Law Commission
Reforming the law

Modernising Wills Law

Summary of the Report

THE LAW COMMISSION'S PROJECT ON WILLS LAW

	**Who are we?**	The Law Commission of England and Wales is an independent body established by statute to make recommendations to Government to reform the law in England and Wales.
	**What are we doing?**	We are making recommendations in our Report for the reform of the law of wills, following our public consultation in 2017 and our supplementary public consultation in 2023. We are also publishing a draft Bill that is intended to replace the old legislation – the Wills Act 1837 – with a modern Wills Act.
	**What is this project about?**	Our project is about the law which applies to wills, including the law governing how wills can be made. A will is a document that deals with the property that a person leaves behind on their death, directing who will inherit from them. The law of wills is old and complex: it is governed by the Wills Act of 1837, and by case law from across the last few centuries. Our work is the first comprehensive review of the legislation in almost 200 years.
	**Where can I find the Report?**	The full Report and our draft Bill, along with other documents, can be found at https://lawcom.gov.uk/project/wills/.
	**What happens next?**	Government will consider our recommendations and draft Bill and decide whether to change the law.

THIS SUMMARY

This Summary explains what the project is about and highlights our key recommendations for law reform. It does not summarise all of our recommended reforms to the law.

Detailed discussion and all of our reform proposals can be found in the full Report, accompanied by a draft Bill, which implements our recommendations for reform.

Where we mention our Report in this Summary, we are referring to our full Report.

The law governing wills is largely a product of the Victorian era. It is governed by both legislation – primarily, the Wills Act 1837 – and case law, some of which has been developing for hundreds of years. Although in some respects the law of wills has been able to respond to modern circumstances and understandings, it has not been comprehensively reviewed for nearly 200 years. This project has sought to ensure that the law governing this important topic remains fit for purpose today, by making recommendations for a modern law of wills.

GLOSSARY

While we have attempted to draft this summary as simply as possible, there are a few more specialist terms that we use, which we set out below.

"**Beneficiary**": a person gifted money or property by the terms of a will.

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

"**Execution**": the final step in making a will, which must be done in compliance with the formality requirements set out in the law for the will to be formally valid.

"**Intestacy**": the rules that govern where a person dies without having made a valid will.

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

"**Revoke**": the formal act of withdrawing a valid will.

"**Statutory will**": a will made by the court on behalf of a person who lacks the capacity to make their own will.

"**Testator**": a person who has made a will.

Timeline of the project

The wills project began in 2016. In July 2017, we published the Consultation Paper, Making a Will. The public consultation period followed and closed in November 2017. We then began analysing consultees' responses and formulating our final policy.

In 2019, we paused the project to undertake a project on the law governing weddings, having agreed to Government's request to prioritise that work. We published our final report on weddings law, Celebrating Marriage, in July 2022.

We re-commenced the wills project shortly afterwards. Since then, we published a Supplementary Consultation Paper in October 2023 to re-consult on two discrete issues: electronic wills and the rule that a marriage or civil partnership revokes an existing will. We took this step because developments since the time of the Consultation Paper caused us to re-examine these issues, and because we suspected that consultees' views on these issues might have shifted.

We published our Report, our draft Bill and this Summary on 16 May 2025. The Report and this Summary, together with other project documents and publications, are available on our website.

We are grateful to everyone who engaged with us during our project and have taken full account of all the views put to us. We have explained our reasoning for all the decisions that we have taken in detail in our full Report.

THE LAW OF WILLS AND WHY REFORM IS NEEDED

When someone dies, their property goes to those they leave behind. The law governing succession determines who receives the property a person owns at their death, referred to as an "estate".

How property passes on death depends on whether the person died with a valid will in place. A will is the primary way that a person can determine what happens to their property when they die. The ability to make a will, and in whatever terms the person wishes, is a fundamental legal principle of the law of England and Wales. The principle of testamentary freedom is a valuable aspect of owning property, giving owners the right to give their property to others on their death. Testamentary freedom also reflects the idea that each person is best able to assess their own responsibilities to, and the needs of, their families and friends, in order to determine how their estate can be most fairly divided.

A person who has a valid will when they die is called a "testator", having died "testate". If the person did not have a valid will in place, they have died "intestate", and the rules governing intestacy apply to determine who receives their property. A person may also have a valid will that deals with only part of their estate; accordingly, they die partially intestate, with the intestacy rules governing the part of their estate not disposed of by their will.

This project is concerned with the law governing wills, rather than with the rules that apply on intestacy.

Wills law is important. It can potentially affect everyone: many people will make a will themselves, often later in life; and many people may benefit under someone else's will, such as one of their parents' wills. Wills are also an important source of charitable funds, with many charities receiving a significant portion of their funding from legacies left to them in wills.

While the law governing wills is old, its age alone would not be a good reason to reform the law. Old law may have stood the test of time. Indeed, in our work, we have discovered that many of the rules governing wills achieve policies or safeguards that reflect human nature and commonly held beliefs that remain as true or necessary today as they were in previous centuries.

However, some things have changed. Most people will live longer than their ancestors did, and, as a consequence, more people will suffer from ill health and a decline in their mental capacity that are commonly associated with old age. The property that the average person owns may be more valuable than it was in the past. Not so long ago, documents would have been in paper form only; but documents in electronic form are now far more prevalent than paper documents. We therefore think that reform is necessary.

What is a will?

A will has three key characteristics.

- It expresses the testator's intentions about what should happen to their property when they die.
- It operates at the testator's death and not before. As a result, the property that the will disposes of will only be ascertained when the testator dies, and it will only be known for sure who will benefit under the will at that time, as, for example, a beneficiary named in the will might have died before the testator dies.
- It can be revoked. Having made a will, the testator remains free to revoke it and make a new will, or to revoke it and not make another will.

However, a will can do more than dispose of property.

A person can, in their will, appoint a personal representative (an executor) to carry out what the will says should happen after the testator has died. In their will, a testator can also appoint a guardian for any minor children they have or express their wishes about what should happen with their body after they die.

THE AIMS OF THE PROJECT

In this project, we have aimed to make recommendations to reform the law so that it better –

1. supports the exercise of testamentary freedom;
2. protects testators, including from undue influence and fraud; and
3. increases clarity and certainty in the law where possible.

In this Summary, we highlight key recommendations that support these objectives. For each recommendation, we discuss the current law and its problems, and how we recommend that the law should change. For each area, we also signpost to the relevant chapter of the Report.

As part of our project, we have also produced a draft Bill for an entirely new Wills Act. If enacted, our draft Bill would remove the Wills Act 1837 from the statute book and replace it. As well as enacting our recommendations, the draft Bill for a new Wills Act will be a modern and accessible piece of legislation to govern wills law.

SUPPORTING TESTAMENTARY FREEDOM

Supporting testamentary freedom is a theme throughout the Report, with many of our recommendations aiming to ensure the law supports this objective. But there are a few key recommendations which are particularly focused on supporting and promoting the recognition of a testator's wishes about what should happen to their property after they die: creating a court power to dispense with the formality requirements to make a valid will; lowering the age at which a person can make a will; and expanding the scope of when a court can rectify a will.

Dispensing power

Currently, a will that does not comply with the formality requirements in the Wills Act 1837 is not a valid will, even if it is very clear what a person wanted to happen with their property after they died. If that person had not made a previous will which remained valid, they would die intestate, and the intestacy rules would determine who inherits their property. The strictness of the outcome of failing to comply with the formality requirements in England and Wales does not match other places around the world, where, depending on the circumstances, it is possible for a person's formally invalid will nevertheless to be given effect to.

We take the view that, where a person's testamentary intentions are clear, then there should be a mechanism making it possible to give effect to those intentions. Such a mechanism would support the aim of testamentary freedom, by making sure that the law gives effect, as much as it can, to the wishes of those who have died. It would mean that deficiencies in complying with formalities would not – in appropriate cases – prevent a testator's wishes from taking effect. And it might be of particular assistance where a will is homemade, and therefore more likely not to comply with the rules on formalities than one drawn up by a professional lawyer or will writer.

We recommend that it should be possible for a court to dispense with the formality requirements in relation to an invalid will – "a dispensing power".

The court will have the power to make an order providing that a document is – or multiple documents are – treated as a formally valid will, which would then govern what happens to the deceased person's property. The court will be able to look at any record made by the testator which expresses their testamentary intentions, including electronic documents, as well as video and sound recordings. In order to exercise the power, the court will have to be satisfied that what the records show are the clear and genuine testamentary intentions of the deceased person. The court will also have to be satisfied that these testamentary intentions remained unchanged at the time of the person's death: that they truly were the person's settled wishes with respect to their estate.

We acknowledge concerns that the introduction of a dispensing power could introduce some uncertainty into this area of the law, particularly as the scope and application of the power is developed by the courts in the case law. However, we take the view that any added uncertainty is justified in light of the benefits of the dispensing power and the ability to give effect to testators' intentions in appropriate cases. We also understand that similar dispensing powers have not led to a disproportionate increase in litigation and are operating successfully in other places across the world, including in Canada, Australia and New Zealand.

☞ See Chapter 6 of the Report

Children making wills

Currently, only those aged 18 and over can make a valid will. If a person attempts to make a will before they turn 18, it will be invalid.

Other places allow people to make wills at lower ages. For example, in Scotland, a person can make a will from 12 years of age, and in British Columbia in Canada from 16. Some places have also moved away from an absolute rule, by allowing the court to authorise a child to make a will in individual cases.

However, in England and Wales, when a child dies, any property that they own is distributed in accordance with the intestacy rules, which will nearly always result in the child's estate going to both of their parents. Applying these rules may cause injustice in exceptional cases, such as where it is against the child's wishes for one of their parents to inherit or to be able to decide what should happen to their body after they die. These situations can arise, for example, in cases where a child is terminally ill (or is expected to die before they are 18) but one of their parents has not played a role in their life.

We conclude that the age at which a person can make a valid will should align with the law on mental capacity. The Mental Capacity Act 2005 governs questions of mental capacity for those aged 16 or over, and assumes that people of this age have capacity, unless it is established that they do not.

We therefore recommend that the age at which a person can make a valid will should be lowered from 18 to 16.

We also conclude that, in the exceptional circumstances where it will be appropriate, the court should have the power to authorise a child under 16 years old to make a will. This power will only be available on application to the Family Court, which will assess whether the under 16-year-old is competent to make the will that they wish to make. This assessment will incorporate questions of whether it is in the child's best interests to make the will in question. We think this power will give testamentary freedom to a child under 16, where the child has substantial assets and might not live to be 16.

We recommend that it should be possible for the court to authorise a child under 16 to make a will.

See Chapter 10 of the Report

Rectification

Rectification describes the power of the court to correct a legal document, including a will, so that it reflects what the testator intended it to say. The law on rectification of wills is currently set out in section 20 of the Administration of Justice Act 1982. This allows the court to correct a will where it fails to carry out the testator's intentions due to:

- a clerical error; or
- the failure of the person who drafted the will to understand the testator's instructions.

The court cannot rectify a will where the testator or drafter intentionally chose language which did not have the meaning or effect they intended, that is, they intentionally but mistakenly used the wrong words. These are often called drafting errors. In general terms, the result is that the court can rectify a will where the wrong words were inadvertently used, which is a clerical error, but not where the wrong words were deliberately used, which is a drafting error. This could result in unfair outcomes, because the remedy depends on the mindset of the person drafting the will, rather than the intentions of the testator.

Our recommendation for the creation of a dispensing power cannot fill this gap. The dispensing power will assist where there has been a failure to comply with the required formalities; whereas rectifying a will assumes that the will being corrected has been properly executed.

We recommend that the court should be able to rectify a will where it is satisfied that the will does not give effect to the testator's intentions because the drafter failed to understand the meaning or direct effect of the language used in the will.

See Chapter 11 of the Report

PROTECTING TESTATORS

Throughout our project, we have considered whether the law sufficiently protects testators, particularly vulnerable testators. Testators might be vulnerable for many reasons. Common reasons might be extreme old age; recent bereavement; illness; or dependency on others for their care. We make some key recommendations to ensure the law safeguards testators from abuse: enabling the court to make an inference that a testator made their will subject to undue influence where there are reasonable grounds to suspect that is the case; providing that gifts to the cohabitants of witnesses and those who sign on the testator's behalf are invalid; and abolishing the rule that when a person marries or enters a civil partnership their existing will is automatically revoked.

The law of testamentary undue influence

One way of protecting testators, and particularly vulnerable testators, is through the law of undue influence. Where a testator has made a will (or a gift in a will) as a result of coercion, meaning pressure which overpowered their mind without convincing them it was what they wanted to do, the will (or gift) is invalid. Currently, if someone wants to challenge a will on the basis that the testator has been unduly influenced, they have the burden of proving it. But undue influence is difficult to prove, particularly if there is only circumstantial evidence, as is often the case. The court is likely to find that the testator was persuaded legitimately, rather than coerced.

We think that it is too difficult to challenge a will on the basis of undue influence, because of the difficulties of proving it. The fact that undue influence often happens behind closed doors and by someone close to the testator may in some cases present an insurmountable hurdle to establishing that the testator was coerced, particularly after the testator has died. We believe that the law is not, therefore, adequately protecting vulnerable testators from financial abuse.

In order to provide better protection to testators (and particularly to vulnerable testators), we recommend that it should be possible for the courts to infer that a will was brought about by undue influence, where there is evidence which provides reasonable grounds to suspect it.

When undue influence is alleged, if there is evidence to provide reasonable grounds to suspect undue influence, the court will be able to infer that undue influence took place. In determining whether there are reasonable grounds, the court must consider, among other factors, any relationship of influence between the person alleged to have exerted undue influence and the testator; that person's conduct in relation to the making of the will; and the circumstances in which the will was made.

If the court does infer that undue influence occurred, the evidential burden will shift to the person seeking to prove the will to satisfy the court, on the balance of probabilities, that undue influence did not take place, and that the will did in fact reflect the testator's own freely formed intentions. Our recommendation will mean that, in appropriate cases, the person who is most able to speak to the circumstances in which the testator made their will – that is, the person who is alleged to have unduly influenced the testator – will be required to provide an explanation that satisfies the court in order for the will to be valid. This recommendation will therefore help to ensure that this type of financial abuse does not go unaddressed.

We make this recommendation about undue influence in the context of a further recommendation that places into statute the requirement for "knowledge and approval". This is the requirement that the testator intended to make the will in the terms that they did, so that they understood the contents of the will and its effects.

We were concerned that there had been a tendency for wills to be challenged on the basis of a lack of knowledge and approval in circumstances where the real concern appears to be about undue influence, that is, that the testator understood the content and effect of their will but it did not reflect their own intentions. Putting the requirement for knowledge and approval on a statutory footing will clearly differentiate it from the law of undue influence.

☞ See Chapter 9 of the Report

Gifts to the cohabitants of witnesses, and to those who sign on the testator's behalf (and their spouse, civil partner or cohabitant)

Another way of protecting testators, particularly those who are vulnerable, involves strengthening protections that are already present in the Wills Act 1837. Currently, where there is a gift in a will to a person who witnessed the will, or to the witness's spouse or civil partner, the law provides that the gift will not take effect, although the will itself remains valid.

The law also provides that someone may sign a will on behalf of the testator, in the testator's presence, where that person has been authorised to do so by the testator. However, the law is inconsistent in that it does not invalidate a gift in a will to someone who signed on the testator's behalf. We think that this is anomalous, given that a similar conflict of interest and potential for abuse exists in the case of a person signing on a testator's behalf as in the case of a witness to a will.

We also think that it is anomalous that the current rule on witnesses only applies to gifts to them or their spouse or civil partner, but not to a person who is cohabiting with them. Given the prevalence of cohabitation in modern British society, and the fact that the risk of abuse appears to be the same whether a gift is made to a spouse or civil partner, or to a cohabitant, we think that the rule should be extended to cover a witness's cohabitant. The rules governing the proof of wills requires there to be independent witnesses who can be relied upon to provide evidence about whether the will was validly made, so witnesses should not have interests under the will.

We acknowledge that the state of being a person's cohabitant is less clear-cut than being a spouse or civil partner. However, other areas of the law have already identified when people are cohabiting. We recommend using the definition contained in section 62 of the Family Law Act 1996:

> "two persons who are neither married to each other nor civil partners of each other but are living together as if they were a married couple or civil partners".

We therefore recommend that the rule invalidating a gift in a will to a witness, or to their spouse or civil partner, should be extended so that gifts in a will are also invalidated where they are made to –

- **the cohabitant of a witness;**
- **a person who signed the will on behalf of the testator; and**
- **the spouse, civil partner or cohabitant of a person who signed the will on behalf of the testator.**

We also make a recommendation to provide relief from these rules invalidating gifts.

We recommend that the court should have the power to save a gift to a witness or a person who signs on the testator's behalf (or to their spouse, civil partner or cohabitant), if the court considers it just and reasonable to do so, having regard to the conduct of that person relating to executing the will or proving the will's validity.

☞ See Chapter 7 of the Report

The rule that marriage revokes a will

Once a person makes a will, they can choose to revoke it. However, under the current law a person's will is *automatically* revoked if they get married or form a civil partnership.

When a will is revoked by a marriage or civil partnership, the person must make a new will or the intestacy rules will apply on their death. Under the intestacy rules, the person's surviving spouse or civil partner will receive the majority of their estate, if not their entire estate. The surviving spouse or civil partner will also have the authority to make funeral arrangements and to decide whether the person's body should be buried or cremated, and where the remains should be interred.

Evidence from consultees tells us that most people do not know about this automatic revocation rule. The result is that testators' wills are being revoked without their knowledge, and without testators necessarily wanting their will to be revoked. This can cause unintentional intestacies. By setting aside people's testamentary wishes without their awareness, the rule therefore operates in a way that is contrary to testamentary freedom.

Moreover, we are concerned that the rule that marriage revokes a will is possibly being exploited for the purpose of enabling "predatory marriage". A predatory marriage is one where a person marries someone, often someone who is elderly or who lacks the mental capacity to marry, as a form of financial abuse. The marriage – even where the person lacks the capacity to marry – revokes any existing will they have, which might leave, for example, the testator's property to children from a previous marriage. As a result, the predatory spouse will inherit all or most of the testator's property under the intestacy rules.

And the testator may not realise the effect of their marriage or civil partnership on their will. Or the testator might not be able to make a new will: the level of mental capacity required to make a will is higher than the level required to get married or form a civil partnership. This means that it is possible for a person to be in the position where, by getting married or entering a civil partnership, they revoke their existing will, but they lack the capacity to make a new will. In this case, the only option to prevent the intestacy rules from applying would be for a statutory will to be made for the testator by the Court of Protection.

We therefore believe that abolishing this rule will add a layer of protection for vulnerable people at risk of this insidious form of financial abuse.

We also think that the rule operates in a way that is unlikely to reflect what many people would want or expect. The social context in which the rule operates is very different today to the early Victorian period from which the rule dates. For many couples, marriage may not represent a significant change in their relationship, for example, where marriage is preceded by a substantial period of cohabitation. Second and later-in-life marriages are also common, and in these cases the marriage may not change a person's plans for their adult children or grandchildren to be the primary beneficiaries of their estate. We also do not think that spouses and civil partners need the protection of the revocation rule in the light of their existing right to make a claim for reasonable financial provision from the estate, under the Inheritance (Provision for Family and Dependants) Act 1975. Spouses and civil partners have the most protection as compared to the other categories of family members and dependants who can make a claim on the property of a deceased person, because they do not have to show that the provision would be necessary for their maintenance, in contrast with other claimants.

We therefore recommend that the rule that marriage or civil partnership revokes a will should be abolished.

See Chapter 13 of the Report

CERTAINTY AND CLARITY

Throughout our project, we have made recommendations that will bring greater certainty and clarity to the law governing wills where it is possible to do so, making it easier to understand and apply the law, and to reduce disputes that stem from current ambiguities. Key recommendations that will further this aim include adopting the test in the Mental Capacity Act 2005 as the test for testamentary capacity, providing that capacity to make a will is to be presumed, and issuing a code of practice on assessing capacity; and making specific provision to enable electronic wills to be formally valid.

Testamentary capacity

The test for whether a person has the mental capacity necessary to make a will is currently found in a case from 1870, *Banks v Goodfellow*. It provides that, in order to have capacity –

- the testator must have the capacity to understand that they are making a will, and the effect of that will;
- the testator must have the capacity to understand the extent of their estate;
- the testator must have the capacity to understand who has a claim on their estate (for example, their children); and
- the testator's understanding must not be impaired by, or their affections or disposition influenced by, any disorder of the mind or delusion.

This test applies when determining whether a will that a person has made for themselves is valid.

However, there is another mental capacity test that also applies in some cases. The Mental Capacity Act 2005 provides the current test for whether a person has the mental capacity to make a decision in many areas of their life, covering a broad range of financial and welfare decisions that may need to be taken on behalf of a person who lacks capacity. The MCA test also applies when the Court of Protection is determining whether a person lacks capacity to make a will for themselves; if they lack capacity, the Court of Protection can order a statutory will be made for them.

The MCA creates a presumption that a person has capacity unless it is shown that they do not. It sets out a two-stage test. First, the MCA sets out the circumstances in which a person is taken to be unable to make a decision for themselves, because they are unable to understand the information relevant to the decision; retain that information; use or weigh that information as part of the process of making the decision; or communicate that decision. Second, the person's inability to make a decision, as defined, must be caused by an impairment of the mind or brain, or a disturbance in their functioning. Where both parts of the test are satisfied, the person lacks capacity in relation to the specific decision. This lack of capacity can be temporary or permanent.

We conclude that it is unprincipled and confusing to have two tests that govern mental capacity in the context of wills.

There has been some confusion in the past, now largely resolved, as to whether the MCA test supplanted the *Banks v Goodfellow* test, in deciding whether a person has the capacity to make a will for themselves. All recent court decisions have applied the *Banks v Goodfellow* test in deciding retrospectively (after the testator's death) whether the testator had capacity at the time that they made their will. However, where the Court of Protection is deciding whether a living person lacks the capacity to make a will, for the purpose of deciding whether the court has the ability to make a statutory will on their behalf, it is clear that the MCA test applies.

The reason for the existing different approaches is purely historical; there is no logical justification for two different tests. The question whether someone has capacity to make a will is a fundamental part of wills law, and one which must carefully balance the principles of testamentary freedom with the need for protection of testators. The law therefore needs to be clear, and the test that is applied to answer the question should not depend on who is answering the question, or when the question is asked.

There are wider benefits of including will-making within the scheme of the MCA as a whole. The MCA test provides a clear test of capacity. Adopting the MCA test will ensure that developments in the law on capacity generally will apply equally to the law governing testamentary capacity. It will also make the law clearer for those who assess capacity as part of their roles – such as medical practitioners – in relation to a wide range of types of decisions.

We therefore recommend that the test set out in the Mental Capacity Act 2005 should apply to all assessments of testamentary capacity.

Our recommendation will mean that the test will be the same whether a person's capacity is assessed during their life, in the context of the making of a statutory will, or after their death, when judging whether they had the necessary capacity at the time they made their will.

Adopting the MCA test may result in changes to the law as to whether a person has capacity to make a will. We think the *Banks v Goodfellow* and the MCA tests might produce different results in relation to testators who are at the margins of having capacity. In some respects, the MCA test might require more of testators, resulting in testators who would have capacity to make a will under *Banks v Goodfellow* not having capacity under the MCA, for example, if they cannot understand the collateral consequences of their will. In other respects, the MCA test could require less of testators, resulting in testators who would not have capacity under *Banks v Goodfellow* being able to make a will under the MCA test, for example, if their mental disability or illness changes their feelings and values. Adopting the MCA test does not appear to mean that the standard for capacity will be higher or lower – just slightly different.

Nevertheless, the rich case law on testamentary capacity of the last 200 years will remain relevant to the operation of the MCA test when it is being used to assess someone's capacity to make a will. In particular, it will continue to inform the information relevant to the specific decision of making a will.

To ensure this is the case, we recommend that the MCA Code of Practice, which provides guidance to those assessing capacity under the MCA, should refer to and explain the elements of the *Banks v Goodfellow* test.

The Mental Capacity Act 2005 test presumes that a person has capacity unless it is shown that they do not.

We recommend that this presumption of capacity should apply in the context of making a will.

Because we recommend that the MCA test should be adopted to govern testamentary capacity, the presumption in the MCA will also apply to testators. However, we do not think the application of this presumption will change the analysis by courts in most contentious cases. This is because, while there is currently no presumption in the Wills Act 1837 that a person has capacity, case law has established a situation similar to a statutory presumption. Where a will is valid in terms of the formalities having been complied with, and where it appears rational, the burden then falls on a person trying to challenge a will to provide enough evidence to cast doubt on the testator's capacity. Moreover, in retrospective assessments under both the *Banks v Goodfellow* test and the MCA test, the courts make a finding about capacity on the totality of the evidence where possible.

Capacity is a matter of degree. Assessing a person's capacity is often a difficult task, particularly where the assessment takes place after the person has died. It is therefore important that solicitors and will writers have clear guidance on assessing capacity, and keep good evidence of their assessments, in order for the law of capacity to operate well in practice.

A rule of best practice derived from case law, called the "Golden Rule", currently outlines in which circumstances, and by whom, a testator's capacity should be assessed.

The Golden Rule plays a crucial role in directing solicitors' and will writers' attention to the issue of capacity and identifying the circumstances in which particular care is needed. However, the guidance it offers is limited. We have concluded that the Golden Rule should be replaced by detailed guidance to solicitors and will writers.

We therefore recommend that there should be a code of practice on testamentary capacity issued under the Mental Capacity Act 2005 on assessing capacity, and that anyone preparing a will or assessing capacity in their role as a professional or for payment should be required to have regard to it.

We recommend that the Code should also include other information on testamentary capacity, including the test, the presumption of capacity, when the testator must have capacity, and how testators should be supported to have capacity.

See Chapter 2 of the Report

Electronic wills

The formality requirements to make a valid will are nearly exactly the same as they were when the Wills Act 1837 was enacted. These requirements have generally stood the test of time.

They require that –

- the will must be in writing;
- the will must be signed by the testator, or by a person on their behalf;
- that testator's signature must show an intention for the will to have legal effect;
- the testator must sign the will in the presence of two or more witnesses; and
- the witnesses must sign and attest the will.

These nearly 200-year-old requirements do not of course expressly cater for electronic wills.

Whether an electronic will could be valid under the current formality requirements in the Wills Act 1837 is not clear.

Electronic documents and electronic execution are increasingly accepted in a wide range of contexts. However, it is contentious whether they should be accepted in the wills context.

Wills are unique. They are unilateral documents, regularly made without the assistance of any professionals or any third party at all, other than the two witnesses to the testator's signature. Because a will cannot be proved as valid until after the testator dies, the assessment about its validity must take place at a time when the testator cannot provide any evidence about how the will was made. That assessment may not take place until months, years or even decades after the will was executed. Fraud and forgery in wills cases is also not unusual, being most often committed by someone close to the testator, such as a family member, friend, or carer, rather than by a stranger.

Although consultees still have concerns about the protections offered by electronic wills, they expressed significantly more support for them during the course of our project, comparing the time that we first consulted on the matter in 2017 and our supplementary consultation in 2023. The COVID-19 pandemic highlighted the advantage of being able to witness wills remotely, which electronic execution facilitates, while provision for electronic wills in other places such as in several US states, in British Columbia in Canada, and Victoria in Australia means that the idea of electronic wills is not as novel as it was when we first consulted on the issue. As this project is the first general review of wills law in 200 years, we have concluded that the results must be future proof.

The law must support testamentary freedom. Enabling wills to be made electronically is critical to doing so for future generations.

We therefore recommend that provision should be made for electronic wills.

However, electronic wills must be secure. They must provide the same level of security against fraud and undue influence and provide the same level of certainty and evidence about the testator's intentions as paper wills. Our review has led us to conclude that they can: that electronic wills can be made in a way that will provide strong evidence that the will was executed by the testator; cause the testator to think carefully about what they want to achieve with their will; direct the testator into complying with standard, clearly defined requirements; and provide sufficient protection for testators against fraud and undue influence when making their will.

We therefore recommend that electronic wills should be capable of being valid, in the same way as paper wills, provided that they meet an additional formality requirement: that a reliable system is used to ensure the security of the will.

In particular, a reliable system must be used that –

- at the time of the signing of the will, links any signature with the person whose signature it is;
- identifies the will so that it can be distinguished from any copies; and
- protects the will against alteration or destruction other than by the testator or a person authorised or directed by the testator to alter or destroy the will.

We also recommend that, for electronic wills, it should be possible for the requirement for the witnesses – or a person signing on the testator's behalf – to be in the testator's presence to be met by remote presence by way of a visual transmission (for example, by video call).

☞ See Chapter 8 of the Report

OUR DRAFT BILL FOR A NEW WILLS ACT

As part of our project, we have produced a draft Bill for an entirely new Wills Act, to provide a single, modern Act that contains all the legislation governing wills in one place.

Therefore, our draft Bill for a new Wills Act does a number of things. If enacted, it would amend the law to bring into effect our recommendations. Where we are not recommending that the law should be changed, the draft Bill converts existing provisions of the Wills Act 1837 into modern provisions and brings into one place some of the other provisions that are about wills, in other legislation, so that they can be found in one place. The draft Bill dispenses with provisions of the 1837 Act where we have concluded that they no longer serve any function.

The draft Bill has been written in a modern and accessible way, using updated and simplified language.

Throughout the Report, we explain in detail how our draft Bill implements each of our recommendations. We have also drafted Explanatory Notes to accompany our draft Bill, which set out how the Bill operates.

CONCLUSION AND WHAT HAPPENS NEXT

The recommendations in our Report together with our draft Bill provide a comprehensive, new and modern law of wills. They will represent the greatest change in the law of wills since the Wills Act 1837. We believe that our recommendations will make the law clearer and more certain; offer greater protection for vulnerable testators; and promote and support a testator's freedom to choose what will happen to their estate after their death.

It is now for Government to consider and respond to the Law Commission's recommendations. Under the Protocol between the Lord Chancellor (on behalf of Government) and the Law Commission of England and Wales, the responsible Minister will respond to the recommendations as soon as possible, and in any event with an interim response within six months of publication of the Report and a full response within a year.

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