

LAW COMMISSION CONSULTATION C.P. 231

‘Making a Will’

A Response on Behalf of the Society of Legal Scholars Property & Trusts Law Section

1. The following response to the Law Commission Consultation Paper ‘Making a Will’ is prepared by the Property & Trusts Law section of the Society of Legal Scholars.
2. The Society of Legal Scholars is a learned society whose members teach law in a University or similar institution or who are otherwise engaged in legal scholarship. Founded in 1909, and with around 3,000 members, it is the oldest as well as the largest learned society in the field. The great majority of members of the Society are legal academics in Universities, although members of the senior judiciary and members of the legal professions also participate regularly in its work. The Society's membership is drawn from all jurisdictions in the British Isles and also includes some affiliated members typically working in other common law systems. The Society is the principal representative body for legal academics in the UK as well as one of the larger learned societies in arts, humanities and social science.
3. All members of the Property & Trusts Law section were invited to contribute. Those who volunteered were invited to contribute to an event day organised by the convenor which was held to discuss and refine our response to the consultation. The event was generously funded by the Society of Legal Scholars and the University of Portsmouth.

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This written response is the output from those proceedings.

Simon Cooper 10/11/17.

Mental Capacity

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The Commission identifies the single test of capacity introduced by the Mental Capacity Act 2005, in contrast to the Common Law test for testamentary capacity in *Banks v Goodfellow* (1870). The Commission (consultation question 3) proposes that the test for mental capacity in the MCA 2005 should be adopted for testamentary capacity.

The test of capacity introduced by the Mental Capacity Act 2005 was specifically directed at decisions relating to financial matters, health care, and welfare decisions and was in connection with the management of affairs for people who are living (but who were unable to manage their own affairs).

The long established and well understood Common Law test for testamentary capacity created in *Banks v Goodfellow* has four limbs concerning:-

- (1) Understanding the nature of making a Will and the effect of doing so;
- (2) Understanding the extent of what a testator has to dispose of;
- (3) Realising who has moral claims on the testator; and
- (4) No mental disorder is distorting the testator's understanding.

It is considered that the Mental Capacity Act 2005 test **should not** replace the Common Law test from *Banks v Goodfellow*. In the last few years there has been considerable judicial consideration as to whether the MCA 2005 superseded the Common Law test in *Banks v Goodfellow* and it seems now to be well settled that it did not. This includes the cases of *Re MM* [2007] EWHC 2003, *Scammell v Farmer* [2008] WTLR 1261, *Pearce v Beverley* [2014] WTLR 85, *Saulle v Nouvet* [2008] WTLR 729, *Re Wilson* [2013] WTLR 899, *Walker v Badmin* [2014] EWHC 71, *Kicks v Leigh* [2014] EWHC 3926 and also this has been considered extra-judicially by the Senior Judge of the Court of Protection, Judge Lush, in <http://www.step.org/banks-v-goodfellow-1870> (in which he commends the *Banks v Goodfellow* test as being “simple and succinct”).

It is considered that the Mental Capacity Act test of capacity is **not** appropriate for the act of making a will. This is demonstrated by the following:-

(1) The Code of Conduct issued with the MCA specifically said (at 4.33) that the MCA's new definition of capacity is in line with the existing Common Law tests and does not replace them. Judges could adopt the new definition whenever it was thought appropriate but the act itself applied to all other cases relating to financial, health care or welfare decisions.

Accordingly it was not contemplated when the MCA was being debated, that it was intended to apply to testamentary capacity.

(2) The MCA test is more appropriate for continuing functions such as management of financial affairs rather than the act of making a will. S.3 contains a requirement to “*retain* relevant information” after the event. On the other hand the *Banks v Goodfellow* test, more appropriately for the act of will making, is about the ability to understand at the time the will is executed.

(3) Section 3 MCA 2005 requires a person making a decision to be able to understand all of the information relevant to that decision. This is very wide and a harder test for elderly clients to pass – making it more difficult for them to be able to make wills (which is undesirable). The *Banks v Goodfellow* test requires the testator to be able to understand the three clear elements set out in the test. It is much more focussed and workable.

(4) The Mental Capacity Act's focus on all decisions being made in a person's “best interests” is not the relevant starting point when a testator is making a will to take effect after he has died.

(5) The Commission comments that the language of *Banks v Goodfellow* is not particularly modern and there is some doubt about whether the fourth “limb” is a separate limb or in some way part of the third limb and suggests this as a reason for doing away with the *Banks v Goodfellow* test of capacity. If the judgement in *Banks v Goodfellow* is read in full, there is a discussion of mental disorders and their effect on the understanding before the four “limbs” are laid out. This makes it clear that the fourth limb is not actually part of the third and in a recent judgement of the Court of Appeal in *Sharp v Adams* [2006] WTLR 1059 the Court of Appeal made it quite clear that the fourth limb is not connected to the third. So the Commission's concern is unnecessary.

The Commission refers to the language as being ‘archaic’. However the test of capacity in *Banks v Goodfellow* still commands considerable respect today and as has been explained as

follows by Frost, Lawson and Jackoby (Testamentary Capacity, Law Practice and Medicine) “it has survived because of its twin characteristics of simplicity and common sense”.

Additionally the clear structure of the first three limbs of the test is used in practice by those taking instructions from testators making wills as a simple and clear structure for the discussion – aiding, in a well known way, the draftsman to form an assessment of the purported testator’s capacity in initial discussion with testators. The Mental Capacity Act does not provide a similar useful framework for taking instructions. Its much more vague requirement of understanding and *retaining all relevant* information would make the task of taking instructions from testators for the drafting of wills much more difficult.

The Commission considers that the *Banks v Goodfellow* test should be more in line with current psychiatric thinking. However the recent case of *Key v Key* [2010] WTLR 623 demonstrates that a modern court has no difficulty in applying *Banks v Goodfellow* to a much wider range of psychiatric circumstances than is suggested by the Law Commission’s comment – in this case a reaction to grief following a spouse’s death was sufficient to invoke the fourth limb of *Banks v Goodfellow*.

Accordingly the answer to consultation question 3 should be no.

Consultation question 4 asks whether if the Mental Capacity Act 2005 test is not adopted, should the *Banks v Goodfellow* test be placed on a statutory footing. Consultation question 5 is linked to this.

The danger here is that any attempt to reformulate the *Banks v Goodfellow* test (which is well understood and workable) would invariably amount to tinkering. In *Sharp v Adam* the Court of Appeal specifically said that they did not consider that the *Banks v Goodfellow* formulation needed to be reformulated. Whilst any situation is always open to criticism and it is always possible to highlight “bad” cases to prove a point either way, changing a test of capacity which has served the public well for many years would in all likelihood in the process throw up the same number of unfortunate or sad cases as the present system. Furthermore, in dealing with disputes about wills a big change which has occurred for a number of reasons over the past few years is the dramatic reduction in the ability and willingness of individuals with a grievance (which may be a legitimate and wholly reasonable grievance) to be able to employ a lawyer, engage the Court process (the Court issue fee alone nowadays is huge) and have that issue considered by a Court. The point is that the Civil Court system is inaccessible and unattractive for most. Therefore if an area of law which works pretty well and has served

the public on the whole admirably well for many years is reformulated, then this will amount to tinkering. The law of unintended consequences is always there in the background and the practical problem is that any uncertainties or problems so caused by changes in the law are now much less likely to be corrected by the Civil Court system. Therefore if changes are suggested, the arguments in favour of change need to be very strong indeed – and in situations where the Law Commission is uncertain whether change is required, it should resist the temptation to tinker.

Consultation question 6 refers to reforming the *Banks v Goodfellow* test by statute and, if so, should it be accompanied by a statutory presumption of capacity. As mentioned previously, it is far from clear that such a reform is warranted or desirable but as to the presumption of capacity, the existing situation is that in the vast majority of cases the question of capacity does not arise and therefore capacity is, de facto, presumed. If it is brought into question the burden of proving capacity lies on the person propounding the will but if the will is rational on the face of it then the burden of proof shifts back to the person who is trying to challenge the will who will have to provide evidence of lack of capacity. Effectively this is not very different from a presumption of capacity. In truth, in practice cases do not get decided on *presumptions*. If disputes arise it is *evidence* which will resolve these disputes and so the reply to consultation question 6 is that it is not necessary.

Consultation question 7 provisionally proposes that the rule in *Parker v Felgate* should be retained and it is considered that it is correct to do so. The circumstances in which *Parker v Felgate* may be relevant must be extremely rare but if they did arise it does provide a means of allowing a testator effectively to complete a will when the clear understanding and intention to do so had been apparent a short time previously. To remove this option would be to deprive people of an opportunity of dying with up to date current wills in place. Its retention is supported. [N.B. an alternative answer to this question is given in Roger Kerridge's contribution.]

Consultation questions 8, 9 and 10 concern the “golden rule”.

The golden rule has always been to a great extent a counsel of perfection. Over recent years - probably because of additional demands being placed upon the medical advisors who were anticipated as the people who should be asked to certify a testator's capacity, it has become difficult to apply the golden rule efficiently. A testator's doctor is consulted; there is likely to

be a delay of several weeks before it is discovered whether and when they are able to attend to the matter (if at all). It is not uncommon for the fee for the medical advisor to exceed the actual fee for the will itself. There is no guidance as to what meaning is to be given to “elderly” in the operation of the rule. The testator’s consent to all of this has to be obtained. It is very difficult to operate the golden rule correctly.

It would be helpful to those preparing wills for some sort of database or register of suitably qualified professionals who *are* willing to undertake assessments of testamentary capacity in a timely manner to be compiled. Accordingly the answer to consultation question 8 is yes but this would be even more useful if it was prepared alongside a central register or database of those who are willing to undertake assessments of capacity and their respective qualifications and indicative charges. It may well be that a general medical practitioner might not be the most appropriate person to be consulted. Other suitably qualified professionals might be better able to fulfil that task. The problem is making their availability more widely known.

Consultation question 9 proposes that the Code of Practice should apply to those preparing a will or providing an assessment of capacity in a professional capacity. Clearly this must be the case (although the Law Commission very regrettably rather fudges the issue of will making being an unregulated activity). In paragraph 1.28 the Commission refers to the recommendation of the legal services board in 2013. There was strong support for will writing to be made a regulated activity amongst all people involved in the consideration of the matter at that time with the sole exception of the then Lord Chancellor Christopher Grayling. Accordingly the answer to consultation question 9 must be that yes it is correct for all those preparing wills in a professional capacity to be regulated by a Code of Practice but how can this be enforced if will making is not made a regulated activity? It is a great pity that the Commission avoids that issue – because if it is not a regulated activity then how could this proposal be enforced.

It was not possible to consider in any detail what the context of such a Code of Practice ought to be (consultation question 10) in view of the time which was available for the exercise of responding to this consultation.

Consultation question 11 refers to a scheme to allow third parties to certify the capacity of a testator (similar to Certificate Providers who are involved in the making of Lasting Powers of Attorney). The Commission do not propose such a similar certification scheme. Because the range of persons needed such a certificate in Lasting Powers of Attorney is very wide, and

incudes, for example, “a friend, neighbour, colleague or former colleague who has known the donor personally for at least 2 years”. This would hardly be suitable for an assessment of testamentary capacity.

Formalities & Electronic Wills

Peter Sparkes, Professor of Law, University of Southampton

1. The Law Commission proposals on wills formalities are, broadly speaking, to retain the existing written formality, tidied slightly, whilst adding a framework to allow for the future possibility of making wills electronically. This is a recognition of the welcome simplicity and practical efficacy of section 9 of the Wills Act 1837.
2. The social circumstances existing 180 years ago were conducive to a relatively simply testamentary formality. Society was divided on class lines, and a person needing to make a will probably had a family solicitor. Section 9 formalities were unlikely to prove problematic since clerks in the firm could act as witnesses, and so it was easy to secure witnesses who were independent. Victorian morality means that it was possible to draft a will at the time of marriage that would remain valid almost irrespective of subsequent events, provided the testator stuck to a boring conventional life. A will could benefit a known spouse, future children and remoter generations and make proper provision irrespective of subsequent births and deaths. The only likely life event to provoke a testamentary rethink was the death of a spouse followed by remarriage – an event which would in any event revoke an existing will. Marriage and will-making were so strongly connected that the need for a new testament was unlikely to slip by unnoticed.

Today, much has changed in the social context of testation. Property is much more widely distributed, giving a wider pool of people needing to make a will. People dying may be tenants rather than property owners. Their family is likely to be much less structured than in the past, and also more fluid. In particular, cohabitation poses completely new questions.

3. It is estimated that 40% of adults die without a will, but one would like to know what percentage of these needed to make a will. The approach to reform surely depends upon an answer to this question. Some commentators (eg Jonathan McDonagh *New Law Journal* September 22nd, 2017, p 13) consider that the intestacy rules are sound and that a person may elect to rely on the rules of intestacy. We suspect that many people who really need to make a will fail to do so, sometimes because of an election to rely on intestacy rules but usually from other factors such as ignorance or superstition about the effects of will making.

In particular, it is evident that any cohabitant needs to make a will because the intestacy laws fail to take adequate account of the relationship which exists between:

cohabitant A and cohabitant B; and

cohabitant A and the children/family of cohabitant B (and vice versa).

If intestacy rules are inadequate the best option is reform of the substantive law, but if progress on this is stalled, significant reform is needed of the testamentary formalities to encourage people to testate.

Cohabitation may be extremely durable or rather transient, and it is very difficult to see how adequate warnings can be given about events triggering a need to (re)-testate. This is why reform of the substantive law is preferred.

4. What happens to a person's estate on death is complex because of the number of factors to consider, which include:
- a. survivorship, especially to the family home, but possibly to other assets;
 - b. the difficulty occasioned by a (possibly unintended) severance of a joint tenancy by a constructive trust (possibly arising after a will has been made);
 - c. the effect of marriage or divorce;
 - d. the intestacy rules;
 - e. the surviving family members and others, divided into those qualified as next of kin and those not recognised by intestacy rules;

- f. dependants;
- g. reasons for the exclusion of provision for dependents;
- h. complex interpretation rules about gifts in wills;
- i. changes eg in charities requiring changes in the wording of gifts;
- j. taxation;
- k. non-property issues such as burial wishes, pets and health treatment;
- l. establishing next of kin in the medical sense, of people to be consulted about treatment; and
- m. the practicalities of handling affairs after death – finding the will, discovering debts and assets, handling access to digital media and digital records of tangible assets.

No doubt more could be added. One look at this list suggests that it is not realistic to think that most people who die intestate have consciously opted for intestacy knowing the consequences.

We think that some consideration should be given to differential formalities for some of the above matters; full formality is most needed for dispositions of property.

Our conclusion is that it needs to be made easier to make a will, easier to understand what will to make, and easier to know when an existing will requires review.

5. The existing will formality is set out in section 9 Wills Act 1837:

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.

6. Will signed by two witnesses

Section 9 has been in force for many years and the relatively low level of litigation suggests that it is operating satisfactorily. We would make a number of minor suggestions in relation to it:

- a. Writing – it should be made clear that a typed document suffices; should it be stated that a document is required?
- b. Signature by the testator – we believe that this is dangerous when there is so much uncertainty in the case law about what signature means and this now requires an explanatory statutory definition limiting the section to a handwritten or wet-ink signature;
- c. The provision for a person to execute on the testator's behalf should be withdrawn and replaced by an alternative form of will (see below). Also a fully competent and able testator should be required to sign the will and should not be able to choose someone else to testate for them.
- d. The requirement for a witness to 'attest and sign' should become, as proposed by the Commission, merely 'to sign.' [NB see Simon Cooper's contribution on Attestation.]
- e. Limitations on capacity to witness/benefit need to be made clear in the section; i.e. it needs to be addressed to a lay audience.

7. Technological innovations since 1837 now call for a variety of forms of will, which is also desirable in terms of consumer choice.

- a. There should therefore be a section setting out permitted forms of wills and stating that any other form is not valid. The provision about standard wills (signed by the testator with two witnesses) should thus be put into a positive form – "A will shall

be valid if ...” - and this should extend to privileged wills (if retained) and to the new forms of will suggested below. The master section needs to be directed to lay testators/will-makers and thus to include mention of the possibility of compliance with foreign formalities.

Our basic approach would be that the law should open a range of possible methods of testation and testators can then choose which to adopt. For example, German testators face a choice between a notarial or a holograph will, but ordinary Germans, other than the wealthy, have chosen not to use notarial services on account of cost (and also restricted freedom of testation). It seems clear that there needs to be a wider choice of forms of testation here, with the permitted means of testation appraised from the point of view of ordinary citizens who do not wish to employ professional drafters and who lack legal knowledge except such as might be obtained from an internet search.

- b. We assume that the Wills Act 1837 was drafted on the assumption that wills would be professionally drawn. The provisions about attestation are straightforward for a testator called into a Victorian solicitor’s office; the solicitor and a clerk can act as witnesses and the problems about capacity to witness would not usually arise. If a solicitor sent a will to a client, detailed instructions about witnessing could be given (at the testator’s cost) and any errors would be wrapped up in the presumption of due execution. We think that these rules are potentially problematic for people wanting to testate but reluctant to commit to the cost of professional will drafting. One can easily imagine a testator who would have difficulty marshalling two witnesses who were not (directly or indirectly) to benefit. Accordingly we think that testators should be offered alternatives which might suit their personal circumstances better.
- c. The Commission propose effectively no change in the formal registration, voluntary registration and holograph will arrangements. They do not propose the introduction of ‘notarial’ wills. We believe that there could be major advantages in the introduction of a new system of registration which could overcome many problems of formality and capacity and streamline the administration of estates.
- d. These proposals are likely to suit the profession. Their suitability for lay testators may be more questionable. We now consider other possible formalities.

8. Registered will signed by testator with one witness

- a. The basic assumption behind section 9 of the Wills Act 1837 is that any issue of validity will arise after the death of the testator and thus two witnesses are needed, two individuals other than the testator.
- b. This is not a guarantee against fraud, but it is certainly much safer than a will put forward posthumously with a single witness.
- c. We suggest that a will with one witness is perfectly acceptable if the will is registered so that its authenticity is determined during the testator's lifetime.
- d. Reduction of the witnesses to one makes the attestation provisions much easier to understand for lay people without the time to study the case law; for example it avoids problems of witnesses out of line of sight of each other. The option of acknowledging a signature could then be withdrawn; the will would merely need the signature of the testator and the witness.
- e. In essence a will attested by one witness is very much like a deed and one could apply deed formality (registration standing for delivery) – 'I execute this document as my will' – without the need for delivery. (Deed formality could be reviewed and applied, for example, to assents and possibly to declarations of trust).
- f. Registration of such a will would remove questions of posthumous forgery.
- g. Lodging a witnessed will should require only a relatively small registration fee.

9. Will signed by the testator and authenticated by a registrar/'notarial' figure.

- a. The Commission set out a detailed and persuasive case against the holograph wills recognised in many other jurisdictions. The twin problems with holograph wills are the risk of forgery and the difficulty in distinguishing intentions from settled wishes. Neither of these problems arises if a holograph will is registered. Different issues arise, mainly identification of the testator and ensuring capacity. The registrar is being asked in some ways to act like a continental notary to ensure the validity of the will. Clearly such a system will require a fee. However, we

believe that many testators might prefer a will-making method that was totally anonymous so far as their friends and family were concerned. In appropriate cases the registrar could require evidence of capacity or a doctor's note could be lodged with the will.

- b. An alternative that is summarily dismissed by the Commission is the notarial will. On the continent these are not popular because notarial services are perceived to be enormously expensive. We believe that this possibility should not be dismissed out of hand if that problem can be addressed. Finland uses cheap system of authentication by professionals which might be a suitable, cheap, model. It might be a big help if some other term could be found to substitute for 'notary'. We use 'notarial figure' to represent this person. The advantage of a notarial will is that it becomes almost impossible to challenge its authenticity because the notarial figure authenticates identity, checks capacity and ensures understanding of the terms of the will. Registration replaces the safe keeping function of the notary. We would envisage the notarial figure also drafting the will. Although this is likely to be a premium market, some testators might be quite happy to pay for the peace of mind generated by knowing that their testamentary dispositions could not be upset. We are envisaging a wealthy testator with several families, complex dispositions of large amounts of property and trouble makers in the family likely to mount a posthumous challenge.
- c. There is no reason why the 'notarial figure' could not be a solicitor or licensed conveyancer, or perhaps, the registrar who certifies deaths.

10. Electronic wills

We very much favour electronic will making but we are not persuaded by the proposals in chapter 6 about electronic wills. These carry echoes of the Commission's proposals for electronic conveyancing, proposed firstly as a superior system and secondly as a solution to problems in the substantive law. A wide framework was laid down to be fleshed out by rules, but the technology to implement eConveyancing ran into difficulties with the profession. As a result the substantive problem of the registration gap remains unsolved. We would, therefore, prefer to see legislation tackling the problems head on rather than laying down a vague framework.

- a. We believe that electronic wills should commence with the model of a will signed by the testator and authenticated by a notarial figure.
- b. The testator could prepare his will as an electronic document and send it electronically to a registrar. This could include video and audio files and more traditional text files.
- c. A reserve power to make rules would be wise in relation to non-text formats.
- d. We believe that an appropriate model for electronic signature would be the testator signing his handwritten signature on a tablet that would be captured as a digital image of his wet-ink signature, technology already in use by delivery companies. This would be perfectly workable if authenticated by a registrar/notarial figure who confirmed the signature, identity, capacity and understanding as for a documentary will. This might very quickly become the standard will. This technology could be used by professionals such as solicitors and licensed conveyancers.
- e. The problem of authenticating general electronic signatures will soon be resolved by the market in ways which cannot yet be predicted, and appropriate provision can be made at that stage.

11. Drafting software

Allowing electronic submission to a registrar would create a market in software capable of generating drafts in various formats. We would like to see software dealing with some of the complexities mentioned above, for example enabling the user to identify next of kin and potential dependants and therefore to see the effect of default rules. Also to assist administration by gathering together an inventory of assets and to give a view of the taxation consequences of death.

12. Dispensing power

We tentatively support a wider dispensing power as proposed by the Commission. However, we are nervous about whether the very wide exercise of this power in *Nichol v Nichol* [2017] QSC 220 would prove wise or whether this would provoke a lot of litigation.

13. Registration

During the nineteenth century, we can presume that a landowner likely to have left a will would have a family solicitor so there was no difficulty in locating the presence or deducing the absence of a will. Today so much has changed. People move around much more freely. When people buy a house they are likely to retain a professional conveyancer, but not necessarily one that is local to the property, and they are quite likely to choose a different conveyancer next time. Consumers have a much larger pool of providers of legal services from which to select. All in all then, it may be much more difficult to track down a professionally drawn will, and, of course, it is virtually impossible to trace a home-made will unless the testator takes steps to alert the family to its whereabouts. All of this suggests that there could be major advantages in the introduction of a new system of registration, which could overcome many problems of formality and capacity and streamline the administration of estates. We believe that there is a role both for registration of the details of a will to facilitate location of a testament and a substantive registration system to create a category of authenticated wills.

14. Obsolescence

As already observed, many adults die without a will and many of these may leave substantial problems in their wake. Another problem less commonly remarked upon is obsolescence of wills. The current law takes little account of obsolescence. It assumes that testators are wealthy individuals who can employ a family solicitor to keep wills under review and notify a testator when a will needs revision. Flexibility is introduced only by two rules:

automatic revocation on marriage;

provision for dependants.

This is not a credible model for the property owning democracy in which many people are asset rich but cash poor. Many home buyers will have made a will (or it has been decided for them that they do not need to make a will) when they bought their house. Conveyancers will commonly have assumed that a declaration of beneficial joint tenancy will lead automatically to survivorship. This is no longer the case since judicial recognition of the ambulatory trust in *Stack v Dowden* which means that people who buy as joint tenants could end up as tenants

in common. At present this should not apply to properties bought since the trusts of land reform, but it may be predicted that judicial activism might even challenge the conclusiveness of express trusts. It is therefore necessary to separate the operation of survivorship from the size of the shares of the co-owners. Where a couple are married, the intestacy rules often have the effect that the survivor will end up with the home (unless it is in London and extremely valuable), but a surviving cohabitee could end up sharing with miscellaneous relatives of his or her deceased partner.

Those problems apart, English law is simple. It gives effect to the last expressed wishes of the testator which have an ambulatory effect until death. In the meantime the assets and the family set-up could have changed beyond all recognition, but only marriage will have a direct effect on the will. The Wills Act 1837 reflects a world long gone of stable marriages with divorce frowned upon and cohabitation not an option for the propertied classes. Second families and cohabitation present thoroughgoing challenges to the system of testation. We are not aware of research, which may well exist, to determine how often our succession system leads to unintended results. Existing provisions to alter the effect of wills do not apply to people who cannot be classified as dependents, which is assumed in the discussion which follows. Wills that have been made many years ago may have become either redundant or may operate contrary to the testator's wishes as a result of deaths, births, and other family events positively. Just to give one example:

the family consists of an elderly parent A, his or her only child, B and the person with whom B is living, C. In this situation one would advise B to make a will in favour of C. If the order of deaths is as expected A's property passes to B and B's will carries the property to C. But when B and C begin to live together and their relationship becomes established, A needs to make a will if it is desired to avoid A's property passing to distant next of kin.

It is suggested that a major advantage of registration, indeed a case for making registration compulsory, is that a facility could be built in to secure periodic review, as an option for the registering testator. There is nothing inherently wrong in a will taking effect many years after it is made, but it will probably only operate correctly if the testator has led an orthodox life. We would therefore suggest:

- a. when wills are registered, registration could either be indefinite or for an initial period of years;

- b. if temporary, notice to review would be given to the testator when the time expired;
- c. the will would be fully effective if a testator gave notice that he or she was content with the existing will;
- d. a review power/discretion would become available if the registration had not been renewed, taking account of cohabitation and informal family relationship.

This scheme would ensure that account was taken of cohabitation when the testator had opted in. We would predict that time limited but renewable wills would be attractive to testators.

Answers to Consultation Questions in chs 5-6.

Consultation Question 15. We invite consultees' views on whether the current formality rules dissuade people from making wills.

Yes; many people who were told the rules would think they needed a lawyer to help them and would be dissuaded by the cost.

Consultation Question 16. We invite consultees' views on what they see as being the main barriers to people making wills.

Finding time; fear of inviting death; cost.

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?

Yes, although we would remove the option for people to sign on behalf of a testator and provide for official authentication in this case.

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?

Yes, but we are not convinced that a lay person making a will would be aware of the bar on gifts to a witness.

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?

We would favour removing the possibility of signing on behalf of a testator in favour of a process of official authentication.

Consultation Question 20. We provisionally propose that a gift in a will to the cohabitant of a witness should be void.

In principle yes. However, this raises very difficult issues of definition, and it would be difficult for a person administering an estate to know whether or not to ignore a will.

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?

Effectively this is to make witnesses neutral parties and often to impose a requirement of professional involvement. If this is introduced, alternative ways of creating wills avoiding attestation are desirable.

Consultation Question 22. We invite consultees' views on whether it should be possible, in defined circumstances, to save a gift to a witness that would otherwise be void.

Yes, the proposals above could operate very unfairly. They are making it much more likely that a will would not operate as intended.

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?

Yes. [NB For discussion, see Simon Cooper's contribution on Attestation.]

Consultation Question 24. If consultees do not agree that the attestation requirement should be removed, we invite their views as to whether attestation should:

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 .

apply in all cases, including those where the witness acknowledges his or her signature in the testator's presence.

Do consultees agree?

N/A

Consultation Question 25. We provisionally propose that holograph wills are not recognised as a particular class of will in England and Wales.

No; see detailed comments above. [N.B. an alternative answer to this question is given in Juliet Brook's contribution.]

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?

We would prefer the abolition of privileged wills. [N.B. a similar answer is also given in Juliet Brook's contribution.] If retained, there should be a requirement of writing and a registration scheme run by the MoD; soldiers could have an e-mail address to which they could e-mail their wishes and the MoD could run a register.

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.

N/A

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?

Yes; but we fear that the wide power considered in *Nichol v Nichol* [2017] QSC 220 could provoke litigation. [N.B. a similar answer is also given in Juliet Brook's contribution.]

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?

No, see detailed comments above.

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?

We are not keen on widely drawn enabling provisions after the experience of eConveyancing. We would prefer immediate introduction of a working scheme of e creation and registration, with a rules based power for extending the permitted types of will.

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).

Agreed; this requires express provision given the state of the case law on electronic signature. That said, we favour a widening of the range of permitted forms beyond s 9 wills, as in the detailed comments above.

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.

We have no evidence but believe that a system of e creation and registration should be created forthwith.

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?

Clearly a registration system requires also a system of deregistration.

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.

Yes. Clearly this has unpredictable implications for the rules of interpretation, but initially this could be left for case law to develop.

Attestation

Simon Cooper, Reader, Oxford Brookes University

The Consultation Paper considers whether the reference to attestation in the Wills Act 1837 should be removed on the basis that it is unnecessary, that it adds nothing to the reference to signing, and is omitted in the case of acknowledgements.

There are difficulties with the meaning of attestation.

(1). First, although it was originally understood as the observation by a person of the testator's carrying out of the solemnities required for a valid will, the word has undoubtedly shifted in meaning at least in legal circles to refer to the written record of that observation.

(2). Secondly, there is the question whether in the statutory requirement to 'attest and sign the will', the person is attesting (without identifying a particular subject matter) or is attesting the will. The court in *Sherrington v. Sherrington* [2005] EWCA Civ 236 'inclined' to the former view, but that does not take the matter much further. Had the court taken the latter approach requiring the person to 'attest the will', it would have been necessary to ask whether that meant attesting the execution of the will or attesting by writing upon the will.

(3). Thirdly, does attestation (in the sense of a written record of an observation) add anything to the mere application of the observer's signature? The courts have indicated in a number of old and new judgments - notably *Sherrington* - that the existence of the two words 'attest' and 'sign' implies that the two are different concepts. They are not simply synonyms as in other time honoured phrases such as 'to have and to hold' or 'null and void'. That is borne out by the wording of the original s.9 Wills Act 1837 which separates them in a way that suggests they are treated as distinct: 'shall attest and shall subscribe'. The Consultation Paper rehearses the case law supporting this. There is, however, a notable absence. This is the case

Re Selby-Bigge [1950] All ER 1009. There, the attestation clause in the will stated that the witnesses had attested but the clause made no mention of them signing. It was held that:

‘the word “attest” in its ordinary meaning is sufficiently wide in connection with a document such as a will to include the word “subscribe”’

That was so even though the judge recognised ‘that the word “subscribe” in the statute is otiose.’ That is significant insofar as it suggests that the existence of the two words - ‘attest’ and ‘sign’ in the modern statutory formula - does not necessarily imply that the two words must be attributed with separate meanings. This goes against the ‘inclination’ in *Sherrington*. The judge in *Re Selby-Bigge* found support in earlier case law which contained judicial comments referring to ‘attestation by subscription’: *In bonis Thompson* (1846) 4 Not Cas 644, *In bonis Maddock* (1874) LR 3 PD 169, *In bonis Sharman* (1869) LR 1 PD 661.

The decision in *Re Selby-Bigge* [1950] All ER 1009, and the case law cited in it, tends to support the view that attesting does not differ significantly from signing. This is reinforced by the Washington Convention noted in the Consultation Paper, footnote 100, which takes a similar stance. It is reinforced by s.1(3)(a)(ii) Law of Property (Miscellaneous Provisions) Act 1989 which requires attestation by a witness but does not explicitly mention any further requirement that the witness apply his signature, yet this has always been assumed to be necessary (see e.g. Norton on Deeds). It is also reinforced by the absence of an attestation requirement on the case of acknowledgements under s.9(d)(ii) Wills Act. These all lend support for the treatment of attesting and signing by witness as synonymous, and thus support the proposal to abolish the separate requirement of attestation found in the Wills Act.

One further issue is that the abolition of the attestation requirement would leave ‘signing’ in the presence of the testator as the sole remaining requirement. That could potentially be viewed as eliminating any rules about the capacity in which the person signs and the purpose and intent behind the signing. It might be argued that a requirement of signing is satisfied by the application of a signature in the presence of the testator even though done by a person

who signed without appreciating that his signature was supposed to vouch for the validity of the testator's execution of the will.

If that argument prevailed, then it would be entirely unsatisfactory. The underlying purpose of requiring the signature is to vouch for the valid execution; if the person signing did not have that intent, then the signing is meaningless. This is clear from the old case law. For example, it was said:

‘What is the duty of a witness? Not to sign his name to he knows not what; he must be aware that he is called to see something done, and to affirm by his signature that he has seen it.’ (Coleridge J, consulted in *Burdett v. Spilsbury* (1842-43) 10 Clark & Finnelly 340, 381).

Also, witnesses ‘are present at the time of execution for that purpose and as evidence thereof they sign the attestation clause stating such execution.’ *Wickham v. Marquis of Bath* (1865) LR 1 Eq 17.

These and many other dicta suggest that the person's mental state at the time of signing should be a vital factor in justifying this particular formality. A statutory reform which abolished any requirement for the requisite mental state would be unsatisfactory because it would not satisfactorily vouch for the validity of the testator's execution.

Nevertheless, it is submitted that a statutory reform requiring the witness merely to sign would not lead to an abolition of the requirement that the witness possess the requisite mental state. First, unlike the original Wills Act, which referred to a ‘person’, the modern Wills Act provision refers to a ‘witness’. It is therefore clear what must be the status of the person signing and it is implicit that his intention at signing must be to provide evidence of his observation of due execution. Secondly, similar implied requirements about mental states at the time of signing exist in respect of other formality requirements. The very requirement that the testator sign the will is subject to an implied requirement that the testator possesses an intention to execute the will.

We therefore support the law commission's proposal to delete the reference to attestation.

We add that the law commission might also consider the related questions:

- is there a sufficient justification for the requirement that the signing by the witnesses must be done in the presence of the testator?
- should the nature and extent of the intention to attest be determined by the drafting of the attestation clause, or by the drafting of the testimonium clause where this is separate from the attestation clause?
- are the presumptions operating satisfactorily in this regard, in particular, whether it is satisfactory to preserve the position that intention to attest may be inferred from a signature alone?

Privileged Wills, Dispensation Power and Donatio Mortis Causa

Juliet Brook, Principal Lecturer, University of Portsmouth

Holograph Wills

It is agreed that there are concerns about the protections available to testators if holograph wills were to be permitted. Note however that such wills could be admitted to probate under the proposed dispensing powers if the court is satisfied that the testator intended the holograph document to be their will.

Privileged Wills

The proposed changes to privileged wills widen their remit by removing the need for the members of the armed forces to be on actual military service. They also do not address the concerns around oral privileged wills (namely the lack of any evidence) nor the fact that privileged wills can still remain valid long after the testator in question has ceased to attract the privilege.

It is argued that there is no basis for retaining privileged wills. As noted in the consultation paper, the majority of service personnel do have a will and the needs of this group of people would be best served by requiring them to make a will at various key moments in their career (i.e. on completion of training, before any overseas posting) and the Armed Forces Covenant would be complied with by providing free legal advice at these times, together with a provision that members of the armed forces who are under the age of 18 are permitted to make wills (unless the age is lowered generally to 16).

If dispensing powers are accepted then members of the armed forces (along with the rest of the population, especially those engaged in risky activities) would be able to revise their will in a moment of crisis by making a record of their new wishes (e.g. recording a video or sending an e-mail). The court would be able to admit such a record to probate if it is satisfied that the testator intended this record to be their will. With such provisions in place the only additional means of making a will for privileged testators would be oral wills and the dangers

of undue influence / lack of certainty and lack of evidence endemic with oral wills (as explained elsewhere in the consultation paper) means that these should not be permitted. The ‘specific policy intention’¹ of the Armed Forces Covenant does not justify relaxing formality requirements completely in any circumstances. To do so undermines the rationale for imposing strict formality requirements.

Although it could be argued that those testators who are currently privileged may feel “let down” by the abolition of privileged wills, many cases of privileged wills have involved testators who did not know that they had privileged status. More research would need to be done to establish the current awareness of the privileged status among the armed forces before this argument would be convincing.

Dispensing Power

It is agreed that a dispensing power should be introduced, to be exercised by the court, and to apply to any records that demonstrate testamentary intention. By creating a dispensing power, thought would need to be given as to the type of evidence that would be sufficient to demonstrate testamentary intention; it is presumed that case law from other jurisdictions with dispensing powers would be seen as persuasive, but also that case law on privileged wills (such as *re Knibbs* and *re Stable*) would inform the courts as to the considerations necessary to determine intention.

The need for a record seems to be a sensible compromise between trying to give effect to a testator’s intentions and the requirement for evidence as to those intentions. One can see that there may be circumstances in which the testator is unable to produce a record in time – the events in Grenfell Tower provide such an example, when many of the victims were able to call relatives but (unless those relatives recorded the call) there will be no record of what was said. However, the advantages of requiring a record for both evidence and to scrutinise the wording to determine what was intended outweigh the arguments in favour of permitting merely oral statements of intent.

It is submitted that the more important question is the burden of proof. The examples given in the consultation paper are ones where there would seem to be no real doubt that the testator intended the document to form their will, and therefore these are examples in which the

¹ Law Commission, *Making a Will* (Law com No 231, 2017) para 5.99

criminal standard of proof of “beyond reasonable doubt” would have been able to be satisfied. (When discussing the New Jersey case of *Elrich* the phrase ‘almost certainly’² is used to explain why the dispensing power was applied.)

However it is easy to imagine less convincing cases, for example a draft will that has been prepared in accordance with the client’s instructions but which is still awaiting execution. Whilst it might be clear that the will reflected the testator’s instructions at the time they were given, it may not be so certain that the draft will still reflected the instructions, especially if a number of days pass between the giving of the instructions and the death of the testator.

It is noted that the burden of proof would be on the propounder with there being no presumption that the “will” is validly executed but it also seems that a burden of proof that only requires evidence on the balance of probabilities (i.e. it is more likely that it is not) would risk documents that are still merely contemplative being admitted to probate. There is an argument that more research needs to be carried out into the manner in which dispensing powers have been exercised in other jurisdictions, with particular reference to the evidence provided to the court prior to the exercise of the dispensing power.³

Donatio Mortis Causa

If a dispensing power is introduced then there would seem to be no need for the retention of the DMC doctrine. Although the Court of Appeal decision in *King v Dubrey* clarified many of the issues the doctrine remains confused in its very nature, being neither an inter vivos nor a true testamentary gift. If the doctrine is retained then the areas of uncertainty noted in the consultation paper could be interpreted by the courts in the future in a way that extends the doctrine once again. It is noteworthy that a (hopeless) claim for a DMC was made in *Keeling v Keeling*⁴ and retention of the doctrine could encourage other hopeless claims.

As Jackson LJ noted in *King v Dubrey*

I must confess to some mystification as to why the common law has adopted the doctrine of DMC at all. The doctrine obviously served a useful purpose in the social

² Ibid para 5.84

³ The recent case of *Nichol v Nichol* [2017] QSC 220 demonstrates clearly the concerns about exercising a dispensing power.

⁴ [2017] EWHC 1189 (Ch)

conditions prevailing under the later Roman Empire. But it serves little useful purpose today...⁵

Furthermore if the DMC doctrine were retained in addition to the introduction of dispensing powers there is a danger of a proliferation of exceptions. One can imagine a situation in which the court is asked to admit an informal document to probate under the dispensing powers, but in the alternative evidence is adduced in support of a DMC. Such a situation would further confuse the quasi-testamentary nature of the DMC.

If the doctrine were abolished this would give clarity to this area of the law. True inter vivos gifts would still be effective, and attempted testamentary gifts which are evidenced by a record may be dealt with under the dispensing powers. However the need for a record under the dispensing powers would avoid the concerns of lack of evidence inherent in the DMC doctrine and would also arguably encourage testators to put something in writing, no matter how informal.

⁵ [2015] EWCA Civ 581 [53]

Undue Influence, Knowledge & Approval

Roger Kerridge, Emeritus Professor, University of Bristol

The part of the Consultation on which I want to concentrate is undue influence (UI) in the wide sense (or, you could call it “Suspicious Wills”). It overlaps with a number of the areas which the Law Commission say they want to examine.

It concerns (directly or indirectly):

- Formalities (including forgery)
- Capacity
- UI
- Fraud
- The pleadings (inc esp “lack of knowledge and approval”)
- Presumptions
- Questions as to who may be involved (for payment or otherwise) in the will making process.

I think that the Law Commission come at this from the wrong angle. You can see where they are coming from when they ask the question, “should the rule that a gift in a will will be void if it is to the spouse (or civil partner) of an attesting witness (Wills Act s. 15), be widened to cover cohabitants?”

This is starting from the wrong place and it is the wrong question (because it diverts attention away from the real problem). The problem is not one of cohabitants of beneficiaries being

witnesses to wills. There may have been some cases where the cohabitant of a beneficiary has been a witness to a will (although I cannot think of one – and I have read many, many, many wills cases) but it seems to me that the problem is much, much wider than “witnesses” and “cohabitants”. Anyway, I think that attempting to work out whether people – especially people of a certain age – are or are not “cohabitants” is, potentially, a waste of time. (See *Swetenham v Walkley* [2014] WTLR 845 – and the problem will be worse if you need to go back in time to when a will was witnessed, if that happened years before the death).

The problem goes back to the first decades of the nineteenth century and to what went on in the ecclesiastical courts.

Two sets of rules were established in the ecclesiastical courts in the early decades of the nineteenth century.

Rule one was that the ecclesiastical lawyers would *not* adopt the Roman Law rule that wills prepared by beneficiaries were void, *nor* would they adopt a lesser form of that same rule to the effect that wills prepared by beneficiaries should be presumed to be vitiated by fraud or undue influence. (See *Paske v Ollatt* 1815 and *Ingram v Wyatt* 1828-29). Why was this? The simple explanation was that they wanted to make work for themselves – and they did. The cases dragged on and on and on, and the lawyers profited.

Rule two was that if solicitors made wills in their own favour, such wills would almost always be upheld (other beneficiary-prepared wills had a much lower success rate). See *Modern Studies in Property Law*, vol 5, chapter 7, at p. 163 for more detail).

So, the two rules worked together in the following way. Wherever a beneficiary got involved in the will-making process, this would lead (if the will were challenged) to long drawn out litigation and lots of profitable work for the lawyers involved in the dispute. A large proportion of the estate would vanish in legal costs. If the beneficiary who had prepared the will in his own favour was a solicitor, he would normally get what was left (after payment of the costs of the dispute). If he was not a solicitor (but, say, the deceased’s doctor) he would lose the case, and the next of kin would take what was left. For the legal profession, these were the good old days.

How did the lawyers in the ecclesiastical courts manage to draw out the cases? It is important to understand this in order to understand what is still wrong today. They did it by creating rules which were confusing. It was never (in the days when the ecclesiastical courts had jurisdiction over wills) clear on exactly what grounds a will could be challenged. It was clear that a will could be challenged for lack of due execution, or lack of capacity, or undue influence (sometimes called “imposition”) or...? There was a vague, grey, area, where it was not clear. In 1858, the probate jurisdiction of the ecclesiastical courts was given to the newly created Court of Probate. In *Hastilow v Stobie* (1865) Sir J P Wilde allowed the new plea of “lack of knowledge and approval” (LOKAA). The introduction of the plea of LOKAA made a bad (and confused) situation worse (and more confused). Sir J P Wilde seems to have realized this, as soon as he had introduced the plea and he then amended the Contentious Probate Rules by adding in a new Rule 40a which was designed to prevent the new plea of LOKAA from being used as a cloak for a plea of undue influence or fraud. A straightforward reading of Rule 40a meant that if someone challenging a will wanted to allege fraud or undue influence, he had to plead it, openly. See 2000 CLJ 317.

There was one worthwhile House of Lords case dealing with a will during the latter part of the nineteenth century and that was *Fulton v Andrew* in 1875, where there are robust judgments from Lords Hatherley and Cairns. This case seems to have been ignored, possibly because following the lead in it might have made it more difficult to string the cases out, as the contentious probate lawyers liked doing.

The next major step in this story was the case of *Wintle v Nye* (1959). Here, Colonel Wintle challenged a will which had been drawn up by a solicitor (Nye) in his, Nye’s, own favour. This started as a straightforward case. If it followed the standard pattern, the case would drag on, producing lots of profit for the lawyers involved, and would then end with victory for the solicitor draftsman. Much of the estate would be paid out in legal costs, and what was left would go to the solicitor draftsman. That would have been the standard pattern, but it did not work out that way.

The case was pleaded as one of LOKAA. That was contrary to Rule 40a (which was still in force). Why was it contrary to Rule 40a? It was contrary to Rule 40a because, either there was nothing wrong with this will, or this was a case of fraud.

That, surely, is obvious (in spite of what seems to be suggested in the Consultation Paper). If the testatrix knew what was in her will - if she knew that it devised and bequeathed most of her substantial estate to the solicitor who had drafted it - there was nothing wrong with the will and no valid challenge. But, if she did not know, this could not possibly be some sort of misunderstanding: it had to be fraud (by him on her).

So, what happened in this case? Wintle ended up the victor. That was not the standard pattern, when there was a challenge to a will drawn up by a solicitor in his own favour.

Wintle was a litigant in person in the House of Lords, and he had been a litigant in person when he lost in the Court of Appeal. But he was NOT a litigant in person when he lost the case at first instance. He had, at the outset, a very expensive legal team (two silks and two juniors). And it was they, not he, who decided on the pleadings. It was they, not he, who decided to plead LOKAA. And it was the wrong plea. I know that Scarman J, in *Fuld*, said that it was the right plea, and I note that the Law Commission Consultation Paper (having noted how important he, Scarman, was to the history of the Law Commission) quote him, with apparent approval, but what he forgot to say is that **Scarman was part of the very expensive legal team which lost the case of *Wintle v Nye* at first instance!** I have to put that in bold, so that it cannot be missed again. Scarman was (I believe) originally the junior in the case, but took silk while it was proceeding. That, I assume, is why Wintle ended up with two silks and two juniors. This very expensive legal team lost Wintle's case for him at first instance, sent him an enormous bill, and then deserted him. It was, surely, adding insult to injury for any member of the team to say, after Wintle had won his appeal, without assistance and as a litigant in person that this was the correct way to do things. Scarman, if he were to refer back to *Wintle v Nye*, should have disclosed his own full part in this tale. It is almost certainly he who drafted the pleadings and he who chose to plead LOKAA, rather than the correct plea, which was fraud.

Why do I say that this was the wrong plea? This was a case of fraud. Either the testatrix knew what was in her will, in which case the will was OK, or she did not. And, if she did not, how could this possibly be so, unless Nye had misled her? It is far-fetched to imagine that Nye could have said “Oh really, I didn’t realize that Miss Wells did not know that she was executing a will in which she was leaving almost her entire estate to me. There must have been a misunderstanding.” This has to be nonsense. There was no misunderstanding. Either she knew, or Nye had misled her.

The real point about *Wintle v Nye* was this. The way the case was fought was dishonest, and that was the fault of Wintle’s expensive legal team. Given the previous case law, they can be forgiven for assuming that they were going to lose the case, and they can, possibly, be forgiven for going in for a damage limitation exercise and pleading LOKAA when they knew that this was a dishonest plea, but Scarman J cannot be forgiven for saying what he said in the *Fuld* case and for making it sound as though the plea of LOKAA was the correct and sensible way to proceed.

It was said above that two sets of rules were established in the ecclesiastical courts in the early years of the nineteenth century. **Rule one** was that the ecclesiastical lawyers would *not* adopt the Roman Law rule that wills prepared by beneficiaries were void *nor* would they adopt a lesser form of that same rule to the effect that wills prepared by beneficiaries should be presumed to be vitiated by fraud or undue influence. **Rule two** was that if solicitors made wills in their own favour, such wills would almost always be upheld.

The effect of *Wintle v Nye* was that Rule two was abolished. The problem is that Rule one still stands. That is the problem.

Where we stand now is this. There is no rule in English law to the effect that a will prepared by a beneficiary is void. Nor is there any rule presuming misbehaviour by a beneficiary who prepares a will in his/her own favour, or who takes part in the will making process. Solicitors are not supposed to make wills in their own favour, but there seem to be no clear rules preventing them from taking instructions from beneficiaries. The standard plea, when

attacking a “suspicious will” is to plead LOKAA. That plea is confusing, it hints at dishonesty, without making it clear what is really being alleged. It is often (as in *Wintle v Nye* itself) linked in with vague references to “suspicions” without its being made clear what the suspicions are suspicions of. Logically, they must be suspicions of misbehavior, but this is never made clear and seems sometimes actually to be denied.

So, where should we go from here?

If one is going to consider the possibility of fundamental change, and, given how long it has been since anyone really carried out an real investigation into what should be done about wills in the making of which beneficiaries have played a part, one should ask the following questions:

The first question (which is not asked in the Law Commission’s Consultation Paper), should be:

1. Should English Law adopt the Roman Law rule to the effect that any will in the making of which a beneficiary has played a part should be void?

My answer to this would be No. The Roman Law rule was a good rule, and it should have been adopted two hundred years ago, but it is now too late. There are now too many beneficiary-prepared wills in the pipeline, and some of them (almost certainly a minority) should be upheld.

2. Second question (which is asked in the Consultation Paper). Should section 15 of the Wills Act 1837 be amended, so that gifts to the cohabitants of witnesses should be treated like gifts to spouses of witnesses and so made void?

My answer would be No. This would be classic minor tinkering gesture and does not remotely address the problem of beneficiaries involved in the will making process. It is not easy, in the Succession context, to work out who is, or is not, a cohabitant (see *Swetenham v*

Walkley 2014). But, in any case, in the context of wills in the making of which beneficiaries have played a part, witnesses are not the real problem. Tinkering with who may or may not be a witness is to miss the big picture. It would create extra work for the contentious probate lawyers without any significant benefit. What we need is something much more major.

3. Third question, which is touched upon in the Consultation Paper, is this: **What should we do about the plea of lack of knowledge and approval LOKAA ? (Consultation Q 40).**

The Consultation Paper suggests that the scope of this plea should be (slightly?) restricted and the scope of undue influence (slightly?) widened. This would be a very small small step in the right direction, but I would be much, much more radical. I would abolish the plea of LOKAA altogether (it began life, in 1865, as a “plea”, not a “requirement”, LOKAA is a ground for attacking a will). I would attempt to create a situation where the grounds for attacking a will were clear and honest. The plea of LOKAA is essentially dishonest. It hints at misbehaviour, it is linked with a doctrine of “suspicious circumstances” without making it clear what the suspicion is a suspicion of, and with the absurd pretence that it is somehow “bad form” to accuse beneficiaries who have been involved in the will making process of doing anything untoward. At the end of the day, it acts as a licence for bad people to do bad things. The plea of LOKAA was invented by Sir J P Wilde in the 1860s as a possible way of overcoming the ridiculous rules invented by the lawyers of the ecclesiastical courts to the effect that (i) they would not allow the introduction of the Roman Law rule to the effect that a will prepared by a beneficiary was void, (ii) that they would not presume misbehaviour when confronted by beneficiary-prepared wills and (iii) that when victims of beneficiary-made wills challenged them for undue influence or fraud, they would face absurd burdens of proof and ghastly financial penalties when (as they usually did) their challenges failed. But the plea did not work. Wilde saw that. That is why he amended the Contentious Probate Rules to limit its scope (see above). The plea has achieved nothing of value and has merely served to confuse things. The discussion in the Consultation Paper as to whether there is a one part, or two part, test for LOKAA is all part of a bigger confusion, and getting involved in it is a waste of time, if one is really interested in reform.

If you start from scratch, and try to work out what pleas to allow when wills are being challenged, what are the alternatives? I suggest that it makes sense to have (first) (a) a plea of lack of due execution. So far, so good, that is simple. Then, after that, what else? It seems to me that there are two possible alternatives. The first is to have another four separate

pleas, which will be (b) lack of capacity, (c) undue influence, (d) fraud, and (e) mistake. Or, instead of (b), (c), (d) and (e) above you could have one, single, overarching plea which would be (f) LOKAA. LOKAA is overarching, it covers everything else. Someone who lacks capacity cannot know and approve of the contents of his will, someone who has been unduly influenced does not (truly) approve it, someone who has been defrauded or is mistaken, either does not know the effect of the document, or does not approve it, or both. You do not need (b), (c), (d) and (e) and (f). You need either (b), (c), (d) and (e) or (f). I would, unhesitatingly, go for the former. Go for lack of due execution plus four further separate pleas, get rid of LOKAA.

At the same time, you must, of course, change the burdens of proof and the presumptions.

4. Fourth question, what about burdens of proof and presumptions? (Consultation Questions 37 & 38)

The CP attempts to deal with burdens of proof and presumptions by introducing a slightly modified version of the Equitable Undue Influence rule which applies to lifetime gifts. This rule does not work for wills. The lifetime rule operates in such a way as to create a presumption against a gift where the donee is somehow closely linked with the donor. But, in the context of wills, that does not make sense. It is perfectly natural, on death, to devise and bequeath property to persons with whom one is closely linked. There is nothing odd or suspicious about making a will in favour of (say) a close member of one's family. You can surely not suggest that there is something odd about a woman who, in her will, leaves most of her property to her husband.

You should not have a rule which presumes against devises and bequests to persons closely linked to the testator. You need a rule which presumes against devises and bequests to all persons who have been directly or indirectly involved in the will making process. For a more detailed discussion of this, see Kerridge in 2012 Conv at 129.

If a beneficiary has been involved in the will making process, there should be a (meaningful) presumption of both undue influence and fraud, and the onus should be on the beneficiary to disprove these presumptions. On this basis, the will (the entire will) in *Burgess v Hawes* would be void. So would the will in *Fuller v Strum*. In fact, the will in *Burgess v Hawes* would not be made, no solicitor could touch it. The CP (para 7.4) assumes that fraud is not a problem. It is true that it may be hard to prove fraud, the testator will not be able to give evidence as to what X said to him about this, that or the other, but fraud should be presumed (i) because, in some cases (*Wintle v Nye* is an example) fraud is implicit, and (ii) because presuming fraud cuts off a possible escape route for the person who claims that he did not unduly influence the testator, but leaves it open as to how an unusual and suspicious gift to him came to find its way into the will.

The reference to *Burgess v Hawes* leads on to another question which is not addressed by the Consultation Paper.

5. Fifth question. Who should be permitted to prepare wills? And/or Who should be permitted to charge fees for the preparation of wills? Should will-drafting be regulated?

The CP ducks this one by suggesting that the Government have now overruled the Legal Services Board who had recommended that will writing should be a reserved activity, so there is nothing to discuss. But the matter should be discussed. Of course will-writing should be a reserved activity. At the same time, all professional will-writers should, of course, ensure that beneficiaries do not get involved in the will-making process. This would, in fact, become much easier for the will writers IF rules were introduced to the effect that wills in the preparation of which beneficiaries has played a part were presumed to be tainted by undue influence and fraud. A solicitor such as the solicitor in *Burgess v Hawes* could request the beneficiary/daughter to leave the room when the will was being discussed, and, if she objected, he could explain that she was in danger of voiding the will.

6. Sixth question. Returning to formalities, are there any changes needed here?

I have already said that I would NOT want to alter the formality rules automatically to void a gift in a will to the cohabitant of a beneficiary. I would, instead, void a whole will if a beneficiary played a direct or indirect part in making, or preparing it. That could, of course be via a friend, a kinsman or a cohabitant, but is usually reasonably direct.

I am concerned with substance, not form, and would be in favour of granting the court a dispensing power.

There is (what is to me) an unnecessary discussion in the Consultation Paper concerning *Barrett v Bem* and signatures to wills by beneficiaries. Of course this should not be permitted. The first instance decisions in *Barrett v Bem* were absurd and the decision in the CA was on too narrow a ground. This was an appalling case of a beneficiary made will and there should never have been any question of granting it probate. This is yet another example of a huge waste of time in getting to a result which should have been inevitable from the outset

7. Seventh question. What about capacity? This often overlaps with problems in relation to beneficiary-made wills. Someone with limited capacity is, obviously, easier to influence or defraud than someone whose capacity is 100%. But, as far as the test for capacity is concerned, when dealing with a will, I'm inclined to prefer the test in *Banks v Goodfellow* to the test under the 2005 Act, but I don't feel particularly strongly about it.

8. Eighth Question (Consultation Q 35). What about the rule in *Parker v Felgate*? I would get rid of it. The facts of the case itself are exceptional (hard cases make bad law) and as applied recently in *Perrins* it has been used to assist in the validation of a will in the making of which a beneficiary played a part. [N.B. an alternative answer to this question is given in Steve Evans's contribution on Mental Capacity.]

Age and Capacity

Rebecca Probert, Professor of Law, University of Exeter

It is good to see the Commission addressing the age at which an individual may make a will, currently set at 18 save for those entitled to make a privileged will by virtue of their role in the armed forces. At present, the ages at which children are permitted to undertake certain actions are scattered across a variety of statutes and hardly give the impression of a code that is carefully worked out with psychological evidence about the development of children in mind. It is clear that some important decisions with long-lasting consequences may be taken at a relatively young age, while others must be deferred until adulthood.

The Law Commission propose that the age at which one should be able to make a will should be reduced to 16 and ask whether there should be the option for competent children to make wills at a younger age.

In this paper I will first suggest that more thought needs to be given to why reform is needed, since that may have an impact on what form it should take.

Is there a need for reform?

It might be useful to begin by considering how many children die under the age of 18. In 2016, 2,251 males and 1,773 females died in England and Wales, but over two-thirds of these (67%, or 2,711) were in their first year of life and almost four-fifths (78%, or 3,154) were under the age of five. Just 260 were aged 16 or 17.

Age at Death: ONS, Deaths registered in England and Wales, 2016 (2017)

0	2,711
1	192
2	103
3	83
4	65
5	60
6	48
7	46
8	34

9	52
10	45
11	57
12	56
13	51
14	76
15	85
16	115
17	145

It might also be useful to consider the causes of death in such cases, in order to ascertain whether these children would have had sufficient notice of their impending death to make a will. (Given the relatively low rates of will-making among the adult population, it is reasonable to assume that few children will make a will without such a spur to doing so). The figures provided by the ONS group together those aged 5-19 as a category and only provide information on the leading causes of death within this group. Of the 1,284 individuals who died between those ages in 2016, around 12% (109 males and 43 females) died in land transport accidents and 37 males died as a result of homicide. By contrast, 13% (121 males and 47 females) died as a result of suicide and injury/poisoning of undetermined intent. All that can really be drawn from this data is that the number of those children who die under the age of 18 will not have had the opportunity to even contemplate making a will.

In assessing the need for reform it would also be useful to know more about the property that children own. Children have ownership of their earnings, although their capacity to earn is constrained by the limits on their employment. A child may only undertake paid employment for a limited number of hours per week at the age of 14.⁶ A child cannot, however, own a legal estate in land.⁷ They may be the beneficiary under a trust of land, but their powers to dictate what should happen to their interest are similarly limited until they reach the age of 18. Dawn Watkins has noted that ‘in principle’ the possibility of ‘any person’ applying to court under s 14 of the Trusts of Land and Appointment of Trustees Act 1996 ‘could include a child beneficiary, but in practice it does not.’⁸

⁶ Children and Young Persons Act 1933, s. 18, as amended by Children (Protection at Work) Regulations 1998/276 r. 2(2)(a), raising the minimum age from 13.

⁷ Law of Property Act 1925, s 1(6).

⁸ D Watkins, ‘Where Do I Stand? Assessing Children’s Capabilities Under English Law’ [2016] CFLQ 25, at p 30.

That only small numbers of children and small amounts of property are likely to be involved does not mean that there is no case for reform; rather it might provide reassurance that the courts are unlikely to be flooded with new cases if children are given the power to write wills.

But why should children be given the power to make a will? Despite an allusion to children's autonomy and a reference to the UN Convention on the Rights of the Child, there is very little discussion of why children might wish to make wills and what kinds of wills they might wish to make. The adult orientation of the chapter is reflected in the section in which the Commission discuss whether the current law causes inconvenience or injustice, which largely focuses on the situation in which 'an estranged parent stands to inherit substantial assets from a deceased child.'⁹ The issue here seems to be not so much the wishes of the child – although that does emerge in the discussion of the Australian case-law – but equity (rather than equality) as between the parents.

Interestingly, the very situation envisaged by Simon Hardy and referred to by the Commission was addressed by the Court of Appeal in the case of *Re B, deceased*.¹⁰ The child in this case had been born severely brain damaged. Damages totaling £250,000 were awarded to her and part of this was used, with the approval of the Court of Protection, to purchase a bungalow for her to live with her mother, her father having left not long after her birth. Upon the child's death at the age of 15, her share in the property vested in her estate and under the intestacy rules would pass to her parents in equal shares. The mother applied under the Inheritance (Provision for Family and Dependants) Act 1975 on the basis that she had been wholly or partly maintained by her daughter before her death. Her claim was originally struck out but her appeal was allowed by the Court of Appeal. Robert Walker LJ, with whom Henry and Allott LJ agreed, stated that the court did have jurisdiction under the 1975 Act: the daughter was maintaining her mother in that she was, even if indirectly, making a substantial contribution to her mother's needs. He also expressed the hope that it would not be necessary for the case to come to trial and that a compromise might be found.

Since *Re B* there have been changes to the 1975 Act by the Inheritance and Trustees' Powers Act 2014 that would facilitate a claim by a parent in that a claim is no longer precluded where the 'dependent' was contributing more to the needs of the deceased than vice versa. Nor is it now necessary to show that the deceased 'assumed' responsibility for the maintenance of the

⁹ LC, at para. 8.14. A second strand raises the question of being able to appoint an executor sympathetic to the child's wishes regarding what is to happen to their body after their death.

¹⁰ [2000] Ch 662.

claimant, although, as the Commission noted in their 2011 report, the courts had found ways to circumvent this requirement ‘by presuming assumption of responsibility from the fact of maintenance.’¹¹ Of course, the fact that a solution may be available does not mean that there is no need for reform so that claims can be assessed prospectively rather than retrospectively. In tragic cases of this kind the child might lack capacity even if the age limit for making a will was reduced, in which case Hardy’s suggestion of permitting the Court of Protection to make a statutory will would be the only viable alternative.

The concern for the interests of parents also raises a question as to what the consequences might be if an individual under the age of 18 were permitted to make a will – i.e. who might be lose out? While the intestacy rules privilege the surviving spouse, this is of limited relevant in this context as the number of 16- and 17-year-olds who enter into a marriage in England and Wales is very small: in 2011 just 11 boys and 90 girls married at the age of 16, and 59 boys and 184 girls married at the age of 17.¹² The likelihood of a person being married and dying under the age of 18 is correspondingly very small: in 2016 just one 17-year-old married male died. And in any case a spouse has the right to challenge a will under the 1975 Act. There is a higher possibility that someone of this age will have a child: in 2015 there were 6,213 births to mothers under the age of 18 (11 mothers were under the age of 14, 87 were 14, 462 were 15, 1,681 were 16 and 3,972 were 17. Since only 123 of these births occurred within marriage or civil partnership, in the vast majority of cases under the intestacy rules any property of the mother would pass to the child if she died under the age of 18.¹³

But should the parent of a child – other than one who can show dependence on the deceased child – be able to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975 if they receive nothing under that child’s will? And if so, would the courts regard the failure to make provision for a parent who has cared for and provided for the child since birth as unreasonable, or merely ungrateful? Or to put the question another way, who is protected by the current prohibition against making a will under the age of 18: the parent or the child? All of these questions need further thought than they receive in the Commission’s paper.

¹¹ 2011 report, para. 6.56.

¹² ONS, ‘Age and previous marital status at marriage’ (2014)

¹³ ONS, ‘Births by parents’ characteristics.’

The age of 16 as a threshold for decision making

Having reviewed the various ages at which children and young persons acquire different rights, the Commission provisionally propose that testamentary capacity be reduced from the current age of 18 to 16.¹⁴

One of the justifications offered for this is that this reflects a more general legal trend. The Commission notes that ‘16 year olds can marry, join the army, leave school, consent to sexual activity, live alone and make their own medical decisions.’¹⁵ It also reviews a number of other provisions before suggesting that ‘the direction of travel is towards a threshold age of 16.’¹⁶ Variations from this are acknowledged, but the Commission suggests that certain analogues are more convincing than others in that ‘[d]ecisions 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’.¹⁷

This is not entirely convincing. First, in many of the situations referred to, those aged 16 or 17 are not actually being treated in the same way as if they were adults. Second, a broader review suggests that the direction of travel may well be towards the age of majority. And third, the analogy to be drawn from the case-law on medical and social welfare decisions is hardly straightforward.

While there are examples of those aged 16 or 17 being treated as if they were adults, in many cases they will only be able to make certain choices with the consent of others, as the footnotes in the Law Commission’s paper acknowledge. Entering into a marriage under the age of 18 is dependent upon the consent of those with parental responsibility.¹⁸ So too is joining the army.¹⁹ Similarly, while it is possible to leave school at 16, there is now a duty on those aged under 18 to participate in some form of education or training instead of or in addition to paid work.²⁰ As regards the issue of consent to sexual activity, the main

¹⁴ LA, at para. 8.28.

¹⁵ LC, at para 8.1.

¹⁶ LA, at para. 8.28.

¹⁷ LC at 8.27.

¹⁸ *Matrimonial Causes Act* 1973, s. 11(a)(ii); *Marriage Act* 1949, s. 2.

¹⁹ Armed Forces (Enlistment) Regulations 2009, r 5 provides that (1) Where a person under the age of 18 (“the young person”) offers to enlist in the regular forces and an appropriate person can be identified in relation to him, he shall not be enlisted unless written consent to the enlistment has been given— (a) where he is living with one or more appropriate persons, by each such person; (b) where he is not living with any appropriate person, by such a person. (2) In this regulation references to an appropriate person are to— (a) a person with parental responsibility (within the meaning of the Children Act 1989... for the young person; (c) where there is no such person as is mentioned in sub-paragraph (a) or (b), or after reasonable enquiry it cannot be ascertained whether there is any such person, any person in whose care the young person may be.

²⁰ Education and Skills Act 2008, s. 2.

significance of being able to consent is to ensure that the activity in question is not criminal. And while there are limits on certain orders being made in respect of children aged 16 or 17, it is still possible for a s 8 order to be in place after a child's 16th birthday²¹ and a care or supervision order may still be made in relation to a 16-year-old as long as they have not married (and will remain in force until the child reaches the age of 18 unless specifically discharged at an earlier date). In short, those aged 16 or 17 are treated differently from those under the age of 16, but they are also treated differently from those aged 18.

I would also suggest that in recent years there has been a degree of convergence around the age of majority. 'Child' is defined by the Children Act 1989 as a person under the age of 18.²² The age at which one can vote is set at 18.²³ The age at which one can buy fireworks or tobacco, for example, has been raised from 16 to 18,²⁴ and that for the purchase of a crossbow from 17 to 18,²⁵ while the age at which one could become a Member of Parliament has been reduced from 21 to 18.²⁶ It is interesting that the Law Commission rely on their own recommendations in relation to those aged 16 and above as evidence of the trend towards regarding 16 as the threshold for rights.

Third, the treatment of age and capacity in the medical context also provides rather an ambiguous precedent. It is true that a child who has attained the age of 16 is entitled to give a valid consent to any surgical, medical or dental treatment 'which, in the absence of consent, would constitute a trespass to his person'.²⁷ The legislation specifically provides that if such a person consents it is not necessary to obtain consent from the child's parent or guardian. A child under the age of 16 who has sufficient understanding and intelligence to make the decision may also give consent to treatment.²⁸ But if the child wishes to *refuse* medical treatment, then a person with parental responsibility may give a valid consent to the treatment being carried out, even if the child is competent and/or over the age of 16.²⁹ The fact that parents can consent does not, however, mean that their consent is required; if the medical

²¹ Children Act 1989 s 9(6) allows for this if the circumstances are exceptional.

²² Children Act 1989, s. 105(1).

²³ Representation of the People Act 1949, s. 1(1)(c).

²⁴ Fireworks (Safety) Regulations 1997/2294; Children and Young Persons Act 1933, s. 7, as amended by the Children and Young Persons (Sale of Tobacco etc.) Order 2007/267.

²⁵ Crossbows Act 1987, s. 2, as amended by the Violent Crime Reduction Act 2006, s. 44.

²⁶ Electoral Administration Act 2006.

²⁷ *Family Law Reform Act* 1969, s. 8(1).

²⁸ *Gillick v. West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 (consent to receiving contraceptive advice); *R (ota Axon) v. Secretary of State for Health* [2006] EWHC 372 (Admin) (consent to abortion).

²⁹ *Re R (A Minor)(Wardship: Consent to Treatment)* [2992] Fam 11; *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] 1 FLR 1.

treatment is needed to save the life of the child, the medical authorities may seek the authorization of the court.³⁰ The court may declare the proposed treatment to be lawful, even if it is opposed by both parents and child,³¹ if this is deemed to be in the best interests of the child.³² The courts have, perhaps understandably, been reluctant to allow minors to make decisions that are likely to result in their death, although this stands in sharp contrast to the position of mentally competent adults, who may refuse treatment even if it will result in their death. In other words, attaining the age of 16 is not necessary for consenting to medical treatment, nor does it ensure that an individual can refuse medical treatment. A child who is not permitted to make the decision whether to die might well find it ironic that they might be permitted to make decisions about what is to happen if they do die.

The point here is not that the age at which an individual's refusal of treatment should be respected must be the same as the age at which an individual may make a will, but simply that the inferences that can be drawn from the law in this area are limited.

The necessity of an absolute rule

The Commission also considers whether or not those under the threshold age should be permitted to make wills if they have sufficient understanding of the process, drawing on *Gillick v West Norfolk and Wisbech AHA*.³³ Their focus on its application in the context of medical decisions seems to have coloured the subsequent discussion as to who the appropriate person would be to decide whether a child had the necessary understanding to make a will and the suggestion that '[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.'³⁴ The same could of course equally be said of adults making a will who may be of border-line capacity. But given the small number of younger children who might wish to make a will, the option of court authorization might well be a viable one.

³⁰ Although it would be lawful for them to accept the child's refusal: see the case of Joseph McAuley, a 15-year-old boy who died after refusing a blood transfusion, discussed in S Gilmore and J Herring, "No" is the hardest word: consent and children's autonomy' [2011] CFLQ 3. The advice given by the General Medical Council is that doctors should seek legal advice if they believe treatment is in the best interests of a competent young person who refuses: *0-18 years guidance*, para 31, available at http://www.gmc-uk.org/guidance/ethical_guidance/children_guidance_30_33_refuse_treatment.asp

³¹ *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386.

³² *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (boy aged 16 years and 10 months; he and parents were Jehovah's Witnesses).

³³ [1986] AC 112.

³⁴ LC, para. 8.35.

The possibility of there being a more flexible approach to assessing a child's capacity to make a will raises the question of what level of understanding would be needed. The Commission contrast the 'high level of understanding... necessary to appreciate the effects of a will' with the ability of 'even young children [to understand] the parameters of simple contracts (for example, buying an ice cream).'³⁵ But the simpler the will, the lower the level of understanding needed to make it, and it is possible to imagine very simple wills made by children who have little but wish to mark friendships and important relationships with a token gift.

It would have been interesting to have learned more about the position in Scotland, where children can make a will at the age of 12. Knowing how many children between the age of 12 and 18 make wills would have been useful to assess the need for reform. The types of wills made by children might also have informed discussions of capacity. Lizzie Cooke, for example, has noted the importance of 'generosity, and a sense of fun, which the law is not always best placed to generate.'³⁶

The continuing effect of a will

Finally, while the Commission note that a will is inherently rescindable, they do not consider whether special rules should apply to wills made before the age of 18. But a rule that any will was automatically revoked when the individual in question attained the age of 18 might provide respect for the choices of those under that age while limiting their long-term impact.

³⁵ LC, para. 8.23.

³⁶ E Cooke, "'Don't Spend It All at Once!'" Parental Responsibility and Parents' Responsibilities in Respect of Children's Contracts and Property' in R Probert, S Gilmore and J Herring (eds) *Responsible Parents and Parental Responsibility* (Hart 2009), p 213.

Interpretation & Rectification

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Here we offer brief comments on two of the questions from the Consultation relating to rectification and interpretation: Question 50 on the scope of rectification and Question 43 on the order of the two doctrines.

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.

[1] The availability of Rectification is relatively settled.³⁷ In the specific context of wills, s 20 of the Administration of Justice Act 1982 governs the position, as considered in the consultation paper. the Supreme Court decision in *Marley v Rawlings*³⁸ has afford greater flexibility which might be thought to be in line with the Commission's general proposals for greater generosity in the approach to wills. By holding that 'clerical error' under s 20 is satisfied if the error was 'a mistake arising out of office work of a relatively routine nature',³⁹ made what has subsequently been described by the Inner House as 'an important extension', which is

³⁷ J Glister and J Lee, *Hanbury & Martin: Modern Equity* (Sweet & Maxwell, 2015), ch 29, paras 29-020 to 29-026. *Bullard v Bullard* [2017] EWHC 3 (Ch) (Master Matthews).

³⁸ [2014] UKSC 2.

³⁹ *Ibid*, per Lord Neuberger PSC at [75].

‘better suited to the reality of working in modern conditions, where the use of computers and electronic forms of communication permit the easy copying and pasting of material, and increase the range of situations in which an error in routine work may occur.’⁴⁰

The need for any further expansion in the scope of rectification must necessarily be tempered by the interaction between rectification, interpretation and disposing powers. Even under the more generous *Marley* approach, there are numerous errors which cannot be corrected by rectification and could only be addressed by a dispensing power: two testators signing each other’s wills is one thing; a testator’s failure to sign the will at all could not be rectified, for example.⁴¹ The introduction of dispensing powers or other potentially wide-ranging relaxations proposed by the Commission in the Consultation would also have an effect on arguments for a broader doctrine of rectification: it would be more difficult to justify offering yet further indulgence to correct mistakes through rectification beyond the present circumstances. Nor should reforms challenge the important general expectation that the will should mean what it says.⁴²

[2] Where there is still lingering uncertainty is whether, as a matter of common law, there was a power for a judge to rectify a will prior to the enactment of the Administration of Justice Act 1982. The premise of the Act was that there had not been such a power, but Lord Neuberger in *Marley v Rawlings* held that ‘as a matter of common law, [it would have been] open to a judge to rectify a will in the same way as any other document: no convincing reason

⁴⁰ *Perth & Kinross Council v Scottish Water* [2016] ScotCS CSIH 83. [31].

⁴¹ 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

⁴² *Fielden v Christie-Miller* [2015] EWHC 2940, Sir William Blackburne at [39]: ‘I am reminded that where what is sought is rectification of a will, namely a document which on its face was executed in compliance with certain formal requirements, the claimant has to overcome a presumption, and it is one of some weight, that the will as executed reflects the testator’s intentions. Why else go to all the trouble of getting a solicitor to advise, draft and engross the will and then go through the process of execution, complete with witnesses and, in the instant case, sign each page of the document if the position were otherwise?’

for the absence of such a power has been advanced'.⁴³ Counsel in the case accepted that it would not be appropriate for the court now to claim wider powers to rectify a will beyond those conferred by section 20.⁴⁴ Lord Neuberger however appeared to leave the point open, stating that that it would be wrong for a court to recognise such a power 'at least in the absence of a compelling reason'.⁴⁵ It would be open to the Commission to express a view on the possible judicial recognition of a broader jurisdiction to rectify wills, even if leaving it to the incremental development of the common law. Further legislative intervention on the point, however, would certainly limit the ability for the courts to recognise a residual jurisdiction.

[3] It is agreed with the Commission (at para 9.61) that 'the doctrine of rectification should not be a means to protect testators from unwise estate planning decisions.' Furthermore, in some cases, the appropriate remedy for where there has been an error in the wording is to pursue a claim in the tort of negligence against the professional who drafted the will. The remedy of rectification should not be a means of relieving such professionals from liability where it properly arises. *Marley's* broader definition of 'clerical error' in s 20 expressly does not include where the activity in question requires some 'special expertise'.⁴⁶

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?

[4] The rectification provisions under Section 20 precede the interpretative provisions under Section 21. It is not thought necessary to prescribe the order in which such claims should be addressed, and the Commission is correct that there is some overlap, and claims to deal with

⁴³ [2014] UKSC 2, [28].

⁴⁴ [2014] UKSC 2, [30].

⁴⁵ Ibid. See further B. Häcker (2014) 130 L.Q.R. 360 at 364–5.

⁴⁶ [2014] UKSC 2, [75]. *Jump v Lister* [2016] EWHC 2160 (Ch), HHJ Hodge QC at [63]–[66] (obiter).

problems with the wording of wills (to use a deliberately non-technical phrase) will often see claimants frame their arguments in terms of both interpretation and rectification. In many cases, the court might be willing to solve the problem under both alternatives.⁴⁷ But the Commission proposals should not, with respect, underplay the distinctiveness of the two doctrines and their consequences:⁴⁸ the order of the process is less significant than recognising the limits of each doctrine. The existing statutory provisions for the doctrines under the 1982 Act place them on a somewhat different footing in the context of wills, but it should also be noted that the relationship between construction and rectification is a matter of intense controversy in the field of contract law.⁴⁹ In that context, Lord Neuberger has emphasised the need for certainty as the operation of rectification.⁵⁰

⁴⁷ For example, *Slattery & Ors v Jagger & Ors* [2015] EWHC 3976 (Ch), HHJ Hodge QC.

⁴⁸ For example, HHJ Hodge QC in *Re Harte* [2015] EWHC 2351 (Ch) concluded in the context of the relevant will: [18] ‘There is no West Berkshire Ambulance Hospital; and the language itself is a nonsense: The concept of an “ambulance hospital” would suggest a hospital for ambulances. Here, it seems to me that the case is not one of interpretation of the will under section 21 but of its rectification under section 20.’ See also Lord Neuberger PSC in *Marley* [2014] UKSC 2 at [40].

⁴⁹ Eg, PS Davies, ‘Interpretation versus Rectification: The Nature and Scope of the Equitable Jurisdiction’ [2016] CLJ 62-85.

⁵⁰ *Daventry DC v Daventry and District Housing Ltd* [2011] EWCA Civ 1153, per Lord Neuberger MR (as he then was) at [194].

Revocation

Steve Evans, Associate Professor, University of Leicester

Consultation question 58 proposes that no reform is required to the Law governing the revocation of wills by Will, or Codicil, writing, or destruction. We agree.

Consultation question 59 asks for any evidence of the level of public awareness of the general rule that marriage revokes a Will.

The general impression is that people are generally aware that they ought to write new wills on marriage. Certainly if they have had a will professionally drawn, this would have been drawn to their attention. Members of the public may not necessarily get around to doing a new will in these circumstances but they tend to know that they ought to, which is a different matter.

Consultation question 59 also asks whether the rule that marriage automatically revokes a previous will should be abolished or retained. In paragraph 11.48 the Law Commission seemed to have as part of their reasoning the fact that there may be deficiencies in the intestacy laws as a reason to consider changing the rules that marriage revokes a will. If there are indeed deficiencies in the intestacy laws then it is those which should be reviewed, rather than changing the longstanding rule that marriage automatically revokes a will.

We struggled to think of any situation where a marriage - especially a second marriage - did not make the testator need to review the will and in all likelihood make a new will.

Consultation question 60 asks the question as to whether testators should be able to provide that a Will should not be revoked by a future unanticipated marriage. It was considered that this was far too vague, speculative, and would make the Will making process overly lengthy and perhaps more costly. Are testators going to be required to make “two wills in one” - one for their circumstances as they now are, and one for alternative unanticipated circumstances should they ever decide to get married at some unspecified date in the future?

Consultation question 60 suggest that on those occasions where a marriage has been entered into in circumstances where a testator actually lacks testamentary capacity, then it would not automatically revoke an existing will.

It was felt that this could create an injustice. If there has been a genuine marriage, the testator may have an earlier will made many years before leaving their estate all to a former spouse or to a charity or whatever. The rule that the subsequent marriage automatically revokes that earlier will does ensure provision for the very person the testator has now committed himself to by reason of his marriage. Changing the law might just introduce another set of unfair outcomes and situations i.e substitute one set of problems for another perceived problem.

Generally it was felt that information could be given to people who get married by the registrar of marriages (if indeed this is not already done) making it clear that marriage automatically revokes any will made before the marriage. The provision of such information ought to go some way to allaying the concerns expressed by the Commission in chapter 11. This is an easy and less risky way of tackling the problem than tinkering with the law which might just substitute one set of problems for another.

Mutual Wills

Nicholas Roberts, Associate Professor, University of Reading

BACKGROUND ISSUES

Terminology: This response will follow the terminology of ‘mutual wills’ as used in the Law Commission consultation, while accepting that the terminology has not always been consistent in the case law (e.g. *Birmingham v Renfrew* – ‘corresponding wills’).

Are they increasing? Mutual wills were not on the standard law syllabus in at least some universities during the twentieth century. The case law was limited: *Re Hagger* (1930) *Birmingham v Renfrew* (1937) and *Re Green* (1951). Since *Re Cleaver* (1981) there has been a positive torrent: *Re Dale* (1993), *Re Goodchild* (1997), *Healey v Brown* (2002) *Re Hobley* (2006) *Olins v Walters* (2009), *Charles v Fraser* (2010), *Fry v Densham-Smith* (2010), *Legg v Burton* (2017). Does this indicate an increase in their use, or an increase in the number of reported cases? Or perhaps an increase in interest in them? Might the increase in reported cases reflect an increasing incidence of remarriage of persons with children by a prior marriage? With divorce, clearly yes, compared with 40 or 50 years ago: but if one goes further back, more marriages ended early through death of one party. Perhaps the lower rate of cases in earlier times is due to there being fewer legal problems when property tended to be vested in the husband.

Case law has clarified certain matters:

The conditions for mutual wills are now clearer. The essential elements are:

- (1) agreement between parties
- (2) survivor to be bound
- (3) first party dies.

It is not a requirement that the second to die should have received benefits under the will of the first to die (*Re Dale*: sometimes previously argued to the contrary).

Express agreement is desirable, but seems not necessary.

Mere existence of mirror wills is not enough (*Re Goodchild*) to raise a presumption of mutuality.

Marriage (usually remarriage) revokes the will of the survivor, but not affect the underlying agreement.

Uncertain areas:

Despite the clarification offered by case law, there remain several important areas of uncertainty:

The first area of uncertainty concerns the nature of the agreement. Para 12.8 of the Consultation Paper rather uncritically accepts *Healey v Brown* (2002) to effect that, if the mutual will agreement relates to land, then it must comply with s.2 Law of Property (Miscellaneous Provisions) Act 1989.

(a) if that is correct, then the mutual will agreement appears likely to fail in many circumstances, as the wills themselves would rarely comply with the formalities required by s.2 (whether by exchange of separate documents, or a memorandum signed by both parties, or even joint will).

(b) the rule from *Healey* is of uncertain scope: does it apply only if (i) land is specifically mentioned (as in *Healey*); or (ii) if land is included in the residue? What if the parties anticipate that land will be included but it turns out that there is none? Or vice versa?

(c) this part of the decision in *Healey* was criticised by David Hayton (and it was first instance decision of a Commercial QC sitting as a deputy judge of the Chancery Division).

(d) it is difficult to see why compliance with statutory formalities should be required if one is dealing with a constructive trust that conventionally justifies a departure from formal requirements.

The second area of uncertainty concerns the restraint on the survivor.

The mutual wills agreement may expressly cover only a part of the estate of the survivor. But if the agreement relates to the whole estate of both parties, then it remains unclear how far the survivor is free to dispose of it. *Birmingham v Renfrew* (on appeal from Australia) seems to indicate that the survivor can use the property but may not dispose of it in a way 'calculated to defeat the intention of the compact.' The issue does not seem to have arisen directly in an English case. There are likely to be difficult decisions over the extent of the restraint on the survivor if, for example, the assets are sought to be used for very high living expenses such as

those arising from long term care (*Birmingham* appearing to apply to gifts not contracts). And it is not clear what impact, if any, there would be if there were a significant change in the circumstances of the ultimate beneficiaries.

The third area of uncertainty concerns the coverage of the agreement. In particular, there is doubt over how far the mutual wills agreement extends to property acquired by the survivor after the death of the first testator.

The fourth area of uncertainty concerns the interaction with other laws surrounding succession. For example, it remains unclear whether the estate of survivor is immune from claims under the Inheritance (Provisions for Family and Dependents) Act 1975, as the Consultation Paper recognises.

REFORM

The options presented in the Consultation Paper include:

- (1) Abolition
- (2) Put on statutory footing
- (3) Leave as is, only amending definition of net estate under 1975 Act to include property subject to a mutual wills arrangement.

Statutory footing

The Consultation Paper contends that this would be perceived as encouraging future use of mutual will agreements.

[In panel discussion, the following points were raised:

First, we doubt that putting the doctrine on a statutory footing it would have that effect.

Second, we doubt that increased popularity is an adequate reason to refrain from reforming law that is in need of reform. There are good reasons to justify statutory intervention due to the problems in the common law (e.g. lack of clarity). Trying to sweep the problems under the carpet by leaving it them as supposedly little-known common law seems to us not to be the right way to approach the issue.]

Thirdly, we do recognise that it would be difficult to draft workable legislation. The sort of unusual or extreme cases which need addressing – e.g. the survivor (or ultimate beneficiary)

gets great and unexpected wealth from elsewhere – is so unusual that the development of the doctrine is probably best left to case law.

Abolition

If mutual wills are rarely used, and the legal doctrine has uncertain scope, then this option holds some initial appeal.

It does seem to meet the need to provide a solution for the problem of remarriage.

However, the existing mutual wills doctrine may be achieving a result which the parties would not have wanted. Ideally, if couples desired to make by express provision the type of property arrangements that are currently achieved through the law of mutual wills, then they should instead draw up an express trust to give effect to their wishes. It would be necessary for both partners to put their property in trust. It seems likely that couples would be discouraged from this when advised of the responsibilities of trusteeship, the cost of professional trustees, the complications of discretionary trusts, and the potential conflicts of interest. When the consequences of trusteeship are appreciated, the couple may prefer some other arrangements. If the couple would not have proceeded with an express trust, then it seems inappropriate to impose a constructive trust or equitable restriction to the same effect.

One objection to the abolition of mutual wills is raised by Hudson and Sloan who refer to diminution of contractual freedom. We do not find that compelling as it could be met with a *numerus clausus* argument: this is just not something that one can do as a matter of property law.

Abolishing mutual wills would go rather against the underlying ethos of constructive trusts: they do seem to be a good example of equity intervening to prevent unconscionability. It is difficult to think of another example where courts are required to exclude the application of a doctrine based on unconscionability. It is not expressly precluded in the Land Charges Act (*Midland Bk v Green*) or in the Land Registration Act (allowed in *Lys v Prowsa*). If one were to exclude application of constructive trusts, one would presumably need also to exclude arguments based on proprietary estoppel: if the current constructive trust analysis were prohibited, then the alternative route via proprietary estoppel would also have to be covered - *Legg v Burton* (2017).

Abolishing mutual wills could also lead to a challenging relationship with the law of secret trusts which in circumstances operate in a way that is not dissimilar.

Even if lawyers knew that mutual wills were ineffective following their future abolition, it is quite possible that (a) lay persons might continue to make home-made wills on that basis or (b) might make mirror wills through their lawyer after having made an agreement (not revealed to the lawyer) that they would be mutual, although the lawyer should ask if any such agreement has been made. The lawyer will not necessarily know what the clients have privately agreed.

Given the potential disadvantages of abolition and the questions over the effectiveness of any legislation in securing the desired effect, we do not support the abolition option.

On Consultation Question 62, we support the view that property passing under mutual wills should be within the estate for the purposes of the Inheritance (Provision for Family and Dependants) Act 1975.

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