Law Commission
Reforming the law

Making a Will
Summary

Consultation Paper No 231 (Summary)
13 July 2017

INTRODUCTION

1.1 Where a person dies having made a valid will, that will determines who inherits the person's property. If someone dies without a will, he or she is said to die "intestate" and statutory intestacy rules determine who will receive the deceased person's property. This project is concerned with the law governing making wills, rather than succession law more widely.

1.2 The project undertakes a broad review of the law of wills but it is not exhaustive, instead focusing on those areas where we think, or stakeholders have told us that reform is needed most. The Consultation Paper, which this summary accompanies, discusses a number of areas, about which we ask questions and make provisional proposals for reform. This summary briefly explains several of the key concepts in the law of wills and outlines the main provisional proposals that we make in the Consultation Paper.

1.3 Of necessity, this summary only offers an overview of our key provisional proposals and questions. Before responding, consultees are encouraged to read our full Consultation Paper or the relevant parts of it.

WHAT IS A WILL?

1.4 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".[1]

1.5 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.[2]

WHY IS THE PROJECT IMPORTANT?

1.6 It has been suggested that 40% of the adult population die without a will.[3] That matters because the intestacy rules that specify what happens to a person's property when he or she dies intestate are a blunt instrument that will not work for everyone. 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 who are not married or in a civil partnership. Likewise, the intestacy rules may not give the result that would be wanted by some people who have second families; for example, where a person has remarried and has children from the first marriage. Many people also wish

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1 L King, K Biggs and P Gausden, *A Practitioner's Guide to Wills* (3rd ed 2010) p 5.

2 See paragraph 1.78 below. See also Chapter 5 of the Consultation Paper.

3 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 Ministry of Justice, *Family Court Statistics Quarterly: July to September 2016* (15 December 2016) and the ONS webpage on Deaths at https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths (last visited 13 June 2017).

to leave a gift to charity in their will and the intestacy rules do not make provision for this.

1.7 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, and therefore to leave his or her property to whoever he or she wants. This idea is the primary principle that underpins succession law and reflects a deeply rooted belief. A will is the primary means by which a person can exercise his or her testamentary freedom. However, testators can also be vulnerable because of age, disability or circumstance, and we take the view that the law can do more to protect such testators.

1.8 Further, many thousands of people each year already make wills or receive inheritances under wills; the law governing the making of a will potentially affects the entire population.

WHAT IS THE PROBLEM WITH THE LAW?

1.9 Given that we think making a will is an important and valuable act, we are concerned about the problems that exist in the law of wills. The law of wills is not as clear or protective as it could be, and it could do more to encourage and facilitate people to make wills.

1.10 Fundamentally, we think that these problems can be traced to the age of the law. 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 mental capacity to make a will ("testamentary capacity") is set out in the case of *Banks v Goodfellow*[4] from 1870. 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 that property passes after their death.

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4 (1869-70) LR 5 QB 549.

HISTORY OF THE PROJECT

1.11 In response to our 2013 public consultation on our 12th Programme of Law Reform, we received suggestions for reform to the law of wills 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 from a wide range of practising lawyers specialising in wills work. Consultation responses focused in particular on the areas of testamentary capacity and the formalities necessary to make a will. 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]

1.12 We commenced our review of the law of wills in late 2015. Since then, we have been researching the law, considering 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.

CONTEXT AND SCOPE

1.13 In the Consultation Paper we briefly sketch several areas of the law which do not form part of our consideration of reform. Those topics have been included because we think they provide useful context for our discussion and provisional proposals.[6]

1.14 These contextual areas are probate and estate administration, the process by which a testator's wishes (or the distribution of property directed by the intestacy rules) are given effect; the other ways in which property may pass from the deceased to others on death (for example, because the deceased is survived by a person who owned property with him or her as "joint tenants"); and the challenges that can be made to a will after the testator's death. A will may be challenged on the basis that it is invalid for one of several reasons; or the effect of a will may be changed because a person makes a successful claim for financial provision from the deceased's estate under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act").[7]

1.15 We also discuss the relevance of international law, in particular the United Nations Convention on the Rights of Persons with Disabilities, which protects and promotes the human rights of disabled people, and how the law, and law reform, in other countries have provided a useful comparative perspective.

1.16 There are some topics that intersect with the law of wills, but lie outside the scope of our work. We do not, for example, consider the law governing secret trusts or proprietary

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

6 At paragraphs 1.16 to 1.24.

7 Only certain categories of people may make such a claim.

estoppel.[8] 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.

1.17 The Consultation Paper includes a discussion of the issue of "digital assets" such as social media, email accounts, and digital music, which differ from the sort of property that is usually dealt with by a will. However, we conclude that a comprehensive consideration of these issues falls outside the scope of the current project both because such "assets" are often only a contractual right, rather than property, and because the issue of passing on digital assets is relevant in circumstances other than the death of the person who had the right to use the asset. We ask consultees to tell us whether they are aware of particular issues concerning the transfer of digital assets.

1.18 The professional drafting of wills, or "will-writing", is currently unregulated. The issue was considered by the Legal Services Board in a 2013 report, which recommended that only certain professions should be permitted to draft wills.[9] The Government rejected this recommendation and because we do not consider that we could add value to the work already done by the Legal Services Board, the Consultation Paper does not consider this issue.

1.19 We recognise that there are problems in making a will that cannot be solved by law reform. For example, people may not make a will because of fear of death or superstition.

AIMS AND OBJECTIVES OF THE PROJECT

1.20 The aim of this project is to produce recommendations for a more modern, improved law of wills.

1.21 This summary explains our main provisional proposals for reform in terms of three important policy objectives: supporting the exercise of testamentary freedom, protecting testators, and increasing clarity and certainty in the law. For the purposes of this overview we have divided our proposals for reform according to the policy objectives but those objectives are interlinked. For example, any reform that clarifies the law might also support testamentary freedom; if testators know precisely what legal effect a will has, they will be better able to carry out their intentions.

SUPPORTING TESTAMENTARY FREEDOM

1.22 The Consultation Paper sets out a number of ways in which we seek to support testators in exercising their testamentary freedom.

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8 We explain these concepts in Chapter 1 of the Consultation Paper.

9 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 13 June 2017).

Dispensing power

1.23 In order to be valid, a will must comply with a number of formality requirements.[10] Essentially, a will must be in writing, signed by the testator in the presence of two witnesses and signed by those witnesses. Under the current law, these formality rules are strict. Non-compliance renders a will void, regardless of how small the error or how certain we can be about what the testator actually intended.

1.24 In order to soften the rough edges of the formality rules, a number of jurisdictions have so-called "dispensing powers" which enable a court to recognise a will as valid even though it does not comply with the formalities requirements.

1.25 We consider that a dispensing power can help 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".[11] 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 might be said to offer more protection than adherence to a particular form.

1.26 By way of example, imagine that a testator makes a will. He clearly had capacity and followed all the formalities save that one of the witnesses who was present while the testator signed his will then signed her own name while the testator was absent from the room. Under the current law, formalities would not have been complied with because the law requires the witnesses to a will to sign while the testator is present. The testator's will would therefore be void and on his death his property would pass under the intestacy rules, or under a previously valid will, if he had made one. But, in this example, neither the intestacy rules nor a previously valid will are likely to reflect the testator's testamentary intentions. However, using a dispensing power, if the court were satisfied that the document represented the testator's genuine testamentary intentions, it could choose to admit the otherwise invalid will to probate, so that his property would pass under the terms of that will.

1.27 We emphasise that the dispensing power will operate as a safety net for testators who have tried to make a will but failed to do so in the proper form. The adoption of a dispensing power will not introduce new types of will-making as a matter of course. For example, wills made electronically or those that have not been properly witnessed will not simply be admitted to probate. They will be considered on a case-by-case basis and it will remain in a testator's interest to comply with the formality rules wherever possible.

1.28 In order to give greater effect to the intentions of testators, we therefore provisionally propose that a dispensing power be introduced in England and Wales and that the power be applied to all records which demonstrate, to the civil standard of proof (on the balance of probabilities), testamentary intention.

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10 See Chapter 5 of the Consultation Paper.

11 J G Miller "Substantial compliance and the Execution of Wills" (1987) 36 *International and Comparative Law Quarterly* 559 at 587, cited in Scottish Law Commission, Report on Succession (1990) Scot Law Com No 124 p 41.

Supported wills

1.29 People with diminished capacity are often supported by friends, family or professionals to make important decisions for themselves. For example, advocates may support a person's active involvement with the local authority processes or, more informally, doctors may help patients to understand their different treatment options. Indeed, the United Nations Convention on the Rights of Persons with Disabilities 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".

1.30 We therefore consider whether a formal support scheme is necessary in the sphere of will-making.[12] The potential benefits are that more people with diminished capacity would be able to make wills, and that fewer people with diminished capacity would have to face the expense of going to the Court of Protection to have a statutory will made for them. However, a formal supporter scheme for will-making would face significant practical difficulties, principally because it is unlikely that such a scheme would be publicly funded, so those requiring support would have to pay for the support themselves. Nonetheless, paying for such support may be cheaper than the alternative of a statutory will.

1.31 We ask consultees whether they believe that a supported will-making scheme is practicable or desirable.

Electronic wills

1.32 Given that the Wills Act dates 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 how that technology can be applied in relation to wills. Our focus in our discussion of electronic wills in the Consultation Paper is on how the law can provide for people to make (or execute) wills electronically.[13] If a system of electronic will-making can be made practicable, testators might find it easier to exercise their testamentary freedom.

1.33 We also note that the electronic execution of wills might result in significant benefits in terms of convenience, security, and cost saving. However, electronic wills also face several challenges in ensuring that testators are protected against the risks of fraud and exploitation. It is also necessary to ensure that an electronic will made using today's technology can be accessed potentially decades in the future when the testator dies.

1.34 We are optimistic about the prospect of allowing electronic wills to have legal effect; but it is not possible to predict with confidence how developments in digital technology will enable the practical challenges to be overcome. We suggest that reform of the law of wills in other respects requiring primary legislation should not be postponed for this purpose. Our view is that it would be preferable for a new Wills Act to confer on the Lord Chancellor the power to make provision for electronic wills by statutory instrument.

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12 See Chapter 4 of the Consultation Paper.

13 See Chapter 6 of the Consultation Paper.

1.35 A key issue for electronic wills is determining how the will should be signed. There are many ways an electronic document can be signed, ranging from a simple typed signature to biometrics and complex cryptographic techniques.

1.36 In considering electronic signatures in the context of wills, we have identified two main challenges: security and infrastructure. Simple electronic signatures are not secure enough to be used to sign electronic wills. For example, a person's typed name looks the same regardless of who types it and so the risk of fraud is too great. More complex systems, such as biometrics and encryption-based signatures, offer greater security, but require a certain amount of infrastructure such as specific equipment and authorities to certify that certain standards have been met. Current infrastructure for electronic signatures has developed in a transactional context, such as contracts, where there is a counterparty (the other party to a contract or banking transaction) interested in authenticating electronic signatures when they are made. Systems that require counterparties will not easily be transposed into a will-making context. Further, given the relatively low cost of making a will, testators might not see value in using electronic means if doing so makes a will more expensive.

1.37 We ask for consultees' views on both the principle of electronic wills and the technical aspects of electronic will-making.

1.38 It is not entirely clear, in the current law, whether a will can be signed electronically. In order to provide certainty, until such time as any enabling power is used to allow electronic signatures, we provisionally propose that such signatures should not be able to fulfil the requirement of signing a will that applies to both testators and witnesses.

Children making wills

1.39 While it may be thought that there is no pressing need to consider whether children should be allowed to write wills, our view is that reform is justified by infrequent, but important, cases.[14] A child might have significant assets, perhaps as a result of a personal injury settlement, and wish to control who receives his or her property after his or her death. That may be particularly important for a child who is estranged from a parent who would otherwise be entitled to the child's property through intestacy rules.

1.40 Moreover, making a will is not solely about distributing assets. Wills may be used to appoint executors who have the ultimate say about what arrangements are made regarding a person's body after his or her death. This aspect of will-making was illustrated in the recent case of *Re JS* in which 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. She was an intelligent young woman who had reached a settled view. However, the girl's estranged father objected to the practice of cryonics. Moreover, it seemed that he would have a say in what arrangements were made for the girl's body since the default rules would make him a joint administrator of her estate. The case was ultimately dealt with by way of a court order made before the girl died, giving her mother control of the arrangements for her body. However, a dispute could have been avoided if the girl had been able to write a will appointing her mother as her sole executor.

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[14] See Chapter 8 of the Consultation Paper.

1.41 Having those factors in mind, we consider two issues. First, we consider whether the current age of testamentary capacity – 18 years – remains appropriate. We note that, in the law concerning medical and social welfare, 16- and 17-year olds are increasingly recognised as capable decision-makers and we are not aware of any compelling reason for the threshold age in the law of wills to be higher than that in those contexts. Therefore, we provisionally propose that the age of testamentary capacity be reduced from 18 to 16 years.

1.42 Secondly, we consider whether testators below the age of testamentary capacity should be allowed to make valid wills where they have sufficient understanding of the process to do so. Such a provision might, for example, have helped in the case discussed above, where an intelligent 14-year old had reached a settled view of her wish for her body to be preserved through cryonics. We ask consultees for their views on whether provision should be made for those under the age of testamentary capacity to make a will when the child has a sufficient understanding to be able to do so.

Ademption

1.43 Ademption is a legal term for what happens when a gift of a particular piece of property in a will does not take effect at the testator's death because that item 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 the place of the gift.[15]

1.44 The rationale for ademption is that testators who make a specific gift – of a painting, for example – do not generally intend the recipient of the gift to receive a substitute instead of the gift where it has already been given away or sold before the testator dies. The ademption rule is meant to ensure that the testator's property is distributed according to his or her genuine wishes insofar as that is possible.

1.45 However, there seem to be cases in which the ademption rule has exactly the opposite effect; it may subvert the testator's wishes.

1.46 We make a number of provisional proposals designed better to align the operation of the law with what we might reasonably presume to be the testator's intentions in particular situations. In particular, we look at cases where:

(1) the testator has entered into a contract to sell property but dies before the completion of the contract;

(2) the testator has made a gift of shares but the company in question has changed the nature of the shareholding; and

(3) the testator dies at the same time as the property is destroyed.

1.47 We also make a proposal that the anomaly between the effect of a sale by a testator's deputy, compared with a sale by the testator's attorney, should be removed.

1.48 Finally, we ask consultees whether more general exceptions to ademption should be created where the ademption is the result of circumstances beyond the testator's

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15 See Chapter 10 of the Consultation Paper.

control, or where the testator has sold property but retains an interest in it at the time of his or her death.

PROTECTING TESTATORS

1.49 As we mention above, testators may be vulnerable; for example, a testator may be reliant on care provided by others. Both vulnerable testators, and testators more generally, should be protected from fraud or undue influence, the effect of which is to deny them the exercise of their testamentary freedom by substituting others' wishes for their own.

Undue influence

1.50 Various stakeholders have expressed concern that vulnerable testators may not be adequately protected from undue influence by the current law. It is important that testators are protected from financial abuse, particularly those who may be vulnerable as a result of age, illness or social isolation. In response to that concern we provisionally propose the creation of a statutory doctrine of testamentary undue influence.[16]

1.51 Currently, the circumstances in which a gift in a will can be set aside for undue influence are narrowly construed because the person claiming that undue influence has taken place must prove that was the case. In contrast, when a gift is made in a person's lifetime, undue influence is presumed when certain factors are present. We think the doctrine of undue influence that currently applies to wills is too narrow, but that the circumstances in which a presumption is drawn in respect of lifetime gifts could operate too broadly in relation to wills. Instead, we suggest that while it should be possible to draw a presumption of undue influence in relation to wills, the circumstances in which the presumption is drawn must be tailored to the wills context. We suggest two approaches that a statutory doctrine of testamentary undue influence could take: a structured approach, or a discretionary approach.

1.52 The structured approach is modelled on the doctrine that applies to lifetime gifts. Under this approach a presumption of undue influence would be raised 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.

1.53 We suggest that the existence of a relationship of influence would be presumed in respect of testamentary gifts made by the testator to:

(a) a trustee;

(b) a medical adviser;

(c) a person who prepared the will for remuneration; and

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16 See Chapter 7 of the Consultation Paper.

(d) a professional carer.

1.54 We ask whether a relationship between a testator and his or her spiritual advisor should also be presumed to be a relationship of influence. That would enable a presumption of undue influence, on appropriate facts, to be drawn both in respect of a gift to the spiritual advisor personally, or a gift made to anyone else (including a religion represented by the spiritual advisor).

1.55 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.

1.56 Under the alternative, discretionary approach, the court would have the power to presume undue influence if it were satisfied that it is just to do so in all the circumstances of the case. The court would take 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 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 pressure on the precise scope of those concepts and ensure greater flexibility in drawing the presumption.

1.57 On either approach (structured or discretionary), if a presumption of undue influence is raised, it would then be for the proponent of the will to rebut that presumption.

1.58 In short, our proposal aims to protect vulnerable testators by broadening the scope of undue influence in the law of wills in a principled way that is tailored to the will-making context.

Knowledge and approval

1.59 The testator's state of mind is central in the law of wills. As well as having capacity to understand the relevant aspects of will-making, and acting free from undue influence when executing their will, the law requires that testators must know and approve the contents of their will.[17]

1.60 This requirement has caused some conceptual difficulty, which impacts on its practical operation. The notion of approving one's will can overlap with the notion of acting free from undue influence. This appears to be one reason why the doctrine of undue influence has been marginalised in the law of wills.

1.61 Since we are provisionally proposing that the scope of undue influence is broadened, we think that the scope of knowledge and approval should be narrowed to remove the overlap with undue influence and to make it clear that the two questions – whether the testator knew and approved the contents of his or her will, and whether the will was freely executed - are independent of each other. We provisionally propose that, in order for a testator to know and approve of his or her will, it is only necessary for a testator to

[17] See Chapter 7 of the Consultation Paper.

know both that he or she is making a will and the terms of that will, and to intend those terms to be incorporated and given effect in the will.

1.62 Consequently, we believe that our provisional proposals concerning undue influence and knowledge and approval work in tandem to clarify the law and increase protection for vulnerable testators.

Signing on a testator's behalf

1.63 Under the current law, it is possible for a testator to direct somebody to sign a will on his or her behalf. The ability to do so is particularly useful for testators who are not physically able to sign their will. There is currently no restriction on who can sign a will on behalf of a testator.[18]

1.64 We think that the lack of restriction might put testators at risk of fraud, as a beneficiary under the will can sign the will on behalf of the testator. This is in contrast to the position of witnesses: where a beneficiary witnesses a will, the will remains valid but that beneficiary (and his or her spouse or civil partner) forfeits any gift made to him or her in that will.

1.65 Such considerations have led us to the view that the law should place limits on who can sign on behalf of a testator. In particular, we provisionally propose that a person who signs a will on behalf of the testator should not be able to benefit under the will.

Witnesses to a will

1.66 Those who witness a will are not allowed to take any gift under the will. This rule 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 (or his or her spouse or civil partner) would receive a benefit.[19]

1.67 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. We provisionally take the view that the rule should be extended to encompass cohabitants as we see some force in the argument that there is little reason to treat witnesses' cohabitants differently from witnesses' spouses or civil partners.

1.68 For that reason, we provisionally propose that a gift in a will to the cohabitant of a witness should be void. We ask consultees for their views on whether gifts in a will to the parent or sibling of a witness, or to other family members of the witness, should also be void.

CLARITY AND CERTAINTY

1.69 A number of our recommendations are aimed at improving the clarity and certainty of this area of the law.

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18 See Chapter 5 of the Consultation Paper.

19 See Chapter 5 of the Consultation Paper.

Capacity

1.70 The legal test of testamentary capacity currently used is from the nineteenth century decision in the case of *Banks v Goodfellow*.[20] We provisionally propose that testamentary capacity should instead be governed by the capacity test in the Mental Capacity Act 2005 (the "MCA").[21]

1.71 Doing so will bring the language of the capacity test into the 21st century. The test in *Banks v Goodfellow* pre-dates our modern understanding of mental health and its operation is not entirely clear. Conversely, the test in the MCA, which applies in other contexts, is also familiar to lawyers, and to medical practitioners and others whom lawyers (and, where a will is challenged, the courts) will ask to assess or provide evidence of a person's testamentary capacity. While both tests focus on a potential testator's understanding, the MCA legislation is underpinned by certain principles that we consider to be beneficial in the context of testamentary capacity. In relation to assessing capacity, the most important principles are that:

(1) a person must be assumed to have capacity unless it is established that he or she lacks capacity;

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

(3) a person is not to be treated as unable to make a decision merely because he or she makes an unwise decision.[22]

1.72 The "presumption of capacity" is particularly important. In our view, the presumption draws attention to the fact that capacity must be assessed on a case-by-case basis. Since it would be presumed that every testator has capacity at the time the will is executed, the presumption would make clear that whether a person has capacity is not dictated by his or her medical status, diagnosis or condition. No disability or impairment is, by itself, proof that the testator lacks capacity.

1.73 We also provisionally propose that 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. A code would help testators and practitioners to recognise who should be assessing capacity in any given case and would assist the assessors of capacity to carry out their task effectively.

Revocation

1.74 There are a number of ways in which testators may revoke a will: by making another will, by written intention to do so, or by destruction of the original will. We consider that there is no strong reason to change the law regarding these methods of revocation.

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20 (1869-70) LR 5 QB 549.

21 See Chapter 2 of the Consultation Paper.

22 See Mental Capacity and Deprivation of Liberty (2017) Law Com No 372, ch 3.

However, we believe that reform might be necessary to the rule that marriage revokes a will.[23]

1.75 We are concerned that the rule might not be widely known and could act as a trap for the unwary. The effects of the rule could be particularly harsh on cohabitants who are unaware of the rule and who 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, such testators will not be aware that their wills have been revoked.

1.76 However, the rule revoking a will on marriage currently protects the position of second families, for example where a person has remarried and has children from both marriages. Marriage revokes any earlier will and, if a new will has not been made, then the testator's property will pass to his or her current spouse under the intestacy rules. If marriage did not revoke the will, then the testator's earlier will remains valid. The testator is unlikely to want his or her first family to inherit on his or her death to the exclusion of the current spouse and the children of the testator's second family.[24] While those affected might be able to make a claim for financial provision under the 1975 Act, such a claim might not always produce the result that the testator would have wished.

1.77 In our view, the arguments for and against the abolition of the rule are balanced. Furthermore, we recognise that this is a sensitive policy area. For those reasons, 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. We also ask whether consultees think that the rule that marriage automatically revokes a previous will should be abolished.

Privileged wills

1.78 Special 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. Privileged wills are exempt from the formality requirements contained in the 1837 Act; they need not be signed, witnessed, or even written. A privileged will, for example, may be oral.[25]

1.79 The rationale for the privilege is that people in the armed forces or at sea face a specific risk of death and may not be able to make a will in the prescribed form. Provision for privileged wills is also 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".[26]

1.80 The privilege has been criticised for being both over- and under-inclusive. On one hand, the inclusion of merchant seamen might be questioned given that they are the only non-service profession covered by the privilege; there may also be members of the armed

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23 See Chapter 11 of the Consultation Paper.

24 The former spouse would not benefit as he or she would be treated by the law, for the purposes of inheriting under the will, as if he or she had died at the time of the divorce.

25 See Chapter 5 of the Consultation Paper.

26 Ministry of Defence, *Policy Paper: 2010 to 2015 Government Policy: Armed Forces Covenant* (8 May 2015), available at https://www.gov.uk/government/publications/2010-to-2015-government-policy-armed-forces-covenant/2010-to-2015-government-policy-armed-forces-covenant (last visited 13 June 2017).

forces serving far from the battlefield who face no specific risk of death who benefit from the privilege. On the other hand, there are many civilians working closely with the armed forces in dangerous areas, and subject to service discipline, to whom the privilege is not extended.

1.81 We provisionally propose that this area of law be rationalised by confining the scope of the privilege to those serving in the British armed forces and civilians who are subject to service discipline. We do not propose any further requirements. While it might be desirable to limit the application of the privilege to those in imminent danger, we take the view that the concept would be too difficult to define in practice. Furthermore, we consider that the Armed Forces Covenant motivates strongly against an approach that might inappropriately exclude members of the armed forces from being able to make privileged wills.

Interpretation of wills

1.82 Many technical questions arise concerning the interpretation of wills – the act of determining what a will means. There are interpretative provisions in the 1837 Act that no longer appear to serve any practical purpose. We provisionally propose the repeal of those sections. Several other interpretative provisions in the 1837 Act are worded in archaic language and are difficult to understand. We provisionally propose that those sections are replaced by provisions drafted in clear, modern language. We ask consultees whether any new interpretative provisions are required in the law of wills and whether there should be any change to the scope of the law of rectification – the power of the court to correct a legal document – as it is applied in the context of wills.[27]

Doctrines affecting testamentary gifts

1.83 We have also considered mutual wills and donationes mortis causa, two doctrines that impact specifically upon testamentary gifts.

1.84 Mutual wills are a way for two (or more) people to make wills in a way that, in effect, prevents the survivor changing his or her will after the death of the first person. Mutual wills should be distinguished from mirror wills which are wills made in virtually identical terms, usually by spouses, but which do not prevent the survivor changing his or her will. Mirror wills are commonly executed. Mutual wills, in contrast, are far less common and have been criticised by both academics and practitioners because they can cause difficulties for the survivor. Once the other party to a mutual will dies, the will becomes binding and the survivor cannot make any changes to his or her testamentary wishes. That might be undesirable where a testator wishes to alter his or her will in order to reflect a change in circumstances (such as remarriage). Nevertheless, we do not propose the abolition of mutual wills. The person who makes a mutual will has some certainty as to what will happen to his or her assets after the death of the first person to inherit and there are situations in which that certainty may be important to the testator.[28]

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27 See Chapter 9 of the Consultation Paper.

28 See Chapter 12 of the Consultation Paper.

1.85 We note, however, that mutual wills are anomalous in that they shield property from a claim under the 1975 Act. We provisionally propose that property that is subject to a mutual wills arrangement should be available for the purposes of such a claim.

1.86 Donationes mortis causa ("DMC") are deathbed gifts, made by a donor in contemplation of, and conditional on, his or her death. They are only valid if the donor delivers the subject matter of the gift to the beneficiary. This type of gift is "anomalous" as it is an exception to the formalities of the Wills Act 1837 and to other legislation that applies to some gifts (such as gifts of land) made during a person's lifetime. It is doubtful that anybody ever intends to make a gift by way of DMC. While some commentators have suggested that the doctrine be abolished, the doctrine does have the virtue of giving effect to a dying person's wishes. Furthermore, we are not aware of any evidence of widespread problems caused by DMC in practice. In short, any assessment of the doctrine must weigh up its beneficial effects against the need for clarity and certainty in the law. We ask whether consultees believe that the doctrine should be abolished.[29]

IMPACT

1.87 We will be preparing, to accompany our final Report, an assessment of the impact of our final recommendations for reform, both economic and non-economic. We would be grateful if those who respond to our consultation could consider whether they have any information regarding:

(1) the respective proportions of wills drafted by practitioners that involve contact with the client face-to-face, by telephone, by post or online;

(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;

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

(4) the reasons why people do, or do not, make a will; and

(5) the impact on those left behind by the testator when there is a dispute about the testator's will; for example, the cost of litigation, and the impact of a will being declared to be invalid and the estate passing according to the intestacy rules.

[29] See Chapter 13 of the Consultation Paper.

RESPONDING TO OUR CONSULTATION PAPER

We publish our Consultation Paper on 13 July 2017 – copies are available to download free of charge from our website.[30] We seek responses to the Consultation Paper by 10 November 2017:

(1) by email to: propertyandtrust@lawcommission.gsi.gov.uk, or

(2) by post to: Damien Bruneau, Law Commission, 1st Floor, Tower, Post Point 1.53, 52 Queen Anne's Gate, London, SW1H 9AG

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.

[30] http://www.lawcom.gov.uk/project/wills/.