:

> Where the testator loses some of his faculties between giving instructions and executing the will, however, the position is different. One must then ask (i) whether at the time he gave the instructions he had the ability to understand and give proper consideration to the various matters which are called for, that is, whether he had testamentary capacity, (ii) whether the document gives effect to his instructions, (iii) whether those instructions continued to reflect his intentions and (iv) whether at the time he executed the will he knew what he was doing and thus had sufficient mental capacity to carry out the juristic act which that involves. If all those questions can be answered in the affirmative, one can be satisfied that the will accurately reflects the

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99 British Columbia Law Institute*, Report on Common-Law Tests of Capacity* (BCLI Report no 73, 2013) pp 43 to 46.

100 See para 2.16 above.

101 Some authorities also state that it is needed when instructions for a will are given: *Re Watson (probate)* [2008] EWHC 2582 (Ch) at [81], *Hansen v Barker-Benfield* [2006] EWHC 1119 (Ch), [2006] WTLR 1141 at [42]. Practically speaking, practitioners will wish to check as to the client's capacity at the time instructions are given.

102 *Arthur v Bokenham* (1708) 11 Mod Rep 148 at 157.

103 (1883) 8 PD 171.

deceased's intentions formed at a time when he was capable of making fully informed decisions.[104]

2.91 There are concerns that the rule in *Parker v Felgate*[105] is unfair or unprincipled. Penelope Reed QC is of the view that the rule deprives the testator of a basic right to check at the point that the will is executed that it carries out his or her instructions, and that it is not in line with the requirement that the testator know and approve of the contents of the will.[106] She argues that the principle would have been more useful in the past, when there was no provision for statutory wills and understanding of dementia was limited. Whilst acknowledging the important principle of testamentary autonomy, Penelope Reed cautions that "it is hard, if not impossible for the Court to be really sure that the Will executed by a testator who lacks testamentary capacity reflects his wishes". Penelope Reed has also questioned the support in case law for the principle, which has been applied only a handful of times.[107] Professor Roger Kerridge is of the view that the rule should only be applied in "…the most exceptional circumstances…".[108]

2.92 We note, however, that the principle has been endorsed by the Court of Appeal in *Perrins v Holland*. There, the Court of Appeal held that it was not open to them to find that *Parker v Felgate* had been wrongly decided and that, in any event, this was not their view.[109] The Chancellor, in this case, pointed to the rationale of the rule being found in the favouring by the law of testamentary freedom, the preference of the court for upholding transactions and "….the pragmatic recognition in that context that the testator has no further opportunity to give expression to his wishes."[110] The rule was also considered by the Privy Council in the much earlier case of *Perera v Perera*,[111] an authority described in *Perrins* as "…strong persuasive authority for upholding the decision in *Parker v Felgate*…" and in which the rule in *Parker v Felgate* was described as "…good law and good sense…".[112]

2.93 The Chancellor's comments in *Perrins v Holland* have been echoed by some stakeholders who see the rule in *Parker v Felgate* as useful, and practically necessary in circumstances where the testator loses capacity between giving instructions for the will and executing the will, a problem that may increasingly arise in an aging population.[113] Some stakeholders have also given us examples in which the rule has been useful in cases where the testator has given consistent instructions for a will over the course of several years, or where the testator loses capacity quickly.

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104 *Perrins v Holland* [2010] EWCA Civ 1398, (2010) 154(47) SJLB 30 at [55].

105 (1883) 8 PD 171.

106 For a discussion of the requirement of knowledge and approval, see Chapter 7 below.

107 P Reed, "Capacity and want of knowledge and approval", in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) para 2, pp 177 to 179 .

108 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 73.

109 [2010] EWCA Civ 840, [2011] CH 270, by the Chancellor at [23] and Moore-Bick LJ at [68].

110 [2010] EWCA Civ 840, [2011] CH 270, by the Chancellor at [23].

111 [1901] AC 534.

112 Above, at 362.

113 M Frost, S Lawson and R Jacoby, *Testamentary capacity* (1st ed 2014) para 3.13.

2.94 Given the appellate authority for the rule in *Parker v Felgate*, and its practical benefits, we take the view that the arguments for the retention of the rule outweigh those for its abolition.

2.95 We have provisionally proposed that the MCA should be adopted as the test for testamentary capacity. As an alternative, if our proposal is not supported, we have suggested that *Banks v Goodfellow* be placed on a statutory footing. On either approach, the question arises whether *Parker v Felgate* should be retained. However, stakeholders have pointed out to us that adopting the MCA test gives rise to a particular problem. The MCA requires that a capacity assessment be made at the particular time that a decision is made and in a wills context that would seem to be the moment of execution. Consequently, the rule in *Parker v Felgate* is arguably inconsistent with the MCA.[114] Nevertheless, we think that it would be possible, should the MCA test for capacity be adopted for testamentary capacity, to enact the rule in *Parker v Felgate* as a qualification to that test.

Consultation Question 7.

We provisionally propose that the rule in *Parker v Felgate* should be retained.

Do consultees agree?

ASSESSMENT OF TESTAMENTARY CAPACITY: THE GOLDEN RULE

2.96 The previous parts of this chapter focussed on what the test for testamentary capacity should be. In this part of the chapter, we consider how testamentary capacity should be assessed. Two fundamental questions arise:

(1) In what circumstances is it necessary for a testator's capacity to be assessed? and

(2) Who should carry out that assessment?

2.97 Under the current law, both of these questions are addressed by what is known as the "golden rule". The golden rule was explained by Mr Justice Templeman in *Re Simpson.*[115]

> In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear and however difficult or tactless it may be to suggest that precautions may be taken: the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and

[114] See P Reed, "Capacity and want of knowledge and approval" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) p 174.

[115] (1977) 121 SJ 224. The idea has its origins in the earlier case of *Kenward v Adams* Times, November 29, 1975 (Ch D).

understanding of the testator, and records and preserves his examination and finding.[116]

2.98 A failure to follow the golden rule does not necessarily mean that a will is invalid. Conversely, the fact that the golden rule has been followed does not guarantee the validity of the will if the testator's capacity is subsequently called into question. The rule is considered to be one of best practice rather than a rule of law.[117]

2.99 While the golden rule is simple, we consider that the answers it provides to the fundamental questions identified are inadequate. It lacks the nuance necessary to recognise the modern understanding of mental capacity and to deal with the diverse range of situations in which questions about capacity might arise.

2.100 The circumstances prescribed by the golden rule in which a further assessment of capacity should be obtained do not reflect modern practice. For example, it assumes that capacity is best assessed by a lawyer or a doctor. In practice, social workers or mental health nurses may be best placed to provide an opinion on testamentary capacity. Further, stakeholders have told us that those well placed to assess capacity may be those skilled in communicating with people who have particular disabilities or lifelong conditions such as deafblindness. Requiring an assessment by a doctor may be both inadequate to determine capacity and inappropriate insofar as it treats a person's disability or condition as a medical issue instead of a communication issue. Moreover, the suggestion that capacity should be assessed merely because a testator is "aged" is based on assumptions that belong to another era and may, today, be seen as unjustified discrimination.

2.101 We consider that for legislation to be modern, fair and effective it should clearly separate the questions of when capacity should be assessed and by whom. It should also give guidance on how capacity should be assessed. We acknowledge that both of these issues raise matters of professional judgement. Legislation can and should provide guidance, but it cannot be prescriptive or give "the answer" for every set of facts.

2.102 Therefore, we provisionally propose that a code of practice should provide guidance on when, by whom and how a testator's capacity should be assessed. This guidance could be set out in statute or issued as a code of practice under powers granted in a statute. We would favour the latter option given that the first alternative sets the provisions in stone and makes them difficult to amend.

2.103 We propose that the code of practice should apply to any person acting in a professional capacity to prepare a will on behalf of a testator, or to assess whether a testator has capacity to make a will. Although aimed at professionals, guidance would also benefit others, including testators who would benefit from greater certainty and uniformity in how their capacity is assessed as well as their family members, carers and beneficiaries.

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116 *Re Simpson* (1977) 121 SJ 224 as cited in M Frost, S Lawson and R Jacoby, *Testamentary capacity: law, practice and medicine* (1st ed 2015) para 6.13.

117 *Sharp v Adam* [2006] EWCA Civ 449, [2006] WTLR 1059; *Burns v Burns* [2016] EWCA Civ 37.

2.104 We note that guidance on the current law is provided by a number of professional bodies for their members.[118] We acknowledge the value and importance of this professional guidance and we anticipate that professional bodies will continue to provide guidance to their own members to supplement a code of practice.

2.105 We have provisionally proposed that the MCA is adopted as the test for testamentary capacity, with specific guidance on testamentary capacity provided in an MCA Code of Practice.[119] If that proposal is adopted, then the Code of Practice could also contain guidance on the assessment of capacity.[120] Even if that proposal is not adopted, the power to issue guidance could be enacted to replace the golden rule and to complement a statutory version of the law on testamentary capacity.

2.106 None of this is to suggest that a will's validity would be determined based on whether any guidance was followed. Following the guidance would simply provide (often strong) evidence of capacity. We expect that failing to follow the guidance set out in a code of practice would be a factor in any personal liability claim against a professional, albeit not a determinative one. We are not in favour of introducing a statutory duty of care[121] and do not envisage any new limitations on the ability of professionals to exclude liability. We have been told that professionals often exclude liability for assessing capacity where instructions for a will are taken over the telephone or the internet.

2.107 Having in mind those considerations, we proceed next to outline the other issues that a code of practice should address.

In what circumstances should a testator's capacity be assessed?

2.108 Practitioners have emphasised to us that the question whether a testator has capacity is one that they ask themselves every time a person gives instructions to make a will. In the majority of cases – perhaps most cases – there will be no question that the testator does have capacity. We believe, however, that guidance in a code of practice can set out a number of indicators or warning signs which highlight the need to consider carefully whether a testator has capacity in certain circumstances. We note that lists of capacity "red flags" have been compiled and could provide a useful source of reference.[122]

2.109 We consider that any mental capacity warning signs specific to will making could draw upon the legal test of testamentary capacity. The guidance might make specific reference to the testator's ability to understand the effect of a will, the nature or extent of his or her estate, or the claims of others on his or her estate. For example, a testator's

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118 For example, STEP, the Law Society and the British Geriatrics Society.

119 See para 2.66 above.

120 The Code of Practice is issued by the Lord Chancellor under section 42 of the Mental Capacity Act 2005 and can be revised.

121 For an example of a statutory duty of care, see Land Registration etc (Scotland) Act 2012, s 111 under which a duty is imposed on certain persons to "take reasonable care to ensure that the Keeper does not inadvertently make the register inaccurate".

122 For example, M Frost, S Lawson and R Jacoby, *Testamentary capacity: law, practice and medicine* (1st ed 2015) ch 15.

capacity may need to be assessed if he or she is uncertain of the value of his or her estate or whether he or she has made a will (and if so, who it benefits).

2.110 The indicators may also refer to the circumstances in which the will is being made. For example, the need for capacity to be assessed should be considered where the will is being made shortly following a bereavement or after a diagnosis of dementia. Additionally, the testator's medical history (insofar as it is known by the practitioner) and personal demeanour may also suggest a need to approach the issue of capacity with care.

2.111 It is important to emphasise that any warning signs would be intended only to offer guidance and the presence of any particular sign would not necessary require a testator's capacity to be assessed by an expert. For example, a diagnosis of dementia may act as a trigger for a person to execute a will and those in the early stages of the disease may well have capacity.

Who should assess capacity?

2.112 The question of whether a testator has capacity is a legal one. It would be possible, in theory, for the law to provide that the question be answered solely on the basis of a medical assessment. However, given the diverse circumstances in which capacity issues arise, we consider that approach inappropriate for testamentary capacity. Our starting point is to keep an open mind as to who would be best placed to assess mental capacity.

2.113 Case law reveals a diversity of opinion as to whether lawyers or doctors are best placed to assess testamentary capacity. In particular, courts have offered conflicting views of the merits of an assessment of capacity by a solicitor at the time a will is executed, and retrospective medical evidence when a will is challenged.

2.114 In *Burgess v Hawes*,[123] the Court of Appeal suggested that the view of an experienced independent solicitor as to capacity will not readily be displaced by expert medical evidence from a doctor who had never met the testator.[124] The emphasis in *Burgess* was on the evidence of those who had seen the testator when she was making the will, particularly given that the solicitor was experienced in seeing elderly clients and drafting wills.[125]

2.115 In contrast, it was noted in *Ashkettle v Gwinnett*[126] that the view of an experienced and independent solicitor will not in every case be sufficient. In that case, the testator had dementia but maintained a sufficient social façade to deceive an "incurious interlocutor" including her solicitor. The facts of that case cast some doubt on the Court of Appeal's confidence in the ability of those who are not trained to do so to detect mental incapacity.

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123 [2013] EWCA Civ 94, [2013] WTLR 453.

124 A solicitor is also not required to obtain medical evidence in every case where a person entering into a contract is elderly: *Thorpe v Fellowes Solicitors LLP* [2011] EWHC 61 (QB), (2011) 118 BMLR 122.

125 See also Greaves v Stolkin [2013] EWHC 1140 (Ch), [2013] WTLR 1793.

126 [2013] EWHC 2125 (Ch), [2013] WTLR 1331.

2.116 Anecdotal evidence from stakeholders suggests doctors are often uncomfortable or unwilling to confirm a testator's capacity. Doctors might not see their job as extending to assisting lawyers in the creation of wills; especially as such assistance is not covered by the NHS and might expose them to legal claims.[127] Moreover, in the modern-day NHS, it is less common for the testator to have seen one GP over a long period of time.[128] Stakeholders have argued that it will be difficult for doctors to ascertain whether a testator has capacity from a short meeting without full knowledge of a patient's history, and therefore any such report will not be adequate to determine whether a testator has capacity.

2.117 Stakeholders' comments on the difficulties of an assessment being provided by a GP in a short meeting reveals an underlying difficulty with the current law. The golden rule suggests that where a lawyer has cause to doubt a testator's capacity, then a medical opinion should be obtained. This reliance on an assessment by a lawyer or a doctor suggests that a person's professional status is the best indication of an ability to assess capacity. In fact, experience in determining testamentary capacity and the history of a person's professional relationship with the testator may be better markers of an ability to assess the testator's capacity.

2.118 Where a testator's capacity is in question, a code of practice would therefore encourage a lawyer to consider who is best placed to assess the testator's capacity and seek an opinion accordingly. An experienced lawyer may be confident of being able to assess capacity him or herself. Someone less experienced or in different circumstances (for example, where there is an obvious question about the testator's capacity) might obtain an assessment from another professional.

2.119 A code of practice could also provide guidance on how best to decide who might assess the testator's capacity. For example, the code could provide guidance on when it would be appropriate to rely upon the testator's GP and when the opinion of another medical professional should be obtained. The code could also explain circumstances in which the most effective assessor might be a social worker, a mental health nurse or a professional able to communicate effectively with the testator.

Guidance on how capacity should be assessed

2.120 Finally, a code of practice should set out in clear terms how a testator's capacity should be assessed; that is, how the mental capacity test is to be applied in practice. The code is an opportunity to explain the capacity test in more detail than is possible in primary legislation (be it the MCA or a statutory version of *Banks v Goodfellow*) and, drawing on the operative test, guidance could be provided as to the sort of questions that the assessor should ask a testator. The code might also encourage people assessing capacity to comment on the testator's ability to meet the capacity test and to record those comments. A clear guide to assessing capacity would leave less room for disputes to arise and reduce the need for retrospective assessments of capacity.

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127 S Taube "All that glitters" [2014] 114 *Private Client Section* 22.

128 S Taube "All that glitters" [2014] 114 *Private Client Section* 22.

Consultation Question 8.

We provisionally propose that:

(1) a code of practice of testamentary capacity should be introduced to provide guidance on when, by whom and how a testator's capacity should be assessed.

(2) that the code of practice should not be set out in statute but instead be issued under a power to do so contained in statute (which may be that contained in the MCA should the MCA test be adopted for testamentary capacity).

Do consultees agree?

Consultation Question 9.

We provisionally propose that the code of practice should apply to those preparing a will, or providing an assessment of capacity, in their professional capacity.

Do consultees agree?

Consultation Question 10.

We invite consultee's views on the content of the code of practice.

SUPPLEMENTARY APPROACHES

2.121 A code of practice is not the only way to address the shortcomings of the golden rule. Several stakeholders have suggested reforms that would bolster the initial assessment of capacity in ways that do not directly address the questions of who should assess capacity in difficult cases and when further help should be sought. We consider two such suggestions below. We note that, even if they are not directly aimed at curing defects in the golden rule, the ability of the reforms to meet those problems should be an important consideration in assessing them.

A certificate of capacity

2.122 In light of the current problems with capacity assessments, stakeholders have suggested that a scheme could be enacted allowing testators to have their capacity certified by a third party. A certification regime could plausibly mirror the law that governs Lasting Powers of Attorney (LPAs).

2.123 In order to make an LPA, the person making the LPA (the donor), must obtain a certificate corroborating his or her capacity. Specifically, the certificate must provide that, at the time the donor executes the agreement –

(i) the donor understands the purpose of the instrument and the scope of the authority conferred under it,

(ii) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney, and

(iii) there is nothing else which would prevent a lasting power of attorney from being created by the instrument.[129]

2.124 The certificate must be provided by someone meeting the qualifications prescribed in regulation: he or she must have known the donor for at least two years or, on account of his or her professional skills or expertise, must reasonably consider that he or she is competent to make the judgement necessary to certify the matters set out in the certificate.

2.125 The regulations provide examples of persons meeting the second requirement: registered health care professionals; barristers and solicitors qualified to practise in the UK;[130] registered social workers; or independent mental capacity advocates.[131]

2.126 The argument from stakeholders is that a similar scheme could be enacted to certify testamentary capacity. We see the force of that argument, particularly the potential of certification to avoid expensive and acrimonious litigation. However, there are several difficulties with transplanting the LPA certification regime into the law of wills.

2.127 First, a professional asked to certify an LPA is in a similar position to a professional taking instructions for a will. The person must make an initial assessment and then decide whether to seek further assistance.[132] The mere existence of the scheme does not tell the certificate provider what to do where he or she is uncertain about a client's capacity. While a certification scheme could solve those problems by limiting the class of potential certification providers (say, to psychiatrists or "accredited people") we consider that any such limitation would be undesirable.[133] In short, transplanting an LPA-like system into the law of wills would not solve the problems surrounding the golden rule.

2.128 Secondly, a compulsory system of certification would place a disproportionate burden on testators, because it would make the process of making a will more complicated, expensive and less efficient. Even if the system were voluntary, there is a risk that it would become a de facto rule because testators might come to think that a certificate

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129 Mental Capacity Act 2005, sch 1, para 2 (1)(e).

130 The Law Society discusses the responsibilities of a certificate provider in Law Society, Practice Note: Lasting Powers of Attorney (8 December 2011) para 7.1.

131 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007 No 1253), reg 8.

132 The Law Society recommends that where the person certifying the LPA is in doubt about whether the donor has mental capacity to make a power of attorney, that person should consider getting a medical opinion. Law Society, Lasting powers of attorney (Practice Note), https://www.lawsociety.org.uk/support-services/advice/practice-notes/lasting-powers-of-attorney/.

133 See para 2.112 above.

of capacity is vital to their will being upheld. Certification may operate, unintentionally, as a barrier to will-making

2.129 Thirdly, it is not clear what value a certificate of capacity would add in practice. As the law stands, professionals instructed to draft wills are required to ensure that the testator has capacity. The professional impliedly endorses the testator's capacity by drawing up the will. Furthermore, testators who wish to insulate their wills against challenge may opt to be assessed by medical professionals or specialist mental capacity assessors. Where testators want further evidence of their capacity, it is already open to them to obtain it.

2.130 Fourthly, we are not convinced that there would be the political will, or resources, to adopt a certification system for wills. Without a system of LPAs there would be an increased burden on the Court of Protection which would have to deal with making decisions on behalf of the incapacitated person. No such justification exists in the law of wills.

2.131 For these reasons, we have taken the view that the potential downsides to a certification scheme outweigh its potential benefits.

Consultation Question 11.

In principle, a scheme could be enacted allowing testators to have their capacity certified by a third party. We provisionally propose that a certification scheme should not be enacted. Do consultees agree?

An accreditation scheme

2.132 Stakeholders have also raised the possibility of introducing an accreditation scheme. An accreditation scheme would deal with the problems raised by the golden rule by directing testators and professionals towards people competent to undertake capacity assessments. Accreditation would mark out who could best assess capacity in difficult cases. Accreditation would also be persuasive in litigation should capacity be contested after the death of the testator. However, accreditation would not solve the problem of when capacity should be assessed by someone other than the professional drafting the will.

2.133 There are two broad types of accreditation scheme. First, a scheme might be operated by a regulatory organisation created by statute. This could be achieved by mirroring the manner in which the Legal Services Act 2007 created the Solicitors Regulation Authority. Secondly, a scheme might be operated by a private organisation who would accredit lawyers, medical professionals and social workers to assess testamentary capacity. The status of that accreditation would depend on the standing of the organisation.

2.134 The first option is not practicable. There is no reason for a regulatory body governing mental capacity assessors to govern only those assessors working in the domain of wills. Consequently, a scheme would have to be considered broadly and that type of broad consideration is beyond the scope of the present project. Furthermore, creating

a statutory body would be disproportionate: the solution risks using a sledgehammer to crack a nut.

2.135 The second option is more workable. For example, we have been told that the Practice Committee of the Society of Trust and Estate Practitioners are considering introducing a qualification standard and creating a list of doctors competent and willing to perform capacity assessments in order to provide a reference source to solicitors preparing wills. We commend those efforts and recognise the value of private accreditation schemes.

Chapter 3: Statutory wills

3.1 As we have discussed in the chapter on capacity, the court has the ability to make certain decisions, or take certain actions, for those who lack capacity to do so. We noted in that chapter that one of the actions that a court can take is to make a will for a person who lacks capacity – a "statutory will". It has been possible to make a statutory will for a person since 1970[1] but the legislative basis for such a will is now to be found in the Mental Capacity Act 2005 ("the MCA"). There are around 400 such applications each year.[2]

THE CURRENT LAW

3.2 Under section 16 of the MCA, the Court of Protection has the power to make a decision on behalf of a person in relation to that person's property and affairs where he or she lacks capacity to do so him or herself, as assessed under the provisions of the Act. The court must make that decision in accordance with that person's best interests.[3] Specific provision for statutory wills is made in section 18 where it is provided that the powers in section 16 extend to "the execution for P of a will".[4] This jurisdiction is expressly reserved only to the court, and not to deputies.[5]

3.3 As our discussion in this chapter is confined to statutory wills, we refer to the person on whose behalf the Court of Protection intervenes – P in the legislation – as the testator.

3.4 Where the court makes an order for a person to execute a will on behalf of the testator, certain formalities must be complied with. The will must:

(1) state that it is signed by the testator acting by the authorised person

(2) be signed by the authorised person with the name of the testator and his own name, in the presence of two or more witnesses present at the same time

(3) be attested and subscribed by those witnesses in the presence of the authorised person, and

(4) be sealed with the official seal of the court.[6]

3.5 A statutory will can make any provision that the testator could have made if he or she had capacity, and the effect of the will is the same as if the testator had made a valid

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1 The Administration of Justice Act 1969 introduced this power into the Mental Health Act 1959 as s 103(1)(dd), which came into force on 1 January 1970. This became Mental Health Act 1983, s 96(1)(e). See D Lush "The evolution of the statutory will jurisdiction" [2014] *Elder Law Journal* 173.

2 G Ashton (ed), *Court of Protection Practice 2016* (2016) para 5.17, 278.

3 Mental Capacity Act, ss 1(5) and 4.

4 Mental Capacity Act 2005, s 18(1)(i).

5 Mental Capacity Act 2005, s 20(3)(b).

6 Mental Capacity Act 2005, sch 2, para 3.

will under the Wills Act 1837.[7] It is not possible for a statutory will to be made for a person under 18.[8] This limitation reflects the general requirement in the 1837 Act that a person must be 18 or older to execute a will.

3.6 The *Court of Protection Practice 2016* sets out the kinds of situations in which an application for a statutory will is likely to be made, providing examples of cases in each situation:

(1) where the testator's circumstances have altered in a major way (for example, where a previous will is revoked by marriage);[9]

(2) where property left in a will adeems;[10]

(3) where there is a change in relation to beneficiaries under a previous will or potential beneficiaries, including the testator's relationship with them;[11]

(4) where there are doubts as to the validity of a previous will;[12] and

(5) where no provision would be made on the person's death, either under an existing will, or (where there is none), the intestacy rules, for a person or organisation for whom the testator might be expected to provide if he or she had capacity.[13]

3.7 As well as allowing a will to be made for a person who would otherwise not be able to execute a will, stakeholders have told us of the benefits of a statutory will in bringing to the surface and resolving any potential succession disputes before the testator's death.

The exercise of the court's discretion

3.8 Once the Court of Protection has ascertained that a testator lacks capacity to make a will, it has the discretion to make a statutory will for that individual. The question then becomes what considerations should govern that discretion.

3.9 Under the MCA, the court's discretion is dictated by determining the testator's best interests. The factors to be taken into account, when deciding what course of action is in a person's best interests, are specified in section 4 of the MCA. That section requires "all the relevant circumstances" to be taken into account and sets out further

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7 Mental Capacity Act 2005, sch 3, para 2 and 4. The formalities required by Wills Act 1837, s 9 are disapplied by Mental Capacity Act 2005, sch 3, para 4(2)(a).

8 Mental Capacity Act 2005, s 18(2).

9 As in *Re Davey (Deceased)* [1981] 1 WLR 164.

10 As in *Re D (J)* [1982] Ch 237.

11 As in *Re HMF* [1976] Ch 33. In *HMF*, the testator had expressed a wish to make a new will benefiting two nephews. In other cases, a beneficiary might have died or been found to have committed financial abuse against the testator.

12 As in *Re D* [2010] EWHC 2159 (Ch), [2012] Ch 57.

13 As in *Re C (Spinster and Mental Patient)* [1991] 3 All ER 866. For a complete list, see *Court of Protection Practice 2016* (2016) para 5.17. Note, however, that the test as to whether a statutory will should be made changed from a "substituted judgment" to a "best interests" approach in the Mental Capacity Act 2005, so the cases predating 2007 must be viewed in this context.

considerations for the decision-maker. In our Report on Mental Capacity and Deprivation of Liberty we explain that the decision maker:

(1) must not make their determination merely on the basis of the age or the appearance of the person, or on the basis of unjustified assumptions from the person's condition or behaviour (known as the principle of "equal consideration");

(2) must consider whether the patient is likely to regain capacity and, if so, when that is likely to occur;

(3) must encourage the person to participate as fully as possible in the decision before making it for the person;

(4) in making best interests decisions in relation to life-sustaining treatment must not be motivated by a desire to bring about the person's death;

(5) must consider the person's past and present wishes and feelings (including written statements), the person's beliefs and values, and any other values that the person would be likely to consider if they were able (thus inserting an element of "substituted judgment"); and

(6) must consult a number of people including carers, holders of lasting powers of attorney, deputies and anyone else named by the person.[14]

It has been suggested that, while there is no hierarchy in the factors set out in section 4 of the MCA significant weight should be given to the wishes and feelings of the person on whose behalf the decision is being made.[15] In our Report on Mental Capacity and Deprivation of Liberty, however, we recommend that the MCA should be amended so that the decision-maker must ascertain, so far as is reasonably practicable, the factors set out at (5) in the list above and, in making the determination, must give particular weight to any wishes or feelings ascertained.[16]

Procedure

3.10 No permission is required for a person to make an application for a statutory will.[17] A 2015 amendment to the Court of Protection Rules made provision for the court to consider how the testator should be enabled to participate in proceedings. In each case, the court must now consider whether it should make one of several specified directions:

(1) joining the testator as a party

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14 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, para 14.3.

15 See the judgment of Lady Hale in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591, at [45], and *Re BM* [2014] EWCOP B20, at [58].

16 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, para 14.21.

17 Mental Capacity Act 2005, s 50 provides that, while permission is generally required for applications to the Court of Protection, permission is not required by, among others, P, a deputy, or a person named in an existing order of the court, if the application relates to the order. Court of Protection Rules 2007, r 51 provides further exemptions from the court's permission being required for an application, one of which is where the application concerns P's property and affairs (r 51(b)(i)) – which would include an application for a statutory will.

(2) appointing an accredited legal representative to represent the testator

(3) appointing a representative to provide the court with information on matters relating to the testator's wishes and feelings, the beliefs and values that would influence the testator's decision if he or she had capacity and other factors that he or she would be likely to consider if he or she were able to do so

(4) giving the testator the opportunity to address the judge determining the application

(5) that the testator's interests and position can properly be secured without making one of the above directions.[18]

3.11 While it is the Court of Protection that makes a statutory will, with the draft will being supplied by the applicant for the statutory will,[19] the Office of the Official Solicitor may be involved in the work leading up to the making of the will. Unless the application is very simple (such as changing the name of an executor) the court will usually join the testator as a party.[20] Where the testator is joined as a party, the court will usually invite the Official Solicitor (or some other person) to act as his or her litigation friend.[21] The Official Solicitor will also act as the testator's solicitor if appointed.

3.12 The Official Solicitor will not automatically accept the appointment, however; whether they do so depends on a variety of factors. The proportionality of the Official Solicitor acting is central to the decision, given the costs that will then be incurred by the testator. These costs may not be justified where an estate is of a modest value.

3.13 The Official Solicitor will gather evidence and views as to the most appropriate provisions for the statutory will, and conduct research into who would otherwise benefit (which will require research into the testator's genealogy where he or she is intestate).

3.14 The Official Solicitor told us that they consider how to involve the testator in the process of making the statutory will; this will usually start with a capacity assessment in which the extent to which the testator can express his or her own wishes is gauged. When proportionate to do so, the Official Solicitor will instruct a Court of Protection visitor as an agent to visit the testator to discuss the implications of the proposed will.[22] The visitor will report back and the Official Solicitor will decide whether further assessment is necessary. They will also initially write to the testator's carer, care home or social worker for information. When the Official Solicitor has sufficient information, the aim is usually to direct proceedings to reach an outcome which reflects the testator's wishes and feelings, with the agreement of potential beneficiaries of the will, or those who would benefit under the intestacy rules (if relevant).

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18 Court of Protection Rules 2007 (SI 2007/1744), r 3A

19 Court of Protection Practice Direction 9F, paragraph 6 provides that where an application is made for the execution of a statutory will, a copy of the draft will must be provided.

20 G Ashton (ed), *Mental Capacity: Law and Practice* (3rd ed 2015) p 288, fn 43.

21 Court of Protection, Practice Direction 9F, para 10.

22 Visitors are "appointed to report to the Court of Protection on how attorneys or deputies are carrying out their duties". MCA Code of Practice (2007) p 283.

3.15 There will be 14 days after an application has been issued for the applicant to serve the respondents to the application, and to notify certain other people of it and 14 days after that for those persons to file an acknowledgement of service or notification.[23] The respondents to a statutory will application will be beneficiaries under an existing or proposed will who are likely to be materially or adversely affected by the application, or, where there is no existing will, any prospective beneficiary under intestacy.[24] The testator must be notified of the application[25] and it may be appropriate for other people also to be notified, for example members of the testator's close family (where they would not otherwise be respondents to the application).[26] The Court will usually set a reporting date 12 to 14 weeks after the application is made. The Official Solicitor has told us that, in the majority of cases, the matter is dealt with by agreement within 12 weeks but that, where the statutory will application is contested, the proceedings can take between six months and two years.

The UN Disability Convention

3.16 The CRPD, the full title of which is the UN Convention on the Rights of Persons with Disabilities,[27] is particularly relevant to the issue of statutory wills.[28] On the UN Convention webpage, the CRPD is described in this way:

> The Convention is intended as a human rights instrument with an explicit, social development dimension. It adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.[29]

3.17 The CRPD has been ratified by the United Kingdom but is not incorporated into national law; (non)compliance is therefore a matter of political rather than legal consequences.[30] It is relevant because it provides a measure against which the statutory wills regime can be assessed in relation to enabling and protecting those with disabilities.

3.18 Article 12 of the CRPD provides for the recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. The Committee on the Rights of Persons with Disabilities provides guidance on the interpretation and implementation of the articles of the CRPD; the states who are parties to the CRPD

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23 Court of Protection Rules 2007, r 42(1), 46(3), 66(1), 70(1) and 72(2).

24 Practice Direction 9F – Applications relating to statutory wills, codicils, settlements and other dealings with P's property (supplementing Part 9 of the Court of Protection Rules 2007).

25 Court of Protection Rules 2007, r 42

26 Court of Protection Rules 2007, r 70 and see Practice Direction 9B – Notification of other persons that an application form has been issued (supplementing Part 9 of the Court of Protection Rules 2007).

27 Adopted on 13 December 2006 (A/RES/61/106).

28 And also supported wills – see Chapter 4.

29 See https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html (last visited 14 June 2017).

30 *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC; [2015] 1 WLR 1449.

must have regard to this guidance.[31] The Committee's General Comment Number 1 on Article 12, issued in 2014, states that substituted decision-making should be abolished and replaced with support for persons with disabilities in the exercise of their legal capacity.[32] Substituted decision-making is interpreted broadly in this context and under the CRPD the "best interests" approach is classed as substituted decision-making.

3.19 The General Comment suggests that "support" for the person to exercise legal agency extends to the situation when a person cannot make his or her own decisions.[33] This description incorporates the situations in which a statutory will is made. The Comment also outlines the requirements of support, including that supported decision-making should be available to all, and that all forms of support in the exercise of legal capacity must be based on the person's will and preferences, not best interests.[34]

3.20 We have noted above amendments to the Court of Protection Rules made in 2015 to make provision for how the testator should be able to participate in proceedings. This support for the testator's involvement may increase the extent to which the MCA may be considered compatible with the CRPD. Notwithstanding, as the "best interests" approach of the MCA is considered a form of substituted decision-making, there is a conflict between the MCA and Article 12 of the CRPD.

PROBLEMS IN LAW AND PRACTICE

Critique of the rationale for statutory wills and the operation of best interests

3.21 As we have explained, the underlying rationale for the making of a statutory will is the testator's best interests. We are aware of criticisms of this rationale: some commentators have asked whether it is appropriate to use the testator's best interests as the criterion to judge whether a statutory will should be made, and, if so, what its provisions should be. The argument is that it is difficult to apply a test of best interests to a disposition which only takes place after a testator has died.[35]

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31 The UK is not bound by the Committee's interpretation of Article 12: see W Martin, "The MCA under scrutiny: meeting the challenge of CRPD compliance" [2015] *Elder Law Journal* 32; Essex Autonomy Project, "Is the Mental Capacity Act of England and Wales compatible with the UN Convention on the Rights of Persons with Disabilities? If not, what next?" p 12. However, In accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties, regard is required for "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", which includes the opinion of the Committee: see L Series, "Comparing old and new paradigms of legal capacity" [2014] *Elder Law Journal* 92.

32 UN Committee on the Rights of Persons with Disabilities, "General Comment No 1: Article 12: Equal Recognition before the Law", para 7.

33 UN Committee on the Rights of Persons with Disabilities, "General Comment No 1: Article 12: Equal Recognition before the Law", paras 3, 7, 9, 14, 15, 17 and 26 to 28. See also Essex Autonomy Project, *Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity legislation across the UK* (Position Paper, 2016) s 6.1.

34 UN Committee on the Rights of Persons with Disabilities, "General Comment No 1: Article 12: Equal Recognition before the Law", para 29.

35 R Harding, "The rise of statutory wills and the limits of best interests decision-making in inheritance" (2015) 78(6) *Modern Law Review* 958.

3.22 More specifically, it is argued that there is an incoherence in the approach taken by the courts to the making of statutory wills, so that the principle of the best interests of the testator is, in fact, overridden by other (less justifiable) reasons, which are concealed behind the best interests test.[36]

3.23 The testator's best interests have been interpreted in case law to include the idea that the testator should be remembered for having "done the right thing" by his or her (statutory) will:[37]

> For many but not all people it is in their best interests that they be remembered with affection by their family as having done the right thing by their will. This is something which the judge is 'entitled to take into account' – is it a relevant consideration – alongside the other factors specified in section 4 [best interests].[38]

3.24 This interpretation has been criticised. In *Re G (TJ)* it was said to be unclear how a person could be seen as having done the right thing when it was the Court of Protection, rather than the person him or herself, making the will.[39] More generally, it has been said that "there is a real danger that best interests defined as 'doing the right thing' can be manipulated and transform common courtesy and generosity to others into some form of entitlement to be included in a will that P would not necessarily have made".[40]

3.25 On the other hand, in *Re Jones*, it was said:

> Occasionally, there may be circumstances such as those referred to by the President [an appropriate reward for a person doing something for the testator, or an inducement to a person to do more for the testator] or the avoidance of post-death litigation which justify departing from a person's clear past and present wishes and beliefs. However, in the ordinary case the Mental Capacity Act is not a vehicle for imposing on people views, wishes and feelings that clearly are contrary to those they held before losing capacity, do not hold now and would not hold if they regained capacity, however right those views may be, and however unworthy P's views are according to most people's standards. …The onset of mental incapacity is not an opportunity for moral correction.[41]

3.26 We note the concerns directed at the idea of a statutory will "doing the right thing". We question, in the light of the explanation in *Re Jones*, whether it is necessarily used in a manner that is incompatible with the testator's best interests. The Official Solicitor has also said to us that the concept of doing the right thing will include many possible factors

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36 R Harding, "The rise of statutory wills and the limits of best interests decision-making in inheritance" (2015) 78(6) *Modern Law Review*, 966.

37 See *Re P* [2009] EWHC 163 (Ch), [2010] Ch 33, *Re M* [2009] EWHC 2525 (Fam), [2011] 1 WLR 344, *Re D* (Statutory Will) [2010] EWHC 2159 (Ch), [2012] Ch 57, *Re Meek* [2014] EWCOP 1, [2014] COPLR 535 and *Re Jone*s [2014] EWCOP 59.

38 *Re Jones* [2014] EWCOP 59 at [61].

39 [2010] EWHC 3005 (Fam), [2011] Med LR 89 at [53].

40 P Hewitt, S Richards and N Stourton, "The Court of Protection, charities and the evolution of best interests" [2012] *Elder Law Journal* 264.

41 *Re Jones* [2014] EWCOP 59 at [64] and [65].

that the testator would be likely to consider if he or she was able to do so and that undue emphasis is not, in practice, placed on it as a standalone factor.

3.27 Rosie Harding argues that statutory wills cases may sometimes operate on the basis of a pragmatic distribution of assets; that is as a result of argument and compromise between the competing members of the testator's family, rather than being determined by the testator's best interests.[42] It may be, however, that a pragmatic distribution, which avoids any costs associated with post-death litigation, is in the testator's best interests in the sense that it is unlikely that the testator would wish his or her estate to be depleted by the costs of such litigation, if it can be avoided.

3.28 Harding also views as controversial those cases in which statutory wills are made for those who have never previously made a will, both in the case where the testator has never had capacity and, particularly, where the testator once had capacity and so was able to make a will but never did so. She argues that, in the latter situation:

> 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 testamentary wishes in a valid will when they had opportunity to do so.[43]

3.29 Harding takes the view that statutory wills should only be made in the situation where they are used to adapt the testator's testamentary will and preferences to changed financial circumstances, which might otherwise frustrate the testator's previous intentions.[44]

3.30 We also note that there is a specific exception to the way in which statutory wills "mirror" those executed by a testator in the usual way. It is possible for an English will made in the usual way to deal with immoveable property (land) outside England and Wales.[45] However, statute specifically prohibits a statutory will from doing so.[46] We understand that the issue does not frequently arise.

Procedural concerns

3.31 Stakeholders have expressed concern with the length of time it can take to obtain a statutory will and with the cost, which may include both the Official Solicitor's fees, and the fees for solicitors representing other parties (which could include the testator's

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42 R Harding, "The rise of statutory wills and the limits of best interests decision-making in inheritance" (2015) 78(6) *Modern Law Review*, 945, 961, discussing the cases of *NT v FS* [2013] EWHC 684 (COP), [2014] WTLR 867. and *Re Meek* [2014] EWCOP 1, [2014] COPLR 535.

43 R Harding, "The rise of statutory wills and the limits of best interests decision-making in inheritance" (2015) 78(6) *Modern Law Review* 945, 970.

44 R Harding, "The rise of statutory wills and the limits of best interests decision-making in inheritance" (2015) 78(6) Modern Law Review 945, 970.

45 In practice, a will may be required in the foreign jurisdiction to deal with immoveable property situated there. Whether this is the case will depend on the law of that jurisdiction.

46 Mental Capacity Act 2005, sch 2(4). A statutory will can, however, have effect in relation to moveable property where P is domiciled in England and Wales, or where he or she is domiciled elsewhere but the question of his or her testamentary capacity would be determined under the law of England and Wales. The situation for moveable property is therefore similar to that where a testator executes his or her own will.

attorney or deputy). We have been told that statutory wills usually cost over £5000 in legal fees and can cost multiples of that amount. Stakeholders have also raised the possibility of statutory wills being made other than by the Court of Protection, in order to reduce costs and delay. That said, stakeholders recognised that the current process was robust and protected against undue influence, and that concerns over length and cost of proceedings may arise, at least in part, from resource constraints upon the Official Solicitor.

3.32 Stakeholders who act for clients in statutory will applications also expressed concerns that their clients may die part way through the process of obtaining the statutory will, at which point proceedings will cease and no statutory will approved.

REFORM

3.33 The best interests rationale for the exercise of the court's discretion to make a statutory will is one that is dictated by the fact that statutory wills are made under the authority of the MCA, which uses such an approach. It does not seem to us to be desirable to remove statutory wills from this framework. Indeed, in the chapter of this paper dealing with capacity we have provisionally proposed that the test of capacity to make a will should be brought within the MCA.[47]

3.34 Our discussion of criticism regarding the testator's best interests illustrates the range of interests that are involved in statutory will proceedings. Moreover, we note that academic criticism could well inform judicial interpretation of the best interests test and its application to statutory wills.

3.35 For those reasons best interests decision-making under the MCA may, in practice, be compliant with the interpretation in the General Comment of Article 12 as requiring support.[48] It appears that the Court of Protection is prioritising the testator's wishes and feelings in the assessments of best interests under the MCA. Taking this into account, and the work of the Official Solicitor to elicit the testator's views that we have described above, we are not clear that there is a compelling need for reform of the way in which best interests are interpreted in proceedings for a statutory will.

3.36 As we discuss above, our report on Mental Capacity and Deprivation of Liberty recommends that section 4(6) of the MCA be amended to require a determination of a person's best interests to give particular weight to a person's past and present wishes and feelings.[49] If implemented, this reform could help to allay concerns that the testator's wishes and feelings were not being sufficiently respected in proceedings for statutory wills.

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47 Chapter 2.

48 A Ruck Keene and C Auckland, "More presumptions please? Wishes, feelings and best interests decision-making" [2015] *Elder Law Journal* 293. See also Essex Autonomy Project, *Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK* (Position Paper, 2016) s 5.4. However, how practitioners on the ground are assessing best interests may fail to prioritise a person's wishes and feelings: see House of Lords Select Committee on the Mental Capacity Act: Report of Session 2013-14: Mental Capacity Act 2005: Post-legislative Scrutiny (2014) HL 139.

49 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, p 161.

3.37 We also question the desirability of restricting the court's jurisdiction to make a statutory will to the situation in which a valid will has previously been executed by the testator. That would necessarily mean that the estate of people who have never had capacity, or who did not execute a will before losing capacity, would be distributed under the intestacy rules. It seems to us, however, that each case is fact specific and that there may be good reasons to make statutory wills in such cases; for example to avoid those who have committed financial abuse against the testator from inheriting under the intestacy rules.

3.38 As we have seen the court's jurisdiction to make a statutory will is also restricted to those cases where the testator is aged 18 or older. We discuss in the chapter on children and succession whether, generally, the age at which a person can make a will should be lowered. We provisionally propose that this age should be reduced to 16 and ask whether it should be possible for a person under the age of 16 to make a will where he or she is found to have the capacity to do so. It would be logical for statutory wills to continue to effectively mirror wills made under the 1837 Act; that is, if there is any reform to the age at which a will can be made then this should also apply to statutory wills.

Consultation Question 12.

We take the view that reform is not required:

(1) of the best interests rationale that underpins the exercise of the court's discretion to make a statutory will;

(2) of the way in which that discretion is exercised; or

(3) to restrict the circumstances in which a statutory will can be made.

Do consultees agree?

3.39 With regard to procedural reform, some stakeholders have queried whether there is a way to make statutory wills more quickly and cheaply. Increasing the resources of the Official Solicitor or the Court of Protection is beyond the ambit of law reform and we therefore draw a distinction between improvements dependent on increased resources and those made possible by reforms to the procedure by which statutory wills are made. We also bear in mind that, inevitably, research and evidence gathering by the Official Solicitor takes time. We would be interested to hear whether consultees think that any improvements can be made to the procedure.

3.40 With regard to the possibility of the testator dying part way through an application for a statutory will, we note that in the recent review of succession law by the Victorian Law Reform Commission, it was suggested, in relation to the equivalent jurisdiction in Victoria, that it should be possible for an application to be made for a statutory will for a person after his or her death. The Victorian Commission did not favour reform of this kind, suggesting that it "…would create difficulties with overlapping family provision

jurisdiction."[50] We agree that the same objection would apply in this jurisdiction, given the availability, after the testator's death, of an application for financial provision from the estate, for certain categories of people, under the Inheritance (Provision for Family and Dependants) Act 1975. In addition, the MCA only applies to living persons, and allowing an application for a statutory will where a person has died would therefore not fit within the legislative framework within which statutory wills are made. We also note that where there are concerns that the testator may die before a hearing date it is possible to ask for the application for a statutory will to be expedited.[51]

3.41 We consider in the next chapter whether there should be a scheme to support people to make a will where, without such support, they would otherwise not have capacity. If such a scheme were to be available that might offer a partial answer to the perceived cost and delay in obtaining a statutory will where the person in question only lacks testamentary capacity because he or she lacks support to make a will (rather than cases where a person would clearly lack capacity, regardless of what support were provided).

Consultation Question 13.

Consultees are asked whether there are reforms that could usefully be made to the procedure governing statutory wills with the aim of reducing the cost and length of proceedings and, if so, what those are?

50 Victorian Law Reform Commission, *Succession Laws Report* (2013) p 24.

51 G Ashton (ed), *Court of Protection Practice 2016* (2016) para 5.54, p 291.

Chapter 4: Supported will-making

INTRODUCTION

4.1 In this chapter, we consider the arguments for and against the introduction of a scheme of supported will-making. Such a scheme would be designed to benefit testators who could have capacity to make a will if provided with support to do so, in line with developments in supported decision-making in other legal contexts. It would therefore complement the provision in the Mental Capacity Act 2005 ("MCA") for making a statutory will for a person who lacks the capacity to do so, which we discussed in the previous chapter.

4.2 Underlying this discussion is the question of whether the approach in English and Welsh law to testamentary capacity is compatible with the UN Disability Convention. As we outlined in the previous chapter, Article 12 is concerned with the right of those with disabilities to enjoy legal capacity in the same way as all other people. We described how, at the level of underlying principles, the best interests test contained in the MCA may be more compatible with the UN Disability Convention than might first appear to be the case. However, we take the view that there is more that can be done on a practical level to increase the support available to testators who might otherwise lack capacity to make a will.

4.3 Some people lack the mental capacity to make a will no matter how much support they might receive. A supported will-making scheme would not be able to assist such people; for them, a statutory will, provided through an application to the Court of Protection, would remain the appropriate course of action.

4.4 In our discussions with stakeholders so far, many have expressed support for a scheme of supported will-making in order to promote autonomy. One stakeholder was in favour of supported will-making as promoting a rights-based approach to testamentary capacity that would ensure people were not denied their right to autonomy. Another stakeholder believed that a scheme of supported will-making would be welcomed by the courts, which have upheld wills in borderline capacity cases based on the importance of testamentary freedom and autonomy.

4.5 We envisage that a scheme of supported will-making would fill the gap between wills made by testators who clearly have testamentary capacity and statutory wills made by the Court of Protection on behalf of testators who are determined not to have capacity. It would apply to testators who are capable of understanding what is necessary to make a will, but who need support in order to do so.

SUPPORTED WILL-MAKING AND INTERNATIONAL LAW

4.6 First, we discuss whether there is any legal requirement for a scheme of supported will-making. We consider the requirements for supported decision-making under the UN Disability Convention. We then examine the current scope for supported decision-making under the common law *Banks v Goodfellow* test and the MCA, and discuss whether they meet the UN Disability Convention's requirements.

The UN Disability Convention

4.7 Article 12(3) of the UN Disability Convention specifically requires states to take "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". This provision therefore requires that persons with disabilities be supported to have capacity.

4.8 The General Comment on Article 12 gives guidance on the interpretation and implementation of Article 12. It explains that Article 12 does not permit the denial of legal capacity based on a person's disability or an assessment of a person's decision-making skills, but requires support in the exercise of legal capacity. Substituted decision-making should therefore be replaced by supported decision-making, and when supported decision-making is not possible because the person is unable to make any decision, support should take the form of a decision based on a person's will and preferences.

4.9 We note that what the General Comment refers to as a supported decision-making scheme is a scheme for making decisions where a person is unable to make such decisions on their own. Using the General Comment's definition of support, such a scheme would therefore include making decisions for a person who, in the language of the MCA, would be said to lack capacity. The General Comment's use of the term support is therefore both broader than, but encompasses, what we mean by a supported will-making scheme.

4.10 The General Comment outlines the requirements for a supported decision-making regime.[1] It must:

(1) be available to all for free or basically for free;

(2) be based on the person's will and preference;

(3) not be limited based on the method of communication the person requires;

(4) have provision for legal recognition of the supporter;

(5) not be used to limit the rights of those with disabilities;

(6) have provision for individuals to refuse support;

(7) have safeguards to ensure a person's will and preferences are respected; and

(8) not be based on mental capacity assessments but rather on "new, non-discriminatory indicators".[2]

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1 UN Committee on the Rights of Persons with Disabilities, "General Comment No 1: Article 12: Equal Recognition before the Law", paras 15 and 29.

2 UN Committee on the Rights of Persons with Disabilities, "General Comment No 1: Article 12: Equal Recognition before the Law" (adopted 11 April 2014) para 29.

4.11 As we have previously discussed, the guidance in the General Comment is non-binding but regard must be had to it by the states who are parties to the CRPD.[3]

Banks v Goodfellow

4.12 In our discussions with stakeholders, we have learned that some solicitors already support testators in drafting their wills. One stakeholder, a firm of solicitors, provided us with examples of the type of support it provides.

4.13 Where a testator understands the nature of a will and to whom he or she wants to give her estate but struggles with understanding the extent and value of the estate, support can be provided to help him or her determine how to divide the estate among the chosen beneficiaries. In one case, the solicitor created 100 counters and a board with designated spaces for each of the beneficiaries the testator had identified. Using the counters, the testator was able to indicate the proportion of the estate that each of the beneficiaries should have. Using those indications, the solicitor then made a number of pie charts, each with a different option for the division of the estate, for the testator to choose one.[4]

4.14 In a similar case, where the testator responded well to visual cues the solicitor created flashcards of pictures of different objects of escalating value to which the solicitor believed that the testator would relate (for example, the testator's favourite drink, favourite holiday destination, a car, a house in the testator's home town and a mansion). Using these over the course of several meetings, the solicitor was able to establish that the testator understood the value of these various items relative to both each other and the value of the assets in the estate.

4.15 In another case, the testator had full cognitive ability but was unable to communicate in the usual way as the testator's physical functions were limited to moving their eyes. Instructions for the will were taken by utilising a letters grid which the testator used by looking at relevant letters and blinking once or twice to confirm yes or no.

4.16 A high level of support is therefore possible under the *Banks v Goodfellow* test, but it is not required: the test says nothing about requiring support to help the testator have capacity to understand all the necessary elements.[5]

4.17 The absence of any provision for supported decision-making means that the test in *Banks v Goodfellow* might be incompatible with Article 12 of the UN Disability Convention. Although *Banks v Goodfellow* passively allows supported will-making, it does not require or promote it. Something more might therefore be required.

The Mental Capacity Act 2005

4.18 As we have seen in Chapter 3, the MCA provides for substituted decision-making for people who are unable to make a decision, with the substituted decision being based

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3 See para 3.17 above.

4 Another solicitor used a similar method, but with sugar packets representing proportions of the person's estate.

5 Contrast with the position under the Mental Capacity Act 2005.

on an assessment of the person's best interests. One of the main principles of the MCA is to promote supported decision-making. Section 1(3) provides:

> A person is not to be treated as unable to make a decision unless all practical steps to help him to do so have been taken without success.

4.19 Supported decision-making is also provided for in the test for mental capacity, in section 3(2):

> A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

4.20 Section 1(3) therefore provides the principle of supported decision-making, with section 3(2) clarifying that support must be tailored to each individual's circumstances and needs.[6]

4.21 Chapter 3 of the MCA Code of Practice provides guidance on helping people make their own decisions under the MCA. It explains that the appropriate steps to support a person will vary depending on the person's circumstances, the decision to be made, and the length of time the person has to make it. Although significant decisions which only need to be taken once require different considerations than daily decisions, the same broad processes apply to support for each. The MCA Code of Practice highlights four important aspects of support:

(1) finding the best method of communication for the person;

(2) providing relevant information to the person in order for him or her to make the decision;

(3) making the person feel at ease, focusing on location and timing; and

(4) assessing whether support from another person, such as an advocate, will help.[7]

4.22 The MCA also creates the independent mental capacity advocate ("IMCA") service.[8] As explained in the MCA Code of Practice–

> The purpose of the IMCA service is to help particularly vulnerable people who lack capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions. IMCAs will work with and support people who lack capacity, and represent their views to those who are working out their best interests.[9]

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6 MCA Code of Practice (2007) p 29.

7 MCA Code of Practice (2007) ch 3. See also The British Medical Association and the Law Society, *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (4th ed 2015) appendix B.

8 Mental Capacity Act 2005, ss 35 to 41.

9 MCA Code of Practice (2007) p 178.

4.23 IMCAs therefore help people without capacity by providing an independent safeguard regarding important decisions affecting them.

4.24 Unlike *Banks v Goodfellow*, the MCA does require supported decision-making. However, even this more empowering approach might be insufficient to promote the aims of the UN Disability Convention. As argued by then Senior Judge Lush, there is insufficient guidance on the supported decision-making provisions in the MCA and it is not clear who is required to provide support.[10] The House of Lords Select Committee on the Mental Capacity Act recently found that supported decision-making and the adjustments required to enable supported decision-making under the MCA "are not well embedded", and that the principles of the MCA are not working well in practice.[11]

4.25 It therefore appears to us that, if the *Banks v Goodfellow* test remains the test of testamentary capacity, further support may be required under the UN Disability Convention in order to support persons to have capacity to make a will. If, as we have provisionally proposed, the MCA test is adopted for testamentary capacity then thought has to be given to how that Act's requirements should be adapted to supported will-making, and how far this would satisfy the UN Disability Convention.

A SCHEME FOR SUPPORTED WILL-MAKING

4.26 We have seen, then, that there is evidence of some stakeholder support for the introduction of a scheme for supported will-making, and the arguments that it is legally required. What might a scheme for supported will-making look like?

4.27 The Law Commission has previously considered supported decision-making in the context of the MCA (as well as the Care Act 2014), in its project on Mental Capacity and Deprivation of Liberty.[12] We explained that supported decision-making begins with a presumption of capacity: that most people are capable of making decisions if they are provided with support to do so. Beyond the existing requirements for supported decision making in the MCA, we were provisionally of the view that, in the care and medical treatment context, a formal legal process in which a supporter is appointed to assist with decision-making offers clear benefits, particularly transparency, and would help the Act to work as it was intended. We took the view that a person lacking capacity to make the relevant decision could appoint a supporter so long as that person had the capacity to appoint a person to assist him or her in making that decision.[13]

4.28 In our report we ultimately recommended the introduction of an enabling power for the Secretary of State and the Welsh Ministers to create a formal supporter scheme to provide individuals with support in order to exercise their legal capacity. We envisage that a formal supporter scheme would enable a person to appoint somebody on an ongoing basis to help him or her to make and express the decisions with which the

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10 D Lush, "Article 12 of the United Nations Convention on the Rights of Persons with Disabilities" [2011] *Elder Law Journal* 61.

11 Mental Capacity and Deprivation of Liberty (2015) Law Commission Consultation Paper No 222, para 12.10, citing House of Lords Select Committee on the Mental Capacity Act: Report of Session 2013-14: Mental Capacity Act 2005: Post-legislative Scrutiny (2014) HL 139, paras 79, 104 and 108.

12 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372.

13 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, paras 14.43, 14.46, 14.51 and 14.55..

person wanted support. Appointing a supporter would prevent the MCA from applying to the person in regard to the supported decisions because the person would have the capacity to make their own decisions.[14]

4.29 We take a similar provisional view in the wills context. Beyond the informal support given to testators, currently under the common law and potentially under the MCA, a formal scheme of supported will-making might be warranted. It would involve the formal process of appointing someone to assist the testator with making a will. We also consider that supported will-making might be useful in contexts in which the person's lack of capacity is not clear or not yet established, as those persons may also benefit from support. Of course, if the person were to be found not to have capacity, even with support, the appropriate route for him or her to have a will made would be an application for a statutory will.

4.30 We will now consider what such a scheme could look like.

ACTING AS A SUPPORTER

4.31 In our Mental Capacity and Deprivation of Liberty Consultation Paper, we identified that parameters should be set for who should be able to act as a supporter. We were open to views as to whether professionals, or alternatively, non-professionals should be able to take this role. We identified family members or friends as well placed to act as supporters, given that the relationship may already have a high level of trust. We noted that some supporter systems in other jurisdictions require supporters to demonstrate certain values, such as respect for personal dignity, or to be of good standing, evidenced by not having been convicted of certain offences.[15] Ultimately, the enabling power proposed in the Mental Capacity and Deprivation of Liberty Report only specifies that the supporter must be aged 16 or over, with a provision for other requirements being set out in regulations.[16]

4.32 We discuss below who could fulfil the supporter role in the specific wills context; we bear in mind the need to ensure that there is not a conflict of interest between a person's role as supporter and any interest that he or she might have in the testator's estate because he or she is a likely beneficiary.

4.33 If professionals were to act as supporters, it makes sense to consider professionals who already provide support services.

4.34 One possibility is that IMCAs should be able to act as supporters for will-making.[17] IMCAs provide independent advocacy and support for persons regarding some decisions under the MCA. They are required to have specific experience and training,

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14 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, paras 14.43, 14.54 and 14.55.

15 Mental Capacity and Deprivation of Liberty (2015) Law Commission Consultation Paper No 222, paras 12.16 and 12.17.

16 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, paras 14.55 and 14.56.

17 There are also Independent Mental Health Advocates, made available to "qualifying patients" under the Mental Health Act, which include patients liable to detention under the Act (except those subject to emergency short term detention), subject to guardianship, a community treatment order, and conditional discharge, and transferred from prison to hospital: Mental Health Act 1983, ss 130A and 130C.

integrity and a good character, and the ability to act independently. They must be independent, meaning that they cannot provide care or treatment in a paid or professional capacity to the person they are representing, or have any links to the person instructing them, the decision maker, or any other individual involved in the person's care or treatment.[18] However, an IMCA's role is focused on advocacy in relation to the best interests of a person without capacity; IMCAs therefore might not be suited to providing support to help a person have capacity.

4.35 Care Act 2014 advocates are another possibility. A Care Act advocate is made available by a local authority to an individual for needs assessments, carer's assessments, care and support planning and safeguarding enquiries, among others. An advocate is appointed if, without an independent advocate, the person would experience "substantial difficulty" with one or more of the following:

(1) understanding relevant information;

(2) retaining that information;

(3) using or weighing that information; or

(4) communicating their views, wishes or feelings.[19]

4.36 A Care Act advocate is only appointed in the absence of an "appropriate person": someone who, to the local authority's satisfaction, is appropriate to support the person's active involvement with the local authority processes.[20]

4.37 Unlike the appointment of an IMCA, a Care Act advocate is appointed not because the person lacks capacity, but because the person needs support to make decisions or communicate his or her wishes. In other words, the advocate assists the person to have capacity. The Care Act advocate's role is to independently represent and support the individual for the purpose of facilitating his or her involvement.[21] Care Act advocates, as we note in our Mental Capacity and Deprivation of Liberty report, are, however, primarily concerned with providing support to a person in the context of key decisions made by local authorities rather than providing support to individuals to make their own decisions on an ongoing basis.[22]

4.38 Care Act advocates must meet the requirements set out in regulations: these requirements include appropriate training and experience, having arrangements in place for supervision, integrity and a good character.[23]

4.39 Another possibility is that appropriately qualified practitioners could act as supporters. One stakeholder suggested that there could be a scheme of accreditation for

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18 MCA Code of Practice (2007) pp 184 to 185.

19 Care Act 2014, ss 67(3) and (4) and 68(1) and 68(3).

20 Care Act 2014, ss 67(5) and (6) and 68(4) and (5); Department of Health, Care and Support Statutory Guidance (2014) paras 7.35 to 7.36.

21 As above, ss 67(2) and 68(2).

22 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, para 14.52.

23 Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 (SI 2014 No 2889), reg 2(1).

practitioners. Accredited practitioners would have expertise in supporting people with disabilities to make wills while at the same time preventing undue influence. Similarly, medical professionals could act as supporters.

4.40 Deputies appointed by the Court of Protection or attorneys appointed under a Lasting Power of Attorney could also potentially act as supporters. As one stakeholder noted, many people who have impaired capacity will already have a deputy or attorney providing them support. Similarly, carers or support workers might also be well placed to act as supporters. However, these categories of supporters are not always professionals (for example, attorneys, deputies and carers may be a member of the person's family) and may lack the legal expertise to assist with testamentary capacity. Significantly, they may also be insufficiently impartial, a concern we also raise for other non-professional supporters below. Supporters, whether professional or non-professional, should be independent.

4.41 If professionals are to act as supporters, then cost is a concern. Currently, IMCAs and Care Act advocates are paid for by local authorities or, in Wales, local health boards. But they are only instructed in relation to specific circumstances, typically serious care and health related matters, where the state is involved and when there is no-one else to help support the person.[24] One stakeholder thought that cost to the public was similarly warranted in the wills context in order to protect and promote the autonomy rights of testators, particularly elderly or disabled testators. We doubt, however, that local authorities or local health boards can, or should, pay for supporters for persons wanting to make a will. A will is a private unilateral act in which the state is not actively involved. Other costs that can be associated with making a will – for example, legal advice, and specialist assessment of capacity – are not borne by the state. We are aware, however, that there is an argument that a scheme requiring a testator to pay for support would not meet the requirements of Article 12, as the Committee on the Rights of Persons with Disabilities in its General Comment suggested that support must be free or basically free.[25]

4.42 If testators had to bear the cost of support themselves it is possible that the scheme might be unaffordable to some of those who would like to take advantage of it.

4.43 However, one stakeholder countered that any such cost would be likely to be significantly less than the cost of a statutory will which will usually fall onto the person for whom the will is being made.[26] Supported wills would therefore be likely to offer a saving for those who would otherwise have to make a statutory will and might enable some people who could not afford a statutory will to exercise their testamentary capacity. Moreover, there may be a possibility of charities providing professionals on an unpaid basis.

4.44 Alternatively, non-professionals could act as supporters. Family and friends might be well placed to provide support in the sense that they are likely to know the testator well and could presumably provide support free or at a low cost. Such family and friends might already be acting as a deputy, attorney, carer or as a supporter under any formal

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24 See Mental Capacity Act 2005, ss 35 to 44; MCA Code of Practice (2007) pp 178 to 179 and 181 to 183.

25 See para 4.7 above.

26 Court of Protection Rules 2007 (SI 2007 No 1744), r 156.

support scheme created by regulations made under the enabling power recommended in our Mental Capacity and Deprivation of Liberty report, and potentially eligible to act as a supporter on that basis. However, stakeholders have raised concerns about the risk of undue influence presented by individuals associated with the supported person acting in the wills context: family members and friends are likely beneficiaries under the person's will so would be placed in a conflict of interest if acting as a supporter. As suggested by one stakeholder, supporters must be able to act independently and also be seen to act independently; it is not clear that family members or friends could do so.

4.45 We tentatively favour any supporter role in a scheme for supported wills being filled by a professional, despite the disadvantage of the cost to the testator. We take this view because of the increased risk of undue influence and conflicts of interest if the role were to be undertaken by family and friends. We also note that it may be necessary for a supporter to carry indemnity insurance, which would suggest that the role is one better suited to professionals.

4.46 Whether professionals or non-professionals could act as supporters, any scheme for supported will-making could also impose certain criteria on supporters. Similar to the criteria for IMCAs and Care Act advocates, supporters for will making could be required to have experience, training, integrity and a good character, to be independent, and to hold certain values.

APPOINTING A SUPPORTER

4.47 In our Mental Capacity and Deprivation of Liberty project, we were provisionally of the view that a person should be able to appoint his or her own supporter, so long as the person retains the capacity to understand the nature of the support offered and to enter into a support agreement.[27] As we set out above, our final recommendation in that project was that the person to be supported must be aged 16 or over and have the capacity to appoint a person to assist with the particular decision.[28]

4.48 A similar approach could be considered here. A person could appoint his or her own supporter, and if the person did not do so, a supporter could be appointed on the person's behalf. However, safeguards would be needed if a person were able to appoint his or her own supporter, particularly if non-professional supporters were used, in order to prevent undue influence.

GUIDANCE ON SUPPORT

4.49 Under a scheme for supported will-making, guidance would be necessary on how supporters should provide support to testators.

4.50 As we discussed, Chapter 3 of the MCA Code of Practice provides guidance on supported decision-making under the MCA, highlighting four important aspects of

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27 Mental Capacity and Deprivation of Liberty (2015) Law Commission Consultation Paper No 222. para 12.20.

28 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, para 14.55.

support.[29] Similar guidelines could be devised in terms of providing support to a person in order for him or her to have capacity to make a will.

4.51 The overarching objective of the supported decision-making process, pursuant to the UN Disability Convention, is to provide people with the support necessary in order to exercise their legal capacity. This overarching purpose would inform the functions of the supporter.[30] In the wills context, an overarching aim of providing the necessary support could similarly inform the specific functions of the supporter in supporting the person to exercise his or her testamentary capacity.

SAFEGUARDS

4.52 If a scheme for supported will-making were created, it would require sufficient safeguards to prevent abuse. The need for safeguards, particularly to prevent undue influence, was highlighted by the stakeholders to whom we have spoken so far.

4.53 One option to prevent abuse by supporters would be to impose a rule that a supporter would not be able to benefit under the person's will. If this approach is taken, the categories of people who should not be able to benefit where a person has been formally supported to make a will should be carefully demarcated. Our views is that those categories should align with the provisional proposals that we make in respect of reform to the existing rule that prevents the witnesses to a will, and their spouses or civil partners, from taking any gifts to them in the will. We provisionally propose that the witnesses' cohabitants should also be prevented from benefitting and ask consultees whether they think that gifts to other family members of the witness (such as parents or siblings) should also be void.[31] We would therefore suggest that it would be appropriate that neither the supporter, not his or her spouse, civil partner or cohabitant (or, depending on the responses that we receive, other family members) should be able to benefit from a will for which support has been formally provided.

4.54 In the Mental Capacity and Deprivation of Liberty consultation paper we also noted that some jurisdictions impose a fiduciary relationship between the supporter and the person, noting that we were open to thoughts on this approach.[32] A fiduciary has been described as:

> someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.[33]

4.55 We note that the MCA Code of Practice explains that both attorneys and deputies are in a fiduciary relationship with donors and protected persons and that this means that the attorney or deputy must not take advantage of his or her position; put him or herself in a position where personal interests would conflict with his or her duties; nor use his

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29 See para 4.21 above.

30 Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, para 14.45.

31 See Chapter 5.

32 Mental Capacity and Deprivation of Liberty (2015) Law Commission Consultation Paper No 222, para 12.18.

33 *Bristol and West Building Society v Mothew* [1998] Ch 1, p 18.

or her position for personal benefit.[34] We question whether or not it would be appropriate for the relationship between supporter and testator to be defined as a fiduciary relationship as a safeguard against undue influence, and ask for consultees' views.

PROVIDING FOR THE SCHEME IN LAW

4.56 Another consideration is whether a supported will-making scheme would be laid out in legislation, regulation or informal guidance. Like the IMCA service, a supported will-making scheme could be enabled in primary legislation, with further detail provided in regulations.

4.57 It would be possible for supported will-making to be informally provided for in guidance. Although informal guidance may be helpful, it would not create a scheme. This approach would be unlikely to meet the requirements of the UN Disability Convention or result in a change from the current situations in which support is provided in some cases but not consistently and uniformly. For those reasons, we do not favour this approach.

4.58 Alternatively, an enabling power could be created. An enabling power in legislation, with detail on the workings of the scheme outlined in regulation or guidance, might be attractive option because of the flexibility it offers. In order to formulate a workable scheme, additional consultation by Government might be required. That process would allow facilitate the further involvement of the appropriate Government departments and stakeholders.

4.59 It may be possible for a person providing support under any scheme introduced by virtue of the enabling power recommended in our Report on Mental Capacity and Deprivation of Liberty also to provide support in a wills context. We take the view that the enabling power in the draft Bill produced with that report is wide enough to permit that approach given that the power leaves the detail of who might act as a supporter (and other details of the scheme) to be set out in regulations.[35] Consideration would need to be given to ensure that a supporter used in a care and treatment context, under any such formal scheme, could appropriately fulfil a supporter role in the wills context. It should, however, also be possible for regulations to make different provision as to the expertise or experience of a supporter, or to impose different restrictions, depending on the decision for which support is being provided.[36]

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34 MCA Code of Practice, pp 132 and 154.

35 See Clause 12 of the draft Mental Capacity (Amendment) Bill at p 200 and 201 of Mental Capacity and Deprivation of Liberty (2017) Law Com No 372.

36 For example, we noted that some jurisdictions restrict the kind of decisions that can be made in a supporter scheme, for example, financial decisions or certain welfare decisions: see Mental Capacity and Deprivation of Liberty (2015) Law Commission Consultation Paper No 222, para 12.22. Clause 12 of the draft Bill leaves open the possibility of specifying decisions to which a supported decision-making scheme would not apply. Consideration would need to be given to the expertise of the supporter and relationship with the person supported.

Consultation Question 14.

Do consultees think that a supported will-making scheme is practical or desirable?

If so, we ask for consultees' views on:

(1) who should be able to act as supporters in a scheme of supported will-making?

(2) should any such category include non-professionals as well as professionals?

(3) should supporters be required to meet certain criteria in order to act as a supporter and, if so, what those criteria should be?

(4) how should supporters be appointed?

(5) what should be the overarching objective(s) of the supporter role?

(6) how should guidance to supporters be provided?

(7) what safeguards are necessary in a scheme of supported will-making? In particular:

  (a) should a supporter be prevented from benefitting under a will?

  (b) should a fiduciary relationship be created between a supporter and the person he or she is supporting?

Chapter 5: Formalities

INTRODUCTION

5.1 For a will to be valid, it must comply with certain formality requirements. Formality requirements are commonly found in law. They have been defined as requirements "that matters of substance must be put into a particular form (in order to have a specified legal effect)".[1]

5.2 The requirements as to the formal validity of a will – the particular form that a will must take to have legal effect - are contained in section 9 of the Wills Act 1837. The formal requirements as to the execution of a will are therefore long-established[2] and many lay people also have some awareness of the need, for example, for a testator's signature to be witnessed.

5.3 Given the age of the formality requirements and the extent to which aspects of those requirements are thought natural or obvious parts of will-making, it might be difficult to imagine that the requirements could be anything other than they are. However, a look at the law in other jurisdictions shows us that the requirements governing the formal validity of wills vary widely. In civil law jurisdictions, such as France and Germany, "notarial wills" are common.[3] These wills derive their validity from being prepared by a notary, who is a public officer. It is also compulsory to register notarial wills in several jurisdictions.[4] There is no equivalent tradition of reliance on a notary in England and Wales, where a notary is an independent professional rather than a public officer.[5] Nor is there any requirement to register wills in this jurisdiction. In Scotland, the law enables a will to be valid simply where it has been written and signed at the end of the document by the testator.[6]

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1 P Critchley, 'Taking Formalities Seriously' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, 1988) p 508.

2 A new s 9 was substituted by Administration of Justice Act 1982, s 17 but the new section is not fundamentally different in its requirements.

3 See K G C Reid, MJ De Waal and R Zimmermann, "Testamentary Formalities in Historical and Comparative Perspective" in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 448.

4 See K G C Reid, MJ De Waal and R Zimmermann, "Testamentary Formalities in Historical and Comparative Perspective" in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011).

5 In 1980 the Law Reform Committee noted that that "A…compelling reason for not introducing a notarial system into our law is that there are a number of differences between continental notaries and solicitors in this country and a notarial system would not be workable here without conferring upon solicitors powers which they do not at present have": Law Reform Committee, Twenty Second Report (The Making and Revocation of Wills) (1980) Cmnd 7902, p 10.

6 Requirements of Writing (Scotland) Act 1995, ss 1(2)(c), 2(1).

5.4 As we will see in the following chapter, the possibility of electronically executed wills may have implications for the legal requirements of formal validity.[7] We discuss electronic wills in Chapter 6 and note that they will need to be governed by tailored statutory provisions. Consequently, the formality requirements that we consider in this chapter relate to physical, hard copy wills.

5.5 We have already discussed, in the introductory chapter, the essential features of a will,[8] and it is worth considering what this means in relation to formalities. A will is created to have effect in the future, after the testator's death, so there will be a delay, possibly extending to several decades or more, between the will being written and the testator's executors acting upon its provisions. In addition, the testator will necessarily no longer be alive at the time that the will takes effect and will therefore be unable to confirm the authenticity of the document expressed to contain his or her testamentary intentions. By contrast, in many other situations, the legal document by which a person transfers property, grants rights or is subjected to obligations, will take immediate effect. Should a dispute arise as to the authenticity of such a contract, or deed (or whatever it may be) that person will usually be available to confirm that he or she was indeed a party to, or the maker of, the document in question.[9] It is therefore useful to consider the purpose of will formalities.

THE PURPOSE OF FORMALITIES

5.6 Formality requirements are considered to perform four main functions.[10]

(1) An evidentiary function: formalities provide proof that the will was executed by the testator. This evidentiary function is particularly important as the will may have been executed decades before the testator's death and its validity challenged only after his or her death.

(2) A cautionary function: formalities alert the testator to the serious nature of making a will and cause them to think carefully about what they want to achieve with their will. This function might also be understood as one of "consumer protection" or of preventing a party from creating a legally binding document inadvertently.[11]

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7 Which, currently, does not happen in practice: the position under the Wills Act 1837 is unclear—see the following chapter for a discussion of the law on this point.

8 See para 1.7 above.

9 Of course, other situations do exist which are analogous to the situation of the will after the testator's death, for example, the donor of a lasting power of attorney after he or she has lost capacity, or after the death of a person who has nominated a beneficiary for his or her life assurance or pension benefits.

10 L Fuller, "Consideration and Form" (1941) 51:5 *Columbia Law Review* 799 at 803; A Gulliver and C Tilson, "Classification of Gratuitous Transfers" (1941) 51 *Yale Law Journal* 1; and J Langbein, "Substantial compliance with the Wills Act" (1975) 88:3 Harvard Law Review 489. The third article drew on the first two articles (see nn 12 and 15 in Langbein's article) which both date from the 1940s and also discuss documents other than wills. All the articles appeared in US journals; it appears that there has been less interest in wills formalities requirements in English law journals.

11 This aspect of a cautionary function is discussed in the Law Commission's report, Transfer of land - formalities in contracts for sale of land (1987) Law Com No 164, p 6.

(3) A channelling function: formalities mean that a will provides a well-defined means of passing property on death and testators are channelled towards a well-understood, standard method of accomplishing their ends.

(4) A protective function: formalities can assist in shielding the testator from fraud and undue influence when making their will. For example, a signed document is more difficult to forge than an unsigned document and the presence of disinterested witnesses could protect the testator from pressure exerted by a beneficiary.[12]

5.7 Academics who have considered the purpose of formality requirements do not all agree that each of these functions are relevant, although there is general agreement that formalities serve evidentiary and cautionary functions.[13] Further, formality requirements are not invariably seen as an effective means of fulfilling these functions.[14] Nevertheless, we think that these functions are helpful to bear in mind in thinking about any reform of the formality requirements for a will.[15]

5.8 In reviewing formality requirements, we are also aware of the need to balance competing objectives. On the one hand, formalities represent a barrier to people writing wills. A person's wishes may be defeated because he or she has not executed a document in the correct form, since a will that does not comply with formality requirements is invalid.[16] If a person dies without a valid will, that person's estate will then generally pass according to the intestacy rules. These rules provide for a person's estate to pass on to specified relatives, with the result varying depending both on the person's situation when he or she dies (for example, whether he or she is married or has children) and on the estate's value.[17] On the other hand, if formality requirements are not effective, then there is a risk of wills being accepted as valid that do not in fact represent the testator's wishes; for example, because the will has been forged, the testator did not appreciate that a document would be given effect as a will, or because the testator was subjected to undue influence.

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12 Other analyses identify other functions: for example, Critchley identifies that will formalities may be of fiscal benefit to the government by providing the means by which to collect a tax such as stamp duty. See P Critchley, "Privileged wills and the testamentary formalities: a time to die?" [1999] *Cambridge Law Journal* 49 at 51. An older article by Perillo, considering contractual formalities, also identifies additional functions, such as the earmarking of intent to contract, and educational functions, but most of those suggested can be fitted within the broader categories discussed in the text above. See Joseph M Perillo [1974] "The Statute of Frauds in the light of the functions and dysfunctions of form." *Fordham Law Review* 43 at 39. Horton recognises an "anti-externality" function. See D Horton, "Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism" (forthcoming) *Boston College Law Review*, Vol. 58.

13 All three articles cited in n 10 identify these functions. The channelling function is identified by Fuller and by Langbein, the latter of whom also identifies, like Gulliver and Tilson, the protective function.

14 See A Gulliver and C Tilson, "Classification of Gratuitous Transfers" (1941) 51 *Yale Law Journal* 1, p 9 and J Langbein, "Substantial compliance with the Wills Act" (1975) 88:3 *Harvard Law Review 489,* p 496.

15 The functions of formalities were discussed in similar terms, and used for analysis, in the Law Commission's report, Transfer of land - formalities in contracts for sale of land (1987) Law Com No 164, pp 6 and 7.

16 Wills Act 1837, s 9.

17 What happens to a person's estate on death may also be affected in other ways, for example by proprietary estoppel or a claim under the Inheritance (Provision for Family and Dependants) Act 1975.

5.9 It is also important that the formality requirements for a valid will are simple and accessible, whilst acknowledging that some complexity may be necessary to ensure that formalities perform their functions. We want to encourage people to make wills, rather than to make it more difficult for people to do so. A will – particularly a simple will – should continue to be a document that a testator can write and execute for him or herself and be confident that the will is valid. Stakeholders highlighted that one feature they like about the current law is that there is only one form of valid will. We are keen to maintain this feature of the law as it brings simplicity.[18]

THE CURRENT LAW OF FORMALITIES

5.10 The formality requirements that must be complied with for a will to be valid are given in section 9 of the 1837 Act.[19] It is worth quoting the section in full:

> No will shall be valid unless—
>
> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
>
> (b) it appears that the testator intended by his signature to give effect to the will; and
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (d) each witness either—
>
> (i) attests and signs the will; or
>
> (ii) acknowledges his signature,
>
> in the presence of the testator (but not necessarily in the presence of any other witness),
>
> but no form of attestation shall be necessary.

Presumption of due execution

5.11 If it appears on the face of the will that the formalities set out in section 9 of the 1837 Act have been complied with, then this allows the court to presume that the will was validly executed and expresses the testator's intentions.[20] It is often said that "the strongest evidence" is required to rebut the presumption of due execution.[21] However, the presumption applies with greater or lesser force according to the circumstances of

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18 With the exception of any different form for an electronic will that might be introduced—see our provisional proposal for an enabling power, para 5.81.

19 There are exceptions: where the will is a statutory will, a privileged will or where the formal validity of the will is determined by the law of a foreign jurisdiction rather than English law. These exceptions are considered later in this chapter at 5.36.

20 *Sherrington v Sherrington* [2005] EWCA Civ 326, [2005] WTLR 587 at [42] by Peter Gibson LJ; *Channon v Perkins* [2005] EWCA Civ 1808, [2006] WTLR 425 at [6] by Neuberger LJ.

21 *Sherrington v Sherrington* [2005] EWCA Civ 326, [2005] WTLR 587 at [62].

each case.[22] Hence, for example, a strong presumption arises where a will contains a formal attestation clause.[23] An attestation clause in a will records compliance with section 9 of the 1837 Act in the execution of the document; an example would be:

> Dated this… day of … 20…
>
> Signed by the testator in our presence and then by us in his.
>
> [Signature of testator]
>
> [Signature, addresses and descriptions of two witnesses][24]

5.12 The presumption of due execution can be displaced by evidence that the circumstances of the execution of the will in fact differed from what is recorded in the attestation clause and did not comply with section 9 of the 1837 Act.[25] A weaker presumption will apply where the clause is in an unusual or irregular form.[26] A presumption of due execution is still applied where the will is informal and contains no attestation clause, as long as there is no evidence that the will has not been duly executed.[27]

The formalities required by section 9

5.13 Looking more closely at section 9 of the 1837 Act we see that it covers several distinct aspects of making a will: the form of the will (that is, the will must be in writing, signed by the testator and by at least two witnesses), the circumstances of the testator's signature and the circumstances of the witnesses' signatures.

In writing

5.14 A will must be in writing.[28] The Interpretation Act 1978 provides a broad definition of "writing". Therefore, a will may be hand-written, typed, printed, lithographed or take any other mode "of representing or reproducing words in a visible form".[29]

5.15 A will may be written in any language[30] and there are no restrictions as to the material upon which a will is written.[31] A will may be written in pen or pencil. However, where both are used there is a presumption that that pencil writing is deliberative – that it

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22 *Vinnicombe v Butler* (1864) 3 Sw & Tr 580 at 582; *Harris v Knight* (1890) 15 PD 170 at 183–184.

23 *Lloyd v Roberts* (1858) 12 Moo P 158; *Smith v Smith* (1866) 1 P & D 143; *Wright v Rogers* (1869) 38 LJP 67; *In the Estate of Musgrove* [1927] P 264; *Re Webb* [1964] 1 WLR. 509.

24 L King, K Biggs and P Gausden, *A Practitioner's Guide to Wills* (3rd ed 2010) p 33. Different forms of attestation clause are necessary where the will is executed in different circumstances, for example, where another person signs on the testator's behalf or where the testator is blind.

25 *Ahluwalia v Singh* [2011] EWHC 2907, [2012] WTLR 1.

26 *Re Rawlinson* [2010] EWHC 1269 (Ch), [2010] WTLR 1443; *Lim v Thompson* [2009] EWHC 3341 (Ch), [2010] WTLR 661.

27 *Salmon v Williams-Reid* [2010] EWHC 1315 (Ch).

28 Wills Act 1837, s 9(a).

29 Interpretation Act 1978, sch 1.

30 *Whiting v Turner* (1903) 89 LT 71 (French); *Kell v Charmer* (1856) 23 Beav 195 (private code).

31 *Hodson v Barnes* (1926) 43 TLR 71 (egg shells).

relates to the testator's tentative considerations rather than his or her settled decisions – and that it does not form part of the will unless the court decides that the pencil writing represents the testator's final intentions.[32]

The signature of the testator

5.16 Although the requirement that the testator sign the will is a strict one, the courts have accepted as a signature marks short of a manuscript name. The requirement of a signature has been met, for example, by the testator's initials,[33] a simple mark made by the testator[34] (which does not have to be a cross)[35] or even the testator's thumb print.[36] In the chapter on electronic wills we discuss the question of the validity of a signature made electronically.[37] There are limits to what will be accepted, however: in *Lim v Thompson*, Judge Purle QC, sitting as a High Court Judge, held that "a photocopy of a previous version of the will with a photocopied signature of the testator is not a document which is signed by the testator at all".[38]

5.17 Section 9(b) of the 1837 Act requires that the testator intended by his signature to give effect to the will.[39] Whether the testator has that intention is a matter of fact, and evidence from outside the will itself (extrinsic evidence) can be admitted in court proceedings to determine the question.[40]

5.18 There is no requirement as to the position of the testator's signature, albeit that, in practice the signature will usually appear at the end of the will.[41] The testator should sign the will after the clauses recording the dispositions he or she wishes to make have been stated in the document. However, because the essential requirement under section 9 is that the testator's signature must be intended to give effect to the will, a will may be valid where the testator recorded the testamentary dispositions after signing it if both operations were part of the same continuing process.[42]

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32 *In the Goods of Adams* (1872) LR 2 P & D 367.

33 *Re Blewitt* (1880) 5 PD 116; *Reynolds v Reynolds* [2005] EWHC 6 (Ch).

34 *Baker v Dening* (1838) 8 A & E 94; *Re Field* (1843) 3 Curt 752.

35 *Re Kieran* [1933] Ir R 222.

36 *Re Finn* (1935) 154 LT 242.

37 Chapter 6.

38 *Lim v Thompson* [2009] EWHC 3341 (Ch), [2010] WTLR. 661 at [25].

39 This requirement was introduced into the Wills Act 1837 by s 17 of the Administration of Justice Act 1982, which substituted a new version of s 9. This requirement was not contained in the original s 9 and it replaced the previous requirement that the testator's signature had to be at the foot, that is, the end, of the document.

40 *In the Goods of Walker* (1862) 2 Sw & Tr 354; *In the Goods of Casmore* (1869) LR 1 P & D 653; *In the Goods of Mann* [1942] P 146; *In the Estate of Bean* [1944] P 83; *Re Beadle* [1974] 1 WLR 417.

41 While the testator does not need to sign every page of a will the pages must be connected with the signature. This does not mean that the pages need to physically attached together; it appears that it is enough that the pages comprising the will are in the same room and under the control of the testator when signed, see *In the Goods of Tiernan* [1942] IR 572; *Sterling v Bruce* [1973] NI 255.

42 *Re White* [1991] Ch 1; *Wood v Smith* [1993] Ch 90; *Weatherhill v Pearce* [1995] 1 WLR 592. Before the introduction of the new Wills Act 1837, s 9 by Administration of Justice Act 1982, s 17 it was a strict requirement that the testator signed the will after the testamentary dispositions had been recorded. This had

Signature made or acknowledged in the presence of witnesses

5.19 Under section 9(c) the testator's signature must be "…made or acknowledged in the presence of two or more witnesses present at the same time." If the testator is signing in the presence of witnesses, it is only necessary that the witnesses are aware that the testator is writing. They do not need to see what the testator is writing or to know what he is writing.[43]

5.20 Where the will has been signed without the witnesses being present, it is sufficient for the testator to acknowledge to the witnesses that the signature on the will is his or her own. The will must have been signed before the testator acknowledges his or her signature.[44] The testator's acknowledgment does not need to include any specific form of words or action.[45] For example, in *Kayll v Rawlinson*, the testator was silent while the first witness (in whose presence the testator had signed) explained to the second witness that both the testator and the first witness had signed and asked the second witness to sign. This was held to constitute acknowledgement by the testator of his earlier signature of the will.[46] The witnesses do not need to see the signature, they must, however, have had the opportunity to see it.[47]

5.21 A requirement for there to be two witnesses to a will is not unusual, though not universal in countries that require a will to be witnessed. For example, while Austria and Brazil require three witnesses, in Scotland only one is required.[48] Stakeholders have expressed mixed views on the value of witnesses. Some see them as providing an important evidentiary safeguard, while others query whether any protection offered by witnesses is eclipsed by the protection offered by using a professional to write a will. We see value in the evidentiary function of witnesses and consider there to be an advantage in having two witnesses given that the validity of a will may be questioned many years after it is executed. Although it has been suggested that three witnesses would offer greater protection,[49] we take the view that any such additional benefit would be small and outweighed by the fact that it would make a will more difficult to make.

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been made clear by Wills Act Amendment Act 1852, s 1 which clarified Wills Act 1837, s 9 with regard to when a signature to a will should be deemed valid.

43 *Smith v Smith (1866) 1 P & D 143.*

44 *Pearson v Pearson* (1871) 2 P & D 451; *Fischer v Popham* (1875) 3 P & D 246.

45 *Hudson v Parker* (1844) 1 Rob Ecc 14. For example, it has been held sufficient for the purposes of acknowledgement that two persons were asked to sign as witnesses (*Daintree & Butcher v Fasculo* (1888) 13 PD 102) and a gesture as small as a nod of the head may also suffice to indicate that person is acknowledging his or her signature (*Goodall v Hadler, The Times* 20 October 1960).

46 [2010] EWHC 1269 (Ch), [2010] WTLR 1443.

47 *Re Gunstan* (1882) 7 PD 102. The opportunity to see the signature must have been a physical opportunity and so the requirements of s 9(c) are not met where the testator's signature is covered by a fold in the page (*Hudson v Parker* (1844) 1 Rob Ecc 14; *In the Goods of Pearson* (1864) 33 LJP 177; *Re Groffman* [1969] 1 WLR 733), or by blotting paper (*Re Gunstan* (1882) 7 PD 102). It is not enough that the testator would have uncovered his signature if asked to (*Re Groffman* [1969] 1 WLR 733).

48 K G C Reid, MJ De Waal, and R Zimmermann, "Testamentary Formalities in Historical and Comparative Perspective" in R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 446.

49 A Borkowski, "Reforming section 9 of the Wills Act" [2000] *The Conveyancer and Property Lawyer* 31 at p 39.

5.22 It is worth emphasising that both witnesses have to be present at the same time when a testator signs or acknowledges a will. In this context 'presence' denotes actual visual presence and the courts have developed a line-of-sight test.[50] A will has been held to be invalid where the testator acknowledged his or her signature in the presence of each of the witnesses individually.[51] We have heard of instances where the need for both witnesses to be present can be difficult; for example, where a practitioner attends an elderly client's home for a will to be executed. However, we are of the view that any inconvenience in having to find two witnesses to attend at the same time is outweighed by the protective and evidentiary benefits of having the witnesses present at the same time: two witnesses at one time may be more likely to provide protection for the testator against undue influence and fraud and, should the will be challenged, each can provide corroboration (or challenge) to the other's account of the execution of the will.

Signing on the testator's behalf

5.23 Under section 9(a) of the 1837 Act, a will can be signed by a third party on the testator's behalf. There are no restrictions on who that third party may be. An attesting witness,[52] the person who wrote the will,[53] or the sole beneficiary of the will[54] may sign validly on behalf of the testator.

5.24 In the leading case on the nature of the testator's direction to sign on his or her behalf, Lord Justice Lewison held that "it is not enough for a third party to sign the will in the presence of the testator" and that "a 'direction' to sign connotes a more active role on the part of the testator than a mere 'acknowledgement' of his or her signature under section 9(c)". Therefore, the testator can only issue a direction for the purposes of section 9(b) of the 1837 Act by "positive and discernible communication (which may be verbal or non-verbal)… that he wishes the will to be signed on his behalf by the third party".[55]

The signature by witnesses

5.25 Section 9(d) of the 1837 Act requires that:

> …each witness either—
>
> (i) attests and signs the will; or
>
> (ii) acknowledges his signature,
>
> in the presence of the testator (but not necessarily in the presence of any other witness)

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50 *In the Goods of Allen* (1839) 2 Curt 331; see *Shires v Glascock* (1688) 91 ER 584; *Casson v Dade* (1781) 28 ER 1010; *Tribe v Tribe* (1849) 163 ER 1210; *Norton v Bazett* (1856) 164 ER 569.

51 *Re Groffman* [1969] 1 WLR 733.

52 *Re Bailey* (1838) 1 Curt 914; *Smith v Harris* (1845) 1 Rob 262; *Doe d Caldwell b Lee* (1852) 19 LTOS 49.

53 *Re Elcock* (1869) 20 LT 757.

54 *Barrett v Bem* [2011] EWHC 1247 (Ch), [2012] Ch 573, Mr Justice Vos, overturned in the Court of Appeal on a different point.

55 *Barrett v Bem* [2012] EWCA Civ 52; [2012] Ch. 573 at [19], [22] and [24].

5.26 It appears that minors can be witnesses to wills.[56] A blind person cannot witness a will since witnessing is an inherently visual act.[57] A witness must be mentally as well as physically present and therefore cannot be asleep, intoxicated or of unsound mind.[58]

5.27 Although it may seem surprising that a minor can be a witness, we are not aware of any difficulties that have arisen in practice. We do not see any reason why a child should not be able to be a witness as long as he or she (like any witness) understands what he or she is doing when witnessing a testator's signature so as to be able to give evidence of their witnessing, if this is later required.

5.28 Sections 16 and 17 of the 1837 Act expressly permit, respectively, both a creditor of the testator (and his or her spouse or civil partner of the creditor) and an executor of the testator's will to be a competent witness to the execution of the will.

5.29 In contrast, section 15 of the 1837 Act invalidates gifts[59] made in the will to witnesses and their spouses or civil partners.[60] The will remains otherwise valid.

5.30 Witnesses have to sign or acknowledge their signature in the presence of the testator but do not have to do so in the presence of the other witness. Witnesses do not need to have any specific knowledge of what the document is. They do not have to know that the document they are signing is a will.[61] If the testator acknowledges his signature rather than signing in the presence of the witnesses, the witnesses do not need to know that acknowledgement is a formal requirement of valid execution.[62]

Attestation

5.31 Section 9(d)(i) of the 1837 Act provides that a witness should "attest" as well as sign the will. We have cited above a typical attestation clause,[63] but no form of attestation is necessary;[64] attestation may be formal or informal.[65] It is unclear what the need for attestation adds to the formalities for a will. According to *Williams on Wills*, attestation

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56 See *Wilson v Beddard* (1841) 59 ER 1041 (14 year old) and A Borkowski, "Reforming section 9 of the Wills Act", [2000] *Conveyancer and Property Lawyer* 31.

57 *In the Estate of Gibson* [1949] P 434.

58 *Hudson v Parker* (1844) 1 Rob Ecc 14 at [24]. Section 14 of the 1837 Act provides that a will shall not be invalid where a witness, at the time of execution or afterwards, is incompetent to be admitted to be a witness to prove the execution of the will. However, this relates to competency to act as a witness, rather than mental capacity and "incompetent" in the context of the section "…refers to those persons who in 1837 were incompetent to give evidence, for example, the parties, their spouses, persons of no religious belief, etc." See J R Martyn and N Cadick, *Williams, Mortimer and Sunnucks Executors, Administrators and Probate* (19th ed of *Williams on Executors*/7th ed of *Mortimer on Probate*, 2008).

59 "Gift" in this section means any benefit under the will (the section says "…any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except any charges and directions for the payment of any debt or debts)…").

60 Read in conjunction with the Civil Partnership Act 2004, sch 4, para 3.

61 *Re Benjamin's Estate* (1934) 150 LT 417.

62 *Kayll v Rawlinson* [2010] EWHC 1269 (Ch); [2010] WTLR 1443.

63 See para 5.11 above.

64 Wills Act 1837, s 9(d).

65 But an attestation clause is usually included, at least in a professionally drawn will.

simply means that the testator should sign in the presence of two witnesses who must then attest and sign (or acknowledge) their signatures in the testator's presence.[66] If this is the case, then attestation does not appear to add to the requirement in in section 9(c). The witnesses must intend to attest the will, but that intention may be evidenced by a signature alone.[67] Witnesses may sign anywhere on the will as long as their intention to attest the will is clear.[68] A witness who has attested a will should be able to say that he or she knows that the testator signed the document.[69]

5.32 We have explained above that witnesses may acknowledge their signature in the presence of the testator, instead of signing in the presence of the testator. Where this happens, there is no statutory requirement of attestation. In this respect, the drafting of section 9 has led to some confusion because the requirement that a witness attest as well as sign the will in the presence of the testator is absent when the witness acknowledges his or her signature. Since attestation appears to be used as a requirement distinct from signing, it is difficult to understand what attest is supposed to mean in this context. We address this difficulty further below.[70]

No requirement to date a will

5.33 The 1837 Act does not require a will to be dated. Therefore the lack of a date or the inclusion of the wrong date cannot invalidate a will.[71]

5.34 It is, however, already standard professional practice for a professionally drafted will to be dated and the inclusion of a date on a will is helpful in several ways. For example, it is easier to determine the testator's capacity when the date of execution is known; descriptions of persons and property are generally interpreted as they would be understood at the date of execution; and where a testator has executed more than one will it is easier to determine which is the most recent if the wills are dated.[72]

5.35 Dating a will would be a relatively small and simple additional requirement to introduce. However, we consider it an undesirable formality requirement. The sanction of invalidity, should the will not be dated, is disproportionate to what would be a relatively minor deficiency in form. Introducing a further formality requirement risks creating another avenue by which a will could be invalid, even where it is clear that the testator intended to execute it. And, given the fact that most wills are already likely to be dated, we do not believe that imposing a sanction upon testators who fail to date their wills would foster

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66 R F D Barlow, R A Wallington, A L Meadway & J A D Macdonald, *Williams on Wills* (10th ed 2014), vol 1, 12.1.

67 *Hudson v Parker* (1844) 1 Rob Ecc 14. The witness must intend to attest the whole will in order for it to be duly executed, see *Re Cunningham's Goods* (1860) 4 Sw & Tr 194. 1.1.

68 *Re Streatley's Goods* [1891] P 172.

69 *Brown v Skirrow* [1902] P 3.

70 See para 5.62 below.

71 *Corbett v Newey* [1998] Ch 57 at 64, 67, 70. However, section 5(5) of the Children Act 1989 requires that any appointment of a guardian of a child made by will must be dated.

72 A Borkowski, "Reforming section 9 of the Wills Act" [2000] *The Conveyancer and Property Lawyer* 31. A document appointing a guardian must be dated. See para 14.30.

a new and beneficial practice. For those reasons, our view is that dating wills should remain a matter of good practice rather than a formal requirement.

Exceptions to the application of section 9 of the Wills Act 1837

5.36 There are a number of situations in which compliance with section 9 is not required in order for there to be a valid will. In Chapter 3, we discuss statutory wills; that is, wills which are made on an application to the Court of Protection for a person who lacks the testamentary capacity to make their own will. Here, we briefly outline two other exceptions.

Foreign wills

5.37 A will that is formally valid under the law of another jurisdiction with which the testator or the will has a connection may be recognised under English law. The rules governing recognition of foreign wills are contained in the Wills Act 1963.

5.38 The 1963 Act contains a general rule which allows a will to be formally valid if it conforms to the law of the jurisdiction:

(1) in which it was executed;

(2) in which the testator was domiciled or habitually resident (whether at the time of the execution of the will or at the time of the testator's death); or

(3) of which the testator was a national (whether at the time of the execution or at the time of their death);[73]

5.39 There are further rules which provide additional bases for a will to be formally valid in more specific situations.[74]

5.40 Consequently, for some wills there will be more than one possible avenue to formal validity. For example, where a French citizen executes a will in Scotland and subsequently dies domiciled in England, that will is validly executed if its execution is valid under any of French, Scottish or English law.[75]

Privileged wills

5.41 Wills made by privileged testators are exempt from the formal requirements in section 9 of the 1837 Act; such testators can make wills without any formalities at all.

5.42 There are three classes of privileged testator:

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73 Wills Act 1963, s 1.

74 For example, a will executed on board vessels or aircrafts in foreign jurisdictions (see s 2(1)(a)) or a will concerning immovable property in foreign jurisdictions (see s 2(1)(b)).

75 There is also provision in English law, under Administration of Justice Act 1982, ss 27 and 28 for an international will made under the annex to the Washington Convention on International Wills (reproduced in the 1982 Act, sch 2) to be valid. If made in a particular form set out in the Annex such a will would be valid irrespective of the place it is made, of the location of the assets, and of the nationality, domicile or residence of the testator. These provisions are not, however, yet in force.

(1) soldiers in actual military service;

(2) any mariner or seaman being at sea; and

(3) members of the naval or marine forces in actual military service.[76]

5.43 Actual military service has been construed broadly to include:

> any soldier, sailor, or airman… if he is actually serving with the Armed Forces in connexion with military operations which are or have been taking place or are believed to be imminent.[77]

5.44 In contrast to the general position that minors do not have the capacity to make a will,[78] those minors who are members of the privileged groups are able to make valid wills.[79]

5.45 Privileged wills may be written or oral.[80] They do not need to be signed or witnessed and remain valid even when the testator has ceased to be a member of one of the three privileged groups.[81]

REFORM

5.46 We have noted above that the need to comply with formalities can be a barrier to making a will.[82] In the introduction to this Consultation Paper we explained that there are now a number of ways in which property passes on a person's death other than through a will; such as where property is co-owned by people (particularly spouses, civil partners and cohabitees) as "joint tenants" and nominations for the receipt of death benefits and a dependant's pension under a pension scheme.[83] The formalities imposed by the 1837 Act, discussed above, do not generally apply to these means of passing property on death.[84] Therefore, to help inform the final recommendations we shall make on formalities in our Report we wish to ask consultees more general questions on whether they think that the current level of formalities for the making of wills is dissuading those

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76 Wills Act 1837, s 11 and Wills (Soldiers and Sailors) Act 1918, s 2. "Actual military service" is a broader category than would be encompassed, in the case of mariners or seamen, by the term "being at sea" hence the reason for the extension of the categories of privileged testator, by 1918 Act, s 2 beyond the first two categories which are set out in 1837 Act, s 11.

77 *Re Wingham* [1948] 2 All ER 908.

78 Wills Act 1837, s 7.

79 Wills (Soldiers and Sailors) Act 1918, ss 1 and 3 confirm that Wills Act 1837, s 11 allows minors who fall within the privileged groups to make valid wills. However, there is a caveat to this in that it appears that the privileged, minor testator (who is unmarried) cannot dispose by will of a fee simple interest in land. See J R Martyn, A Learmonth, J E Gordon, C Ford and T Fletcher, *Theobald on Wills* (18th ed 2016) para 4-030.

80 *Morrell v Morrell* (1827) 1 Hag Ecc 51.

81 *Re Coleman* [1920] 2 IR 332; *Re Booth* [1926] P 118; *In the Estate of Snow* (1963) 107 SJ 216.

82 See para 5.8 above.

83 A donatio mortis causa is another way that property may be passed on death, and we discuss this in Chapter 13.

84 A Braun, "Will-substitutes in England and Wales" in A Braun and A Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (2016) pp 63 to 65.

who would otherwise wish to make wills from doing so and what other barriers exist to people making wills.

Consultation Question 15.

We invite consultees' views on whether the current formality rules deter people from making wills.

Consultation Question 16.

We invite consultees' views on what they see as being the main barriers to people making wills.

The need for a will to be in writing

5.47 It would be possible to provide that a valid will could be made orally. It is already the case that an oral will can be valid when it is a privileged will. We do not consider, however, that it would be desirable to allow oral wills otherwise than in the context of privileged wills. In a 1980 Report, the Law Reform Committee noted that those who provided evidence overwhelmingly took the view that oral wills "…would create uncertainty and give rise to litigation because of the difficulties of proving and interpreting oral statements."[85] We agree with that conclusion. Our provisional proposals for reform are therefore confined to considering the formality requirements that should apply for a valid will to be executed in writing.

5.48 If an oral will were only to be valid if recorded, that is, if an "audio" will were to be valid, this would be go some way towards mitigating the concerns about the function of formalities expressed above. A recording of an oral will would provide evidence, could offer protection if witnesses were required and the act of recording may allow testators more opportunity to use a particular form of words (the channelling function) and cause them to think more deeply about what they are actually doing (the cautionary function).

5.49 We take the view, however, that reform should not seek to enable the validity of wills made in an oral form, whether recorded or not. We do not seek to change the current position regarding the validity of a will made orally by a privileged testator, nor do we seek to preclude any discussion of the reform of that privilege.

5.50 In Chapter 6 we consider whether video wills should be permitted as a form of electronic will. Whilst there is some similarity between audio wills and video wills, we take the view that audio wills provide less protection against fraud. A video will has the advantage of capturing two recordings (visual and audio) while an audio recording captures only one.

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85 Twenty Second Report of the Law Reform Committee on The Making and Revocation of Wills (1980) Cmnd 7902, pp 8 and 9.

Signature of a will on behalf of the testator – a new restriction?

5.51 As we have noted, it is possible for a testator validly to execute the will by directing that it be signed by another person in his presence and at his direction. There is no restriction on who that other person can be and the possibility that the person signing on the testator's behalf could be a beneficiary, or even the sole beneficiary, is a cause for concern. It appears incongruous that, while section 15 of the 1837 Act ensures that a witness to a will cannot benefit from the will, no such limitation is imposed on a person who signs a will on behalf of a testator. In the case of *Barrett v Bem*, Mr Justice Vos found that section 15 of the 1837 Act could not be interpreted to apply to someone signing at the direction of the testator. He took the view that those circumstances would be "suspicious", justifying the court's careful examination of the evidence adduced by the propounder in order to ensure that the will did indeed express the true will of the deceased.[86] However, he thought that there was a need for legislation to remove the possibility of a beneficiary executing a will in his or her own favour.[87]

5.52 In the Court of Appeal Lord Justice Lewison agreed saying:

> I echo the judge's view that it is plainly undesirable that beneficiaries should be permitted to execute a will in their own favour in any capacity; and that Parliament should consider changing the law to ensure that this cannot happen in the future.[88]

5.53 We note that *Barrett* is the only reported case in which the issue has arisen of a person signing a will on behalf of a testator and benefitting from the will. Notwithstanding, we share the Court of Appeal's concern. We consider that the risk of undue influence or fraud is disproportionately high when weighed against the (not very great) difficulty of finding someone who is not a beneficiary to sign on the testator's behalf.

5.54 We provisionally consider that a person who signs a will in the testator's presence and at his or her direction under section 9(b) of the 1837 Act should be placed in the same position as a witness and that the same consequence should follow. That means that in such a case, although the will would remain valid, a gift to the person who signed, or to his or her spouse or civil partner, would be void.

5.55 We consider below whether gifts made to the cohabitee or to other family members of a witness should also be void. We anticipate that any change that is made in respect of witnesses would be replicated in respect of those who sign on behalf of the testator. That means that, if a gift to the cohabitee (or any other family member) of a witness is made void, then a gift to the cohabitee (or other family member) of a person who signs on behalf of a testator should also be void.

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86 *Barrett v Bem* [2011] EWHC 1247 (Ch); [2011] 3 WLR 1193 at [99]. Mr Justice Vos thought that in these circumstances the rule regarding "suspicious circumstances" should apply with additional force. See the chapter on undue influence and knowledge and approval for further discussion of wills made in "suspicious circumstances".

87 *Barrett v Bem* [2011] EWHC 1247 (Ch); [2011] 3 WLR 1193 at [02].

88 *Barrett v Bem* [2012] EWCA Civ 52; [2012] Ch. 573 at [144].

Consultation Question 17.

We provisionally propose that a person who signs a will on behalf of the testator should not be able to be a beneficiary under the will.

Do consultees agree?

Consultation Question 18.

We provisionally propose that a gift made in a will to the spouse or civil partner of a person who signs a will on behalf of the testator, should be void, but the will should otherwise remain valid.

Do consultees agree?

Consultation Question 19.

We provisionally propose that if the law is changed so that a gift to the cohabitee (or other family member) of a witness is void, then a gift to the cohabitee of a person who signs the will on behalf of the testator should be void.

Do consultees agree?

Reforms relating to witnesses

5.56 As we have indicated in our discussion of the current law, we see no need for reform of the requirement that there be two witnesses present at the same time, or of the ability of a child to be a witness to a will.[89] In this part of the chapter we consider whether two aspects of the law relating to witnessing a will should be reformed:

(1) The rules relating to the invalidity of gifts to witnesses; and

(2) The requirement for witnesses to attest a will.

We then consider whether there are circumstances in which it should be possible for a valid will to be executed without the need for it to be witnessed.

The invalidity of gifts to witnesses

5.57 As we have seen, under section 15 of the 1837 Act a gift made to a witness to a will and to his or her spouse or civil partner is void, although the will otherwise remains

[89] See para 5.22 above.

valid.[90] This rule has been abolished in some Australian states and, in others, does not apply to deprive gifts to the spouses of those who witness wills.[91] We do not favour abolition of the rule given that it provides protection for the testator against the self-interested witness who would otherwise falsely affirm the valid execution of a will under which he or she would receive a benefit. We also share the conclusion of the Law Reform Committee in its 1980 report that to reform the rule as to remove the spouses of witnesses from its scope "would open greatly the possibilities for abuse".[92]

5.58 The concerns of conflict of interest and abuse addressed by the rule are arguably equally present where the witness's cohabitant, parent or sibling stands to inherit under a will. In order to address the problem more effectively, and in the interests of equal treatment, the rule could be extended to encompass those groups.

5.59 In particular, we see some force in the argument that there is little rationale for treating cohabitants of witnesses differently from witnesses' spouses or civil partners. A significant percentage of the adult population now cohabits without marrying.[93] The possibility that a witness's cohabitant might benefit from a will is therefore significantly more likely to occur now than in the nineteenth century. Extending the rule so that a gift to a witness's cohabitant is void has the practical difficulty of defining who constitutes a cohabitant. However, there are existing definitions of a 'cohabitant' in statute which might be adopted. For example, under the Inheritance (Provision for Family and Dependants) Act 1975 a cohabitant is defined as a person who, for the period of two years ending with the death of the deceased, was living in the same household as the deceased and as the deceased's husband, wife or civil partner.[94] However, we favour a more inclusive test than under the 1975 Act, driven by the desire to prevent fraud. We are therefore of the view that 'cohabitant' should be defined as a person who lived in the same household as the deceased and as the deceased's husband, wife or civil partner at the time the will was executed.

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90 Wills Act 1968, s 1 provides that, where a will would be duly executed without the attestation of any persons to whom (or to whose spouse) a gift is made then the attestation of those persons shall be disregarded for the purposes of s 15.This means that if there are more than two witnesses to a will, and at least two witnesses (or their spouses) are not beneficiaries, a witness (or his or her spouse) who is a beneficiary can retain their benefit under the will.

91 South Australia, Australian Capital Territory and Victoria have all abolished the rule. See N Peart "Testamentary Formalities in Australia and New Zealand" in R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 344.

92 Twenty Second Report of the Law Reform Committee on The Making and Revocation of Wills (1980) Cmnd 7902, p 7.

93 The population of those aged 16 and over who are "cohabiting, never married or civil partnered" increased from 6.8% in 2002 to 9.5% in 2015: Office of National Statistics, *Population estimates by marital status and living arrangements, England and Wales: 2002 to 2015*, 13 July 2016. https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2002to2015 (last visited 14 June 2017).

94 Inheritance (Provision for Family and Dependants) Act 1975, ss 1A and 1B.

Consultation Question 20.

We provisionally propose that a gift in a will to the cohabitant of a witness should be void.

Do consultees agree?

Consultation Question 21.

We invite consultees' views on whether gifts in a will to the parent or sibling of a witness, or to other family members of the witness should be void. If so, who should those other family members be?

5.60 In some Australian jurisdictions, rules prohibiting gifts to a witness have been reformed, so that the gift is valid if the persons who would otherwise benefit consent in writing or the court is satisfied that the testator knew and approved the gift and the gift was made voluntarily.[95]

5.61 The potential disadvantage of an exception of this kind is that it may weaken the protection afforded to the testator as the witness who would otherwise be prevented from benefitting by the application of section 15 may be able to convince the court that the testator (whose own evidence is not available) did know and approve of the gift, and make it voluntarily. The discretion afforded by the rule may also increase litigation over wills. Nevertheless, we acknowledge that the rule may result in a testator's wishes being defeated, particularly where a will is prepared without professional advice. The rationale of introducing a discretion so as best to give effect to a testator's wishes is similar to that underpinning our provisional proposal to introduce a dispensing power.[96]

Consultation Question 22.

We invite for consultees' views on whether it should be possible, in defined circumstances, to save a gift to a witness that would otherwise be void.

Is the requirement for witnesses to "attest" necessary?

5.62 We have explained above that the 1837 Act requires the witnesses to attest the will, except where the witness acknowledges his or her signature in the testator's presence.[97] However, the purpose of the requirement is not clear. The Court of Appeal

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95 Succession Act 2006 (NSW), s 10(3); Wills Act 2000 (NT), s 12(2); Wills Act 2008 (Tas), s 4(2); Succession Act 1981 (Qld), s 11(3); cited in N Peart "Testamentary Formalities in Australia and New Zealand" in R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 344.

96 See paras 5.81 to 5.105 below.

97 See para 5.31 above.

has said that "as a matter of statutory construction it is plainly correct that meaning over and above "signs the will" must be given to the words "attests and…".[98] It has also said that the intention of the witness is not immaterial when signing the will and refers to the factual question of a witness's intention to attest.[99]

5.63 The statute already provides that the testator must have made or acknowledged his signature in the presence of the two witnesses and that the witnesses must then sign the will. The witnesses will therefore have observed the testator's signature or his or her acknowledgment of that signature and be signing (or acknowledging their signature) to that effect.[100]

5.64 By comparison, the requirement to attest also appears in the Law of Property (Miscellaneous Provisions) Act 1989, which provides that an instrument is validly executed as a deed if it is signed "…in the presence of a witness who attests the signature".[101] The 1989 Act does not contain a definition of "attest" but in the Law Commission's report that preceded this Act, the Commission had taken the view that "attestation… includes the subscription of the witness' signature following a statement (attestation clause) that the document was signed or executed in his presence".[102] The Commission's view appears to explain why the 1989 Act contains no explicit requirement that the witness should sign the deed to record their attestation of the signature of a party to the deed.[103] By contrast, section 9 of the 1837 Act, as we have seen, does include a requirement for the witness to sign (or to acknowledge his or her signature).

5.65 If "attestation" does not require anything more than the witnesses being present and bearing witness to the testator's signature (or his or her acknowledgement of the signature) then the requirement for the witness to "attest" appears redundant.[104]

5.66 We consider that the current law relating to the requirement of attestation is in need of reform. The requirement should either be removed or, if retained, then it should apply in all cases and be clearly defined. The fact that attestation is not required when a witness acknowledges his or her signature in the presence of the testator (instead of signing in the testator's presence) might indicate a connection between attestation and acknowledgement. However, as we have noted above, the Court of Appeal appeared to link attestation to the witnesses' intention. Therefore, if retained, then we suggest that

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98 *Sherrington v Sherrington* [2005] EWCA Civ 326, [2005] WTLR 587 at [37].

99 Above, at [38] and [39].

100 We note that art 5(3) of the annex to the Washington Convention on International Wills—reproduced in sch 2, Administration of Justice Act 1982 which is not in force—says "The witnesses and the authorized person shall there and then attest the will **by** signing in the presence of the testator" (our emphasis).

101 S 1(3)(a)(i), Law of Property (Miscellaneous Provisions) Act 1989.

102 Deeds and Escrows (1987) Law Com No 163.

103 M Dray "Deeds speak louder than words. Attesting time for deeds?" [2013] 77 *The Conveyancer & Property Lawyer*, Issue 4, 298 at 301.

104 We note the view of Professor Kerridge that that "Once all the other provisions concerned with signatures and timing have been complied with, it does seem hard to see how there is room to find fault with the execution of a will solely on the ground that "attestation" is somehow lacking." See R Kerridge (assisted by A H R Brierley), *Parry and Kerridge: the Law of Succession* (13th ed 2016) (2016) p 54.

in order for a will to be attested the witness must sign the will and intend that his or her signature serve as clear evidence of the authenticity of the testator's signature.[105]

Consultation Question 23.

We provisionally propose that the reference to attestation in section 9(d)(i) of Wills Act 1837 be removed. Do consultees agree?

Consultation Question 24.

If consultees do not agree that the attestation requirement should be removed, we invite their views as to whether attestation should:

(1) be defined to mean that the witness must sign the will and intend that his or her signature serve as clear evidence of the authenticity of the testator's signature; and

(2) apply in all cases, including those where the witness acknowledges his or her signature in the testator's presence.

Holograph wills – wills without witnesses

5.67 A holograph[106] will is a will written and signed in the testator's hand. Holograph wills have no special status in English law because the formal requirements in section 9 of the 1837 Act apply equally to handwritten and other wills regardless of who has drafted them. However, unwitnessed holograph wills are recognised as valid in a number of other jurisdictions.[107]

5.68 In some jurisdictions, therefore, holograph wills form a distinct type of will, which is valid without being witnessed. They are, for example, the most popular type of will executed in Germany, Austria and Switzerland.[108] Generally, holograph wills are recognised only in civil jurisdictions. Australia, as another common law jurisdiction, does not recognise holograph wills as a specific class but they may be recognised under the dispensing powers found in the legislation of all the Australian states.[109] However, the US Uniform

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105 We draw on the dictionary definition of attest – to "provide or serve as clear evidence of": *Oxford Dictionary of English* (3rd ed 2010) p 102.

106 'Holograph' meaning 'wholly written'.

107 See K G C Reid, MJ De Waal, and R Zimmermann, "Testamentary Formalities in Historical and Comparative Perspective" in R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 441 to 443.

108 K G C Reid, MJ De Waal, and R Zimmermann, "Testamentary Formalities in Historical and Comparative Perspective" in R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 439.

109 See para 5.81 and following below.

Probate Code[110] makes provision for holograph wills[111] and they are recognised in approximately half of the states in the US, albeit often because of the influence of civil law concepts in the US.[112]

5.69 The concept of a holograph will has evolved and adapted. Many jurisdictions have relaxed the requirement that the entire document be handwritten and now recognise wills that are "materially" in the testator's hand.[113] This relaxation has opened the door to holograph wills made using store-bought will packs.[114] Although the concept of a holograph will is flexible, almost every jurisdiction that recognises them insists that some part of the body of the will is in the testator's hand.

5.70 The law in Scotland goes further, and allows "subscribed" wills. A will is valid under Scottish law if it is signed by the testator at the end of the document, without any requirement for the will to be written in the testator's own hand.[115] The same approach to formalities is taken, however, to deeds and conveyancing documents that are used to transfer property. To take the same approach to wills in English law would be to apply markedly different (and lower) formal requirements to wills than are generally required to transfer property. Further, although valid, a subscribed will does not enjoy the same "probative" value as a witnessed will; only the latter benefits from a presumption of authenticity.[116]

5.71 Holograph wills do carry some advantages. The absence of the need for witnesses provides a straightforward means for writing a will that is appropriate for simple wills and small estates. Holograph wills are particularly suited for testators who wish to execute a homemade will.[117] Wills may be safely executed without instructions or professional supervision.

5.72 While removing the requirement for witnesses might be viewed as reducing the protective function witnesses provide against fraud, the balance might be considered to be redressed by the requirement that the will is written in the testator's own hand.[118] Whilst that may provide some safeguard against fraud, however, a requirement of handwriting does not appear to protect against undue influence. Further, as we have

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110 A legislative provision promulgated by the US Uniform Law Commission, designed to be enacted in any state in the US, in order to harmonise probate law between US states.

111 For example, *Newman v Brinkgreve; The Estate of Floris Verzijden* [2013] NSWSC 371.

112 R Scalise Jr, "Testamentary Formalities in the United States of America" in in K G C Reid, MJ De Waal, and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 370.

113 See, for example, s 2-502(b) of the Uniform Probate Code (USA).

114 K G C Reid, MJ De Waal and R Zimmermann, "Testamentary Formalities in Historical and Comparative Perspective" in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 443.

115 K G C Reid, "Testamentary Formalities in Scotland" in in K G C Reid, MJ De Waal and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 418.

116 Requirements of Writing (Scotland) Act 1995, s 3.

117 K G C Reid, MJ De Waal, and R Zimmermann, "Testamentary Formalities in Historical and Comparative Perspective" in R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 447

118 W Pintens, "Testamentary Formalities in France and Belgium" in K G C Reid, MJ De Waal, and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 57.

noted above, some jurisdictions have moved away from a strict requirement that a holograph will is handwritten.

5.73 Removing the requirement for witnesses also appears to weaken the channelling and cautionary purposes of the formalities requirements.[119] If making a will is as simple as writing and signing a document, then a testator may not appreciate that he or she has written a legally valid will.

5.74 While we see the advantages in provision for holograph wills, we are not currently persuaded that these outweigh the risks. In particular, we are mindful of the simplicity and certainty offered by maintaining a single set of formality requirements for wills (other than privileged wills). We are concerned that the provision of two separate means of executing a valid will would be a source of confusion and could increase the amount of litigation challenging the validity of wills.

Consultation Question 25.

We provisionally propose that holograph wills are not recognised as a particular class of will in England and Wales.

Do consultees agree?

Privileged wills

5.75 As we have explained, specific provision is made for soldiers and members of the naval or marine forces in actual military service and for mariners and seamen at sea to make a privileged will.[120] Privileged wills are exempt from the formality requirements contained in the 1837 Act. A privileged will, for example, may be oral. A number of rationales may be put forward for privileged wills. First, those on military service face a specific risk of death. Secondly, soldiers are "not in a position to make [their wills] in the form required of persons in ordinary circumstances" as they lack access to the necessary legal services and advice.[121] Finally, but perhaps most importantly, provision for privileged wills is consistent with the principles that underpin the Armed Forces Covenant, which provides that "special consideration is appropriate in some cases, especially for those who have given most such as the injured and the bereaved".[122]

5.76 Commentators have questioned whether some of the assumptions underpinning privileged wills remain valid in modern times.[123] The privilege has also been considered

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119 R Scalise Jr, "Testamentary Formalities in the United States of America" in in K G C Reid, MJ De Waal, and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 370.

120 See para 5.41 above.

121 *In the goods of Hiscock* [1901] P 78 at p 80.

122 https://www.gov.uk/government/publications/2010-to-2015-government-policy-armed-forces-covenant/2010-to-2015-government-policy-armed-forces-covenant.

123 P Critchley, "Privileged wills and the testamentary formalities: a time to die?" [1999] *Cambridge Law Journal* 49 at p 55; R Kerridge, "Testamentary Formalities in England and Wales" in K G C Reid, MJ De Waal, and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 324.

to be both under- and over-inclusive. For example, drone pilots engaging in warfare thousands of miles from the battlefield may be covered by the privilege, whilst civilians engaged in dangerous occupations (such as firefighters) are not.[124] Nor is the privilege available to civilians who find themselves in danger of imminent death; for example, following an accident.[125] There is also a risk that privileged wills undermine the important functions served by formalities. Critchley gives the example of an oral privileged will which consisted of the oral statement by a soldier "If I don't make it, make sure Anne gets all my stuff".[126] The will was ambiguous; it might be interpreted as the soldier leaving Anne (his fiancée) only his personal effects or, instead, as leaving Anne his entire estate. Furthermore it superseded a written will by which the soldier left his whole estate to his mother. Both of those features may indicate that the will was (understandably) not carefully thought out by the soldier; he may have acted differently were his attention drawn to the seriousness of the act.

5.77 Notwithstanding these concerns, there is little evidence that privileged wills create difficulties in practice. We understand from initial discussions with the Ministry of Defence that disputes over wills made by service personnel are rare. We have been told that around 64% of service personnel have made a will – a higher percentage than that for the population as a whole. Service personnel are provided with a simple form to complete which is a formally executed will under the 1837 Act.[127] The form advises personnel to seek professional advice, particularly where the estate might be large or complex.

5.78 We note the criticism that has been directed at privileged wills.[128] We provisionally consider that the strongest justification for the maintenance of the privilege lies in its connection to the Armed Forces Covenant. That being the case, however, (and subject to one exception, which we discuss below) we consider that the privilege should be confined to those covered by the covenant; that is, to those serving in the British armed forces. A change to the scope of the privilege in this way would exclude its operation, for example, to merchant seamen and women, and to those serving other than in the British armed forces.[129]

5.79 We explained above that the operation of the privilege has been considered to be both under- and over-inclusive. If the privilege is confined to armed forces personnel, then we do not consider that over-inclusivity is a concern. There would be practical difficulties

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124 See the discussion by M West, "Modern privileges" (2016) *Trust Quarterly Review* (online) in which he concludes that such drone operators would currently be able to make a privileged will.

125 See P Critchley, "Privileged wills and the testamentary formalities: a time to die?" [1999] *Cambridge Law Journal* 49 at pp 56 and 57.

126 *Re Jones* [1981] Fam 7.

127 MOD Form 106.

128 See R Kerridge (assisted by A H R Brierley), *Parry and Kerridge: the Law of Succession* (13th ed 2016) p 62; P Critchley, "Privileged wills and the testamentary formalities: a time to die?" [1999] *Cambridge Law Journal* 49 citing M Davey, "The Making and Revocation of Wills" [1980] *Conveyancer and Property Lawyer* 64; A G Lang, "Privileged Will – A Dangerous Anachronism?" (1985) 8 *University of Tasmania Law Review* 166; G Cole, "How Active is Actual Military Service?" [1982] *Conveyancer and Property Lawyer* 185; and P Bailey, "A Soldier's Privileged Will in Northern Ireland" (1982) 33 *Northern Ireland Legal Quarterly* 53.

129 On the possible application of the privilege to foreign armed forces, see M West, "Modern privileges" (2016) *Trust Quarterly Review* (online).

in defining active service in such a way as to only capture situations in which personnel are in imminent danger. We consider (particularly given the infrequency with which the privilege appears to be relied upon) that it is preferable for the privilege to be over-inclusive in this minor respect than to risk drawing the privilege too narrowly.

5.80 There is one respect in which we provisionally consider the privilege could usefully be extended beyond armed forces personnel. At present, contractors and civilians who are deployed in combat zones to work alongside armed forces personnel do not benefit from the privilege. We consider that their exclusion creates anomalous results. It means, for example, that where a civilian contractor and soldier are travelling together in a combat zone, the soldier alone benefits from the privilege even though both are equally in danger. We consider that this anomaly should be removed by an expansion of the privilege. Further, we consider that such an expansion can be achieved, without creating uncertainty as to who benefits from the privilege, by extending it to apply to civilians who are subject to service discipline within schedule 15 of the Armed Forces Act 2006.

Consultation Question 26.

We provisionally propose that provision for privileged wills should be retained, but should be confined in its scope to:

(1) those serving in the British armed forces; and

(2) civilians who are subject to service discipline within schedule 15 of the Armed Forces Act 2006.

Do consultees agree?

A dispensing power

5.81 A number of jurisdictions[130] have so-called "dispensing powers" which enable a court to recognise a will as valid even though formalities have not been complied with.[131] In general terms, dispensing powers may take two forms: powers that focus on the extent to which the formality rules have been complied with; and powers that focus on whether the (invalid) will represents the genuine intentions of the testator.

5.82 Substantial compliance doctrines allow strict formality requirements to be dispensed with where a court finds that the rules have been followed to a sufficient extent for it to be satisfied that the purpose of the rules has in fact been fulfilled.[132] Dispensing powers that focus on the testator's intention enable the court to recognise a will as being valid

130 Including all of the Australian states, New Zealand, a number of states and provinces within the USA and Canada, and South Africa.

131 For the sake of convenience, our discussion refers to a dispensing power being used to recognise a will notwithstanding formal defects in its execution. However, it is important to note that a dispensing power would apply equally to documents that revoke, revive or alter a will.

132 J Langbein, "Substantial compliance with the Wills Act" (1975) 88:3 *Harvard Law Review* 489 at p 526.

despite any degree non-compliance with formalities when it is satisfied that doing so will give effect to the testator's intentions.[133]

5.83 This section focuses on intention-based dispensing powers. We prefer that approach for two main reasons. First, the policy aim of the measure is to give greater effect to a testator's intentions. Therefore, we do not believe that a dispensing power should target compliance with formalities when it could reasonably target intention more directly. Secondly, the history of Queensland's substantive compliance doctrine is a cautionary tale. The doctrine was enacted in 1981.[134] However, it was construed narrowly and its effect was limited. The Queensland provision was deemed a "flop" by Professor Langbein in a much cited article and most dispensing powers enacted since have been intention-based.[135] Queensland abandoned substantial compliance in favour of an intention-based provision in 2006.

The usefulness of a dispensing power – some examples

5.84 In order to appreciate the potential effects of a dispensing power, it is helpful to consider the types of case in which a dispensing power is most likely to be used. While a dispensing power could be calibrated in various ways, the following examples capture the difficult cases that dispensing powers are enacted to address.

(1) A dispensing power would address cases in which the validity of a will turns on a minor technical matter. For example, in *Re Groffman*, the judge was "perfectly satisfied that that document was intended by the deceased to be executed as his will and that its contents represent his testamentary intentions". However, the will was invalid because despite being signed by two witnesses, the witnesses acted separately rather than in each other's presence.[136] Similarly, in *Re Colling* a will was invalid because one of the witnesses, a nurse, was found to have left the room before the testator had completed his signature.[137]

(2) A dispensing power has also proved useful where the original copy of a will has been lost. For example, in the New Jersey case of *Ehrlich* the testator was a trusts and estates lawyer who died in 2009.[138] After his death, the only testamentary document that could be found was a copy of a will. That copy was unsigned but a note on the copy indicated that an original had been sent to a friend. The friend pre-deceased Mr Ehrlich and the original was never found. The copied document almost certainly represented Mr Ehrlich's wishes. However, being a copy, it was never signed or witnessed. The copy was not a formally valid will. The court therefore relied on the 'harmless error' provision (an intention-

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133 Wills Act 1936, 12(2) (South Australia).

134 Queensland Succession Act 1981, s 9(a).

135 See J Langbein "Excusing harmless errors in the execution of wills: a report on Australia's tranquil revolution in probate law" [1987] 1 *Columbia Law Review* 1 and Scottish Law Commission, *Report on Succession* (1990) Scot Law Com No 124, p 41. We also note that the substantial compliance doctrine in Queensland has been abandoned in favour of an intention-based provision (Succession Act 1981 (QLD), s 18).

136 [1969] 1 WLR 733.

137 [1972] 1 WLR 1440.

138 *In re Estate of Ehrlich*, 47 A 3d 12.

based dispensing power) in New Jersey law to treat the copy of Mr Ehrlich's will as if it had been executed in compliance with the ordinary formality rules.

(3) The intentions of seriously ill testators have been given fruition by a dispensing power. For example, in *Newman v Brinkgreve* the testator was seriously ill in hospital. He wrote instructions to his solicitor to amend his will on the back of a medical form. When it became clear that time was running short for him to execute his will, the testator asked a nurse to witness the document, saying

> I want you to witness this. My mind is strong and I know what I'm doing. I want to talk to my solicitor but he is not here, and I want to make sure this gets witnessed. I'm waiting for the social worker too. This is really important.

The evidence was sufficient to convince the court that the testator had intended the note written on the back of the medical form to constitute a codicil to his will and it was treated as such.[139]

(4) The power to dispense with formalities has also been applied to suicide notes that contain testamentary dispositions.[140] For example, a note that began "Mum, you are the beneficiary of my estate" was held to be an expression of testamentary intentions and treated as a will.[141]

A dispensing power and rectification

5.85 While there is no dispensing power in the law of England and Wales, there is a statutory power to rectify wills[142] which in some cases may produce results that could otherwise be obtained by a dispensing power. For example, dispensing powers in other jurisdictions might be used to deal with the problem of "switched" wills, where two testators making mirror wills sign in each other's will in error. That problem was recently addressed by the Supreme Court, using the statutory power of rectification, in the case of *Marley v Rawlings.*[143] Hence, there is a degree of overlap between dispensing powers and a power to rectify wills. But this overlap is not complete. As one academic has commented in relation to the power to rectify a will:

> Yet what would certainly not be possible under any circumstances is for the testator's missing signature to be supplied via rectification. On no reading of Lord Neuberger's judgment does *Marley v Rawlings* introduce anything like a full-blown 'judicial dispensing power' or a 'substantial compliance' doctrine.[144]

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139 *Newman v Brinkgreve; The Estate of Floris Verzijden* [2013] NSWSC 371.

140 For example *MacDonald v MacDonald* [2012] NSWSC 1376; *Public Trustee v Alexander - Estate of Alexander* [2008] NSWSC 1272.

141 *MacDonald v MacDonald* [2012] NSWSC 1376.

142 Administration of Justice Act 1982, s 20.

143 *Marley v Rawlings* [2014] UKSC 2; [2015] AC 129.

144 B Häcker "What's in a Will?" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) p 131 at p 153.

Should a dispensing power be introduced?

5.86 The strongest argument in favour of a dispensing power is that it helps ensure that a testator's intentions are given effect. In this respect, a dispensing power reflects the idea that formality requirements are "a means to an end and not an end in themselves."[145] Any risks involved in removing the need for formalities to be complied with are mitigated by the fact that the operation of a dispensing power would be subject to judicial control. Indeed, an assessment of evidence to establish whether a document or record in fact represents the testator's intention may be said to offer more protection than adherence to a particular form. Against these advantages is the potential risk of increased litigation. In 1980 the Law Reform Committee concluded that a dispensing power "could lead to litigation, expense and delay, often in cases where it could least be afforded, for it is the home-made wills which most often go wrong."[146]

5.87 The Committee was writing at a time when statutory dispensing powers were in their infancy and we are now in a position to learn from significant experience in other jurisdictions. The widespread adoption of dispensing powers suggests that those powers can be, and are being, operated in a sufficiently certain, efficient and cost-effective manner. We also note that litigation brought about by the introduction of a dispensing power would be appropriate. The purpose of the power (and consequent litigation) would be to give effect to a testator's intentions and to avoid the unsatisfactory consequence of the testator's intentions being displaced by intestacy or resort to an earlier will that the testator no longer wanted. A dispensing power would have the positive effect of shifting the focus of litigation from upholding formal rules to upholding testamentary intention.

5.88 Given the important role that a dispensing power can play in upholding the intentions of testators, and therefore testamentary freedom, and the fact that the main criticisms are now answerable, we think it right to propose provisionally that a dispensing power be introduced in England and Wales.

5.89 Nevertheless, we note two reasons to be cautious about reform in this area of law. First, dispensing powers have not been widely discussed in the UK and in preliminary consultations, stakeholders have expressed both positive and negative views. We hope that this Consultation Paper will stimulate a productive discussion of this issue. We note that in the United States, the introduction of an intention-based dispensing power by way of a harmless error provision in the Uniform Probate Code has prompted substantial ongoing academic debate.[147]

5.90 Secondly, there is a lack of evidence about the extent to which wills currently fail for non-compliance with formalities in England and Wales. Where it is apparent that a will

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145 Miller "Substantial compliance and the Execution of Wills" 36 ICLQ (1987) 559 at 587, cited in Scottish Law Commission, (1990) Report on Succession Scot Law Com No 124 p 41.

146 Law Reform Committee, Twenty Second Report (The Making and Revocation of Wills) (1980) Cmnd 7902, p 4.

147 See J Baron, "Irresolute Testators, Clear and Convincing Wills Law" (2016) 73 *Washington and Lee Law Review* 3; M Glover, "In Defense of the Harmless Error Rule's Clear and Convincing Evidence Standard: A Response to Professor Baron" (2016) 73 *Washington & Lee Law Review Online 289*; P Wendel, "Setting the Record Straight: The 'Flexible Strict Compliance' Approach to the Wills Act Formalities", (forthcoming) *Oregon Law Review*, Vol. 95, No. 2; and D Horton, "Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism" (forthcoming) *Boston College Law Review*, Vol. 58.

is invalid, it may not be submitted for probate and so there will be no record of the will. However, in a survey conducted for us by the Association of Contentious Trust and Probate Specialists, practitioners told us that "inadvertent failure to observe formalities required for due execution" was one of the main reasons for probate and wills disputes in which they had been involved over the last three years.[148] This survey suggests a dispensing power would be useful. It would provide a clear avenue for such disputes to be resolved. We would, however, like to hear evidence on how common it is for a will to be invalid for non-compliance with formalities.

Consultation Question 27.

We invite consultees to provide us with evidence of how common it is for a will to be invalid for non-compliance with formality requirements.

5.91 One of the main concerns that has been expressed by stakeholders in preliminary consultations is that a dispensing power would be uncertain. There may be some merit in that view. However, it is important to recognise that dispensing powers do not involve a broad, unstructured judicial power. In order to demonstrate this, and to address concern about the uncertainty of dispensing powers, we outline below the various ways in which an intention-based dispensing power could be tailored.

How should a dispensing power be drawn?

5.92 It is necessary to consider how a dispensing power would be drawn were such a power to be adopted in this jurisdiction. We think that is it necessary to consider five aspects of a potential dispensing power.

(1) Who should exercise the power?

(2) What should the scope of the dispensing power be?

(3) What standard of proof should apply?

(4) Should the provision operate retrospectively?

(5) What surrounding facts should a court be permitted to determine conclusively?

Who should exercise the power?

5.93 It appears that every jurisdiction with a dispensing power confers that power upon its courts. However, in Australia the courts have delegated their powers, so that, in straightforward cases, a probate registrar may grant probate to a formally invalid will. That contrasts with the position in South Africa where a court hearing is required for an application to admit to probate a formally invalid will even when those adversely affected

[148] From a survey of members of the Association of Contentious Trust and Probate Specialists conducted in 2015, which received 97 responses.

support the application.[149] We take the view that, were a dispensing power to be introduced in this jurisdiction, it would be for the court to exercise that power. We consider that the court is best placed to assess the facts in an individual case and to set the parameters for the operation of the dispensing power. We would expect applications under a dispensing power provision generally to be made in the Chancery Division of the High Court but also for it to be possible to issue a claim in the County Court where the value of the deceased's estate does not exceed £350,000.[150] Were a dispensing power shown to work simply and effectively, the jurisdiction to exercise the power could be delegated to the Probate Service in certain cases.

The scope of the power

5.94 A variety of approaches are taken in other jurisdictions to the scope of a dispensing power. The power is sometimes limited to written documents,[151] or even to particular types of written documents.[152] In contrast, in other jurisdictions, dispensing powers have been used to admit video wills to probate.[153] In considering the scope of a dispensing power, we believe that the key issues are whether the power should apply to:

(1) electronic documents;

(2) audio and video recordings; and

(3) purely oral statements.

5.95 Our tentative initial view is that the scope of any dispensing provision in English law should be drawn widely. Were a dispensing power to be introduced, there are strong arguments that it should apply not only to traditional written documents, but also where testators express their testamentary intentions in an electronic format, as well as in an audio or audio-visual recording. Those records are all potentially strong evidence of the testator's intentions and, as we have seen, upholding the testator's intentions is the strongest argument for introducing a dispensing power.

5.96 That said, we note that the potential recognition of electronic wills via a dispensing power is a double-edged sword. On the one hand, it seems essential that the power be applicable to electronic documents. Testators who do not follow the formality rules – either through ignorance of them or necessity – are increasingly likely to use electronic means. For example, a person who is seriously ill in hospital may have more immediate access to a tablet or smartphone than to a pen and paper, and may be more able to speak than to write. On the other hand, the potential recognition of electronic documents could provide a treasure trove for dissatisfied relatives. They may be tempted to sift

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149 K G C Reid, MJ De Waal, and R Zimmermann, "Testamentary Formalities in Historical and Comparative Perspective" in K G C Reid, MJ De Waal, and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 466.

150 By analogy with s 23 of the County Courts Act 1984 and the County Court Jurisdiction Order 2014 which, read together,stipulate a £350 000 county court limit for the administration of the estate of a deceased person.

151 Uniform Probate Code, s 2-503.

152 Ohio Rev Code Ann. S 2107.24. Note that this does not exclude electronic written documents, but does exclude oral and video wills which cannot be signed (although the media containing them might be signed).

153 See Chapter 6, particularly para 6.98.

through a huge number of texts, emails and other records in order to find one that could be put forward as a will on the basis of a dispensing power. In that way, the large number of electronic documents that we store on our phones, tablets and computers may open up a variety of avenues by which probate could become both expensive and contentious.[154] While there are arguments on both sides, we take the view that, on balance, electronic documents and audio and audio-visual recordings should fall within the scope of the dispensing power.

5.97 It might also be thought that there is also a risk that the potential recognition of electronic wills could supersede a proposal that we make elsewhere in this Consultation Paper. In the chapter on electronic wills we provisionally propose that an enabling power should be introduced that will allow electronic wills to be recognised in the future.[155] This would allow the Government to bring forward secondary legislation to enable the use of electronic wills at a time when it is feasible to do so. At first blush, it may seem that a dispensing power would make the enabling power ineffective. However, the function of the enabling power is to allow electronic will-making as a matter of course when the time is right. The function of the dispensing power is to recognise informal wills (possibly electronic) retrospectively on a case by case basis.

5.98 We do not consider that the dispensing power should be available where the only evidence of a testator's intention is an unrecorded oral statement. We agree with the view of the Scottish Law Commission that "there would be too much scope for dispute as to the content of oral expressions of intention and too much scope for fraud".[156]

5.99 Oral wills would continue to be available only in respect of privileged wills, where the specific policy intention justifies admitting oral evidence.

What standard of proof should apply?

5.100 Again, this is a matter on which different approaches have been taken in other jurisdictions. When a dispensing provision was introduced in South Australia it provided that the court had to be satisfied that there could be "no reasonable doubt that the deceased intended the document to constitute his will". On its face, that provision adopted the criminal standard. However, the courts subsequently weakened the test to approximate the civil standard.[157] The Uniform Probate Code attempts to provide a standard somewhere between the ordinary criminal and civil standards by requiring the proponent of the document to discharge their burden by clear and convincing evidence.[158]

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154 D Horton, "Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism" (forthcoming) *Boston College Law Review*, Vol. 58.

155 Chapter 6.

156 Report on Succession (1990) Scot Law Com No 124 p 43. The Commission, perhaps, because of the time as which it was writing, allowed that this objection might not stand for wills recorded on "tape" or "video" but were not aware that there was a problem in relation to such wills and so concluded that the issue could be considered at a later date if problems emerged.

157 N Peart, "Testamentary Formalities in Australia and New Zealand" in K G C Reid, MJ De Waal, and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) p 349.

158 Arguably the courts have interpreted this provision permissively. See J Baron, "Irresolute Testators, Clear and Convincing Wills Law" (2016) 73 *Washington and Lee Law Review* 3.

5.101 We provisionally take the view that the ordinary civil standard of proof should apply to a dispensing power. To apply the criminal standard could have the effect of substantially limiting the utility of such a power by making it potentially very difficult to prove that the document or record represented the deceased's intentions. The use of the criminal standard could therefore negatively impact on the policy intention behind a dispensing power of upholding the deceased's testamentary intentions. In addition, it would be inconsistent to apply the criminal standard of proof to this issue where it does not apply in respect of other issues that concern a will,[159] for example, a testator's capacity to make a will. As regards adopting a "clear and convincing evidence" standard, we do not see the value of introducing a new standard of proof when the civil standard is appropriate.[160]

Should the provision operate retrospectively?

5.102 In order to create certainty as to when the dispensing power should be used we suggest that the clearest approach to adopt would be for the power to apply to a record or document of the deceased's testamentary intentions where the deceased dies after the coming into force of the relevant legislative provision. We do not think that it would be viable for a dispensing power to be available depending on whether a document or record was created after the date that the provision came into force. The date of the document may be difficult to discover (without further evidence) in comparison to the usually straightforward question of the date of a person's death.[161] So, the power could operate "retrospectively" in the sense that it might be used to admit to probate a document created before it came into force.[162]

5.103 This approach does not violate the principles that inform the common law presumption against retrospective laws.[163] In short, this sort of retrospective application would not violate a testator's liberty, nor would it alter any law upon which any testator would have relied in making his or her will (or a document similarly intended).

The surrounding facts

5.104 When the Scottish Law Commission discussed the possibility of a dispensing power they recommended that:

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159 This argument is made in the Scottish Law Commission's paper, see Report on Succession (1990) Scot Law Com No 124 p 45.

160 The House of Lords also rejected an intermediate standard in child cases: *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11.

161 We appreciate that the court would, if an applicant sought to use a dispensing power, need to know the date of the purported will, record or document to work out whether it had been superseded by an up to date statement of the deceased's testamentary intentions.

162 We note that the date of death of the testator determines whether the original or amended version of s 9 of the Wills Act 1837 (substituted by s 17 of the Administration of Justice Act 1982) applies to a will, see s 73(6) of the 1982 Act.

163 The presumption relates to the interpretation of statutes. However, we consider the same principles ought to inform law making. For commentary on those principles, see B Juratowitch, *Retroactivity and the Common Law* (2008).

> The court making an order should have power to make a finding as to the date when, period within which, or place where, the writing was executed or made.[164]

5.105 We agree that this would be a useful power. It is possible to envisage that after a will is recognised through a dispensing power, a formally executed will is found. Identifying the date on which the will recognised through the dispensing power should be deemed to have been made will determine which will is later in time and should therefore be given effect. Determining the place in which the will was made may have consequences in private international law, for example, if a will's validity or the law applicable in a dispute were to turn on where the will was executed.

Consultation Question 28.

We provisionally propose that a power to dispense with the formalities necessary for a valid will be introduced in England and Wales.

We provisionally propose a power that would:

(1) be exercised by the court;

(2) apply to records demonstrating testamentary intention (including electronic documents, as well as sound and video recordings);

(3) operate according to the ordinary civil standard of proof;

(4) apply to records pre-dating the enactment of the power; and

(5) allow courts to determine conclusively the date and place at which a record was made.

Do consultees agree?

Registration of wills

5.106 Registration aims to tackle the problem of lost or destroyed wills. Testators who have gone to the effort of making a valid will may have their wishes thwarted if their will cannot be found after their death. The family and loved ones of the deceased may not know where to find the will, or they may be uncertain whether a will existed in the first place.

5.107 In order to assess the potential for reform in this area it is important to note the difference between "registration" and "storage" and the difference between compulsory and voluntary systems.

5.108 Registration usually refers to the act of recording the fact that a will exists and noting the location in which it is kept. Registration service providers index the relevant details so that executors and administrators can search the register in order to locate the testator's will. Storage goes a step further; a service provider holds the document for

[164] *Report on Succession* (1990) Scot Law Com No 124 p 46.

safekeeping. Many professionals will store a will as well as recording its existence with a registration company. Public bodies, solicitors, will-writers and specialised private companies provide storage and registration services.

5.109 In a system of compulsory registration, testators are compelled to register their wills. The usual sanction for failing to register a will is that the unregistered will is invalid. That stands to reason since it seems that no other sanction would properly serve to enforce the rule. In a system of voluntary registration, the testator chooses to register his or her will. Registration is then a matter of convenience; a way to make things easier for the executors of the estate.

The current system in England and Wales

5.110 In England and Wales, there is no system of compulsory registration. However, testators can voluntarily register their wills with certain public or private bodies. Whether a will is registered or not has no bearing on the validity of the will.

5.111 The Principal Registry of the Family Division operates a scheme that is publicly accessible.[165] For a fee of £20, testators may deposit their will at the Registry where it will be registered and stored.[166] Testators are issued with a certificate of deposit.

5.112 Regulations make provision for the withdrawal of wills and outline the procedure to be followed on the death of a testator.[167] Essentially, anybody who is entitled and intends to prove the will may withdraw it after the testator's death on production of a death certificate and the certificate of deposit. Up until that point, the service is entirely confidential.

5.113 Several commercial registries also operate in England and Wales. Generally, those services do not store wills but record their location so that they can be easily found by executors when testators die. Solicitors and will-writers may also offer storage services and usually keep a register of the wills that they have stored.

5.114 This voluntary system does serve to address the problem of lost wills but it relies on the testator choosing to register their will. Reform of this voluntary system would amount to regulating the registration industry and therefore falls outside the scope of the project. Since the introduction of a compulsory system would impact the validity of wills, that question has been the focus of our considerations.

Should the registration system be reformed?

5.115 While a system of compulsory registration would solve the problem of lost or destroyed wills, we consider that the disadvantages of such a system would far outweigh its benefits.

5.116 Compulsory registration would come at a financial cost, to either the state or individual testators. That cost, along with the additional administrative burden on the testator,

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165 See the Senior Courts Act 1981, s 126.

166 *How to Deposit a Will at the Probate Service*, http://formfinder.hmctsformfinder.justice.gov.uk/pa007-eng.pdf (last visited on 14 June 2017).

167 Wills (Deposit for Safe Custody) Regulations 1978 (SI 1978/1724).

would risk discouraging people from making wills. Furthermore, it is not clear what an appropriate sanction would be for failure to register a will. If unregistered wills were not valid then compulsory registration would create unacceptable barriers for death-bed and homemade wills. Any sanction less than invalidity risks being ineffective.[168]

5.117 We note that some civil law jurisdictions require wills to be registered.[169] However, it appears that only notarial wills are subject to that requirement. Given that a public official is necessarily involved in the making of a notarial will, the requirement to register a will is significantly less burdensome in that context than it would be in England and Wales.

5.118 We have also considered potential reform of the system of voluntary registration of wills in England in Wales. A public scheme for voluntary registration and storage exists and appears to function effectively. Additionally, the regulation of private schemes is clearly beyond the scope of our review of the law of wills. We have therefore provisionally concluded that the system of voluntary registration should not be the subject of any recommendations for reform in the Law Commission's wills project.

5.119 Insofar as registration is relevant to electronic wills, it is considered in Chapter 6.

Consultation Question 29.

We provisionally propose that reform is not required:

(1) of current systems for the voluntary registration or depositing of wills; or

(2) to introduce a compulsory system of will registration.

Do consultees agree?

168 Although we note that under the Italian system, pecuniary sanctions apply to those who fail to register wills when required to do so. See K G C Reid, MJ De Waal, and R Zimmermann (eds)*, Comparative Succession Law: Testamentary Formalities* (2011), 126.

169 For example, Belgium, Italy, Netherlands and Spain. See K G C Reid, MJ De Waal, and R Zimmermann (eds), *Comparative Succession Law: Testamentary Formalities* (2011) pp 68, 126, 164 and 85.

Chapter 6: Electronic Wills

INTRODUCTION

6.1 Given that the law of wills is mostly contained in legislation from 1837 it comes as no surprise that the law assumes (even though it does not clearly require) that a will is a paper document. However, the increasing prevalence of digital technology in many aspects of our lives raises the question of whether and how that technology can be applied in relation to wills. In this chapter, we consider how the law can provide for people to make electronic wills.

6.2 The term "electronic will" is imprecise. A will might be called "electronic" because it uses digital technology in a number of different ways, at different stages of the process of making a will:

(1) in the preparation and drafting of a will;

(2) in the execution of a will (the completing of formalities); or

(3) in the storage and admission to probate of a will.

6.3 At the first stage, technology is used in the preparation and drafting of a will, which is then printed and signed in the usual way and stored as a paper document. The second stage takes the use of technology a step further. A will could be "electronically executed". For example, the formalities might be met by an electronic signature and the will could then be printed to create the one authentic version of the will that the law currently requires. Finally, at the third stage, a will might exist only as an electronic or digital file. A will could be prepared, executed and stored electronically, and submitted to probate on the testator's death as an electronic file. We call such a will a "fully electronic will".

6.4 Technology is already widely used in the preparation and drafting of wills, whether a will is homemade or professionally written. A testator preparing a homemade will may purchase a will-making pack containing standardised electronic documents, or prepare a simple word-processed document to print and execute. Where a will is professionally written, technology is opening up new avenues of communication between practitioners and their clients. "Distance wills" in which a practitioner and client never meet in person, have existed for some time. Clients may give instructions for their will in the post or by telephone. A draft will is then prepared and sent to the client with instructions on how to execute it, before it is returned to the practitioner. Technology means that practitioners and clients may now communicate by email or videoconference, rather than through the post or by telephone.

6.5 Technology is also being used in more sophisticated ways in the preparation of wills. For example, will-drafting software can be used to prompt a professional to ask the testator certain questions or to include clauses that may apply to the majority of testators. Once the testator's answers have been inputted, the automated system then creates a first draft of a will which is reviewed by the professional, discussed with the

client and amended as necessary.[1] Similar systems are available to people who wish to prepare a homemade will by downloading and subscribing to a will-making app.

6.6 Since technology is already widely used to prepare hard copy wills, the intuitive next step is to develop our capacity to execute wills electronically and to make use of fully electronic wills. In the rest of this chapter we use the term "electronic wills" to refer to both electronically executed and fully electronic wills.

6.7 In our view, electronic wills can only be effectively introduced using specially designed legal rules. In what follows we explore the benefits of electronic wills, explain why the current formality rules stand in the way of such wills and examine several methods of electronically authenticating documents.

6.8 While we are optimistic about the prospect of electronic wills, law reform in this area is not straightforward. Other law reform bodies have considered electronic wills and legislation geared towards introducing electronic wills has been proposed in several US states.[2] However, we are not aware of any major jurisdiction that has successfully introduced electronic wills. While Nevada (USA) introduced an electronic wills statute in 2001, the statute's technological requirements have proved so difficult to satisfy that no current technology can meet the prescribed standards.[3] The experience of other jurisdictions and our assessment of various methods of electronic authentication inform our provisional proposal of an enabling power to pave the way for the introduction of electronic wills.

POTENTIAL ADVANTAGES OF THE USE OF TECHNOLOGY IN WILL-MAKING

6.9 The promotion of technology and the digitalisation of electronic commerce and transactions is a worldwide and ongoing project. The Government has been pursuing the digitalisation of government services since the late 1990s. Currently, the Government is pursuing a digital transformation strategy to transform the relationship between the citizen and the state, which includes the vision of giving

> citizens, businesses and other users a better, more coherent experience when interacting with government services – one that meets the raised expectations set by the many other (non-government) services and tools they use every day.[4]

6.10 There is little doubt that we increasingly expect to be able to manage our lives digitally. The use of technology in wills has the potential to make wills quicker and easier to

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1 Graham Cohen, "Drafted in" (2011) 155(33) *Solicitors Journal* 12, 12.

2 Law Reform Commission of Saskatchewan, *Report on Electronic Wills* (2004); Alberta Law Reform Institute, *The Creation of Wills* (2009). The US Uniform Law Commission have assembled a Drafting Committee on Electronic Wills; however that Committee has not yet published any Bills or reports. See for example the Florida Electronic Wills Act, and New Hampshire Senate Bill 40.

3 J Banks, "Turning a won't into a will: revising will formalities and e-filing as permissible solutions for electronic wills in Texas" (2015 to 2016) 8 *Estate Planning and Community Property Law Journal* 291, 301.

4 Cabinet Office and Government Digital Service, *Government Transformation strategy* (2017) https://www.gov.uk/government/publications/government-transformation-strategy-2017-to-2020/government-transformation-strategy (last visited 14 June 2017).

make. If will-making becomes more convenient, more people may have a will; accordingly, convenience supports testamentary freedom.

6.11 The advantages of preparing wills electronically are clear; it is easier to amend a draft using a key stroke than re-writing an entire document. Technology can save practitioners time in drafting a will, allowing them to focus their attention on matters requiring legal or other expertise such as estate planning. Technology may also make will-making more convenient for testators: testators may find distance will services, in which they communicate their instructions on the phone or online, more convenient than meeting a solicitor or will-writer in person.[5] Individuals who are isolated or who have disabilities or sensory impairments may also find online communication more accessible than having to meet someone face-to-face.

6.12 Electronic wills offer potentially significant gains in convenience. Some commentators have suggested that electronic wills could be easier to amend after they have been signed.[6] Consequently, it would be simple for testators to keep their wills up to date. Commentators and stakeholders also suggest that electronic wills will be easier for testators to store than paper documents, offering increased security and prevention of accidental destruction.[7] Electronic wills may also be easier for executors to find on the death of the testator.

6.13 The greatest gains, not just for individual testators but also the probate system as a whole, could be offered by a system that linked up fully electronic wills with the probate service. It is possible to imagine a situation in which an electronic will could be created and executed online, electronically checked to ensure that it complies with the formality rules (at least, on its face),[8] and then stored ready to be submitted for probate in electronic form automatically and efficiently on the testator's death.

6.14 Some commentators have also suggested that the use of technology in will-making can offer improvements in terms of security. Some types of electronic signature may offer advantages over handwritten signatures, potentially being more difficult to forge and offering additional services. For example, as we discuss below, digital signatures encrypt the document to which they are applied, making the document unalterable once it is signed. However, different types of electronic signature present their own concerns relating to security; we discuss these concerns in more detail below.

THE CURRENT LAW

6.15 The position of electronic wills under the current law is not entirely clear. It may be argued that certain types of electronic wills are valid under the current law. However,

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5 See J Banks, "Turning a won't into a will: revising will formalities and e-filing as permissible solutions for electronic wills in Texas" (2015 to 2016) 8 *Estate Planning and Community Property Law Journal* 291, 307.

6 See eg J Banks, "Turning a won't into a will: revising will formalities and e-filing as permissible solutions for electronic wills in Texas" (2015 to 2016) 8 *Estate Planning and Community Property Law Journal* 291, 298.

7 G W Beyer and C G Hargrove, "Digital wills: has the time come for wills to join the digital revolution?" (2007) 33(3) *Ohio Northern University Law Review* 865, 887. This point has also been reinforced by recent feedback from stakeholders.

8 This would not prevent challenges to wills which might arise for a variety of reasons including lack of capacity, undue influence and so on. However, it would prevent testators from making clearly invalid wills.

an electronic will has never been recognised as valid in this jurisdiction and our view is that the formality rules most likely preclude the electronic execution of wills. Even if the formality rules do not entirely prohibit electronic wills, the fact that the formality rules were not designed with electronic wills in mind is an impediment to the principled recognition of such wills. In order to see why this is the case, it is necessary to examine the current formality rules.

6.16 To be valid, a will must comply with the formality requirements which provide that a will must be in writing and be signed by the testator and by two witnesses in the presence of the testator.[9] The question is then whether electronic wills are capable of fulfilling those requirements in their current form.

6.17 In the Law Commission's 2001 Advice to Government on electronic commerce, we made the following observation:

> It is at least arguable that both the writing and the signature requirements found in section 9 of the Wills Act 1837 may be satisfied in relation to an electronic will. For example, the will could be typed on a computer and appear on screen, and the testator and the witnesses could add their signatures by one of the methods described above. We do not express any view as to the validity of an electronic will; such matters are beyond the scope of this Advice. But we can anticipate that the suggestion that, as the law currently stands, it may be possible to make an electronic will would surprise and concern many people, and that it might well be thought desirable to impose restrictions on the validity of 'e-wills', or even to deny their validity altogether.[10]

6.18 The legal position of electronic wills remains largely unchanged and the matter has not been the subject of a judicial decision. However, the decision in *Lim v Thompson* emphasises the forensic value of handwritten signatures and may lend further weight to the argument that handwritten signatures are required by section 9 of the 1837 Act.[11] In what follows, we consider both sides of the argument.

6.19 An electronic will would most likely satisfy the requirement of writing in the 1837 Act. The Act imposes no restriction on the material to be used and the Interpretation Act 1978 defines "writing" broadly.[12] As we suggested in our 2001 Advice to the Government, the Interpretation Act 1978's requirement of "words in visible form" would be satisfied by some forms of electronic communication, including emails, because they allow information to be viewed in visible form, with the words displayed on a computer screen.[13] Moreover, courts have subsequently accepted emails as satisfying legislative requirements that a document (usually an agreement) be in writing.[14] Although we are

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9 See Chapter 5 and Wills Act 1837, s 9.

10 Electronic Commerce: Formal Requirement in Commercial Transactions (2001) Advice from the Law Commission, paras 3.45.

11 [2009] EWHC 3341 (Ch), [2010] WTLR 661.

12 Interpretation Act 1978, sch 1.

13 Electronic Commerce: Formal Requirement in Commercial Transactions (2001) Advice from the Law Commission, paras 3.5 to 3.23. See Interpretation Act 1978, s 5 and sch 1.

14 For example, as required under the Statute of Frauds 1677, s 4: *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [16].

not aware of any such decision in relation to the requirement for writing under the Wills Act 1837, similar considerations would apply.

6.20 A more difficult issue is whether electronic wills could satisfy the present requirement that a will is signed (by both the testator and the witnesses). "Signature" is not defined in the Interpretation Act 1978 and there is no reported decision in which the issue has been addressed by a court in England and Wales in respect of wills.[15]

6.21 On one hand, it is arguable that a simple typed signature would meet the signature requirement in the 1837 Act. Typed signatures have been accepted as fulfilling the requirement for a signature in some other contexts and arguably, the same should be true of wills.[16]

6.22 On the other hand, it may be argued that signatures on wills have been held to a particularly high standard. For example, in *Lim v Thompson*, Judge Purle QC considered that one of the primary purposes of the Wills Act is to prevent fraud. In that case, it was held that a photocopy of the testator's signature did not meet the requirements of the 1837 Act. Given that the testator is not alive to testify, the judge noted that "it is very important that what must survive is an original signature … so that the court can examine it and properly evaluate the evidence as to due execution".[17]

6.23 *Lim v Thompson* suggests a reluctance by the court to accept anything other than an original handwritten signature as fulfilling the requirement of section 9 of the 1837 Act. However, electronic signatures might be seen in a different light, particularly where they are more secure than a simple typed name. The case law does not conclusively resolve the issue of whether an electronic signature could meet the requirements of the 1837 Act.

6.24 EU directives and regulations add a further dimension to the debate.[18] EU directives have been implemented by the UK via the Electronic Communications Act 2000 and the Electronic Identification and Trust Services for Electronic Transactions Regulations

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15 It seems that this question has been considered in some US states. A will in which the testator typed his name, which was then printed and signed by the witnesses, was accepted as meeting the requirements for a valid will in Tennessee: *Taylor v Holt* (2003) 134 SW 3d 830 (Tennessee Court of Appeal). However, one commentator suggested the case is an application of the state's harmless error doctrine: see S S Boddery, "Electronic wills: Drawing a line in the sand against their validity" (2012) 47 *Real Property, Trust and Estate Law Journal* 197, 204 to 205. See also *Re Castro* (2013) Probate Div Case No 2010ES00140 (Lorain Country, Ohio, Court of Common Pleas).

16 For example: a typed name in an email satisfies the requirement in the Statute of Frauds 1677 that a guarantee to be in writing and signed (*Pereira Fernandes SA v Mehta* [2006] EWHC 18 (Ch), 1 WLR 1543 at [29] and [30]); and typed names in emails would be capable of meeting the statutory requirements that a contract for a disposition of an interest in land, an actionable representation about another person's character, and an offer to settle all be in writing and signed (*Green v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 at [44]; *Lindsay v O'Loughnan* [2010] EWHC 529 (QB), [2012] BCC 153 at [95]; *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953 at [21]).

17 *Lim v Thompson* [2009] EWHC 3341 (Ch), [2010] WTLR 661 at [25].

18 Electronic Commerce Directive (2000/31/EC on certain legal aspects of information society services, in particular, electronic commerce, in the Internal Market); Directive on a Community Framework for Electronic Signatures (1999/93/EC) (repealed); and the Regulation on electronic identification and trust services for electronic transactions in the internal market (2014/910/EU) ("eIDAS Regulation").

2016.[19] The EU Regulation (No. 2014/910) on electronic identification and trust services for electronic transactions in the internal market ("the eIDAS Regulation") has been directly applicable in EU member states since July 2016.

6.25 The purpose of these laws is to facilitate electronic commerce, which includes facilitating the use of electronic signatures by parties to transactions. As part of this, section 7 of the Electronic Communications Act 2000 states that electronic signatures are admissible in legal proceedings in relation to electronic transactions.

6.26 For two reasons, we believe that the EU legislation, and the domestic measures through which it has been implemented, does not impose any requirement for electronic signatures to be accepted in the context of wills. First, both the EU instruments and the domestic legislation apply in a commercial and transactional context, not in the context of will-making.[20] Secondly, the EU and domestic legislation does not generally dictate that an electronic signature meets a statutory requirement for a signature or writing. Article 2(3) of the eIDAS regulation "does not affect national or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form".[21]

6.27 There is one exception in the eIDAS Regulation which provides that one type of electronic signature, a "qualified electronic signature", has special status. Article 25(2) of the Regulation provides that "a qualified electronic signature shall have the equivalent legal effect of a handwritten signature". A qualified electronic signature is a digital signature that meets a particular standard (called a qualified electronic signature creation device) and certified by a certification authority meeting certain standards (called a qualified certificate for electronic signatures, by a qualified trust service).[22] As noted by the Law Society, "qualified electronic signatures are not commonly used in England".[23]

6.28 Even if eIDAS applies to wills, it is not clear that qualified electronic signatures would be treated as valid for the purposes of executing a will. It appears that, even if eIDAS applies in the context of wills, qualified electronic signatures would have to be functionally equivalent to handwritten signatures in order to have the same effect. In commercial transactions, the signature functions to validate one counterparty's identity

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19 SI 2016 No 696.

20 The eIDAS Regulation applies to electronic identification schemes notified to the European Commission and trust service providers. "Regulation seeks to enhance trust in electronic transactions in the internal market by providing a common foundation for secure electronic interaction between citizens, businesses and public authorities, thereby increasing the effectiveness of public and private online services, electronic business and electronic commerce in the Union": ((2014/910/EU), Recital (2)).

21 The eIDAS Regulation ((2014/910/EU), art 2(3)); see also recitals (21) and (49). Moreover, Electronic Communications Act 2000, s 8 enables the appropriate Minister to modify provisions of legislation to authorise or facilitate the use of electronic signatures; authorisation would not be necessary if electronic signatures already amounted to signatures for the purposes of all legislation. See also Judicial Studies Board, *Digital Signature Guidelines* (July 2000) p 3.

22 See O A Orifowomo and O Agbana, "Manual signature and electronic signature: significance of forging a functional equivalence in electronic transactions" (2013) 24(10) *International Company and Commercial Law Review* 357, 364. However, for the criticism that no type of electronic signature can meet the first requirement that it is "uniquely linked to the signatory", on the basis that the signature is uniquely linked not to the user, but to the private key, which users cannot memorise, see S Mason, "Electronic Signatures" (2016) 22(7) *Computer and Telecommunications Law Review* 173, 173.

23 The Law Society, *Execution of a document using an electronic signature* (Practice notes, 21 July 2016).

to the other. The signature evidences the agreement. In a wills context, the signature functions to authenticate a document. Arguably, the unilateral nature of wills means that a signature on a will performs a distinct function.

6.29 Beyond the issues described above, we also note that there is a degree of tension within the Regulation itself: Article 25(2) of eIDAS is arguably contrary to article 2(3), (both quoted above).

6.30 While we recognise that there is significant uncertainty in this area, our view is that eIDAS does not require a qualified digital signature to be recognised as a valid signature on a will. In light of the further uncertainty as regards electronic signatures in the current law, we see a need for the law to be clarified and we make a provisional proposal to that effect in this chapter.[24]

6.31 It will be apparent that the key issue for electronic wills is authentication: whether an electronic signature could and should be accepted as a signature for the purposes of executing a will. Nevertheless, it is also important to consider the current witnessing requirement with regard to electronic wills.

6.32 For a will to be valid, the testator must sign or acknowledge his or her signature in the presence of both witnesses and the witnesses must sign or acknowledge their signatures in the presence of the testator. Whether the parties are in each other's presence is currently decided with reference to whether they are in the same room and whether there is a line of sight.[25] That rule would be difficult to apply where a witness is said to have had a line of sight to the testator via an online videoconference (there has been no such case). However, it is unlikely that the current law governing witnessing extends to witnessing via videoconferencing because "presence" has been held to involve physical presence.[26]

ENABLING ELECTRONIC WILLS

6.33 In this section, we set out the key elements of the policy arguments that have informed our provisional proposals regarding electronic wills. While those arguments are informed by the detailed considerations explained later in this chapter, we hope that setting out the essential points will assist consultees in responding directly to our provisional proposals.

6.34 Our starting point has been to recognise that, while the status of electronic wills is currently uncertain, it is highly likely that their use will become commonplace in the future. We welcome development in this area and believe that our review of the law of wills is an opportunity to ensure that any future transition to electronic will-making is as smooth as possible. With that in mind, we have tried to determine the parameters of a satisfactory system for electronically executing a will. We have focussed on electronic signatures and identified three core issues.

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24 See para 6.44 below.

25 See Chapter 5, and R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) pp 49 and 50.

26 *In the goods of Chalcraft* [1948] P 222.

6.35 First, and most importantly, electronic signatures must be secure. Electronic signatures must provide strong evidence that a testator meant formally to endorse the relevant document; electronic signatures must reliably link a signed will to the person who is purported to have signed it. Handwritten signatures perform this function well. They are distinctive marks, made directly by the testator, amenable to detailed forensic analysis. Consequently, we have proceeded on the basis that electronic signatures should be no less secure than handwritten signatures. Since the level of security offered by different electronic signatures varies, it is essential that a legal mechanism exists for determining which electronic signatures are sufficiently secure, and which are not. For this reason, we have concluded that electronic wills must be subject to specific legal rules.

6.36 Secondly, the infrastructure required to support electronic will-making must be viable, both technologically and commercially. There is a risk that narrowly specifying types of valid electronic will could be counterproductive. Tightly specifying the necessary technical requirements may have the effect of preventing the adoption of electronic wills rather than enabling their adoption. This appears to be a problem in Nevada, the only jurisdiction we are aware of having legislated to introduce electronic wills.[27] A similar issue has arisen with regard to the Land Registration Act 2002 where the electronic conveyancing provisions were arguably so ambitious that the Act prevented incremental development of appropriate systems.[28]

6.37 Considering the numerous potential ways in which electronic wills could be made, we are cautious of proposing overly specific primary legislation. We believe that any recommendations that we ultimately make should not unduly limit either the technology that is used in electronic will-making, or the commercial incentives to create a secure will-making system. These considerations suggest the need for a degree of flexibility in the law.

6.38 Thirdly, we believe that there should be a degree of consistency across platforms for electronic will-making. There are myriad possible methods for executing and storing a will electronically and a free-for-all as to permissible methods might create uncertainty as to what constitutes a valid electronic will, thereby dissuading testators from using electronic means. Furthermore, a clear and consistent definition of what constitutes an electronic will would protect testators from using methods that might not be upheld after death. Like the concerns about security of electronic wills, concerns about consistency suggest a need for electronic wills to be regulated.

6.39 The issues of security, viable infrastructure, and consistent implementation all indicate that a balance needs to be struck between regulating electronic wills and allowing enough flexibility in the law for electronic wills to develop. Our current view is that the balance is best struck by conferring on the Lord Chancellor the power to make provision for electronic wills by statutory instrument.

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27 J Banks, "Turning a won't into a will: revising will formalities and e-filing as permissible solutions for electronic wills in Texas" (2015 to 2016) 8 *Estate Planning and Community Property Law Journal* 291, 301.

28 In particular, with regard to the requirement for simultaneous completion and registration: Updating the Land Registration Act 2002: A Consultation paper (2016) Law Commission Consultation Paper No 227, paras 20.16 and following.

6.40 This view is reinforced by the fact that technical expertise will be vital in shaping the precise legal framework for electronic will-making. In that regard, specialised departments within Government may be more apt than the Law Commission to provide relevant advice. Nevertheless, we see the present consultation as an opportunity to engage with specialist stakeholders and call for evidence (from all stakeholders) about methods of electronic signatures.

6.41 While we have focussed on electronic signatures, the witnessing requirements will also be an important part of the formality rules. If electronic wills are introduced, the rules governing "presence" will have to be revisited. At a minimum, there will be a need to make clear whether witnesses have to be physically present or whether some sort of online presence (for example, videoconferencing) will suffice.

6.42 We do not make any provisional proposals as to the nature of the witnessing in relation to electronic wills since the suitability of any particular method of witnessing would depend on precisely how a will is to be electronically signed. We note, however, that the introduction of electronic wills is not, by itself, a reason to dispense with the witnessing requirement. While the most secure electronic signatures could make fraud extremely difficult, the witnessing requirement functions not merely to prevent fraud but also to protect testators from undue influence. Witnesses might also provide valuable evidence when a will is contested.[29] For example, as to the testator's capacity, as well as in respect of any allegation of undue influence. In short, witnesses fulfil functions that electronic signatures cannot.

6.43 We consider that protecting testators from fraud and undue influence ought to be an important consideration whatever system for electronic will-making is ultimately adopted. The current rules provide a convenient benchmark. At a minimum, electronic wills should meet the standards of protection provided by handwritten signatures made or acknowledged in the presence of witnesses.

[29] See para 6.98 below.

Consultation Question 30.

We provisionally propose that:

(1) an enabling power should be introduced that will allow electronically executed wills or fully electronic wills to be recognised as valid, to be enacted through secondary legislation;

(2) the enabling power should be neutral as to the form that electronically executed or fully electronic wills should take, allowing this to be decided at the time of the enactment of the secondary legislation; and

(3) such an enabling power should be exercised when a form of electronically executed will or fully electronic will, as the case may be, is available which provides sufficient protection for testators against the risks of fraud and undue influence.

Do consultees agree?

Uncertainty in the current law

6.44 The provisional conclusion that we have reached with regard to electronic wills also suggests a way forward with regard to the uncertainty that exists in the current law concerning whether electronic signatures could satisfy the requirements of the 1837 Act.

6.45 The enabling power that we provisionally propose would allow electronic wills to be subject to a legal regime designed specifically to govern such wills. In our view, electronic wills are better recognised through that type of explicit law making than through the interpretation of the 1837 Act, which could not have been created with electronic will-making in mind. For that reason, we provisionally propose that legislation should be introduced to make clear that electronic signatures do not satisfy the current signature requirement – a requirement we propose to maintain unaltered in the law of wills.

Consultation Question 31.

We provisionally propose that electronic signatures should not be capable of fulfilling the ordinary formal requirement of signing a will that applies to both testators and witnesses (currently contained in section 9 of the Wills Act 1837).

Do consultees agree?

ELECTRONIC SIGNATURES: METHODS AND CHALLENGES

6.46 The ability of testators and witnesses to sign wills electronically is essential to the viability of electronic wills. Assessing electronic signatures is complicated by the fact that there are many methods by which a document can be authenticated electronically. Some such methods are quite different from handwritten signatures. For example, while a handwritten signature is a "name or some mark which is intended to represent that name",[30] there may be no such mark on the face of a document protected by a password. Nevertheless, a password can serve to authenticate a document even when it does not mark it. For that reason, methods such as passwords are considered to be electronic signatures.

6.47 In this section we consider the following forms of electronic signature:

(1) typed names and digital images of handwritten signatures;

(2) passwords and PINs;

(3) biometrics; and

(4) digital signatures.

6.48 In Chapter 5, we explained the purposes of formalities. In short, formalities serve to protect testators from fraud and undue influence as well as to channel them towards a known form of will and to alert them to the seriousness of making a will. Signatures function primarily (although not exclusively) to authenticate a document and thereby prevent fraud. For that reason, our consideration of electronic signatures focuses on security. In what follows, we assess and explain the strengths and weaknesses of various methods.

6.49 To some degree, we have used handwritten signatures as a benchmark against which to assess electronic signatures. In our view, electronic signatures used for the purposes of executing a will should be at least as secure as handwritten signatures. While it is impossible to measure the security of any means of authentication precisely, we note that handwritten signatures provide a particular level of protection against fraud because of their forensic value. Forensic document examiners can provide valuable evidence about the authenticity of handwriting, including signatures.[31] We expect viable electronic signatures to have similar or better forensic value.

6.50 Nevertheless, we recognise that security is not the only issue at stake in considering electronic signatures. Each method that we consider relies on some technological infrastructure (even if that is as simple as owning a computer or tablet) and we explain various challenges that different platforms raise with regard to infrastructure and convenience as well as assessing their security.

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30 *Hindmarsh v Charlton* (1861) 11 ER 388, 391.

31 Forensic document examiners have scientific training so are distinct from graphologists. However, they are not a regulated profession, so some will have more expertise than others: J Holland, "The rise and rise of will forgery actions" (2015) 1 *Private Client Business* 37, 41 to 42.

Typed names and digital images of handwritten signatures

6.51 A rudimentary electronic signature may consist of a typed name in an electronic document, or a digital image of a handwritten signature. Such digital images may be produced by a scan, a photograph or using a stylus on a tablet, and therefore require little by way of technological infrastructure.[32]

6.52 While these forms of electronic signature have the benefit of simplicity, they bring with them a high risk of fraud. Anyone can type "Jane Smith" into an electronic document without Jane Smith's knowledge or involvement. Similarly, an image of signature can be easily copied into a document. As a result, typed names and pictures of signatures provide little evidence that a testator intended to authenticate a document. This is in stark contrast to original handwritten signatures.

6.53 Where a dispute arises over the authenticity of a handwritten signature, the signature itself provides significant forensic evidence. A professional will be able to compare known samples of a person's writing with the signature under consideration, examining each type of writing, independently, to determine two things:

(1) whether it is original (meaning ink on paper); and

(2) whether it has the features of natural writing, by considering whether there is consistent size and slant and thickening and thinning of lines when the pen changes direction.

6.54 The examiner will consider whether each writing has distinctive characteristics by assessing its internal consistency, comparability and variation. Next, the examiner will compare the writings to identify significant similarities or differences. In comparing them, the examiner will consider a long list of attributes.[33] If there is no normal variation between the writings, he or she will look for indications of tracing or imitation. He or she will be alert for retouching, lifts, stops, slow draft line quality, and unnatural tremors. The examiner will consider factors that can limit a person's writing, such as age, illness, fatigue, haste, nervousness, the nature of the document, and, importantly, a deliberate attempt to disguise. The examiner will then evaluate the significance of the characteristics observed in comparison in order to make a conclusion whether the writings were made by the same or different persons.[34]

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32 Where a stylus is used and data is captured about speed, pressure and so on, the stylus signature is a "biodynamic manuscript signature". That type of signature is considered below at para 6.69. See *Re Castro* (2013) Probate Div Case No 2010ES00140 (Lorain Country, Ohio, Court of Common Pleas) in which a signature made on a tablet with a stylus was treated merely as an image.

33 These attributes include alignment; arrangement; positioning; connectedness; cross strokes and dots; direction of strikes; handedness; line quality; pen hold and pen position; overall pressure and patterns of pressure; size; skill; slope; spacing; speed; initial, connecting and ending strokes; and range of variation.

34 D Harrison, T M Burkes and D P Seigner, "Handwriting examination: Meeting the challenges of science and the law" (2009) 11(4) *Forensic Science Communications*, https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/oct2009/review/2009_10_review02.htm (last visited 14 June 2017). See also S Mason, *Electronic Signatures in Law* (3rd ed 2012) pp 11 to 12.

6.55 Robust analysis requires original writings: photocopied writing does not allow for full consideration of all the different attributes of writing.[35]

6.56 Although courts prefer evidence of direct witnesses to the alleged execution, expert evidence from a forensic document examiner in will forgery cases is generally useful, and is vital when there are no available witnesses to the will's alleged execution.[36] As one commentator noted, "it would be a brave party indeed who felt able to take a case to trial without such expert evidence".[37]

6.57 Therefore, while handwritten signatures may appear superficially to be very similar to electronic pictures of signatures, there is a significant difference between them from a forensic standpoint. For that reason, we consider that these typed names and digital pictures of signatures are not secure enough to be used to authenticate electronic wills.

6.58 This conclusion is not affected by the fact that a testator can, in principle, sign by merely making a mark.[38] It is true that a simple mark is a poor source of forensic evidence and, in terms of security and the prevention of fraud, it would seem that, with regard to signatures by mark, the bar is set fairly low. However, marks tend only to be used as signatures in exceptional circumstances. Therefore, the vast majority of handwritten signatures provide significant forensic evidence in relation to fraud. The infrequency of signatures by mark makes it practically acceptable for the Probate Service (and, if necessary, the courts) to look to extrinsic evidence to verify the fact that a mark is, in fact, an authentic signature.

6.59 Were typed names and electronic images recognised as valid signatures, there would be a risk that those signatures could become the norm. If insecure electronic signatures were commonly used, it might be that the majority of probate cases would require reference to extrinsic evidence of execution. That situation would be practically unworkable. Therefore, in our view, the different practical effects of electronic signatures and physical signatures warrant different treatment. The appropriate comparison is between ordinary handwritten signatures and their electronic counterparts.

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35 D Harrison, T M Burkes and D P Seigner, "Handwriting examination: Meeting the challenges of science and the law" (2009) 11(4) *Forensic Science Communications*, https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/oct2009/review/2009_10_review02.htm (last visited 14 June 2017).

36 J Holland, "The rise and rise of will forgery actions" (2015) 1 *Private Client Business* 37, 41.

37 J Holland, "The rise and rise of will forgery actions" (2015) 1 *Private Client Business* 37, 43. For confidence in the value of a handwritten signature, see a consultation response to Ministry of Justice, *Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default* (Response to Consultation CP(R) 26/11/2013, August 2014) p 34, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346357/digital-by-default-response.pdf_-_Adobe_Acrobat_Pro.pdf (last visited 14 June 2017).

38 See para 5.16 above.

Passwords and PINs

6.60 Passwords and PINs are common ways to authenticate electronic documents. Commentators have suggested that a password or PIN could be used to sign a will created online or to password protect a will created on a computer.[39] There are different forms that such a will could take. A simple version would be a document that we store on a computer and sign by adding a password or PIN, which is provided to our executors (or someone else) to access on our death. Alternatively, we could use a password or PIN to execute our will by sending it to a third party. We consider one possible use of these electronic signatures below, through a system known as Verify.[40]

6.61 Passwords and PINs do not all offer the same level of security. The strength of passwords and PINs depends on their inherent complexity as well as the user's ability to keep secret the PIN or password. As Stephen Mason has explained, in order to make passwords easy to remember, people chose personally meaningful words or combinations of numbers, which are predictable by others. People may allow personal or work computers to remember and apply passwords automatically, giving anyone with access to the computer the ability to apply a password or PIN, or people may too readily share passwords with others.[41]

6.62 In our initial discussions with stakeholders the security of passwords and PINs was raised as a specific concern in respect of elderly people. Stakeholders expressed concern that some older people might provide their passwords or PINs to family members and carers, increasing their vulnerability to undue influence and fraud.[42]

6.63 Furthermore, passwords and PINs are not intrinsically connected to their users. It is necessary to link a password and PIN with a particular individual. For example, we are only able to use PINs to authenticate our identity at cash machines because our bank has already reliably linked us to an account, card number and PIN. This is usually done in person at a branch; we present ourselves, as well as identity documentation in order to open an account. What this shows is that passwords and PINs are convenient methods of authentication once they are set up, but initially establishing the connection between user and password or PIN might be labour intensive and require specialised technological infrastructure. One concern is that the initial difficulty might not be proportionate in the context of one-off (or seldom done) acts such as making a will.

6.64 In addition, it is arguable that typing in a password or PIN could be too commonplace to alert people to the seriousness of preparing a will. Many people now use passwords or PINs many times a day, for a variety of tasks, including accessing mobile phones,

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39 See eg J Banks, "Turning a won't into a will: revising will formalities and e-filing as permissible solutions for electronic wills in Texas" (2015 to 2016) 8 *Estate Planning and Community Property Law Journal* 291, 308 to 309.

40 See para 6.65 below.

41 S Mason, *Electronic Signatures in Law* (3rd ed 2012) pp 286 to 288, discussing the use of passwords to protect the private key of a digital signature.

42 Similar concerns were raised with regard to the potential for digital Lasting Powers of Attorney: Ministry of Justice, *Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default* (Response to Consultation CP(R) 26/11/2013, August 2014) p 35, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346357/digital-by-default-response.pdf_-_Adobe_Acrobat_Pro.pdf (last visited 14 June 2017).

email or voicemail inboxes, turning house alarms on and off, and purchasing groceries on a card payment machine. Passwords and PINs have become routine ways of accessing private materials or spaces and making payments. If making a will came to be seen as routine, there is a risk that testators would be more likely to make ill-considered dispositions.

6.65 The challenges of using passwords may be met by using Verify to execute electronic wills. Verify is an identification system that is used to provide members of the public with access to some Government services. Verify operates by requiring an authorised company to authenticate details of a person on the basis of known information in order for the person to access a Government service. When a member of the public wants to access a Government service electronically, he or she must choose from a list to select one Government-authorised company to confirm his or her identity using Verify. The company checks the person's identity by comparing information the person provides against known information about him or her: it asks the person questions about, for example, the person's passport, driving licence or mobile phone contract, or performs checks, for example, using photo identification or financial information. Once the person's identity has been verified, the Verify service will provide the person with a username and password, which can be used to log onto online Government services.[43]

6.66 It is possible, in principle, for the Government, or a Government authorised body, to use Verify to provide for fully electronic wills, with the will being executed by the testator entering his or her username and password and then being stored.

6.67 We have concerns, however, as to whether the use of Verify would be sufficient to protect testators from undue influence and impersonation. Verify does not currently ensure that the person entering the information is in fact the person he or she is purporting to be; rather it focuses on verifying that the person exists.[44] While the involvement of witnesses generally provides some protection against fraud and undue influence, Verify does not currently have any facility for the participation of witnesses. Furthermore, Verify relies on passwords to control access to the service. There is a risk, therefore, that testators will give their passwords to family members or carers, and might be pressured to do so by persons wanting to abuse them.

6.68 The use of Verify also requires a third party – the Government or an authorised body – to be involved in the process of the testator signing his or her will electronically. The need for a counterparty to be involved is a common feature of secure electronic signatures and we discuss the practical challenges associated with counterparties where we consider digital signatures, below.

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43 Cabinet Office, Government Digital Service, Gov.UK Verify Guidance (17 September 2014), https://www.gov.uk/government/publications/introducing-govuk-verify/introducing-govuk-verify (last visited 14 June 2017).

44 Similar concerns were raised in response to the consultation on fully digital Lasting Powers of Attorney: Ministry of Justice, *Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default* (Response to Consultation CP(R) 26/11/2013, August 2014) p 35, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346357/digital-by-default-response.pdf_-_Adobe_Acrobat_Pro.pdf (last visited 14 June 2017).

Biometric signatures

6.69 A biometric signature is a type of electronic signature that measures a unique physical attribute of the signatory in order to authenticate a document.[45] Examples of biometrics include fingerprints, iris scans, voice recognition, facial recognition, and even gait recognition. A biodynamic version of a handwritten signature (called a biodynamic manuscript signature) is a type of biometric signature that is increasingly being used. The unique way that a person signs is recorded as a series of measurements together with a digital reproduction of the signature.[46] Various parameters may be recorded, including speed, rhythm, pressure, and even the angle of the stylus. While a handwriting examiner will look for indicators of these characteristics, biodynamic signatures can capture actual measurements of them. Biodynamic signatures therefore allow analysis of characteristics not inherently captured in handwritten signatures.[47]

6.70 Biometrics are more secure than many types of electronic signature. However, biometrics, particularly biodynamic manuscript signatures, are limited by the systems used to record and analyse them.[48] The quality of systems used varies widely. Different systems record and transmit data differently and at different speeds, with some only recording a few measurements and others recording many. For example, biodynamic data (for example, speed) could be recorded on a tablet when a testator signs with a stylus. However, the tablet would measure fewer parameters than specialised equipment and the data that is recorded could be of lower quality. In policy terms, a decision on biodynamic signatures is not a binary issue of allowing testators to use biodynamic signatures or not. If biodynamic signatures were recognised it might be useful to specify which parameters should be measured and to set minimum standards for the reliability of the data captured.

6.71 Biometric data are also not as secure as some might think and recent work in the area has shown that they may be obtained from photographs. Japanese researchers have shown that fingerprint data can be obtained from smartphone photographs taken of subjects making "peace signs" from three meters away,[49] and a hacker claims to have obtained Angela Merkel's iris data from a photograph.[50] One difficulty with biometric data is that once it is compromised, it cannot easily be made secure again; a fingerprint cannot be reset in the same way a password can.

6.72 Furthermore, biometrics must be linked in a coherent way to individuals. Each individual must provide a biometric sample against which his or her biometric signature will be

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45 Biometrics are contemplated as the "authentication characteristic" of the testator in the Nevada electronic will statute: Nevada Revised Statutes, s 133.085.

46 S Mason, *Electronic Signatures in Law* (3rd ed 2012) pp 256 and 269 to 271.

47 H H Harralson, "Forensic document examination of electronically captured signatures" (2012) 9 *Digital Evidence and Electronic Signatures Law Review* 67, 67.

48 H H Harralson, "Forensic document examination of electronically captured signatures" (2012) 9 *Digital Evidence and Electronic Signatures Law Review* 67.

49 https://phys.org/news/2017-01-japan-fingerprint-theft-peace.html (last visited 14 June 2017).

50 https://www.scmagazineuk.com/starbugs-in-your-eyes-german-hacker-spoofs-iris-recognition/article/535281/ (last visited 14 June 2017).

compared in the future.[51] This could involve checking biometric data attached to a will against the same data stored privately by the testator for other purposes. For example, a biodynamic signature on an electronic will could be checked against the testator's biodynamic signature on another electronic document. However, a more robust system would require an organisation to take responsibility for checking individuals' identities and taking their biometric samples. This organisation would have to retain and keep safe from third-party intrusion this repository of signatories' personal biological information.[52] The use of biometric signatures in respect of wills might then require specialised infrastructure and a dedicated counterparty. Both of those issues are explored with regard to digital signatures, below.

Digital signatures

6.73 A "digital signature" is a distinct form of electronic signature. It is currently the most secure form, and offers protections that handwritten signatures do not. Stephen Mason describes a digital signature as "data appended to, or a cryptographic transmission of, a data unit that allows the recipient of the data to prove the source and integrity of the data unit".[53] A digital signature comprises two actions: a signature by the signatory and verification of the signature by the recipient.

6.74 A digital signature is based on asymmetric cryptography.[54] In the most basic terms, a complex cryptographic algorithm allows data to be scrambled (or encrypted) using one long numerical key, and unscrambled (decrypted) using a different numerical key.[55] The keys are paired and the decrypting key will only work to decrypt data that was encrypted using a particular encrypting key. The mathematical relationship between the two keys makes it is impossible, at present, to ascertain an encrypting key from the decrypting key within a useful time scale (doing the necessary calculations might take a powerful computer hundreds of years).[56] As a result, when a person successfully decrypts data using a key, they can be certain that it was encrypted using that key's counterpart and has not been altered.

6.75 A person using this system to sign a document will keep their encrypting key private. By making their decrypting key public, the person who encrypts a document allows others to i) read the encrypted document and ii) to be sure the contents of the document have not been tampered with because only the person with the private encrypting key could have encrypted it. In doing so, the person who encrypts the document is able to

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51 This applies to biodynamic manuscript signatures too. They cannot yet be reliably compared to handwritten signatures due to the differences in writing surfaces and writing instruments in biodynamic versus handwritten signatures, and the quality of electronic recordings: H H Harralson, "Forensic document examination of electronically captured signatures" (2012) 9 *Digital Evidence and Electronic Signatures Law Review* 67, 60 to 70 and 72.

52 S E Blyth, "Finland's Electronic Signature Act and E-Government Act: Facilitating security in e-commerce and online public services" (2008) 31 *Hamline Law Review* 443, 448; S Mason, *Electronic Signatures in Law* (3rd ed 2012) pp 256 and 272.

53 S Mason, *Electronic Signatures in Law* (3rd ed 2012) p 189.

54 S Mason, *Electronic Signatures in Law* (3rd ed 2012) p 189.

55 A cryptographic algorithm is a set of mathematical rules applied to data in order to convert it into a code, thereby concealing information from all except those who are able to reverse the effects of the process. In this case, one of the two keys is required to reverse those effects; to decrypt the encrypted data.

56 S Mason, *Electronic Signatures in Law* (3rd ed 2012) p 123.

prove to its recipients that the document they have read is authentic. In that sense, the person who encrypts a document with their private key signs it.[57]

6.76 Digital signatures on their own do not guarantee that the user was the one who applied the private key. There must be a reliably established link between the key pairs and the person who claims that it links to their private key. Public Key Infrastructure ("PKI") attempts to link users securely with their key pairs and so to their digital signatures. PKI relies on authorised or trusted intermediaries, called certification authorities, to certify the link between a user and his or her public key.[58] They do so by issuing the user an identity certificate that binds the user's name to his or her public key. The identity certificate also identifies the certification authority and is signed with the certification authority's own private key.[59]

6.77 Under PKI, certification authorities must establish protocols to verify each user's identity, create and distribute identity certificates (and possibly also key pairs),[60] and cancel identity certificates when they expire or their security has been compromised.[61] These protocols are vital, and the security of digital signatures relies on them.

6.78 PKI authentication is evidently secure and using a PKI system to sign wills could improve protection afforded to testators against fraudulent wills. Digitally signed wills might also offer advantages in terms of storage as well as ease of transfer between legal teams, courts, those dealing with probate and so on. However, we have identified four challenges that would have to be met were a PKI system to be adopted. These challenges also apply to password-based and biometric systems that require a counterparty.

6.79 First, PKI would have to be adapted for executing a unilateral document. In the commercial context, there are third parties with an interest in verifying the authenticity of a PKI signature. Counterparties to a contract use public keys to check the veracity of documents and certification authorities have an interest in making sure that their protocols are robust.

6.80 In a will-making context, there is no natural counterparty and one would have to be engineered. While we are aware that the position might change rapidly, the low cost of making physical wills (which are sometimes used by solicitors as a "loss leader") diminishes the commercial incentive to create a counterparty system that would have to be secure and guaranteed to be robust in the long term. Furthermore, stakeholders

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57 The reverse process is also possible to keep communication private: the sender uses the recipient's public key to encrypt a document, and the recipient uses his or her private key to decrypt it. Only the recipient's private key can decrypt it.

58 Note that under the Electronic Communications Act 2000, s 7(1)(b) "the certification by any person of such [an electronic] signature" is admissible as evidence of authenticity. Section 7(3) clarifies that a person certifies a signature by confirming that "the signature, a means of producing, communicating or verifying the signature, or a procedure applied to the signature" is a valid means of signing.

59 S Mason, *Electronic Signatures in Law* (3rd ed 2012) pp 265 to 266.

60 With the appropriate software, users can generate their own key pairs. This avoids the difficulties in distributing key pairs securely; however, it does not remove the need for the certification authority to certify that the key pair belongs to the user: S Mason, *Electronic Signatures in Law* (3rd ed 2012) pp 265 to 266 and 274.

61 S Mason, *Electronic Signatures in Law* (3rd ed 2012) pp 284 to 285.

have indicated that there is little demand for electronic wills. While it would be possible for the state to create a counterparty system, there is no clear cost benefit to the state in doing so unless the state could reduce the cost of probate, executors costs and the like. There may be a reason for the state to offer a system for registering Lasting Powers of Attorney when a person chooses to execute one given that registration can prevent the court being approached later on to make decisions about an incapacitated person. Registering LPAs electronically might realise a genuine cost saving for the state and the parties concerned.

6.81 Secondly, any PKI system used to sign electronic wills would have to offer long term security. Authentication in commercial transactions generally arises at the time of the transaction (or relatively shortly afterwards). In a wills context, it is possible that the authenticity of a signature will have to be assessed many years in the future. One important question is whether an electronic signature (purportedly) executed in 2017 can be adequately authenticated in 2057. While the ability to analyse the authenticity of a 2017 wet ink signature may well improve, the ability to forge a 2017 electronic signature is likely to develop as time progresses and technology advances.

6.82 At present, it is not clear that certification authorities retain information relating to identity certificates and key pairs long enough for them to operate in the timeframes necessary for wills. In order for digital signatures to be used for wills, certification authorities would have to keep historical point-in-time information for all of the identity certificates, so that decades after being used to electronically execute the will a private key could be established to have been valid at the moment the will was signed.[62]

6.83 Thirdly, some work would be required to make signing a will using PKI technology convenient for testators. In order to obtain an identity certificate, individuals will generally have to prove their identification to a certification authority and as a matter of best practice will have to meet face-to-face in addition to providing other evidence of their identity. For many testators, signing a will by hand might seem much easier.

6.84 One solution to this problem might be for solicitors to sign wills on behalf of testators using their own existing digital signatures. However, to authorise the solicitor to do so, and to comply with professional regulations, clients will likely need to authorise the solicitor to do so – usually by signing an authorisation form by hand.[63]

6.85 Fourthly, the private keys used in PKI systems must be safely stored:

> the private key of each person is rather difficult to memorize, they are most often stored in computers. If the computer is not kept in a secure location, the contents of the private key may be vulnerable. This heightens the necessity of maintaining the security of the private key and protecting it from intruders. However, it should be noted that this weakness of the digital signature is also common to most other forms of electronic signatures. The password or the PIN face similar security problems.

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62 As well as to establish liability if the identity certificate proves to be inaccurate or the private key was compromised: see S E Blyth, "Finland's Electronic Signature Act and E-Government Act: Facilitating security in e-commerce and online public services" (2008) 31 *Hamline Law Review* 443, 461 to 462.

63 See Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271, para 13.62.

Therefore, with good security policies and procedures, this disadvantage can be minimised.[64]

6.86 In a wills context, testators would need to comply with rules governing their use and storage to prevent wrongful use of private keys. There may be challenges implementing and enforcing such rules in an individual and personal context, rather than a professional or organisational context where sanctions can be more easily applied to individuals.

Conclusions

6.87 In our view, the following points are the most important policy considerations that emerge from our discussion of electronic signatures.

(1) While there may be many electronic methods that are at least as secure as handwritten signatures, it appears that rudimentary electronic signatures – typed names and digital images of handwritten signatures – are easily copied and would not sufficiently protect testators from fraud.

(2) While forgery is less of a concern with regard to more sophisticated electronic signatures, we note that passwords, PINs and keys could be compromised in other ways; by users sharing their details, or by undue influence. This is a particular concern for electronic signatures used to authenticate wills because any system must take account of the position of vulnerable testators.[65]

(3) We also note that the introduction of electronic wills is going to require infrastructure to i) provide a secure means by which testators can make wills and ii) maintain the integrity and security of electronic wills over time. That infrastructure may be provided by commercial entities or by the Government and it may be created specifically for wills, or will-making could piggy-back on other systems (such as Verify).

Consultation Question 32.

We ask consultees to provide us with their comments on, or evidence about:

(1) the extent of the demand for electronic wills; and

(2) the security and infrastructure requirements necessary for using electronic signatures in the will-making context.

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64 S E Blyth, "Finland's Electronic Signature Act and E-Government Act: Facilitating security in e-commerce and online public services" (2008) 31 *Hamline Law Review* 443, 451.

65 See Chapter 7.

STORAGE OF ELECTRONIC WILLS

6.88 The possibility of electronic wills raises questions about storage. There are many differences between storing data electronically and storing data in paper form. While paper documents may be lost, stolen or destroyed, electronic documents are susceptible to different risks such as obsolescence or hacking.

6.89 The issue of obsolescence is particularly pertinent with regard to fully electronic wills, which would have to be stored over long periods of time. There is no standard format for electronic files; many different forms are used, and they are not universally compatible. Moreover, hardware and software undergo continuous development, a process that renders old forms obsolete. Hardware physically deteriorates causing a particular problem for portable media storage devices. Preserving electronic documents over long periods requires documents to be migrated, or converted into new formats so they can remain readable. It is difficult to "future proof" an electronic document.[66] Electronic documents must be maintained in a way that physical documents need not be.

6.90 Stakeholders have also raised concerns about the wide variety of formats fully electronic wills could take. Stakeholders have suggested to us that the benefits of only one form of will being acceptable – a paper will – are simplicity and certainty; fully electronic wills could make it more difficult to establish whether a person has a will or whether a will was the person's last will.

6.91 There is also the issue of hacking. The storage of wills in electronic form may provoke different types of fraud or fraud on a larger scale than paper wills do. Online systems cannot be made absolutely secure against intrusion, and some of the most secure systems in the world have been hacked. Fully electronic wills could prove to be a tempting target and we note that hackers have recently attacked Government computer systems, threatening to destroy data unless a ransom was paid.[67]

6.92 The difficulties and vulnerabilities of storing wills could be mitigated if the task were undertaken by the Government or by a Government authorised body. A body responsible for storing wills could determine (and standardise) the format of fully electronic wills; ensure that there is only one, authentic, version of each fully electronic will (if necessary); take responsibility for migrating fully electronic wills to new formats in order to ensure they continue to be accessible; and put robust security mechanisms in place to reduce vulnerability to hacking.[68]

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66 G W Beyer and C G Hargrove, "Digital wills: Has the time come for wills to join the digital revolution?" (2007) 33(3) *Ohio Northern University Law Review* 865, 894 to 895; Members of the Succession Law Reform Project, *Wills Estates and Succession: A Modern Legal Framework* (British Columbia Law Institute Report No 45, June 2006) p 32; K Melnychuk, "One click away: the prospect of electronic wills in Saskatchewan" (2014) 77 *Saskatchewan Law Review* 27, 41.

67 See S S Boddery, "Electronic wills: Drawing a line in the sand against their validity" (2012) 47 *Real Property, Trust and Estate Law Journal* 197, 206 to 207. On the WannaCry ransomware attacks, see bbc.co.uk/news/health-39899646 (last visited 17 May 2027).

68 See South Australian Law Reform Institute, *Losing it: State scheme for storing and locating wills* (Issues paper 6, July 2014) paras 62 to 65, 87 and 91.

6.93 Centralised electronic storage could produce considerable benefits, especially if joined up to the admission of the will to probate after the testator's death. Such a system would reduce the potential for wills to be lost and increase the efficiency of admitting wills to probate. However, we have not seen any appetite or evidence of the immediate need for such a development. Moreover, it is not clear that there is any appetite within Government to create such a system. There may be a commercial incentive to provide a system of fully electronic wills, but that is not a matter we are in a position to assess fully.

6.94 The prospect of fully electronic wills raises a fundamental question: what is the will? At present, the answer is straightforward. A will is a single, physical document. If wills were stored electronically, multiple copies might exist, each as authentic as the next. In the digital realm, what is relevant is data, not the particular hardware on which data is stored. A shift away from there being one identifiable physical will might have practical consequences.

6.95 Under the Wills Act 1837, there is a notion of a single original will; although many documents can together constitute a single will, there is only one "will".[69] This implicit requirement relates to revocation by destruction: if there are multiple copies of a fully electronic will (for example, stored on both the testator's and a witness's personal computers), and the testator has deleted one, privately, has the will been revoked?[70] It is possible that technology could be used to ensure that only one authoritative electronic copy of a will exists. However, it is not clear whether this technology yet exists and requiring an authoritative electronic copy appears to have hampered the effect of electronic wills legislation in Nevada.[71]

6.96 One plausible way to address this problem would be to enact legislation governing electronic wills that excludes the notion of a single original will. Doing so could remove the ability of a testator to revoke a will by destruction. However, having copies of electronic documents may be unavoidable. It might even be helpful to have copies made, to back up data, for example. Below, we ask for consultees' views about revocation by destruction and the notion of a single original will in the context of electronic wills.

6.97 A further practical consequence of the recognition of electronic wills is that a mechanism will have to be put in place to admit such wills to probate. That system may differ according to the form that electronic wills take. Because there is such a variety of potential forms and the solution will require technical rather than legal expertise, we are not in a position to consult on potential systems in this Paper. Nevertheless, it is important to note that if electronic wills are to be admitted to probate as well as physical wills, the manner in which wills are received by the Probate Service needs to be reconsidered.

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69 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 39.

70 See Wills Act 1837, s 20; Members of the Succession Law Reform Project, *Wills Estates and Succession: A Modern Legal Framework* (British Columbia Law Institute Report No 45, June 2006) pp 31 to 32. See also Uniform Law Conference of Canada, *Proceedings on the Eighty-third Annual Meeting* (Toronto, 2001), Appendix E, Electronic Wills, W H Hurlburt QC, "Electronic wills and powers of attorney: has their day come?" paras 56 to 60.

71 Commentators have identified the requirement that there is a single authoritative copy of the will as one of the reasons the Nevada electronic wills statute (Nevada Revised Statutes, s 133.085) has not been used in practice: G W Beyer and C G Hargrove, "Digital wills: Has the time come for wills to join the digital revolution?" (2007) 33(3) *Ohio Northern University Law Review* 865, 891; S S Boddery, "Electronic wills: Drawing a line in the sand against their validity" (2012) 47 *Real Property, Trust and Estate Law Journal* 197, 199 to 200.

Consultation Question 33.

If electronic wills are introduced, it is unlikely that the requirement that there be a single original will would apply to electronic wills. Consequently, it may be difficult or impossible for testators who make wills electronically to revoke their wills by destruction.

(1) Do consultees think that a testator's losing the ability to revoke a will by destruction is an acceptable consequence of introducing electronic wills?

(2) Are consultees aware of other serious consequences that would stem from there not being a single original copy of a will made electronically?

VIDEO WILLS

6.98 So far, our discussion in this chapter has assumed that electronic wills, including fully electronic wills, would consist of words in visible form. We now consider whether it should be possible to create a legally valid will by a video recording. A video will would be a fully electronic will that exists only as a digital file. It would be different from any other form of fully electronic will that we have considered, however, it would not consist (as the current legislation explains) of "words in visible form" and would not be "signed".

6.99 In addition to being the will and providing evidence of execution, it has been suggested that a video recording could also provide evidence that the testator had capacity at the time of making the will and was not subject to undue influence. Potentially, witnesses could continue to play the same role they do now by appearing in the video with the testator, stating their names and possibly that they witnessed the will.[72]

6.100 It has also been suggested that video recordings of the execution of a paper will can evidence due execution of the will entered for probate, as well as capacity and the absence of undue influence. Because this suggestion continues to require a paper will and so relates to evidence rather than formalities, we consider it separately, below.

6.101 In many respects, video recordings seem ideally suited to wills. An audio and visual recording of the testator stating his or her testamentary dispositions would be a recording of a unilateral declaration. The testator's voice and image are directly linked to his or her identity; they require no counter party to create data to establish a link between the two and later confirm the link is present. Like handwritten signatures, a court could rely on characteristics personal to the testator to establish the authenticity of the image and sound, and therefore the will. Without the need for a signature, video wills side-step the difficulties we have discussed about the use of electronic signatures in the wills context.

6.102 Nevertheless, it appears to us that there are difficulties with video wills. Wills are technical documents in which it is important that language is used precisely. There is a

[72] See eg J Banks, "Turning a won't into a will: revising will formalities and e-filing as permissible solutions for electronic wills in Texas" (2015 to 2016) 8 *Estate Planning and Community Property Law Journal* 291, 313; J C Grant, "Shattering and moving beyond the Gutenberg Paradigm: the dawn of the electronic will" (2008 to 2009) 42 *University of Michigan Journal of Law Reform* 105, 135.

risk of a spoken will being incomplete or open to interpretation unless carefully scripted. There is also a risk, which it is beyond our expertise to assess, that computer-generated imagery (CGI), editing or dubbing could be used to create a convincing forged video will.

6.103 Witnesses could continue to play a protective role. Arguably, witnesses might be less necessary for video wills than paper wills, given the additional evidence in relation to undue influence that a video will could provide. However, coercion could easily occur off-camera or before the time that the will is "executed" in the video. For these reasons, as well as our concerns about forgery, we think that witnesses would still be required.

6.104 Video wills also raise the practical difficulties about storage of digital files that we have considered above.[73] There is a risk that a video will made 20 years ago, stored on obsolete hardware and recorded in a format no longer used, would not be viewable now.

6.105 Accordingly, a video recording may be better not as a replacement to a will, but in addition to a written will as evidence of the testator's intentions and circumstances surrounding its making and execution.

6.106 In our discussion above, we have provisionally proposed the introduction of an enabling power to allow electronically executed and fully electronic wills to be introduced in the future. Video wills would necessarily be fully electronic wills. In light of the distinct issues raised by video wills, we would like to hear from consultees separately as to whether this form of will should be considered in any enabling power.

Consultation Question 34.

We invite consultees' views as to whether an enabling power that provides for the introduction of fully electronic wills should include provision for video wills.

The use of video evidence in relation to wills

6.107 A separate issue arises as regards the use of video recordings as evidence in contested probate cases.

6.108 Some jurisdictions have passed legislation that specifically allows video recordings of the execution of a will to be used as evidence of a testator's capacity and intention as well as the authenticity and proper execution of the will. Some commentators view the legislation as a positive step towards electronic wills.[74]

6.109 We agree that a video recording of the execution of the will, and indeed a recording of any discussion of the will and expressions by the testator of his or her testamentary

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73 See para 6.88 above.

74 J C Grant, "Shattering and moving beyond the Gutenberg Paradigm: the dawn of the electronic will" (2008 to 2009) 42 *University of Michigan Journal of Law Reform* 105, 108 to 109; G W Beyer and C G Hargrove, "Digital wills: Has the time come for wills to join the digital revolution?" (2007) 33(3) *Ohio Northern University Law Review* 865, 884 and 885.

intent, may be useful. We do not, however, think it is necessary for a specific provision in a new Wills Act to allow for such evidence: we think that the admissibility of video evidence can be determined by the ordinary rules of evidence.[75]

ELECTRONIC WILLS AND A DISPENSING POWER

6.110 In Chapter 5, we considered the introduction of a dispensing power. The effect of a dispensing power would be to enable the court, on a case by case basis, to accept as valid a will that has not been properly executed. There are different forms that a dispensing power may take.

6.111 In other jurisdictions, electronically executed and fully electronic wills have been admitted to probate on the basis of dispensing powers.[76] Documents typed on computers and mobile phones have been admitted to probate,[77] as have videos[78] and a will "handwritten" using a stylus on a tablet.[79] These cases often concern the wishes of testators who were suffering serious illness or who committed suicide.

6.112 We note that other law reform bodies have recommended that dispensing powers be drawn widely enough to include electronic documents. Doing so effectively enables electronic wills to be admitted to probate on a case-by-case, discretionary basis thereby giving greater effect to testators' intentions. However, David Horton has recently expressed scepticism about the value of extending a dispensing power to electronic documents. He is concerned that the practice could lead to more disputes, higher costs and greater inconvenience in probate cases.[80] In Chapter 5, above, we addressed the question in greater detail and asked consultees whether a dispensing power should be able to be used in respect of electronic documents.

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75 J R Martyn, A Learmonth, J E Gordon, C Ford and T Fletcher, *Theobald on Wills* (18th ed 2016) para 12-001.

76 *Taylor v Holt* (2003) 134 SW 3d 830 (Tennessee Court of Appeal – typed name, dispensing power). S S Boddery, "Electronic wills: Drawing a line in the sand against their validity" (2012) 47 *Real Property, Trust and Estate Law Journal* 197, 204 to 205. See also *Re Castro* (2013) Probate Div Case No 2010ES00140 (Lorain Country, Ohio, Court of Common Pleas).

77 *Rioux v Coulombe* (1996) 19 ETR (2d) 201 (Quebec Superior Court) (a document saved on a computer disk), cited in Members of the Succession Law Reform Project, *Wills, Estates and Succession: A Modern Legal Framework* (British Columbia Law Institute Report No 45, 2006) p 32; *Macdonald v The Master* (2002) (5) SA 64(N) (South Africa) (a document saved on the testator's work computer), cited in S S Boddery, "Electronic wills: Drawing a line in the sand against their validity" (2012) 47 *Real Property, Trust and Estate Law Journal* 197, 204; *Re Yu* [2013] QSC 322 (Supreme Court of Queensland) (typed document using an app on the testator's mobile phone).

78 *Mellino v Wnuk* [2013] QSC (Supreme Court of Queensland), *In the Estate of Wilden (Deceased)* [2015] SASC 9 (Supreme Court of South Australia).

79 *Re Castro* (2013) Probate Div Case No 2010ES00140 (Lorain Country, Ohio, Court of Common Pleas).

80 See D Horton, "Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism" (forthcoming) *Boston College Law Review*, Vol. 58.

Chapter 7: Protecting Vulnerable Testators: Knowledge and Approval and Undue Influence

INTRODUCTION

7.1 In Chapter 1, we noted the importance of testamentary freedom. We have seen that testamentary freedom is supported by formality requirements that must be met for a will to be valid and by ensuring that the testator has the mental capacity necessary to execute a will. To ensure testamentary freedom, however, it is not enough to show that a will has been properly executed by a testator with capacity to do so. The law must also ensure that the will truly reflects the wishes of the testator, and that those wishes were freely decided by the testator. As Scarman J (as he then was) explained in *In the Estate of Fuld*:

> Lord Penzance once said of the issues of testamentary capacity, knowledge and approval, undue influence and fraud, that they very often merge into one another.[1]

7.2 In this chapter, we consider two means by which the law protects testamentary freedom: "knowledge and approval" and "undue influence". We consider these two topics together because the concepts are applied in closely related circumstances. We consider that any proposals for law reform made in respect of these doctrines need to be considered alongside each other in order to understand their effect.

7.3 The question that lies at the heart of our examination of knowledge and approval and undue influence is how the law can best protect testators from financial abuse, where a person has testamentary capacity but is in a vulnerable situation. A testator may be vulnerable because he or she has been subjected to a degree of influence that he or she has been unable to resist. Additionally, the testator's susceptibility to pressure may be the consequence of dementia or other mental or physical conditions that leaves the testator in a vulnerable position. Another way of looking at the issues we consider in this chapter is to say that the content of the testator's will raises a suspicion that it might not represent the testator's true intentions. It is through protecting the vulnerable against abuse that the law upholds testamentary freedom.

7.4 A will may also be set aside where it has been procured through fraud – where a false representation has been made to the testator. We do not discuss fraud as a ground for setting aside a will in this chapter as we are not aware of any particular problems or concerns that exist with the application of the law of fraud in the context of wills. We do, however, briefly refer to a specific type of fraud, known as fraudulent calumny, which is a type of fraud closely related to undue influence. We invite consultees to explain any personal experience of fraud in a wills context and to let us know if they think that the law of fraud, as it relates to wills, requires reform.

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1 [1968] P 675 at 722. The case was heard over 93 working days by Mr Justice Scarman from 8 February to 27 July 1965, during which time the Law Commissions Act 1965, providing for the establishment of the Law Commission, was enacted. Mr Justice Scarman was the first Chair of the Commission.

7.5 In this chapter we first outline the current law of knowledge and approval and undue influence and then consider the overlap in the application of the principles and their relationship with each other and with the test of capacity. We then consider the role of the law in these areas and make recommendations for reform.

KNOWLEDGE AND APPROVAL

7.6 In addition to the requirement for a testator to have the necessary testamentary capacity to make a will, for that will to be valid a testator must also know and approve of the contents of his or her will. There is a logical link between capacity and knowledge and approval, although each asks a different question. The test of capacity asks whether the testator had the ability to understand that he or she is executing a will and the effect of doing so. The requirement of knowledge and approval focuses on whether the testator actually knows and understands the content of the document that is being executed as a will. Where that knowledge and approval is lacking the will is invalid. There is no requirement of knowledge and approval in respect of a statutory will, as those wills are executed by the Court of Protection for testators who lack testamentary capacity.[2]

The meaning of knowledge and approval

7.7 In *Ark v Kaur* it was explained that:

> Knowledge and approval of the contents [of a will] means only that the testator knows that he is making a will, knows what the terms of it are, and intends that those terms should be incorporated into and given effect by the will.[3]

7.8 This interpretation of knowledge and approval reflects that given in the contemporaneous decision in *Perrins v Holland*.[4] There, the Court of Appeal explained that "knowledge and approval requires no more than the ability to understand and approve choices that have already been made".[5]

7.9 On occasion, however, the courts have indicated that knowledge and approval goes further than an appreciation of the contents of the will. In *Hoff v Atherton*, Lord Justice Chadwick said that "it may well be that where there is evidence of a failing mind … the court will require more than proof that the testator knew the contents of the document which he signed".[6] Lord Justice Chadwick suggested the court:

> may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect.[7]

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2 Statutory wills are considered in Chapter 3.

3 [2010] EWHC 2314 (Ch), (2010) SJLB 34 at [19]. See also Fuller v Strum [2001] EWCA Civ 1879. [2002] 1 WLR 1097, at [59], approved in *Gill v Woodall* [2010] EWCA Civ 1430, [2011] Ch 380, at [14].

4 *Perrins v Holland* [2010] EWCA Civ 840, [2011] Ch 270.

5 Above, at [64].

6 *Hoff v Atherton*, [2004] EWCA Civ 1554

7 Above, at [64].

7.10 This interpretation suggests that knowledge and approval requires proof of the same things necessary to establish testamentary capacity. In *Perrins v Holland*, however, the court doubted that was Lord Justice Chadwick's intention.[8]

7.11 Knowledge and approval "requires decision, not mere assent".[9] It does not require knowledge and approval of the *legal* effects of the will,[10] and nor does the testator have to understand the legal terminology used in the will, or be aware of other means of achieving his or her goal.[11]

Timing

7.12 Knowledge and approval must be present at the time the will is executed.[12] There is an exception allowing knowledge and approval to be present at the time when a testator instructs a professional to write his or her will, rather than at the time of execution. This exception, which mirrors the rule in *Parker v Felgate* in relation to capacity,[13] applies where "… [the testator] knew what he was doing [in executing the will] and thus had sufficient mental capacity to carry out the juristic act which that involves".[14] Therefore, if the professional follows the testator's instructions and the testator knows on execution that the professional has prepared the will in accordance with his or her instructions, knowledge and approval can be satisfied.[15]

7.13 In our discussion of capacity we have noted the differing views of the rule in *Parker v Felgate*, but we have provisionally proposed that the rule should be retained. On the one hand, the rule deprives the testator the right to check at the point of execution of the will that the will carries out his or her instructions. On the other hand, however, the rule can ensure the testator's wishes are carried into effect where his or her capacity is in decline. Similar opposing views may be expressed on the operation of the equivalent principle in respect of knowledge and approval.

Evidence and presumption

7.14 The evidence produced as to knowledge and approval must relate to the preparation and execution of the will.[16] It is possible to have knowledge and approval for only part of a will.[17]

7.15 In assessing knowledge and approval it is clear that the court will place some emphasis on the fact that a testator with testamentary capacity has correctly executed the will. In

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8 *Perrins v Holland* [2010] EWCA Civ 840, [2011] Ch 270, AT [64].

9 *Key v Key* [2010] EWHC 408 (Ch), [2010] 1 WLR 2020, at [116].

10 *Morrell v Morrell* (1882) 7 PD 68 at 70 to 71.

11 *Greaves v Stolkin* [2013] EWHC 1140 (Ch), [2013] WTLR 1793.

12 *Guardhouse v Blackburn* (1886) 1 P & D 109 at 116.

13 See para 2.89 above.

14 *Perrins v Holland*, [2010] EWCA Civ 840; [2011] Ch 270 at [55].

15 *Re Flynn* [1982] 1 WLR 310 at 319 to 320; *In the Estate of Wallace* [1952] 2 TLR 925.

16 *Re R* [1951] P 10.

17 *Fuller v Strum* [2001] EWCA Civ 1879, [2002] 1 WLR 1097, at [36].

the leading Court of Appeal case of *Gill v Woodall*, whist rejecting the idea that a formal evidentiary presumption of knowledge and approval will be raised, Lord Neuberger said:

> As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testator's intentions at the relevant time.[18]

7.16 Where a will is challenged on the basis that the testator did not know and approve of its contents, the burden of proving knowledge and approval will be on the person propounding the will.[19] As Lord Neuberger's statement suggests, it may be sufficient to show that the will was prepared by a professional and read over to the testator. It may, however, be necessary to show that the testator heard and understood the will.[20] Particular evidence of knowledge and approval may be required where the testator is blind,[21] illiterate,[22] deaf or unable to talk,[23] or where the will was signed on the testator's behalf.[24]

The two stage and one stage approaches to knowledge and approval

7.17 The approach of the courts where a will is challenged for want of knowledge and approval previously consisted of two distinct stages. First, the court would consider if its suspicions were aroused, which is tantamount to asking whether an initial case that the testator did not know or approve the contents of the will had been shown.[25] The court's suspicions would be aroused, for example, where a beneficiary under a will helped prepare it,[26] including where the solicitor who prepares a will is a beneficiary under it.[27] Secondly, the court would then consider whether those suspicions could be addressed by the beneficiary providing an explanation for the apparently suspicious circumstances.

7.18 Commenting on case law in which the two-stage test was applied, Barbara Rich said

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18 [2010] EWCA Civ 1430, [2011] Ch 380 at [14].

19 *Barry v Butlin* (1838) 2 Moo PC 480 at 482.

20 *Franks v Sinclair* [2006] EWHC 3365.

21 Non-Contentious Probate Rules 1987, r 13.

22 Non-Contentious Probate Rules 1987, r 13.

23 *Re Geale's Goods* (1864) 3 Sw & Tr 431.

24 Non-Contentious Probate Rules 1987, r 13.

25 Gill v Woodall [2010] EWCA Civ 1430, [2011] Ch 380, at [21].

26 *Barry v Butlin* (1836) 2 Moo PC 480, applied in *Re Wilson (deceased)* [2013] EWHC 499 (Ch).

27 *Cushway v Harris* [2012] EWHC 2273 (Ch). The Law Society has provided guidance on proper conduct for solicitors where clients wish to leave them a gift in their will: Law Society, "Preparing a will when your client is leaving a gift for you, your family or colleagues" (20 January 2015), available at http://www.lawsociety.org.uk/support-services/advice/practice-notes/preparing-wills-when-your-client-is-leaving-a-gift-for-you-your-family-or-colleague/ (last accessed 14 June 2017).

> The scope of the court's inquiry is relatively narrow and quite striking suspicions may be dispelled by relatively limited yet cogent and inherently credible evidence.[28]

7.19 The two stage test of knowledge and approval was applied, for example, in *Fuller v Strum*.[29] There, the claimant (a family friend) was a beneficiary under a will and had been closely involved in its execution. The will made a number of gifts before leaving the residuary of the estate "very grudgingly" to the testator's adopted son. Referring to the son, the will stated "I hate him like poison. That Irish bastard". While the suspicions of the court were roused, the Court of Appeal held that the claimant had discharged the burden of dispelling the suspicion. The gift to him was modest, and the language used in the will to refer to the son reflected the poor relationship the testator had with him at the time the will was executed.

7.20 This two stage approach was, however, rejected by Lord Neuberger in *Gill v Woodall*.[30] In that case the judge at first instance had held that the testator, Mrs Gill, knew and approved of the contents of her will, under which her property passed to the RSPCA, to the exclusion of the claimant, her daughter. The judge had, however, set aside the will for undue influence. On appeal the Court of Appeal held that the will was invalid for want of knowledge and approval. Mrs Gill, who suffered from severe agoraphobia, had executed a mirror will along with her husband who had died before her. Lord Neuberger explained that he preferred a one stage approach to knowledge and approval. Under this approach, derived from the unreported decision of Mr Justice Sachs in *Re Crerar*, the court should

> consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption.[31]

7.21 The one stage approach has been endorsed in a number of subsequent cases, though not universally.[32]

7.22 In *Gill v Woodall* Lord Neuberger suggested that whichever approach is adopted, "the answer should be the same".[33] Opinion has differed on whether, in fact, the change of approach has affected the outcome of cases. Writing shortly after the decision in *Gill*, Ruth Hughes echoed Lord Neuberger's assessment.[34] But writing in 2015, Penelope

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28 B Rich, "What does "want of knowledge and approval" mean in the 21st century?" [2008] 5 *Private Client Business* 303.

29 [2001] EWCA Civ 1879, [2002] 1 WLR 1097.

30 [2010] EWCA Civ 1430, [2011] Ch 380.

31 Above, at [22], citing *Re Crerar* (unreported) (1956) 106 LJ 694, p 695, which decision was followed in *re Morris* [1971] P 62, p 78.

32 *Hawes v Burgess* [2013] EWCA Civ 94, [2013] WTLR 453.

33 [2010] EWCA Civ 1430, [2011] Ch 380, at [23].

34 R Hughes, "Probate: want of knowledge and approval" [2011] *Elder Law Journal* 122.

Reed QC suggested that it has in fact become easier to challenge a will on the basis of want of knowledge and approval.[35]

7.23 In *Gill*, there were no typically suspicious circumstances that might raise an issue of want of knowledge and approval. Nevertheless, the judge at first instance, applying the two stage approach, considered that there was an initial case of want of knowledge and approval, but went on to hold that the beneficiary under the will rebutted the initial case. The beneficiary under the will (the RSPCA) was not involved in the making of the will, and the will was explained to Mrs Gill by her solicitor.

7.24 However, the Court of Appeal was satisfied that in the unusual circumstances of the case, Mrs Gill's agoraphobia precluded her from being able to know and approve the contents of her will when it was read out to her in her solicitor's office. Her agoraphobia meant that she was reluctant to leave the farm, which was her home, or to be left alone at the farm, and was severely socially withdrawn. The impact of her mental condition on her understanding "would not even have been appreciated by most doctors, let alone a solicitor reading a draft will to her, especially if he had not met her before".[36] At the time of the meeting, expert evidence demonstrated that Mrs Gill

> would have experienced anxiety of such severity that her thoughts would have been dominated by an impulse to escape back to the safety of her house and she could not have followed or understood what she was doing or known or understood the terms and effect of her will.[37]

The effect of the Court of Appeal upholding the judge's order that Mrs Gill's will was invalid was that Mrs Gill was treated as having died intestate and her daughter inherited her estate.[38]

7.25 In *Hawes v Burgess* it was held that there was a lack of knowledge and approval where a will procured by one of the testator's children excluded another child for a reason which was untrue, even though the solicitor read out the will to the testator before she signed it.[39] Penelope Reed takes the view that:

> While the Court of Appeal in *Gill* made it clear the facts of the case were exceptional, one is left with a feeling that a different approach will make it easier in the right cases to plead want of knowledge and approval successfully and the number of cases where the plea has succeeded are increasing. It is clear that the involvement of the beneficiary in the will making process is not a requirement for the challenge to be invoked.[40]

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35 P Reed, "Capacity and want of knowledge and approval" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) para 3.4.

36 [2010] EWCA Civ 1430, [2011] Ch 380, at [65].

37 [2010] EWCA Civ 1430, [2011] Ch 380, at [44].

38 [2010] EWCA Civ 1430, [2011] Ch 380 at [10].

39 [2013] EWCA Civ 94, [2013] WTLR 453.

40 P Reed, "Capacity and want of knowledge and approval" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) para 3.11.

7.26 There have, however, been a number of recent cases, including *McCabe v McCabe*[41] and *Burns v Burns*[42] where challenges on grounds of lack of knowledge and approval have failed. In *Sharp v Hutchins*[43] it was reaffirmed that a surprising result under a will is not in and of itself enough to demonstrate a lack of knowledge and approval, especially where the testator was "an educated man, with full capacity who had drawn up previous wills", and where the will itself was "short and easy to understand".[44] Cook notes that this case demonstrates the importance of explaining in your will why you have left your estate in a certain way.[45]

Mistakes

7.27 The discussion of knowledge and approval so far has focused on a situation where the challenge to the will for want of knowledge and approval is based on the circumstances in which the will was executed, or mental state of the testator during the process of the will being made. A will may also be held to be invalid for want of knowledge and approval because of a mistake made by the testator or the person preparing the will for the testator. Want of knowledge and approval may be found, for example, where the will includes or omits particular words, or where the testator has mistakenly signed the wrong will.[46] Want of knowledge and approval will not invalidate a will, however, where the mistake is as to the legal effect of the will, rather than what the will says.[47]

7.28 Where words have been erroneously entered into a will and therefore the testator did not know and approve of the clause on grounds of mistake, there are three ways in which the court can assist:

(1) The court has the power to exclude words from probate of which the testator did not have knowledge and approval,[48] except for where this would change the meaning and effect of the remaining will.[49]

(2) The will can be rectified.[50]

(3) The courts may interpret a will to remove the effect of a mistake.

UNDUE INFLUENCE

7.29 Where someone makes a gift, or enters into a contract, but was not acting under his or her own free will, English law has a number of doctrines that operate to set aside the

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41 [2015] EWHC 1591 (Ch).

42 [2016] EWCA Civ 37, [2016] WTLR 755.

43 [2015] EWHC 1240 (Ch), [2015] WTLR 1269.

44 Above, at [46].

45 C Cook, "An unexpected beneficiary", available at http://www.privateclientadviser.co.uk/blog/unexpected-beneficiary.

46 As happened in *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129. On which, see Chapter 9.

47 J R Martyn, A Learmonth, J E Gordon, C Ford and T Fletcher, *Theobald on Wills* (18th ed 2016) para 3-025.

48 *In Re Morris, deceased* [1970] 2 WLR 865.

49 *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129.

50 See Chapter 9.

gift or contract. The law of undue influence one such doctrine. Gifts may also be set aside where they are have been procured by fraud (as we have noted in the introduction to this chapter), duress and misrepresentation.

7.30 Undue influence enables gifts and contracts to be set aside where the decision to make the gift, or enter into the contract, has been made as a result of unlawful pressure being applied. Gifts and contracts procured through undue influence are voidable and can therefore be set aside where the person subject to undue influence chooses to do so.[51]

7.31 Where a will is executed as a result of undue influence, the will is void and therefore has no effect.

7.32 The British Columbia Law Institute explains undue influence as follows:

> Undue influence consists of imposing pressure that causes a person to perform some legal act, such as making a will, that does not reflect the true wishes or intentions of that person, but rather those of the influencer.[52]

7.33 It is important to note that undue influence is concerned with "unlawful" pressure, as not all pressure is unlawful. The law recognises, for example, that it is perfectly legitimate for a person to seek to persuade a testator to make a gift to them in his or her will. As Sir J P Wilde explained in *Hall v Hall*:

> Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, - these are all legitimate and may be fairly pressed on a testator.[53]

7.34 The line between legitimate persuasion and undue influence is not always clear. There is a wide spectrum between egregious instances of undue influence and the innocent appeals of relatives seeking to curry favour with the testator. The line is crossed when the testator would say "this is not my wish, but I must do it".[54]

7.35 The law of undue influence that applies in respect of testamentary gifts is, however, different from that applied to lifetime gifts or contracts. The effect of this difference is that it is more difficult for a will to be set aside on the grounds of undue influence than it is for a lifetime gift or a contract. In order to understand the difference it is helpful briefly to explain the operation of the equitable doctrine of undue influence that applies to lifetime gifts and contracts before examining testamentary undue influence.

Equitable Undue Influence

7.36 Discussions of undue influence commonly distinguish between "actual" and "presumed" undue influence, but it is important to note that there is in fact a single doctrine. The central question for the court, in all cases, is whether a transaction was brought about

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51 Where that person has died, the gift or contract may be set aside on an application by a third party. For example, see *Tociapski v Tociapski* [2013] EWHC 1770 (Ch), [2013] WTLR 1821.

52 British Columbia Law Institute, Report No 61 (2011) p 5.

53 (1865 - 69) 1 P & D 481, p 482.

54 *Wingrove v Wingrove* (1885) 11 PD 81, by Sir James Hannen. See further, M Allardice, "The vulnerable testator and undue influence" [2017] *Elder Law Journal* 10, at p 12.

by the exercise of undue influence, which is a question of fact.[55] Whether undue influence is actual or presumed depends upon how that question has been answered.

7.37 In a case of actual undue influence, the party alleging undue influence is normally required to prove four elements of undue influence, that:

(1) "the other party to the transaction... had the capacity to influence the complainant;

(2) the influence was exercised;

(3) its exercise was undue; and

(4) that its exercise brought about the transaction. [56]

7.38 In a case of presumed undue influence, the ability of one party to influence the other, and the fact of undue influence, may both be presumed. The operation of presumed undue influence was set out authoritatively by the House of Lords in *Royal Bank of Scotland v Etridge (No 2)*.[57] As explained by Lord Nicholls in that case, a presumption of undue influence is raised where parties are in a relationship of influence and a transaction calls for explanation. Where the presumption is raised, the onus lies on the party seeking to enforce the contract (or retain the gift) to show that he or she did not exert undue influence.

Relationships of influence

7.39 In certain special classes of case, it is unnecessary to analyse the specific facts to determine whether the parties are in a relationship of influence. The nature of the relationship itself is taken as definitive evidence that a relationship of influence exists. In other words, the relationship gives rise to an irrebuttable presumption of influence (not undue influence, as all that is being presumed here is that one party had the capacity to influence the other).

7.40 A presumption that there is a relationship of influence is raised where a gift is made:[58]

(1) by a child to a parent[59] or guardian;[60]

(2) by a beneficiary to a trustee;

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55 *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44; [2002] 2 AC 773, at [13].

56 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, 967; H Beale, *Chitty on Contracts*, para 8-066.

57 [2001] UKHL 44; [2002] 2 AC 773.

58 At one time it was thought that there was a relationship of influence where a gift was made from a fiancée to her fiancé but this no longer appears to be the case, see J McGhee QC (ed), *Snell's Equity* (33rd ed 2016) para 8-030.

59 The presumption appears to end a short time after the child reaches 18 years of age: *Re Pauling's Settlement Trusts (No 1)* [1964] Ch 303, at p 337. The length of time for which the presumption remains after a child reaches majority (at the time of the case, 21 years of age) was considered by the court to be a question of "fact and degree".

60 But not once the wardship and the influence of the guardian has over the child's actions have come to an end: *Hatch v Hatch* (1804) 9 Ves 292.

(3) by a follower to a religious or spiritual adviser;

(4) by a patient to a medical adviser;

(5) by a client to a solicitor.[61]

7.41 The mere fact the relationship is one of influence does not mean that undue influence is present. The presumption does no more than direct the court to consider whether the gift calls for explanation.

7.42 There is no presumption of a relationship of influence between spouses or in gifts made by a parent to a child (or transactions entered into by a parent for the benefit of a child).

7.43 Where there is no presumption that the relationship is one of influence, the party alleging undue influence must show that the other party was in a position to influence the person making the gift or entering into the transaction. The vulnerability and dependence of the party who effected the transaction is relevant to the analysis and the mere fact of closeness and mutual trust does not establish a relationship of influence.[62]

Calling for explanation

7.44 If a relationship of influence exists (whether because it has been established, or is presumed), then the person alleging undue influence must show that the gift or transaction calls for explanation; in other words, that the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship.[63]

7.45 This second requirement performs an essential role. Without it, as Lord Nicholls explained, the law would presume that

> every gift by a child to a parent … was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far reaching. The law would be out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent …. The law would be rightly open to ridicule, for transactions such as these are unexceptionable.[64]

7.46 This requirement therefore ensures that the presumption is raised only (for example) where "the gift is so large as not to be reasonably accounted for on the ground of friendship, charity, or other ordinary motives on which ordinary men act".[65]

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61 For a discussion of the relationships of influence set out at (1) to (5) see J McGhee QC (ed), *Snell's Equity* (33rd ed 2016) para 8-024 to 8-029.

62 J McGhee QC (ed), *Snell's Equity* (33rd ed 2016) para 8-031 citing *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44; [2002] 2 AC 773 and *Thompson v Foy* [2009] EWHC 1076 (Ch).

63 *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44; [2002] 2 AC 773, at [22] to [24] by Lord Nicholls.

64 *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44; [2002] 2 AC 773, at [24].

65 *Allcard v Skinner* 36 Ch D 145, p 185.

The presumption of undue influence

7.47 A presumption of undue influence arises where there is proof of both a relationship of influence and a transaction calling for explanation.

7.48 In order for that presumption to be rebutted, the court must be satisfied "that the donor was acting independently of any influence from the donee and with full appreciation of what he was doing".[66] This question is different from the question of whether the transaction calls for explanation. It requires proof that the transaction was a result of "full, free and informed thought".[67] The conclusion that the transaction was entered into as a result of undue influence is avoided by showing that while the donor effected a questionable transaction, he or she did so knowingly and freely.

7.49 The most usual way of rebutting the presumption of undue influence is to prove that the donor was independently advised. However, there are no limits to the appropriate evidence and the provision of independent advice is not always sufficient to rebut the presumption. Ultimately, "[the] question of whether the presumption of undue influence has been rebutted is a question of fact to be determined on all the evidence".[68]

TESTAMENTARY UNDUE INFLUENCE

7.50 The law of undue influence that is applied when a will is challenged (which we refer to as testamentary undue influence) operates differently to the general equitable doctrine.

7.51 Where a will is challenged on the basis that it has been executed through undue influence, no presumption of undue influence is available. Instead, the burden falls on the person challenging the will to prove the undue influence. In this respect, in testamentary cases claims to undue influence are confined to actual undue influence.

7.52 Further, the burden imposed on the person claiming undue influence appears high. Under the general doctrine, undue influence has been found in a wide range of behaviour from threats, coercion and blackmail to honest advice given where the relationship was one of influence.[69] In contrast, testamentary undue influence has been held to be confined to coercion. As was explained in the seminal mid-nineteenth century case of *Boyse v Rossborough*:

> I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and

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66 *Inche Noriah v Sheik Allie Bin Omar* [1929] AC 127, 135.

67 J McGhee QC (ed), *Snell's Equity* (33rd ed 2016) para 8-033, citing *Zamet v Hyman* [1961] 1 WLR 1442.

68 *Royal Bank of Scotland Plc v Etridge (No.2)* [2001] UKHL 44; [2002] 2 AC 773 at [20].

69 J McGhee QC (ed), *Snell's Equity* (33rd ed 2016) para 8-018.

make him execute as his will an instrument which, if he had been free from such influence, he would not have executed.[70]

The approach to testamentary undue influence

7.53 The approach to testamentary undue influence was summarised by Mr Justice Lewison (as he was then) in *Re Edwards (deceased)* in the following terms.

> i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;
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> ii) Whether undue influence has procured the execution of a will is therefore a question of fact;
>
> iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;
>
> iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.
>
> v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;
>
> vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A “drip drip” approach may be highly effective in sapping the will;
>
> (…)
>
> ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent.[71]

7.54 In *Re Edwards* the testator had previously made a will in which her estate was shared equally between her two sons, Terry and John. She then made a new will in which Terry inherited the estate to the exclusion of John. At the time the new will was made, the

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70 *Boyse v Rossborough* (1857) 6 HLC 2 at 48 to 49 by Lord Cranworth.

71 [2007] EWHC 1119 (Ch), [2007] WTLR 1387, at [47].

testator was frail and elderly and after a stay in hospital she had been taken back, against medical advice, to the home she shared with Terry. Mr Justice Lewison explained that at the time she made the new will, the testator was "… frail and vulnerable, and frightened of Terry" who kept her way from John, with whom she had an excellent relationship. The judge held that Terry had used the time to poison the testator's mind against John and his wife by making deliberately untruthful accusations. Mr Justice Lewison concluded that in changing her will, the testator "was simply doing as she was told. In my judgment that amounts to undue influence".[72]

7.55 This summary has been cited with approval in several cases.[73] Doubt has, however, been cast on the suggestion that for a claim of undue influence to succeed the circumstances must be "inconsistent with a contrary hypothesis". This requirement, which has its origins in *Boyse v Rossborough*, does not reflect the current approach to the civil standard of proof.[74] In *Cowderoy v Cranfield*, Mr Justice Morgan said:

> where I have considerable evidence as to the circumstances in which the disputed will was prepared and executed, I think it is more appropriate for me simply to ask whether the party asserting undue influence has satisfied me to the requisite standard.[75]

7.56 The undue influence may be applied by a third party, in order to benefit someone else, as in the case of *Schomberg v Taylor*,[76] discussed below.

Recent case law

7.57 A claim to undue influence succeeded in *Schrader v Schrader*, a case which has some similarly to *Re Edwards*. There, the elderly testator made a new will leaving her home (her main asset) to one of her sons, Nick. The will replaced a previous one in which her estate was divided equally between her two sons. In finding undue influence, Mr Justice Mann took into account a number of factors. He considered the testator's vulnerability; her dependence on Nick; his "powerful personality" and "forceful physical presence" (although there was no abuse); the fact that her reasons for excluding her other son were inaccurate; and that Nick had taken more of a role in procuring the will than he had initially admitted. It was also relevant that the will had not been written by the testator's usual solicitors.

7.58 The frail health of the elderly testator in *Schomberg v Taylor* was also relevant to the finding of undue influence. The testator, who is described as being "in a very fragile physical and mental state" following the loss of her husband changed her will to benefit her brother-in-law's children, to the exclusion of her step-sons, who were beneficiaries under a previous will and with whom the testator had a good relationship. The judge

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72 Above, at para [55].

73 *Cowderoy v Cranfield* [2011] EWHC 1616 (Ch), [2011] WTLR 1699; *Wharton v Bancroft* [2011] EWHC 3250 (Ch), [2012] WTLR 693; *Schrader v Schrader* [2013] EWHC 466 (Ch), [2013] WTLR 701; *Schomberg v Taylor* [2013] EWHC 2269 (Ch), [2013] WTLR 1413

74 M Allardice, "The vulnerable testator and undue influence" [2017] *Elder Law Journal ,* 10, pp 13-14

75 Above, at [141]. This view was endorsed in *Wharton v Bancroft* above, at [30] and *Schomberg v Taylor* above, at [30].

76 [2013] EWHC 2269 (Ch).

explained that there was "no obvious reason" for this fundamental change unless the testator had been pressurised. There was "cogent evidence" of pressure being applied by her brother-in-law, which satisfied the judge that the testator was

> so worn down … that she was prepared to do what [her brother-in law] was suggesting in order to have a quiet life, rather than because that reflected what, in reality, she wanted to do.[77]

7.59 These recent decisions are not, however, considered to be typical of testamentary undue influence claims. They have been described as "rare" examples of the courts' willingness to find undue influence on the basis of circumstantial evidence.[78] The absence of the presumptions applied under the general doctrine, combined with the high bar of establishing coercion, means that claims for testamentary undue influence commonly fail for a lack of sufficient evidence.

7.60 For example, in *Re Devillebichot (deceased)* it was held that the testator had been persuaded, but not influenced;[79] in *Wharton v Bancroft*, in the case of a deathbed will, there was insufficient evidence that the testator had been coerced;[80] in *Cowderoy v Cranfield*, no undue influence was found on the part of a friend of the testator's alcoholic son, as there was no evidence that the friend "ever tried to persuade … [the testator] to make a will in his favour" and no such inference could be drawn.[81] In other cases, the suggestion that the testator was subject to undue influence has appeared misconceived. In *Parker v Litchfield* it was held that the testator had in fact been "an independent-minded woman who was keen to do things her way".[82] In *Jeffery v Jeffery* it was found that it had in fact been the testator who was "undoubtedly dominant" in her relationship with the person alleged to have applied undue influence.[83]

Undue influence and fraudulent calumny

7.61 A specific type of fraud, known as fraudulent calumny, is sometimes pleaded alongside a claim to undue influence. Fraudulent calumny, like undue influence, provides a basis on which a will may be set aside. It was described in *Re Edwards* by Mr Justice Lewison (as he then was) in the following terms:

> The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside.[84]

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77 [2013] EWHC 2269 (Ch) at [107], [110], [108] and [109] respectively.

78 M Allardice, "The vulnerable testator and undue influence" [2017] *Elder Law Journal* 10, at p 14.

79 [2013] EWHC 2867 (Ch), [2013] WTLR 1701.

80 [2011] EWHC 3250 (Ch), [2012] WTLR 693.

81 [2011] EWHC 1616 (Ch), [2011] WTLR 1699, at [147].

82 [2014] EWHC 1799 (Ch), at [31].

83 [2013] EWHC 1942 (Ch), [2013] WTLR 1509, at [173].

84 Above, at [47].

7.62 Mr Justice Lewison went on to explain that "[the] essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false".

7.63 While the will in *Re Edwards* was set aside on the basis of undue influence, it seems that the facts of the case also fit the description of a claim to fraudulent calumny.

THE RELATIONSHIP BETWEEN KNOWLEDGE AND APPROVAL, UNDUE INFLUENCE AND CAPACITY

7.64 Where a will has been executed and the testator has died, there are three key ways in which the law ensures that the will represents the testator's true wishes:

(1) the testator must have had capacity to execute the will;

(2) the will must reflect the testator's actual intentions; and

(3) those intentions must have been freely formed by the testator.

7.65 At face value, each of these questions is distinct. The first is ensured by the rules on capacity, which focuses on the mental capacity of the testator. The second is ensured by knowledge and approval, which is concerned with the relationship between the testator's wishes and the content of the will, as well as by rules relating to the rectification and interpretation of wills that we consider in Chapter 9. The third is ensured by undue influence, which focuses on the process by which the will was written.

7.66 In practice, the relationship between these three issues is closely intertwined. Each has a role to play in protecting vulnerable testators by ensuring that a will is given effect only where it represents a genuine expression of testamentary freedom, and the precise relationship between them is not clear.

7.67 The relationship between undue influence and capacity is perhaps the most straightforward. Whilst capacity ensures that a will is not given effect where the testator lacked mental capacity to execute the will, undue influence protects testators who retain capacity, but have acted under coercion. The relationship between these principles is not further discussed.

7.68 In the remainder of this chapter, we consider the relationship between knowledge and approval and capacity, and knowledge and approval and undue influence, and make recommendations for reform.

Knowledge and approval and capacity

7.69 We have noted above that knowledge and approval has been interpreted in different ways.[85] On one interpretation, it requires knowledge and approval of the same issues as are given in *Banks v Goodfellow* in respect of capacity. On this view, it would be difficult for a court to find that a testator had knowledge and approval of a will if the

[85] See para 7.7 above.

testator lacked capacity.[86] The more recent view, however, is that all that is required is knowledge and approval of choices that the testator has already made.[87]

7.70 On either interpretation of knowledge and approval, a testator may have capacity but not have knowledge and approval of his or her will. In *Gill v Woodall*, counsel for the appellant (the charity beneficiary) argued that, if the testator were incapable of taking in what she was being told about the contents of a document this necessarily raised an issue of capacity (which had not been pleaded) rather than knowledge and approval. Lord Justice Lloyd rejected that suggestion.[88] In holding that the testator did not know and approve of the contents of a will, which had been executed in a solicitor's office, Lord Justice Lloyd explained:

> It is one thing to say that on a relevant date Mrs Gill had the necessary understanding of the nature and extent of the property of which she could dispose by her will, and of the claims of relevant persons on her benevolence. It is quite another to examine whether, in particular circumstances, she did in fact understand what was said to her at a given meeting and what was in the document which she signed.[89]

7.71 There, the testator may have been able to have knowledge and approval of her will if had been executed in circumstances that mitigated the effects of her severe agoraphobia; for example, if had been executed at home with the contents explained to her by people that she knew.[90]

7.72 Both capacity and knowledge and approval are required at the same time; the date on which the will is executed. In this respect, the question of whether a testator who lacks capacity can have knowledge and approval of a will appears irrelevant – the will would fail for lack of capacity.

7.73 Practical questions arise, however, where there is a gap between the giving of instructions for a will and its execution. As we have seen above, knowledge and approval benefits from a rule akin to the rule in *Parker v Felgate* that is applied in relation to capacity.[91] The combined effect of the rules is that where a testator loses capacity between giving instructions for a will and the execution of the will, the will is not made invalid because of the testator's lack of capacity or want of knowledge and approval at the time the will was executed.

7.74 If knowledge and approval requires awareness of the same issues that are set out in *Banks v Goodfellow* in respect of capacity, then the need to mirror the rule in *Parker v Felgate* is apparent. But even if knowledge and approval is confined to an awareness of choices already made, the same policy that underpins the rule in *Parker v Felgate*

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86 P Reed, "Capacity and want of knowledge and approval" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) para 3.17.

87 *Perrins v Holland* [2010] EWCA Civ 840, [2011] Ch 270.

88 [2010] EWCA Civ 1430, [2011] Ch 380.

89 Above, at [70].

90 Lord Justice Lloyd acknowledged, however, that there might still have been difficulties in the will being executed in such circumstance: above, at [70].

91 See para 2.89 above.

supports a mirror rule operating in relation to knowledge and approval; that is, the desire to give effect to the testamentary wishes of a testator where his or her capacity declines after giving instructions. It would appear inconsistent to hold that, where the testator loses capacity between giving instructions and the execution of the will, the will is saved from invalidity for lack of capacity, but may fail for want of knowledge and approval.

7.75 Even if, as appears to be the case, knowledge and approval is confined to an awareness of previous choices, then it is possible that a testator who has lost capacity at the time that his or her will is executed is, notwithstanding, able to display knowledge and approval of the contents of the will. It will be necessary to invoke the rule mirroring *Parker v Felgate* only where the decline in capacity is such that the testator is unable even to demonstrate knowledge and approval of previous choices.

7.76 In Chapter 2 we have provisionally proposed that the rule in *Parker v Felgate* should be retained for the purposes of capacity. Similarly, we consider that the mirror rule that applies in respect of knowledge and approval should be retained.

Consultation Question 35.

There is currently a rule relating to knowledge and approval that mirrors the rule in *Parker v Felgate*, which relates to capacity. The rule allows, by way of exception, that the proponent of a will may demonstrate that the testator knew and approved the contents of his or her will at the time when he or she instructed a professional to write the will, rather than the time at which the will was executed.

We provisionally propose to retain the rule.

Do consultees agree?

Knowledge and approval and undue influence

7.77 The most complex relationship is that between knowledge and approval and undue influence.

7.78 In particular, there is a concern that the law has developed in such a way that in a number of instances wills are being challenged on the basis of want of knowledge and approval, when in fact the circumstances would more appropriately give rise to a claim to undue influence.

7.79 The foremost critic of the law concerning knowledge and approval is Professor Roger Kerridge.[92] He has identified a number of reasons for claimants inappropriately invoking knowledge and approval instead of undue influence (or fraud), which he considers to be a cause for concern. Professor Kerridge traces this approach to the decision of the Court of Appeal in *Wintle v Nye*.[93] There, want of knowledge and approval was pleaded where a solicitor helped to prepare a will under which he benefitted. We have explained

92 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 85. See also E Myers, "The friendly approach" (2015) 165 New Law Journal.

93 [1959] 1 WLR 284.

above that a beneficiary's participation in making a will is a matter that would raise the court's suspicions in the context of knowledge and approval.[94] Professor Kerridge, however, suggests that the plea was a cover for the solicitor's fraud.[95] Subsequently, in the *Estate of Fuld*,[96] Mr Justice Scarman (as he then was) welcomed the decision in *Wintle v Nye*. He said:

> It may well be that positive charges of fraud and undue influence will not feature as largely in the pleadings of probate cases, now that *Wintle v Nye* has been decided, as they have done in the past; clearly it would be preferable if they did not, and I am bound to say that it was unnecessary in the present case for such charges to have been raised.[97]

7.80 It has been suggested, for example, that the claim for want of knowledge and approval in *Fuller v Strum*,[98] *Sherrington v Sherrington*[99] and *Hawes v Burgess*[100] cloaked allegations of undue influence.

Why is a plea of knowledge and approval preferred?

7.81 There are at least three reasons why want of knowledge and approval is pleaded in place of undue influence.

7.82 First, it has been suggested that a challenge based on the testator's want of knowledge and approval may be preferred by litigants in cases involving close family members. Litigants may be reluctant to allege fraud or undue influence on the part of family members.[101]

7.83 Secondly, and most significantly, Professor Kerridge notes that there is a positive incentive for those who wish to challenge a will to plead knowledge and approval rather than undue influence and fraud, given that the burden of proving knowledge and

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94 See para 7.17 above.

95 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 95. In *Wintle v Nye* the House of Lords ordered a retrial because they found that the jury has been misdirected, but the solicitor, Nye, then conceded the case.

96 [1966] 2 WLR 717.

97 Above, at 722.

98 [2001] EWCA Civ 1879. [2002] 1 WLR 1097, R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 86. In this case one of the principal beneficiaries drew up the will (using a will form) for the testator in a bedroom in the testator's house, with only the testator and the beneficiary present.

99 [2006] EWCA Civ 1784 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 96. In this case the testator's will, which left everything to his second wife, had been prepared by her daughter (his step-daughter). The court at first instance found that the testator's relationship with his second wife was so bad that it caused him great unhappiness and deep depression and that the deceased would "…do anything for a peaceful life."

100 [2013] EWCA Civ 94, [2013] WTLR 453, see M Evans, "Knowledge is power", available at http://www.privateclientadviser.co.uk/blog/knowledge-power (last accessed 14 June 2017). In this case the judge at first instance had found that the daughter who benefited from the new will which disinherited her brother had been the "controlling force" in the instructions given for the drafting of the will.

101 J Brook, "The Neighbour, The Carer and The Old Friend – the Complex World of Testamentary Capacity", in H Conway and R Hickey (eds) *Modern Studies in Property Law* (9th ed 2017) p 119.

approval is on the propounder of the will. By contrast, those challenging the will on the grounds of undue influence or fraud will have to positively prove their case and a failed challenge on these grounds will usually result in the challenger having to pay the costs of those propounding the will.[102] In contrast, those "…who unsuccessfully plead lack of knowledge and approval hope to be awarded costs from the estate, or at least not to have a costs order made against them."[103]

7.84 Thirdly, Professor Kerridge argues that changes to the procedural rules that govern claims have made it easier for knowledge and approval to be used in contentious probate cases to "cloak" an argument that is, in fact, one of undue influence and fraud.[104] On the other hand, however, in *Ark v Kaur* it was emphasised that "the court will not allow the rule [as to excitement of suspicion] to be used to screen for allegations of fraud and dishonesty, which must be pleaded and proved".[105]

Does reliance on knowledge and approval matter?

7.85 The question must be asked whether it matters that claimants are relying on knowledge and approval even if the substance of their allegation would more appropriately be considered to reveal undue influence.

7.86 The primary purpose of the law in this context is to protect vulnerable testators. That purpose is achieved where a will is set aside for want of knowledge and approval, even if undue influence would have been a more appropriate claim. Indeed, it may be suggested that reform that seeks to deny the claim risks leaving vulnerable testators without sufficient protection. A desire for claims to be honest is important, but if the facts support two possible avenues to challenges, then the claimant is entitled to choose whichever plea (of undue influence, or want of knowledge and approval) he or she wishes.

7.87 There are, however, two reasons why reliance on knowledge and approval gives rise to concern. First, it means that the requirement of knowledge and approval is being asked to perform a task that it is neither designed nor best placed to achieve. As has been noted above, undue influence is concerned with the process by which a will has been made. In other words, it ensures that the testator's knowledge and approval of his or her will has been given freely. Knowledge and approval is directed at the substance of the document that has been signed as a will, and the testator's awareness of the contents. To invoke knowledge and approval where the substantive claim that is being made is that the testator did not freely execute the will conflates procedure and substance.

7.88 The requirement of approval in knowledge and approval can be understood widely or narrowly. Understood narrowly, it requires only that the testator approves the content of

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102 See R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) pp 89 to 90.

103 See R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 97. On costs see J R Martyn, A Learmonth, J E Gordon, C Ford and T Fletcher, *Theobald on Wills* (18th ed 2016) para 11-104.

104 See R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) pp 85 and 90.

105 [2010] EWHC 2314 (Ch), (2010) 154(36) SJLB 34, at [43].

the document and intends that document to be his or her will. Understood widely, approval also requires the testator to be acting on the basis of his or her own free will. This wider interpretation conflates knowledge and approval with undue influence. It is possible (on the narrow interpretation) for a testator to intend a document to be his or her will, despite (indeed, because) the testator has been placed under undue pressure. Restricting "approval" to this narrow interpretation does not, however, mean that the will is valid. It means only that the role of determining whether the testator's approval of the will was freely reached is determined through undue influence.

7.89 It is important that determining whether the testator acted freely in approving his or her will is left to undue influence because the question of process raises distinct issues to that of substance. The law of undue influence is equipped to direct the court as to how to answer those questions (such as whether the testator was coerced) in a way that knowledge and approval is not. There is a danger therefore that relying on knowledge and approval to answer questions of process will not provide adequate protection.

7.90 Secondly, the fact that claimants rely on knowledge and approval suggests that undue influence is not able adequately to perform the role it is intended to achieve in the context of wills. In other words, reliance on knowledge and approval suggests dissatisfaction with the operation of testamentary undue influence and therefore a need for reform.

REFORM

7.91 We consider that recommendations for reform must take into account collectively the role of undue influence and knowledge and approval. Reform must have at its centre the need to protect testamentary freedom. To do so, however, it is necessary to balance two objectives.

(1) The law must provide adequate protection to vulnerable testators by ensuring that wills that do not reflect the freely made wishes of the testator are able to be challenged.

(2) The law must not encourage speculative or spurious claims by disappointed beneficiaries.

7.92 In particular, in relation to the second of these objectives, it is important to make clear that a will should not be left subject to challenge simply because it does not accord with social norms or expectations. The mere fact, for example, that the testator favours one child over another, a second family over a first, friends over family, or charity over family and friends, is not a ground to cast suspicion over a will. Such decisions are the expression of testamentary freedom, not an indication that a vulnerable testator has been abused.

7.93 We first consider reform to undue influence and then consider knowledge and approval in light of our recommendations for reform of undue influence.

Undue influence

7.94 Stakeholders we have spoken to have expressed concern that it is currently too difficult to challenge a will on the basis of testamentary undue influence. In particular, stakeholders are concerned that vulnerable testators are not adequately protected from

financial abuse in older age.[106] We have been told that where financial abuse arises it may often occur within a family, and may be conducted without an awareness that any wrongdoing is being committed.

7.95 Outside of family relations, there is an awareness of the potential for financial abuse to be conducted by professional carers. Again, the abuse may arise without an awareness of wrongdoing; for example, where a carer accepts a gift of money from a vulnerable person. We emphasise that we have not been told that undue influence by professional carers is a significant problem; indeed the majority of carers carry out a very difficult job with honesty and dedication. Stakeholders who provide care for particularly vulnerable people have explained to us policies that they have in place to minimise risks, such as not permitting staff to accept testamentary (or lifetime) gifts. We have, however, been told of particular concerns that arise in respect of undue influence where testators are socially isolated, for example as a result of age, illness or disability. We have also heard anecdotally of particular instances where a carer has formed an intimate relationship with an older testator, sometimes involving marriage, where there is a suspicion that the carer may have been motivated by a desire to obtain that person's assets. It has not, however, been suggested to us that such occurrences are common.

7.96 Reform could take one of two approaches:

(1) the general doctrine of undue influence could be applied in the testamentary context, so that the presumptions that operate under the general doctrine can be invoked; or

(2) a specific statutory form of testamentary undue influence could be created.

7.97 We consider that adopting the general doctrine of undue influence is neither appropriate nor workable and we explain our reasons below. We then put forward two forms that the specific law of testamentary undue influence could take.

Applying the general doctrine of undue influence in the testamentary context

7.98 The development of a separate law of testamentary undue influence appears to be based on the idea that a will does not strip a person of property during his or her lifetime. In other words, the harm to the individual is different in the lifetime and testamentary contexts. This distinction was drawn by Viscount Haldane in *Craig v Lamoureux*.[107] He explained:

> A will, which merely regulates succession after death, is very different from a gift inter vivos, which strips the donor of his property during his lifetime … . There is no reason why a husband or a parent, on whose part it is natural that he should do so, may not put his claims before a wife or a child and ask for their recognition, provided the person making the will knows what is being done.[108]

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106 See further, in a different context (financial abuse by an attorney under a lasting power of attorney), Dalley et al, "Exploring financial abuse as a feature of family life: an analysis of Court of Protection cases" [2017] *Elder Law Journal* 28.

107 [1920] AC 349.

108 [1920] AC 349, 356 to 357.

7.99 We question whether, as a matter of policy, this distinction is convincing. While the testator is not deprived of his or her property, in the testamentary context undue influence operates to deprive of property those who would have inherited but for the undue influence. Further, harm is caused to the testator who is deprived of the exercise of his or her testamentary freedom. Indeed, it has been suggested that being able to raise a presumption of undue influence:

> … is more necessary in the case of wills, because exploiters might be more inclined to refrain from depredations in the *inter vivos* context by the very fact that their victims might still be alive and able to expose them.[109]

7.100 Nevertheless, we consider that there is good reason to treat the testamentary context differently. First, the relationships in which a presumption of undue influence is raised in the general doctrine do not necessarily capture those in which there may be a suspicion of undue influence in the testamentary context. For example, a large gift from an adult child to a parent in a will may not be considered at all unusual because, where a child dies before his or her parent(s) the parent may be the natural beneficiary of the child's property.[110] Conversely, the relationship between a professional carer and the recipient of care in which, as explained above, there may be particular concerns in the testamentary context, is not presumed to be one of influence under the general doctrine.

7.101 Secondly, we are concerned that the general requirement that a transaction calls for explanation may operate too broadly in respect of a will. This would particularly be the case were the requirement to be used to challenge a will which did not correspond to social norms or expectations; for example, by favouring one child over the other. The concern that the general doctrine of undue influence may threaten testamentary freedom in this way has been voiced by Professor Pauline Ridge. As she explains:

> There is … a danger that the judicial discretion involved in deciding whether requirements (i) and (ii) [relationship of trust and confidence and whether a transaction can be explained on the facts] of an equitable undue influence claim are satisfied on the facts of a particular case could lead courts to decide claims according to cultural norms regarding the testamentary disposition of property, rather than upholding freedom of testation, however socially unacceptable.[111]

7.102 Thirdly, where a presumption of undue influence is raised in the lifetime context, a common way of rebutting the presumption is to show that the person claiming to have

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109 DR Klinck, "Does the presumption of undue influence arise in the testamentary context?" (2005) 24 *Estates, Trusts and Pensions Journal* 125, at 136 to 137.

110 As is reflected in the intestacy rules where, in the absence of a spouse or children (or other descendants), the property of an intestate person will pass to his or her parents (see Administration of Estates Act 1925, s 46). In addition, as we have discussed at paragraph 7.40 above the presumption may last only a short time after the child reaches 18 and minor children cannot currently make a will (see Chapter 8 for a discussion of possible reform in this area), making the presumption less applicable in the testamentary context.

111 P Ridge, "Equitable undue influence and wills" (2004) 120 *Law Quarterly Review* 617, at 633. Fiona Burns agrees: see F Burns, "Reforming testamentary undue influence in Canadian and English law" 29 *Dalhousie Law Journal* (2006), 455 at 474. See also F Burns, ", "Reforming testamentary undue influence in Canadian and English law" 29 *Dalhousie Law Journal* (2006) 455. Burns also cautions against adopting the general doctrine of undue influence in the testamentary context.

been unduly influenced received legal or other independent advice.[112] In the testamentary context, reliance on advice may place the beneficiary under a particular disadvantage. The beneficiary may have been unaware that the will has been executed, or as to its terms, and so unable to encourage the testator to seek advice. Further, in the wider context of encouraging people to make wills, a rule that operated to favour the validity of professionally drawn wills may be seen as placing a barrier in the way of home-made wills to the extent that it was seen as suggesting that a person considering making a will should necessarily seek professional advice.

7.103 Fourthly, and following on from the third point, it may generally be considered more difficult for a beneficiary to rebut a presumption where the person he or she is alleged to have unduly influenced is dead and so their own evidence is not available to the court. In the nineteenth century case of *Parfitt v Lawless* Lord Penzance explained:

> In those cases of gifts or contracts inter vivos there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took, and the circumstances that brought about the gift or obligation, the Court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no part in or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burthen of shewing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge.[113]

7.104 We note, however, that this concern does not prevent the operation of the presumption where the donor of a lifetime gift has died before a claim to undue influence is made.[114]

7.105 We consider the collective force of these arguments persuasive. We are concerned that the adoption of the general doctrine of undue influence in the testamentary context risks leaving wills too ready to challenge by disappointed beneficiaries. The operation of the presumptions would cast the web of suspicion too widely in circumstances in which it may be difficult for the beneficiary to rebut a presumption once raised.

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112 M Allardice, "The vulnerable testator and undue influence" [2017] *Elder Law Journal* 10 at p 18.

113 (1869-72) LR 2 P&D 462, at 469.

114 See, for example, *Re Estate of Brocklehurst (deceased)* [1978] Ch 14, [1977] 3 WLR 696, and P Ridge, "Equitable undue influence and wills" (2004) 120 *Law Quarterly Review* 617, at 630; L Mason "Undue influence and testamentary dispositions: an equitable jurisdiction in probate law?" [2011] 2 *Conveyancer and Property Lawyer* 115, at 119; and DR Klinck, "Does the presumption of undue influence arise in the testamentary context?" (2005) 24 *Estates, Trusts and Pensions Journal* 125, at 136.

Consultation Question 36.

We provisionally propose that the general doctrine of undue influence should not be applied in the testamentary context.

Do consultees agree?

A statutory doctrine of testamentary undue influence

7.106 We consider that while the current law of testamentary undue influence is too narrowly drawn, causing claims to be made on the basis of want and approval, the general doctrine is too broad to apply to testamentary gifts. We have provisionally concluded, therefore, that there is a need for a specific, statutory form of testamentary undue influence that can focus on the particular harm that undue influence seeks to prevent in the testamentary context.

7.107 The idea of providing a specific form of undue influence for the testamentary context is not a novel one. Fiona Burns has argued that a modified doctrine of undue influence should be applied in the testamentary context as a means of imposing "practical and achievable thresholds".[115] While Burns expresses concern at the operation of presumptions in the testamentary context, we think that there is a role for them. We consider, however, that their scope needs to be more closely confined than under the general doctrine.

7.108 A statutory presumption of undue influence in the testamentary context has been introduced in British Columbia. There, statute provides as follows:

> In a proceeding, if a person claims that a will or any provision of it resulted from another person
>
> (a) being in a position where the potential for dependence or domination of the will-maker was present, and
>
> (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,
>
> and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.[116]

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115 F Burns, "Reforming testamentary undue influence in Canadian and English law" 29 *Dalhousie Law Journal* (2006) 455, at 486.

116 Wills, Estates and Succession Act, S.B.C. 2009, s 52.

7.109 In our view, the British Columbian provision appears to cast the scope of undue influence too widely. It focuses on the finding of a relationship of influence, to the exclusion of any requirement that the disposition calls for explanation.

7.110 We suggest that a statutory doctrine of testamentary undue influence could take one of two forms, either a structured approach or a discretionary approach. Those approaches would not affect cases in which undue influence can be proved directly. The approaches we consider would supplement rather than replace the law of undue influence as set out in *Re Edwards*[117] which concerns a finding of actual undue influence. The structured and discretionary approaches are mechanisms for applying a presumption of undue influence. Where undue influence is proved by a presumption it is presumed that the behaviour in question (the alleged undue influence) caused the testator to execute the will. Evidence in the case will focus on whether a presumption arises or whether it is rebutted.

A structured approach

7.111 A structured approach would follow the same pattern as the general doctrine, but modify the application of the doctrine more appropriately to suit the testamentary context. Under this approach, a presumption of undue influence would be raised (as it is under the general doctrine) where two pre-requisites are shown:

(1) the existence of a relationship of influence, which would be presumed in respect of some relationships; and

(2) the disposition calls for explanation.

7.112 An irrebutable presumption that there is a relationship of influence would be raised in respect of testamentary gifts made by the testator to:

(a) a trustee;

(b) a medical adviser;

(c) a person who prepares their will for remuneration; and

(d) a professional carer.

7.113 The first two relationships mirror those considered to be relationships of influence under the general doctrine. The third extends the relationship of solicitor and client under the general law to any person who prepares a will for remuneration. The fourth is designed to respond to the risk of abuse of vulnerable testators by paid carers, which is a particular concern in the testamentary context. Importantly, the category does not extend to family members and others who provide informal care.

7.114 The list excludes from the list applied under the general law gifts from a child to a parent or guardian. This category is excluded to ensure that testamentary dispositions that may be considered common are not too easily brought under suspicion. It would remain

[117] [2007] EWHC 1119 (Ch), [2007] WTLR 1387, at [47].

open for the person alleging undue influence to prove that a relationship of influence in fact existed in any particular case.

7.115 With regard to gifts made by a follower to a spiritual advisor, which are included in the list applied under the general law, we think that the question of whether a relationship of influence should be presumed in the testamentary context is a more finely balanced one. Such dispositions, like those from a child to a parent, may not be thought unusual in the testamentary context because of the link between spiritual beliefs and mortality. On the other hand, the relationship between a follower and his or her spiritual adviser may offer potential for undue influence.[118] Consequently, we ask consultees for their views on this point.

7.116 In all other cases, the existence of a relationship of influence would need to be proven.

7.117 Where a relationship of influence is presumed, or shown to exist, then a presumption of undue influence would be raised, as under the general doctrine, only where it is also established that the disposition made in a will calls for explanation.

7.118 The circumstances in which a testamentary gift calls for explanation would need to be carefully circumscribed, although there would necessarily be a need for the courts to consider the facts of individual cases.

7.119 We have explained above that under the general doctrine of undue influence a gift or transaction calls for explanation when it cannot readily be accounted for by the ordinary motives of persons in that relationship.[119] We consider that this criterion is inappropriate in the testamentary context. It gives rise to the risk, outlined above, of a presumption of undue influence being raised because a testamentary disposition departs from accepted norms or expectations. Instead, we consider that in the testamentary context, in determining whether a disposition calls for explanation, the court should be directed to consider two factors:

(1) the conduct of the beneficiary in relation to the making of the will; and

(2) the circumstances in which the will was made.

7.120 The first factor reflects a common feature in a number of cases in which testamentary undue influence has been found.[120]

7.121 Professor Kerridge has argued that there should be a presumption of undue influence where a beneficiary has been instrumental in the preparation of a will.[121] He considers that this approach would be preferable to the adoption of the general doctrine of undue influence as the general doctrine would not, in his view, have operated to raise a presumption in some cases where there is a suspicion of undue influence or fraud. For

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118 See Lindley J's comments in *Allcard v Skinner* (1887) 36 Ch 145 at 183.

119 See para 7.36 above.

120 For example, *Schrader v Schrader* [2013] EWHC 466 (Ch).

121 R Kerridge, "Wills made in suspicious circumstances: the problem of the vulnerable testator" (2000) 59 Cambridge Law Journal 310, at 322., and R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 107.

example, in *Re Rowinska (deceased)* following the testator's death the claimant produced a will in which he was named as the sole beneficiary.[122] The will had been prepared by the claimant a few weeks before the testator's death and revoked a previous professionally drawn will in which the testator had divided her estate amongst relatives in Poland, including the defendant, her niece, and various Catholic charities. The beneficiary's involvement cast suspicion on the will, along with the fact that it was written in English, when the testator's English was poor. The testator had remained in a close and strong relationship with her niece. The will was set aside for want of knowledge and approval.

7.122 We agree that the beneficiary's role in the making of the will is relevant, but we consider that it should still be necessary to establish a relationship of influence before a presumption is raised. While the relationship between the testator and beneficiary in *Re Rowinska* was not one that would have given rise to a presumption of influence under our proposal, that would not prevent the existence of a relationship of influence being shown on the facts. But we do not consider that the beneficiary's role need then meet the apparently high threshold of being "instrumental". The court should consider the beneficiary's role in light of the relationship of influence that has been found (or is presumed) to exist. There may also be situations of undue influence where the person influencing the testator is a third party rather than a beneficiary, and which would therefore not be caught by such a presumption. Furthermore, the threshold of "instrumental" could be difficult to apply in practice.

7.123 Great care must be taken to ensure that this provision regarding the conduct of the beneficiary is not interpreted too widely. There is nothing inherently suspicious, for example, in a son or daughter making arrangements for his or her elderly parent to see a solicitor and in accompanying the parent to the appointment. Equally, there is nothing suspicious in children enquiring whether their parents have written their wills and encouraging them to do so.

7.124 The second factor is designed to catch circumstances where the beneficiary has not been involved in making the will, or the beneficiary's involvement is not such as to suggest that the will calls for explanation, but the circumstances in which the will is made are such as to cast a suspicion of undue influence.

7.125 Care is needed in defining its scope as many cases may be susceptible to an "innocent" or "suspicious" interpretation. For example, the fact that a will is made close to the end of life following a change in circumstances (such as a decline in physical or mental health, or the forming of a new relationship) may suggest that the disposition calls for explanation. Equally, however, making the will may indicate no more than that the testator was planning for the end of life by putting his or her affairs in order. It will be necessary for the courts carefully to consider whether the disposition calls for explanation. A will executed by a testator who has become increasingly isolated, except through contact with the new beneficiary, may call for explanation; as may a will which significantly excludes previous beneficiaries where there is no apparent reason for the change (other than the alleged undue influence). Conversely, a change made that reflects the realities of the testator's life would not call for explanation even though it leaves disappointed beneficiaries. For example, a will that excludes a beneficiary from

[122] [2005] EWHC 2794 (Ch), [2006] WTLR 487.

whom the testator has become estranged, or favours those who have played a more significant role in the testator's final years.

7.126 Once the presumption of undue influence is raised, it would be necessary for the beneficiary to rebut the presumption. As we have seen above, in the general doctrine the presumption is commonly rebutted by showing that legal or other independent advice was obtained.[123] We have noted, however, that reliance on obtaining advice does not necessarily work in the testamentary context. Where legal advice has in fact been obtained, then it will of course still be relevant for the court to take into account. But it will be necessary for the court to look at factors other than legal advice to consider whether the presumption has been rebutted. For example, the court may consider evidence of the testator's motivations for making the will, and of the extent to which the testator generally remained in control of managing his or her affairs. Ultimately, the presumption having been raised on the basis that the disposition calls for explanation, the question for the court is whether, on the balance of probabilities, an explanation has been given so that the court is satisfied that the testator acted freely.

7.127 We acknowledge that determining whether the presumption of undue influence should be raised and, if it is, when it is rebutted, may require a difficult assessment of facts by the court where a challenge to a will is made. However, by ensuring that the circumstances in which a presumption of undue influence arises are carefully drawn, it is only in cases in which there is a real suspicion of abuse that the assessment will need to be made.

A discretionary approach

7.128 The structured approach to testamentary undue influence suggested above retains the two pre-requisites to raising a presumption of undue influence that are contained in the general doctrine. It relies, therefore, on the court finding a relationship of influence and then finding that a gift that calls for explanation; each limb would have to be established in each case as a matter of law. While we have suggested that the two tests should remain relatively flexible, we cannot anticipate exactly how they would be applied by the courts. It is possible that judicial decisions about the scope of these tests could cause them to be crystallised in such a way as to prevent the court subsequently finding a presumption of undue influence in circumstances where such a presumption was desirable on the facts, or vice versa.

7.129 An alternative to the structured approach where undue influence is presumed if the court finds that there is a relationship of influence and a transaction calling for an explanation would be to give the court power to presume undue influence while only having to take into account these factors and the general circumstances of the case. In other words, to change the two criteria that have to be individually satisfied under the structural approach to considerations for the court in deciding whether there should be a presumption. Under this discretionary approach there would be no need to presume that certain relationships are relationships of influence. The precise framing of the court's power would need to be considered, but it could enable the court to presume undue influence "where it is satisfied that it is just to do so in all the circumstances of the case, taking into account in particular the extent to which there was a relationship of influence between the deceased and another person and whether the nature of the

[123] See para 7.48 above.

gift is such as to call for explanation". While this approach would still bring in the concepts of "relationship of influence" and "a gift calling for explanation", the more discretionary approach would put less focus on the precise scope of those concepts and ensure greater flexibility. If the court used its power to presume undue influence, it would then be for the proponent of the will to rebut that presumption.

Consultation Question 37.

We provisionally propose the creation of a statutory doctrine of testamentary undue influence.

Do consultees agree?

Consultation Question 38.

We invite consultees' views on:

(1) whether a statutory doctrine of testamentary undue influence, if adopted, should take the form of the structured or discretionary approach.

(2) if a statutory doctrine were adopted whether a presumption of a relationship of influence would be raised in respect of testamentary gifts made by the testator to his or her spiritual advisor.

Costs

7.130 As we have seen above, one of the reasons claimants may prefer to challenge the validity of a will on the basis of knowledge and approval rather than undue influence is because of the more favourable costs regime that applies. Some commentators have argued that the costs rules that apply in cases where undue influence are argued should be reformed, that is, claimants basing their claims on undue influence should not be in a more precarious position than claimants basing their claims on knowledge and approval.[124]

7.131 The thrust of that argument is that changing the costs rules would result in undue influence being pleaded more often and the role of knowledge and approval being more tightly circumscribed. Our proposals would have the same effect. Consequently, it may be thought that no change to the costs rules is necessary. Nevertheless, we have considered whether the costs rules should be changed and hope that it is helpful to set out our reasoning.

[124] R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 107; L Mason "Undue influence and testamentary dispositions: an equitable jurisdiction in probate law?" [2011] 2 *Conveyancer and Property Lawyer* 115, at 122; F Burns, "Reforming testamentary undue influence in Canadian and English law" 29 *Dalhousie Law Journal* (2006) 455, at 488.

7.132 In relation to costs, the general rule in litigation is that costs follow the event. That is, the unsuccessful party pays both their own costs and the costs of the successful party.[125] However, there are exceptions to the general rule which apply in contentious probate cases; costs will be paid out of the testator's estate where litigation has been caused by the conduct of the testator or the principal beneficiaries, or where the circumstances lead reasonably to an investigation of the matter.[126] Nevertheless, costs are always awarded at the discretion of the court[127] and parties pleading undue influence are likely to have to pay their opponent's costs if the claim fails. Lord Justice Hodson in *Re Cutliffe* said:

> it must surely be obvious to anyone who has studied the history of litigation in the Probate Division… that where pleas of undue influence and pleas of fraud are made, the probability, at any rate, if they are unsuccessfully made, is that people who make such charges and fail will be condemned in the costs not only of that charge but of the whole action.[128]

7.133 That statement might lead to concern about our proposal. It might be thought that our proposals could make claimants' positions precarious. Having to plead undue influence rather than want of knowledge and approval would seem to increase claimants' risk of being sanctioned in costs should their claims fail. Being in such a precarious position might act as a disincentive to litigation and, therefore, it might be thought that our proposal risks reducing the protection for vulnerable testators (by which we also mean protecting the testator's testamentary freedom by seeking to ensure that his or her estate does not pass to those whom the testator did not intend should inherit). That concern arguably warrants a change in the costs rules. However, our view is that the concerns can be adequately met without changing those rules.

7.134 To assess the impact of our proposal, it is necessary to consider the reason claimants are currently in a particularly precarious position when pleading undue influence. In short, under the current law, the circumstances of a case can seldom be seen as leading reasonably to an investigation of undue influence. The reason is that most claims that would succeed on the grounds of undue influence would succeed on grounds of want of knowledge and approval. It follows that it is usually unnecessary to plead undue influence and those claimants who do so unsuccessfully will face adverse consequences in costs.

7.135 That position would be different were our proposals to be taken up. There would be a greater range of circumstances in which it would be reasonable to contest a case on the basis of undue influence. The expanded doctrine of undue influence would make it easier to raise such claims, and the narrow scope for claims based on want of knowledge and approval would restrict the circumstances in which it would be appropriate to raise that issue. Consequently, if our proposal for a statutory doctrine of testamentary undue influence were taken up, there would be more cases in which the costs of an action on the basis of undue influence would be paid from the estate

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125 CPR r 44.2(b).

126 *Spiers v English* [1907] P 122 at 123. See also CPR r 57.7(5).

127 Senior Courts Act 1981 s 51.

128 *Re Cutliffe* [1959] P 6.

(following the rule that this is the case where the circumstances lead reasonably to an investigation of the matter). The costs position of claimants pleading undue influence would no longer be so precarious. The claims made by Lord Justice Hodson in *Re Cutliffe* would no longer ring true.

7.136 For that reason our opinion is that the costs rules are adequate as they stand and do not require amending as a result of our proposed reforms to undue influence and knowledge and approval. However, we would like to ask for consultees' views in this area.

Consultation Question 39.

We ask consultees to tell us whether they believe that any reform is required to the costs rules applicable to contentious probate proceedings as a result of our proposed reform to the law of undue influence, and knowledge and approval.

The effect of reform

7.137 We have given consideration to the practical effects, including the prospect of litigation, should our provisional proposal for reform to the law of undue influence be adopted.

7.138 First, we think that undue influence will be pleaded in more cases and want of knowledge of approval pleaded less often. While the result will not be affected in most cases, the focus of the court's inquiry will be more appropriately directed – to whether the will was freely executed.

7.139 One example of a case in which our proposal may have had an effect is *Hubbard v Scott*.[129] In this case an elderly man, aged 87, executed a will just over ten days before his death, leaving his estate to a woman who had at one time been his cleaner but who had moved into his house. The woman accompanied the man on both his visits to the solicitor to give instructions and to execute the will. There was a dispute over how long the man had known the woman but the judge rejected the claimants' case that they had only been acquainted for several months before his death.

7.140 The beneficiaries of a previous will challenged the will, attempting to establish a case of undue influence purely on circumstantial evidence. The challenge failed, Mrs Justice Proudman noting that there was "no evidence, including circumstantial evidence, of coercion or victimisation in this case".

7.141 While we cannot guarantee that our proposals (if adopted) would change the outcome of the case, it is clear that the nature of the inquiry would be different. On either the structured or discretionary approach the court would take account of whether a relationship of influence persisted and whether the disposition called for explanation. In effect, circumstantial evidence of behaviour short of coercion or victimisation could have been decisive in the case.

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[129] [2012] WTLR 2, cited in R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 91.

7.142 Secondly, our proposal should give litigants greater confidence in bringing a challenge on the basis of undue influence. Professor Kerridge explains the present situation as follows:

> It is almost certain that no challenge at all is launched against some thoroughly suspicious wills, while there are other cases where the propounders of the documents which invite serious investigation enter into compromises with their opponents, who are persuaded not to proceed to litigation.[130]

7.143 Thirdly, concern might be raised that our provisional proposal could bring about an undesirable increase in litigation. We consider that it would not. While there may be an increase in litigation initially, that increase is likely to fall away once the law "beds in" and has become well settled. Furthermore, much of the litigation brought on the basis of a new undue influence provision would probably have been brought on the basis of a lack of knowledge and approval; that is, some new proceedings will represent a change of basis rather than an increase in litigation. Where litigation on the basis of undue influence is brought that would not have been brought merely on the basis of knowledge and approval, we believe that it would be justified on the basis that is provides greater protection for testators.

Knowledge and approval

7.144 If a statutory doctrine of testamentary undue influence is introduced, then the role that needs to be played by knowledge and approval can and should be clarified in statute. This area of the law can then be confined to performing the function described in *Ark v Kaur* of ensuring that the testator knows that he or she is making a will and what its terms are, and intends those terms to be incorporated and given effect in the will.[131] In other words, "approval" is confined to the narrower understanding of the concept outlined above.

7.145 Importantly, on this narrower approach, knowledge and approval is not directed at questioning whether terms of the will have been freely decided by the testator in an exercise of testamentary freedom. That means that a testator may be found to have knowledge and approval of a will, regardless of whether or not the intention to execute the will was brought about by undue influence. That does not mean, however, that the will is valid; the will would be struck down through undue influence. We consider that this approach improves the protection available to vulnerable testators because it focuses the court's mind separately on issues of process and substance.

7.146 As we have discussed above, we think that there are cases under the current law where want of knowledge and approval is given as the reason for finding a will to be invalid where the circumstances of the case are, in fact, suggestive of undue influence. Under the present law of undue influence, it may too difficult to establish undue influence in the particular case. Cases involving "suspicious circumstances" have therefore been considered within the context of knowledge and approval. We think that the combined effect of our provisional proposals regarding undue influence and knowledge and approval should be that cases involving suspicious circumstances would instead be

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130 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 99, fn 220.

131 [2010] EWHC 2314 (Ch), (20100 34, at [19].

dealt with by reference to a reformed law of testamentary undue influence that makes use of statutory presumptions. For cases that do not involve suspicious circumstances, such as *Gill v Woodall*,[132] the key issue, other than the testator's capacity, would continue to be whether the testator knew and approved of the terms of the will.

7.147 We do not offer a view on the continuing relevance of presumptions in the law of knowledge and approval[133] beyond observing that:

(1) such presumptions appear to have less relevance in the current state of the law given the holistic, one-stage approach to knowledge and approval preferred by the Court of Appeal in *Gill v Woodall*;[134] and

(2) the effect of any such presumptions would be weakened by adoption of our provisional proposals in this area.

7.148 While reform could proceed by way of clarifying the presumptions that apply in the area of knowledge and approval[135] we hope that our provisional proposals offer, instead, a way of simplifying the law by reducing the overlap between undue influence and knowledge and approval.

7.149 To summarise, in terms of substance, the court is directed, through the law of knowledge and approval, to consider whether the testator approves the content of the document and intends that document to be his or her will. As a matter of process, though undue influence, the court will ensure that the will was freely executed by the testator.

Consultation Question 40.

We provisionally propose that the requirement of knowledge and approval should be confined to determining that the testator:

(1) knows that he or she is making an will;

(2) knows the terms of the will; and

(3) intends those terms to be incorporated and given effect in the will.

Do consultees agree?

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132 [2010] EWCA Civ 1430, [2011] Ch 380.

133 That is, that the testator with capacity who duly executes a will is presumed to know and approve of its contents, and that suspicious circumstances require affirmative proof of knowledge and approval.

134 [2010] EWCA Civ 1430, [2011] Ch 380.

135 See B Sloan, "Burdens, Presumptions and Confusion in the Law on Want of Knowledge and Approval" (May 1, 2017). University of Cambridge Faculty of Law Research Paper No. 26/2017. Available at SSRN: https://ssrn.com/abstract=2977319.

Chapter 8: Children making wills

INTRODUCTION

8.1 In England and Wales, the age of testamentary capacity is 18.[1] This is just one of a number of age limits that exist to protect children. For example, only people over the age of 18 can vote or buy alcohol or tobacco.[2] However, legal age limits vary. 16 year olds can marry,[3] join the army,[4] leave school,[5] consent to sexual activity,[6] live alone, and make their own medical decisions.[7] In each case, there is a balance to be struck. Young people must be protected, but age limits should not inhibit their autonomy unnecessarily.

8.2 In England and Wales, the age limit placed on testamentary capacity is absolute. It admits no exceptions. Under no circumstances can a person below the threshold age make a will. As a result, there may be 17 year olds who have left school, live alone, have jobs and parental responsibilities but cannot make a valid will. That sort of anomaly is sufficient reason to re-examine the age of testamentary capacity.

8.3 There is also significant variation in the age of testamentary capacity across other jurisdictions. In Scotland, people over the age of 12 can make valid wills.[8] In the state of Georgia (USA), the age of testamentary capacity is 14 and in British Columbia and Louisiana it is16.[9]

8.4 However, several Australian jurisdictions have moved away from an absolute rule. In New South Wales, the age of testamentary capacity is 18.[10] However, the court "may make an order authorising a minor… to make or alter a will in the specific terms approved by the Court".[11] There is also an exception for children who have married.

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1 Wills Act 1837, s 7. The exception to this rule is that privileged wills can be made by persons of any age as long as they fall within a qualifying category. See Wills Act 1837, s 11 and para 5.41 above.

2 Licensing Act 2003, s 149; Children and Young Persons (Sale of Tobacco etc.) Order 2007.

3 Marriage Act 1949, ss 2 and 3 (subject to parental consent).

4 Armed Forces (Enlistment) Regulations 2009, reg 4 (subject to parental consent).

5 Education Act 1996, s 8.

6 Sexual Offences Act 2003.

7 See para 8.24 below.

8 Age of Legal Capacity (Scotland) Act 1991, s 2.

9 M Glover, "Rethinking the Testamentary Capacity of Minors" (2014) 79 *Missouri Law Review* 69, pp 77 and 78; Wills, Estates and Succession Act 2009 (BC), s 36.

10 Succession Act 2006 (NSW), s 5.

11 Succession Act 2006 (NSW), s 16.

Since the age of consent to marriage is 16, a special provision enables married 16 and 17 year olds to make valid wills.[12]

8.5 Having in mind the various age limits in place to protect children, we have considered whether strictly limiting the ability to make a valid will to persons aged 18 and over is the best legal approach for this jurisdiction. In short, we see two potential motivations for reform: cases in which the current law may cause injustice or inconvenience, and consistency with other areas of the law.

8.6 Two broad, but not exclusive, approaches to potential reform emerge from considering the law in other jurisdictions:

(1) the age of capacity could be changed; and/or

(2) a new rule could allow people below the threshold age to make wills in appropriate cases.

DOES THE CURRENT LAW CAUSE INCONVENIENCE OR INJUSTICE?

8.7 Since minors cannot make wills, they have no say over what will happen to their property after their death or who will oversee the execution of their estate. As with any other person who dies without a will, any property that a minor owns will pass according to the intestacy rules.[13] In most cases, that will mean that a deceased minor's assets will be inherited by his or her parents. From a practical point of view, this might seem unproblematic. Few minors have significant assets and most of those who do would not object to their significant assets passing to their parents. It may seem equally unproblematic that the default rule dictates that parents jointly administer the estate of a deceased minor.[14] However, two cases suggest that reform is required in this area of the law.

8.8 The first is a sad and difficult case that could have been avoided if there was scope for minors to make a will: *Re JS (Disposal of Body)*.[15] The legal background to that case is that no testator can make binding instructions regarding the disposal of his or her body. However, adults can use a will to choose an executor who they trust to carry out their wishes.[16] Children have no such choice. As the administrators of the estate, a deceased child's parents will usually decide together how to dispose of the child's body. Where there is a dispute between administrators, the court may be called upon to resolve it by appointing one of the administrators to make that particular decision.[17]

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12 Several other Australian jurisdictions take a similar approach: see Wills Act 1997 (Vic), ss 6 and 20; Succession Act 1981(Qld) ss 9 and 19; Wills Act 1936 (SA) ss 5 and 6.

13 Administration of Estates Act 1925, s 46.

14 Non-Contentious Probate Rules 1987, Rule 22(1)(c).

15 [2016] EWHC 2859 (Fam), [2017] 4 WLR 1.

16 *Re JS (Disposal of a Body)* [2016] EWHC 2859 (Fam), [2017] 4 WLR 1 at [47] and [48] by Mr Justice Peter Jackson. See also Chapter 14.

17 Under the Supreme Court Act 1981, s 116.

8.9 In *Re JS*,[18] a 14 year old girl suffering from cancer wanted her body to be frozen after her death in the hope that she might be resuscitated and cured in the distant future. The judge found that JS was an intelligent young woman who had spent a lot of time researching cryonics and who had reached a settled view. However, a combination of her wishes, her family situation and her inability to choose an executor created a problem for JS.

8.10 JS's mother supported her daughter's decision. However, JS's estranged father objected to the practice of cryonics. Moreover, it seemed that he would have a say in the disposal of JS's body since the default rules would make him a joint administrator of JS's estate.

8.11 JS's mother could have waited until JS had died to apply to the court to have the default rules displaced in order for her to be made sole administrator of JS's estate. However, any delay caused by a dispute after JS's death would have rendered cryonics impossible. Consequently, JS chose to apply to the court in an attempt to resolve the issue before her death.

8.12 The case was novel and Mr Justice Peter Jackson resolved it by:

(1) making a prospective order "appointing the mother as the sole administrator of her estate in place of the mother and father jointly"; and

(2) granting an injunction to prevent the father from applying for a grant of administration or interfering with any arrangements made for the disposal of JS's body.[19]

8.13 In our view, the result was satisfactory. However, if JS were able to make a valid will, she could simply have appointed her mother as her executor and no dispute would have arisen. The case shows that the debate about whether children should be able to make valid wills is about more than just assets.

8.14 The second type of case is one in which an estranged parent stands to inherit substantial assets from a deceased child. That might happen where the child received a large award as a result of a personal injury claim or if a child is left money by a relative.

8.15 Simon Hardy imagines:

> the situation of a single mother who has fought for her disabled child for many years, successfully pursuing a claim for compensation and dedicating her life and love to that child's welfare.[20]

8.16 He argues that it is not fair that the estranged father of such a disabled child would be entitled to half of the amount won in compensation, notwithstanding his complete failure to contribute to the child's life.

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18 [2016] EWHC 2859 (Fam), [2017] 4 WLR 1.

19 *JS (A child)* [2016] EWHC 2859 (Fam); [2017] 4 WLR 1 at [41] by Peter Jackson J.

20 S Hardy, "The death of a child without a will – is it time to change the law?" *The Times*, 7 April 2016.

8.17 In the final part of this chapter, we consider two Australian cases that are real life examples of the problem that Hardy envisages.[21] This type of case shows that where the current law does lead to injustice, there is the potential for that injustice to be grave.

COMPARISON WITH OTHER AREAS OF LAW

Contract and gifts

8.18 At common law, minors are protected when they enter contracts or give gifts. In general, minors may rescind a contract or gift if they change their minds about the transaction. Exceptionally, minors may bind themselves in certain contracts, for example, contracts of apprenticeship or employment.[22] One important underlying principle is that minors can bind themselves in contracts where the contract is for their benefit.[23]

8.19 A comparison between the law of wills and the law of contract raises questions of

(1) whether the same protective attitude should be adopted towards a minor who might wish to make a will; and

(2) how that attitude should be legally implemented, if at all.

8.20 Mark Glover has argued that minors require less protection when making wills than they do when entering contracts.[24] Glover presents three key reasons. First, a will is inherently rescindable. Testators are free to revoke their wills at any time, which means that significant protection against rash decision-making is already built into the law of wills. Secondly, the consequences of any rash dispositions will not be felt by the minor since a will only takes effect on death. Therefore, making a will cannot prejudice a child in the same way as entering a contract. Thirdly, since a will only takes effect on death, the testator is acting in contemplation of an event that will occur at an indefinite point in the future. When a person is considering consequences that lie in the future, there is little or no prospect of immediate reward and consequently less incentive to act impulsively. For that reason, minors are less likely to act rashly in making wills than they would be when entering agreements that take effect immediately.

8.21 According to Glover, it follows that the absolute prohibition on minors making wills is not supported by adequate policy reasons. We agree with that conclusion. However, accepting that the current restriction goes too far does not answer the question of what the law governing minors making wills should be.

8.22 In considering that question, we have been mindful of one important difference between the wills and contracts: that the decisions made in a will are far more serious than decisions made when minors enter simple contracts in the course of everyday life.

8.23 A high level of understanding is necessary to appreciate the effects of a will, whereas even young children are capable of understanding the parameters of simple contracts (for example, buying an ice cream). It follows that only older children will have the

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21 See paras 8.40 to 8.43 below.

22 H Beale,*Chitty on Contracts* (32nd ed 2015) para 9-007.

23 H Beale, *Chitty on Contracts* (32nd ed 2015) paras 9-024 to 9-034.

24 M Glover, "Rethinking the Testamentary Capacity of Minors" (2014) 79 *Missouri Law Review* 69.

capacity to make wills, and the gravity of will-making weighs in favour of setting an age limit on who can write a valid will. The precise level of that limit is considered below.

The age of 16 as a threshold for decision making

8.24 In *Birmingham City Council v D*, Mr Justice Keehan was referred to "a number of statutory provisions which draw a distinction between those who have attained the age of 16 and 17, but have not yet achieved their majority, and children and younger people" and provided the following list of examples which we quote:

> a) s131 Mental Health Act 1983, provides that a capacitous patient aged 16 or 17 years of age may consent or not consent, as the case may be, to the making of arrangements including admission to a hospital for treatment for a mental disorder;
>
> b) s8 of the Family Law Reform Act 1969 provides that a minor who has attained the age of 16 years may give consent to any surgical, medical or dental treatment which shall be as effective as it would be if he were of full age;
>
> c) s9(6) Children Act 1989 provides that no court may make a s8 order which is to have effect for a period which will end after the child has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional;[25]
>
> d) s20(11) Children Act 1989 provides that a 16 or 17 year old young person may consent to his or her accommodation by a local authority;
>
> e) s31(3) Children Act 1989 provides that a care order or a supervision order may not be made in respect of a child who has reached the age of 17 (or 16 in respect of a child who is married);
>
> f) s2 (5) Mental Capacity Act 2005 provides that, the powers under the act are exercisable in respect of a person who has achieved the age of 16 years but not those who are under the age of 16 (this is subject to exceptions, immaterial for present purposes).[26]

8.25 We also note that we previously recommended a threshold age of 16 years old in our report on mental incapacity, which led to the Mental Capacity Act 2005.[27] That Act provides a legal framework for making decisions for and on behalf of people aged 16 and over who lack the mental capacity to make particular decisions for themselves.[28]

8.26 In our recent Report, *Mental Capacity and Deprivation of Liberty*, we recommend the introduction of new Liberty Protection Safeguards which would apply to people aged 16 and above to provide for the authorisation of care or treatment arrangements which

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25 A "section 8 order" is any of the orders that the court has the power to make under s 8(1) of the Children Act 1989. Those orders include "child arrangements orders" which regulate where and with whom a child is to live and spend time; a "prohibited steps order" which constrains the actions a parent can take without consent of the court and a "specific issue order" which gives directions for determining any specific question that arises in connection with any aspect of parental responsibility for a child.

26 *Birmingham City Council v D* [2016] WLR(D) 143, [2016] EWCOP 8 at [64] by Mr Justice Keehan.

27 Mental Incapacity (1995) Law Com No 231.

28 Mental Capacity Act 2005, s 2(5).

would give rise to a deprivation of liberty.[29] The current Deprivation of Liberty Safeguards apply only to people aged 18 and above. While the context of deprivation of liberty is quite different from the context of will-making, the recommendations are indicative of a tendency for the law increasingly to treat 16 and 17 year olds as adults.

8.27 As noted above, other areas of law adopt a threshold age of 18. However, even there, 18 is not always the threshold age.[30] Moreover, we have come to the provisional conclusion that medical and social welfare decision-making are better analogues for the age of testamentary capacity. Decisions about property and the disposal of one's body are more akin to medical and social welfare decisions than they are to political, behavioural or purchasing decisions.

8.28 The legislative provisions set out above and our previous considerations suggest that the direction of travel is towards a threshold age of 16. We are not aware of any compelling reason for the threshold age in the law of wills to be higher than that in a medical or social welfare context. Therefore, we provisionally propose that the age of testamentary capacity be reduced from 18 to 16.

Consultation Question 41.

We provisionally propose that the age of testamentary capacity be reduced from 18 to 16 years. Do consultees agree?

IS AN ABSOLUTE RULE NECESSARY?

8.29 Some jurisdictions have sought to soften the edges of an absolute rule by allowing people below the threshold age ("underage testators") to make valid wills where they have sufficient understanding of the process to do so.[31] We have considered this issue but have not yet formed a view about the most appropriate policy for England and Wales. The arguments are outlined below and we ask consultees for their views on whether such a policy should be adopted in this jurisdiction.

8.30 A move towards a discretionary rule for the age of testamentary capacity suggests a parallel with *Gillick* competence, a concept in medical law. The concept takes its name from a case concerning the capacity of children under the age of 16 to give consent in a medical context[32] and the central idea is that children are competent to make decisions about their own medical treatment if they are "mature and intelligent enough to understand the proposed treatment or procedure" regardless of their age.[33]

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29 Mental Capacity and Deprivation of Liberty (2016) Law Com No 372.

30 See Licensing Act 2003, s 150 allowing 16 and 17 year olds to drink wine, beer and cider with a meal.

31 See para 8.4 above and Appendix 1 below.

32 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 [1985] 3 WLR 830.

33 *Clarke Hall & Morrison on Children*, Division 16, ch 1, B[43].

8.31 In order to develop the law of wills along similar lines, children could be allowed to make valid wills if they have sufficient understanding and intelligence to be capable of making up their own minds about their testamentary dispositions.

8.32 Furthermore, it is arguable that such a development would enhance the UK's compliance with its international law obligations:

> The United Nations Convention on the Rights of the Child by Article 12(1) requires that contracting states "shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child"….[34]

8.33 The prospect of an analogue of *Gillick* competence in the law of wills raises a difficult question of who the appropriate person is to determine that a child has the necessary understanding to make a will. In medical treatment cases, a doctor must be satisfied that the patient is competent to consent to treatment. However, the doctor will have met the patient in person, whereas, in wills cases, there is not necessarily anybody in a similar position. A person could make a will alone, with only the involvement of witnesses. Although, professionals may perform an assessment when they are employed to assist a testator, nobody is specifically tasked with assessing the competence of the testator when the will is executed. In some cases, assessment of the testator's capacity may be undertaken only retrospectively in the course of litigation after the testator's death.

8.34 The key point is this: where a minor makes a medical decision, their capacity will be contemporaneously assessed. That is not necessarily the case where a minor makes a will. For that reason, the analogue with *Gillick* competence cannot be complete in the law of wills.

8.35 A contemporaneous (as opposed to retrospective) assessment would be desirable where a minor makes a will in order to protect the child and to prevent litigation. Therefore, a rule enacted to allow minors to make wills should specify who would be entitled to determine whether an underage testator has sufficient understanding to make a will. The question is then: who should that person be?

8.36 Two options are immediately obvious. An underage testator's capacity could be determined either by a professional employed to draw up the will or by a court. We do not propose that it should be one or the other but ask for the views of consultees on this question.

8.37 There are advantages to having solicitors and will-writers determine capacity; doing so would make it easy and relatively inexpensive for children to make wills. However, doing so would force children to have wills professionally drawn up. Moreover, cases are likely to arise rarely and will inevitably raise serious and sensitive issues. For those reasons, the task of determining a child's capacity might be better suited to a family court.

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[34] *Clarke Hall & Morrison on Children*, Division 16, ch 1, B[44].

8.38 We note that jurisdictions that have moved away from an absolute age limit have done so by granting courts the power to authorise minors to make wills in appropriate cases.[35] While relying on a court to oversee wills written by minors appears to be a promising solution in principle, we recognise that it is important to assess how this power has operated in practice.

8.39 There appear to be very few reported cases on the relevant statutory provisions.[36] However, two cases – one from Queensland, the other from South Australia – illustrate the benefits of authorising minors to make wills.

8.40 The Queensland provision was considered in *Re K.*[37] In that case, K was 16 years old and had suffered severe injuries in a motor vehicle accident. He was likely to benefit from a large settlement before he reached 18, the age of testamentary capacity in Queensland.[38] K was estranged from his father and his mother had acted as his sole carer for many years. Understandably, K wished to avoid the effects of intestacy, particularly, his father being entitled to half of K's estate.

8.41 The judge was presented with evidence from an experienced child psychiatrist and heard from K orally in court. The judge was satisfied that K understood the nature and effect of the proposed will and authorised K to make it, stating:

> This is an example of precisely the kind of case in which it is beneficial for the Court to be able to authorise a minor, who would not otherwise be able to do so, to make a will, so that his estate does not suffer the consequences which would follow if he were to die intestate.

8.42 In *In the matter of J, LC*,[39] no expert evidence appears to have been adduced. However, the judge was satisfied that the application should be granted on the basis of a discussion with the 16 year old LCJ at the hearing of the application. The judge referred to LCJ as "an intelligent young woman who fully understands the application and the terms of the proposed will".[40]

8.43 A further matter that arose in LCJ's case was whether her estranged father should be served with notice of the application since the order sought would disentitle him from what he might receive under the intestacy rules. The relevant procedural rules provided that the requirement to service of notice arose at the discretion of the court.[41] In the circumstances, the court did not require notice to be served on LCJ's father.

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35 The Australian provisions to this effect are included in Appendix 1 by way of example.

36 This suggests that the provisions have not overburdened the courts.

37 [2014] QSC 94.

38 Succession Act 1981 (Qld), s 9.

39 [2014] SASC 20 (24 February 2014).

40 *In the matter of J, LC* [2014] SASC 20 (24 February 2014), at [6].

41 Probate Rules 2004 (SA), Rule 97.04.

8.44 Having the above considerations in mind, we are interested in hearing from consultees about whether they believe that the courts in England and Wales should have the power to authorise children to make wills.

Consultation Question 42.

Should the courts in England and Wales have the power to authorise underage testators to make wills?

If so, who should be allowed to determine an underage testator's capacity at the time the will is executed?

Chapter 9: Interpretation and rectification

INTRODUCTION

9.1 Testators use their wills to instruct their executors as to how their estates should be divided. Ideally, those instructions will be precise and the testator's instructions will be for clearly identified property to pass to clearly identified beneficiaries. However, sometimes, the testator's instructions are unclear. Wills are sometimes drafted imprecisely or contain mistakes.

9.2 In those circumstances, the uncertainty makes it difficult for the executors to know what a testator meant by the instructions given. Where disputes arise, executors and potential beneficiaries might ultimately ask a court to intervene. Executors can ask a court to determine the true meaning of a will before the estate is distributed in order to avoid accidentally distributing the estate otherwise than in accordance with the will. Moreover, two (or more) potential beneficiaries might dispute the meaning of a will and advance their own arguments about the true meaning of the will.

9.3 In order to determine the meaning of any document, it is necessary to correct errors (where possible) and interpret the words used. To that end, the court has powers to both rectify and interpret wills. This chapter concerns the rules and principles that govern the operation of those powers.

9.4 This chapter is divided into two main parts. First, we outline the current law governing the interpretation and rectification of wills. Secondly, we consider several potential reforms of that law. At the end of the chapter, we also briefly explore the connection between a dispensing power[1] and the law of interpretation and rectification. Throughout this chapter, it will be helpful to keep in mind the basic differences between interpretation and rectification and some working definitions are useful.

9.5 Interpretation is the act of determining the intended meaning of the words used (usually in a document). The question the court must ask is "What does the document mean?" and in order to answer that question the court has to consider the document in its proper context. It is important to remember that, fundamentally, interpretation is a matter of what a document actually means, rather than a matter of what its writer intended it to mean, although understanding the writer's intentions may help to resolve ambiguities in the text.

9.6 Rectification is a process through which a court can correct mistakes in a will. It is a remedy provided when "the document does not say what it was meant to say".[2] The question that the court must ask is "What words did the writer intend to use?" and in order to answer that question the court must consider the context as well as the intentions of the writer. Rectification allows the court to correct (some of) a testator's linguistic mistakes.

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1 See Chapter 5.

2 Nineteenth Report of the Law Reform Committee (1973) Cmnd 5301, para 3.

THE CURRENT LAW

Interpretation

9.7 Historically, the interpretation of wills has been governed by its own, unique stream of common law doctrine. For a long time wills were interpreted literally; the court looked at the document and nothing else. Moreover, a number of rules and presumptions were applied in the process and have been set out in centuries of case law. The utility of the presumptions in the modern law is unclear. However, practitioners' texts suggest that they may still be of assistance in certain cases.[3]

9.8 That strict, literal approach came to contrast with the approach taken by the courts in the interpretation of contracts. In that context, the result of developments in the case law[4] has been:

> to assimilate the way in which documents are interpreted by judges to the common-sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded.[5]

9.9 An intentional approach[6] is now taken to the interpretation of contracts (and most other documents). The court seeks to ascertain the true meaning of a document by considering the context in which it was created and the interrelation of its various terms.

9.10 In the law of wills, a movement towards an intentional approach began in 1943 when Viscount Simon said in *Perrin v Morgan*[7] that:

> the duty of a judge who is called on to interpret a will containing ordinary English words is not to regard previous decisions as constituting a sort of legal dictionary to be consulted and remorselessly applied whatever the testator may have intended, but to construe the particular document so as to arrive at the testator's real meaning according to its actual language and circumstances.

9.11 In that case, the testator's instruction was that "all moneys of which I die possessed of shall be shared by my nephews and nieces now living". The court interpreted her words broadly and interpreted "money" to include her stocks and shares. It was more likely that she meant to use "money" in this broad manner than it was that she intended to die intestate with respect to her stocks and shares, leaving only the money in her bank account to be split between her nephews and nieces.

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3 R F D Barlow, R A Wallington, S L Meadway, J A D MacDougald, *Williams on Wills* (10th ed 2014) para 50.1; J R Martyn, A Learmonth, J E Gordon, C Ford and T Fletcher, *Theobald on Wills* (18th ed 2016) para 13-002.

4 Particularly, *Prenn v Simmonds* [1971] 1 WLR 1381; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989.

5 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 by Lord Hoffmann.

6 Also called a purposive approach.

7 [1943] AC 399.

9.12 The movement towards an intentional approach was reinforced by the enactment of sections 20 and 21 of the Administration of Justice Act 1982.[8] Nevertheless, debate continued about whether a literal or intentional approach should be deployed in the interpretation of wills. There was, and arguably still is, some ambiguity in case law and commentary about which approach is correct.[9] However, *Marley v Rawlings* appears to have been a decisive moment. Although the case was decided on a rectification point, Lord Neuberger said:

> When it comes to interpreting wills, it seems to me that the approach should be the same [as the approach to interpreting a contract]. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said… "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre."[10] To the same effect, Sir Thomas Bingham MR said… that "courts will never construe words in a vacuum".[11]

9.13 This confirmed the decision of the Court of Appeal in *RSPCA v Sharp*[12] and may be regarded as the culmination of the movement that began in *Perrin v Morgan*.[13] The intentional approach to the interpretation of wills is now firmly entrenched in English law.

9.14 The intentional approach has direct consequences for the law of evidence. In order to interpret a document having regard to the circumstances in which it was created, a court must scrutinise evidence of what those circumstances were.[14] In relation to contracts, a court will not consider evidence of the actual intentions of a party. To do so would focus the inquiry on what the parties intended a document to say rather than on what the document did ultimately say.

9.15 In a wills context, the considerations are different. Given that a will is a unilateral document, there may be some merit in considering what a testator intended to say when considering the meaning of what was ultimately written down. In recognition of this, a special rule of evidence applies in the law of wills. Section 21 of the 1982 Act allows evidence of the testator's intentions to be admitted to assist in interpretation in certain cases. That section reads:

> 21 Interpretation of wills—general rules as to evidence.
>
> (1) This section applies to a will—
>
> (a) in so far as any part of it is meaningless;

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8 See paras 9.15 and 9.17 below.

9 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 269.

10 *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64.

11 *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129, at [20] citing *Arbuthnott v Fagan* [1995] CLC 1396, 1400.

12 [2010] EWCA Civ 1474, [2011] 1 WLR 980.

13 [1943] AC 399.

14 See H Beale, *Chitty on Contracts*, ch 13.

(b) in so far as the language used in any part of it is ambiguous on the face of it;

(c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.

9.16 As well as the overarching principles of intentional interpretation, wills are interpreted having regard to several provisions in the Wills Act 1837. Many of those provisions govern interpretation in narrowly defined circumstances.[15] However, section 24 of the 1837 Act applies to interpretation more broadly. That section provides that wills shall be construed to speak and take effect as if they "have been executed immediately before the death of the testator, unless a contrary intention shall appear by the will". For example, if a testator leaves to a beneficiary all of his or her shares in ABC Co, then the beneficiary will receive the shares that the testator held at the time of his or her death, even if the testator had altered his or her shareholding in ABC Co after having executed the will.

Rectification

9.17 The courts have long had the power to rectify contracts and a range of other documents.[16] However, the power to rectify wills in a similar way is relatively new and was introduced on the basis of a recommendation from the Law Reform Committee.[17] The statutory basis of that power is section 20 of the 1982 Act. The relevant part of that section reads as follows:

20.— Rectification.

(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—

(a) of a clerical error; or

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions.

9.18 That provision makes clear that the court cannot rectify every possible error in a will. The error must be of a certain type; either a clerical error, or a consequence of the drafter's failure to understand the testator's instructions. Those limitations on the scope of the power have proved contentious. For example, in the case of *Marley v Rawlings* the Supreme Court overturned the judgment of the Court of Appeal and held that

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15 See para 9.44 below.

16 See D Hodge, *Rectification* (2nd ed 2016).

17 Nineteenth Report of the Law Reform Committee (1973) Cmnd 5301.

"clerical error" included a mistake that led to a husband and wife each signing the will prepared for the other spouse.[18]

9.19 It has been noted that errors falling beyond the scope of section 20 of the 1982 Act may be broadly characterised as drafting errors.[19] Those are errors caused by a "failure to appreciate the effect of the words used".[20] For example, a practitioner might include a clause in a will with the intention of minimising a client's tax liability. The mere fact that the clause does not operate to save tax in the anticipated way is not sufficient to warrant rectification.

Relationship between rectification and interpretation

9.20 While we have explained interpretation as the process of finding the true meaning of a will and rectification as the separate process of correcting errors in a will, the separation between interpretation and rectification is not as neat as it may appear. Interpretation and rectification overlap in various ways. We explain several of those ways below.

9.21 Interpretation is an unavoidable part of the process of rectification. This is evident from the judgment in *Re Segalman*[21] where Mr Justice Chadwick explained that section 20 of the 1982 Act required the court to answer three questions.

(1) What were the testator's intentions with regard to the dispositions in respect of which rectification is sought?

(2) Does the will, so expressed, fail to carry out those intentions?

(3) If so, is that failure due to either a clerical error or a failure of the drafter to understand the testator's instructions?

9.22 The second question brings out the point. In the middle of the process of rectification, a court must ask what the will, so expressed, means. In other words, the court must interpret the will.

9.23 Moreover, courts have arguably muddied the conceptual waters by correcting mistakes by interpretation. In that vein, Lord Hoffman sparked significant academic debate with his comments in *Chartbrook Ltd v Persimmon Homes Ltd* where he said:

> there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.[22]

9.24 That passage appears to allow mistakes to be corrected by interpretation. Many commentators take the view that the correction of mistakes is the proper domain of

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18 *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129.

19 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) para 10-11.

20 Nineteenth Report of the Law Reform Committee (1973) Cmnd. 5301, para 22.

21 [1996] Ch 171, [1996] 2 WLR 173.

22 [2009] UKHL 38; [2009] 1 AC 1101.

rectification, not interpretation, and that the correction of mistakes by interpretation crowds out the doctrine of rectification.[23] Regardless of the practical effect, correcting mistakes by interpretation makes it impossible to draw a sharp distinction between the doctrines of interpretation and rectification. The doctrines overlap.

9.25 Crossover between the principles of interpretation and rectification is also evident in practice. In many cases, the same result may be reached by more than one route. For example, a simple mistake may be remedied either by interpretation or by rectification.

9.26 In the recent case of *Guthrie v Morel*,[24] the testator left a property at "87 Loma Del Rey" to the claimant. However, the testator owned number 81 and not number 87. John Baldwin QC (sitting as a Judge of the Chancery Division) gave summary judgment for the claimant, holding that:

> the deceased intended by his Will to deal with his entire estate and that he intended the words "My property 87 Loma Del Rey" to be understood as a reference to his villa at 81 Loma Del Rey and not to some other property which he did not own.[25]

9.27 In a short note on this case, Hugh Cumber points out that:

> this decision is a clear application of the approach to the interpretation of wills following the decision of the Supreme Court in *Marley v Rawlings*… [and] illustrates that construction will usually be an alternative to rectification even in the case of what would appear to be an obvious mistake.[26]

REFORM

9.28 Several aspects of interpretation and rectification are potential candidates for law reform. In particular, we have considered the following four topics:

(1) the relationship between interpretation and rectification in the law of wills;

(2) the dated language of existing interpretative provisions;

(3) a need for new interpretative provisions; and

(4) the scope of rectification in the law of wills.

Each of those topics is considered in turn below.

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23 See *Marley v Rawlings* [38] to [40] by Lord Neuberger citing R Buxton, "Constructionand Rectification after Chartbrook" [2010] *Cambridge Law Journal* 253 and K Lewison *The Interpretation of Contracts* (5th ed 2011). Also, P Davies, "Rectification versus interpretation: the nature and scope of the equitable jurisdiction" (2016) 75(1) *Cambridge Law Journal* 62 and D McLauchlan, "The lingering confusion and uncertainty in the law of contract interpretation" [2015] 3 (Aug) *Lloyd's Maritime and Commercial Law Quarterly* 406.

24 [2015] EWHC 3172 (Ch), [2016] WTLR 273 (Ch D).

25 [2015] EWHC 3172 (Ch), [2016] WTLR 273 (Ch D) [41].

26 H Cumber, "Probate: interpretation of wills" [2016] *Elder Law Journal* 20.

The order of interpretation and rectification

9.29 There is some debate about whether rectification or interpretation should be conducted first when determining the meaning of a will.[27] On one hand, it stands to reason that we must know the true wording of a document before we can say what that wording means. It seems then to follow that rectification should come before interpretation. On the other hand, we can only say that a term was included (or omitted) in error by considering what the document means in light of that inclusion (or omission). Seen that way, it seems to follow that interpretation must come before rectification.

9.30 This aspect of interpretation and rectification may cause confusion and we have therefore considered whether law reform would be a useful way of bringing clarity to the issue. Our starting point has been to consider the views of academics and practitioners.

9.31 Professor Roger Kerridge has expressed the view that rectification must come first,[28] citing with approval the Law Reform Committee's 1973 report which concluded:

> The court should first ascertain precisely what words the testator meant, or must be taken to have meant, his will to contain; if necessary it should rectify the words admitted to probate so as to make them conform with that intention, then, and only then, should it proceed to the task of ascertaining what those words mean, in accordance with the rules of interpretation.[29]

9.32 Professor Birke Häcker adopts a similar position and has expressed concern about comments made by Lord Neuberger in *Marley v Rawlings* that seem to endorse the view that interpretation comes before rectification.[30] In that case, Lord Neuberger said:

> Although Mr Ham [counsel for the appellant] primarily based his contention that the will was valid on the ground of rectification (which was the sole basis on which the case was considered in the courts below), he accepted that the interpretation argument ought to be considered first…[31]

9.33 There appear to be conflicting opinions about the order of interpretation and rectification. In our view, the issues are best explained by paying careful attention to i) the processes involved in interpretation and rectification, and ii) the practicalities involved in contentious probate litigation.

9.34 Turning first to the processes of interpretation and rectification: as we noted above, interpretation is a necessary component of rectification.[32] A court has to determine what a document means in order to determine whether an error has been made. If an error has been made, it may then be corrected, at which point the court must determine what

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27 See B Häcker, "What's in a Will?" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016), R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) ch 10.

28 See R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) ch 10.

29 Law Reform Committee, *Interpretation of Wills* (1973) Cmnd 5301.

30 B Häcker, "What's in a Will?" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) p 144.

31 *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129, para 33.

32 See para 9.21 above.

the corrected document means. Where there is alleged to be a mistake in a will, the court will interpret the document as it is composed by the will-drafter;[33] rectify any mistakes in the document (insofar as that is appropriate); and then interpret the rectified document.

9.35 Seen this way, rectification comes both before and after interpretation. This framework explains the tension apparent in the first paragraph of this section.[34] Both ways of looking at rectification are correct:

> a will needs to be interpreted before it can be rectified, but this is a preliminary interpretation and, if there has been a clerical error, that should be cured before the final interpretation.[35]

9.36 Consequently, our provisional view is that compelling courts to consider rectification and interpretation in a particular order is likely to cause more uncertainty than it resolves.

9.37 That view is reinforced by considering the practicalities of contentious probate litigation. Litigants will often plead interpretation and rectification points in the alternative. A potential beneficiary will often argue that the will, as written, actually means what he or she contends it does, and if it does not, then there has been an error and the will should be corrected to give it the meaning asserted.

9.38 For example, in *Slattery v Jagger*, the testator, Mr Jagger, attempted to give instructions for the disposition of his share in the marital home. However, the clause in his will used for that purpose was unclear. The testator's wife claimed that the unclear clause should be interpreted in her favour. She also argued that if the court was not able to interpret the clause in that manner, then the clause should be rectified to make clear that she was the intended beneficiary of the clause.

9.39 The key point to take from this type of case is that the "preliminary" interpretation of a will may often resolve a case. If the true meaning of Mr Jagger's poorly drafted will was that Mrs Jagger should get Mr Jagger's share of the house, then her arguments about rectification would have been unnecessary.[36]

9.40 The case shows the practical importance of scrutinising interpretative arguments before considering a claim for rectification. There is no room for a claimant to succeed on both the grounds of interpretation and rectification. If a will is interpreted to mean what the claimant asserts, then there is no need (or scope) to rectify the will to give it the meaning asserted.[37]

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33 This initial act of interpretation is noted by both R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) see para 9.35 below, and B Häcker, "What's in a Will?" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) p146.

34 Para 9.29, above.

35 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 262, fn 20.

36 In the event, the judge considered those arguments, but only to show that even if he had been mistaken about the interpretation of the will, the result of the case would have remained the same.

37 This point is also illustrated in *Rainbird v Smith* [2012] EWHC 4276 (Ch), [2013] WTLR 1609.

9.41 In our view, the above explains the passage quoted from *Marley v Rawlings*.[38] There, Lord Neuberger does not endorse any conceptual view about the order of interpretation and rectification. Rather, His Lordship is referring to the practical aspects of the dispute: if the case could be decided on the grounds of interpretation, then the rectification point would not arise. This point is reflected in the summary of counsel's argument in the case report. Counsel for Mr Marley advanced the proposition that: "if the will does not bear that construction, the court will have to consider whether it can be rectified".[39]

9.42 Having considered the various arguments, we recognise the sense in which rectification is conceptually prior to interpretation: if a court's aim is to say what the true meaning of a document is, the court should apply the principles of interpretation to a corrected document. However, given the practical need for courts to consider interpretative arguments before considering rectification, we do not believe that statutory intervention would be helpful in this area.

9.43 Beyond the processes involved in interpretation and rectification, and the practicalities involved in litigation, we also note that we have not seen evidence from practitioners that the order of interpretation and rectification causes pervasive problems in practice. For that reason, we are interested to hear from consultees whether the issues raised in this section impact upon practitioners.

Consultation Question 43.

We provisionally propose that statute should not prescribe the order in which interpretation and rectification should be addressed by a court.

Do consultees agree?

Consultation Question 44.

Do consultees know of any cases in which the order of interpretation and rectification has caused problems in practice? If so, please explain the facts of the case and the nature of the problem.

Interpretative provisions in the Wills Act 1837

9.44 The 1837 Act contains a number of provisions related to the interpretation of wills. The relevant provisions are sections 23 to 31 (inclusive). We have included the text of those provisions in an appendix. Given the outdated language of those sections, we have also provided equivalent provisions that were drafted in the course of a law reform project in

[38] At para 9.32.

[39] *Marley v Rawlings* [2015] AC 129.

Victoria, Australia.[40] The Victorian draft provisions are included in the appendix as an aid to understanding. We do not necessarily endorse the content of those provisions, nor are we proposing their adoption in England and Wales.

9.45 We are aware that a number of jurisdictions have enacted reforms relating to sections 23 to 29 of the 1837 Act or their equivalents in domestic law elsewhere.[41] We provisionally propose to replace sections 23 to 29 of the 1837 Act with new provisions that retain the substantive effect of those sections while updating and simplifying the language of the provisions. This view is informed by the fact that each of those sections appears to have some practical effect, as well as the fact that we are not aware of any evidence to the effect that substantive reform is necessary.

9.46 We are aware that a different approach might be necessary with regard to sections 30 and 31 of the 1837 Act. The purpose of section 30 is summarised in its title: "No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest". However, we are not aware of any reported cases applying that section and it is not referred to in any of the texts to which we have made reference in this Consultation Paper. Consequently, we would like to hear from stakeholders whether section 30 of the 1837 Act serves any practical purpose.

9.47 We have similar concerns about section 31 of the 1837 Act and ask consultees for evidence of its use in practice. The title of section 31 reads: "Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, shall take the fee".

Consultation Question 45.

We provisionally propose to replace sections 23 to 29 of the Wills Act 1837, modernising and clarifying the language of those sections while retaining their substantive effect.

Do consultees agree?

[40] Reprinted with commentary in Report No 52 of the Queensland Law Reform Commission (1997) QLRC R 52.

[41] Those jurisdictions include Northern Ireland, New Zealand and Australian states.

Consultation Question 46.

As regards sections 23 to 29 of the Wills Act 1837, we ask consultees whether in their view:

(1) any of those provisions are obsolete;

(2) any of those provisions require substantive alteration; and

(3) if any provisions are obsolete or require substantive alteration, what changes are needed and why.

Consultation Question 47.

We provisionally propose that section 30 of the Wills Act 1837 be repealed.

Do consultees agree? If not, please provide evidence of the practical use of section 30 of the Wills Act 1837.

Consultation Question 48.

We provisionally propose that section 31 of the Wills Act 1837 be repealed.

Do consultees agree? If not, please provide evidence of the practical use of section 31 of the Wills Act 1837.

New interpretative provisions

9.48 While the intentional approach to interpretation furthers the extent to which a will gives effect to a testator's actual wishes, we are aware that specific problems in the law might warrant specific interpretative provisions. Two examples from other jurisdictions serve to illustrate this point.

9.49 First, the confusion that arises from the use of technical terms in the law of wills has formed the basis of reform in Australia. Historically, the terms "devise" and "bequeath" had specific, technical meanings. The former referred to a gift of real property and the latter referred to a gift of personal property. Many lay people will not appreciate the difference between these terms and, perhaps understandably, will use them as synonyms.

9.50 That gives rise to potential situations in which testators, trying to use legal wording in their wills, end up disposing of only their real or personal property when they mean to give everything to a particular beneficiary. For example, testators who "bequeath" their residuary estate to a particular beneficiary could be understood to be giving only the residue of their personal property to the beneficiary. On that reading, any real property not expressly disposed of by the will would be left to pass by the intestacy rules.

9.51 In response to this potential problem, the Australian National Committee for Uniform Succession Laws recommended a rule of interpretation that imposed a non-technical reading in the absence of contrary intention.[42]

9.52 It is possible that the problem is already resolved adequately in the law of England and Wales law by the intentional approach to interpretation; the context in which a will was executed could inform a non-technical interpretation of the clause. However, the example illustrates one way in which the need for a specific interpretative provision might arise.

9.53 A second example concerns shares. The nature of a shareholding may change for several reasons. For example, a testator might include in his or her will a gift to a beneficiary of 100 of the testator's shares in XYZ Co. The company might then split the shares, doubling the number of shares held by the testator but maintaining the total value of those shares. If the testator were to die subsequent to the split, there is a question of whether the beneficiary should receive 100 or 200 shares. Again, the intentional approach to interpretation might resolve this question. However, in the United States, the Uniform Probate Code (UPC) now includes a provision that has the effect of passing to the beneficiaries any shares "acquired as a result of the testator's ownership of the described securities by reason of an action [such as a share split]".[43]

9.54 The problem of changes in shareholding is essentially a matter of whether the gift (or part of it) should adeem. However, the UPC shows that the solution could be to introduce an interpretative provision. Given the nature of the problem, we consider it in our chapter on ademption.[44] It is mentioned here to illustrate that interpretative provisions might be used to solve problems that arise in other areas of the law of wills.

9.55 Having in mind the types of example given, we ask consultees whether there is a need for any new interpretative provisions in the law of wills.

Consultation Question 49.

Do consultees think that there is a need for any new interpretative provisions in the law of wills?

If so, please state:

(1) what problem the new provisions would address; and

(2) why that problem is inadequately addressed under the current law.

Please also give an example of a case in which the problem has arisen where possible.

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42 See cl 41, Wills Bill 1997 in the Report of the National Committee for Uniform Succession Laws (1997) QLRC MP29.

43 Uniform Probate Code, comment on s 2-605.

44 Chapter 10

Widening the doctrine of rectification

9.56 The scope of rectification is limited in the law of wills. Section 20 of the 1982 Act provides that rectification is available only where a will "fails to carry out the testator's intentions, in consequence (a) of a clerical error; or (b) of a failure to understand his instructions".[45]

9.57 It has been argued that the doctrine of rectification in the law of wills has been drawn too narrowly. David Hodge QC notes that the 1982 Act implements the Law Reform Committee's recommendations and the policy behind those recommendations was to extend the equitable doctrine of rectification to wills. However, it appears that the doctrine of rectification in the law of wills has been drawn more narrowly that the equitable doctrine of rectification. In equity, rectification may operate "not only when the parties intended to use different words but also when they mistakenly thought their words bore a different meaning".[46] The thrust of the argument (somewhat ironically) is that there has been an error transposing the equitable doctrine into the law of wills and that the error should be corrected.

9.58 One way to address this apparent failing is to adopt the approach taken in South Australia where rectification is not limited in the same way as it is by the 1982 Act. In that jurisdiction, the court may order a will to be rectified if it is satisfied that the "will does not accurately reflect the testamentary intentions of a deceased person".[47]

9.59 We appreciate the force of the argument; however, we note that there are reasons to maintain the current, relatively narrow, doctrine of rectification.

9.60 First, we are concerned with the manner in which a broader doctrine of rectification would affect the law of negligence. For example, it seems that in some cases where a will does not accurately reflect the testamentary intentions of the testator the reason will be that a practitioner has been negligent in drafting the will. In those cases, the appropriate action appears to be a claim in negligence rather than a claim for rectification of the will.

9.61 Secondly, it has been noted that "section 20(1)(b) is potentially a gateway for executors and draftsmen having a second bite at the estate planning cherry".[48] The key point is that if the term "failure to understand instructions" were expanded, then rectification claims might focus on the effect desired by the testator rather than the wording desired by the testator. This would open the door to rectification claims that are unwarranted as a matter of principle. The doctrine of rectification should not be a means to protect testators from unwise estate planning decisions.

9.62 For those reasons, we are not convinced that reform of section 20 of the 1982 Act is necessary and ask consultees for their views on this issue.

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45 See para 9.17 above.

46 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, at [46] by Lord Hoffmann.

47 Wills Act 1936 (SA), s 25AA.

48 B Häcker, "What's in a Will?" in B Häcker and C Mitchell (eds) *Current Issues in Succession Law* (2016) p 166.

Consultation Question 50.

Do consultees think that the scope of rectification in the law of wills should be expanded?

If so, please state:

(1) what problem the expanded doctrine of rectification would address; and

(2) why that problem is inadequately addressed under the current law.

Please also give an example of a case in which a problem has arisen where possible.

INTERACTION WITH A DISPENSING POWER

9.63 In Chapter 5 we consider the introduction of a dispensing power. We note that were such a power to be introduced, its rationale and effect would be similar to those underpinning the doctrines of interpretation and rectification in this jurisdiction. As such, it may be helpful to briefly explore those connections.

9.64 The rules of interpretation and rectification in the law of England and Wales are, to some extent, based on the same rationale as a dispensing power. The use of interpretation, rectification and dispensing power serve a common purpose: to give greatest effect to the wishes of the testator.[49] The goal of intentional interpretation is to understand the terms of a will as a testator meant them; rectification aims to ensure that a will includes the wording that the testator intended; and a dispensing power gives effect to the testator's wishes even when those wishes are not expressed in the prescribed form.

9.65 Furthermore, if a dispensing power were introduced in England and Wales, there would be likely to be some practical, as well as conceptual, overlap between the doctrines of rectification and interpretation and the operation of a dispensing power. That is, certain results might be reached using any of these legal mechanisms. "Switched wills" cases like *Marley v Rawlings* provide a perfect example. In that case, if the court had a dispensing power it would have been able to either i) rectify the document that Mr Rawlings actually executed, or ii) admit to probate, as Mr Rawlings's will, the document that his wife signed by operation of the dispensing power.

9.66 Given the fact that interpretation, rectification and a dispensing power share the same underlying rationale, it is not surprising that there is some overlap in the practical effect of the doctrines. We do not think that the potential for overlap is particularly egregious, nor do we think that it militates against adopting a dispensing power.

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[49] J R Martyn, A Learmonth, J E Gordon, C Ford and T Fletcher, *Theobald on Wills* (18th ed 2016) para 13-002 (on interpretation); J Langbein, "Substantial compliance with the Wills Act" (1975) 88:3 *Harvard Law Review* 489.

Chapter 10: Ademption

INTRODUCTION

10.1 Where a testator makes a gift in his or her will of property which the testator no longer owns at the time of death, the gift fails. The failure of the gift in these circumstances is described as ademption.[1] Ademption can be compared to the concept of lapse – where a gift in a will fails because the beneficiary of a gift dies before the testator. In both cases, the law makes assumptions about what the testator would intend in these circumstances.

10.2 In this chapter we briefly examine how ademption operates and identify the rationale that underpins the current law as based on giving effect to the testator's intentions. We identify specific circumstances where the current rules appear to defeat, rather than uphold, the testator's intentions, and we make provisional proposals for reform. We then invite consultees' views on whether wider reform is required.

10.3 Before we explain the law relating to ademption it is necessary to explain how gifts that are made in a will are classified.

CLASSIFICATION OF GIFTS IN A WILL

10.4 Gifts in a will fall within one of three categories. A gift may be specific, general or demonstrative. It is necessary to understand the classification of gifts before considering ademption as only specific gifts can adeem.

10.5 Specific gifts are those where the testator specifies a particular piece of property, which might be land or another kind of property. The use of "my" is a common indicator of a specific gift. For example, "I give to A my house at 10 Acacia Avenue, Anytown" or "I give to B my diamond engagement ring" are both specific gifts.

10.6 A general gift is not a gift of a particular property, but is one to be provided out of the testator's estate. For example, "I give C £5,000" is a general gift of £5,000 to be paid out of the testator's estate. General gifts will commonly be of money[2] but they may be of other property, for example, shares in a particular company.[3] The subject of the gift may or may not already be part of the estate. If the testator's estate does not own the property then the executors will have to obtain it, for example, by selling property to raise money or buying shares.

10.7 A demonstrative gift arises where the testator makes a general gift, but specifies the fund out of which the gift is to be provided. For example, a gift "to D of £10 000 from my Anybank bank account number 123456789" is a demonstrative gift. If there are

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1 *Ashburner v MacGuire* (1786) 2 Bro CC 108.

2 For example, "I give to A £1000".

3 For example, "I give to B 100 shares in C Plc".

insufficient funds in the Anybank account, then the executors must resort to the rest of the estate in order for the gift to be made.

THE LAW OF ADEMPTION

10.8 A gift in a will adeems when the property that is the subject a specific gift is destroyed, lost or lawfully changes hands[4] by the time of the testator's death.[5] The fact that the subject of the gift is removed from the testator's estate by the actions of a third party is irrelevant, except where that third party is the Court of Protection or a deputy appointed under the Mental Capacity Act 2005 (MCA).[6]

10.9 Where the nature of the property has changed, but the property remains the same in substance, the gift will not adeem. It is a question of fact whether the property remains the same in substance at the time of the testator's death as it was at the time when the will was made. This issue may arise in respect of shares, where a testator's shareholding is changed by the company. We consider this issue further below.[7]

10.10 It is also possible for a will to be drafted in such a way that ademption of a specific gift is prevented. For example, a testator may make provision for a gift of money to be made if he or she no longer owns the specific property at the time of death.[8] However, we doubt that testators should be required to have to "draft around" problems caused by ademption. Drafting in this way may also be difficult for testators to do effectively where they are making a will without professional advice.

10.11 It follows that ademption will not occur when:

(1) the court interprets a gift as general or demonstrative rather than specific;

(2) the subject of the gift was disposed of without authority;[9]

(3) the property has not changed in substance;[10] or

(4) the testator has drafted a gift so as to avoid ademption.[11]

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4 By sale, gift, expropriation or otherwise.

5 Ademption has sometimes been used to describe a narrower range of circumstances in which a gift fails. See R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 359.

6 Where the court or a deputy has made a disposal of property of a person who lacks capacity under the provisions of the MCA, in which case the gift may be saved by the operation of the statute – see para 10.25 below.

7 See para 10.58 below.

8 For example: "I give my grandmother's ruby ring to A provided that if I no longer own this ring at my death then I give to A free of inheritance tax a sum equal in amount to the value of the ring."

9 For example, where a person sells another person's property without having permission to do so. *Basan v Brandon* (1836) 8 Sim 171.

10 The difficult cases seem to concern shares. See para 10.58 below.

11 For example, "I give my grandmother's ruby ring to A provided that if I no longer own this ring at my death then I give to A free of inheritance tax a sum equal in amount to the value of the ring and I direct that this sum shall be subject to abatement as if it were a specific gift."

10.12 Ademption should be distinguished from "abatement", which refers to the order in which assets are applied by the executors towards the payment of the estate's expenses, debts and liabilities. General legacies abate, meaning that they are used towards such payments, before specific legacies do. Therefore, a general gift is immune from ademption but vulnerable to abatement. A specific gift is vulnerable to ademption but privileged in respect of abatement. A demonstrative gift gets the best of both. It is not vulnerable to abatement because it is linked to a specific fund and it is protected from ademption because if the fund is insufficient, recourse will be made to the rest of the estate.

THE RATIONALE FOR ADEMPTION

10.13 As the law stands, ademption requires a two-stage inquiry. The court must ask:

(1) Does the gift in the will refer to specific property?

(2) Is that property within the testator's estate?

10.14 If the answer to the first question in "yes" and the answer to the second question is "no", the gift adeems.

10.15 The rationale for the rule is that it gives effect to the testator's intentions, at least in most cases. The Victorian Law Reform Commission (Aus) notes:

> This rule is clear and easy to apply and avoids a case-by-case determination of the [testator's] intent. It is based on the assumption that, if a specific gift is no longer in the estate, the [testator] intended that the beneficiary would receive nothing in its place. If the [testator] did not intend this, they could have amended their will after the item was disposed of.[12]

10.16 The Victorian Law Reform Commission's explanation reflects the fact that ademption operates as a "bright line rule". The law assumes that a testator intended the gift to fail, and so the gift fails through ademption in every case. Ademption does not enable the intended beneficiary of a gift to argue, on the facts of the particular case, that the testator did not intend the gift to fail.

10.17 Ademption can, however, work to subvert the intentions of the testator. For example, in *Banks v National Westminster Bank Plc & Another*, the testator's daughter became the testator's attorney. Acting in that capacity, she sold her mother's house during the mother's lifetime. The house had been left to the daughter as a specific gift in her mother's will, with the residue of her mother's estate to be divided equally between the daughter and another beneficiary, the testator's son. The court rejected the daughter's argument that she should be entitled to the remaining proceeds of sale of the house. The sale of the house adeemed the gift and the remaining proceeds of sale therefore formed part of the residue of the estate to be divided between the daughter and the other beneficiary. Arguably, this outcome did not reflect the testator's wishes: the terms of her will suggest that she did not intend to benefit her two children equally.[13]

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12 Victorian Law Commission, *Succession Laws Consultation Paper* (2012) p 46.

13 [2005] EWHC 3479 (Ch).

10.18 It would be possible for the law relating to ademption to take greater account of the testator's intent. Instead of a bright line rule under which the gift necessarily fails, the law could raise a presumption that the testator intended the gift to fail, but enable the presumption to be rebutted where a contrary intention could be demonstrated. In the US, the Uniform Probate Code[14] includes an intention-based ademption rule.[15] Under the rule, unless a specific exemption is provided for ademption, an initial presumption is raised in favour of ademption. However, the presumption is rebutted where it is proved that:

> ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition [of the property] or otherwise, the testator did not intend ademption….[16]

10.19 When the presumption is rebutted, the beneficiary of a gift that would otherwise adeem receives money "equal to the value [of the gift] as of its date of disposition.[17]

10.20 An intention-based approach would ensure that ademption better upholds the testator's intentions. It may, in particular, help to uphold the testator's intentions where the will is home-made and the testator is unaware of the concept of ademption.[18]

10.21 Despite this advantage, we are not attracted to an intention-based rule. We think that the current law has the significant merit of providing certainty. We would be concerned that an intention-based approach would render the administration of estates practically difficult. It would require executors to consider the testator's intentions in respect of each specific gift made where the subject of the gift is not held at the time of the testator's death. The increased difficulty may also add to the costs of administration of an estate, particularly where professionals act as executors. Further, an intention-based approach may provoke litigation by disappointed beneficiaries seeking to establish the testator's intention. We take the view that the disadvantages of adopting an intention-based approach heavily outweigh the advantages.

10.22 The US state of Kentucky has abolished ademption. In that jurisdiction, if the subject of a gift falls out of the estate, the beneficiary receives the value of the gift instead.[19] We are not attracted to abolishing ademption. While a testator may not always intend that a specific gift is adeemed if he or she no longer owns the property in question at death, it seems implausible that a testator would always intend that a gift should not adeem where that property is no longer in the estate.

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14 A legislative provision promulgated by the US Uniform Law Commission, designed to be enacted in any state in the US, in order to harmonise probate law between US states.

15 Although it appears that states that have adopted the Uniform Probate Code tend to adapt the legislation so as to maintain an identity-based rule.

16 Uniform Probate Code, s 2.606(a)(6).

17 Uniform Probate Code, s 2.606(a)(6).

18 Victorian Law Reform Commission report, *Succession Laws* (2013) p 39.

19 Kentucky Revised Statutes, s 394.360.

REFORM

10.23 There are four specific instances in which ademption appears to us to operate unsatisfactorily:

(1) disposals of property by attorneys and deputies;

(2) incomplete transfers and options to purchase;

(3) gifts of shares; and

(4) simultaneous destruction of property and death.

10.24 In each of these situations, it appears that ademption may be more likely to defeat, rather than give effect to, the testator's intentions. We consider each of these below, and then make recommendations for reform.

The respective position of attorneys and deputies

10.25 One problem to which we have been alerted by stakeholders is the difference in the consequences of a disposal of property by an attorney and by a deputy. Under the MCA, a deputy (or the court) has the power to dispose of the property of a person who lacks capacity. The MCA provides that where, but for the disposal, another person would have received the property under the will of the incapacitated person,[20] that disposal does not have the effect of adeeming the gift. This saving from ademption is provided for by paragraph 8 of schedule 2 to the MCA:

> (1) Sub-paragraphs (2) and (3) apply if–
>
> (a) P's property has been disposed of by virtue of section 18 [that is, by the court or by a deputy],
>
> (b) under P's will or intestacy, or by a gift perfected or nomination taking effect on his death, any other person would have taken an interest in the property but for the disposal, and
>
> (c) on P's death, any property belonging to P's estate represents the property disposed of.
>
> (2) The person takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of.
>
> (3) If the property disposed of was real property, any property representing it is to be treated, so long as it remains part of P's estate, as if it were real property.

10.26 The intended beneficiary of the testamentary gift takes the same interest in property belonging to the testator's estate which represents the property disposed of, where that

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[20] The section will also save a person's interest in a gift where the person would have taken the property under a nomination taking effect on death, or by a gift perfected on death – a donatio mortis causa. See Chapter 13.

exists and if and so far as circumstances allow.[21] Disposal covers the sale, exchange, charging of or other dealing with property other than money; removing property from one place to another; using money to acquire property; and transferring money from one account to another. Successive disposals fall within the scope of the provision.[22]

10.27 Attorneys who have the power to deal with the property and affairs of a person[23] are in a similar position to that of a deputy or the court, but the disposal of property by an attorney operates to adeem a gift.

10.28 The different effect of a disposal of a person's property by a deputy (or the court) under the Mental Capacity Act 2005 and by an attorney is illustrated by *Banks v National Westminster Bank Plc & Another*.[24] In that case, which we have discussed above, the sale of her mother's house by the daughter, as attorney, operated to adeem the gift of the house the mother made to the daughter in her will. If there was no attorney, and the house had been sold by a deputy, then the daughter would have been entitled to the remaining proceeds of sale.

10.29 The incongruity of the outcome in *Banks* was noted by the judge, Judge Rich QC, who said:

> I recognise that this conclusion means that the claimant, who accepts the duty of acting as her mother's attorney, is placed in an invidious position in dealing with her mother's affairs, although not in a way which is totally different from the conflict of interest that commonly arises where a child is a beneficiary under his parent's will. I accept that it is unfortunate if results follow from acting in the interests of an incapacitated parent which she has no means of avoiding.[25]

10.30 In *Banks*, the daughter knew the terms of her mother's will, but did not understand that the effect of selling the house would be to adeem the gift. It is possible that even if she had understood the effect of the sale, her duty as attorney to act in her mother's interests would still have necessitated the sale.

10.31 In some cases, however, an attorney is not aware of the terms of a will and inadvertently adeems a gift in circumstances that could have been avoided if the contents of the will were known. For example, an attorney may be able to prioritise the sale of assets that are not the subject matter of a specific gift in a will.

10.32 We understand that in the past there has been uncertainty over an attorney's (or a deputy's) ability to see the will of the person lacking capacity. However, in March 2017, the Law Society published guidance clarifying that a solicitor may disclose a person's

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21 Mental Capacity Act 2005, sch 2, para 8(2).

22 Mental Capacity Act 2005, sch 2, para 8(5).

23 In respect of a person lacking capacity the attorney might have been appointed under either a Lasting Power of Attorney (LPA), under sections 9 to 14, and schedule 1, of the Mental Capacity Act 2005 or an Enduring Power of Attorney (EPA), under the Enduring Power of Attorney Act 1985 (the EPA was the predecessor to the LPA and the MCA repealed the 1985 Act so that no new EPAs can be created; existing EPAs are governed by section 66 and Schedule 4 of the MCA).

24 [2005] EWHC 3479 (Ch), [2006] WTLR 1693.

25 [2005] EWHC 3479 (Ch), [2006] WTLR 1693 at [30].

will to his or her attorney or deputy unless the client has previously made it clear that he or she does not wish his or her will to be disclosed to an attorney or deputy.[26]

10.33 Being able to see the will should help prevent an attorney from inadvertently adeeming a gift. It will not, however, prevent ademption from taking place where the attorney has no choice but to sell the property; for example, an attorney may have to sell property that is the subject of a specific gift in the will in order to raise funds to pay for the testator's care.

10.34 There is a risk that an attorney who knows the contents of a will may act deliberately to adeem a specific gift so that the funds realised fall into the residue of the estate and pass to another beneficiary instead (who might well be the attorney him or herself). In *Banks*, however, Judge Rich QC suggested that the disposal of property by an attorney for the purpose of depriving a beneficiary of a gift might "not have the effect of creating an ademption".[27]

Reform

10.35 We think that there is a clear case for reform to address the anomaly that the actions of an attorney adeems gifts in a will, whereas the actions of a deputy do not, by virtue of paragraph 8 of schedule 2 of the MCA.

10.36 In the *Banks* case, Judge Rich QC took the same view:

> I would further accept that such position would desirably be altered by a provision analogous to section 101 of the Act of 1983 [now replaced by the provision in the Mental Capacity Act 2005]. It is, however, in my judgment, a matter for Parliament, and it is not within the scope of amendment by judicial pronouncement to avoid this result which, in my judgment, flows from the claimant's lawful and proper dealing with her mother's property.[28]

10.37 We note that similar changes have been proposed and introduced in other jurisdictions. In Canada, for example, the Alberta Law Reform Institute noted:

> The trend in recent years has been to extend the anti-ademption exception to all substitute decision-makers and to move the legislative exception to the wills legislation.[29]

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26 Law Society Practice Note "Access and disclosure of an incapacitated person's will" 1 March 2017, see https://www.lawsociety.org.uk/support-services/advice/practice-notes/access-and-disclosure-of-an-incapacitated-persons-will/ (last visited 14 June 2017). The practice note also makes clear that a solicitor can refuse to provide the will to an attorney or deputy where the solicitor has reasonable cause for concern that the attorney or deputy may act in a way that is not in the best interests of the person for whom he or she acts (and therefore in breach of statutory and fiduciary duties).

27 [2005] EWHC 3479 (Ch), [2006] WTLR 1693 at [14].

28 *Banks v National Westminster Bank Plc* [2005] EWHC 3479 (Ch) at [14] citing *Shaftsbury v Shaftsbury* [1716] 2 Vern 747.

29 Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances* Final Report No 98 (August 2010) p 165. See further, in Australia, the proposal of the Victorian Law Reform Commission in its report, *Succession Laws* (2013) p 40.

10.38 We take the view that there should be provision in the MCA to prevent ademption by attorneys that mirrors the provision that already exists for deputies.

When the new exception should apply

10.39 A deputy is able to act on behalf of another person only when that person lacks capacity to act for him or herself.[30] An attorney, in contrast, is able to act even when the donor of the power still has capacity. To mirror the position in respect of deputies, any new provision in the MCA should only prevent ademption where property is disposed of by an attorney at a time when the donor of the power lacks capacity to act in relation to that particular disposal him or herself.[31]

10.40 The application of ademption on disposals of property by an attorney has been considered by the Victorian Law Reform Commission. They considered that a gift of the property should not adeem following such a disposal, regardless of whether the donor had capacity to make the disposal. They explained that this approach would avoid the need to determine the donor's capacity at the time of the disposal for the purpose of working out whether any exception to ademption applied.[32]

10.41 We take a different view of how ademption should operate on a disposal by an attorney, led by the desire to ensure that the law is most likely to give effect to the donor's testamentary intentions. We consider that the key question is whether the donor had testamentary capacity at the time the attorney made the disposal. If the donor had testamentary capacity, then he or she could avoid the effect of ademption by changing his or her will following the disposal. That is, the donor has the opportunity to ensure that his or her testamentary intentions are given effect by a will. If the donor does not have testamentary capacity, however, then he or she is unable to take into account the disposal in a will. In such cases, the disposal should not operate to adeem the gift, as that is most likely to reflect the donor's testamentary intentions. Given the guidance that will exist on the subject of testamentary capacity, it should not be unduly onerous for an attorney to explain why he or she reasonably believes that the testator lacks such capacity at the time of the disposal, triggering the exception to ademption. The proposed exception would apply only if the disposition of the property occurred after any new legislation has come into force.

10.42 We note that the application form for a Lasting Power of Attorney (LPA) for financial decisions and the guide on making and registering an LPA, both produced by the Office of the Public Guardian, refer to the attorney not being able to make a will for the donor of the power.[33] We suggest that it would also be useful for both publications to explain that, where an LPA is used to make dispositions of property, any specific gifts that the testator has made under his or her will may be affected, and that the testator should

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30 Mental Capacity Act 2005, s 20(1).

31 In relation to decisions about a person's property and affairs, both Lasting and Enduring Powers of Attorney can be used where the donor has capacity (provided that, in the case of the Lasting Power of Attorney, the power has been registered with the Office of the Public Guardian: MCA, s9(2)(b)).

32 Victorian Law Reform Commission, *Succession Laws* (2013) p 51.

33 See forms LP1F "Lasting power of attorney financial decisions" and LP12 "Make and register your lasting power of attorney: a guide" https://www.gov.uk/government/publications/make-a-lasting-power-of-attorney (last visited 14 June 2017).

review his or her will in the light of this consideration.[34] The inclusion of that guidance is beyond the scope of our project on wills law; therefore, we have not made a proposal to that effect in this Consultation Paper.

Consultation Question 51.

We provisionally propose that the Mental Capacity Act should be amended to provide that disposal of property by an attorney, where the donor lacks testamentary capacity, does not adeem a gift.

Do consultees agree?

Incomplete transfers and options to purchase

10.43 Ademption may also produce unjust results where a testator, having executed his or her will, enters into a contract to sell property, which is completed after the testator's death.[35]

10.44 For example, take the case where a testator leaves a house to a person by a gift in his or her will, then subsequently enters a contract to sell the house to a third party and dies before completion of the sale. The testator's executors are bound to complete the contract.[36] The beneficiary will be entitled to enjoy the property or income derived from it until the time of completion but, at that point, the proceeds of sale will become part of the testator's estate and the beneficiary's gift will be adeemed. That is, the beneficiary will not receive the proceeds of the sale.[37]

10.45 We have explained above that the rationale for ademption is that, in most cases, it gives effect to the testator's intentions. It is doubtful that the ademption of a gift where a transfer has been started by the testator before his or her death, but is completed afterwards, gives effect to the testator's intentions. Completion of the sale is the point at which a testator might be expected to think about changing his or her will to take into account the sale and the testator has died before that point. It seems hasty for the law to presume that the testator intended the gift to adeem.

10.46 A similar issue arises with an option to purchase.[38] If, in the example above, the testator granted the third party an option to purchase the house rather than agreeing to sell the property to him or her, then the exercise of that option after the testator's death

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34 This was a suggestion made by the Victorian Law Reform Commission in relation to the analogous forms provided for in their legislation on enduring powers of attorney, see Victorian Law Reform Commission report, *Succession Laws* (2013) p 51.

35 Where the will is made after the testator has entered into a contract ademption will not occur, see *Drant v Vause* (1842) 1 Y & CCC 580.

36 F Silverman, *Conveyancing Handbook* (22nd ed 2015) para 6.2.1.

37 *Farrar v Earl of Winterton* (1842) 5 Beav 1, 49 ER 476.

38 An option to purchase is a contract entered into between the owner of property and a prospective purchaser; it provides the prospective purchaser with the option to purchase the property during a specified period. The prospective purchaser can choose whether or not to exercise the option during the specified period.

retrospectively adeems the gift. The beneficiary will have a beneficial interest in the property until the third party exercises the option. At that point, the beneficiary's interest is adeemed and he or she takes no interest in the proceeds of the sale.[39]

10.47 Again, the bare fact of the testator granting the option says nothing about whether or not the testator intended to give the original beneficiary an interest in the proceeds of sale. The case of the option to purchase is, arguably, more of a problem because it is "easier to overlook an option than it is to overlook a contract".[40]

Reform

10.48 We think that reform is warranted to prevent gifts adeeming as a result of an incomplete transfer or the exercise of an option to purchase. We believe that reform should also extend to conditional contracts since they are analogous to options to purchase.[41]

10.49 The problem that arises from incomplete transfers has been addressed by legislation in several Canadian jurisdictions.[42] The US Uniform Probate Code also makes provision in these circumstances, giving the beneficiary of a specific gift a right to:

> any balance of the purchase price, together with any security agreement, owed by a purchaser at the testator's death by reason of sale of the property.[43]

10.50 Under this type of provision, in the case of a contract for sale of property made after the will but which has not yet completed at the time of the testator's death, the gift of the property would not adeem but would instead consist of the proceeds of sale of the property.

10.51 An analogous solution would also be appropriate where an option to purchase has been granted, so that on the exercise of this option the beneficiary receives the proceeds of sale paid under the option. This provision would reflect what happens where land subject to an option to purchase is given as a lifetime gift.

10.52 The problem of incomplete transfers may most commonly arise in relation to land because land is usually sold in a two-stage process of a contract for sale followed by a deed of transfer. Land is not uniquely affected, however, as the completion of a transfer of other property (for example, shares in a private company) may fall outside of the testator's control. Further, options to purchase may be granted in respect of property other than land including a shareholding. Therefore, we consider that any statutory exception should be expressed generally to cover incomplete transfers of, and options to purchase, any property. The proposed exception would apply only if the contract or option was entered into after any new legislation had come into force.

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39 *Lawes v Bennett* (1785) 1 Cox 167.

40 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 364.

41 The subject of a gift will adeem once the condition is fulfilled and the contract therefore completed. See *Re Sweeting* [1988] 1 All ER 1016.

42 Ontario, Alberta, Saskatchewan, New Brunswick, the Northwest Territories and Nunavut: see Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances*, Final Report No 98 (August 2010) pp 158 to 161.

43 Uniform Probate Code, s 2-606(a)(1).

Consultation Question 52.

We provisionally propose that a specific gift should not adeem where, at the time of the testator's death, the subject matter of that gift:

(1) has been sold but the transaction has not been completed; or

(2) is the subject of an option to purchase.

In those circumstances, the beneficiary of the specific gift that would otherwise have adeemed will inherit the proceeds of the sale.

Do consultees agree?

10.53 Certain complete transfers, where a specific gift has been sold, and the testator has received the proceeds of sale (or other consideration) before his or her death, might be as problematic as incomplete transfers. For example, the testator might die so soon after the completion of a sale of land that, although he or she has received the proceeds, he or she has not had the opportunity to revise the will.[44] The law could be reformed to provide that where the property disposed of can be traced into other property (perhaps, for example, because the proceeds of sale of a property are held in a separate bank account) the beneficiary should take that property.

10.54 In support of such a reform it might be argued that if the property is traceable, due, say, to the testator continuing to segregate the substitute property from the rest of his or her estate, that provides evidence that the testator did not intend the gift to adeem.

10.55 The main problem with a tracing-based approach is that it assumes that the value of a specific gift is its financial value. That assumption is contrary to the basic rationale of ademption. Ademption is based on the idea that, generally, where a testator makes a specific gift, there is something particular to the property given that makes it an apposite gift for the beneficiary. If value were the testator's primary motivation for leaving property to a beneficiary, the testator would have done so by a general or demonstrative gift. It follows that, generally, testators intend specific gifts to fail if the relevant property falls out of the testator's estate.

10.56 The point is even clearer when we consider cases in which one piece of property can be traced to another. For example, where, having made a specific gift of a diamond ring in a will, a testator later sells the ring to pay for a mobility scooter, it is unlikely that the testator intended the beneficiary to receive the scooter as a legacy.

10.57 Furthermore, a tracing-based rule would lead to increased litigation and uncertainty. Whenever a gift is said to adeem, the beneficiary might argue that it can be traced. In addition, the law of tracing is far from simple; if the equitable concept of tracing is to be

[44] See Alberta Law Reform Institute *Wills and the Legal Effects of Changed Circumstances* Final Report No. 98 (August 2010) p 157.

used, there are numerous areas of uncertainty.[45] If a new concept of tracing is used, it is difficult to say how that concept would be formulated. Accordingly, we neither propose such a reform nor ask whether it should be introduced.

Gifts of shares

10.58 As we have explained above, a gift will not adeem where, upon death, the testator holds property that is different in form, but not substance, to the subject matter of a specific gift. This question arises, for example, where a company changes the nature of a shareholding. If the new shares are considered to be different only in form, then the gift is given effect. But if the new shares are considered to be difference in substance, then the gift adeems.

10.59 In *Re Slater*[46] the testator left a gift to his wife of the interest arising from stock held in the Lambeth Waterworks Company. Before he died that company was transferred to the Metropolitan Water Board which had to pay compensation to the water companies that it acquired. The Lambeth Waterworks Company opted for its shareholders to receive stock in the Metropolitan Water Board as compensation, rather than cash. The Court of Appeal held that the gift in the will had adeemed as the Metropolitan Water Board stock was not substantially the same thing as the Lambeth stock. In contrast, in *Re Clifford*[47] the court held that a gift of a shareholding did not adeem where the company had changed its name and subdivided its shares because the subject matter of the gift retained its substance and had only changed its name and form.

10.60 It seems doubtful that the failure of a gift of shares where the shares have changed without any act on the part of the testator gives effect to the testator's intentions. The testator's failure to act (say, by making another will) is not good evidence that the testator intended the gift to adeem. It appears more likely that the unilateral act of the company subverts the testator's intentions. The US Uniform Probate Code provides a statutory solution in the form of an interpretative provision. Gifts of shares are interpreted to include additional shares acquired by events such as the declaration of stock splits or stock dividends or spinoffs of a subsidiary.[48]

10.61 We are not aware that ademption of shareholdings is a significant problem in practice. Notwithstanding, in the context of a general review of ademption it appears to us that it would be preferable for the law to provide the outcome that is most likely to accord with the testator's intentions. We note that the proposed exception would apply only if the actions of the company that caused the change occurred after any legislation had come into force.

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45 See L Tucker, N Le Poidevin, J Brightwell, *Lewin on Trusts* (19th ed 2016) ch 41.

46 *Re Slater* [1907] 1 Ch 665.

47 *Re Clifford* [1912] 1 Ch 29.

48 "Share splits are usually carried out when the existing shares reach such a high price that trading in them becomes difficult": J Law, *Oxford: A Dictionary of Business and Management* (6th ed 2016) p 522.

Consultation Question 53.

We provisionally propose that, except where a contrary intention appears from the will, a gift of shares will not be subject to ademption where the subject of the gift has changed form due to dealings of the company which the testator has not brought about.

Do consultees agree?

Simultaneous death and destruction of property

10.62 Ademption takes place when the property that is the subject matter of a gift is destroyed, lost or lawfully changes hands before the testator's death. Where the testator dies and his or her property is destroyed simultaneously (such that the order of these events is uncertain) there is a presumption that the property was destroyed before the testator died.[49] This presumption means that the gift adeems. The application of the presumption appears inconsistent with the rationale that ademption gives effect to the testator's intentions: where the destruction of property is simultaneous with the testator's death, the testator does not have any chance to respond to the event that caused ademption, by changing his or her will.

10.63 We have therefore considered reform to save such a gift from ademption. The gift could be saved in such circumstances by giving the beneficiary a right to claim the value of the destroyed property from the rest of the estate. We are aware that saving gifts from ademption in those circumstances might have some unfair consequences. For example, if the destroyed gift was an expensive heirloom, recourse to the rest of the estate to satisfy that gift could cause undue hardship to other beneficiaries of the estate. However, not saving gifts from ademption in cases of simultaneous death and destruction of property appears to cause hardship to the disappointed beneficiary in every case and especially where the destroyed gift was substantial. Furthermore, items that form a large part of a person's estate are likely to be insured and family provision legislation adds a layer of protection for beneficiaries of the rest of the estate.[50] We therefore provisionally propose that a provision be enacted to save gifts from ademption in cases of simultaneous death and destruction of property. The proposed exception would apply only if the testator died after the legislation had come into force.

10.64 We also ask for consultees' views about whether there are further specific instances in which the effects of the doctrine of ademption should be mitigated.

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49 *Durrant v Friend* (1852) 5 de G & Sm 343. See R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 366.

50 The Inheritance (Provision for Family and Dependants) Act 1975 allows a court to make provision from an estate for certain classes of people connected to the testator (for example, spouses and children). That power may override the terms of a will.

Consultation Question 54.

We provisionally propose that a beneficiary be entitled to the value of a specific gift that has been destroyed where the destruction of the property concerned and the testator's death occur simultaneously.

Do consultees agree?

Consultation Question 55.

We invite consultees' views about whether there are further specific instances in which the effects of the doctrine of ademption should be mitigated.

ARE WIDER REFORMS REQUIRED?

10.65 In the preceding section, we have identified specific problems with the operation of ademption and we have provisionally proposed reforms to address them. Some of those problems could be seen as illustrations of wider issues. The disposal of property by an attorney when the testator lacks capacity, changes in a testator's shareholding arising from an act by the company, and the simultaneous destruction of property on the testator's death can each be seen as examples of when ademption is caused by involuntary events; that is, events beyond the control of the testator. Options to purchase and incomplete transfers are both situations in which ademption arises, notwithstanding the fact that the testator retains an interest in the property at the time of death. In this section of the chapter we therefore ask whether any reform of ademption should be expressed more widely, rather than dealing only with the particular problems that have been identified in the current law.

Ademption by events beyond the control of the testator

10.66 The concept of "events beyond the control of the testator" could cover the various cases in which the testator does not expressly consent to the sale, destruction or loss of the property. In addition to disposal by an attorney, simultaneous destruction of property on death and changes in the mechanism of shareholding by the company, reform that provided for a beneficiary to receive cash in place of a specific gift that has ceased to form part of the testator's estate by reason of an event beyond the control of the testator could cover, for example:

(1) destruction by flood, fire or other means (even where the destruction does not occur simultaneously with death);

(2) theft; and

(3) expropriation by the Government.

10.67 We note that Professor Roger Kerridge appears to endorse this approach and advocates drawing a distinction between "i) a case where a change is effected by the voluntary act of the testator and ii) a case where a change is effected otherwise".[51]

10.68 One objection to this broader suggestion for reform could be that some transfers, even if they are made otherwise than by the voluntary act of the testator, "signal to the testator the need for a will change".[52] For example, when the testator's property is expropriated by the government, he or she should recognise that the expropriation may prevent the disposition in his or her will being effective and be spurred to alter his or her will. If the testator fails to make use of this opportunity to change his or her will, that failure is arguably an indication that the testator did, in fact, intend the gift to adeem. Similarly, the destruction of property which is the subject of a specific gift in a will should trigger the need to update the will if the testator intends for the beneficiary to receive a gift in its place.

10.69 The responses to individual problems that we have provisionally proposed above may each be justified on the basis that they appear more likely than the current law to uphold testamentary intentions. The same rationale does not appear to justify wider reform, when events beyond the testator's control should trigger the need to update a will. The justification for wider reform is different; it is designed to prevent outcomes that may be considered to be anomalous if some involuntary events are treated differently to others. For example, in the absence of wider reform, the destruction of property that is the subject matter of a specific gift in a fire in which the testator is killed would not adeem the gift in light of our proposed reform, but the gift would adeem if the testator survives.

10.70 There are further reasons to be cautious about introducing a rule based on events outside the control of the testator. Consider a case in which a testator's house is burgled and a piece of jewellery taken that was the subject of a specific gift in the testator's will. Even if the view was taken that the beneficiary should receive cash in place of the ring, the question of its value might prove intractable if there is no existing valuation. Furthermore, a change along these lines would mean that after every burglary, a testator would have to revise his or her will if he or she did not wish the person to whom any of the stolen property had been left to receive cash instead.

10.71 For these reasons, we are not minded to propose such a reform, but we invite consultees' views on whether broader reform is desirable.

Consultation Question 56.

We ask consultees for their views on reform to create a general exception to ademption where the property that is the subject of a specific gift and would otherwise adeem is no longer in the testator's estate due to an event beyond the control of the testator.

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51 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 362.

52 Alberta Law Reform Institute *Wills and the Legal Effects of Changed Circumstances*, Final Report No 98 (August 2010) p 160, citing the Law Reform Commission of Saskatchewan *Proposals Relating to Ademption by Equitable Conversion* (1984) pp 10 to 11.

Ademption where an interest in property is retained by the testator

10.72 In addition to options to purchase and incomplete contracts, there are other situations in which the testator may retain an interest in property even though the property has changed hands so that a gift would adeem. For example, the testator may have sold property to a family member to whom the testator lends the purchase price through a private mortgage; so that the testator becomes the purchaser's mortgagee, receiving the purchase price through mortgage payments rather than as a lump sum.. In some jurisdictions, legislation ensures that in such circumstances the interest retained by the testator is received by the beneficiary of a specific gift, so that the gift does not adeem.

10.73 The Uniform Law Conference of Canada, which recommends harmonised laws for the provinces of Canada, recommended a widely-drawn exception to ademption that covers a number of situations in which the testator retains an interest in property at his or her death.[53] Section 20(2) of the Uniform Wills Act suggests that an exception is drawn in the following terms:

> Except when a contrary intention appears by the will, where a testator at the time of his death has a right or chose in action or equitable estate or interest that was created by a contract respecting, a conveyancing of, or other act relating to real or personal property that was comprised in a devise or bequest, made or done after the making of a will, the devisee or donee of the that real or personal property takes the right or chose in action or equitable estate or interest of the testator.

10.74 An exception along these lines has been introduced in a number of Canadian jurisdictions.[54] Again, we do not feel that such wider reform is justified by the desire to ensure that the law reflects the testator's intentions. A testator who has sold property and been granted a mortgage to secure the proceeds, or has otherwise dealt with the property to change his or her interest, may be expected to update his or her will on the completion of the transaction. Therefore, we do not provisionally propose wider reform, but again we invite consultees for their views on whether wider reform is desirable.

Consultation Question 57.

We ask consultees for their views on reform to create a general exception to ademption, so that the beneficiary of the gift receives any interest that the testator holds in the property that was the subject of the gift at the time of his or her death.

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53 Uniform Wills Act, s 20(2) (http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/708-wills/1677-uniform-wills-act-consolidated-2010 last accessed 4 April 2017).

54 Alberta Law Reform Institute *Wills and the Legal Effects of Changed Circumstances*, Final Report No 98 (August 2010) p 156, citing statutes in Alberta, Ontario, New Brunswick, Northwest Territories, Nunavut and Saskatchewan.

Chapter 11: Revocation

INTRODUCTION

11.1 Revocation is the term used to describe the formal act of withdrawing a will. A will is, by its very nature, revocable by the testator until his or her death. In England and Wales, there are four established methods of revocation:

(1) by another will or codicil;

(2) by written intention to revoke;

(3) by destruction; and

(4) by marriage or formation of a civil partnership.

The law governing the revocation of a codicil to a will is the same as the law governing the revocation of wills generally.

11.2 For ease of reference, throughout this chapter, when we refer to revocation "by another will", we mean both revocation by a will or by a codicil.

11.3 A testator's intention to revoke a will by destruction, by another will or by written intention, may be absolute or conditional. If it is absolute, revocation takes place immediately. If it is conditional, revocation does not take effect unless the condition is fulfilled. In this chapter we set out the current law for the first three methods by which a will may be revoked before turning briefly to consider reform of these areas. We have formed the view that these three methods generally work well and that the law does not require reform. We then turn to consider the current law governing revocation by marriage, and consider reform of the law in more detail. We ask whether the rule that marriage should automatically revoke a will should be retained.

11.4 The effect of the testator's divorce on a will is different from that of marriage: the will is not revoked but, from the time of the divorce, the testator's former spouse is treated as having predeceased the testator for the purpose of both the appointment of executors and trustees, and the inheritance of property under the will.[1] If the will remains otherwise unchanged, the gift will either fall into the residue of the testator's estate or a substitional gift will become effective.[2]

11.5 The Law Commission published a Report entitled *The Effect of Divorce on Wills* in 1993 and the subject is beyond the scope of this Report. For that reason, we do not further consider reform to that area of law.

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1 Wills Act 1837, s 18A. The dissolution of a civil partnership has the same effect (Wills Act 1837, s18C).

2 For example, where a testator leaves something to his or her spouse, but to a charity in the event that the spouse pre-deceases the testator. In that case, the charity is a substitute to whom the gift goes if the spouse is no longer alive.

ANOTHER WILL OR CODICIL

11.6 Section 20 of the Wills Act 1837 has the effect that the whole of or any part of a will may be revoked by a subsequent validly executed will; one that complies with formality requirements for a will,[3] was executed by a testator who has testamentary capacity[4] and was not formed as a result of undue influence.[5] Revocation by will may be express or implied.

Express revocation

11.7 Express revocation by will occurs when the terms of the subsequent will stipulate that any previous testamentary dispositions are revoked by the new will. Wills commonly contain such clauses, providing, for example, that "all wills, codicils and other testamentary dispositions heretofore made by me" are revoked. Express revocation clauses generally revoke all previous wills and codicils, as if they had never existed.[6]

11.8 Of course, whether or not an express revocation clause operates to revoke all previous testamentary instruments depends on its proper construction. An express revocation clause may be drafted in such a way that it revokes a single clause, or even word, in a previous will. In *Re Wayland*,[7] for example, an express revocation clause which was expressed to relate only to English property was held not to revoke a previous will dealing only with Belgian property.

11.9 No particular form of words is required for an express revocation clause to have its intended effect. It is clear, however, that the common description of a will as the last will of the testator —"This is the last will and testament of Mr Smith"— is insufficient to revoke a previous will.[8]

Implied revocation

11.10 A will is impliedly revoked, in the absence of an express revocation clause, by a subsequent will where the latter is inconsistent with or merely repetitive of it.

11.11 If the provisions of the subsequent will are entirely inconsistent or repetitive, the prior will is revoked entirely.[9] If, however, the two wills are only partially inconsistent or repetitive, the parts of the previous will which are not affected by the inconsistency or repetition remain valid.[10] In the absence of an express revocation clause, the facts in *Re Wayland*[11] provide a useful illustration of this principle: the first will dealing only with

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3 See Chapter 5.

4 See Chapter 2.

5 See Chapter 7.

6 *Sotheran v Dening* (1881) 20 ChD 99.

7 [1951] 2 All ER 1041.

8 *Cutto v Gilbert* (1854) 9 Moo PC 131.

9 *In the Estate of Bryan* [1907] P 125.

10 *Curati v Perdoni* [2013] WTLR 63.

11 [1951] 2 All ER 1041.

Belgian property would not be impliedly revoked by the second will dealing only with English property.

Proof of revocation

11.12 Importantly, revocation by will takes effect when the subsequent will is executed. This means that the earlier will is revoked even if the later will is lost[12] or inadmissible to probate[13] when the testator dies. Where the subsequent will is void, however, for example where it was drawn under undue influence, it will not revoke any previous will as a void will is treated as never having been drawn. The facts of *Re Howard*[14] are an example of the situation where a later will is valid but inadmissible to probate, and therefore still revokes a previous will. There, the testator executed a will in which he left his estate to his son, and later executed two further wills on the same day; one in favour of his wife, the other in favour of the same son. The new wills both contained express revocation clauses and revoked the first will on execution. They could not be admitted to probate, however, as there was nothing to indicate the order in which they were made. The revocation of the will combined with the inability to admit one of the new wills to probate had the effect that the testator died intestate.

11.13 There may be evidential difficulties where the subsequent will has been lost or destroyed. In such circumstances, it is necessary to prove that:

(1) the later will was duly executed; and

(2) the later will expressly or impliedly revoked the earlier document.

The express or implied revocation may be proved by production of a copy of the will or written drafting instructions, or by clear oral evidence.[15]

WRITTEN INTENTION TO REVOKE

11.14 A will may also be revoked by a written statement of intention to revoke the will.

11.15 Section 20 of the Wills Act 1837 provides for revocation:

> …by some writing declaring an intention to revoke the same and executed in the manner in which a will is herein-before required to be executed…

In other words, where a person with capacity to do so expresses an intention to revoke a previous will in writing and complies with the law governing the formalities of wills (that is, where the writing is signed by the testator and two witnesses), and the revocation is not made under undue influence, it will revoke any previous testamentary document.

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12 *Brown v Brown* (1858) 8 E & B 876.

13 *Re Howard* [1944] P 39.

14 [1944] P 39.

15 In *Cutto v Gilbert* (1854) 9 Moo PC 121, it was held that "oral evidence ought to be stringent and conclusive". The ordinary standard of a reasonable balance of probabilities applies. In *Re Wipperman* [1955] P 59, for example, evidence that it was a solicitor's usual practice to insert a revocation clause was held to be insufficient by itself.

11.16 There are no other restrictions on the form or content of the document. In *Gosling*,[16] for example, it was held that stating at the foot of an obliterated codicil that "We are witnesses to the erasure of the above", signed by the testator and properly attested by two witnesses, is sufficient to amount to a written intention to revoke. The lack of any requirement of specific form of writing is also illustrated by the judgment of the Court of Appeal in *Re Spracklan's Estate*[17] where it was held that a letter signed by the testator, properly witnessed and addressed to the manager of the bank having custody of her will, instructing him to "destroy the will already made out", was sufficient to revoke the will held by the bank.

DESTRUCTION

11.17 The third method of revocation is by destroying the document itself.

11.18 Section 20 of the Wills Act 1837 refers to revocation:

> By the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

11.19 There are two requirements to revocation by destruction:

(1) an act of destruction; and

(2) an intention to revoke.

11.20 In the words of Lord Justice James in *Cheese v Lovejoy*, "all the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying: there must be the two".[18] Both requirements must also be satisfied in respect of each document which is purported to have been revoked: the effective revocation of a will by destruction does not by itself act to revoke a codicil to that will.[19]

Act of destruction

11.21 An effective act of destruction requires that the entirety, and not merely part, of the will must be destroyed—though it is sufficient if the essence of the will, not necessarily the material on which it is written, is destroyed.[20] Cancelling a will by striking its contents through with a pen and crossing out the name of the testator is not an act of destruction,[21] for example, nor is writing the word "cancelled" over a signature.[22]

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16 *In the Goods of Gosling* (1886) 11 PD 79.

17 [1938] 2 All ER 345. The Court of Appeal followed the judgment of Lord Penzance in *In the Goods of Durance* (1872) LR 2 P&D 406, in which he stated, "If a man writes to another 'Go and get my will and burn it,' he shows a strong intention to revoke his will".

18 (1877) 2 PD 251, per James LJ at 253.

19 *In the Goods of Savage* (1870) LR 2 P & D 78.

20 *Hobbs v Knight* (1838) 1 Curt 768, at 778.

21 *Stephens v Taprell* (1840) 2 Curt 459.

22 *In the Goods of Brewster* (1859) LJP 69.

11.22 In *Cheese v Lovejoy*,[23] the testator crossed out some lines of his will with a pen, wrote on the back of it "All these are revoked", and threw it among a heap of waste paper in the corner of his sitting room. It was later retrieved by his housemaid and kept in the testator's kitchen until his death seven years later. The Court of Appeal upheld the validity of the will: there was no effective act of destruction.

11.23 Case law suggests that the key to effective destruction is that the will itself or a key component of it (that is, one that is required in order for the will to be valid) is no longer legible. It suffices, therefore, if the signature of the testator is cut out,[24] or the signatures of the testator and attesting witnesses are scratched away with a penknife or pen[25] so that it is impossible to identify them as signatures. In contrast, a will is not revoked where the testator's signature has been scratched, but still remains legible.[26]

11.24 In addition, the testator must complete all that he intends to do by way of destruction. A will is not revoked, for example, where the testator intends to burn the entirety of his will, but in fact only burns a particular section. In *Doe d. Perkes v Perkes*,[27] for example, it was held that a testator who tore his will into four pieces, then stopped and said "it is a good job it is no worse" had not revoked his will because he had not completed all that he intended to do. On the other hand, if his original intention had been to tear the will into four pieces only, the act of doing so would have been sufficient to revoke it.

11.25 The act of destruction must also be carried out by the testator or by another person in his or her presence and under his or her instruction. For example, where a testator instructed a third party by telephone to destroy his or her will and a third party did so, the will was not revoked.[28] Similarly, a will destroyed by a third party in the testator's presence but without the testator's instruction to do so, will not revoke the will, even where the testator subsequently ratifies the destruction.[29]

Intention to revoke

11.26 An intention to revoke must be shown whilst the act of destruction was carried out. It may be evidenced by:

(1) actual proof of the testator's expressed intention to revoke;[30]

(2) circumstances from which such an intention may be inferred;[31] or

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23 (1877) 2 PD 251.

24 *Hobbs v Knight* (1838) 1 Curt 768.

25 *In the Goods of Morton* (1887) 12 PD 141; *Re Adam* [1990] 1 Ch 601, respectively.

26 *In the Goods of Godfrey* (1893) 69 LT 22.

27 (1820) 3 B & Ald.

28 *In the Estate of Kremer* (1965) 110 SJ 18.

29 *Mills v Millward* (1890) 15 PD 20, at 21.

30 *Elms v Elms* (1858) 1 Sw & Tr 155.

31 *Re Kennett's Goods* (1863) 2 New Rep 461.

(3) by the condition of the will after the alleged destruction has taken place.[32]

11.27 Destruction whilst the testator lacks capacity does not revoke a will; the same standard of capacity is required for revocation by destruction as for the making of a will.[33] Where the testator lacks capacity, he or she cannot be said to have intended to revoke his or her will by any act of destruction. Similarly, a will destroyed by accident is not revoked.[34]

11.28 Although in practice significant evidential difficulties may arise in demonstrating an actual intention to revoke, a will which was last known to be in the testator's possession but which cannot be found at his or her death is presumed to have been destroyed by the testator with the intention of revoking it.[35] The strength of the presumption varies according to how secure the will was being kept by the testator. It will be stronger, for example, where the will was kept in a locked safe to which only he or she had access, than where it was kept in an unlocked sideboard in a house occupied by the testator and others. It may also be rebutted by evidence that the will was not revoked, such as evidence that the will was destroyed by a third party or by accident, or by evidence showing the testator's intention to adhere to the will. The contents of such a missing will may be proved by a draft or copy document or by clear oral evidence.[36]

11.29 The operation of the presumption is illustrated by the facts of *Sugden v Lord St Leonards*.[37] Lord St Leonards' will and a number of codicils were kept prior to his death in a locked box, to which there was a spare key that a number of household staff and family had access to. After he died, it was discovered that the will was lost. The Court of Appeal refused to presume an intention that the testator intended to revoke his will, and accepted the evidence of his daughter, who had read over the will with her father on a number of occasions, as to its contents.

11.30 Similarly, a will which has been in the testator's possession but which is found to have been torn or mutilated at his death, is presumed to have been torn or mutilated by the testator with the intention of revoking it in whole or in part.[38] Again, the presumption may be rebutted by evidence to the contrary,[39] and unless the party alleging revocation proves that the testator was of sound mind (and thus capable of revoking the will) at the time of destruction, the will is admissible to probate.

REFORM

11.31 We are not aware of any significant problems in the operation of the law governing the revocation of wills by a subsequent and properly executed will. The principle of revocation by will is relatively simple, and the flexibility introduced by the doctrines of

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32 *Re Eeles' Goods* (1862) 2 Sw & Tr 600.

33 *Re Sabatini* (1969) 114 SJ 35. See generally Chapter 2.

34 Thus a will was not revoked where it was destroyed under the mistaken belief that it was invalid (*Giles v Warren* (1872) 2 P&D 401) or where it had already been revoked (*Scott v Scott* (1859) 1 Sw & Tr 258).

35 *Eckersley v Platt* (1886) LR 1 P & D 281.

36 *Re Webb* [1964] 1 WLR 509.

37 (1876) 1 PD 154.

38 *Lambell v Lambell* (1831) 3 Hag Ecc 568.

39 *In the Estate of MacKenzie* [1909] P 305.

express and implied revocation allow the courts to give effect to the testator's testamentary intentions in most cases. There is equivalent provision for revocation by subsequent will in many jurisdictions, including New South Wales,[40] British Columbia,[41] New York[42] and California.[43]

11.32 We have also formed the view that the law governing the revocation of wills by written intention to revoke is unlikely to present any significant problems in practice, and therefore does not require substantive reform. The Courts impose no further restrictions on the form and content of the writing, beyond that required in section 20 of the Wills Act 1837 (that is, that it complies with the same formalities requirements as a will and was not made under undue influence). Equivalent provisions again exist in many jurisdictions, including New South Wales,[44] British Columbia,[45] New York[46] and Florida.[47]

11.33 We note that there may be significant evidential difficulties in demonstrating an intention to revoke a will by destruction. It will be rare, for example, for a testator to record his intention to destroy his or her will whilst carrying out the act of destruction. Accordingly, the operation of the rebuttable presumptions discussed above is key to the effective operation of the law governing revocation by destruction.[48]

11.34 Notwithstanding this, however, we note that many of the cases concerning alleged revocation by destruction are Victorian and that it is doubtful that revocation by destruction will be common today. The principle is also established in many other jurisdictions, including those set out above in respect of revocation by a subsequent will.[49] We are of the view that the law is sufficiently clear and practicable, and that no reform is necessary.

11.35 We observe, however, that there may be cases where the testator has shown a strong intention to revoke his or her will but has failed to comply with the formalities when seeking to act on that intention. So, in seeking to revoke a will by a writing, the testator may omit to have his or her signature witnessed, or in seeking to destroy a will a testator may think that writing "cancelled" across the will is, in fact, sufficient to do so.

11.36 We think that the dispensing power, which we discuss in Chapter 5, can play a role here and allow the courts to give fuller effect to a testator's testamentary intentions. Of course, where the power is used to dispense with formalities needed for a will, the

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40 Section 11(1)(c), Succession Act 2006 (NSW).

41 Section 55(1)(a), Wills, Estates and Succession Act (BC).

42 NY Est Pow & Trusts L § 3-4.1 (2015).

43 CA Prob Code § 6120 (2015).

44 Section 11(1)(d), Succession Act 2006 (NSW).

45 Section 55(1)(a), Wills, Estates and Succession Act (BC).

46 NY Est Pow & Trusts L § 3-4.1 (2015).

47 F.S. §732.505.

48 See paras 11.28 above.

49 Section 11(1)(e), Succession Act 2006 (NSW); Section 55(1)(c), Wills, Estates and Succession Act (BC); NY Est Pow & Trusts L § 3-4.1 (2015); CA Prob Code § 6120 (2015).

document that is admitted to probate by virtue of the dispensing power may expressly or impliedly revoke any earlier will. But we think that, for the purposes of that power, a testator's intention to revoke a will by way of writing or destruction can constitute "testamentary intentions". A testator's intention to revoke a will by writing or by destruction should, therefore, fall within the scope of the proposed power, providing the court with the ability to dispense with the formalities of these methods of revocation where that is warranted on the evidence in the particular case.[50]This does not require, in our view, any further proposal with regard to the dispensing power in the specific context of revocation.

11.37 In Chapter 6 we have provisionally proposed the creation of an enabling power to make provision for the introduction of electronic wills. When that power is exercised, it will be necessary for consideration to be given to how an electronic will may be revoked by a written intention to revoke the will or by destruction. We do not make specific proposals here, as the form that destruction or writing will need to take is dependent on the format of electronic wills when such wills are introduced.

Consultation Question 58.

We provisionally propose that no reform is required to the law governing the revocation of wills by will or codicil, writing or destruction.

Do consultees agree?

MARRIAGE

11.38 Marriage automatically acts to revoke any will made by either party before the marriage. It is immaterial whether the party intends the will to be revoked or is even aware of the significance of marriage on the validity of any previous will. Throughout the remainder of this chapter we refer to this as "the general rule".

11.39 The general rule is contained in section 18 of the Wills Act 1837:[51]

> Subject to subsections (2) to [(5)] below, a will shall be revoked by the testator's marriage.

[50] Where the testator's intention is purely to revoke an earlier will and the use of the dispensing power carries that intention into action, the result will be that the testator's estate will pass according to the intestacy rules.

[51] As substituted by the Administration of Justice Act 1982. Section 18B was inserted by the Civil Partnership Act 2004 to provide for the automatic revocation of any previous wills by the formation of civil partnership: "subject to subsections (2) to (6), a will is revoked by the formation of a civil partnership between the testator and another person".

11.40 A voidable marriage,[52] whether subsequently annulled or not, revokes any will already made by either party in the same way as if the marriage was valid. A void marriage,[53] however, is treated as never having taken place, and therefore does not revoke any will already made by either party.[54]

11.41 Section 19 goes on to make clear that no other alteration in circumstances, such as the birth of children, separation or change of financial circumstances, however significant, acts to revoke a will:

> No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

Exceptions

11.42 There are two exceptions to the general rule where marriage does not automatically act to revoke a previous will:

(1) where the will is expressed to have been made in contemplation of the marriage; and

(2) for certain appointments made by will.

A will expressed to be made in contemplation of marriage

11.43 Section 18(3) of the Wills Act 1837 provides that:

> Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.

In other words, a subsequent marriage will not act to revoke a previous will where it is apparent from the drafting of the will that it was made in contemplation of the particular marriage and that it should not be revoked.[55]

Certain appointments by will

11.44 Section 18(2)[56] of the Wills Act 1837 provides that:

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52 Matrimonial Causes Act 1973, s12 sets out the circumstances in which a marriage is voidable, including non-consummation due to wilful refusal or incapacity; lack of consent due to duress, mistake, unsoundness of mind or otherwise; mental disorder which renders the person unfit for marriage, venereal disease; existing pregnancy and change of gender.

53 A marriage will be void, for example, where there has been "knowing and wilful" non-compliance with certain of the formalities required for a marriage, see ss 25 and 49 Marriage Act 1949.

54 *Mette v Mette* (1859) 1 Sw & Tr 416.

55 Civil Partnership Act 2004, s18(B)(3) makes provision for the same exception with regard to civil partnerships. Section 18(4) of the Wills Act 1847 operates in the same way in respect of a particular disposition made by a will.

56 As substituted by the Administration of Justice Act 1982.

A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.[57]

11.45 This provision operates where a testator has been given a power by someone else (that can be exercised in a will) to decide who should receive that other person's property, and then seeks to exercise that power in his or her will. For example a person may leave a life interest in his or her estate to his or her spouse. As the spouse will only be able to enjoy the estate for his or her lifetime a decision must be made as to who will receive the property when the spouse dies. The first testator might therefore provide, in his or her will, a power for the surviving spouse with the life interest to decide, using his or her own will, how the property should be divided between their children when the surviving spouse dies. Section 18(2) varies the general rule on revocation in its application to the exercise of a power of appointment in a will. Such an appointment in a will (by the surviving spouse in the above example) will only be revoked by marriage where the terms of the power to appoint (found in the original testator's will in the example) provide that, in default of any appointment being made, the property would pass to the personal representatives (of the surviving spouse in the example).

11.46 We understand that the policy rationale behind the section is, consistent with the general rule, protection of the testator's spouse: the disposition by way of the exercise of the power of appointment will be revoked where revocation favours the spouse. If, in default of appointment, the property passes to the personal representatives of the person who exercised the power (the surviving spouse in the example) then the disposition is not protected from revocation because any new spouse could then benefit. If, in default of appointment, the property passes to other people, there is no point in marriage revoking the appointment because any new spouse could not benefit anyway.

Reform

Operation of the general rule

11.47 It appears that the general rule has not been reconsidered in any detail since the enactment of the Wills Act 1837. The effect of the general rule is that, by default, the spouse is entitled to the deceased person's property under the intestacy rules (or at least some of it; it will depend on the deceased person's familial circumstances). This default position could be regarded as inappropriate and reflective of outdated societal norms for a number of reasons.

11.48 First, we can look at the effect of the intestacy rules which will apply where the deceased person has remarried, and any previous wills have therefore been revoked due to the operation of the general rule. Under the intestacy rules, the spouse is likely to receive the majority of the estate.[58] As a result, the general rule has the effect that second

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57 Civil Partnership Act 2004, s18(B)(2) makes provision for the same exception as regards civil partnerships.

58 Where there are no children (or other descendants), the spouse receives the entire estate; where there are children (or other descendants) the spouse receives a fixed net sum (currently £250,000) and shares any remainder with the issue equally. See Administration of Estates Act 1925, s 46, and Family Provision (Intestate Succession) Order 2009/135 (repealed). In 81% of estates in England and Wales (both intestate and where there is a will) the size of the estate is £300,000 or less: see Ministry of Justice (February 2017) "Court Fees: Government Response to consultation on proposals to reform fees for grants of probate" Cm 9246, p 10.

families are favoured over children from a previous marriage or other beneficiaries. Although this outcome may reflect the deceased person's intentions, default entitlement in favour of the surviving spouse ignores those cases in which the testator feels that he or she still has moral or financial obligations arising from events before a marriage.

11.49 Secondly, automatic revocation following marriage is also apt to frustrate the wishes of people for whom marriage no longer represents a significant lifestyle change. Many couples now cohabit before marrying, and where that is the case the testator may neither wish nor expect that a will that he or she has made which makes provision for his or her cohabitant to be revoked on marriage.[59] Instead, such a person's intention may well be that the will made when the couple were cohabiting should continue to be valid now that they are spouses.

11.50 Against these factors, however, we note that the operation of the general rule, coupled with the effect of the intestacy rules, provides the strong benefit of protecting the surviving spouse where the first spouse, at the time of his or her death, has not made another will providing for the surviving spouse. It might be the case that the surviving spouse does not have any significant assets in his or her own name with which to support him or herself. Although the surviving spouse is protected by being able to make an application for financial provision from the deceased person's estate under the Inheritance (Provision for Family and Dependants) Act 1975,[60] such protection comes at the emotional and financial costs of bringing a claim under the Act.

11.51 We are also mindful that changing the rule, so that marriage does not revoke a will, may cause problems where the public is not aware that any change has happened. A change may act to the detriment of surviving spouses where, in reliance on the rule, the deceased person had assumed that the marriage would revoke an earlier will which made no provision for the surviving spouse. That said, we do not know whether the public has any awareness of the existence of the general rule.[61]

11.52 Revocation by marriage is a delicate policy area because, whatever the rule, there will be difficult cases. Cohabiting couples may be tripped up by the current rule that marriage revokes a will. They might decide to get married having already settled their testamentary affairs, in which case the marriage would revoke any will already made. In the worst cases, cohabitant testators who marry will not be aware that their wills are thereby revoked. Were the revocation rule changed such that marriage no longer revoked a will, second families would be disadvantaged. In that case, where a testator remarried and did not intentionally revoke a previous will benefiting his or her first family to the exclusion of his or her second family, the second family – the testator's family at

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59 In 2011, only 14.9% of the 249,133 who married did not cohabit prior to marriage: Office for National Statistics, "Marriage statistics, cohabitation and cohort analyses" (2014). See https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/datasets/marriagestatisticscohabitationandcohortanalyses (last visited 14 June 2017).

60 Under s1(1)(a), the spouse or civil partner of the deceased may apply to the court for an order under s2 on the ground that the disposition of the deceased's estate, or the intestacy rules, is not such as to make reasonable financial provision for him or her.

61 We note that the gov.uk website states that "you should review your will every 5 years and after any major change in your life, for example: getting separated or divorced; getting married (this cancels any will you made before)…". See https://www.gov.uk/make-will/updating-your-will (last visited 14 June 2017).

the time of his or her death – would have no entitlement to the testator's estate under the will. While the 1975 Act could affect both scenarios, a claim under the Act might not always produce the result that the testator would have wished.

11.53 We note that the difficult cases will only arise when a testator has not made a new will at the time of (or in anticipation of) a marriage. In those cases the essential question is whether greater overall fairness is achieved by application of the intestacy rules and the 1975 Act (with the earlier will having been revoked), or by applying the earlier will together with the 1975 Act.

11.54 Looking at the comparative picture, we note that marriage does not automatically revoke a previous will in Scotland, British Columbia[62], New York[63] and California,[64] although it does in New South Wales.[65]

11.55 We have found it difficult to form a view as to whether the general rule that marriage revokes a will should be changed or not. This question raises a policy issue of the level of protection that should be afforded to a surviving spouse. To assist us in making this decision, we would find it useful to have greater evidence of the public's awareness of the general rule.

Consultation Question 59.

We ask consultees to provide us with any evidence that they have on the level of public awareness of the general rule that marriage revokes a will.

Do consultees think that the rule that marriage automatically revokes a previous will should be abolished or retained?

Opting out of the revocation rule

11.56 Whether or not marriage revokes a will, testators could be given the choice to opt out of the default rule. If the basic rule remains as it is, testators could be allowed to displace that rule by clearly stating in their will that they do not wish it to be revoked on any subsequent marriage. Were the law to change such that marriage no longer acted to revoke a will, testators could direct that their will, or particular dispositions in it, should be revoked by any future (uncontemplated) marriage.

11.57 Allowing testators to do so would have two advantages. First, it would strengthen testamentary freedom; testators would have greater choice about how their wills operate. Secondly, where testators seek the help of professionals to draft their wills, those professionals would advise the testators about the potential effects of marriage on a will. Consequently, there would be greater awareness of the default rule.

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62 s 55, Wills, Estates and Succession Act (BC).

63 NY Est Pow & Trusts L § 5-1.3 (2015).

64 F.S. §732.506 (2015)

65 s 12, Succession Act 2006 (NSW).

11.58 Nevertheless, the disadvantage of such a proposal is that it would put testators in the position of making decisions under conditions of great uncertainty. We note that all testamentary decisions are necessarily made under conditions of uncertainty. For example, testators might not know whether, at the time of their death, they would still feel any obligation to a particular beneficiary. However, where the issue is one of an uncontemplated future marriage, it might be that the uncertainty is so great that the testator cannot realistically be expected to make that choice. Deciding whether or not a will should be revoked on marriage, when no marriage is contemplated at the time the will is executed, and so the identity of a future spouse is unknown, is far less certain than deciding who, among known beneficiaries, should receive property. Arguably, choice made under such great uncertainty is not a valuable choice at all.

Consultation Question 60.

Should testators be empowered to prescribe whether a will or particular dispositions in it should be revoked by a future (uncontemplated) marriage?

Special provision in the situation where the testator lacks capacity

11.59 In the event that consultees are of the view that marriage should generally continue to revoke a previous will, we consider whether specific provision should be made in a particular type of case; where a person marries after having lost testamentary capacity.

11.60 As we have explained in Chapter 2, there is no single test of capacity in English law. The test of capacity required to marry is different – and lower – from the test of testamentary capacity.[66] Stakeholders have suggested that the different tests of capacity give rise to a particular concern in respect of older, vulnerable testators. A person may have the capacity to marry but, through lack of testamentary capacity, be unable to make a will after the marriage. As a result, following the marriage, the person is unable to make a new will to redress the balance of provision that would, under the intestacy rules, be made between the new spouse and any children from a previous relationship.[67] This position appears clearly undesirable.

11.61 Even where a person who has married is found to have lacked capacity to do so, a will made by that person will be revoked by that marriage. That is because lack of consent means that a marriage is voidable, rather than void, and a voidable marriage revokes any will already made by either party, whether the voidable marriage is annulled or not.[68]

11.62 A solution to this situation would be to provide that where a person enters into a marriage at a time when he or she lacks testamentary capacity, and is unlikely to

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66 The two key considerations in assessing capacity in this context were summarised by Mr Justice Munby in *Sheffield City Council v E* (An Alleged Patient) [2004] EWHC 2808 (Fam): (1) Does the person understand the nature of the marriage contract? (2) Does the person understand the duties and responsibilities that normally attach to marriage?

67 Assuming that the children receive anything – which they will not do if the estate is under £250,000.

68 See para 11.40 above.

recover such capacity, that marriage will not, as an exception to the general rule, revoke any previous will.

Consultation Question 61.

We provisionally propose that marriage entered into where the testator lacks testamentary capacity, and is unlikely to recover that capacity, will not revoke a will.

Do consultees agree?

Chapter 12: Mutual wills

INTRODUCTION

12.1 Mutual wills are a way for two (or more) people to make wills in a way that prevents the survivor changing his or her will after the death of the first person. This form of will has been criticised by both academics and practitioners.

12.2 There also appears to be confusion amongst the public with regard to mutual wills arrangements. Stakeholders have told us that members of the public may think they have a mutual wills arrangement with their partner or spouse when in fact this is not the case, and they simply have mirror wills (or couples may mistakenly call their mirror wills mutual wills). With mirror wills each person makes a will that mirrors the other person's will, in that, for example, spouses leave their property to each other and, should the other spouse have died before him, to any children. Mirror wills are not mutual wills; they do not ordinarily bind the survivor, who is free to make a new will after the death of the other person, should he or she wish to do so.

12.3 We understand that while mutual will arrangements are made (there are a number of reported cases to which we refer below) they are, in practice, rare; one practitioner specialising in private client work told us that he had only seen one such arrangement in over 30 years of practice.[1]

12.4 Practitioners have told us, unanimously, that they would not encourage clients to make mutual wills because they are an inflexible device. We understand that if clients wish to control how those who inherit their property deal with it following their death, practitioners will suggest alternative ways of doing so. That might involve giving a person an interest under a trust so that, for example, the surviving person might only have the right to occupy a house until he or she dies, rather than inheriting the house outright.

THE CURRENT LAW

12.5 There are three requirements for a valid mutual will:

(1) two or more persons execute wills pursuant to an agreement;

(2) the parties agree that the survivor shall be bound by the arrangement; and

(3) the first party dies.[2]

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1 There do seem to be some differences in opinion. While most commentators agree that mutual wills are rare (see R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession*, (13th ed 2016) p 134, and Sion Hudson and Brian Sloan , "Testamentary Freedom: Mutual Wills Might Let You Down", *Modern Studies in Property Law* (8th ed 2015) we note the comment by the editors of *Williams on Wills* that they "have become more common in recent years." See RFD Barlow, R A Wallington, S L Meadway and J A D MacDougald, *Williams on Wills* (10th ed 2014) para 2.3.

2 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 131.

Execution of wills pursuant to an agreement

12.6 An agreement must be reached between the testators, which amounts to a contract.[3] It appears that the doctrine is not in any way restricted by the relationship between the testators; for example, there is no requirement that the wills be executed by spouses or blood relatives.

12.7 Although mutual wills usually make provision for the surviving testator in some way, it is not necessary that each of the testators receives a financial benefit.[4] So, it is possible, for example, for two people to execute mutual wills in favour of a common third party, such as their children or other relatives.

12.8 The agreement to make mutual wills may be oral or in writing, but must be in writing if it concerns a disposition of land, to comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.[5] The effect of section 2 is that such written agreements must be signed by both parties or that one copy be signed by each party and those copies then exchanged.

Agreement that the survivor shall be bound by the arrangement

12.9 The agreement can take one of two forms; either (a) an agreement by the parties not to revoke their mutual wills,[6] or (b) an agreement to leave property by will in a particular way.[7] In each case, the key issue is that each of the parties has agreed with the other not to alter his or her testamentary dispositions after the first party dies.[8]

12.10 The agreement can be proved by express declarations within the mutual wills, by recital or otherwise,[9] or by clear and satisfactory extrinsic evidence.[10] Commentators suggest that express declaration is clearly preferable:

> This is certainly the better course because, if any question arises, it may well arise many years after the execution of the will and evidence of an oral agreement may be either unobtainable or it may be difficult to establish its precise terms.[11]

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3 *Re Goodchild* [1997] 3 All ER 63.

4 In *Re Dale* [1993] 4 All ER 129, for example, the second to die received no benefits under the will of the first to die.

5 *Healey v Brown* [2002] WTLR 849; (2001-02) 4 ITELR 894.

6 This is the more common scenario. In *Re Hagger* [1930] 2 Ch 190, for example, a husband and wife made a mutual will containing a declaration that the will should not be altered or revoked other than by mutual agreement. Accordingly, they agreed that both would be bound.

7 In *Re Green* [1951] Ch 148, for example, a husband and wife made a mutual will pursuant to which the survivor would have the use of the first to die's property for life, then would provide by will for the carrying out of the other's wishes.

8 *Brynelsen Estate v Verdeck* [2002] CanLII 187 (BCCA).

9 *Re Hagger, Freeman v Arscott* [1930] 2 Ch 190.

10 In *Charles v Fraser* [2010] EWHC 2154 (Ch), 13 ITELR 455, for example, evidence was permitted that two sisters had spoken freely about "the will", indicating that they had decided that the surviving sibling would have the other's money for their care, and that it would then be distributed between friends and family.

11 RFD Barlow, R A Wallington, S L Meadway and J A D MacDougald, *Williams on Wills* (10th ed 2014), 2.3.

12.11 It is established that the making of wills at the same time and in substantially the same terms is insufficient (by itself) to establish an agreement that the survivor shall be bound.[12] That is, parties who make mirror wills are not presumed to have agreed to be bound by the terms of those wills.

The death of the first party

12.12 Before the death of the first testator, the mutual wills arrangement is a contractual agreement; the consideration taking the form of mutual promises.[13] After the death of the first party, a constructive trust is imposed on the second testator.[14] The constructive trust is imposed because the first testator has disposed of property under his or her a will in a certain way (agreed between the testators) in return for the second, surviving, testator's promise to make (or not to revoke) his or her will also to dispose of property in an agreed way. The constructive trust prevents the second testator reneging on his or her promise to the first testator.[15] This constructive trust, framed by the terms of the wills, arises following the death of the first testator (not under the will of the surviving testator) in favour of those intended to benefit by the terms of the mutual wills.[16] The second testator may use the property but the beneficiaries under the mutual wills take what is left when the second testator dies.

12.13 Professor Roger Kerridge states that "there was, until recently, considerable controversy as to when the binding event occurred", but it is now settled that the constructive trust takes effect from the death of the first testator.[17] No trust therefore arises where the first testator dies having revoked his or her mutual will and the survivor has notice of this revocation (or alteration). The same is true if the first testator dies knowing that the agreement to be bound no longer stands because the other testator had repudiated it.[18]

The effect of the mutual wills arrangement

12.14 Where the three requirements are satisfied and the doctrine applies, the existence of a mutual will allows any beneficiary under the trust to enforce it.

12.15 Therefore, a mutual will, like other wills, remains revocable until the death of the person who makes it. However, if the surviving testator does revoke his or her will and makes a new will, the survivor's personal representatives under the new will take the property subject to the constructive trust that has arisen.[19] The will can be changed but those who benefitted under the mutual wills arrangement will still receive the gift(s). As

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12 *Re Goodchild* [1997] 3 All ER 63.

13 J R Martyn, A Learmonth, J E Gordon, C Ford and T Fletcher, *Theobald on Wills* (18th ed 2016) para 1-015.

14 A constructive trust is a trust that arises without having been expressly created by the parties, and is imposed by the law.

15 *Olins v Walters* [2009] Ch 212 at [9].

16 *Dufour v Pereira*, 2 Hargr, Jurid. Arg, 304, 310; *Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch).

17 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p131.

18 *Re Hobley* [2006] WTLR 467.

19 *Re Cleaver* [1981] 1 WLR 939. The survivor's new will remains effective and will be admitted to probate, see *Hobson v Blackburn and Blackburn* (1822) 1 Add 274.

Professor Kerridge states: "equity does not prevent, but frustrates, the unconscionable revocation of a mutual will".[20]

12.16 The fact that the constructive trust takes effect on the death of the first testator means that a beneficiary who survives the first testator but predeceases the second testator, does not lose his or her benefit.[21]

12.17 Following the judgment of Mr Justice Carnwath (as he then was) in *Re Goodchild*,[22] it seems established that a mutual will is revoked by operation of law (section 18 of the Wills Act 1837) following the remarriage of the second testator but that the trust remains intact and is unaffected, so that the surviving testator is still bound by the arrangement.[23]

Property subject to the trust

12.18 Following the first testator's death the property subject to the constructive trust depends on the agreement made; the trust might apply only to certain property, or to a part or the whole of each testator's residuary estate.[24] If the agreement relates to the residuary estates, the question then arises as to what property, including property inherited from the first testator and his or her own property (including property acquired after the first testator's death), the surviving testator is free to dispose of.[25]

12.19 Whether property acquired after the first testator's death is subject to the constructive trust has not been definitively answered.[26] Lowe and Douglas state that:

> it is still not settled whether any property acquired by the testator after the first party's death is also subject to the trust or whether this will attach only to the property which he has at that time.[27]

12.20 Mitchell believes that where the scope of the trust is not defined by the agreement it does include such subsequently acquired property.[28] Martin takes the opposite view, arguing that:

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20 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p133.

21 *Re Hagger* [1930] 2 Ch 190.

22 [1997] 1 WLR 694, at p 702.

23 See, for example, J R Martyn, A Learmonth, J E Gordon, C Ford and T Fletcher, *Theobald on Wills* (18th ed 2016), 1-017 and R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 134.

24 See *Re Green* [1951], Ch 148; *Re Cleaver* [1981] 1 WLR 939; *Healey v Brown* [2002] WTLR 849; (2001-02) 4 ITELR 894.

25 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 133.

26 Sloan and Hudson summarise the arguments, see Sion Hudson and Brian Sloan , "Testamentary Freedom: Mutual Wills Might Let You Down", Modern Studies in Property Law, 2015, 157, at 161.

27 N Lowe and G Douglas, *Bromley's Family Law* (10th ed 2007), 1093.

28 JDB Mitchell, "Some Aspects of Mutual Wills" (1951) 14 MLR 136, 140.

the consequences of the doctrine could be draconian for the survivor; for example if he acquires new dependants after the death of the first testator; similarly if the agreed beneficiary acquires a fortune elsewhere or is guilty of misconduct.[29]

12.21 In an Australian mutual wills case it was suggested that the surviving testator (the husband in this case) should be able to deal with all the property which he had inherited from the first testator so as to enjoy it for his own benefit and then to leave (on the terms agreed with his wife) what property was left at his death. This right to enjoy the property would be qualified by a restriction on the second testator disposing of his or her property, during his or her lifetime, in a way "calculated to defeat the intention of the compact."[30]

PROBLEMS IN THE LAW

12.22 Stakeholders have highlighted for us the problems that mutual wills can cause, in particular the fact that, by dictating how the surviving testator must deal with his or her property on death, they do not allow for the surviving testator to respond to changes in his or her situation after the death of first testator. Stakeholders were also worried that mutual wills arrangements could go wrong or increase tension within the family, or that they reflected a Victorian attitude that a surviving spouse (usually a woman) should be bound by the wishes of the deceased (usually a man).

12.23 The effect of "a mutual Wills constructive trust will probably mean…that the second to die's testamentary dispositions are immune from alteration under the [Inheritance (Provision for Family and Dependants) Act 1975]".[31] This is because, under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"), claims for financial provision against a person's estate after his or her death can only be made against the "net estate" as defined,[32] and property bound by a mutual wills arrangement appears to fall outside this definition.[33]

12.24 The net estate is defined in section 25(1) of the Act as including "all property of which the deceased had power to dispose by his will… less the amount of his funeral, testamentary and administration expenses, debts and liabilities…" In contrast to the law governing DMC,[34] there is no specific provision which allows property subject to a mutual wills arrangement to be treated as part of the net estate. While, under section 11(2) of the Act, a contract to leave property by will, by which the deceased intended to

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29 J Martin, *Hanbury and Martin: Modern Equity*, (19th ed 2012) para 12-033, cited in Sion Hudson and Brian Sloan, "Testamentary Freedom: Mutual Wills Might Let You Down", Modern Studies in Property Law, 2015, 157, at 161.

30 *Birmingham v Renfrew* (1937) 57 CLR 666, per Mr Justice Dixon at 36.

31 Hughes, "Mutual Wills" [2011] Private Client Business, 131, 132, cited in Sion Hudson and Brian Sloan, "Testamentary Freedom: Mutual Wills Might Let You Down", *Modern Studies in Property Law* (8th ed 2015) p 174. We note, however, that, in an Australian case, the opposite view has been taken, so that a claim under family provision legislation was allowed where a mutual wills arrangement existed, see *Barns v Barns* [2005] WTLR 1093.

32 Inheritance (Provision for Family and Dependants Act) 1975 s 2.

33 Sion Hudson and Brian Sloan, "Testamentary Freedom: Mutual Wills Might Let You Down", Modern Studies in Property Law, 2015, 157, 174.

34 Donatio(nes) mortis causa – see Chapter 13.

avoid the effect of the 1975 Act, can be set aside by court order, this applies only where full valuable consideration was not given. In a mutual wills arrangement full valuable consideration will, in fact, have been given because of the promises that have been made by the testators.[35]

12.25 Sloan and Hudson highlight the perceived injustice of the binding nature of mutual wills; they argue that what may once have been an appropriate testamentary arrangement may not necessarily be appropriate years later. They argue that the binding nature of mutual wills, following the death of the first testator, is unfair in automatically defeating alternative claims, including estoppel claims[36] and claims under the 1975 Act. For example, we can imagine the situation of a niece caring for her aunt after her uncle's death, where her uncle and aunt entered into mutual wills some years ago, with the beneficiaries being solely their children, the carer's cousins. A claim by the carer against the aunt's estate will be automatically defeated because the estate of the deceased continues to be subject to a constructive trust imposed by a mutual wills arrangement. Sloan and Hudson conclude that "…the contractual rigidity of a mutual wills arrangement in English law is unsatisfactory."[37]

12.26 Stakeholders have also pointed out to us that, because an agreement to enter into mutual wills does not have to be expressly set out within the will, but can instead be proved by evidence outside the will, it may well not be obvious that wills are mutual wills.

REFORM

12.27 The options for reform that we consider are:

(1) The abolition of mutual wills.

(2) Placing mutual wills on a statutory footing.

(3) Amending the definition of the net estate under the 1975 Act to include property subject to a mutual wills arrangement.

Abolition

12.28 We understand that mutual wills can create problems for the surviving testator bound by the agreement. Taking account of these problems, the apparent rarity of such arrangements and practitioners' concerns about mutual wills, we have considered whether the best course would be to recommend that mutual wills should be abolished so that it were no longer possible to enter into such an arrangement. Of course, this would not prevent couples choosing to make mirror wills. However, we note that other stakeholders have told us that they feel to take such a step would mean taking away a couple's ability to decide exactly how they wish their estates to be dealt with after their deaths; that is, it would restrict testamentary freedom. A mutual wills arrangement

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35 Sion Hudson and Brian Sloan, "Testamentary Freedom: Mutual Wills Might Let You Down", Modern Studies in Property Law, 2015, 157, 173 to 174.

36 See para 1.27 above.

37 Sion Hudson and Brian Sloan, "Testamentary Freedom: Mutual Wills Might Let You Down", Modern Studies in Property Law, 2015, 157, 176.

allows, for example, a person married for the second time later in life to ensure that his or her children from the first marriage will be provided for by the surviving spouse (the children's step-father/mother) without entering into a trust arrangement which may be both more complex and potentially more expensive (in respect of any legal or accountancy fees to set up and manage the trust).

12.29 Sloan and Hudson conclude, on the issue of abolition, that:

> The conclusion of many works on mutual wills is that, from both a practical and a normative perspective, the doctrine should be abolished in its entirety. However, such a broad brush may be too onerous an attack on contractual freedom, and indeed unlikely, and a rather more nuanced tweak to its operation may be preferable.[38]

12.30 The abolition of mutual wills can also be countered on the basis that making a principled distinction between mutual wills arrangements and other examples of constructive trusts is not possible, and that it would therefore be incoherent to abolish mutual wills.[39]

12.31 We are not convinced of the need to abolish mutual wills, given that the arguments for doing so can be counterbalanced by the practical consideration that, however inflexible or inconvenient, they can provide a method of protecting a person's assets. The person who makes a mutual will has some certainty as to what will happen to their assets after the death of the first person to inherit and there are situations in which that certainty is important to the testator.

Placing mutual wills on a statutory footing

12.32 However, we also do not believe that there is a good case for placing mutual wills on a statutory footing (including any reforms to the doctrine).[40] The disadvantages of mutual wills, and their comparative rarity, mean that we view negatively any attempt to increase their popularity, which we fear might be the result of codification.

Changing the definition of net estate under the Inheritance (Provision for Family and Dependants) Act 1975

12.33 We have noted above that it appears that claims under the 1975 Act cannot be made against property that is subject to the mutual wills arrangement. We think this is potentially unfair in that it blocks an obvious route of redress against the inflexibility and potential injustice that may be caused by a mutual wills arrangement. For example, after such an arrangement has been made, a person (perhaps an informal carer) who is not provided for in the mutual will, becomes financially dependent on the surviving testator.

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38 Sion Hudson and Brian Sloan, "Testamentary Freedom: Mutual Wills Might Let You Down", Modern Studies in Property Law, 2015, 157, 175.

39 Ying Khai Liew, "Explaining the Mutual Wills doctrine" in B Häcker and C Mitchell, *Current Issues in Succession Law* (2016), 125.

40 We note, however, that this has been done elsewhere: see section 30 of the Wills Act 2007 (New Zealand). The section provides a remedy where a mutual wills arrangement has been concluded between two people but the second (surviving) testator does not keep the promise made in the mutual wills arrangement; in those circumstances the person who would have received a benefit had the second testator kept his or her promise can claim the benefit from the second testator's estate.

12.34 We take the view that allowing a claim for financial provision under the 1975 Act against property in a deceased person's estate that is subject to a mutual wills arrangement is a plausible route for reform. It provides a middle ground between abolition and encouragement of the doctrine, while providing some relief from the inflexibility of mutual wills. There is also a precedent; the net estate from which financial provision can be made does include gifts made under the DMC doctrine.[41] This means that, where a person has made a gift of property using a DMC, that property will still be available as an asset from which the court may make financial provision for a claimant who makes a claim under the 1975 Act.

12.35 We note that if property subject to a mutual wills arrangement is included within the scope of the 1975 Act this may engage Article 1 of Protocol 1 ("A1P1") of the European Convention of Human Rights. A1P1 provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

12.36 Allowing property subject to a mutual wills arrangement to be vulnerable to a claim under the 1975 Act will potentially deprive the beneficiary(ies) under the arrangement of property. The question is then whether any deprivation of property can be justified. We note that ECHR jurisprudence generally requires compensation to be paid, by the state, to a person deprived of property.[42] However, there is not a right to full compensation in all circumstances "…since legitimate objectives of 'public interest' may call for less than reimbursement of the full market value".[43]

12.37 However, where A1P1 is engaged, it is not absolute in its prohibition against the deprivation of property. A deprivation can be justified under A1P1 where it is in the public interest and in accordance with the law, insofar as the deprivation is proportionate to the public interest. In our view, any deprivation of property caused by applying the 1975 Act to property left under a mutual will would be justified. The policy reasons that justify family provision legislation can justify its application to mutual wills; if the way in which a person has passed on property on his or her death fails to make reasonable financial provision for an eligible applicant then this is just as true whether or not that failure is the result of the deceased person having previously entered into a mutual wills arrangement.

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41 Inheritance (Provision for Family and Dependants) Act 1975, s 8(2). See Chapter 13 for further details about DMC.

42 D J Harris, M O'Boyle, E P Bates and C M Buckley, Harris, O'Boyle and Warbrick: *Law of the European Convention on Human Rights* (3rd ed 2014), 888. See also *Lithgow and Others v UK* A 102 (1986); 8 EHRR 3129 para 120 PC.

43 *Pye v UK* [2007] Application no. 44302/02, at [53].

12.38 We are reassured in this conclusion by looking at other cases in which the 1975 Act applies. Where a 1975 Act claim by one person may result in removing property from another person who was entitled to it as the donee of a DMC, the latter person is being deprived of property given that the donee has an equitable interest in the property from the time of the death of the donor.[44] We also note that the court may order that the deceased person's share of any property held with another person under a joint tenancy shall be treated as part of the net estate, to such extent as appears to the court to be just in all the circumstances of the case.[45] Given that an interest a person has as a joint tenant cannot pass under his or her will, but simply remains held by the surviving joint tenant or joint tenants, the exercise of this power by the court (and any subsequent use of such property to meet a claim for financial provision) might be regarded as depriving the surviving joint tenant of property. We have not heard any suggestion, however, that in either of these cases there is an unjustified violation of A1P1 rights.

12.39 Moreover, in the context of financial relief claims on divorce or the dissolution of a civil partnership,[46] property may well be taken from the spouse or partner who owns it and transferred, pursuant to a court order, to the other spouse or partner. Ostensibly, this would seem to engage and breach A1P1. However, the family courts have strongly resisted any arguments against such redistribution based on breach of A1P1, calling such a suggestion "…frankly absurd…"[47] and stating both that there is nothing arbitrary in the operation of the court's power under the Matrimonial Causes Act 1973[48] and that "…the power given to the court under that Act is clearly proportionate and strikes a fair balance."[49] In discussing these cases, Choudhry and Herring conclude that:

> It seems the current judicial approach, based on admittedly limited authority, is that although the Article right is infringed in an ancillary relief case, it is invariably a justifiable breach.[50]

12.40 We acknowledge, however, that the position of the spouse deprived of property in favour of the other spouse may be distinguishable from the third party beneficiary under a mutual wills arrangement deprived in favour of a possibly unrelated person, following a claim under the 1975 Act. In the former case, the two spouses or partners are in a relationship of mutual support into which they have voluntarily entered by marrying or

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44 The situation of the ordinary beneficiary under a will who receives less than he or she otherwise would because of a claim under the 1975 Act may not be a deprivation of property at all as a beneficiary under a will, before property is transferred to him or her, has only a right to have the estate properly administered rather than an interest in those assets, see *Williams, Mortimer and Sunnucks Executors, Administrators and Probate* (19th ed) para 78-04.

45 Inheritance (Provision for Family and Dependants) Act 1975, s 9.

46 Under the provisions of the Matrimonial Causes Act 1973 or the equivalent provisions of the Civil Partnership Act 2004.

47 *Charman v Charman* [2006] EWHC 1879, [2007] 1 FLR 593 at [126].

48 *Radmacher v Granatino* [2008] EWHC 1532 (Fam), [2009] 1 FCR 1478, at [135].

49 *C v C* [2009] 1 FLR 8, at [96].

50 S Choudhry and J Herring, *European Human Rights and Family Law* (2010), 399.

forming a civil partnership and have therefore made themselves subject, in the event of a divorce or dissolution, to the redistributive provisions of the relevant statutes.[51]

12.41 States that are party to the European Convention of Human Rights have a wide margin of appreciation in interpreting rights under the A1P1.[52] Taking this into account, and the analogous situations which we have discussed above, we take the view that A1P1 does not prevent statutory reform to the definition of the net estate under the 1975 Act to provide that property subject to a mutual wills arrangement falls within that definition. We note that the extent of the beneficiary's interest under such an arrangement is, in any event, likely to be uncertain. This is because the doctrine does not prevent the surviving testator using the property; for example, the survivor may wish to sell property to release funds for his or her care. This may mean that the beneficiary receives less than he or she might have expected, in common with all other beneficiaries under wills.

12.42 Practically, the court considering a claim for financial provision under the 1975 Act, where the deceased person had entered into mutual wills, will have to balance the interest of a mutual wills beneficiary against the interests of those with a claim under the Act. This may be difficult in a case where, say, the mutual wills leave the whole estate to the children of a first marriage and no provision has been made for a second spouse who has been left in need. This is because, unless an estate clearly exceeds that spouse's needs, it may be entirely consumed to make provision for that spouse.[53] However, we do not see that this situation is any different from the process that the court has to undertake already in balancing the competing interests of potential claimants under the 1975 Act and those already entitled under the will (or indeed, by way of a DMC or as the survivor of a joint tenancy in property).[54]

Consultation Question 62.

We propose that section 8 of the Inheritance (Provision for Family and Dependants) Act 1975 be amended to provide that property that is subject to a mutual wills arrangement be treated as part of the net estate.

Do consultees agree?

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51 The Matrimonial Causes Act 1973 and the Civil Partnership Act 2004.

52 See for example *Lithgow and others v UK* (1986) 8 EHRR 329 (App No 9262/81).

53 Even then there may be ways in which the court can balance the interests of the second spouse and the mutual wills beneficiaries, perhaps by awarding the second spouse an interest in the property only for the extent of his or her lifetime.

54 We acknowledge, however, that Lady Hale in the recent Supreme Court case of *Ilott v Mitson* ([2017] UKSC 17 at paragraphs 58 and 66) was critical of the lack of guidance provided in the statute as to how the court should deal with claims for financial provision, in the context of a claim by an adult child of the deceased person.

Chapter 13: Donationes mortis causa

INTRODUCTION

13.1 The focus of this Consultation Paper has been the law of wills; however, in this chapter, we consider the operation of a doctrine, donatio mortis causa (DMC),[1] that lies outside the law of wills as strictly defined. A DMC is a gift made by a donor in contemplation of, and conditional on, his or her death. It is anomalous in that it is neither a gift made in a will, nor a gift made during lifetime; it is a hybrid.

13.2 Given that it is not a gift made by will, one might ask why we are including a discussion of DMC in this paper. In Chapter 1, we explained that there are other ways of passing on property on death (such as benefits under a pension scheme or insurance policy) which can be called "wills-substitutes". A DMC can be classed as a will-substitute[2] but we see it as somewhere further along a spectrum towards the will, compared to other forms of will-substitute. As we shall see, like a will, a DMC "…takes effect on death, and remains revocable until then".[3]

13.3 Unlike a gift in a will, a DMC is not subject to any formal requirements.[4] A DMC is also an exception to the general law of gifts. The basic legal position is that a gift is only complete when ownership of the property given has been transferred to the donee, or when the donor signs a formal deed promising the gift to the donee.[5] The mere promise of a gift creates no legal obligation.[6] A DMC is an exception to that basic rule in that it allows the donor to promise the donee that he or she will receive a gift when the donor dies. That promise is binding and the gift is completed when the donor dies, even though the donor never transferred ownership the property to the donee. In our view, the exceptional nature of DMC and the narrow confines of the doctrine warrant its consideration in this project.

13.4 The DMC doctrine has a long history, dating back to the Roman period; even at that time it was considered an anomalous doctrine because of its hybrid nature. However, it had a purpose: to operate in a situation where the donor lacked the opportunity to make a gift.[7] The doctrine was then adopted by English common law, gaining prominence after oral wills were abolished by the Statute of Frauds in 1677. Following that, the

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1 *Donationes mortis causa* in the plural form - we refer to both the singular and plural forms as "DMC" in this chapter.

2 A Braun and A Röthel (eds) (2016) *Passing Wealth on Death – Will-Substitutes in Comparative Perspective*, p 4.

3 Above, p 62.

4 On formality requirements, see Chapter 5.

5 *Milroy v Lord* (1862) 45 ER 1185. The legal term for a gift promised, but not delivered is an "imperfect gift". The reference to transferring ownership also glosses over several legal nuances including matters of beneficial and legal title.

6 Contrast contracts, where a promise is legally binding on the contracting parties.

7 *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-03. See also *King v Dubrey* [2015] EWCA Civ 581 at [37], by Jackson LJ.

doctrine appeared regularly in case law throughout the 18th and 19th centuries.[8] During this time, the range of property which could be passed validly by a DMC was expanded.[9] At one time, it applied only to gifts of a chattel by delivery of the chattel itself whereas at present there appear to be few limits.[10] One of the most significant expansions of the ambit of a DMC came late in its development in 1991 when it was held that land could be passed by a DMC.[11] We focus on the modern case law, in particular the leading case of *King v Dubrey*[12] in the Court of Appeal, because it shows that the law governing DMC is a "live issue"; the *King* case in fact overrules another recent decision of the High Court, *Vallee v Birchwood*.[13]

13.5 There are several areas of uncertainty in the law governing DMC which we refer to below, but the main issue with the doctrine may be that it exists at all. DMC is an exception to the formality requirements imposed by statute. In particular, DMC is an exception to the formalities required of a will, governed by section 9 of the Wills Act 1837; that is, the requirement that a will be signed by the testator and two witnesses.[14] DMC is also an exception to the formalities relating to lifetime gifts of interests in land (of more than three years), which were contained in the Statute of Frauds 1677 and are now governed by section 53 of the Law of Property Act 1925, requiring that the transfer of land must be made by writing signed by the person making the transfer. These statutory provisions do not apply to gifts which meet the requirements for a DMC; only the doctrine's own requirements need to be met for a valid transfer of property, whether real or personal, from the donor to the donee.[15] We explain in Chapter 5 that formality requirements provide certain safeguards – particularly against fraud – and in circumventing the formality requirements, DMC also circumvents those safeguards.

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8 *Vallee v Birchwood* [2013] EWHC 1449 (Ch), [2014] Ch 271 (overruled) at [14]; *King v Dubrey* [2015] EWCA Civ 581 at [37], by Jackson LJ.

9 *Sen v Headley* [1991] Ch 425, 2 WLR 1308, at 430 and 432.

10 *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-16. Note also that Jackson LJ did not note any limitations on the type of property that could be subject to of DMC in *King v Dubrey* [2015] EWCA Civ 581. As we see below, it is unclear whether registered land can be the subject of a DMC- see Chapter 13.

11 *Sen v Headley* [1991] Ch 425, 2 WLR 1308. This case concerned, however, unregistered land. It is not clear whether, and how, registered land could be transferred by a DMC.

12 [2015] EWCA Civ 581, [2016] Ch 221.

13 [2013] EWHC 1449 (Ch), [2014] Ch 271.

14 See Chapter 5.

15 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [51], by Jackson LJ; *Sen v Headley* [1991] Ch 425, 430, by Nourse LJ. See also A Briggs, "DMC: not quite dead?" (2015) 165 (7661) *New Law Journal* 16. After the donor's death the land will be held on trust for the donee by the donor's personal representatives; the requirements of s 53 of the Law of Property Act 1953 do not apply to the creation of such trusts, see s 53(2).

THE CURRENT LAW

13.6 In *King v Dubrey*[16] the alleged donor was the claimant donee's elderly aunt. The donor had made a will in 1998, leaving some modest gifts to friends and family and the bulk of her estate, including a house worth £350,000, to seven animal charities.[17]

13.7 In the summer of 2007, the claimant began living with his aunt, who was by then frail and elderly. In November of 2010, four to six months before her death, the donor gave the deeds of her freehold property to the claimant. She said to him "this will be yours when I go", looking at him (according to the claimant) in a way that made clear to him that she knew her health was failing and that her death was approaching. During the six months before her death the donor also signed three separate documents, one prepared by the claimant, purporting to leave her estate to him and expressing a hope that he would care for her animals after she died. None of the documents complied with the 1837 Act, and were therefore not valid wills, so on the donor's death the 1998 will took effect. The claimant claimed that the donor had made a DMC of her house to him.[18]At first instance, the judge had found there to be a valid DMC.[19] However, the charity beneficiaries appealed.

13.8 The Court of Appeal set out the requirements for a DMC to be valid:

(1) the donor had to contemplate his or her impending death;

(2) the donor had to make a gift which would take effect only when his or her contemplated death occurred; and

(3) the donor had to "deliver dominion" (possession) over the subject matter of the gift to the donee.[20]

13.9 The court held that the donor was not contemplating her impending death and that she was not making a gift which was conditional upon her death within a limited period of time.[21] The claimant therefore lost the appeal, with the Court of Appeal holding that there had not been a valid DMC.[22]

13.10 It is important to stress that the courts will require strict proof of compliance with the three requirements.[23] While a DMC can be established solely on the claimant donee's evidence, if the court considers the evidence trustworthy,[24] the claimant's evidence

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16 [2015] EWCA Civ 581, [2016] Ch 221.

17 *King v Dubrey*, [2015] EWCA Civ 581, [2016] Ch 221 at [9] and [10].

18 *King v Dubrey*, [2015] EWCA Civ 581, [2016] Ch 221 at [13] to [19].

19 *King v Dubrey*, [2014] EWHC 2083 (Ch), [2014] WTLR 1411.

20 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [50], by Jackson LJ. See paras 13.13, 13.16 and 13.19 below.

21 Above, at [68] and [71].

22 *King v Dubrey*, [2015] EWCA Civ 581, [2016] Ch 221 at [65] by Jackson LJ with which Patten LJ, at [89], and Sales LJ, at [97], agreed.

23 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [60], by Jackson LJ.

24 *Re Dillon* (1890) 44 Ch D 76, 80; *Re Farman* (1887) 57 LJ Ch 637.

must be unequivocal.[25] Strict proof is necessary to prevent abuse, given that DMC circumvents the safeguards for lifetime gifts and leaving property by will. The case law dating from the 18th century has recognised and emphasised this requirement.[26]

13.11 In addition to the three requirements set out above, the donor must also have the mental capacity necessary to make a DMC. The capacity to make a DMC is not the same as testamentary capacity. Rather, the level of capacity required varies depending on the nature of the gift: a trivial gift will only require a low degree of capacity, whereas a gift of the donor's only or main asset will require a degree of capacity the same as required to make a will.[27]

13.12 We now look at each of the three requirements in more detail.

Contemplation of impending death

13.13 In making the gift, the donor must have a good reason to anticipate death in the near future from an identified cause. However, death need not be inevitable and the donor need not be on his or her deathbed; he or she can be suffering from an illness that it is possible to survive.[28] Although typically arising from an illness, death may also be contemplated based on, for example, a forthcoming dangerous medical operation or activity. Contemplation of suicide would also be sufficient.[29] It seems that a donor does not have to die from the cause that he or she contemplated; he or she may, in fact, die from another cause.[30]

13.14 With regard to how quickly death must occur after the time of the gift for the DMC to be valid, Lord Justice Patten, in his judgment in *King v Dubrey*,[31] contrasted the months-long delay in the case before him to the examples of successful DMC in the case law: in *Sen v Headley*,[32] the donor made the gift three days before he died; in *Re Craven's Estate*,[33] five days; and in *Birch v Treasury Solicitor*,[34] four days. The Court of Appeal in *King v Dubrey* held that the 2013 case of *Vallee v Birchwood*,[35] in which a valid DMC

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25 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [96], by Patten LJ. See also *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-06.

26 See discussion in *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [38] by Jackson LJ, and [91] by Patten LJ.

27 *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-05, citing *Re Beaney* [1978] 1 WLR 770.

28 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [55], by Jackson LJ.

29 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [68], by Jackson LJ. In the past contemplation of suicide would be insufficient because suicide was a crime: *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-06, citing *Re Dudman* [1925] Ch 553 and the Suicide Act 1961.

30 *Wilkes v Allington* [1931] 2 Ch 104.

31 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [92].

32 *Sen v Headley* [1991] Ch 425.

33 *Re Craven's Estate* [1937] Ch 423.

34 *Birch v Treasury Solicitor* [1951] 1 Ch 298.

35 [2013] EWHC 1449 (Ch), [2014] Ch 271.

had been found where the gift was made five months before death, was wrongly decided.[36]

13.15 The Court of Appeal therefore restricted the time period within which death must occur for a valid DMC, but it does not appear that death in a matter of days is necessarily required. The Court of Appeal cited with approval *Wilkes v Allington*, a case which determined that a DMC made six weeks before the donor died was valid.[37] Although, it is clear that, after *King v Dubrey*, courts will not give effect to a DMC made too far in advance of death, it is not clear how long is too long. The Court of Appeal provided no guidance on the time period necessary, "but plainly, four to six months is likely to be too distant".[38] However, each case will turn on its own facts. For example, a long delay will be readily explicable where the deceased had fallen into a coma shortly after making a DMC.

Gift conditional on death

13.16 To satisfy the second requirement, the donor must intend to make a conditional gift, that is, one that will only take effect if his or her contemplated death comes about. The donor must reserve the right to revoke the gift, and also specifically require the property back if he or she survives. However, this requirement is relaxed if the donor's death is inevitable. The intention to make a gift cannot be either an intention to make a gift during the donor's lifetime or to make a gift by will, in either of those situations the necessary formalities to make a valid gift in these ways must be observed.[39]

13.17 Proof of the intention to make a gift conditional on his or her death can be established by the donor's words in making the gift but also can be inferred from the circumstances in which he or she makes the gift.[40]

13.18 In *King v Dubrey*[41] the Court of Appeal held that the statement "this will be yours when I go" did not show an intention to make a gift conditional upon the testator's death within a limited period of time; it was supported in this conclusion by the fact that the donor, after making the statement, signed two documents which indicated that she was trying to make a will (albeit unsuccessfully).[42] By contrast, in *Re Craven's Estate* the donor was found to have made a valid DMC of money and shares to the donee before she underwent a potentially fatal operation (which did, in fact, cause her death).[43] The

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36 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [56], by Jackson LJ.

37 *Wilkes v Allington* [1931] 2 Ch 104.

38 E Rowntree, "Restricting an anomaly" (2015) 165 (7674) *New Law Journal* 21, 21.

39 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p136; *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-07. See also *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [71], by Jackson LJ; *Edward v Jones* (1836) 40 ER 361.

40 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 136; *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-07, both citing *Gardner v Parker* (1818) 3 Madd 184.

41 [2015] EWCA Civ 581, [2016] Ch 221.

42 Above, at [71] and [95].

43 *Re Craven's Estate* [1937] Ch 423, cited in *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [58], by Jackson LJ.

transfer of money and shares was held to be valid because it was made in case anything happened to the donor, indicating a clear intention to make a gift only if the donor died.[44]

Delivery of dominion

13.19 The third requirement for a valid DMC is that the donor must deliver dominion over the subject matter of the DMC to the donee.

13.20 In *King v Dubrey*, Lord Justice Jackson concluded that:

> "dominion" means physical possession of (a) the subject matter or (b) some means of accessing the subject matter (such as the key to a box) or (c) documents evidencing entitlement to possession of the subject matter.[45]

13.21 How dominion is delivered may depend on the type of property that is the subject of the DMC.

13.22 First, dominion can mean physical possession of the subject matter of the DMC. For example, a donor may deliver dominion of chattels, such as watches or jewellery, by physical possession.

13.23 Secondly, delivery of some means of accessing the subject matter can also constitute dominion. Most commonly this might be by the delivery of a key: for example, dominion of a trunk and its contents by delivery of the key to the trunk;[46] the contents of a warehouse by delivery of the key to the warehouse;[47] jewellery by a key to a safe deposit box which contained another key to another safe deposit box which contained the jewellery.[48]

13.24 Thirdly, delivery of documents showing entitlement to possession of the subject matter can also deliver dominion. This method of delivery must be used for property which is incapable of physical delivery, such as land. For example, delivery of a savings bank book or a deposit bank book was sufficient for a DMC of the bank account;[49] delivery of a mortgage deed was sufficient for a DMC of the mortgage debt and security;[50] and delivery of the title deeds to unregistered land was sufficient for a DMC of the real property.[51] It is unclear whether, and how, dominion of registered land might be delivered in the context of a DMC as, to our knowledge, there has been no case on the

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44 *Re Craven's Estate* [1937] Ch 423.

45 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [59], by Jackson LJ.

46 *Jones v Selby* (1709) Fin Pr 288, cited in *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [38], by Jackson LJ.

47 Discussed in *Ward v Turner* (1752) 28 ER 275; *Smith v Smith* (1740) 2 Stra 955.

48 *Re Lillingston (Deceased)* [1952] 2 All ER 184. See generally *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) paras 42-11 to 42-12; R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) pp 139 to 140.

49 *Birch v Treasury Solicitor* [1951] 1 Ch 298.

50 *Duffield v Elwes* (1827) 4 ER 959.

51 *King v Dubrey* [2015] EWCA Civ 581. See generally *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) paras 42-13 to 42-14; R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 140 and 142.

point. Given the lack of physical title deeds, it is difficult to know how dominion of registered land could be delivered to the donee.[52]

13.25 There are additional requirements to establish that delivery has occurred.

13.26 The donor must intend to part with dominion of the property. A donor retaining a right to deal with the property him- or herself will indicate that he or she had no intention to deliver dominion to the donee, and a DMC would therefore not be established.[53] It seems that it is the donor's intention together with delivery of possession that amounts to "dominion".[54]

13.27 It is also not necessary for the donor to deliver the subject matter at the same time as expressing an intention to make a DMC: delivery can be effected before or afterwards, so long as it occurs within the donor's lifetime. If the subject matter of the gift is delivered after the donor dies, the DMC fails.[55]

13.28 Another such requirement is that delivery must be by the donor (or his or her agent) to the donee (or his or her agent); delivery from the donor to his or her agent is itself insufficient.[56] For example, in a case in which the donor had written the donees' names on the parcels containing the subject matter of the gifts and given the parcels to his son, instructing him to see the property delivered to the donees after his death, there had been no delivery and so no DMC.[57]

13.29 In *King v Dubrey*, the Court of Appeal determined that this third requirement had been satisfied. The donor had handed over the title deeds to her property to her nephew; this act constituted delivery of dominion of the freehold property.[58]

Effect of DMC

Revocable

13.30 As noted in *King v Dubrey*, it is an essential characteristic of a DMC that it is revocable by the donor during his or her lifetime.[59] Revocation happens automatically if the donor survives the contemplated peril, whether it was an illness, operation or dangerous

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52 See R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 147. Prior to 2003, a physical land certificate would have been available in respect of registered land but these were abolished following the coming into force of the Land Registration Act 2002, see Land Registration Act 2002 (Transitional Provisions) Order 2003, art 24.

53 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 137, citing *Reddel v Dobree* (1839) 59 ER 607.

54 *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-08. See also para 42-15. See also *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [59], by Jackson LJ.

55 *Cain v Moon* [1896] 2 QB 283; *Woodard v Woodard* [1995] 3 All ER 980. See generally R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 138; *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-11.

56 See eg *Farquharson v Cave* (1846) 63 ER 768.

57 *Bunn v Markham* (1816) 7 Taunton 224, cited in *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-10.

58 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [73], by Jackson LJ.

59 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [58], by Jackson LJ.

activity, so a DMC will lapse automatically if the donor "does not die soon enough".[60] A donor may also expressly revoke a DMC. Express revocation can be accomplished by the donor assuming dominion over the property (although assuming possession for safe custody will be insufficient).[61] Although it is not clear, it may also be possible for a donor to revoke a DMC by informing the donee. It appears to be generally accepted that a donor cannot revoke a DMC by will, however, because on death the title of the donee becomes absolute from the time of delivery.[62]

Nature of the donor's and donee's rights

13.31 The effect of a DMC at the time it is made depends on the nature of the subject matter of the gift and how it was delivered. Because a DMC is conditional on the donor's death, equitable title to the property will not pass to the donee until the donor's death.[63] The time at which legal title passes to the donee depends on the type of property that is the subject of the DMC; in some cases, such as that where a chattel is transferred, physical delivery will be sufficient to pass legal title of the subject matter to the donee, whereas, in other cases, such as land, legal title will have to be claimed by the donee against the donor's personal representatives after the donor's death.[64]

Comparison with a legacy

13.32 Like a legacy by will, a DMC will fail if the donee predeceases the donor. Similarly, the property that is the subject matter of the DMC is available to pay for the estate's debts if the estate's assets are insufficient. The property forms part of the estate for the purposes of family provision claims[65] and inheritance tax.[66] A DMC can also adeem if the property no longer forms part of the donor's estate at his or her death.[67] However,

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60 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [58], by Jackson LJ.

61 *Re Hawkins* [1924] 2 Ch 47.

62 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 143, citing *Jones v Selby* (1709) Fin Pr 288; *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-29. We note however that the contrary position has been argued: that a subsequent will which disposed of the same property gifted by DMC would constitute revocation, see H Cumber, "Donationes mortis causa; a doctrine on its deathbed?" [2016] 1 *Conveyancer and Property Lawyer* 56, 60 to 61.

63 *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) paras 42-09 and 42-28. The person with equitable title to property, or beneficial owner, has the "beneficial interest" in the property and therefore the true benefit of the property, whereas the person with legal title to property, or legal owner, merely has the right to deal with the property. The legal and beneficial owner may be the same person.

64 *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) paras 42-28 and 42-31.

65 Inheritance (Provision for Family and Dependants) Act 1975, s 8(2).

66 See Withers LLP, Aparna Nathan, Marika Lemos (2016) *McCutcheon on Inheritance Tax* (7th ed) para 8-05 and Inheritance Tax Act 1984, s5(1).

67 *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) para 42-31- see Chapter 10.

unlike a legacy, probate is unnecessary since the DMC takes effect from delivery, even though it is conditional on death.[68]

PROBLEMS WITH THE LAW

13.33 We have seen that a DMC constitutes an exception to the statutory stipulations governing how gifts may validly be made; it is therefore a doctrine which presents a risk of abuse. The courts have long recognised the risks of DMC. They were clearly explained in in 1862 by the Privy Council in *Cosnahan v Grice*:

> The burthen of proof is necessarily on the donee, as in the first place, so many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend deathbed donations, that there is always danger of having an entirely fabricated case set up; and, secondly, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of a person languishing in mortal illness, and by a slight change of words, to convert the expressions of intended benefit into an actual gift of property; and no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character.[69]

13.34 More recently in *King v Dubrey*, the Court of Appeal emphasised the risk of abuses inherent in DMC in circumventing the formalities required by the 1837 Act and Law of Property Act 1925 are intended to prevent. Rather than a gift being made in a document executed in compliance with those statutes:

> the making of a DMC … will usually occur privately between the donor and the donee in circumstances where the potential for fabrication and invention by the donee is high and the prospect of disproving an alleged DMC correspondingly low.[70]

13.35 The risks of DMC were well illustrated on the facts in *King v Dubrey*. If the claimant, the donor's nephew, had established a valid DMC by his evidence, he would have received the bulk of the donor's estate even though he was not named as a beneficiary in her will. The seven animal charities which were the main beneficiaries under her will would have been left empty-handed.[71] Because of the risk of abuse, Lord Justice Jackson emphasised that it is important to confine the doctrine within its proper bounds and not extend it to a wider range of situations.[72]

13.36 In addition to the concern over the risks that DMC presents, we can identify several areas of the law which remain unsettled and on which the court in *King v Dubrey*[73] did not comment:

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68 R Kerridge (assisted by A H R Brierley) *Parry and Kerridge: The Law of Succession* (13th ed 2016) p 144; *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (20th ed 2013) paras 42-31 and 42-32 citing *Rigden v Vallier* (1751) 2 Ves Sen 252 at 258; *Kelly v O'Connor* [1917] 1 Ir R 312.

69 (1862) 15 Moo PC 215, 223.

70 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [90], by Patten LJ.

71 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [69], by Jackson LJ.

72 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [54], by Jackson LJ.

73 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221.

(1) the rules pertaining to whether certain subject matter can only be delivered in certain ways for the purposes of DMC;

(2) the requirements of "delivery"; and

(3) how a DMC can be revoked.

13.37 These issues therefore lack recent authority at the level of the appellate courts, although there is, as we have discussed above, existing law at first instance.

13.38 A more serious question arises over whether, following the decision in *King v Dubrey*,[74] the DMC doctrine now includes a requirement that the donor should not have had time to make a will in order for there to have been a valid DMC.

13.39 Aidan Briggs seems persuaded that the Court of Appeal implicitly included such a criteria. He states that now, practically, the first requirement asks "did the donor (subjectively) have time to execute a will or codicil to dispose of the subject-matter?" If the donor did not, the first requirement is likely satisfied; if he or she did, it is likely not.[75] Hugh Cumber, however, argues against this view, stating that the English law has never required the donor to lack an opportunity to make a will in order to make a DMC, and it is not clear why it should. He argues that the Court of Appeal's approach to confine the doctrine to the contemplation of impending death from a specific cause satisfies the policy goal of limiting the doctrine while also providing flexibility for it to apply to different reasons for impending death – operations and journeys.[76]

13.40 Given that the Court of Appeal cites the case of *Wilkes v Allington*, in which the donor did not die until six weeks after making the DMC, as a good illustration of the contemplation of death in the near future for a specific reason,[77] we share the view that there is no requirement for a valid DMC that the donor should die so quickly that he or she did not have the opportunity to make a will.

13.41 The options for reform of DMC are therefore:

(1) Codification in statute (which could include any reform to the doctrine necessary to deal with areas of debate or uncertainty).

(2) Abolition of the doctrine.

13.42 We are not minded to suggest that the DMC doctrine be codified in statute; as an anomalous doctrine we would not want to increase its prominence and promote its use by enshrining it in statute. We also take the view that the recent judgment by the Court of Appeal provides a reasonably clear statement of the law. In so far as the judgment in *King v Dubrey*[78] failed to clarify certain elements of the law, we regard the flexibility

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74 [2015] EWCA Civ 581, [2016] Ch 221.

75 A Briggs, "DMC: not quite dead?" (2015) 165 (7661) *New Law Journal* 16.

76 H Cumber, "Donationes mortis causa; a doctrine on its deathbed?" [2016] 1 *Conveyancer and Property Lawyer* 56, 60.

77 *Wilkes v Allington* [1931] 2 Ch 104, at [55].

78 [2015] EWCA Civ 58.

of the common law to deal with future matters on a case-by-case basis as an advantage. The question, we think, then becomes: should the doctrine be abolished?

Should DMC be abolished?

13.43 Most of the stakeholders to whom we spoke were not in favour of retaining the doctrine. We also note that the Scottish Law Commission recommended its abolition: its 2007 report contained a recommendation that a DMC should be presumed to be an outright gift unless the donor clearly stipulates otherwise. The Report states that DMC are "…unknown in current practice", that lifetime gifts "…almost invariably take the form of outright gifts" and that "[i]f conditions were sought to be attached to gifts… a trust would be used."[79] Following a recommendation by the Scottish Law Commission in 2007, the doctrine has been abolished in Scotland.[80]

13.44 While we must be wary of uncritically carrying over the Scottish experience into the different legal landscape of England and Wales, it is true that, while DMCs do not appear to be unknown in this jurisdiction, given the recent case law, these cases do not display an enthusiasm for the concept. In *King v Dubrey*[81] the DMC claim failed and the court also decided that the recent case of *Vallee v Birchwood* [82] (in which a valid DMC had been found) was wrongly decided.[83]

13.45 Looking further at the arguments for abolition we note the real risks of abuse presented by the DMC doctrine. The evidence for the making of the conditional gift, necessary for a valid DMC, is, usually, an oral statement by the donor[84] and we note that, in our earlier discussion of a potential dispensing power, we reject the inclusion of oral statements of testamentary intentions within the scope of that power, given the risk of fraud and dispute.[85]

13.46 It is also true that DMC also seem most apt to cases where the donor, who may be on his or her deathbed, is able to deliver dominion of the property easily. Taking into account the modern context for delivery, the DMC doctrine can seem antiquated. Specifically, as we have explained above, it is doubtful whether dominion can be delivered over registered land.[86] Moreover, the requirement of the DMC doctrine for delivery may generally be less easily achieved; for example, people are far less likely

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79 Scottish Law Commission (2007), *Report on Succession* Scot Law Com No 215, p 116.The report states that people would still be able to make gifts with express conditions attached.

80 Succession (Scotland) Act 2016, s 25 (in force as from 1 November 2016).

81 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221.

82 *Vallee v Birchwood* [2013] EWHC 1449 (Ch), [2014] Ch 271.

83 *King v Dubrey* [2015] EWCA Civ 581, [2016] Ch 221 at [70].

84 See, for example, *Jones v Selby* (1709) Fin Pr 288), *In re Craven's Estate* ([1937] Ch 423), *Birch v Treasury Solicitor* ([1951] 1 Ch 298) and *Vallee v Birchwood* ([2013] EWHC 1449 (Ch), [2014] Ch 271) (to use examples where DMC were validly made). DMC have been found valid in other circumstances. See, for example, *Wilkes v Allington* ([1931] 2 Ch 104.) where the donor gave an envelope to the donees marked "Deeds relating to Astwood. To be given up at death. W. Allington" and *Clement v Cheesman* (1883] C 3221(1884) 27 Ch. D. 631) where the donor gave the donee a cheque drawn by a third party and payable to the donor.

85 See para 5.81 above.

86 See para 13.24 above.

to be operating a savings account using a book which can be handed over to the donee in order to make a DMC.

13.47 Nevertheless, the DMC doctrine may continue to serve a useful purpose, because it "softens" the hard edges of formalities law.[87] It is useful to compare the DMC with our proposal for a dispensing power because both concepts can be understood as providing protection for testators against the possibility that the statutory formalities for wills will frustrate their intentions.

13.48 However, DMC and a dispensing power operate in different ways. DMC require the delivery of dominion over the subject matter of the gift, which would not be required for the operation of the dispensing power. And, while DMC require the donor to be contemplating impending death, and may therefore be most useful in a "deathbed" scenario, we do not propose any such requirement for a dispensing power. The deceased person could have set out their testamentary intentions in a document (or other record) far in advance of his or her death, on which the dispensing power could then operate following death. The dispensing power and the DMC therefore do not necessarily occupy the same ground in furthering a would-be donor or testator's otherwise frustrated intentions.

13.49 Increasingly widespread and easy access to devices that can make a written, audio or video record may mean that, in the situation of impending death, a person can record their testamentary intentions in such a way as to bring them within scope of the proposed dispensing power. But this will not always be the case and so there will be situations where a DMC can assist the donor but where the use of the proposed dispensing power would not.

13.50 It is arguable, that, following *King v Dubrey*, the DMC doctrine is sufficiently clearly stated so as not to require reform. Taking that development into account, the lack of any evidence either way as to problems caused by DMC in practice, and the arguments that in principle can be made both for and against abolition, we have not formed a definite view as to whether DMC should be abolished. We therefore ask consultees for their views.

Consultation Question 63.

Do consultees believe that the DMC doctrine should be abolished or retained?

[87] See H Cumber, "Donationes mortis causa; a doctrine on its deathbed?" [2016] 1 *Conveyancer and Property Lawyer* 56, 61.

Chapter 14: Other things a will could do

INTRODUCTION

14.1 At the time it is made, a will is a private document containing a person's wishes about what should happen after his or her death. Those wishes are deeply personal and often become known only after the testator has died. It is natural then, that when people write wills, their minds will turn to more than just the destination of their possessions. Testators may worry about their children and wish to appoint guardians or leave words of advice or encouragement. They may also want to decide what should happen to their bodies or their digital assets.

14.2 The purpose of this chapter is to consider things other than property that testators might think about at the time they are writing their wills and to gauge the potential of wills to help testators address those issues. For present purposes, the main legal topics are "digital assets" and what happens to a person's body when they die. However, we also discuss guardianship, which is an area in which we believe that reform is most plausible. Some topics – such as organ donation or the welfare of pets when their owner dies – have a clear connection to will-making, but have not been included in this chapter because the law is well-settled or has been recently reviewed.

14.3 Stakeholders have also raised "ethical wills" which may include expressions of love and care; statements of belief; expressions of gratitude; exhortation and encouragement for the family; and reminders of the testator's heritage.[1] In short, ethical wills serve to record and transmit the testator's values. Clearly, the transmission of values cannot give rise to legal obligation. For this reason, there is no scope for the Law Commission to recommend legal reforms that would touch directly upon ethical wills.

DIGITAL ASSETS

14.4 We use computers in almost every aspect of our daily lives. We communicate via instant messaging services and emails and many of the messages we send and receive will be stored indefinitely on our laptops, phones, tablets, or in the cloud by the companies who provide the platforms we use. Social media accounts let us instantly share pictures, videos, links and posts. We might have music collections without the need for physical storage and we can store documents and media files on hard drives or using cloud-based hosting services. As technology develops, an increasing number of people are likely to use cryptocurrencies, and participate in MMOGs and the like.[2]

14.5 In all of those activities, we may be said to be dealing with "digital assets". That phrase is not a term of art. While some commentators have tried to define "digital assets" as

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1 Z Hicks, "Is Your (Ethical) Will in Order?" (2008) 33 *ACTEC Journal* 154.

2 A cryptocurrency is a digital currency that relies on sophisticated encryption techniques and operates independently of central banks. A MMOG is a "massively multiplayer online game", that is, a game played online by thousands of players in the same online world. Characters within the games are often developed over time and certain resources within the online world hold real-world monetary value.

digital files and their attendant metadata or property rights,[3] most commentators eschew formal definitions and rely on "collective descriptors of what typically falls within the realm of digital assets".[4] For present purposes, we take the latter approach, describing various digital assets without attempting a comprehensive formal definition.

14.6 Our electronic data and online accounts all fall naturally under the broad heading of "digital assets" and legal questions arise about what happens to those "assets" when we die.[5] We therefore consider what a will could do with regard to various types of data and accounts as well as the electronic devices used to store and access our digital assets.

14.7 On one level, the legal status of laptops, tablets and mobile phones is straightforward; they are physical objects that can be passed to others by a will in the same manner as any other physical object. However, complex issues arise as regards access, use and ownership of the digital assets to which electronic devices give access. In each of those areas, a user's rights will be affected by a user agreement; a contract or licence (permission) to use software. Any issues will be complicated by the fact that those agreements reveal "a bewildering array of permutations with absolutely no consistency".[6] The prevalence and importance of user agreements is therefore an overarching element of the legal landscape relating to digital assets.

14.8 Stakeholders have told us that when a beneficiary inherits an electronic device, the immediate problems are how to log on and whether the beneficiary has any entitlement at all to access and use of the device that he or she has been given. We have heard that one common solution to the former problem is for the testators to list their passwords for loved ones to use after the testator's death. The list may typically be contained not in the will itself (which becomes a public document once admitted to probate), but in a letter left with the will. Sharing passwords may be a practical solution, but it will breach some user agreements. Moreover, passwords may be changed over time and testators may not think to update the list that they prepared at the time they made their will.

14.9 Similar issues arise with regard to online accounts irrespective of whether the person wishing to access them has inherited any electronic hardware. Sharing passwords will facilitate access but doing so may be a breach of the terms of the user agreement. Some online services have attempted to address this problem by allowing users to express preferences for how their account is to be dealt with after their death. Google has an "Inactive Account Manager" tool which allows users to decide what happens to the data that they have stored in their Google accounts (emails, photographs,

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3 J Jacobsen, T Schlenker and L Edwards, *Implementing a Digital Asset Management System* (2013). Metadata is data attached to digital files giving information about that file. For example, digital photographs will often have a "time-stamp" indicating when the photograph was taken. That time-stamp is part of the photograph's metadata.

4 S Grattan and H Conway, "The "New" New Property: Dealing with Digital Assets on Death" paper delivered at *Modern Studies in Property Law 2016, School of Law, Queen's University Belfast* (April 2016).

5 The term "assets" is used loosely here. It is apparent from what follows that many digital assets are not assets in a legal sense at all.

6 S Grattan and H Conway, "The "New" New Property: Dealing with Digital Assets on Death" paper delivered at *Modern Studies in Property Law 2016, School of Law, Queen's University Belfast* (April 2016).

documents and so on) once those accounts have been inactive for a certain period of time. Users can choose for their data to be shared with certain trusted contacts or deleted.[7] Facebook operates a different type of scheme. Users can nominate a legacy contact who may contact Facebook on the death of the user. The users account will then be either deleted or "memorialised" according to the preference expressed by the user when nominating a legacy contact.[8] If memorialised, the account remains visible to the audience it was shared with, but no-one can log on to the account and other features, such as sending birthday reminders, are removed.

14.10 Many services make no provision for access after a user's death. This may also be an issue where online accounts are the only means of accessing valuable digital assets, for example bitcoins[9] or characters and resources collected in MMOGs that have real-world financial value.

14.11 It appears to us that law reform is necessary regarding access to digital devices and social media accounts. Some issues of access may be resolved by changing practice. In a 2015 YouGov survey, 52% of adults "said no-one, including friends or family, would be able to access their online accounts should anything happen to them".[10] Stakeholders have told us that awareness is vital in this area and that much can be done simply by having testators turn their minds to digital assets when making their wills. For example, we note the work of the Digital Legacy Association, which provides a framework and toolkit for professionals caring for those near the end of life, to encourage people to make arrangements for their digital legacy.[11] That sentiment is echoed in advice from the Law Society,[12] and the US government has encouraged its citizens to make "social media wills".[13] While such changes in practice perform a valuable role, they cannot overcome legal barriers; such as the risks that user agreements will be breached.

14.12 Whatever the position, any reform of the law surrounding access would most likely be directed at user agreements. As one stakeholder pointed out, the big issue with digital assets relates to contract law. The central importance of contract law takes user agreements far beyond the scope of the law of wills which form the terms of reference

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7 *Plan your digital afterlife* (2013) https://publicpolicy.googleblog.com/2013/04/plan-your-digital-afterlife-with.html (last visited 14 June 2017).

8 *Memorialized Accounts* https://en-gb.facebook.com/help/1506822589577997/ (last visited 31 March 2017).

9 Bitcoins are a form of cryptocurrency.

10 *Widespread confusion over who owns online accounts after death* (2015) https://yougov.co.uk/news/2015/04/13/widespread-confusion-over-who-owns-online-accounts/ (last visited 14 June 2017).

11 *The Digital Legacy Association* http://www.digitallegacyassociation.com/ (last visited 14 June 2017).

12 *Online accounts, photos, music, emails - what happens to your digital assets after your death?* (2016) http://www.lawsociety.org.uk/news/press-releases/what-happens-to-your-digital-assets-after-death/ (last visited 14 June 2017).

13 The original government blog post has been removed but its content is reported in the Atlantic Magazine: *The Government Would Like You to Write a 'Social Media Will'* (2012) https://www.theatlantic.com/technology/archive/2012/05/the-government-would-like-you-to-write-a-social-media-will/256700/ (last visited 14 June 2017).

for this project. For that reason, we do not make any proposals about access to devices and accounts in this Consultation Paper beyond calling for evidence about the issue.

14.13 We turn then to digital assets that are "assets" in a more conventional sense of the word – things that a person owns; for example, intellectual property rights that attach to digital photographs or writing stored on a computer. Those sorts of digital assets can be transferred by will and may have significant financial value.

14.14 In addition to potentially being difficult to access, testators may find it difficult to work out which digital assets they can pass by will and which ones they cannot. Many of what are thought of as digital assets are not assets at all in the traditional sense. For example, iTunes libraries are merely a suite of single-user licenses that expire on the user's death – the user never owns a copy of the songs. Hence, while I can leave my collection of CDs to a beneficiary in my will, I cannot leave my digital music library.

14.15 Moreover, it might not be clear what rights are entailed when a testator purports to leave a beneficiary a gift of the electronic device on which genuine assets are stored. For example, if a professional photographer leaves a computer containing his or her work to his or her children, it might be asked whether the children have any legal right to make commercial use of those photographs. While the law is clear that the copyright of those images is property in its own right, separate from the computer, it might not be clear whether the testator intends to give a beneficiary all of the hardware, the image files and the copyright.

14.16 Having in mind the problems outlined above, we have considered what the law of wills could do to remedy them. We have concluded that the law of wills is not the best place to address those problems. Contract law is central to the use and transmission of digital assets. Furthermore, the issues canvassed above do not merely arise with regard to wills. Issues of access, use and ownership arise whenever digital assets are transferred. Consequently, the problems explained above may arise when digital assets are transferred in a person's lifetime or when someone becomes incapacitated and can no longer deal with the assets themselves.

14.17 Looking to other jurisdictions, we note that US legislation has been passed to address some of the issues arising with regard to digital assets.[14] However, that Act "applies only to records in which an individual has a property right or interest" and therefore does not directly address the issues that arise from the contractual aspects of digital assets.

14.18 We therefore consider that the law governing the succession of digital assets falls outside the scope of our current project. The issues raised appear to relate to matters of consumer protection relating to user agreements; these are legal issues of contract and intellectual property law, rather than being governed by the Wills Act. Further, the issues arise in circumstances other than death; such as on the loss of capacity. We consider that a consistent policy towards digital assets is required, rather than a "piecemeal" solution that would apply only in respect of death, and only where the person has made a will. Nevertheless, we believe that there is scope to consider the

[14] The Fiduciary Access to Digital Assets Act (USA) (2015) has been adopted by numerous states.

adequacy of the law in this area in a separate law reform project. Therefore, we ask for evidence from consultees of problems that arise in relation to transfers of digital assets.

Consultation Question 64.

Are consultees aware of particular issues concerning the transfer of digital assets (be it on death or otherwise)?

If so, please provide details of:

(1) the effect that the issue had upon the people concerned;

(2) the scope of the problem; and

(3) why the problem is inadequately addressed under the current law.

BURIAL AND CREMATION

14.19 When making their wills, testators will naturally consider what should happen to their bodies after their death. Many people will include instructions about whether they wish to be buried or cremated. However, testators cannot dictate what happens to their bodies when they die. This is essentially because there is no property in a human body.[15] The legal position in England and Wales is effectively that:

> a will disposes of property on death, but if a corpse is not property it cannot be dealt with in this way. As a result, funeral instructions are simply precatory statements, which do not impose any legal obligation on those tasked with the funeral.[16]

14.20 The person in lawful possession of a body has a right and a duty to dispose properly of the body.[17] In most cases, this rule operates simply.

14.21 Where the deceased has died having made a will, the executor(s) of the estate will have lawful possession of the body and will ordinarily choose to dispose of the body in accordance with the testator's wishes.[18] Where the deceased dies intestate, the administrator – or, more accurately, the person entitled to a grant of letters of administration[19] – of the deceased's estate will have lawful possession of the body.

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15 *Williams v Williams* (1881-82) LR 20 Ch D 659.

16 H Conway, *The Law and the Dead* (2016). "Precatory" statements merely express a person's hopes or wishes.

17 *Williams v Williams* (1881-82) LR 20 Ch D 659.

18 Executors derive their powers from the will itself. For that reason executors have lawful possession of the body even before the grant of probate is issued. Therefore, there is no problem with swift disposal where the executor is known. Where the executor is unknown or disputed, the same considerations in para 14.24 below apply.

19 Often it will be desirable to bury or cremate the body before letters of administration can be granted. Therefore, the law has come to recognise the person entitled to the grant as having lawful possession even before the grant has been made. For simplicity, we have referred only to the administrator.

14.22 Ordinarily, the person entitled to a grant of letters of administration is determined with reference to the priority rules for intestate succession; the surviving husband or wife takes first priority, the children of the deceased take second priority, the father and mother of the deceased take third priority and so on.[20] It follows that if there is a spouse, he or she will become the deceased person's administrator; if not, that role will fall to the children and so on. The administrator will usually dispose of the body according to the deceased's wishes or the wishes of the deceased's family. However, there is no binding legal obligation upon the administrator to give effect to those wishes.

14.23 In some cases, the simple system breaks down. This may happen where executorship is disputed,[21] the family of the deceased disagree with the executor, or where there is a dispute between parties who share priority.[22] One instance in which disputes may particularly arise is where a child dies and the child's divorced or separated parents have conflicting views about whether and where the child should be buried or cremated. In these cases, one or more of the people involved will apply to the court for a limited grant of administration to dispose of the body.[23]

14.24 Since the award of such a grant to one party will disturb the usual order of priority, this course of action invokes section 116 of the Senior Courts Act 1981. That section allows the court to appoint an administrator who would not be given priority under the probate rules where "special circumstances" make it "necessary or expedient" to do so.

14.25 The special circumstances that a court will consider when there is a dispute as to the disposal of a body include: the deceased's wishes;[24] the connection that the deceased had with a particular place;[25] the connection that the deceased had to particular people;[26] and the unified wishes of the deceased's family (where those differ from the view of the executor).[27]

14.26 Disputes about the disposal of bodies are difficult to resolve. Arguably, the broad discretionary approach prescribed by section 116 of the Senior Courts Act 1981 could be improved by making paramount the deceased's wishes about the disposal of his or her body. One way to do this would be to make wishes expressed in a will binding on the testator's personal representatives.

14.27 We are aware that this issue could be addressed as a matter of reform concerning the law of wills. However, wills may not be the apposite document in which to record preferences for what happens to one's body. It may take some time to locate a deceased person's will and that can frustrate the deceased's wishes. That concern was reflected in the Burial Rights Reform Bill, a Private Member's Bill which lapsed when a

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20 Non-Contentious Probate Rules 1987, rule 22.

21 *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch).

22 *Hartshorne v Gardner* [2008] EWHC 3675 (Ch); [2008] 2 FLR 1681; *Burrows v HM Coroner for Preston* [2008] EWHC 1387 (Admin); [2008] 2 FLR 1225.

23 For example, see the order in *Re JS* [2016] EWHC 2859 (Fam), [2017] 4 WLR 1, described at para 8.12.

24 *Burrows v Preston Coroner* [2008] EWHC 1387 (QB).

25 *Hartshorne v Gardner* [2008] EWHC 3675 (Ch); [2008] 2 FLR 1681.

26 *Burrows v Preston Coroner* [2008] EWHC 1387 (QB).

27 *Khan v Crossland* unreported, Ch D, 25 November 2011.

general election was called for 8 June 2017. The Bill aimed to enable a person to make "a declaration of his or her directions and requests concerning his or her funeral and burial arrangements *other than in his or her will or testament*" (our emphasis).

14.28 Moreover, we note that there are few general restrictions on disposing of a body beyond doing so in private without causing a nuisance.[28] We consider that before the step is taken to make burial wishes binding, the law governing the means by which a person's body may be disposed of should be reviewed. Otherwise, we are concerned that executors may find that they are bound to carry out wishes which they (or family members) may consider inappropriate.

14.29 The need for an examination of the law relating to the disposal of bodies was raised with us by stakeholders in response to our consultation on our 13th Programme of Law Reform. As this Consultation Paper went to press, we continue to have discussions with government on the possibility of a law reform project in this area.

GUARDIANSHIP

14.30 At present, the law allows testators to use their wills to appoint guardians for their minor children. That power is contained in the Children Act 1989, which enacts recommendations from the Law Commission's Report on guardianship and custody.[29]

14.31 The relevant parts of section 5 of the Children Act 1989 read as follows:

> (3) A parent who has parental responsibility for his child may appoint another individual to be the child's guardian in the event of his death.
>
> (4) A guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death[; and a special guardian of a child may appoint another individual to be the child's guardian in the event of his death].
>
> (5) An appointment under subsection (3) or (4) shall not have effect unless it is made in writing, is dated and is signed by the person making the appointment…

14.32 This section raises an issue of consistency between the 1989 Act and the law of wills. Section 5(5) of the 1989 Act requires that the document appointing a guardian is dated. However, a will does not need to be dated in order to be valid. Therefore, it is possible that an appointment made in an otherwise valid will would fail because it does not include the date on which it was executed.

14.33 While the inconsistency could be removed, it is not clear that doing so would have any discernible practical effect. Stakeholders have told us that dating a will is already good practice and most testators (and professionals) do so. Furthermore, we have not been told of any problems that have been caused by the inconsistency between the formal requirements for wills and the formal requirements for the appointment of guardians.

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[28] See J Spencer, "Criminal liability for the desecration of a corpse" [2004] Archbold News, 6, 7 to 9.

[29] LC 172 (1988). Testators cannot use privileged wills to appoint guardians : Wills (Soldiers and Sailors) Act 1918, s 4. See para 5.41 above.

Consequently, we do not believe that it is necessary to cover the aspects of guardianship that relate to the law of wills in this project.

Consultation Question 65.

Are consultees aware of any instances in which the requirement to date an appointment of guardianship but not to date a will has caused difficulty in practice?

If so, please provide details of the case.

Chapter 15: Consultation questions

Consultation Question 1.

In any new legislation on wills should the term "testator" be replaced by another term?

If so:

(1) should the term that replaces "testator" be "will-maker"? or

(2) should another term be used and, if so, what term?

Consultation Question 2.

We ask consultees to tell us about their experiences of the impact, financial and otherwise of the:

(1) preparation, drafting and execution of wills; and

(2) disputes over wills following the testator's death.

Consultation Question 3.

We provisionally propose

(1) that the test for mental capacity set out in the Mental Capacity Act 2005 should be adopted for testamentary capacity; and

(2) that the specific elements of capacity necessary to make a will should be outlined in the MCA Code of Practice.

Do consultees agree?

Consultation Question 4.

We invite consultees' views on whether, if the Mental Capacity Act 2005 is not adopted as the test for testamentary capacity, the *Banks v Goodfellow* test should be placed on a statutory footing.

Consultation Question 5.

We invite consultees' views on whether any statutory version of the testin *Banks v Goodfellow* should provide:

(1) a four limbed test of capacity, so that the relevance of the testator's delusions or disorder of the mind (or other cause of capacity) is not confined to understanding the claims on him or her;

(2) that a testator's capacity may be affected by factors other than delusions or a disorder of the mind; and

(3) clarification that the testator must have the capacity to understand, rather than actually understand, the relevant aspects of a will.

Consultation Question 6.

We provisionally propose that if a reformed version of the *Banks v Goodfellow* test is set out in statute it should be accompanied by a statutory presumption of capacity.

Do consultees agree?

Consultation Question 7.

We provisionally propose that the rule in *Parker v Felgate* should be retained.

Do consultees agree?

Consultation Question 8.

We provisionally propose that:

(1) a code of practice of testamentary capacity should be introduced to provide guidance on when, by whom and how a testator's capacity should be assessed.

(2) that the code of practice should not be set out in statute but instead be issued under a power to do so contained in statute (which may be that contained in the MCA should the MCA test be adopted for testamentary capacity).

Do consultees agree?

Consultation Question 9.

We provisionally propose that the code of practice should apply to those preparing a will, or providing an assessment of capacity, in their professional capacity.

Do consultees agree?

Consultation Question 10.

We invite consultee's views on the content of the code of practice.

Consultation Question 11.

In principle, a scheme could be enacted allowing testators to have their capacity certified by a third party. We provisionally propose that a certification scheme should not be enacted. Do consultees agree?

Consultation Question 12.

We take the view that reform is not required:

(1) of the best interests rationale that underpins the exercise of the court's discretion to make a statutory will;

(2) of the way in which that discretion is exercised; or

(3) to restrict the circumstances in which a statutory will can be made.

Do consultees agree?

Consultation Question 13.

Consultees are asked whether there are reforms that could usefully be made to the procedure governing statutory wills with the aim of reducing the cost and length of proceedings and, if so, what those are?

Consultation Question 14.

Do consultees think that a supported will-making scheme is practical or desirable?

If so, we ask for consultees' views on:

(1) who should be able to act as supporters in a scheme of supported will-making?

(2) should any such category include non-professionals as well as professionals?

(3) should supporters be required to meet certain criteria in order to act as a supporter and, if so, what those criteria should be?

(4) how should supporters be appointed?

(5) what should be the overarching objective(s) of the supporter role?

(6) how should guidance to supporters be provided?

(7) what safeguards are necessary in a scheme of supported will-making? In particular:

(a) should a supporter be prevented from benefitting under a will?

(b) should a fiduciary relationship be created between a supporter and the person he or she is supporting?

Consultation Question 15.

We invite consultees' views on whether the current formality rules dissuade people from making wills.

Consultation Question 16.

We invite consultees' views on what they see as being the main barriers to people making wills.

Consultation Question 17.

We provisionally propose that a person who signs a will on behalf of the testator should not be able to be a beneficiary under the will.

Do consultees agree?

Consultation Question 18.

We provisionally propose that a gift made in a will to the spouse or civil partner of a person who signs a will on behalf of the testator, should be void, but the will should otherwise remain valid.

Do consultees agree?

Consultation Question 19.

We provisionally propose that if the law is changed so that a gift to the cohabitee (or other family member) of a witness is void, then a gift to the cohabitee of a person who signs the will on behalf of the testator should be void.

Do consultees agree?

Consultation Question 20.

We provisionally propose that a gift in a will to the cohabitant of a witness should be void.

Do consultees agree?

Consultation Question 21.

We invite consultees' views on whether gifts in a will to the parent or sibling of a witness, or to other family members of the witness should be void. If so, who should those other family members be?

Consultation Question 22.

We invite for consultees' views on whether it should be possible, in defined circumstances, to save a gift to a witness that would otherwise be void.

Consultation Question 23.

We provisionally propose that the reference to attestation in section 9(d)(i) of Wills Act 1837 be removed. Do consultees agree?

Consultation Question 24.

If consultees do not agree that the attestation requirement should be removed, we invite their views as to whether attestation should:

(1) be defined to mean that the witness must sign the will and intend that his or her signature serve as clear evidence of the authenticity of the testator's signature; and

(2) apply in all cases, including those where the witness acknowledges his or her signature in the testator's presence.

Consultation Question 25.

We provisionally propose that holograph wills are not recognised as a particular class of will in England and Wales.

Do consultees agree?

Consultation Question 26.

We provisionally propose that provision for privileged wills should be retained, but should be confined in its scope to:

(1) those serving in the British armed forces; and

(2) civilians who are subject to service discipline within schedule 15 of the Armed Forces Act 2006.

Do consultees agree?

Consultation Question 27.

We invite consultees to provide us with evidence of how common it is for a will to be invalid for non-compliance with formality requirements.

Consultation Question 28.

We provisionally propose that a power to dispense with the formalities necessary for a valid will be introduced in England and Wales.

We provisionally propose a power that would:

(1) be exercised by the court;

(2) apply to records demonstrating testamentary intention (including electronic documents, as well as sound and video recordings);

(3) operate according to the ordinary civil standard of proof;

(4) apply to records pre-dating the enactment of the power; and

(5) allow courts to determine conclusively the date and place at which a record was made.

Do consultees agree?

Consultation Question 29.

We provisionally propose that reform is not required:

(1) of current systems for the voluntary registration or depositing of wills; or

(2) to introduce a compulsory system of will registration.

Do consultees agree?

Consultation Question 30.

We provisionally propose that:

(1) an enabling power should be introduced that will allow electronically executed wills or fully electronic wills to be recognised as valid, to be enacted through secondary legislation;

(2) the enabling power should be neutral as to the form that electronically executed or fully electronic wills should take, allowing this to be decided at the time of the enactment of the secondary legislation; and

(3) such an enabling power should be exercised when a form of electronically executed will or fully electronic will, as the case may be, is available which provides sufficient protection for testators against the risks of fraud and undue influence.

Do consultees agree?

Consultation Question 31.

We provisionally propose that electronic signatures should not be capable of fulfilling the ordinary formal requirement of signing a will that applies to both testators and witnesses (currently contained in section 9 of the Wills Act 1837).

Do consultees agree?

Consultation Question 32.

We ask consultees to provide us with their comments on, or evidence about:

(1) the extent of the demand for electronic wills; and

(2) the security and infrastructure requirements necessary for using electronic signatures in the will-making context.

Consultation Question 33.

If electronic wills are introduced, it is unlikely that the requirement that there be a single original will would apply to electronic wills. Consequently, it may be difficult or impossible for testators who make wills electronically to revoke their wills by destruction.

(1) Do consultees think that a testator's losing the ability to revoke a will by destruction is an acceptable consequence of introducing electronic wills?

(2) Are consultees aware of other serious consequences that would stem from there not being a single original copy of a will made electronically?

Consultation Question 34.

We invite consultees' views as to whether an enabling power that provides for the introduction of fully electronic wills should include provision for video wills.

Consultation Question 35.

There is currently a rule relating to knowledge and approval that mirrors the rule in Parker v Felgate, which relates to capacity. The rule allows, by way of exception, that the proponent of a will may demonstrate that the testator knew and approved the contents of his or her will at the time when he or she instructed a professional to write the will, rather than the time at which the will was executed.

We provisionally propose to retain the rule.

Do consultees agree?

Consultation Question 36.

We provisionally propose that the general doctrine of undue influence should not be applied in the testamentary context.

Do consultees agree?

Consultation Question 37.

We provisionally propose the creation of a statutory doctrine of testamentary undue influence.

Do consultees agree?

Consultation Question 38.

We invite consultees' views on:

(1) whether a statutory doctrine of testamentary undue influence, if adopted, should take the form of the structured or discretionary approach.

(2) if a statutory doctrine were adopted whether a presumption of a relationship of influence would be raised in respect of testamentary gifts made by the testator to his or her spiritual advisor.

Consultation Question 39.

We ask consultees to tell us whether they believe that any reform is required to the costs rules applicable to contentious probate proceedings as a result of our proposed reform to the law of undue influence, and knowledge and approval.

Consultation Question 40.

We provisionally propose that the requirement of knowledge and approval should be confined to determining that the testator:

(1) knows that he or she is making an will;

(2) knows the terms of the will; and

(3) intends those terms to be incorporated and given effect in the will.

Do consultees agree?

Consultation Question 41.

We provisionally propose that the age of testamentary capacity be reduced from 18 to 16 years. Do consultees agree?

Consultation Question 42.

Should the courts in England and Wales have the power to authorise underage testators to make wills?

If so, who should be allowed to determine an underage testator's capacity at the time the will is executed?

Consultation Question 43.

We provisionally propose that statute should not prescribe the order in which interpretation and rectification should be addressed by a court.

Do consultees agree?

Consultation Question 44.

Do consultees know of any cases in which the order of interpretation and rectification has caused problems in practice? If so, please explain the facts of the case and the nature of the problem.

Consultation Question 45.

We provisionally propose to replace sections 23 to 29 of the Wills Act 1837, modernising and clarifying the language of those sections while retaining their substantive effect.

Do consultees agree?

Consultation Question 46.

As regards sections 23 to 29 of the Wills Act 1837, we ask consultees whether in their view:

(1) any of those provisions are obsolete;

(2) any of those provisions require substantive alteration; and

(3) if any provisions are obsolete or require substantive alteration, what changes are needed and why.

Consultation Question 47.

We provisionally propose that section 30 of the Wills Act 1837 be repealed.

Do consultees agree? If not, please provide evidence of the practical use of section 30 of the Wills Act 1837.

Consultation Question 48.

We provisionally propose that section 31 of the Wills Act 1837 be repealed.

Do consultees agree? If not, please provide evidence of the practical use of section 31 of the Wills Act 1837.

Consultation Question 49.

Do consultees think that there is a need for any new interpretative provisions in the law of wills?

If so, please state:

(1) what problem the new provisions would address; and

(2) why that problem is inadequately addressed under the current law.

Please also give an example of a case in which the problem has arisen where possible.

Consultation Question 50.

Do consultees think that the scope of rectification in the law of wills should be expanded?

If so, please state:

(1) what problem the expanded doctrine of rectification would address; and

(2) why that problem is inadequately addressed under the current law.

Please also give an example of a case in which a problem has arisen where possible.

Consultation Question 51.

We provisionally propose that the Mental Capacity Act should be amended to provide that disposal of property by an attorney, where the donor lacks testamentary capacity, does not adeem a gift.

Do consultees agree?

Consultation Question 52.

We provisionally propose that a specific gift should not adeem where, at the time of the testator's death, the subject matter of that gift:

(1) has been sold but the transaction has not been completed; or

(2) is the subject of an option to purchase.

In those circumstances, the beneficiary of the specific gift that would otherwise have adeemed will inherit the proceeds of the sale.

Do consultees agree?

Consultation Question 53.

We provisionally propose that, except where a contrary intention appears from the will, a gift of shares will not be subject to ademption where the subject of the gift has changed form due to dealings of the company which the testator has not brought about.

Do consultees agree?

Consultation Question 54.

We provisionally propose that a beneficiary be entitled to the value of a specific gift that has been destroyed where the destruction of the property concerned and the testator's death occur simultaneously.

Do consultees agree?

Consultation Question 55.

We invite consultees' views about whether there are further specific instances in which the effects of the doctrine of ademption should be mitigated.

Consultation Question 56.

We ask consultees for their views on reform to create a general exception to ademption where the property that is the subject of a specific gift and would otherwise adeem is no longer in the testator's estate due to an event beyond the control of the testator.

Consultation Question 57.

We ask consultees for their views on reform to create a general exception to ademption, so that the beneficiary of the gift receives any interest that the testator holds in the property that was the subject of the gift at the time of his or her death.

Consultation Question 58.

We provisionally propose that no reform is required to the law governing the revocation of wills by will or codicil, writing or destruction.

Do consultees agree?

Consultation Question 59.

We ask consultees to provide us with any evidence that they have on the level of public awareness of the general rule that marriage revokes a will.

Do consultees think that the rule that marriage automatically revokes a previous will should be abolished or retained?

Consultation Question 60.

Should testators be empowered to prescribe whether a will or particular dispositions in it should be revoked by a future (uncontemplated) marriage?

Consultation Question 61.

We provisionally propose that marriage entered into where the testator lacks testamentary capacity, and is unlikely to recover that capacity, will not revoke a will.

Do consultees agree?

Consultation Question 62.

We propose that section 8 of the Inheritance (Provision for Family and Dependants) Act 1975 be amended to provide that property that is subject to a mutual wills arrangement be treated as part of the net estate.

Do consultees agree?

Consultation Question 63.

Do consultees believe that the DMC doctrine should be abolished or retained?

Consultation Question 64.

Are consultees aware of particular issues concerning the transfer of digital assets (be it on death or otherwise)?

If so, please provide details of:

(1) the effect that the issue had upon the people concerned;

(2) the scope of the problem; and

(3) why the problem is inadequately addressed under the current law.

Consultation Question 65.

Are consultees aware of any instances in which the requirement to date an appointment of guardianship but not to date a will has caused difficulty in practice?

If so, please provide details of the case.

Appendix 1: Provisions authorising minors to make wills

SUCCESSION ACT 1981 (QUEENSLAND)

19 Court may authorise minor to make, alter or revoke a will

(1) The court may make an order authorising a minor to—

(a) make or alter a will in the terms stated by the court; or

(b) revoke a will or part of a will.

(2) A minor, or a person on behalf of a minor, may apply for an order under subsection (1).

(3) The court may make the order only if the court—

(a) is satisfied that the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of any property disposed of under the proposed will or alteration; and

b) is satisfied that the proposed will, alteration or revocation accurately reflects the intentions of the minor; and

(c) is satisfied that it is reasonable in all the circumstances that the order be made; and

(d) has approved the proposed will, alteration or revocation.

(4) The court may make the order on the conditions it considers appropriate.

(5) To remove any doubt, it is declared that an order under this section does not make, alter or revoke a will or dispose of any property.

WILLS ACT 1997 (VICTORIA)

20. Wills by minors authorised by the Court

(1) Despite section 5, the Court may make an order under this section authorising a minor to make a will in specific terms or revoke a will.

(2) An order under this section may be made on the application of the minor or a person on behalf of the minor.

(3) In making an order under this section, the Court must approve the terms of the will.

(4) The Court may impose any conditions on the authorisation that the Court thinks fit.

(5) Before making an order under this section, the Court must be satisfied that—

(a) the minor understands the nature and effect of the proposed will or revocation and the extent of the property disposed of by it; and

(b) the proposed will or revocation accurately reflects the intentions of the minor; and

(c) it is reasonable in all the circumstances that the order should be made.

(6) In addition to the requirements for the execution of a will specified in Part 2, one of the witnesses to the making of a will under this section must be the Registrar.

(7) A will made under this section must be deposited with the Registrar under Part 1, Division 1A of the Administration and Probate Act 1958 .

(8) Despite section 5C of the Administration and Probate Act 1958 , any will which has been deposited with the Registrar under subsection (7), must not be withdrawn from deposit unless—

(a) the Court has made an order under this section authorising the revocation of the will; or

(b) the testator has attained 18 years of age or marries.

(9) A failure to comply with subsection (7) does not affect the validity of the will.

SUCCESSION ACT 2006 (NEW SOUTH WALES)

16 Court may authorise minor to make, alter or revoke a will

(1) The Court may make an order authorising a minor:

(a) to make or alter a will in the specific terms approved by the Court, or

(b) to revoke a will or part of a will.

(2) An order under this section may be made on the application of a minor or by a person on behalf of the minor.

(3) The Court may impose such conditions on the authorisation as the Court thinks fit.

(4) Before making an order under this section, the Court must be satisfied that:

(a) the minor understands the nature and effect of the proposed will or alteration or revocation of the will or part of the will and the extent of the property disposed of by it, and

(b) the proposed will or alteration or revocation of the will or part of the will accurately reflects the intentions of the minor, and

(c) it is reasonable in all the circumstances that the order should be made.

(5) A will is not validly made, altered or revoked, in whole or in part, as authorised by an order under this section unless:

(a) in the case of the making or alteration of a will (in whole or in part)-the will or alteration is executed in accordance with the requirements of Part 2.1, and

(b) in the case of a revocation of a will (in whole or in part):

(i) if made by a will-the will is executed in accordance with the requirements of Part 2.1, and

(ii) if made by other means-is made in accordance with the requirements of the order, and

(c) in addition to the requirements of Part 2.1, one of the witnesses to the making or alteration of the will under this section is the Registrar, and

(d) the conditions of the authorisation (if any) are complied with.

(6) A will that is authorised to be made, altered or revoked in part by an order under this section must be deposited with the Registrar under Part 2.5.

(7) A failure to comply with subsection (6) does not affect the validity of the will.

WILLS ACT 1936 (SOUTH AUSTRALIA)

6—Will of minor pursuant to leave of Court

(1) The Court may, on application by a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke a will.

(2) An authorisation under this section may be granted on such conditions as the Court thinks fit.

(3) Before making an order under this section, the Court must be satisfied that—

(a) the minor understands the nature and effect of the proposed will, alteration or revocation; and

(b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and

(c) it is reasonable in all the circumstances that the order should be made.

(4) A will or instrument altering or revoking a will made pursuant to an order under this section—

(a) must be executed as required by law and one of the attesting witnesses must be the Registrar or the Public Trustee; and

(b) must be deposited for safe custody with the Registrar under section 13 of the Administration and Probate Act 1919

Appendix 2: Wills Act 1837 – Sections 23 to 31

23. A devise not to be rendered inoperative by any subsequent conveyance or act.

No conveyance or other Act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

24. A will shall be construed to speak from the death of the testator.

Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

25. Residuary devise shall include estates comprised in lapsed and void devises.

Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect shall be included in the residuary devise (if any) contained in such will.

26. A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a [...] leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the [...] leasehold estates of the testator, or his [...] leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

27. A general gift shall include estates over which the testator has a general power of appointment.

A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which

he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

28. A devise without any words of limitation shall be construed to pass as free.

Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

29. The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

In any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise:

Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue

30. No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

31. Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, shall take the fee.

Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Appendix 3: Draft Wills Act 1994 (Victoria)

Clause 20 (corresponding to section 23 of the Wills Act 1837)

What interest in property does a will operate to dispose of?

If -

(a) a testator has made a will disposing of property; and

(b) after the making of a will and before his or her death, the testator disposes of an interest in that property -

the will operates to dispose of any remaining interest the testator has in that property.

Clause 21 (corresponding to section 24 of the Wills Act 1837)

When does a will take effect?

(1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.

(2) Sub-section (1) does not apply if a contrary intention is shown in the will.

Clause 22 (corresponding to section 25 of the Wills Act 1837)

What is the effect of a failure of a disposition?

(1) If any disposition of property, other than the exercise of a power of appointment, is ineffective, the will takes effect as if the property were part of the residuary estate of the testator.

(2) Sub-section (1) does not apply if a contrary intention is shown in the will.

Clause 27 (corresponding to section 26 of the Wills Act 1837)

What does a general disposition of land include?

(1) A general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

Clause 28 (corresponding to section 27 of the Wills Act 1837)

What does a general disposition of property include?

(1) A general disposition of all or the residue of the testator's property, or of all or the residue of his or her property of a particular description, includes all the property of the relevant

description over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

Clause 29 (corresponding to section 28 of the Wills Act 1837)

What is the effect of a devise of real property without words of limitation?

(1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

Clause 31 (corresponding to section 29 of the Wills Act 1837)

How are requirements to survive with issue construed?

(1) If there is a disposition to a person in a will which is expressed to fail if there is either -

(a) a want or a failure of issue of that person either in his or her lifetime or at his or her death; or

(b) an indefinite failure of issue of that person -

those words must be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.